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III. CONSTITUTIONAL PROBLEMS OF EMERGENCY STATES

1. *Emergency States*

Law is common sense turned into a duty to be. In constitutional systems, the State adopts rules that rationalize its behavior and offer the greatest possible certainty to the governed. This is one of its differences in relation to other forms of State. However, since the formation of the modern State, it has been understood that there were extraordinary events that escaped the regularities of everyday life, which could place the State in extreme situations that made it difficult for it to abide by its own ordinary rules and justified the adoption of ad hoc measures.

There are indications that the rationalization of the exercise of power in Greece contemplated, from the archaic period, the possibility of an extraordinary magistracy. The Greek institution generally goes unnoticed. Who called attention to this fact in the nineteenth century was A. H. J. Greenidge, pointing out that the institution *aisymnesia* corresponded to a mediator with special powers to resolve a critical situation that put the *polis* at risk.[6] The hypothesis of the Oxonian professor was based on the text where Aristotle distinguishes three types of tyranny: the one practiced by the barbarian peoples by anointing an autocrat, the one imposed by a person against the will of the governed, and the one established on a temporary basis "by the ancient Greeks", called *aisymnetas*.[7] This reference by Aristotle coincides with the hypoth-

[6] Greenidge, A. H. J., *Greek Constitutional History*, London, MacMillan, 1929, p. 27. The first edition is from 1899.

[7] Aristotle, *Política,* IV, vii, 1295a.

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esis that in the primitive stage of the Greek peoples the ruler was a kind of arbitrator.[8] In the Homeric language there is also an allusion to an archaic figure, the *aisymnetes*, arbiter of the games.[9] From this derived the figure of the political mediator.[10] It is probable that the remote and shady precursor of the Roman dictator obeyed the process of rationalization of power rooted in Greece, which much later nourished modern constitutionalism.

With the Renaissance, the expression *reason of State* began to be used, which Giovanni Botero formalized in 1589, to give the ancient Roman *dictatorship* a dimension in accordance with the nascent modern State. At the dawn of absolutism, it was imperative to have the means to enable the monarch to deal with threats to the integrity of the State. Botero's theory, shared by his contemporaries,[11] referred to the Italy of his time, where there coexisted a plurality of states whose common denominator was the presence of a prince, often contending with papal authority and almost always facing internal conspiracies. The stability of power demanded the use of peremptory resources, of particular harshness, to maintain the integrity of power.

Overcoming the adversities that could lead to the fracture of state institutions required a temporary interruption of the regularities. The argument in favor of defending the state was based on the legitimacy of the prince and, in return, the illegitimacy of his opponents. The idea of the republic was not yet associated with democratic principles.

Among the many distinguishing features of the constitutional State is the predictability of its acts. It happens, however, that

8 Thür, Gerhard, "Oaths and Dispute Settlement in Ancient Greek Law", in Foxhall, L., and Lewis, D. E., *Greek Law in its Political Setting*, Oxford, Clarendon Pres, 1996, p. 59.

9 Homer, *Odyssey* VIII-258.

10 Plácido Suárez, Domingo, "Las formas del poder personal: la monarquía, la realeza y la tiranía", in *Gerión*, Madrid, Universidad Complutense, 2007, vol. 25, num. 1, p. 137.

11 See Meinecke, Friedrich, *La idea de la razón de Estado en la Edad Moderna*, Madrid, Centro de Estudios Constitucionales, 1983.

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it is not possible, nor even desirable, for the norm to foresee all things likely to occur, so that in addition to specific rules there are general principles to be applied in unforeseen cases. Principles and rules provide the appropriate instruments for exceptional situations, which in turn admit varying levels of severity. The nomenclature adopted by the various legal systems is very extensive, and it is common that even contingencies referred to by the same word have different meanings and treatments in each of these systems. This is the case with cases known as emergencies.

If we look at the lexicons of six languages (English, French, German, Italian, Portuguese, Spanish and French), we will see that *emergency* means an unforeseen or unexpected event or occurrence; a sudden situation of risk or danger, or a serious alteration of normality. It is in any of these senses that the declaration of a Emergency State is inscribed. It is an exceptional, serious, unavoidable and temporary situation whose effects require extraordinary and immediate responses.

The experience of the constitutional state enriches that of the modern state. Today Botero's perspective is insufficient because the reasons for exceptionality in the conduct of the State no longer concern the stability of the prince but the democratic governability of the institutions, in addition to the fact that exceptional states often serve the interests of the governed more than those of the rulers. That is why the constitutional State has developed two families of instruments to deal with intemperate cases: those that serve the protection of the collective interest and those that concern the protection of the organs of power.

2. *Problems of Emergency States*

It is not possible to generalize about the prevalence of administrative law or constitutional law in each of the specific cases that may arise, although the order of the dominant measures may swing in terms of the predominance of administrative or political measures, in the latter case when power relations or the

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safeguarding of the rights and interests of the governed are involved.

These instruments are usually framed as states of emergency. This situation is always surrounded by multiple precautions to avoid excesses expressed through either of two anomalies: illegality or arbitrariness. Illegality is relatively easy to determine, although sometimes there are circumstances where the infringement of the rule is a matter of opinion. Once the legality of the state's decision has been accepted, a second problem arises: whether the conduct conforms to the reasonable standards that the governed demand of the ruler. This is a more complex issue because assessing the behavior of State organs in terms of the arbitrariness or reasonableness of their actions involves subjective elements.

For example, in the context of restrictions on the movement of people to prevent the spread of COVID-19, in some places police authorities were empowered to detain those who disobeyed. Even assuming that this measure was legal, detaining people for even a few hours exposed them to the disease they were being protected from. This was clearly an unreasonable and therefore arbitrary act. Another case of unreasonableness consisted in sanctioning those who drove their private vehicles, forcing them to do so in public transport, thus increasing the risk of contagion. Even with the legal power to impose such restrictions, their lack of reasonableness made them arbitrary measures.

Faced with decisions of this type, the interdiction of arbitrariness is an element of current constitutionalism whose necessity is evident, particularly during states of emergency, in which it is not sufficient to observe the mere formalities required for their declaration and validity. Eduardo García de Enterría was very insistent on such interdiction, thanks to whose influence the Spanish Constitution of 1978 was the first to prohibit arbitrariness (Article 9.3). [12]

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[12] Alzaga, Óscar, *La Constitución española de 1978*, Madrid, Foro, 1978, p. 140.

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This principle has already been incorporated in the constitutions of Argentina (Article 43) and Chile (Article 20). In the Dominican Republic, the Constitution legitimizes the habeas corpus action in cases of deprivation of liberty when it is carried out in either of two ways: illegally, or "arbitrarily or unreasonably" (Article 71). Venezuela's supreme law (Article 281.2) limits the prohibition of arbitrariness to the provision of public services, thus leaving the full range of possible arbitrary acts unconsidered. That of Guatemala (Article 161) only prohibits arbitrariness insofar as it may lead to "maneuvers" to re-elect the president of the republic. Ecuador's law uses the concept of arbitrariness as a synonym for illegality, as in the case of displacements (Article 40) and arbitrary detentions (Articles 7714 and 89), or the freezing of funds by financial institutions (Article 308). These examples show that the enormous potential of this Spanish institution to give a greater dimension to the protection of fundamental rights has not yet been realized.

The conditions prevailing during states of emergency make it highly advisable to have an instrument that compels the reasonable conduct of public servants.[13] Moreover, in Spain, the development of the principle of non-arbitrariness has been possible thanks to case law.[14] Jurisprudential interpretation qualifies as arbitrary legal acts that lack *rational explanation* or *institutional coherence*, regardless of whether they are formally constitutional or legal.

Like any other principle, this principle is susceptible to distortions, since the judge may exceed his or her assessment of the alleged arbitrary acts of the authority. Even so, it is preferable that the zeal of the judges exceeds certain limits if this will better protect the governed, especially in times of collective tension. In

[13] Aragón Reyes, Manuel, *Derecho constitucional*, Madrid, McGraw-Hill, 1995, p. 10.

[14] Fernández, Tomás-Ramón, *De la arbitrariedad del legislador. Una crítica de la jurisprudencia constitucional*, Madrid, Editorial Civitas, 1998, pp. 47 and *et seq*., 61 and 90.

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this case, the open texture of the norm facilitates the judge's function as a guarantor in situations where there is fear of excesses of power.

In addition to the risks of arbitrariness, states of emergency can give rise to doubt, suspicion, misinformation, and political use of data, both for and against the authorities. These possibilities are all the greater the more concentrated and less controlled government power is. Mistrust often accompanies regimes characterized by a lack of effective political controls. In general, states of emergency require a strong presence of such checks and balances, which in turn are only viable where a robust representative system is present. Democratic constitutional states tend to have organs of power that are well balanced in their design and operation, and intra-organic and inter-organic controls are part of the political guarantees of the governed.

States of emergency make it essential to have adequate instruments to ensure the exercise of the right to the truth. During the state of emergency, all State bodies are on alert and put into action the full range of available controls. But even that is not enough. It is also necessary to have a punctual record of the use that governments make of the exceptional powers so that the governed can make sure that the holders of the organs of power do not succumb to pressures or dominant interests at a critical moment. This is particularly relevant where the government has a parliamentary majority. It is also necessary to give parliamentary minorities the power to set up committees of inquiry into the government. This is a common provision in constitutional states and is essential in emergencies.

The problems of authoritarianism with majority political support were anticipated by Tocqueville. The tyranny of the majority did not escape his observations and analysis of the United States. Although his perception of Latin America was distant and shallow, he warned that these were oscillating societies that moved toward anarchy when they tired of obedience, and accepted dictatorship when they did not want more destruc-

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tion.[15] Beyond the hyperbolic nature of generalizations of such caliber, the swings pointed out by Tocqueville were facilitated by the majority democracy, typical of the 19th century, by bad institutional designs and by societies accustomed to religious and monarchical submission during the colony, and religious and military submission after independence, novices in the exercise of their sovereignty, lacking in education and alien to public deliberation during a long colonial period. In this context, only what happened was feasible; the rest were heroic plans of the liberal republican leaders that only began to have institutional viability in the twentieth century.

In Latin America, states of emergency meant legalized excess for decades. Nowadays, they are subject to numerous requirements that allow their use in conditions of relative legal security. However, the complementary elements mentioned here are missing interdiction of arbitrariness, right to truth, rights of parliamentary minorities and a new public culture.

3. *Right to Truth*

Truth is a victim of political cynicism. During the 2016 presidential campaign in the United States, the expression "alternative truth" was coined to avoid the recognition of ostensible facts and reject without arguments data provided by academic, financial or media sources. I mention this fact as an eloquent example, not because it is an isolated case. Misrepresentation of the truth is one of the endemic evils of political society, and its eradication is one of the functions and objectives of the constitutional state.

Häberle has written brilliant pages on the relationship between truth and the constitutional state. In contrast to what happens in this state, he points out that in the totalitarian state there

[15] Tocqueville, Alexis de, *La democracia en América*, Madrid, Aguilar, 1989, t. I, pp. 157 and 222; t. II, p. 182. II, p. 182.

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are "ordered truths".[16] That is why the constitutional state must be characterized by truth without adjectives. The legal, philosophical, and literary erudition of the German jurist multiplies the examples about the use of truth and its legal necessity. Häberle credits Vaclav Havel with being the first to demand a *right to truth*.[17] I haven't found a previous pronouncement either, so I am taking up this original proposal to make it present in the context of a health crisis with very sensitive institutional ramifications.

The obligation to act in accordance with the truth underlies all national and international legal systems. Its function and relevance are normative. Apart from a formal enunciation, truth corresponds to the essence of democracy. The electoral processes, for example, take place in the middle of two apparently antithetical realities that consist in the freedom of the participants to express themselves freely, even when they incur in exaggerations or inaccuracies, many times deliberate; on the other hand, it is demanded that the pronouncement of the voters and the verdict of the electoral bodies is limited to the precision of the votes. The electoral freedom admits the hyperbole, but the electoral certainty demands the truth, and without this certainty the whole democratic building would collapse.

However, it is possible to note that misrepresenting, hiding or exaggerating facts has become commonplace even on the part of heads of state and government. To the public political lie was added a circumstance of widespread relevance: that of COVID-19. It is likely that the States lacked accurate data about the pandemic and therefore their officials did not tell deliberate lies, but just as in matters of law their ignorance does not excuse their compliance, in matters of social interest the holders of the organs of power are not relieved of their political responsibility for not knowing the reality of the facts.

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[16] Häberle, Peter, *Verdad y Estado constitucional*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 2006, p. 104.

[17] *Ibidem*, pp. 2 and 45 *et seq*.

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The right to the truth means that the authorities must not conceal it and, moreover, must seek it. The concealment of the truth, in any of its modalities, or the incapacity to find it, contradicts the objectives of the public function. In one case there is malice and in the other there is guilt. Neither is it justified to lie in order not to alter the social mood. To think that lying is interchangeable with social tranquility is a pretext that alters the foundations of democratic systems because by allowing the official to decide the priorities of society, he has nothing less than the truth at his discretion.

Truth is already present in the Mexican Constitution. It obliges public servants to present their patrimonial declarations "under oath to tell the truth" (Article 108) and imposes the same obligation on high-ranking officials who appear before the chambers or commissions of Congress (Articles 69 and 93). This obligation does not bind them when they make statements to the media. Here, too, they are required to do so because they are addressing public opinion and, moreover, appearances are infrequent in a presidential system as archaic as the Mexican one.

The right of access to public information, which is already part of many legal systems, should not be confused with the right to the truth. The former is exhausted with the knowledge of what appears in state repositories, while the latter concerns the authenticity of the word of those who hold positions of high political and administrative hierarchy. In the case of the judiciary, truth is the means by which judges do justice.

Lying is very dysfunctional for the governed and the rulers. An aphorism attributed to Abraham Lincoln is a very fortunate synthesis of the extent of lying: "you can deceive everyone for a while, some all the time, but not everyone all the time". It is probable that there are historical lies that remain unclarified, but in all cases the lie becomes unaccountable because it leads to contradictions with reality. From this perspective the lie is also an error. This has become clear during the pandemic, especially when it has been difficult to reconcile the numbers of sick and even dead

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people, and to explain the lack of facilities, equipment, and medicines in hospitals, distorting previous propagandistic assertions.

For the governed and the rulers, there is an additional problem when lies become a trend: the negative paradigm of high officials lying generates an emulative effect that causes the lie to be reproduced in a cascade, as the inferior feels prevented from contradicting the superior and is forced to follow him in the lie. This phenomenon saturates the information space and stimulates discrepant versions and rumors.

Another institutional weakness arises here: the reverential fear, vertical discipline and obsequiousness that contribute to the staggered reiteration of lies has part of its origin in the patrimonialist nature of the exercise of power. As long as the administrative structure is subject to temporary appropriation by those who conquer power and is distributed according to personal relationships or private or political interests, the hierarchical inferior has no legal powers to correct the errors or falsehoods incurred by his superior. This phenomenon is recurrent in outdated administrative systems, such as that of Mexico and other Latin American countries, which lack a rigorous civil service based on merit.

Lies conceal an asymmetrical relationship between the governed and their rulers, who know the truth and tell lies, or who ignore the truth but choose to invent one to suit themselves. That is why they produce the greatest possible erosion in a system: the one that affects the word. Words serve the State to inform, orient and convince; without reliable words the State tends to use coercion as a legal and political resource to a greater extent. Lying invalidates the possibilities of persuasion through words and preludes the use of force.

A rule is an ought to be, not a true or false statement, but as a systemic unit law is a set of words with power, and this power is related to the widespread certainty that the precepts are binding on all. Habitual observance is what persuades the most before the few offenders must be subjected to coercion. When the meaning of the word is altered by the State itself because it is untrue,

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spontaneous adherence to the norm tends to decrease. There is abundant empirical evidence on this. Doubt regarding compliance with the norm is one of the factors of anomie, and at some point, this leads to anarchy or repression.

The combination of the right to truth and political culture is typical of advanced constitutional states. The study of political culture, which has become a classic, corresponds to Almond and Verba.[18] Separately, the study of juridical culture was developed, where the work of Tarello stands out,[19] and there are subspecialties of constitutional culture, as it was proposed in Mexico,[20] and of the culture of legality. The latter is restricted, by its very wording, to the law. The complexity of political and social life shows that even the concepts of political culture and legal culture are beginning to prove insufficient. Unless the concept of political culture is broadened, the conditions of the constitutional State suggest adopting a broader term: political-legal culture.

Almond and Verba's concept of political culture is used as a synonym for civic culture. To illustrate its scope, they trace the evolution of political culture from Plato and Aristotle, enriched over the generations by Machiavelli, Montesquieu, Rousseau, and Tocqueville, until culminating with the great theoretical constructions of Marx, Mosca, Pareto, Michels and, of course, Durkheim and Weber. Situated in the Anglo-Saxon culture, they extend the genealogy of their thought to Mill, Bagehot, Dicey, Wallas, Lippmann, Finer, Friedrich, Schumpeter and, of course, Parsons. To the psychological aspect, already present in some of their predecessors, such as Mosca and Pareto, they added psycho-

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[18] Almond, Gabriel A., and Verba, Sidney, *The Civic Culture: Political Attitudes and Democracy in Five Nations*, Princeton, Princeton University Press, 1963, and *The Civic Culture Revisited*, Boston, Little, Brown and Co., 1980.

[19] Tarello, Giovanni, *Cultura giuridica e política del diritto*, Bologna, il Mulino, 1988. English translation: *Cultura jurídica y política del derecho*, Mexico, Fondo de Cultura Económica, 1995.

[20] See Concha Cantú, Hugo A. *et al.*, *Cultura de la Constitución en México. Una encuesta nacional de actitudes, percepciones y valores*, Mexico, UNAM, Instituto de Investigaciones Jurídicas 2004.

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anthropology. With this background they formulated a concept that has marked an era.

Based on such a robust synthesis, Almond and Verba inquired about a political culture composed of three elements: the cognitive, made up of values, beliefs, information, and analysis; the affective, consisting of feelings of adhesion, aversion, or indifference; and the evaluative, which expresses moral judgments.[21] With these instruments, they set themselves the task of exploring the stability of democracies, based on the levels of civic culture. However, among the cultural elements measured, those of juridical relevance were not contemplated. In the 1960s, at the time of Almond and Verba's study, three of the five countries, Germany, the United States and Great Britain, had a solid normative structure; Italy lived in political irregularity but with a functional legal system, and Mexico had a kind of hegemonic regularity.

Legal culture has significant contributions to gauge the performance and stability of systems. As far as stability is concerned, Thucydides took anomie into account, although it was Durkheim who centuries later developed its examination extensively. It is surprising that the anomic factor did not influence Almond or Verba. Legal sociology offers tools that, when applied together with those of political culture, allow for a better empirical observation.

Tarello identifies a double dimension of legal culture: the internal and the external.[22] The first is that which corresponds to legal specialists, such as academics, judges and technical staff of the judiciary, public administrators, parliamentary lawyers, members of the forum and the notary's office. The external legal culture is "that of the public", who may or may not have legal knowledge, but in any case, have an opinion on the law. A conceptual and methodological integration would make it possible to complement the elements of the political and legal cul-

[21] Almond and Verba, *op. cit.*, pp. 28 *et seq*.

[22] Tarello, *op. cit.*, pp. 181 *et seq*.

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tures to obtain a clearer picture of reality in a constitutional state.

In sum, among the multiple constitutional implications of the emergency state with which the health crisis produced by COVID-19 was handled, it is possible to combine three factors: arbitrariness, lies and lack of political culture. Therefore, it is foreseeable that among the institutional consequences of the pandemic, it will be necessary to review the reasonableness of the actions of the State organs, the truthfulness of the information and the actions that contribute to raise the levels of general culture and, especially, of political-legal culture. For the first two objectives to be incorporated into the legal system, it will be necessary to develop legal instruments that contribute to the prohibition of arbitrariness and the right to the truth.

Comparative constitutional law already offers some reference points on arbitrariness, but new instruments are needed as far as truth is concerned. In my opinion, a problem arises that must be addressed with guarantees of a political nature. The sanction for those who infringe the right to truth of the governed must be in the sphere of political controls. Minority parliamentary forces must be strengthened to investigate cases in which it is assumed that the truth has been distorted.

In the same way that unconstitutionality actions have been constructed, instruments for the defense of truth could be formulated, but in this case leaving the entire procedure in the seat of political representation. Parliamentary systems are more advanced than presidential systems, but it is necessary to combine both experiences to analyze the specific problem of the political guarantee of the right to the truth and develop a design that allows for the reasonable exercise of this guarantee. Minorities must be prevented from becoming a source of political discredit or a secular version of the Inquisition. A successful design in terms of the proscription of arbitrariness plus the exercise of the right to truth would have an impact on the development of a

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political-legal culture that contributes to the stability with equity and progress of constitutional democracies.

In the modern state, the legitimacy of the origin of power was essential. The dominant emphasis was placed on dynasty, which led to absolutism. With the constitutional state, the legitimacy of origin shifted towards electoral systems and a further change took place, covering a long period, according to which legitimacy in the exercise of power became the second axis of the coordinates of power. It is from this new state geometry that the instruments of control of legality, constitutionality and, most recently, of conventionality were configured.

The behavior of the organs of power is very dynamic and generates additional problems. The health crisis showed, on a planetary scale, that the course now points towards the control of arbitrariness and official lies. These problems are not recent, but their recurrence has become more acute, and they have also become more identifiable by the recipients of power. From this perspective, these are emerging constitutional issues that must be addressed with the greatest possible timeliness.

Part of the solution consists of interdicting arbitrariness, following the channel opened by the Spanish Constitution, and constructing the right to truth with the most convenient instruments of political guarantee.

Every crisis leaves a scar in the memory of the people; it also leaves lessons that, when well learned, contribute to the progress of institutions. The Emergency State produced by COVID-19 will not be an exception within the exception.

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