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The separation of powers in the state of exception (on the occasion of COVID-19 in Ecuador)

La separación de poderes en el estado de excepción (en ocasión al COVID-19 en Ecuador)

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SUMMARY: The article aims to analyze the principle of separation of powers in the Ecuadorian context of the state of emergency, decreed due to the health emergency caused by COVID-19. Its specific objective is to provide reasons to consolidate this principle and an adequate understanding of it, within a regime of exception. A brief introductory look at the theoretical and experiential aspects of the state of exception reveals the general suspicion of said institution. Then, from the analysis of its defining features, its regulated nature is deduced and conditioned by constitutional presuppositions. Thus, the state of exception exists and operates in observance of the principle of separation of powers. On this principle, an analytical journey of doctrinal bases consolidates the overcoming of its traditional notion towards a collaborative and dialogic opening between powers. Furthermore, the review of the minimum functions of each power of the state during the exceptional regime shows refuted the prevalence of one power over others. Already in the Ecuadorian context, a review of some specific scenarios induces the ratification of the operation of the principle of separation of powers and constitutional jurisdiction during the state of emergency. Finally, critical thinking is collected regarding the management of the pandemic, from which risks and warnings for democracy and human rights are inferred.

KEYWORDS: separation of powers, state of emergency, emergency, control of power, decision making.

RESUMEN: El artículo analiza el principio de separación de poderes en el contexto ecuatoriano del estado de excepción, decretado a causa de la emergencia sanitaria por COVID-19. Su objetivo concreto radica en brindar razones para consolidar a este principio y un adecuado entendimiento del mismo, dentro de un régimen de excepción. Una breve mirada introductoria de aspectos teóricos y experienciales del estado de excepción, permite evidenciar la suspicacia generalizada sobre dicha institución. Luego, del análisis de sus rasgos definitorios, se deduce su carácter normado y condicionado por presupuestos constitucionales. Es así que el estado de excepción existe y funciona en observancia al principio de separación de poderes. Sobre este principio, un recorrido analítico de bases doctrinarias consolida la superación de su noción tradicional hacia una apertura colaborativa y dialógica entre poderes. Además, el repaso de funciones mínimas de cada poder del Estado durante el régimen excepcional, muestra refutada la prevalencia de un poder sobre otros. Ya en el contexto ecuatoriano, de la revisión de algunos escenarios concretos, se induce la ratificación del funcionamiento del principio de separación de poderes y de la jurisdicción constitucional durante el estado de excepción. Finalmente, se recoge cierto pensamiento crítico respecto al manejo de la pandemia, del que se infieren riesgos y advertencias para la democracia y los derechos humanos.

PALABRAS CLAVE: separación de poderes, estado de excepción, emergencia, control de poder, toma de decisiones

INTRODUCTION

In the global context of the new coronavirus (COVID-19), several States, including Ecuador, declared their exceptional emergency regime in order to adopt measures aimed mainly at mitigating its spread. Under this scenario, the public management of the virus has been marked, mainly, by the restriction of presence in various activities and by the technological commitment to continue, as far as possible, the regular performance of functions.

In this context, the principle of separation of powers within the exception regime is analyzed. Then, the budget for the state of emergency and some fundamentals that give it some scepticism is first reviewed. Later, the paradigm of the separation of powers concerning the state of exception is reviewed, highlighting its most appropriate approach in order to prevent authoritarianism and the imbalance of powers during an emergency. Likewise, the functions of each power of the State are highlighted because of the role that the Executive commonly acquires in the extraordinary regime. All of which will allow us to affirm that, even in the exceptional situation, the rule of operation of the separation of powers is confirmed.

With regard specifically to the Ecuadorian scenario, seven situations provide us with examples of how powers have developed in their respective spheres, at the same time that the need for their interdependent functioning is evidenced to ensure control of power in the exception. At the same time, the fundamental role of constitutional control in this combination of the principle of separation of powers with the state of exception will be appreciated.

Given all the above, it is essential to review some critical exponents regarding the global pandemic and its treatment. Just a quick view of these approaches shows that warnings about states of exception are commonplace, especially in terms of the risks they represent for the enforcement of rights and democracy itself. This, especially considering a context of social protests that had been germinating even before the pandemic and that are expected to expand, of various kinds, in a climate of discomfort not only in health but also political, social and economic.

1. THE STATE OF EXCEPTION, AN INSTITUTION SEEN WITH SUSPICION

The state of exception consists of a legal mechanism that establishes a special regime of law, to face situations that endanger the order, of various kinds, of a community or the existence of a State itself. These situations are such that they cannot be faced or resolved by the means provided for

normal circumstances, this being the distinctive feature of this institution, which receives various names in the States. In this sense, the professor from Coimbra, José Gomes Canotilho (2003), has expressed:

> Whatever the linguistic statement [...] the constitutionalization of the state necessity regime is fundamentally redirected to the following: provision and normative-constitutional delimitation of institutions and measures necessary for the defence of the constitutional order in case of abnormality situation that, not being able to be eliminated or combated by the ordinary means provided for in the Constitution, they require recourse to exceptional means. (p. 1085)

As can be seen, since it is contemplated in a Constitution, that is, within it, the state of exception is unfailingly subject to compliance with formal, substantive and often conventional parameters (v. Gr. Art. 27 ACHR, Turku Standards, and others). Regarding their budgets, initially related to war situations and internal public order, a variety of scenarios are currently presented (humanitarian crisis, security, health, natural disasters, among others).

However, both theoretical and practical factors, given mainly during the last century, have had a decisive influence on the general consideration of the state of emergency, consolidating it as a mechanism that can be seen as high risks for democracy and fundamental rights.

On a theoretical level, we refer to Carl Schmitt's (1985) approaches, mainly to his works The Dictatorship and Political Theology. In this last, Schmitt makes the analogy of theological phenomena with legal-political ones. In this way, it assumes that, just as the miracle is necessary to explain theology, exceptionality is necessary to understand the State and the Law.

It is necessary to consider Schmitt's thesis as interpretive referents - although not the only ones - of abusive and prolonged regimes of exception. In this sense and context, the eighth thesis of the German philosopher of Jewish origin Walter Benjamin (2010) is always a reference, in his Philosophy

of History written in 1942 during the National Socialist regime, in which Schmitt actively influenced and participated:

> The tradition of the oppressed teaches us meanwhile that the "state of emergency" in which we live in the rule. We must come up with a concept of history that is consistent with this. The task of creating a proper state of emergency will then be set for us, and this will improve our position in the fight against fascism. (...). (p. 64)

Returning to Schmittian notion of exceptionality, in it, the concepts of decision and sovereignty stand out and converge. According to this author, the sovereign is the one who decides on the state of exception, whether or not the proposed case is of necessity, and how to control the situation. The state of exception is not reduced to a decree of necessity or a state of siege, but to a factual situation in which the extraordinary power of the sovereign is unlimited and requires, given the abnormality, the total suspension of the current legal order (Schmitt, 2009). When this happens, says Schmitt, "while the State subsists, the right passes into the second term [...] In an exceptional case, the State suspends the right under the right to self-preservation" (Schmitt, 2009, p. 18).

Moreover, for Schmitt (2009), the normality nothing proves, while the exceptionality all , because "not only confirms the rule, but it lives on it" (p. 20). Thus, the ultimate response to regulations must be found in the exceptional. This has led to the identification of Schmitt's conception as that of "a theorist of the exception who never bases his analysis on the normal situation, but, on the contrary, always starts from the extreme, limit case, extreme"(Herrera, 1994, p. 220).

This invocation of the exception, devoid of any legal status -being eminently decision and political scope-, calls for the establishment of a dictatorship, which is at the same time the denial of a constitutional government and rational discussion (Negretto, 1995). The disregard by the sovereign, of the other powers of the state on the occasion of the exception, is evident in The Dictatorship, when it is expressed: "politically,

any exercise of state power that is carried out immediately can be classified as a dictatorship, that is to say, not mediated through independent intermediate instances, understanding by it centralism, as opposed to decentralization" (Negretto, 1985, p. 179). It is precisely such a dictatorship that Schmitt presents as the antithesis of dialogue, which is relegated to the power of decision.

To this, it could well be opposed that the emergency constitutes a purpose and that a Constitution sets, in essence, the limits for the achievement of that proposed purpose. However, from Schmitt's perspective, such limits would be denied, since the sovereign must be free from all regulatory obstacles that hinder his full decision-making power in the emergency. This was the meaning that the German jurist gave to article 48 of the Weimar Constitution, in the last chapter of The Dictatorship, according to which the neutral power of the President of the Reich and the defence of the Constitution, were resolved in the person of the dictator.

In different proportions, several of these postulates have seen the light in the emerging praxis of States during the 20th century. Under those, it has been tried to justify the concentration of decision-making power in a single person, in ignorance of all kinds of control during the emergency.

Indeed, all the discredit that falls on states of exception is not due to Schmitt's thesis. On a practical level, several cases regarding events raised under exceptional regimes have added to this suspicion. In Latin America, this took place during the last three decades of the 20th century, in which the Annual Report of the Inter-American Commission on Human Rights for 1980-1981 is illustrative, where the concern of the organism regarding the states of emergency declared in several countries of the continent:

> [...] However, in practice, many times, these states of emergency have been dictated without the circumstances justifying it, as a simple means of increasing the discretion of the exercise of public power. This contradiction is evident when the public

> authorities themselves affirm, on the one hand, that there is social peace in the country and, on the other, they establish these exceptional measures, which can only find justification in the face of real threats to public order or security of the state.
>
> Even more severe is the establishment of these states of emergency indefinitely or for a prolonged period, especially when they grant the Head of State such a wide range of powers, including the inhibition of the Judicial Power regarding the measures decreed by him, which can lead, in some instances, to the very denial of the existence of the rule of law.
>
> At the time of approval of this report, several American States had decreed these exceptional measures, although to varying degrees and assigning powers to the Heads of State that vary from country to country. [...] (GS/OEA, 1981)

Those decades were marked by de facto regimes and actions by the security forces that led to subsequent declarations of state responsibility by the Inter-American Court. Just to mention a few, there are the judgments of the cases Neira Alegría and others v. Peru (1995); Durand and Ugarte v. Peru (2000); Montero Aranguren and others (Detention Center of Catia) v. Venezuela (2006); Almonacid Arellano and others v. Chile (2006); Zambrano Vélez and others v. Ecuador (2007); J v. Peru (2013); García Lucero and others v. Chile (2013); Yarce and others v. Colombia (2016).

It should be noted that, even under the return to democracy and in periods of relative political stability in the region, the states of exception persist under a particular sceptical eye. As an example of this, it is common to find immediate warnings, reminders and follow-ups that national and international bodies, mainly those of human rights monitoring, present as a result of the declarations of exception.

2. STATE OF EXCEPTION AND POWERS OF STATE: *EXCEPTIO FIRMAT REGULAM*

The readings that question the states of exception tend to focus on the habit of their declaration and its prolongation. However, a common problem often goes unnoticed: that of the functioning of the powers in the context of the exception.

The practice has implanted in the legal-political imaginary, a scenario of the prevalence of a single power -usually the Executive- over the others, in the handling of crises.

At first sight, it seems reasonable that, in a scenario of crisis or shock, good leadership and determination is required to act immediately. This generally falls to an authority empowered to declare and direct the exceptional regime. Hence, in extraordinary circumstances, an exception to the ordinary management of power is also allowed, placing control of the situation in a single function of the state.

However, such reasoning, no matter how logical it is, is based on an undemocratic basis that does not differ from approaches such as Schmitt's and that is, by default, contrary to constitutionalism and violates the principle of separation of powers. Below we will point out three considerations tending to justify the persistence of the balance of power and the separation of powers during the state of emergency, but not before making a brief clarification of terminology.

Without wishing to ignore their theoretical and terminological differentiation, for practical purposes we will refer indistinctly to the terms separation and division, as well as powers and functions[1]. Then, referring only to the principle of

1 Taking the legislative, executive and judicial functions as functions, Duverger (1962) warned: the distinction of functions should not be confused with the separation of powers; the first refers to a division of government burdens; the second tends to make each category of State organs (Executive, parliament) independent of each other (p. 154). For Hauriou (1927), the functions of the state are the various activities of the government company, considered according to the guidelines that state ideas print them (justice, legislative, governmental and administrative); while the powers public, are the various forms of power used by the state-company to carry out its functions (Executive, legislative and suffrage) (pp. 372-374).

separation of powers, these being the Executive, the Legislative, the Judicial and the Constitutional Control. However, we start from a conscious attitude regarding the evolution that this principle has undergone:

> The "horizontal and tripartite division of State powers and functions" has not only been transformed into practically another, the modern constitutional organization but has also been replaced by a plurality of too complex rules and principles, complementary to each other. in the work of controlling and limiting power. (García Roca, 2000, p. 66)

2.1 The State of exception is provided within and not outside the Constitution

In the first place, the state of exception is contemplated and allowed by and within the Constitution. For this reason, both the magnitude of the action and its scope are normatively foreseen, not allowing any preposition of the political and the factual over the existing regulations.

Thus, granted according to constitutional parameters, the state of exception operates under the presuppositions of the constitutional State of law, including the division of powers, a principle that persists even during the emergency.

The persistence of the division of powers during the emergency implies that each power conserves its respective faculties and avoids, at all costs, an imbalance under the pretext of the exception. Thus, we find that "even in crises the rule of law tries to preserve a true balance between the different powers of the State, for which it pre-establishes certain operating rules that seek to prevent their concentration" (Despouy, 1999, p. 67).

Although the public management of the emergency includes the more significant role of one power before others, precisely to avoid free action and concentrated decision-making, limits are set on the state of exception and the active participation of all powers is foreseen, constituting these in necessary instances -not optional- of deliberation and decision.

From this perspective, an attempt has been made to correct that normalized imbalance in favour of the Executive, illustrated as follows:

> (...) The emergency is cruel because it alters institutional roles. It is made for the Executive because it is the only one who arrives on time. The Legislature endorses it. The Judicial sometime corrects it in its effects. We cannot blame the presidential regime for its leadership in an emergency. It is made for that, but it does not mean that the emergency authorizes it to run over the balances created by the constitutional culture. (Frías, 1992)

Therefore, it would be inconceivable the provisional abolition of the distinction of powers that Giorgio Agamben (2004, p. 18) has considered the essential character of the state of exception. Instead, we can speak of a reaffirmation of powers and their operation. This leads to establishing that a state of exception and separation of powers are not exclusive concepts. The Ecuadorian constituent seems to have understood it in this way when it established that the declaration of the state of the exception does not interrupt the activities of the functions of the State (CRE, 2008, art. 164).

2.2) It is necessary to overcome the traditional notion of the separation of powers for a state of exception

Second, it is worth highlighting the notion of separation of powers to be combined with a state of exception.

Assuming that there is only one state power, whose will be manifested through organs fulfilling various functions, the argument for the separation of powers as a division of labour in decision-making is feasible (Greppi, 2013). The traditional notion of the separation of powers understands that division of labour under a logic of non-interference, where each power specialized in its functions acts strictly separated and isolated from the others. A state of exception carried out under such a traditional notion could allow outbreaks of authoritarianism and sovereign decisionism in a Schmittian key, according to

which a single power would exclusively manage the entire crisis, without controls and according to its sole criteria.

In the first half of the 20th century, a broader sense of the separation of powers was advocated. For example, according to Kelsen (1974), the constitutional balance is maintained only under the meaning of the principle of separation of powers seen as a division of the same, which indicates the distribution of power between different organs, not so much to isolate them, but to allow a common control of one over the other, preventing the concentration of excessive power in a single organ.

For their part, French advertisers postulated reflections based on their national experience. Duguit (1996), despite the limitations he considered for the Judicial Power, emphasized that an absolute division would fatally lead to the concentration of all powers in one: "To place at the head of the State two powers without link between them, without interdependence, without solidarity, it is fatally condemning them to fight" (p. 132). He criticized the National Assemblies of 1789 and 1791 for their incorrect interpretation of the work The Spirit of the Laws, reproaching them for not having seen that Montesquieu "shows, with crystal clarity, that intimate solidarity, that a constant collaboration must unite the different powers of the State..." (Duguit, 1996, p. 14).

Likewise, faced with Montesquieu's premise, that because of the necessary movement of things, powers need to march in agreement, Hauriou (1927) proclaimed: "March in agreement, what is it but to collaborate?" (p. 379). Equal place in Duverger (1962), which differentiated the regime of the collaboration of powers -from those of confusion and separation- by three aspects: distinction, organic dependence and functional collaboration. Such functional collaboration will exist "when two organs act in concert to produce the same act" (Duverger, 1962, p. 193).

Such principles of collaboration and solidarity between powers would weaken the traditional notion of strict and absolute separation, even transcending the checks and balances control system. Thus, the principles mentioned above are

essential for the required model of division of powers during a state of emergency, because they avoid centralized and hasty decision-making and offer conditions for all possible voices to be heard, including those of potentially affected parties.

As we can see, the critical approach points to the deliberative system, which, in the words of Professor Roberto Gargarella (2014), requires a logic of institutional organization different from that offered by the system of checks and balances: "While the traditional system of checks and balances [...] is aimed at avoiding and channelling social war; a dialogic system requires orienting itself towards other purposes, in such a way as to organize and facilitate an extended conversation and between equals " (p. 125).

Of course, the urgency that distinguishes a state of exception does not conceive the possibility of a broad dialogue in all its dimensions; however, this does not mean giving up its realization at any time. For this reason, it is forced to accept without further ado the idea that "deliberation that postpones the decision leads to chaos, aggravates the crisis, suspends the moment of sovereign political decision-making by the one who has the powers to do so" (Bercholc, 2014, p. 211). Furthermore, it is that going to deliberative instances means instead, in terms of efficiency, saving time and resources, since the rethinking and reopening of dialogues and ways that were initially avoided are mostly prevented.

2.3) There are minimum requirements for each power of the State during the emergency regime

Finally, there are minimal aspects of the participation of the powers during states of exception, beyond the legal regime that each State provides and the basic guidelines for observance for such circumstances (e.g. parameters on judicial guarantees and legal procedures not to be suspended during states of emergency, OC-8-87 and OC-9-87 I / IACHR).

In the first order, the current performance of the functions of each power is entrusted to the logic of adaptability to the circumstances of the case and to the extent that this

is possible. In this regard, in Ecuador, Under the COVID-19 context, executive and legislative sessions have taken place both virtually and in-person under security protocols. Similarly, the Judiciary and the Constitutional Court they continued to dispatch causes and audiences, through virtual media that were reinforced and created for this purpose.

As indicated above, in the Ecuadorian case, the declaration of the state of the exception does not interrupt the activities of the State functions (CRE, 2008, art. 164). However, in general terms, it is worth highlighting a minimum required function of each power of the State during the exception.

The power with the most significant decision-making power in the emergency, which is generally the Executive, is expected to exhaust, to the extent of the pressing circumstances, a dialogue before the preparation and adoption of measures. This offers the possibility of presenting a more elaborate proposal, if desired, before the examination and control of the other powers.

Likewise, the Legislative Power expects optimal collaboration of benches, parties or groups within it, through a more simplified deliberative process than usual. This requires placing specific salable differences based on a common goal. Moreover, of course, from the Judicial Power and the Constitutional Justice, the most excellent protection of the legal and constitutional order and mainly of rights is expected, remembering that the state of exception is always developed, inescapably, following the Constitution.

Nevertheless, it is necessary to clarify the Judicial Power and the Constitutional Justice, in terms of not becoming an obstacle within a legitimate emergency. In this sense, controlling does not always mean denying. Argentine professor Carlos S. Nino (1997) argued that on many occasions, the optimal form of judicial intervention is not that of a total invalidation of an unconstitutional norm, nor that of an administration decree:

> Judges do not always need to rule out the results of the democratic process to promote measures that they believe are more conducive to the protection or

> promotion of rights. Instead, judges can, and should, adopt measures that promote the process of public deliberation or more careful consideration by political bodies. (p. 292)

In this way, it is mostly ensured that the authorities collaborate and exhaust, as far as possible, the much-needed dialogue in emergencies.

So far, we have offered reasons under three parameters tending to reaffirm the division of powers as an unalterable and unavoidable principle during the emergency regime. For this reason, the logic that postulates "for exceptional circumstances, also exceptional remedies", is not understood in an absolute way, since the exception must function only within and under the Constitution and therefore, respecting its canons and fundamental principles, in those, the separation of powers. This was illustrated by an old ruling of the Supreme Court of Justice of the Argentine Nation (1927):

> That the Constitution is a statute to regulate and guarantee the relations and rights of the men who live in the Republic both in time of peace and in time of war and its provisions could not be suspended in any of the great emergencies of a financial or economic nature. Another order in which governments might meet. The enactment of a law, even an emergency law, therefore presupposes its submission to the Constitution and the public and administrative law of the state as soon as it has not been repealed [...]. (Court decision: 150: 150).

3. OVERVIEW OF THE ISSUE IN ECUADOR: STATE OF EXCEPTION AND COVID-19.

Approximately half a century ago, the exceptional regime began to be entrusted to the Executive, in the particular person of the President.

> [...] The constitutional regulation of states of exception was substantially modified in the 1978 Constitution which, taking into account the doctrine of national security, transferred to the President of the Republic,

> as the highest authority of the public force, the power to decree the measures extraordinary. (Aguilar, 2010, p. 63)

Since then and under the presidential roots, it was clear the identification of the exceptional sphere with the orbit of the Executive. Note the notion expressed by Julio César Trujillo (2006):

> States of exception are situations in which the Executive Power cannot save external security or public order with the ordinary powers that the Constitution and the laws attribute to it and, therefore, it needs extraordinary powers for effect until the dangers are conjured. (p. 202)

However, at the same time, the regulation of emergencies in Latin American legal systems was gaining ground, to the point of consolidating a tendency to "increasingly limit the powers of the Executive itself, through the intervention of the legislative chambers, but also with the participation of jurisdictional bodies through the instruments of judicial review of constitutionality " (Fix-Zamudio, 2004, p. 822).

In Ecuador, this trend took full force with the 2008 Constitution, by imposing brakes on the faculties and powers of the Executive for the state of exception. Thus, the Legislative Power can revoke the decree declaring exception at any time; the Constitutional Court formally and materially controls the declaration of exception, the measures to be adopted, and monitors the emergency; and, in the same way, the judiciary knows and resolves jurisdictional guarantees in the event of an emergency.

Regarding COVID-19, the President of the Republic, by executive decree No. 1017 (2020), declared a state of exception for sixty days throughout the national territory for reasons of public calamity. The decree reminded all the functions of the state, mainly the judicial, to maintain the respective inter-institutional coordination during the validity of the state of exception. The declaration obtained a favourable opinion from the Constitutional Court (No. 1-20-EE/20), making essential

clarifications on the respect and protection of people living on the street and vulnerability, on the right to privacy, the regulation of the use of the public force, the closure of borders and the suspension of flights, among others.

Subsequently, by executive decree No. 1052, the state of exception was renewed for another thirty days. The Constitutional Court gave a favourable opinion (No. 2-20-EE/20), emphasizing rights and guarantees in the areas of health, education and connectivity, violence against women, indigenous peoples, work, human mobility, access to information, free expression and public protest, people deprived of freedom and transparency, corruption and responsibility of public servants.

In this emergency context, some events confirm the relevance of the constant functioning of the powers of the State during the emergency regime. To name a few:

a) The President of the Republic sent to the National Assembly an urgent economic bill (Humanitarian Support Law), of controversial labour, economic and tax measures. On the eve of the end of the term to pronounce and a tacit acceptance configured, the Assembly ended up approving the project with several modifications. In the same way, the bill for the regulation of public finances was sent, also approved on the eve of the expiration of the term, with various adjustments and modifications. Both projects returned to the Executive for their objection or sanction. Regardless of sharing the result of these projects, it should be recognized that the Legislature has met, discussed, and pronounced its positions, mostly holding back the original will of the Executive.

b) Once the emergency was decreed, the Plenary of the Judiciary Council resolved to restrict the attention to the public and the filing of actions, except in the judicial units with competence in matters of flagrante delicto, criminal, domestic violence, traffic, in addition to multicompetent units and criminal guarantees (Res. No. 028-2020). Immediately, the Constitutional Court, through a follow-up order, reminded the Council of the Judiciary, its decentralized bodies and the judges with competence to hear judicial guarantees, that

access to constitutional justice cannot be restricted, nor the adequate protection of constitutional rights in the context of the COVID-19 health emergency. This timely control of constitutional justice allowed the prompt reopening of courts,

c) In the framework of the state of exception, constitutional actions and a follow-up phase have been presented regarding the budget reduction in education. The Executive, from its finance ministry, has presented to the Constitutional Court the reasons why it considers the reduction as a consequence of the economic crisis aggravated by the pandemic.

This is another example of how constitutional justice could mean a brake on the decision-making power of the Executive during the exception. These processes make it possible to ensure the justification of such budgetary measures and that those potentially affected are heard. Furthermore, it is that by their nature, the economic measures adopted in an emergency, even more so, require judicial control. In the words of Professor Juan Vicente Sola (2016):

> The notion of economic emergency is a surrender of judicial control to guarantee economic freedoms because once the existence of a crisis is established, Congress and the Executive are granted broad freedom to regulate economic life. Generally, the activity carried out by the political powers has aggravated the situation that it was trying to remedy. The answer to this problematic situation is the reestablishment of judicial control in defence of economic freedoms in the same way that it is carried out in the case of civil liberties. At the same time, the recognition of due economic process or economic reasonableness as a form of adequate control of the decisions taken by the political powers during the emergency. (p. 520)

d) The Ministry of Defense issued Agreement No. 179, by which it updates the Regulations for the Progressive, Rational and Differentiated Use of the Force by the members of the Armed Forces in situations of internal social resistance. In that, a rational scale of the use of force is established according to five levels.

The agreement arose in the context of several citizen protests guided by various reasons, from the lack of labour and health guarantees for medical personnel, layoffs in various sectors, reduction of the education budget, lack of payment to teachers, doctors and other professionals and servers, even the increasingly frequent cases of corruption revealed.

Some actions have been brought against this agreement and will undoubtedly constitute a valuable opportunity to control the decisions made by the Executive Power in the emergency.

e) Countless cases of corruption revealed, during and on the occasion of the emergency, have set the powers of the state in motion, especially the judicial function as the main protagonist in the investigation and prosecution of the alleged participants, ranging from individuals, private companies, public servants, even elected officials.

f) On June 15, 2020, by executive decree No. 1074, the President of the Republic declared a new state of exception for sixty days. To the cause of the public calamity, this time, the economic emergency supervening to the health emergency was added. The Constitutional Court gave a favourable opinion (No. 3-20-EE / 20), which this time was not unanimous, as there were two concurring votes and three saved. The statement highlights the non-consideration of the economic emergency as a cause for establishing and maintaining a regime of exceptionality, as well as the coordinated work requirements of the different functions of the State and local authorities, and to resort to institutionalized deliberative processes.

Thus, this passage, through the Constitutional Court, as an instance of control of power, shows the importance of the dialogic interaction between the powers before making decisions in the context of an emergency.

g) On August 14, 2020, through executive decree No. 1126, the President of the Republic declared a new state of exception for thirty days, due to public calamity due to the pandemic caused by COVID-19. Being declared its constitutionality by opinion (No. 5-20-EE / 20), the Plenary of the Constitutional Court, unanimously, anticipated that once the period of thirty days of renewal has elapsed, it will not admit a new statement on the same facts that have constituted public calamity on two previous occasions with their respective renewals. As such, it set parameters for national and sectional authorities to gradually transition to an ordinary regime capable of facing COVID-19.

In this way, the Constitutional Court, in a conscious attitude for not normalizing the exceptional regime, has taken a decisive step in calling on both the central government and the local authorities to put into operation the ordinary regulations that exist, giving introductory provisions of order to face the pandemic, without the need to invoke an extraordinary regime.

These seven examples reflect the importance of maintaining and ensuring the average performance of the powers of the State during states of exception. The main reason is that its effective functioning prevents all forms of authoritarianism, on the part of the power with greater decision-making power in the crisis and guarantees a conversational dynamic as a prior filter of the decisions to be adopted. Meanwhile, constitutional justice shows the relevant role of being the foremost interpreter and guardian of the Constitution, setting the determining parameters and mandatory observance for states of exception.

4. RISK OF REGRESSION: A SCENARIO ALREADY KNOWN BUT OF NEW MAGNITUDES

Philosophical thought has been vindicated within the COVID-19 context, questioning the paradigms that permeate various parameters of normality in our societies.

By March 2020, while the South American States, some earlier than others, began to prioritize the pandemic and while Europe was already facing it in all its dimensions, Wuhan Soup (2020) was published under the initiative of the editorial ASPO (Preventive and Compulsory Social Isolation). In this work, Contemporary thoughts are piling up around COVID-19 and the realities it brings. A month later, the publisher released a second volume entitled The Fever (2020), this time from Argentine thinkers.

Wuhan soup and *The Fever* gain relevance by inserting, from a multi and interdisciplinary approach, a common concern around states of exception in the management of the health crisis. Thus, Agamben distrust declarations of a state of exception, because they have become a standard paradigm of state government. According to Berardi, we have entered the era of biopolitics, where presidents can do nothing. López Petit warns that governments are re-nationalizing, decisionism coming to life again. For his part, Byung-Chul Han warns that on the occasion of the closure of borders, the state of exception is strengthened under the old idea of sovereignty. Nevertheless, perhaps the most subtle reflection, in a Latin American key, is offered by Maristella Svampa (2020):

> On the other hand, the sanitary Leviathan is accompanied by the State of Exception. Much has been written about this, and we will not elaborate. Suffice it to say that the most significant social controls are made visible in different countries in the form of violation of rights, militarization of territories, repression of the most vulnerable sectors. In reality, in the countries of the South, rather than an Asian-style digital surveillance society, what we find here is the expansion of a less sophisticated surveillance model, carried out by the

> different security forces, which can hit even more to the most vulnerable sectors, in the name of the war against the coronavirus.
>
> A question resonates all the time. How far do the States have broad shoulders to continue in the key of social recovery? This is something that we will see shortly, and in this future, social struggles will not be alien, that is, movements from below, but also the pressures exerted from above by the most concentrated economic sectors [...] (pp. 20, 21)

The reflections mentioned above converge in two warnings: 1) of the return to the abuse of states of exception, marked by authoritarianism and violations of rights, under the pretext of the health emergency; and, 2) the imposition of economic measures and programs outside of any consensus, even when this implies exerting force to eliminate everything considered as an obstacle. Such scenarios were already experienced, to varying degrees, in various countries of the region, particularly during the 1970s and 1980s.

These warnings also reveal the adverse effects of a state of exception, by which popular sovereignty would be affected, the process of depoliticization of which current society is a victim would be potentiated and where democratic dialogue would be replaced by authoritarian monology. This is how Rafael Valim (2018) highlights it, as one of the most distinctive features of the state of exception:

> The conception is subverted that any authority - administrative, legislative or judicial - is a mere administrator of the people and, therefore, must act within the limits of the Constitution and the laws, opening a dangerous space for voluntarism, what constitutes, by the way, the genealogical sense of the state of exception. (p. 444)

The circumstances described threatening the return of authoritarian decision-making models, with absolute disregard for the citizens and the control bodies themselves. Added to this is the concern about a growing government endorsement

by the public force in the face of dissidents and manifestations of disagreement. In this context, an internal enemy is usually created and configured discursively, from the central power, identifying it with anyone who destabilizes or obstructs what has been indicated - and promoted - as the only way to face the crisis.

Undoubtedly, the economic and fiscal impact caused by the stoppage of activities, due to COVID-19, requires the taking of urgent measures. However, a very different thing is the use of the exception scenario to establish, in the name of the emergency, an entire economic model that will endure from now on without previously evaluating the consequences it may entail. Anne Klein (2016) has warned, with numerous examples of state experiences, that the upheaval is a propitious moment to establish a new type of government or to implement economic decisions:

> However, if we are hit by an economic crisis of sufficient severity - a rapid currency depreciation, a market crash, or a significant recession. Crises are, in a sense, zones «ademocratic», parentheses in habitual political activity within which consent or consensus does not seem to be necessary. (p. 194)

It should be noted that all these risks are in direct contradiction with the foundation of the state of exception, which in the words of Pérez Royo (2005): "makes no sense except to return to normality. Consequently, every right of exception has to be valued from this perspective" (p. 1078). For this reason, the full and vigilant operation of the state powers, including the constitutional jurisdiction, during and after the health emergency cycle becomes imperative. This is the only way to control any attempt to impose non-consensual agendas and programs, even when these involve new means of force and surveillance.

CONCLUSIONS

Intended to rule legally in specific circumstances of abnormality, the state of exception is an institution of law and not, as Carl Schmitt considered, a purely political sphere devoid of legality. This means that it is subject to the constitutional parameters that determine its formal and material validity, which is why it is not correct to conceive that the state of exception works outside the Constitution. For this reason, it is explained that during the state of exception, the principle of separation of powers is reaffirmed as immovable, in order to avoid any trait of decisional authoritarianism.

That the circumstances that motivate the declaration of exception require urgent and effective decisions does not imply that one power prevails over the others. For this, it is necessary to overcome the traditional notion of absolute separation, through collaboration, joint work and deliberation between the powers, to avoid their concentration during the exception. Under this approach, a minimum of optimal performance is expected from each state power.

In the Ecuadorian context, the State of the exception does not interrupt the activities of the State functions. The powers recognized to the Legislative and the Judiciary, without prejudice to constitutional justice, encourage to avoid the accumulation of power and the solitary and uncontested decision-making by the Executive. In particular, the control exercised by the Constitutional Court has been decisive in reminding the State powers of elementary respect for fundamental rights and democratic institutions.

Finally, the uniqueness of the COVID-19 pandemic and its treatment by governments, invites careful monitoring of the exception regimes concerning the imposition, without any consensus, of programs and measures of a political nature-economic in the name of the emergency and the application of innovative mechanisms of control and force.

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