

CORONAVIRUS & THE LAW (I): A SHORT INTRODUCTION TO THE LAW OF EXCEPTION

The history of humanity (and, of course, the history of Spain) is replete with situations of crisis which have often been occasioned by the forces of nature (earthquakes, floods, major urban and forest fires, etc.). Yet, on many other occasions, these situations are also due to human action that has originated them in more or less conscious ways (wars, terrorist attacks, etc.).

Among these crises, health emergencies have featured prominently. Although it is true that for years they have not featured prominently in the life of the Western world, they have not ceased to be present in some developing areas (we can think of the periodic epidemic crises caused by the Ebola virus in Africa – which was also a minor scare for Europe-). Epidemics have always existed and, surely, these health emergencies will continue to occur as long as human beings inhabit our planet.

The dimensions of these catastrophes have varied from one case to another, and the social responses, consequently, have differed according to the severity or imminence of danger in the situations that have had to be faced.

Our purpose over the next few pages is to try to explain in very brief comments (in small doses) how the law behaves in crisis situations and, in particular, in the fight against the coronavirus (COVID-19) epidemic.

It should be borne in mind, as a starting point, that legal responses have always been a highly qualified mechanism in all societies to face the natural or human dangers that have stalked them throughout the ages. Against this background, the fight against emergencies has had the characteristic mechanism of substituting the legal rules that govern the day-to-day running of a society with extraordinary legality (which can only appear in these serious situations, and

which must disappear when these dangers have ceased to exist). Montesquieu explained this phenomenon with very precise words: "There are cases in which a veil should be drawn for a while over liberty, as it was customary to hide the statues of the gods".

This exceptional legality is set today through constitutional norms, but this does not mean that necessary provisions do not exist in other norms of a lower legal value, such as Acts of Parliaments. Indeed, the current Spanish Constitution of 1978 provides for the existence of three exceptional states (alarm, exception and siege), but Spanish statutory health laws also include rules of the exception to face crises, permitting, for example, the adoption of the "emergency measures" by the health authorities to deal with "communicable diseases". This is demonstrated, for example, in article 3 of Spanish Organic Law 3/1986, of April 14, on Special Measures in the Field of Public Health.

The eagerness to anticipate crises on the part of the Law is justified by the primary idea of seeking security of how the Power should behave in the face of emergency situations, in order to overcome them in the best possible way. In this sense, enormous powers are conferred on the subjects to whom society entrusts the direction of the fight against the crisis. These subjects must have ample legal capacity to carry out this task of maximum general interest, sometimes being able to limit or, in the most serious cases, even suspend the fundamental rights and freedoms of persons. With the declaration of the state of alarm, our leaders, for example, have centralized the emergency powers to fight against the coronavirus in the hands of the Spanish Government and have substantially limited (although they have not totally suspended) the freedom of movement of people.

Within the preventative interest of the Law of crises, there is, however, a second idea: in the face of the dangers confronting a society, the law of emergency grants wide ranging powers to the leaders who govern (those necessary to overcome the crisis), because, otherwise, it would not be possible to overcome it, and the

social group would be threatened. Notwithstanding, these leaders must not be able to abuse these great powers. It is necessary to limit them, being the Law of exception a key for this purpose. Thus, governing leaders cannot, for example, use these powers indefinitely, but only while the crisis lasts. In concrete terms, the Spanish state of alarm for the fight against the coronavirus epidemic makes it possible to force most of the population to be confined to their homes, but this restriction on fundamental freedom of movement can only exist for the duration of the health crisis, and cannot be extended further, indefinitely.

In the following comment we will try to explain what are the essential elements of this Law of the exception, whose existence we have just introduced.

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