

CORONAVIRUS & THE LAW (II): THE ESSENTIAL ELEMENTS OF THE LAW OF EXCEPTION

An analysis of the legal responses offered by Western States to the extreme dangers that have occurred throughout history allows us to establish the essential elements of the Law of exception. We will now explain in a few paragraphs these basic characteristics, developed at length the book *El concepto de necesidad en Derecho Público* [The Concept of Necessity in Public Law] (Civitas, 1996).

First of all, the "Public Powers" are obliged to fight against critical situations.

In order to ensure the very existence of the State and the performance of essential tasks for the orderly functioning of it, society is endowed with "Public Powers". It is the performance of the aforementioned functions that precisely justifies their creation and existence.

The "Public Powers", therefore, are not only entitled, but are obligated to fulfil this mission. And, inasmuch as this is so, it is essential to provide them with the sufficient means to do so, since it would not make the slightest sense to create organs, entrust them with functions, and then prevent them from complying with these functions due to a lack of means. In short, if the State intends to survive and function in a minimally correct manner, it must equip its "Public Powers" with the necessary means to perform the functions of general interest entrusted to it. The obligation of the "Public Powers" to carry out these tasks essentially differentiates them from private subjects. Any citizen can decide if, in case of need, to resort to self-defence or not. The "Public Powers" of a State do not have that option: in dangerous situations that threaten their existence or to their proper

functioning, they must adopt the "emergency measures" for their defence, *a priori*, and as a general rule.

Second, Law is a qualified means of fighting against critical situations in the life of States.

Among the means available to these "Public Powers" to ensure the ends of the State, we encounter Law. It is not, therefore, an end in itself, but a mechanism to achieve the orderly survival of the State, under certain factual circumstances, because of dangers or potential threats (real, current and with a certain geographical scope), which could undermine or even terminate the existence of said State.

Now, it must be reaffirmed that, in the case of Law, as in any other means for the protection of States, the end does not justify every mean. The end only justifies the use of those means that are effectively necessary and proportionate for its realization. Obviously, the more legally valuable the purpose to be protected is, and the more serious and pressing the danger is to it, the more incisive the measures will be and which will be justified by necessity.

Third, there are two fundamental effects of the Law of exception.

Having stated that, in the first place, the action of the "Public Powers" is obliged to fight against the dangers that threaten the orderly life of the States, and that, secondly, the Law is one of the qualified mechanisms of the that these Powers possess for this crucial battle, it is necessary to pause for a moment on the fundamental effects of the Law. Specifically, those destined to face critical situations, which is the Law of exception.

In this context, emergency has two types of fundamental effects that are very characteristic of Law: one negative, and the other positive.

Focusing on the first of these, it must be emphasized that emergency makes it possible to temporarily exempt the application of “normal” or “ordinary” Law. Emergency enables the removal of all legal obstacles to the actions of the Public Powers when these are indispensable for the realization of essential functions that are necessary for the orderly existence of the community.

This negative effect of inapplication of “normal” Law is complemented by another positive consequence: emergency entitles the Public Powers to adopt the specific rule, the precise legal instrument, which, in a specific situation of danger to the essential community purpose (in particular, the very existence of the State), will allow the realization of the end, overcoming the specific threat against it. In this way, the emergency becomes a technique for adapting the Law to the threatened social reality.

Both effects of the emergency, the negative or derogatory, and the positive or adaptive, find a concrete projection on the different legal rules that discipline the ordinary actions of the Public Powers, allowing their alteration. The emergency justifies, indeed, a modulation of the legal rules of responsibilities (permitting, for example, a readjustment of powers among different Public Administrations), of procedure (allowing its simplification, its replacement and, even, its suppression), of form and of content. Applying this idea to the moment in which we live, the current Spanish state of alarm has made possible, for example, the recentralization of health and police powers in favour of the Spanish Government, the suspension of administrative deadlines within the entire public sector in Spain (national, regional and local) or the limitation of the freedom of movement of people.

In the next chapter we will address the limits that accompany legal emergency measures, as well as the controls of a different nature that exist to avoid potential abuses.

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