

CORONAVIRUS & THE LAW (III): THE LIMITS OF EMERGENCY POWERS.

We saw in the previous comments that exceptional measures temporarily replace the rules that govern our lives in ordinary circumstances: if we can normally move freely¹, this fundamental freedom is severely limited after the declaration of the Spanish state of alarm². If under normal circumstances our domicile is inviolable and the forces of order cannot enter except with our consent, a flagrant crime occurs or if there is a judicial authorization³, in cases of the activation of the Spanish state of exception this fundamental right could be suspended⁴, etc. These are just a couple of examples of the many imaginable changes in the behaviour of ordinary (or normal) Law in crisis situations.

The existence of some emergency powers with this importance in the hands of the public authorities is essential if we want to overcome the serious dangers that may stalk the orderly life of States. That said, we have to ensure that these authorities are not tempted to abuse them. History shows that, as a general rule, these emergency powers have been used correctly; but also, on more than a few occasions, they have been used in an improper fashion, undermining the life and additional multiple fundamental rights of the people. The Law must ensure that this does not happen, and that the emergency powers in the hands of public authorities are not legally uncontrolled.

Therefore, in order to avoid (or, at least, reduce) the possible risks of abuse in invoking emergency powers, it is essential to use two types of counterweights: on the one hand, it is essential to rigorously outline a system of legal limits and, on the other, it is essential to establish an effective system of control over the

¹ Article 19 of the Spanish Constitution of 1978 (CE).

² Article 11 a) of the Organic Law 4/1981, 1 June, on the states of alarm, exception and siege (LOAES), and article 7 of Royal Decree 463/2020, 14 March, that declares the state of alarm to manage the situation resulted of the health crisis created by COVID-19.

³ Article 18.2 CE.

⁴ Article 55.1 CE and article 17 LOAES.

specific use of such extraordinary powers. We will focus now on offering a panoramic view of the legal limits of emergency, and then we will review the political, administrative and jurisdictional controls against the initial decision to activate the extraordinary powers and the concrete use of the emergency powers that are applied after such activation.

The legal limits of the emergency powers can be basically divided into two: first, the effective existence of a situation of emergency, and, second, the principle of proportionality in the specific use applied in each case of extraordinary powers.

A) The effective existence of the emergency powers supposes the concurrence of a serious and real danger to the community's survival. For example, a pandemic like the one that is currently devastating Spain, threatening the orderly life of the State and putting the health of its citizens in extreme danger. When there is no effective factual situation that endangers the achievement of an essential purpose, the public authorities will obviously not be able to invoke the concept of emergency in order to justify their actions. Public powers are responsible for observing and evaluating the existence and concrete content of the serious and real danger and its threat to community survival, from the moment they adopt and apply the first specific emergency measure. Notwithstanding, naturally, these assessments will be audited, in the second instance, by the different control bodies.

B) The second category of limits, which operates when, in fact, there is a situation of emergency, serves to outline the concrete content that each of the specific exceptional measures may have, or, what is the same, to delimit the derogatory scope (on the ordinary Law) and the adapted one (creating a new extraordinary measure) of a certain exceptional rule. All the limits that make up this category redirect back to the principle of proportionality considered in a broad sense, whose function is to reconcile opposing interests, seeking a specific equilibrium point for each conflict situation, an equilibrium point that finds its reflection in each exceptional measure. This concept of proportionality in a broad sense

constitutes, since its historical configuration by the Prussian Police Law, a complex concept, integrated, in turn, by three other (sub) principles of progressive application:

- a) First, that of 'adjustment' (temporal, spatial and material) of the measure to the factual situation threatening the community's survival. The "temporary adjustment", for example, demands that the measures are not extend beyond the duration of the crisis situation.
- b) Second, that of 'minimal intervention'. This (sub) principle means that, among the different appropriate measures to face the dangerous situation, the public powers must choose the least harmful to the interests of individuals and for the generality.
- c) Third, that of 'proportionality in the strictly sense'. Or, what is the same, the eventual damage to the rights and private and general interests caused by the appropriate and less damaging measure must not be 'manifestly out of proportion' regarding the beneficial effects derived from the effective realization of the purpose, overcoming the looming danger.

In conclusion, in each concrete case, emergency can only justify measures which are: effectively aimed at overcoming a danger that threatens community survival, are adequate for it, are as least harmful as possible and whose negative effects are not found manifestly out of proportion in relation to the beneficial effects derived from the realization of the end.

We said in previous chapters that emergency powers in the hands of the public powers are essential to overcome the crisis, and in the preceding paragraphs we have seen the limits devised by Law so that abuses are not committed when taking extraordinary measures. Nevertheless, it must be borne in mind that these limits are useless if a system of effective controls over the exercise of the emergency powers is not established. We will dedicate next chapter to this issue, as we have advanced previously.

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