

CORONAVIRUS & THE LAW (IV): THE CONTROL MECHANISMS OF EMERGENCY MEASURES.

The rules, whether legal or not, are of little value if they are not accompanied by more or less effective mechanisms to ensure they are respected by the different subjects they affect. It serves no purpose, as it happens, to establish a ban on the movement of people and vehicles on the streets during an epidemic, if a significant part of the population does not respect it. The problem here is twofold: on the one hand, the possibility that the defaulter will become contaminated, helping to spread the disease; and, on the other, the eventuality that the defaulter is already infected and serves as a chain of transmission. To avoid these assumptions, the existence of administrative (police) and, where appropriate, jurisdictional (criminal) controls is essential.

However, now we do not want to focus on this aspect of the obligation of citizens to respect legal norms (and, in particular, those of crisis), but rather on controls over the exercise of emergency powers by the public authorities. It is essential, in fact, that the public powers respect the limits inherent in the Law of emergencies. That is, the existence, on one side, of a true crisis situation that justifies invoking extraordinary powers, and on the other side, the respect of the principle of proportionality for each of the emergency measures adopted to fight against the corresponding emergency. It would essentially be useless to set precise limits on the functioning of powers and measures of exception if there were no control bodies with sufficient capacity to enforce them, avoiding or, at least, significantly reducing, the possible risks of abuse in its use. These control bodies are, of course, as bound by these limits as the public authorities themselves, holders of the emergency powers.

The control of the emergency, indeed, must be entrusted to a plurality of bodies of diverse nature. This enables, in the first place, the effective extension of control to all interstices of the concept of emergency, whatever the nature and range of the measure in which it finds expression. The distinct nature of the control bodies

means, in the second place, that they face the control of emergency measures from very different perspectives. The multiplicity of control bodies, thirdly, hinders potential attempts to dominate or silence all reactions against possible abuses in the unjustified invocation of emergency, or in the concrete adoption and determination of scope of each of the measures of this nature.

In this context, in Spain, the control over the emergency is carried out by three types of bodies that use different parameters or criteria for the performance of their supervisory task:

A) In the first place, there are the political control bodies, among which Parliament stands out, that use essentially (political) opportune parameters for their oversight function¹.

An excellent example of political control is that of the intervention of the Congress of Deputies [*Congreso de los Diputados*] in the process of declaring the constitutional state of alarm. It should be recalled that the initial declaration of this exceptional status corresponds exclusively to the Government of the Nation through a Royal Decree [*Real Decreto*] agreed upon by the Council of Ministers². Despite this legal form, this Royal Decree has the value of statutory law, as established by our constitutional jurisprudence³. Thus, the Legislative Power does not have any type of competence when it comes to making this declaration and the participation of the Congress of Deputies is limited to functions of mere political control. This is because the obligations of the national Government are limited solely to give an account to this Legislative Chamber of the declaration of the state of alarm, and the Executive branch must also supply it with the

¹ The Spanish Houses of Parliament are bicameral. According to article 66 of the 1978 Spanish Constitution, "The Cortes Generales represent the Spanish people and consist of the Congress of Deputies [Lower House] and the Senate [Upper House]".

² Article 116.2 of the Spanish Constitution (CE) and articles 4 and 6.1 of the Organic Law 4/1981, 1 June, on the state of alarm, exception and siege (LOAES).

³ Order of Constitutional Court (ATC) 7/2012, 13 January; and Judgment of Constitutional Court (STC) 83/2016, 28 April.

information that is required⁴. The Senate [*Senado*], however, has no role in this process.

Something slightly different happens with the extension of the state of alarm: this function also corresponds to the Government through a Royal Decree, which also has the value of a statutory law. However, the Government must have the express authorization of the Congress of Deputies, which may establish the scope and conditions in force during the extension⁵. Hence, this authorization is not (or, at least, not only) a measure of political control, because, as we will see later, the will of Congress coincides with the will of the Government to decide on whether or not to agree to the extension, as well as on “the scope and conditions” in force during the extended state of alarm.

B) In second place are the bodies of an administrative nature which, in the performance of their supervisory task, use both parameters of legality and those of strictly good judgement (political-administrative). Keep in mind that the legality control checks whether the measures of emergency respect the norms that make up the Spanish legal system (and that they are mandatory for all, that is, both for individuals and for the public authorities); while the oversight based on good judgement allows for controlling whether the measures that are intended to be applied (and which are perfectly legal) are also reasonably good for achieving the general interest objective pursued with their adoption.

C) Third, and as an essential locking mechanism, are the jurisdictional bodies (that is, the courts), which are ultimately responsible for the control, based on exclusively legal parameters, on the existence or not of the need –and proportionality- justifying the measure, even when it has satisfactorily passed the appropriate political and administrative controls previously.

Jurisdictional control in the event of a Spanish state of alarm is exercised directly by the Constitutional Court with regard to both the Royal Decree declaring this

⁴ Article 116.2 CE, article 162 of the Standing Order of the Congress of Deputies of 24 February 1982 (RCD) and article 8.1 LOAES.

⁵ Art. 116.2 CE, art. 162 RCD y art. 6.2 LOAES.

exceptional status and the one that accords its extension⁶; while "the acts and provisions of the Public Administration adopted during (its) validity" may be contested before the ordinary jurisdiction⁷.

With this fourth paper, we end the review of the essential characterizing features of the Law of exception or Law of crisis. The fifth and following papers (in Spanish) will be dedicated to the analysis of the concrete keys that comprehend the legal rules of exception that exist in Spain to face a health emergency such as that of the coronavirus (COVID-19).

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Vicente Álvarez-García*
Professor of Administrative Law
University of Extremadura

* Flor Arias-Aparicio and Enrique Hernández-Diez are also collaborating in the edition and revision of this series. They are teaching and research staff at the Administrative Law Area (Department of Public Law) of the University of Extremadura.

⁶ ATC 7/2012, 13 January; and STC 83/2016, 28 April.

⁷ Article 3.1 LOAES.