

Ecuador – Constitutionalism and Covid-19

Andrés Cervantes

2020-05-09T09:53:37

The Ecuadorian government's first measure in response to COVID-19 was taken on February 29 when it publicly confirmed that an infected patient had arrived from Spain. During the first weeks of March, no restrictive or preventive measures other than an [ineffective](#) travelers' control at airports (without requiring mandatory quarantine for passengers arriving from Spain or China) were adopted by the national government. However, some days after the World Health Organization declared COVID-19 as a global pandemic, President Lenin Moreno declared an [emergency state](#) on March 16 adopting a series of measures that are currently being implemented at a national level such as the suspension of the constitutional rights of freedom of movement and association, the active intervention of the national police and military service in the control of public order, the electronic surveillance of infected patients, and the general suspension of labor activities, among others.

After this late reaction to the global pandemic, the current situation of Ecuador is especially complex due to a series of factors. First, the principal economic income of the nation is based on the [exportation of petroleum](#) and this commodity suffered a historical crash in its market price on April 20 when WTI oil was valued at -\$36. This presages a major economic disaster because the 2020 general budget of Ecuador assumed an income price around [\\$51 per oil barrel](#). Second, the lockdown strategy is simply not viable in a society where only 4 out of 10 individuals have a [formal job](#). Third, the public health system is in a state of total [collapse](#) and last, but definitely not least, the country is unable to pay its sovereign debt nor to print more national currency and introduce it to the market as, for example, the [European Central Bank](#) or the [United States Federal Reserve](#) have already decided, due to the fact that Ecuador does not control its monetary policy after the country adopted in [2000](#) the US dollar as national currency.

When referring to the rule of law and constitutionalism we must be extremely cautious: Ecuador was founded in 1830 after the dissolution of Great Colombia, and in just 190 years has adopted [20 constitutions](#). The current Ecuadorian Constitution dates from 2008. This means that the nation does not possess a strong constitutional tradition nor a culture of promotion of the [rule of law](#). On the contrary, Ecuador has a long history of institutional breakdowns and [coup d'états](#) (the most recent happening in 1997, 2000 and 2005) which were caused by political and economic crisis. However, these were nothing compared with the situation all Ecuadorians are currently facing. Nowadays, the media and political actors are discussing the possibilities of a [parliamentary dissolution](#) by the executive which would result in president Lenin Moreno legislating by executive decrees without any political opposition and without a clear foresight on the real probability of organizing presidential and parliamentary [elections](#) in February 2021 due to COVID-19.

Taking all this information into consideration, this article analyses some of the most relevant consequences of the covid-19 pandemic to constitutionalism in Ecuador.

Pre-existing emergency powers of the state

The Ecuadorian Constitution of 2008 establishes a detailed regulation on emergency states (*estado de excepción*) which can be declared only by the President of the Republic in the following cases: international aggression, international or civil armed conflict, natural disasters, severe social commotion or public calamity (Art. 164 Const.)

On procedural aspects, the emergency state must be adopted by an executive decree and may be controlled *ex post* by the National Assembly at a political level, and it is *automatically* controlled by the Constitutional Court on matters of law (Art. 436.8 Const.) Additionally, the emergency state has a temporal limit of a maximum of 60 days after which it shall be renewed or automatically revoked. An emergency state must also be notified to the Organization of American States as required both by the fundamental norm (Art. 166 Const.) and the article 27 of the Inter American Convention of Human Rights. [Ecuador immediately complied with this requirement.](#)

The President is obliged to detail in the executive order which are the specific measures that will be enforced during the crisis. The only measures authorized by the fundamental norm are the suspension or limitation of the rights of the inviolability of domicile, correspondence, freedom of transit, association and assembly and freedom of information. Authorized measures also include: decreeing the early collection of taxes; using public funds (of the national government) assigned to other purposes, except for the funds of public health and education; moving the government base to any place of national territory; deploy media censorship in emergency related issues; designate a part or the whole national territory as a security zone; order the call to action of police, military and reserve forces; dispose the closing of ports and national borders and the citizens' obligation to collaborate and the possibility of private property requisitions (Art. 165 Const.)

Even when the fundamental norm regulates strictly the emergency state, it is important to note that since 2008 more [than 100 executive decrees](#) of this type have been adopted, however, none has ever been declared unconstitutional. In the case of the COVID-19 emergency the [recently appointed Constitutional Court](#) has ended up disrupting this practice. With rulings of March 19 and March 25 ([files #1-20-EE/20 and #1-20-EE/20A](#)). It set some guidelines for the national government that included affirming the state duty of protecting vulnerable groups; the obligation to adopt measures to guarantee access to vulnerable population to alimentation, medicine and the public health system; the obligation to adopt measures to guarantee that Ecuadorian nationals abroad can return to the country and the duty to maintain the normal functioning of the constitutional justice system.

Constitutional justice in times of crisis – Recent developments

As [Stephen Holmes](#) has explained, when we have an emergency at home, we must not act impulsively falling into despair. On the contrary, we must follow rules and previous protocols which are the best way for managing difficulties. As I have affirmed [elsewhere](#), this is the primary role of the Constitution in times of crisis and by extension the role of the Constitutional Court. As guardian of the fundamental norm, Constitutional Courts are legitimate actors that can become a public forum of deliberation between citizens, local governments, the legislature and the executive branch and its agencies in order to promote action and ensure fundamental rights.

In the Ecuadorian case, the Constitutional Court limited the constitutionality of the state of emergency only to the extent that it required the government to respect a series of [guidelines](#) which includes the State duty to protect homeless people and vulnerable groups and people who labor in essential areas, such as policemen and health service personnel. Additionally, the Court affirmed the state duty consistent in allowing the return of Ecuadorian nationals that are impeded from entering the country by the lockdown of airports and borders.

Given the fact the Ecuadorian Constitution recognizes the principle of collaboration between powers in order to ensure fundamental rights, and that procedural constitutional law which provides for the Constitutional Court to have oversight over the legality of governmental action, I [have criticized](#) the extremely deferential stance set by the Court in favor of the President as the guidelines set by the Court appear to be non-justiciable: they do not determine a specific authority which must comply, nor concrete terms of the duties or any time limit for compliance. This is concerning because the Court rejected two non-compliance injunctions filed by groups of citizens without a hearing or government response.

One of the two cases involved Ecuadorian nationals abroad that had asked the national government to allow charter flights in order to return home ([28-20-IS](#)), the second case asked the Court to order the national government not to pay \$300 million on sovereign debt and instead to invest those funds in the sanitary crisis ([29-20-IS](#)). Of course, these are extremely difficult cases to resolve, and I share the opinion that both cases should be dismissed but, in any event, the principles of due process and equal treatment under the law must be respected.

It is crucial to mention that new non-compliance injunctions related to the Covid-19 crisis have been filed before the Constitutional Court (cases: 30-20-IS/20; 31-20-IS/20; 32-20-IS; 33-20-IS) and even though some of them have not been decided and others have been dismissed, the insistent citizenship injunction filings before the Court have had an impact as the Court ordered on April 16 an *ex officio* procedure to [monitor](#) governmental compliance to its ruling on the state of emergency (case 1-20-EE/20).

This procedure is of great importance as it gave 8 days to the national government to inform the Court on the crisis management and the protection of fundamental

rights. For example, the Court asked specific information regarding the means adopted by the executive for avoiding the expansion of the sanitary crisis at jails; the measures adopted to combat domestic violence during the lockdown; the number of Covid-19 tests applied to the population and “first line” personnel; and also asked for information to the National Judiciary Council on the normal functioning of the judicial system. This last topic was of vital importance as the Council had [suspended](#) the attention even for constitutional actions (order DP17-2020-0178) which is manifestly contrary to the fundamental norm. This particular action has already had an effect: The Judiciary Council has already revoked the order. However, we must remain alert and wait for new developments on this case.

Bills in progress

The Ecuadorian constitutional system has been categorized as [hyper presidential](#) which means in simple terms that the executive branch has a wide range of powers that place the president in a dominant position when compared with other branches such as the legislative or judiciary. One of the multiple manifestations of this dominance is that only the president can initiate the parliamentary process in legislation regarding the creation of new taxes or the increase of public expense (Art. 135 Const.)

Furthermore, the president is able to use a fast-track legislative procedure in cases of economic urgency which means that if the National Assembly does not approve or reject a bill within 30 days of the president’s proposal, it shall enter automatically in force. In ordinary situations only one economic urgency bill project may be presented at a time, yet, when the emergency state is in force the president may present as many as he considers necessary (Art. 140 Const.)

It is important to keep in mind that in ordinary situations, this type of procedure is harmful for the rule of law and the ideal of deliberative democracy in which citizens’ participation in addition to public and processed debate are necessary to improve a legislative proposal. In any case, the deliberative crisis has been especially aggravated during the COVID-19 scourge. President Lenin Moreno has recently presented two economic urgency bills to the National Assembly, entitled *“humanitarian law measure* and *“public finances law measure”* which poses a dilemma for legislators: if they reject these projects the National Assembly may be dissolved by the President under the argument of “internal commotion”, or worst, “political crisis” (Art. 148 Const.). On the other hand, President Moreno is very unpopular ([92% of Ecuadorians think poorly of his administration](#)) and there seems to be a [political consensus](#) in the National Assembly on considering these measures as contrary to public interest.

Another manifestation of the hyper presidential constitutionalism is that even when the National Assembly could impeach (Art. 129 Const.) or remove the president in cases of great social commotion or political crisis (Art. 130 Const.) the fundamental norm gives the president some procedural advantage as he must be heard before the National Assembly. In practical terms this means that at the first sign of legislative action for initiating the destitution procedures the president

may immediately react by dissolving the National Assembly, which only requires an executive decree (Art.148 Const).

Impacts of emergency powers on local governments

On April 26 President Lenin Moreno [announced](#) that local governments will have the power to determine the levels of confinement of the population as they are better situated to respond to the developing circumstances in cities and towns. This means that starting May 4, mayors may decide whether or not to maintain, and even at different levels, the terms of confinement in order to reactivate labor and commerce. Notwithstanding, this announcement seems to be both operationally problematic and unconstitutional. First, it would mean that the national government must provide local governments with financial and human resources to confront the crisis locally, and this seems difficult when considering the economic landscape of Ecuador. Second, the constitution clearly establishes that security, the health system and the maintenance of public order are exclusive attributions of the central government (Art. 261 Const.)

Conclusion: the road ahead

The social, economic and political landscape of Ecuador is extremely concerning as the president has no political support and the situation may end with an impeachment or dissolution of the legislature by the President. Both scenarios would be harmful to the rule of law as there is no guarantee that elections can take place in February 2021. More than ever, the citizens demand constitutional collaboration, transparency and not more “separation” between the executive, legislative and judiciary. On the contrary, they have been called in this historical moment to unite forces in order to confront the pandemic scourge.

