

Dealing with the Pandemic: A Stress Test for Colombian Political Institutions

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Introduction

It has been a year now since a discussion began about the profound changes that the arrival of the SARS-Cov-2 pandemic could bring to our constitutional systems. This year has confirmed that the bad omens of the early days of the pandemic were well justified. The system has been put through a severe stress test and, unfortunately, we cannot say that it has been up to the challenge. This blog post seeks to briefly review the main events that have marked the institutional response to the pandemic and the implications that this response has had for the Colombian constitutional system.

The Colombian Government has not done very well in managing the pandemic. According to the [Bloomberg's Covid Resilience Ranking](#), Colombia ranks 51th out of 53 countries. In the ranking of the Australian think-tank [Lowy Institute](#), the country ranks 96th out of 98. These rankings take into account different indicators from multiple sources that include the number of confirmed Covid-19 cases, number of deaths, mortality rates, number of tests, access to vaccines, administration of doses, among others. At the time of writing this post in mid-February, the first vaccine has not yet arrived in Colombia, being one of the countries with [the highest number of Covid-19 cases](#) where the vaccination process has not begun yet. In general terms, we could affirm that the Colombian population has complied with the measures imposed by the government during the pandemic. However, the high rates of labor informality made it impossible for the population to remain confined during the strict quarantine. Covid-19 cases in Colombia, [as in other Latin American countries](#), increased when strict quarantine measures were lifted.

In brief, our constitutional design (we refer to the constitutional arrangements shared by the vast majority of Western democracies) have the dual purpose of establishing institutions that make the exercise of power possible, while creating an intricate network of relations between these established powers that allow for mutual control. The system works properly if power can be exercised and controlled effectively, so that citizens' rights and freedoms are satisfied and protected. It is precisely this network of relationships that enable and control power that has been weakened, a situation that has led to an authoritarian drift (a drift that does not seem to be limited to the Colombian system). Unfortunately, the pandemic has led to the strengthening of the concentration of power in the executive branch in political systems where the balance between the different powers has been precarious already (see [Gargarella](#)).

This has been aggravated by the executive's ability to evade constitutional controls along with a poor justification of decisions that strongly affect fundamental rights.

The Problems

The crisis generated by SARS-Cov-2 is, without a doubt, an emergency. It has demanded rapid action to try to deal with a pandemic for which little information was available, and it has demanded action under ever-changing conditions. In the face of a situation like this, the branch of government that was best placed to deal with it was the executive branch. The Colombian National Government, with its decision-making apparatus concentrated in a few hands, has the possibility to assume extraordinary legislative powers. It also has greater budgetary, technical and bureaucratic sufficiency, that allows it to take a leadership not devoid of problems.

As soon as the crisis began, the National Government [declared](#) a State of Economic, Social and Ecological Emergency, which authorized it to issue legislative decrees that had the same legal status as laws enacted by Congress. In just a few months, Iván Duque's government [issued 115 of such legislative decrees](#) as part of the emergency legislation, an impressive volume considering that in those few months more legislative decrees were issued than in the entire previous decade. These legislative decrees were not the only constitutionally-relevant decrees promulgated during this time. The executive branch adopted the controversial thesis that mass confinements – which involve strong restrictions to a multitude of rights – could be ordered through [ordinary decrees](#), which are issued as the result of the regular exercise of police powers (the problems of this thesis were discussed in [our previous entry to this blog](#)).

In addition to the exercise of this immense power by the National Government, state and local governments followed suit. Although less well equipped than their national counterpart in terms of normative, budgetary, and bureaucratic capacities, state and local governments adopted the President's thesis and considered that the strong restrictions on citizens' liberties implied by the measures of isolation were part of the [ordinary exercise of their constitutional powers](#). Such measures include curfews, border closures between municipalities, general restrictions on mobility, and bans on the sale of alcohol, among many others (a brief explanation of the controversy surrounding this issue can be found in Spanish [here](#)).

Checks and Balances

The first image left by this pandemic in Colombia (at least from a constitutional point of view) is that of an executive (in the center, but also on the periphery) exercising enormous normative powers which entail strong restrictions of constitutional rights and liberties. Faced with this situation, we should expect (at least this is what the theory tells us) an equally energetic action on the part of those other constitutionally-authorized powers which, in this case, have the important function of controlling the executive. One could say, following a well-known quote, that defense "[must in this, as in all other cases, be made commensurate to the danger of attack](#)". Such control

would include political control exercised by Congress and local collegiate bodies, as well as judicial control exercised by the judicial branch. However, this is not what has happened in Colombia in this first year of the pandemic.

To start, Congress has played a secondary role in attending to the crisis and in controlling the National Government. This is explained, at least in part, by the fact that at the beginning of the crisis there was intense [discussion](#) about the possibility that Congress could meet virtually. The main reason for this discussion was that the rules of procedure of the Colombian Congress did not expressly provide for such a possibility. The debate was overcome and Congress began holding virtual sessions, but there were repeated complaints from sectors of [minority political parties](#) because they considered that virtuality excluded deliberation and the effective exercise of political control. Consequently, there was a strong demand to resume in-person or mixed sessions. In the midst of this discussion, [Congress did not end up exercising rigorous political control over the decrees issued by the President, nor did it approve relevant laws to control the pandemic and its effects](#). Meanwhile, the executive branch continued to issue decrees on various matters and to avoid discussion of the National Government's agenda in the legislature.

At the local level, city councils and state assemblies [did move to virtual sessions](#) quickly, but their political control over local leaders was weak and mostly irrelevant (which is significant, considering that many of the most restrictive measures were taken by local leaders and affected citizens more directly). We came to this conclusion after a non-systematic observation of their work and taking into account some private conversations with local council members and politicians.

In the case of the judicial branch, the weakness in control may be explained by the volume and diversity of governmental decrees issued to control the pandemic. [The Constitutional Court, for example, had to review the 115 legislative decrees mentioned above](#). While attending to this enormous task, the Court had to continue to fulfil its other constitutional functions in matters relating to the protection of fundamental rights and the judicial review of legislation.

But the extraordinary legislative decrees were not the only ones issued by the National Government. An immense number of decisions were adopted through ordinary decrees and resolutions. Among them were the [decrees that ordered the mandatory preventive isolation of the entire population](#), one of the measures that most seriously affected the rights and freedoms of citizens. As these were ordinary decrees, the Council of State (*Consejo de Estado*) refrained from exercising automatic control over them, and many of these decrees ended up not having effective judicial control.

The lack of review of the executive branch's decisions has also been notorious. According to the Colombian executive's point of view, both at the national and local levels, the main (and at times it seems only) tool for controlling the pandemic has been to avoid social interaction. To avoid social interaction, the different governments have [severely restricted citizens' rights](#). In doing so, there have been many times where the constitutionality of their measures, which have varied in nature, has been less than clear. A constitutional democracy requires that power

be exercised in accordance with the limits established by the Constitution itself. The reasonableness of the measures is not something merely desirable, but something that the system itself demands. Rigorous judicial control over measures for which, at the very least, a justification should have been presented, has been glaringly absent ([an example of this is the use of apps and technological platforms of quasi-mandatory use without a clear justification of their necessity and usefulness](#)). One cannot easily explain how, for example, in a state of 116 municipalities, where 83.4% of the cases were concentrated in 15 municipalities, the governor ordered an extremely strict curfew in all municipalities, including those where there were no active cases (see [Juan Ospina](#)).

A notable exception in the judicial control of executive decisions can be found in the important (though solitary) ruling of the Bogotá Circuit Administrative Judge, Edith Alarcón-Bernal, who [ruled in favor of a group of petitioners over 70 years of age](#). In one of its decrees, the National Government had decided to severely restrict the mobility of this group of people, arguing that they were more susceptible to complications arising from the disease. In her [decision](#), Judge Alarcón-Bernal concluded that although the objective set by the government –the protection of the elderly’s health– was a legitimate one, the measures taken by the executive were disproportionate, discriminatory, inefficient and violated their human dignity. This ruling, which was later [upheld](#) by the Administrative Tribunal of Cundinamarca, was one of the few decisions that provided an effective counterweight to the decisions of the executive branch during the pandemic.

What is Next

The enormous power exercised by the executive branch therefore requires a corresponding response from the other branches of government. We have seen that Colombia’s institutions have not been up to the demands of a constitutional democracy. However, there are ways to avoid such a situation. First, Congress has the power to modify the decrees issued by the government through laws (which it has not done up fully to now) and, second, to exercise more strict political control over its actions. We have also insisted on the need for Congress to enact a law regulating the actions of the authorities when dealing with the pandemic. This law must resolve the questions of *who* can take measures that severely restrict the fundamental rights of citizens for the control of a pandemic and *how* such measures can be adopted. This regulatory framework should also specify the mechanisms of coordination and work between national and local authorities; the appropriate role of Congress in the exercise of political control; and the principles and rules that should be taken into account by judges to exercise adequate judicial control over measures adopted by the executive power.

This proposal, which was [well received by local academics](#), was not echoed in Congress. On the contrary, some politicians (such as House Representative, César Lorduy) have [asked](#) the National Government for new declarations of emergency. The counterargument to this proposal for a legal framework is that the approval of such a law would take time in Congress. However, the pandemic is not over and will

continue through 2021, so it is prudent to insist on its approval. There are [concrete proposals](#) on the table regarding its substance.

In addition, a more active role for the judicial branch is desirable and necessary. Effective and reasonable control measures are not out of reach for Colombian judges. The Constitutional Court has shown enormous institutional courage on other occasions, and there is no reason to believe that this is not possible in these circumstances where it is so much required. It has at its disposal the very important tool of reviewing [tutela](#) decisions, which is no small matter given the restrictions to fundamental rights discussed above. The decision that protected the rights of the elderly is a concrete example that judicial control can be effective in protecting fundamental rights. In the event that new emergencies are declared, as is now requested by some political sectors of the National Government, the Constitutional Court also has the power to exercise automatic and strict control over the decrees issued by the National Government in accordance with its own jurisprudence.

Finally, the system of judicial control in Colombia is robust, and the administrative jurisdiction also has ample powers to exercise control over the legality of administrative acts issued to contain the emergency, which it has so far not exercised sufficiently. Other judges in the country may also eventually protect the fundamental rights of citizens when their violation is not clearly justified. Today, we must insist that the health of the rule of law has also been affected by this public health crisis and we believe that the Colombian Constitution has the tools and instruments to deal with it.

