

## COVID-19 AND CONSTITUTIONAL LAW: THE CASE OF MEXICO

José Ma. SERNA DE LA GARZA\*

Summary: I. *Introduction*. II. *The Principle of the Separation of Powers*. III. *The Powers of the Ministry of Health and the Board of General Health*. IV. *The Restriction of Human Rights*. V. *Democracy and Elections*. VI. *Constitutional Litigation During the Pandemic*. VII. *Health Crisis and the Crisis of Public Security*. VIII. *Final Reflection*.

### I. INTRODUCTION

In this brief essay I will discuss six issues that demonstrate the ways in which the institutions, authorities and mechanisms contemplated in the Mexican Constitution have acted and reacted in the context of the COVID-19 pandemic, which emerged at the end of 2019 and began to impact Mexico in March of 2020. These issues are related to the principle of the separation of powers; to the powers of the federal Ministry of Health and the Board of General Health; to the measures which have restricted human rights in order to deal with the pandemic; to the postponement of elections; to legal cases which have been constitutionally litigated during the pandemic, and to the use of the army to carry out public safety tasks.

### II. THE PRINCIPLE OF THE SEPARATION OF POWERS

The pandemic has contributed to centralizing power around the federal executive branch, in a system that even before the health crisis was already

---

\* Researcher in the Institute of Legal Studies at the National Autonomous University of Mexico (UNAM). President of the Mexican chapter of the Ibero-American Institute of Constitutional Law.

centered on the President of the Republic. The President's party has a majority in both chambers of Congress, which stopped meeting since the end of March, 2020. This has meant that health measures—as well as measures related to the mitigation of the economic impacts of the pandemic—have been adopted by the President of the Republic and the Ministry of Health in a vertical manner, almost without deliberation.

Particularly controversial was the proposal that the President of the Republic sent to Congress on April 23, 2020, which sought to give him the power to “reorient resources assigned in the expenditures budget and direct them to maintain the completion of the projects and actions declared priorities by the public federal administration and foment economic activity in the country, attend to health emergencies, and programs that benefit society” in the case of “economic emergencies in the country”.

This proposal was not discussed in Congress, in part because of the difficulties regarding face to face meetings, but also because of the fact that it was presented seven days before the end of the ordinary sessions of the federal Congress, which runs from February 1st to April 30th every year. Regardless, the proposal represented an attempt to absorb a power that is exclusively held by the Chamber of Deputies of the Congress of the Union, which is responsible for the approval of the expenditures budget of the federation. In addition, it is worth noting that the proposal to declare an “economic emergency” was left totally to the President's discretion.

We can also see how the pandemic has impacted the integration of a state agency that is particularly important in Mexico—the National Electoral Institute (its acronym in Spanish is INE)—which is in charge of the organization of elections at the national and state level. The direction of this agency is in the hands of a general council composed of 11 people; the term of four members ended in March of 2020. The designation of new council members is done by the Chamber of Deputies, but they decided to suspend the proceedings to choose the four new councillors “until the necessary conditions are met”, and so the General Council of the INE worked with only seven members, until the new councillors were finally designated by the end of July 2020.

Additionally, since the end of March, Federal and State Courts stopped functioning in a regular manner. Those that have the technological possibility and the capacity to continue functioning virtually have done so in a limited manner, which is the case of the Federal Courts. But there are courts at the state level that have been shut for months. Some lawyers have even presented legal cases against the closure of the courts and in favor of gradual reopening, with whatever health measures are required to do so safely.

### III. THE POWERS OF THE MINISTRY OF HEALTH AND THE BOARD OF GENERAL HEALTH

Article 73.XVI of the Mexican Constitution contemplates two authorities that have the power to make decisions during a health crisis: the Ministry of Public Health (Secretaría de Salud) and the Board of General Health (Consejo de Salubridad General). Their constitutional powers are defined as follows:

- 1a. The Board of General Health shall report directly to the President of the Republic, without intervention of any Ministry. Its orders and provisions shall be compulsory for the whole country.
- 2a. In the event of serious epidemic or risk of invasion of exotic diseases, the Ministry of Public Health shall issue immediately the appropriate preventive measures, subject to being approved later by the President of the Republic.
- 3a. The Sanitation Authority [Ministry of Health] shall be an executive organ; its orders, regulations, measures and provisions shall be observed by the administrative authorities throughout the country.

Because of the COVID-19 pandemic, and in exercise of the constitutional powers described above, on March 30, 2020, the Board of General Health emitted an accord through which the epidemic of illness generated by SARS-CoV2 (COVID-19) was declared a health emergency of *force majeure*. One day later, on March 31st, the Ministry of Health also emitted an accord establishing extraordinary actions to attend to the health emergency generated by SARS-CoV2.<sup>1</sup>

Various criticisms have been levied on the Board of General Health and its actions in the context of the pandemic. First is the criticism of its late response, as evidence that the crisis was coming began to appear in March of 2020, and it wasn't until the end of that month that the Board declared an emergency. A second criticism was that despite the collegiate structure of the Board, which, without entering in great detail, brings together high level public servants (at the federal and state levels) and leaders from aca-

---

<sup>1</sup> Among other things, the accord of the Ministry of Health established, in its first article, as an extraordinary action, that to attend to the health emergency related to the SARS-COV2 virus, the public, social, and private sectors must implement various measures, including the “immediate suspension, from March 30 to April 30, 2020, of non-essential activities, with the goal of mitigating the spread and transmission of the SARS-CoV2 virus in the community, to lower levels of illness, complications emerging from it, including death, among the population residing in the national territory.

democratic institutions (experts), in practice, decisions are made by the head of the Ministry of Health. And third, it has been observed that neither the General Health Law nor the Internal Regulations of the Board of General Health include a procedure that regulates the expedition of a declaration of a health emergency, which implies that the only way to emit it is at the discretion of the head of the Health Ministry, who is a subordinate of the President of the Republic.

It is also notable that there has been a lack of communication between the federal Health Ministry and state governments. The issue of “general health” is concurrent between the federal and state governments. In the case of pandemics like COVID-19, the Ministry of Health can adopt “extraordinary actions” in regards to health, and state governments are obliged to follow federal guidelines. However, what we have seen during the entire crisis are a series of conflicts, disagreements and failed encounters between federal and state authorities with regards to: the moment to declare a health emergency; the kinds of health security measures that should be adopted; the moment that the public should return to activities given the necessity of reopening the national economy; and the pace of said reopening. This is due in large part to the non-existence of an institutionalized agency that ensures communication and the harmonization of public policy between the President of the Republic and the state governors.

#### IV. THE RESTRICTION OF HUMAN RIGHTS

The Mexican Constitution contemplates the possible suspension or restriction of certain human rights, as decreed by the President of the Republic with approval from the Congress of the Union, to deal with “cases of invasion, serious perturbation of public peace or of any other kind that puts society in great danger or conflict”. This constitutional mechanism has not been used to deal with the COVID-19 crisis in Mexico.

On the other hand, Article 11 of the Mexican Constitution establishes free movement, but it also contemplates the possibility that emigration, immigration or general health laws can establish limitations on this right.

As I mentioned previously, public health is a concurrent issue between the federation and the federal entities. Authorities of both levels of government have the power to take measures regarding public health, including decreeing quarantines or the isolation of people during a pandemic.

Regardless, federal policies have not been based in implementing obligatory confinement, rather it has been voluntary. The population has been asked to “stay at home”. That said, some governors have taken more restric-

tive measures and have decreed “obligatory confinement”, which has led to charges of unconstitutionality. For example on April 20, 2020, the governor of the State of Michoacán emitted a decree which declared mandatory isolation because of the SARS-COV2 (COVID-19) pandemic, based on which harsh restrictions to movement were introduced, along with penalties for those who infringe those restrictions.

That decree was challenged by a group of professors in the Law Faculty at the Nicolaíta University of Michoacán. The district judge (the Seventh Judge of the District of Michoacán) conceded a provisional suspension of the decree. The decision was reviewed and revoked by a collegiate circuit court (the Second Collegiate Circuit Court in Labor and Administrative Issues), which invoked the Law on *Amparo*, according to which the suspension cannot be granted if social interest would be impacted, which would have happened in this case, as it would have impeded the carrying out of measures to fight the spread of the pandemic.

On the other hand, there have been cases of municipal authorities who, in an unconstitutional and illegal manner and without the powers to do so, established severe restrictions to the free movement of people. For example, there is the case of a couple, Maria Elena L. S. and José Luis S. V., who left their community in order to work, but when they tried to return they found that the municipal authorities had decided not to allow anyone into the community so as to avoid the spread of coronavirus.

Given this situation, the couple sought constitutional protection, which was denied by the Tenth District Court Judge in Oaxaca, arguing that municipal authorities had acted to protect the social interest of residents. But the couple appealed the decision and finally, the Collegiate Tribunal in Civil and Administrative Issues of the 13th Circuit reversed the district judge’s decision and granted the suspension of the decision, as the municipal authorities were not allowed, according to the Constitution, to suspend or restrict human rights, in addition the restriction of the freedom of movement in this case affected other rights, like those of the couple’s youngest son not to be separated from his parents (the best interest of the child).<sup>2</sup>

## V. DEMOCRACY AND ELECTIONS

There were legislative and municipal elections scheduled in the states of Coahuila and Hidalgo on June 7th, 2020. However, the state of the health

---

<sup>2</sup> These events occurred in the community of Concepción Las Mesas, Mesones Hidalgo, Putla de Guerrero, Oaxaca State.

emergency made it clear that the basic conditions for carrying out the corresponding electoral processes were not in place. Carrying out the elections would have put the health and lives of millions of citizens and electoral workers who participated at risk. Given these circumstances, it was asked: What is the Constitutional means to satisfactorily solve this extraordinary situation?

The Constitutional means to solve this problem was found in Article 41, Numeral V, second paragraph, subhead c) of the Mexican Constitution, which allows the General Council of the INE to “Bring to its knowledge any matter competence of the local electoral organs when its transcendence or importance requires so or when the matter shall be used to establish an interpretation criterion”. It is worth clarifying that this power of the INE was the product of a political-electoral Constitutional reform on February 10th, 2014, which established a system of concurrence with regards to the organization of state elections. Under this system, the INE and the Local Public Branches (known as OPLES) share powers and responsibilities in the organization of electoral processes in the states, and the possibility was left open, through the rule quoted above, for the INE to exercise the “power of attraction” and absorb the functions of the OPLES.

This disposition in Article 41 of the Mexican Constitution, together with the agreement through which a health emergency caused by a force majeure was declared with regards to the epidemic generated by SARS-CoV2 (COVID-19), and the “Declaration of a Health Emergency” by the Health Board, published in the Official Journal of the Federation on March 30, 2020, were the constitutional and legal basis for the agreement through which the General Council of the INE postponed the elections in Coahuila and Hidalgo until health conditions allow them to proceed.

In essence, what the INE did was postpone the steps and the activities that were to come (including election day), so as to reschedule them when the health conditions to carry them out exist, with the full guarantees of political rights, but also keeping in mind the right to the protection of health as described in Article 4 of the Mexican Constitution and in various international agreements which the Mexican government has ratified.<sup>3</sup>

In the case of the state of Hidalgo, the postponed elections were related to the selection of new municipal authorities, who were slated to take office

---

<sup>3</sup> Resolution INE/CG83/2020 of the General Council of the INE, through which the exercise of the power of attraction is approved, leading to the temporary suspension of local electoral processes in Coahuila and Hidalgo because of the COVID-19 pandemic, caused by SARS-COV2. April 1, 2020.

on September 5, 2020. As this will not take place because of the pandemic, what will occur is that which is laid out in the subnational Constitution of Hidalgo, which allows the state congress to provisionally designate municipal councillors in each municipality until there are conditions to carry out elections. In the case of the state of Coahuila, in which it is the state congress elections at issue, the new representatives are scheduled to take office on January 1, 2021. Because there is more time, it appears that it may still be possible to organize the respective electoral process.

The constitutional solution that the General Council of the INE devised was the best available, but in reality, constitutional and legal norms regarding the issue of elections do not contain directions directly applicable to an extraordinary circumstance such as that which we are living; a situation which has sidelined something in a way that has never occurred in the democratic life of the country: the postponement of electoral processes.

## VI. CONSTITUTIONAL LITIGATION DURING THE PANDEMIC

Though in a limited fashion, Federal Courts have continued working through the writ of *Amparo* decisions, which is the principal instrument that people who live in Mexico can use to defend their constitutional rights, invoking protection before a federal district judge. These cases can proceed for actions as well as for omissions which imply a violation of human rights by federal and state authorities, as enshrined in the Constitution and in international treaties.

Additionally, within the writ of *Amparo* proceeding, there is an injunction that is called a “suspension”, which has the effect of ordering an authority to stop the actions or omissions that are potentially violations of human rights until the matter is resolved. This also allows the district judge to order the responsible authority to act in a particular way. The writ of *Amparo* proceedings for constitutional protection can last for months, but a suspension can be decreed the moment that constitutional protection is sought. In the context of the COVID-19 pandemic, many district judges have ordered suspensions in order to protect the right to live and the protection of the health of the plaintiffs, as will be described in what follows.

There are cases of doctors and nurses who have sought and obtained protection via federal justice through the writ of *Amparo*, in order to force the authorities in the health institutions where they are employed to provide them with the equipment they need in order to work safely and minimize

their risk of infection, in addition to providing them with the training to use said equipment in a safe manner. Additionally, there have been cases of medical personnel who have obtained legal protection from working in a hospital where there are patients who are ill from COVID-19 until the authorities provide them with the protective equipment they require to work safely. Others still have obtained protection so as not to have to work in a hospital, because they have a chronic illness (asthma, high blood pressure, diabetes) which makes them particularly susceptible to fatal consequences were they to become infected with COVID-19.

Another case that was widely discussed in the media was the collective protection case brought by members of the Maya Ch'ol nation (based in the municipalities of Palenque, Ocosingo and Salto del Agua), against the continuation of the megaproject known as the “Tren Maya”. In this case, the district judge who heard the case determined that the federal government should abstain from continuing the construction of said project in the aforementioned municipalities during the pandemic, as continuing construction could put at risk the health and lives of the population that lives there.

Constitutional protection through the writ of *Amparo* was also sought by a group of deaf people who lacked accessible information about the current situation with the pandemic and the measures that should be taken. In this case, the district judge ordered the federal authorities to use Mexican Sign Language (LSM) in all official communication as well as establishing support services for communication in health centers, via certified sign language interpreters.

It is also worth mentioning the protection sought by Indigenous Tsotsil, Tzeltal, Zoque and Chol peoples, to demand access to information regarding health measures and actions resulting from the COVID-19 pandemic be made available in their languages. In this case, the district judge ordered the authorities to provide the information in these languages, and in addition that it be shared over mass media (audiovisual, oral and graphic) “respecting the cultural specificities of each people”.

Various writ of *Amparo* cases have also been brought with reference to people who are imprisoned in jails. For example, in one case, the district judge in the city of Tuxtla Gutiérrez (State of Chiapas) ordered state authorities to define the preventative measures and actions necessary to contain and avoid the spread of the virus, to guarantee the right to health and life, and also that studies and analysis be carried out to see if prisoners have the virus. In Mexico City, another district judge ordered local authorities to follow health and prevention protocols inside the prisons; to

institute effective general health measures; to carry out actions to detect cases of COVID-19 in prisons; to guarantee prisoners can have communication with the outside world; and to guarantee prisoners and their families with access to information on the health emergency.

Other constitutional protection cases are in reference to migrants. Such is the case in which the First District Judge in Administrative Material in Mexico City ordered federal migration authorities to free all of the people who were in transit (migrants) who were detained in stations or shelters of the National Institute of Migration, so as to avoid outbreaks of COVID-19. The protection granted by the same judge obliged the federal government to design and implement the protocols and measures required to guarantee the life, the safety and the health of migrants expelled from the United States of America to Mexico during the COVID-19 health crisis.

## VII. HEALTH CRISIS AND THE CRISIS OF PUBLIC SECURITY

The health crisis in Mexico is taking place in the midst of a crisis of insecurity and violence. This situation, which is related in large part to disputes between drug cartels, has been produced over many years and is related to the inefficiency and corruption that exists in the justice system and in federal, state and municipal police departments.

In this context, the President of the Republic published an Accord on May 11, 2020, which opens the door for the armed forces, which is to say, the army and the marines, to carry out activities related to public security. This accord is based in a Constitutional reform in 2018, which created a civil police force called the National Guard, while admitting that while that force was created, the executive branch could order the armed forces to carry out public security duties “in an extraordinary, regulated, audited, subordinated and complimentary manner”.

This created a controversy in public opinion, which led to a legal challenge against the accord presented by the president of the Chamber of Deputies. Basically, the legal challenge alleges that it is up to the Congress of the Union to define, though a law (and not to the executive branch via an accord) how the intervention of the armed forces in security activities would be realized in an extraordinary, regulated, audited, subordinated and complimentary manner. The Supreme Court of Mexico accepted the case, though it will take months before it makes a decision about the constitutionality or the unconstitutionality of the accord.

It is worth mentioning that part of the crisis of insecurity that Mexico is experiencing is concerning especially with regards to increasing violence against women, who are particularly vulnerable when they are required to stay at home or quarantine. This remains true even though the Congress of the Union approved the General Law for Women to Access a Life without Violence in 2007.

### VIII. FINAL REFLECTION

Constitutionalists are used to reflecting on and providing opinions on constitutional processes and issues in a context of normality. Regardless, I believe that the COVID-19 pandemic has imposed upon us a pending duty: design institutions, procedures and mechanisms so that the democratic and constitutional state can react in the face of emergencies of this kind with the least possible alteration of its founding principles: human rights, the separation of powers, and democracy.