

# Mexico's legal view of the COVID-19 contingency

## La visión legal en México de la contingencia por COVID-19

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### ABSTRACT

The COVID-19 pandemic began in China at the end of 2019. The first case reached Mexico City on February 27, 2020, forcing the Mexican State to adopt extraordinary measures to contain the pandemic and avoid contagion by establishing emergency policies to provide medical care to those infected. The legislation in Mexico is at the height of the circumstances, it grants the Executive and the General Health Council powers to issue sanitary provisions, which are mandatory nationwide, without any precedent, restricting the principles of freedom, equality, legal certainty, and free exercise of the profession contemplated in the Political Constitution of the United Mexican States. In response to these extraordinary actions, the population in isolation confuses civil and political rights by being dominated by fear. To protect the nation, sanitary measures were implemented and access to justice and human rights were restricted. On the other hand, medical care and health services are saturated, presenting non-compliance with the obligation to provide timely information to patients and respect their autonomy by not obtaining informed consent, in addition to the inadequate documentation of the medical care provided in the clinical record. Decision-making during the pandemic is affected by political decisions aimed at achieving control of information. If these conditions continue, the control of public health information and the violation of fundamental principles will continue, even when the pandemic has been brought under control.

### RESUMEN

La pandemia de COVID-19 inició en China a finales de 2019, el primer caso llegó a la Ciudad de México el 27 de febrero de 2020 obligando al Estado mexicano a adoptar medidas extraordinarias ante la crisis sanitaria para la contención de la pandemia y evitar el contagio estableciendo políticas de emergencia, con el fin de otorgar la atención médica a los contagiados. La legislación en México se encuentra a la altura de las circunstancias, otorga al Ejecutivo y al Consejo de Salubridad General facultades para emitir las disposiciones sanitarias, las cuales son obligatorias a nivel nacional, sin existir precedente alguno, viéndose restringidos los principios de libertad, igualdad, seguridad jurídica y libre ejercicio de la profesión contemplados en la Constitución Política de los Estados Unidos Mexicanos. En respuesta a estas acciones extraordinarias la población en aislamiento confunde los derechos civiles y políticos al ser dominados por el miedo. Con el objetivo de proteger a la nación se instauran medidas sanitarias y se restringe el acceso a la justicia y a los derechos humanos. Por otra parte, la atención médica y los servicios de salud se encuentran saturados, presentando incumplimiento de la obligación de proporcionar información oportuna al paciente y respetar su autonomía al no recabar el consentimiento informado, aunado a la inadecuada documentación de la atención médica otorgada en el expediente clínico. La toma de decisiones durante la pandemia se ve afectada por las decisiones políticas con el fin de lograr el control de la información. De seguir bajo estas condiciones, el control de la información del sistema de salud pública y la violación de los principios fundamentales continuarán, aun cuando la pandemia haya sido controlada.

### INTRODUCTION

The Political Constitution of the United Mexican States in the face of the SARS-CoV-2 pandemic, COVID-19. The rapid and exponential spread of this disease, reaching the

limit of becoming a pandemic, has generated an extreme crisis. This situation has forced countries to adopt extraordinary measures to prevent the spread or contagion and to be able to provide medical care to those infected.

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These measures have a direct impact on public, administrative and economic order; this constitutes limitations or restrictions on the exercise of certain fundamental rights. Normally, extraordinary or emergency measures are adopted based on the Constitution, but for unusual situations such as those the world is going through, these measures do not always exist. This forces to make creative and practical interpretations of the Constitution, which may generate some tensions due to government excesses.<sup>1</sup>

The hierarchy of laws in Mexico encompasses the constitutional principles of freedom, equality, safety, and free exercise of the profession, for which it is necessary to observe the legal precepts and the correct application of the current regulations on health and professions.<sup>2</sup>

The concept of hierarchy applied to medical law is closely linked to the concrete application of legal concepts. Not only in its regulatory principles, but also in all those situations that directly affect the practice of the profession.<sup>2</sup>

In any state governed by the rule of law, the existence of legal rules makes possible the harmony of its citizens and the exercise of the fundamental rights of freedom, equality, social protection, and legal certainty.<sup>3</sup>

The Political Constitution of the United Mexican States,<sup>4</sup> in Article 4, establishes the right to health protection and establishes that this right must be in accordance with the principles of equity, quality, free access, and universality, which gives rise to the current General Health Law.

The Executive has the power to establish norms and decrees, which are established in the Constitution. This is stated in Article 89, Section I:<sup>4</sup>

*It grants powers and obligations to the President to enact and execute the laws issued by the Congress of the Union, providing in the administrative sphere for their exact observance.*

*The President of the Republic is empowered to issue laws in matters of general health. Article 73, Section XVI 1st. and 2nd.*

*1a. The General Health Council will depend directly on the President of the*

*Republic, without the intervention of any Secretary of State, and its general provisions will be obligatory in the country.*

*2a. In case of serious epidemics or danger of invasion of exotic diseases in the country, the Ministry of Health shall have the obligation to immediately dictate the indispensable preventive measures, subject to be later sanctioned by the President of the Republic. Article 89 section XVI.*

Making use of these constitutional powers and privileges, the Executive published on March 27, 2020, in the Official Gazette of the Federation the 1st and 2nd decrees, which we will comment below.

According to Article 73 section, it is the General Health Council who must act in urgent cases, as in this case, whose functions are duly detailed.

As medical professionals, we are obliged to know the provisions and guidelines that the General Health Law establishes in relation to the sanitary emergency, and it is precisely the General Health Council who must implement all the safety measures, in accordance with the international standards recommended by the World Health Organization itself.<sup>5</sup>

The General Health Council is a body that reports directly to the President of the Republic, in the terms of article 73, section XVI, first base of the Political Constitution of the United Mexican States.<sup>5</sup> It is composed of a president, who will be the Ministry of Health, a secretary and thirteen members, two of whom will be the presidents of the National Academy of Medicine and the Mexican Academy of Surgery, and the members determined by its own regulations. The members of the council will be appointed and removed by the President of the Republic, who must appoint to such positions professionals specialized in any of the health branches.<sup>5</sup>

The organization and operation of the General Health Council will be governed by its own internal regulations, which will be formulated by the Council itself and submitted to the approval of the President of the Republic for its issuance.

Since it is an infectious-contagious disease, the Ministry of Health is responsible for the prevention and control of diseases and accidents,

without prejudice to the provisions of the labor and social security laws on occupational hazards, Section II. To establish and operate the National Epidemiological Surveillance System in accordance with this law and the provisions issued for such purpose.<sup>5</sup>

The Ministry of Health and the governments of the federative entities, in their respective areas of competence, will carry out epidemiological surveillance, prevention and control activities for the following communicable diseases: epidemic influenza and other acute respiratory tract infections.<sup>5</sup>

It is worth mentioning that the General Health Law establishes that at the discretion of the Ministry of Health in places where serious epidemics are identified, as well as in adjacent places exposed to the spread, the civil and military authorities and private individuals will be obliged to collaborate with the health authorities in the fight against such disease.<sup>5</sup>

In accordance with sanitary provisions, the competent authorities are empowered to use all medical and social assistance resources of the public, social and private sectors existing in the regions affected by epidemic diseases.<sup>5</sup>

The Ministry of Health shall immediately dictate extraordinary measures in matters of general health to prevent and combat damage to health in epidemic diseases, subject to such measures being later sanctioned by the President of the Republic.<sup>5</sup> In accordance with the foregoing, the Federal Executive may declare by decree the threatened region or regions that are subject, for the necessary time, to extraordinary action in matters of general health.

When the causes that have originated the declaration of a region to extraordinary action in matters of general health have disappeared, the Federal Executive shall issue a decree declaring the termination of such action.<sup>5</sup>

Extraordinary action in matters of general health will be exercised by the Ministry of Health, which may integrate special brigades that will act under its direction and responsibility and will have the following attributions:

- I. To entrust federal, state, and municipal authorities, as well as professionals, technicians, and auxiliaries in the health

disciplines, with the performance of the activities it deems necessary and to obtain the participation of private individuals for this purpose.

- II. To dictate sanitary measures related to meetings of persons, entry and exit in the populations and with the special hygienic regimes to be implemented, as the case may be.
- III. To regulate land, sea, and air traffic, as well as to freely dispose of all means of transportation owned by the State and of public service, whatever the legal regime to which the latter are subject.
- IV. To use freely and on a priority basis the telephone, telegraph, and postal services, as well as radio and television transmissions.
- V. Others determined by the Ministry of Health.<sup>5</sup>

The General Health Law and its regulations provide that we are obligated to attend to emergencies. In case of non-compliance, the following sanctions are contemplated:

*Any health professional, technician, or assistant who, without legitimate cause, refuses to perform the functions or services requested by the health authority in the exercise of extraordinary action in matters of general health, shall be sentenced to six months to three years in prison and fined the equivalent of five to fifty days of the general minimum wage in force in the economic zone in question.<sup>5</sup>*

*Any health professional, technician, or assistant who, without just cause, refuses to aid a person in a case of obvious urgency, endangering his life, shall be sentenced to six months to five years in prison and a fine of five to one hundred and twenty-five days of the general minimum wage in force in the economic zone in question, and suspension from practicing the profession for up to two years. If damage is caused by the lack of intervention, a definitive suspension from professional practice may also be imposed, at the discretion of the judicial authority.<sup>5</sup>*

The persons or public or private institutions that have knowledge of accidents or that any person requires the urgent provision of health

services, shall ensure by the means at their disposal that they are transferred to the nearest health facilities to receive immediate attention, without prejudice to their subsequent referral to other institutions.<sup>6</sup>

The Law of Professions of Mexico City and the respective laws of the states establish that the physician is obliged to put all his scientific knowledge and technical resources at the service of his patient as well as the performance of the work, obligations of means and safety, which defines the *Lex Artis ad hoc*.<sup>7</sup>

The Federal Labor Law in force establishes in Article 132, Section III, that the employer is obligated to timely provide the workers with the tools, instruments, and materials necessary for the execution of the work. They must be of good quality, in good condition and must be returned as soon as they cease to be efficient.<sup>8</sup>

Likewise, the regulations of the General Health Law regarding the provision of health care services oblige both public and private facilities to provide immediate attention to users in the event of an emergency when it occurs in the vicinity of such facilities. Emergency is understood as any acute medical-surgical problem that endangers life, an organ or a function and requires immediate attention.<sup>6</sup>

The lack of protective equipment has been a constant in the amparo lawsuits before the courts. Given that the authorities have ignored the acquisition of supplies, and if they are provided, the quality is not in accordance with international recommendations for the management of patients with suspected COVID-19. The person in charge of the health system is the one who must decide with the competent authorities so that his hospital has sufficient and suitable personnel, equipment, material, and facilities adequate for the services provided; failure to do so will result in an administrative sanction and a fine.<sup>6</sup>

Personnel rendering services in any medical care facility, whose activities could spread any of the communicable diseases according to the General Health Law, must have a sanitary control card issued by the competent authority.<sup>6</sup>

Facilities that refuse to provide medical services in cases of obvious urgency, endangering the life or physical integrity of a person, shall be sanctioned in accordance with the law.<sup>6</sup>

The emergency services shall operate 24 hours a day throughout the year, with a doctor on duty permanently in charge of the same. The person in charge of the emergency service shall take the necessary measures to guarantee the medical evaluation of the patient and the complete treatment of the emergency or stabilize his/her general conditions so that he can be transferred for definitive attention in another hospital unit that has the infrastructure and the physical, technological, and human resources to ensure his/her treatment.<sup>6</sup>

Normally, the admission of a patient to a hospital is voluntary, but sometimes, to avoid risks and damage to the health of the community, the health authority orders the admission; then it is considered mandatory.<sup>6</sup>

In case a patient requests voluntary discharge, it will be explained to him/her that it is not appropriate because it is a contagious infectious disease in a health emergency.

It will be mandatory for the person in charge of health care to notify the Public Prosecutor's Office when the patient shows signs of violent death or when the specific cause of death is unknown, and this will be recorded in the clinical record, and the corresponding legal provisions will be observed.<sup>6</sup>

Likewise, the authorities must be responsible for the custody of the detainees.<sup>6</sup> It is necessary to give informed consent, whenever the patient's condition allows it at the time of admission to the hospital, respecting his/her autonomy and prior explanation of the risks and benefits of the procedure to be performed, being the record signed in writing in the clinical record.

In case of emergency or when the patient is in a state of transitory or permanent incapacity, it will be the closest relative, guardian or legal representative who will sign the informed consent.

When it is not possible to obtain the authorization due to the patient's incapacity and absence of family members, the authorized physicians of the hospital, after evaluating the case and with the agreement of at least two of them, will carry out the therapeutic procedure, leaving a written record in the clinical record.

The document must be printed, written clearly and without abbreviations, amendments or erasures.<sup>6</sup>

## CONCLUSIONS

The collective maturity produced by situations such as isolation and fear can also translate into demands for more truthful and systematic

information. The preservation of civil and political rights must be present in the demand for new changes.<sup>11</sup>

It is important to emphasize that in times of emergency and extraordinary

### “Decree published in the Official Gazette of the Federation on March 24, 2020, establishing measures for the COVID-19 epidemic”<sup>9</sup>

**ARTICLE ONE** - National Healthy Distance Day: its objective is the social distancing to reduce person-to-person contagion with special emphasis on vulnerable groups, allowing the disease burden not to be concentrated in reduced time units, to guarantee the care of serious patients

Avoid attendance to workplaces, public spaces and other crowded places, to seniors 65 years of age or older and groups of people at risk of developing serious illness and/or die from it, who will enjoy their salary and other benefits established in the current regulations

Temporarily suspend school activities at all levels, until April 17, 2020, as established by the Ministry of Public Education

Temporarily suspend the activities of the public, social, and private sectors that involve the physical concentration, transit or movement of people as of the entry into force of this Agreement and until April 19, 2020

Suspend temporarily and until further notice from the health authority, mass events and meetings and congregations of more than 100 people

Comply with basic hygiene measures

The others that at the time are determined necessary by the Ministry of Health

**Article three:** The agencies and entities of the Federal Public Administration shall maintain coordination with the Ministry of Health for the implementation of the measures subject to this Agreement

**Article four:** The Ministry of Health shall be the only agency responsible for the issuance and management of the official information derived from this Agreement

**Article five:** The Ministry of Health shall be responsible for the interpretation for administrative purposes of this Agreement, as well as for the resolution of cases not provided for herein

### “Extraordinary actions to be implemented in the affected regions of the Mexican territory”<sup>\*\*10</sup>

Use as auxiliary elements all medical and social assistance resources of the public, social and private sectors

To acquire all types of goods, services, merchandise, and objects without the need to carry out the public bidding procedure

Importing or acquiring in the national territory for necessary quantities or concepts

Carry out necessary measures to avoid price speculation

Others deemed necessary by the Ministry of Health

Use as auxiliary elements all medical and social assistance resources of the public, social and private sectors

To acquire all types of goods, services, merchandise, and objects without the need to carry out the public bidding procedure

Importing or acquiring in the national territory for necessary quantities or concepts

Carry out necessary measures to avoid price speculation

Others deemed necessary by the Ministry of Health

\*\* Taken from the agreement published on March 27, 2020, in the Official Gazette of the Federation

measures is when the functioning of the courts, independent and impartial, is most needed to protect the rights of the people and control the excesses of power. Justice cannot be quarantined because then the Constitution, democracy, the rule of law and human rights are also quarantined.

The challenge then is to adapt the functioning of the courts in extraordinary times of pandemic to be able to continue fulfilling their function of resolving disputes.<sup>1</sup>

In most of the controversies that have arisen in this health contingency, the lack of supplies for the protection of health professionals has been a constant. It is worth mentioning that all the legislation in force establishes the obligation to provide the necessary material and that it must be of high quality. The lack of these supplies affects both the patient's safety and that of all the personnel working in the institutions where care services are provided.

Note in the clinical record everything related to the patient's evolution and as stated in NOM 004, record the missing items so that they can later support any medico-legal controversy.

We must comply with the obligations of means (filling out the documents properly and with all the requirements and formalities of the clinical record).

Always have the informed consent. Mexican Official Standard NOM 004-SSA3-2012:10.1.1.7

- We are obliged to promptly attend to emergencies. Even without supplies in qualified emergencies, medical attention cannot be denied.
- In labor matters, it is considered an occupational hazard if the employer did not provide what was necessary to perform the work; if it was provided, it is the responsibility of the employee.
- It is considered a crime to infect people according to the Penal Legislation.
- Respect the service contracts that we have contracted with the institutions. (Civil Legislation).
- To fill out the certificates and the informed consent form correctly.

“The forced confinement has affected all the associative nuclei, so it is inevitable that their members exchange experiences, reflections and projects. From this set of common perceptions and experiences will emerge the satisfaction or dissatisfaction with what the authorities have done or not done.”

Diego Valadés-Ríos

“The law for the preservation of health” *Salus publica populi Romani*, a precept that places health above other norms, which is why it becomes a supreme norm.<sup>12</sup>

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Data privacy. In accordance with the protocols established at the authors' work center, the authors declare that they have followed the protocols on patient data privacy while preserving their anonymity. The informed consent of the patient referred to in the article is in the possession of the author.

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