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## **REGRESSION OF DIFFERENCIATION OF FUNCTIONAL SYSTEMS IN MÉXICO DUE TO COVID-19 PANDEMIC: HUMAN RIGHTS SYSTEM SUBSUMED BY POLITICAL SYSTEM**

## **REGRESIÓN DE DIFERENCIACIÓN DE SISTEMAS FUNCIONALES EN MÉXICO POR PANDEMIA COVID-19: SISTEMA DE DERECHOS HUMANOS SUBSUMIDO POR SISTEMA POLÍTICO**

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## **ABSTRACT**

The year 2020 came with SARS CoV-2 virus and COVID-19 pandemic. Governments all around the world have been forced to take measures to protect public health. On the one hand slack or risky measures can strain health care systems and put many lives in danger but, on the other hand, severe measures can entail significant economic, social and human rights burdens. In this paper using the deductive-argumentative method, we examine the effect administrative regulations that contain preventive and extraordinary measures due to COVID 19-pandemic issued by Mexican authorities along with a weak health system have on rule of law and, as a result, on human rights and the differentiated functional systems. We consider that through administrative rulings, the political system in Mexico is subsuming different social processes, jeopardizing human rights and the rule of law, and leaving citizens in a state of unnoticed fragility.

## **KEY WORDS**

Regression of differentiation; human rights system; COVID-19, Mexican health system, rule of law.

## **RESUMEN**

El año 2020 llegó con el virus SARS CoV-2 y la pandemia COVID-19. Los gobiernos de todo el mundo se han visto obligados a tomar medidas para proteger la salud pública. Por un lado, las medidas poco estrictas o arriesgadas pueden sobrecargar los sistemas de atención de la salud y poner muchas vidas en peligro, pero, por otro lado, las medidas severas pueden implicar importantes cargas económicas, sociales y de derechos humanos. En este artículo, utilizando el método deductivo-argumentativo, examinamos el efecto que las regulaciones administrativas que contienen medidas preventivas y extraordinarias debido a la pandemia de COVID 19 emitidas por las autoridades mexicanas, junto con un sistema de salud débil, tienen sobre el estado de derecho, los derechos humanos y los sistemas funcionales diferenciados. Consideramos que a través de regulaciones administrativas, el sistema político en México está subsumiendo diferentes procesos sociales, atentando contra los derechos humanos y el estado de derecho, y dejando a la ciudadanía en un estado de fragilidad inadvertida.

## **PALABRAS CLAVE**

Regresión de diferenciación; sistema de derechos humanos; COVID-19, sistema de salud mexicano, estado de derecho.

**Summary:** I. Introduction. II. Theoretical note. III. Mexican Health care system. IV. Human rights and rule of law crises in the scenario of SARS-CoV 2 virus. 1. Rule of law. 2. Applicable legal framework and administrative regulations issued. 3. Measures that violate the rule of law. V. Conclusions. Bibliography.

## I. INTRODUCTION

In 2019 the virus SARS CoV-2 appeared in China; the virus causes the disease called COVID-19. On December 31, 2019, the World Health Organization (WHO) China Country Office was informed of cases of pneumonia of unknown cause that were detected in Wuhan City, Hubei Province of China. On January 7, 2020 a new type of coronavirus, 2019-nCoV was detected from an outbreak in the same city (WHO, 2020a). On January 30, 2020, WHO declared the 2019-nCoV (later named SARS CoV-2) outbreak a public health emergency of international concern (WHO, 2020b). Two months later, on March 25, WHO proposed a plan of six points (WHO, 2020c). These recommendations and any other, were to be implemented by different countries with full respect to human rights, fundamental freedoms and be consistent with rule of law.

Since the end of December 2020, SARS CoV-2 virus and the disease caused by it COVID-19 began spreading to different countries around the World. The first case of Covid-19 disease in Mexico was reported on February 28, 2020 (Secretaría de Salud, 2020b). As in other countries, with the coming of the disease, governments, national and subnational, have been taking a series of measures to deal with its spread and to reduce the stress on the health care system. Nonetheless, one year later, as of January 2021, the disease has not yielded and governments' measures to deal with such a disease are questioned either because they are too slack or because they are too strict without taking into account other aspects such as the economic.

Governments' decisions and actions taken to deal with COVID-19 pandemic cannot be fully examined even after a year, this is a process that has not been lived, at least recently. It will be after some years, probably decades that we will have all the elements to make a real balance of the situation. Still, we can advance some reflections on the matter, especially concerning the conformity of measures to rule of law.

In this paper we examine the effect administrative regulations (that contain preventive and extraordinary measures due to COVID-19-pandemic) and a weak health system in Mexico, have on rule of law and, as a result, on human rights and the differentiation of functional systems. Covid-19 pandemic is part of the environment of health care system and other functional self-referential systems of society. We hold that through administrative rulings the political system is subsuming different social processes, jeopardizing human rights and the rule of law, and leaving citizens in a state of fragility. This can result in the regression of the differentiation of the systems.

In Mexico, since March 2020, many administrative measures were issued and are still being issued regarding different matters related to the pandemic, we examine only some of the earlier administrative rulings and emphasize on preventive and emergency measures; still, those examined are useful to determine if decisions are consistent with rule of law. We first refer to systems theory since it serves as a theoretical background. Then, we dedicate some words to the Mexican health system and finally, we argue about the human rights and rule of law crisis due to COVID-19 disease. This last part is divided in three sections that deal with: rule of law, applicable legal framework and administrative regulations and measures that violate rule of law.

## **II. THEORETICAL NOTE**

Our theoretical support is Luhmann's theory of social systems (Luhmann, 1984) According to Luhmann, the social system is a self-referential system; this means, a system that has the ability to establish relations with itself and, importantly, to differentiate those relations from relations with environment (Luhmann, 1984, p. 13). System differentiation is a key concept in Luhmann's theory of social systems, it implies the repetition of system formation within systems (Luhmann, 1984, p. 7). Through differentiation, which coincides with function specificity, the whole system (society) uses itself as environment in forming its own subsystems (political, economic, legal, education, health, religion, human rights, etc.).

Though differentiated functional self-referential systems are preserved by maintaining a difference with their environment and by using their boundaries to regulate this difference, boundaries do not mark a complete break of connections

(Luhmann, 1984, p. 16). So, although each of society's system is a self-determined system with its own operations, its own code and its own boundaries, systems are all part of the environment for each other and cognitively open to each other (Luhmann, 1992, p. 1428). In this way, systems (or subsystems) that are part of the social system can be conceived as chain of interactions or communications (Luhmann, 1984, p. 87) that irritate or cause perturbations on each other.

Differentiated systems can be structurally coupled. Structural coupling means system to system relations, which triggers reciprocal irritations and reciprocal interpretation in the systems involved. With structural coupling, different systems remain independent but develop connection points (Mattheis, 2012, p. 631) or common values and thus, communicate about the same themes but in their specific and different codes. So, in system relations, one can find common communication that binds different functional systems and allow co-evolution. Internally, in the case of the political system and legal system, they are connected by the specific country constitution (Mattheis, 2012, p. 631), and in world society, human rights system and the political system are connected by the principle of rule of law (Mattheis, 2012, p. 645). Also, when it comes to health system and human rights system, they share the right to health.

Society's differentiated systems (or subsystems) have each their own function; thus, they are functional systems. For example, political system's function is to take binding decisions and exercise power. Health system's function is to provide access to health care; economic system's function is to satisfy needs; and education system's function is to provide secondary socialization, etc. In the case of human rights as a functional differentiated system of society, Verschraegen identifies two mayor functions: protect and stabilize the functionally differentiated society, and protect individual spheres of action typical to modern society (Verschraegen, 2002, p. 262). In the first case, Verschraegen states that with human rights, modern society protects its own structure against tendencies of regression or de-differentiation. Human rights guarantee differentiation between different functional systems of society. This means that human rights system is a mechanism that assures the continuance of modern society system.

With respect to the second function, human rights ensure the protection of individual spheres of action typical to modern society. According to Luhmann, communication

is a part of social system, not so persons. Persons are part of the environment of society system. With modern society and its complexity, came the need for functional differentiation. Modern society does not allow social differentiation based on putting whole persons into distinct groups (tribe, family, etc.) so, groups of people cannot be differentiated. With modern society, persons can participate in various of society's systems such as the economy, science, education, health, legal and politics, they cannot live in only one functional subsystem as in pre-modern society (Verschraegen, 2002, p. 266).

With the transition towards functional differentiation, individuals became fragile, they don't belong to only one group which gives them support. Now, fundamental freedoms and human rights serve as mechanisms to increase stability and protection of the individual persons (Verschraegen, 2002, p. 262). Verschraegen considers that, according to Luhmann's social systems theory, the emergence of subjective rights can be linked to a specific structural societal transformation and the concept of subjective rights can be linked to the transition from a stratified society to a functionally differentiated society with the help of the sociological principle of inclusion (Verschraegen, 2002, p. 265).

As can be noted, human rights system has a societal function linked to individual's fragility and structural differentiation caused by society's ongoing complexity: it assures the inclusion of persons in the different function systems. In this manner, human rights system is coupled to other subsystems, it shares certain values with them; for example, with the economic system, economic rights; with the political system, political rights, with the religious system, religious rights, with the health system, the right to health, and so on.

### **III. MEXICAN HEALTH CARE SYSTEM**

Like all social systems, the health system is a self-referential system of meaning and communication. It communicates through a specific code: healthy/not healthy or sick. Also, it is a functionally differentiated system, which means that it has a function of its own, health system's function is the restoration of damaged health (Roth & Schütz, 2015, p. 24) and it is through diagnosis that it determines who is ill. Thus, the health system deploys its coding program to distinguish sickness

and health through its hospitals, clinics and other healthcare institutions. The COVID-19 pandemic has placed different health systems around the world in great stress, much more so is COVID-19 a treat to weak health systems. This implies that health systems may not be able to perform their function of restoring damaged health or taking care of the ill to an acceptable degree.

In the case of Mexico, its health care system has some performance problems even before COVID-19 pandemic (OECD, 2019, p. 25-27). Besides, diabetes and obesity are considered comorbidities of COVID-19 as is hypertension. In the last case, 18.4% of Mexico's population over 20 years have medical diagnosis of hypertension (Instituto Nacional de Estadística y Geografía, 2019).

Regarding access to health care, concerning population coverage and financial protection, Mexico ranks below OECD average. (OECD, 2019, p. 29). Another factor in health systems' performance is health care resources; Mexico is below OECD average in health spending per capita, health spending share as a percentage of Gross Domestic Product, in practicing physicians and in practicing nurses (OECD, 2019, p. 33). Also, Domestic Public Health Expenditure is 51.5% of Current Health Expenditure; and out-of-pocket payments are 41.3%, according to WHO Global Health Expenditure Database.<sup>1</sup>

Federal government recognized a deficit of 200,000 doctors: 123,000 general doctors and 76,000 specialists and efforts are being made to hire physicians and nurses. Even so, in words of Ruiz-Healy, health sector lacks and will lack the necessary health personnel to treat the majority of those who become seriously ill with COVID-19 (Ruiz-Healy, 2020).

According to official data, up to December 2020, Mexico has been able to offer health services to all COVID-19 patients who have required it. As of 28 December 2020, COVID bed occupancy was the highest reached up to that date with 18,223 beds occupied, which represented 47% of all beds (48% of beds without ventilators and 42% of beds with ventilators) on average, though some subnational states had a higher percentage of occupied beds, such as Mexico city (87 percent of occupied beds without ventilators and 84 % of occupied beds with ventilators) and the State

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<sup>1</sup>See: [https://apps.who.int/nha/database/country\\_profile/Index/en](https://apps.who.int/nha/database/country_profile/Index/en)

of Mexico (80% of occupied beds without ventilators and 75% of occupied beds with ventilators) which had the highest COVID-19 beds occupied on that date (Secretaría de Salud, 2020a). Despite the numbers mentioned, there are reports of many hospitals that in December occupancy reached full capacity and so new patients were not allowed (Camhaji, 2020).

A weakened health system oversees COVID-19 pandemic in Mexico, and in such condition, Ruiz-Healy's prediction is not farfetched. Even if the measures being taken to condition new health facilities and increase the amount of health workers makes the system functional to an acceptable degree, the perception of weakness can cause unwanted irritations in the health system as well as in other systems. A weak or perceived weak health system does not inspire societal trust and without trust systems find it difficult to maintain autonomy. Lack of societal trust makes systems need to constantly justify their actions and have a reduced operational autonomy (Jessop, 2007, p. 157-179). This can be exacerbated, if like now, there is fear due to a new disease for which there is up to the beginning of December 2020 no medications that can cure it. Even though by December 2020 the vaccines were starting to be distributed in Mexico, it is still not being distributed at a fast enough pace. This lack of trust is reflected in the many incidents of physical aggression to health workers (ONU México, 2020) and in disturbances in health institutions and protests by health workers (Duran, 2020), especially during the first months of the pandemic in Mexico, and the critics towards the way the pandemic has been handled in Mexico (Lino, 2020) (Ximénez-Fyvie, 2021).

On the other hand, systems maintain operational autonomy when they can maintain their code and have time to implement it (Jessop, 2007, p. 157-179). But, without trust and/or sufficient resources, health systems cannot deploy their healthy/sick code effectively. The problem is that when functionally differentiated systems are unable to perform their function to an acceptable degree, in this case, restore health or treatment of the ill, they can lose their capacity for both autopoiesis and differentiation and cause unwanted irritations in other functionally differentiated systems. One of these systems is the human rights system. The health system and the human right system are structurally coupled through the common value of right to health or the protection of health in Mexican constitutional language. When the health system is not able to perform its function in an acceptable manner, either in fact or perception, the system may lose its ability for differentiation.

Not only the right to health is affected by a health system that is not able to acceptably perform its function. A weak health system, in fact or perception, leads to material dependence on the performance of other systems, such as the political system. It also leads to the risk of politicization and drastic decisions that affect many spheres of society and many human rights. Verschraegen observes that the functionally differentiated society, but particularly the political subsystem, because of its high degree of complexity and its high sensitivity to irritations, is easily tempted to look for drastic solutions. In the case of Mexico, the weak health system contributes to make drastic solutions become politically acceptable, probably because of fear. This poses a risk to the structure of modern society (Verschraegen, 2020, p. 271).

The extraordinary situation caused by COVID-19 apparently puts governments in a dilemma: On the one hand, the protection of health as a human right can lead to perturbations of other systems and the limitation of other rights such as economic liberty, freedom of movement and freedom of assembly. On the other hand, failure to establish restrictive measures in a timely manner can increase the risk that the health system will be overwhelmed. The implementation of a series of measures in Mexico seems to reflect the dilemma mentioned. But, on both sides of the equation: individual freedoms and the protection of public health, there is a rule of law dimension. The legal system serves as society's immune system (Luhmann, 1984, p. 373-374) (human rights system and rule of law when it comes to world society). Thus, it is important to ask whether the decisions taken through administrative rulings or otherwise, due to COVID-19, respect the principle of rule of law. If it is not so, it can lead to the regression of the differentiation of the functional systems and to the fragility of persons.

#### **IV. HUMAN RIGHTS AND RULE OF LAW CRISES IN THE SCENARIO OF SARS-CoV 2 VIRUS**

We start this section accepting that there is a structural coupling between the human rights system and the political system. According to Mattheis, within the national state, there is a structural coupling of the legal system and the political system through the national constitution. Citing Luhmann, he states that the constitution guarantees the independence of the systems therefore one can no

longer look to the political system in order to know what law is, one must look at the legal system (Mattheis, 2012, p. 642).

Mattheis also affirms that in world society there is a structural coupling between the political system and the human rights system but also with all other subsystems through the rule of law. That is, the rule of law serves as a communication platform for the systems of society. As such, the rule of law leads to a more complex legal communication which implies the subjection of political operations to legal control (Mattheis, 2012, p. 643).

### **1. Rule of law**

In 1885 Albert Dicey, rendered three ideas of rule of law: 1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; 2) every man, whatever be his rank or condition, is subject to the ordinary law; and 3) equality before the law (Dicey, 1959, p. 183-184). The rule of law imposes limits on governments and avoid arbitrariness.

According to Lord Bringham, the center of rule of law is that persons and authorities, should be bound by and entitled to the benefit of laws that are publicly and prospectively promulgated and publicly administered in the courts. The sub-rules of this principle, are (Bringham, 2006):

- Law must be accessible and, as far as possible, intelligible, clear and predictable.
- Questions of legal right should ordinarily be resolved by application of the law and not the exercise of discretion.
- Laws should apply equally to all, save to the extent that objective differences justify differentiation.
- Law must afford adequate protection of fundamental human rights.
- The means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
- Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers (core of rule of law principle).
- Adjudicative procedures provided by the state should be fair.
- Rule of law requires compliance of the state with its obligations in international law.

The actual meaning of rule of law is near to its old significance, the United States Supreme Court has stated that the rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are: 1) publicly promulgated, 2) equally enforced, 3) independently adjudicated, and 4) consistent with international human rights principles.

SARS CoV-2 virus urges political decisions and new regulations are being issued to try to stay afloat with the new reality. Still, every political decision in response to a crisis must be mediated by legal certainty and protection of human rights of all involved. That is the requirement of the rule of law.

One of the functions of the political system is to take binding decisions. This paper does not question the recourse of administrative decrees and agreements to issue emergency binding decisions in this time of pandemic. Executive measures are important to deal with the situation. But what is also important is that those decisions be in accordance to the rule of law.

## **2. Applicable legal framework and administrative regulations issued**

The Mexican constitution asserts that in the event of serious epidemics or danger of invasion of exotic diseases in the country, the Ministry of Health has the obligation to immediately issue the indispensable preventive measures, such measures are subject to later being sanctioned by the president (Constitución Política de los Estados Unidos Mexicanos [Constitution], 2017 as amended, Article 73, section XVI, 2a.). A similar norm is found in the General Health Law; such norm declares that in the event of a serious epidemic, danger of invasion of transmissible disease, emergency situations or catastrophes that affects the country, the Ministry of Health shall immediately issue the necessary measures to prevent and control damage to health, and that such measures should be sanctioned by the president. It also states that the federal executive may declare by decree, the threatened region or regions that are subject, to extraordinary action in matters of general health (Ley General de Salud [Health Law], 1984 as amended, Article 181).

General Health Law also asserts that the Ministry of Health and state governments can carry out epidemiological surveillance activities for the prevention and control of transmittable diseases including those diseases determined as such by the

*Consejo de Salubridad General* [General Health Council], treaties and conventions (Health Law, Article 181). The General Health Council recognized the epidemic disease due to the SARS-CoV2 virus as a serious disease of priority attention in Mexico effective on March 23, 2020.<sup>2</sup>

The legal precepts mentioned endowed Mexican health authorities, especially the Ministry of Health, with the legal attribution to adopt measures for the prevention and control of the COVID-19 pandemic in Mexico, though not for the restriction or limitation of human rights. On March 24, 2020, preventive measures to mitigate and control health risks of the disease caused by the SARS-CoV2 virus were issued by the Ministry of Health through an administrative agreement.<sup>3</sup> Such agreement was sanctioned by the President on the same day<sup>4</sup> in compliance with the constitution and the General Health Law. The preventive measures refer primarily to community interventions which aim at social distancing. Measures include: avoiding the assistance of persons at risk of developing serious COVID-19 disease to workplaces, public spaces and other crowded places; temporary suspension of school activities at all levels; temporary suspension of activities of the public, social and private sectors that involve the physical concentration, transit or displacement of people; temporary suspension of massive events, reunions and congregations of more than a 100 persons, and compliance with basic hygiene measures.

Some of the mentioned measures may affect human rights, for example the right to assembly and freedom of association (American Convention on Human Rights

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<sup>2</sup> Acuerdo por el que el Consejo de Salubridad General reconoce la epidemia de enfermedad por el virus SARS-CoV2 (COVID-19) en México, como una enfermedad grave de atención prioritaria, así como se establecen las actividades de preparación y respuesta ante dicha epidemia [Agreement by which General Health Council recognizes COVID-19 as a serious disease of priority attention], *Diario Oficial de la Federación* [Official Journal of the Federation], March 23, 2020 (Mex.).

<sup>3</sup> Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implican la enfermedad por el virus SARS-CoV2 (COVID-19) [Agreement by which preventive measures are established to mitigate and control the risks to health that COVID-19 implies], *Diario Oficial de la Federación* [Official Journal of the Federation], March 24, 2020 (Mex.).

<sup>4</sup> Decreto por el que se sanciona el Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (COVID-19) [Decree that sanctions the agreements that establishes preventive measures to mitigate and control the risks to health that COVID-19 implies], *Diario Oficial de la Federación* [Official Journal of the Federation], March 24, 2020 (Mex.).

“Pact of San Jose, Costa Rica”, 1969, Articles 15-16;<sup>5</sup> International Covenant on Civil and Political Rights, 1966, Articles 21-22;<sup>6</sup> Constitution, 1917, Article 9). On the other hand, one agreement declares that persons that should not attend work should enjoy full salary and other benefits. This stands out since there is a labor law and a social security law that deals with such issues. Health authorities do not have any attribution in deciding on salaries. If specific workers cannot attend work due to health issues not attributable to professional illness or due to contagious disease (temporary suspension), Federal Labor Law and Social Security Law provides what should take place in terms of payment. The employer pays full salary the first three days that the employee does not work and from the fourth day to the 52<sup>nd</sup> week the employee (if four weekly quotes of social security have been covered prior to illness) receives a cash subsidy of sixty percent of last salary. After the 52<sup>nd</sup> week, if needs be, the worker can receive said subsidy for 26 weeks more (Ley del Seguro Social [Social Security Law], 1995 as amended, Articles 96-98).

Apart from any preventive measures, the General Health Law provides specifically for extraordinary actions in general sanitation that can be implemented by the Ministry of Health in the event of a serious epidemic, danger of invasion of transmittable diseases, emergency situations or catastrophes that affect the country. In such cases, the Ministry of Health should integrate and maintain permanently trained and updated special brigades that will act under its direction and responsibility and have powers to: dictate sanitary measures related to meetings, entry and exit of people and special hygienic regimes; regulate land, sea and air traffic, as well as freely dispose of all state-owned and public-service means of transportation; free and priority use of telephone, telegraph and postal services, as well as radio and television transmissions, and others determined by the Ministry of Health (Health Law, 1984, Article 184).

Though not in the extraordinary actions section but applicable in cases of infectious diseases, the General Health Law provides for other measures such as: the isolation of the sick in suitable places, of those suspected of suffering the disease and of

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<sup>5</sup> American Convention on Human Rights “Pact of San Jose, Costa Rica”, Nov. 22, 1969 S. Treaty Doc. No. 95-21; 1144 U.N.T.S. 123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).

<sup>6</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

the carriers of germs of the same, for the strictly necessary time, as well as the limitation of their activities when so warranted for epidemiological reasons (Health Law, 1984, Articles 139 section II and 151); the inspection of passengers who may be carriers of germs and of luggage, means of transport, merchandise and other objects that may be sources of pathogens (Health Law, 1984, Article 139, section VII); the issuance (by Ministry of Health) of official Mexican standards for the control of people who are engaged in work or activities through which transmittable diseases may be spread (Health Law, 1984, Article 145); rules for the authorization by the Ministry of Health for people who suffer from infectious diseases, who are carriers of infectious agents to enter the national territory (Health Law, 1984, Article 149); the prevention of the sick or germ carriers from entering meeting places such as hotels, restaurants, factories, workshops, prisons, and others (Health Law, 1984, Article 150); and, the temporary closure of the premises or meeting centers of any kind (Health Law, 1984, Article 152). As can be noted, some of the measures mentioned can lead to violations of human rights if not properly executed but they do not authorize generalized suspension or restrictions on human rights or on fundamental freedoms.

The measures, other than preventive, established by the Ministry of Health to mitigate and control the health risks of the disease caused by SARS-CoV2 virus were issued in various administrative regulations, four of which are of our interest in this paper.

The first is an administrative decree issued by the president with the purpose of declaring various extraordinary actions to combat the disease generated by SARS-CoV2 virus.<sup>7</sup> This is surprising because according to the General Health Law the federal executive can declare the region or regions threatened and that are subject, during the necessary time, to extraordinary actions. On the other hand, the decision about the extraordinary actions to be taken corresponds to the Ministry of Health and the president is supposed to sanction such actions, not the other way around.

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<sup>7</sup> Decreto por el que se declaran acciones extraordinarias en las regiones afectadas de todo el territorio nacional en materia de salubridad general para combatir en la enfermedad grave de atención prioritaria generada por el virus SARS-CoV2 (COVID-19) [Decree that declares extraordinary actions to combat the serious disease of priority attention generated by COVID-19], *Diario Oficial de la Federación* [Official Journal of the Federation], March 27, 2020 (Mex.).

This shows that, at least, there is some confusion about what decisions correspond to the different authorities.

The second agreement is an administrative agreement issued by the General Health Council. It declared in its first article the epidemic disease of COVID-19 as a health emergency due to force majeure. In its second article, the agreement states that the Ministry of Health will determine all the actions that are necessary to attend the emergency.<sup>8</sup> Two things stand out, the first one is that in the event of serious epidemic or the invasion of transmittable disease, the Ministry of Health has the legal attribution to issue indispensable measures to prevent and combat damage to health, not General Health Council (Constitution, Article 73, section XVI, 2a.) so, the content of the first article can cause confusion, is unnecessary and not in the scope of attribution of General Health Council. Besides, a couple days before, in the administrative decree mentioned, the president stated that the Ministry of Health should immediately implement the extraordinary actions contained in the General Health Law.

The second issue that stands out is that General Health Council made a declaration with serious implications to labor law (health emergency due to force majeure) that is also not in the scope of its attribution. We again observe confusion regarding decision making that corresponds to the different authorities.

Mexican constitution places General Health Council attributions in matters such as campaign against alcoholism, sale of substances that poison the individual or degenerate the human species and environmental pollution (Constitution, 2017, Article 73, section XVI, 4a.). General Health Law includes other attributions concerning: establishments intended for drug process, most frequent priority and non-infectious diseases, scientific research programs and human resource training, national compendium of health supplies, efficiency of national health system and proposals for legal health provisions (Health Law, 1984, Article 17). Actions mentioned taken by General Health Council have no legal basis either in the Constitution or in the General Health Law.

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<sup>8</sup> Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV2 (COVID-19) [Agreement that declares disease COVID-19 as a health emergency of force majeure], *Diario Oficial de la Federación* [Official Journal of the Federation], March 30, 2020 (Mex.).

The third administrative regulation is an agreement issued by the Ministry of Health. It established the extraordinary actions to attend to the health emergency caused by the SARS-CoV2 virus to be implemented by the public social and private sectors.<sup>9</sup> The most important extraordinary action is the suspension of non-essential activities from March 30 to April 30, 2020. The same agreement stated which activities were considered essential and thus, could continue functioning.

In addition, the agreement specifies some mandatory (to be observed anywhere where essential activities are performed) and voluntary co-responsible measures. The mandatory measures refer to hygienic actions and the voluntary/co-responsible measures urges all persons who do not participate in essential activities to maintain home confinement as of March 30, to April 20, 2020. It also urges strict co-responsible home confinement for all persons considered in danger of developing COVID-19 in a life-threatening form, regardless of whether their work activity is considered essential.

The fourth agreement modifies the previously described agreement. It extends the suspension of non-essential activities to May 30, 2020.<sup>10</sup> It also provides for the suspension of non-essential activities as well as the mandatory measures where essential activities are performed and the voluntary/co-responsible measures of home confinement as of May 18, 2020 in the municipalities that have low or no transmission of SARS-CoV2 virus. Likewise, the agreement established that when the period of validity of the measures established in the agreement ended, the Ministry of Health in coordination with the Ministry of Economy, labor and social welfare, would issue the guidelines for an orderly, staggered and regionalized return to labor, economic and social activities in the country. On May 14, 2020, the Ministry of Health published an agreement establishing a strategy for the reopening of social, educational, and economic activities, as well a “traffic light” system

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<sup>9</sup> Acuerdo por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2 [Agreement that establishes extraordinary actions to attend to the health emergency generated by SARS-CoV2], *Diario Oficial de la Federación* [Official Journal of the Federation], March 31, 2020 (Mex.).

<sup>10</sup> Acuerdo por el que se modifica el similar por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2 [Agreement that modifies agreement that established extraordinary actions to attend to the health emergency generated by SARS-CoV2], *Diario Oficial de la Federación* [Official Journal of the Federation], April 24, 2020 (Mex.).

by regions to weekly evaluate the epidemiological risk related to the opening of activities in each federative entity.<sup>11</sup>

### 3. Measures that violate the rule of law

As noted, COVID-19 preventive measures in Mexico include limitations to reunion and assembly and the extraordinary measures include the suspension of non-essential activities and with such suspension there is a restriction or limitation to economic rights, specifically the right to earn a living and perform the economic activity of one's choice, that is, economic liberty. Our arguments evolve mainly around this last human right, but are also applicable to the human rights to reunion and assembly and to freedom of movement or transit.

There is no doubt that the COVID-19 pandemic has caused much institutional challenges and that governments have been forced to take measures and exercise public powers yet, one crucial aspect of such measures and the exercise of such powers is their legitimacy and not only the extent of the measures adopted. This raises questions about the duration of measures and the degree of parliamentary oversight (Binder, 2020). It also raises questions about the possibilities according to the legal infrastructure of each country, the rule of law and about checks and balances.

The International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>12</sup> of which Mexico is a signatory country, states that all people have the right to self-determination and that by virtue of that right, they freely pursue their economic development (ICESCR, 1966, Article 1). Mexican constitution also asserts that no person may be prevented from engaging in the profession, industry, trade or work that suits him, being lawful (Constitution, 1917, Article 5). Thus, we can speak of economic liberty as a part of the spectrum of human rights.

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<sup>11</sup> Acuerdo por el que se establece una estrategia para la reapertura de las actividades sociales, educativas y económicas, así como un sistema de semáforo por regiones para evaluar semanalmente el riesgo epidemiológico relacionado con la reapertura de actividades en cada entidad federativa [Agreement establishing a strategy for the reopening of social, educational and economic activities, as well as a traffic light system by regions to weekly assess the epidemiological risk related to the reopening of activities in each federal entity], *Diario Oficial de la Federación* [Official Journal of the Federation], May 14, 2020 (Mex.).

<sup>12</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

Some human rights can be restricted or limited in extraordinary cases. In fact, Mexican constitution provides for the prohibition to engage in the profession, industry, trade or work of one's choice by judicial determination, when the rights of third parties are attacked, or by governmental resolution, when the rights of society are offended, given that such prohibition is dictated in the terms established by law. Also, the General Health Law, as mentioned above, permits the temporary closure of the premises or meeting centers of any kind, as a measure to prevent or control transmittable diseases such as COVID-19.

On the other hand, international human rights instruments such as the American Convention on Human Rights (ACHR) "Pact of San Jose, Costa Rica" allow limitations to some human rights, in terms of the law, in cases of affections to public health (ACHR, 1969, Articles 12-16 & 22). And, according to Mexican constitution, rights and their guarantees can be restricted or suspended in cases of invasion, serious disturbance of public peace, or any other that puts society in serious danger or conflict, but only by the president with approval of the congress can do so (Constitution, 1917, Article 29). Also, the constitution is clear in that the exercise of human rights cannot be restricted or suspended except in the cases and under the conditions established by the constitution (Constitution, 1917, Article 1).

The above leads us to affirm, that although rights, such as the right to choose and carry out the profession industry, trade or work of one's own choice can be limited or restricted in case of infectious diseases, it can only be done in Mexico after the decision is made formally and publicly by the president with the approval of the congress. This means that the preventive and extraordinary actions provided for in General Health Law do not include de restriction or suspension of human rights. Besides, even when the constitution provides for restriction and suspension on human rights, the president and congress have certain limitations. For example, the rights and guarantees that can be restricted or suspended are only those that are an obstacle to face the situation quickly and easily; the suspension or restriction must be for a limited time, and the restriction or suspension must be legally founded and justified, and be proportionate to the danger faced, observing at all times the principles of legality, rationality, publicity and non-discrimination. Besides, all decrees issued by the executive during the restriction or suspension, should be reviewed *ex officio* and immediately by the supreme court of justice, which must

take a stand on its constitutionality and validity. Thus, to restrict or limit rights and guarantees, Mexican constitution requires the participation of the executive, the legislative and the judiciary.

International human right instruments also permit the restriction or limitation of human rights in cases of a state of emergency, but they also require similar safeguards as the Mexican constitution. ICESCR declares that “the State may subject such rights [economic, social and cultural rights] only to such limitations as are determined by law only in so far as it may be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society” (Article 4). UN Human Rights Committee (HRC) General Comment 29 regarding states of emergency<sup>13</sup> require two conditions for the suspension of human rights and guarantees: the situation must amount to a public emergency which threatens the life of the nation and, there must be an official proclamation of state of emergency (HRC, 2001). Without such official proclamation, which was not done in the case of Mexico, there should not be any suspension or restriction of human rights and guarantees. General Comment 29 explicitly declares that the official proclamation of state of emergency is essential for the maintenance of the principles of legality and rule of law when they are most needed. States must act within their constitutional and legal provisions that govern such proclamation. Besides, the proclamation and the measures taken should reflect the principle of proportionality and be carefully justified.

On the other hand, ACHR provides for the suspension of rights and guarantees in time of war, public danger or another emergency. But it should be for the period of time strictly required by the situation and such measures should not be inconsistent with other obligations under international law and should not involve discrimination (ACHR, 1969, Article 27).

Besides, in its advisory opinion OC-8/87,<sup>14</sup> Inter-American Court of Human Rights (IACHR), recognizes that the measures that may be taken in states of emergency

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<sup>13</sup> Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/ C /21 / Rev.1/Add.11 (2001).

<sup>14</sup> The Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).

must be tailored to the requirements of the situation therefore, what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures will depend on the character, intensity, pervasiveness, and particular context of the emergency as well as on the corresponding proportionality and reasonableness of the measures (IACHR, 1987). It is the judicial system that must determine whether such measures are according to the rule of law, that is, if they meet all requirements. It is in such manner that political operations can be subjected to legal control and thus, human rights system can stabilize functionally differentiated systems and protect individual spheres of action. If not done in the manner indicated, with the participation of the executive, the legislative and the judiciary, there is a regression of differentiation. The legal system is not performing its function of deciding what is legal, another system is.

Federal government has insisted that Mexico has not been declared in a state of emergency contemplated in article 29 of the Mexican constitution, and therefore human or fundamental rights have not been restricted or suspended. This would mean that human rights cannot be legally suspended or restricted. But the decrees issued by the federal executive, and the agreements issued by the Ministry of Health and the General Health Council, refer to COVID-19 as a “serious illness of priority attention” and a “health emergency”, but they do not refer to a state of emergency. Yet, in the two administrative agreements issued by the Ministry of Health that sets out the extraordinary measures, the temporary closure of premises is obligatory, not voluntary as are other of the extraordinary actions there stated. This means that, many persons, natural or legal, cannot perform the profession, industry, trade or work of their choice.

We also note that the extraordinary measures contemplated in the General Health Law do not include the suspension of non-essential activities. Although, the possible measures regarding transmittable diseases do include the temporary closure of the premises or meeting centers of any kind. We can argue that such “temporary closure” includes “temporary suspension” of non-essential activities. Still, since it implies the suspension or restriction of a human right, it should only be possible if the decision taken by the president with the approval of congress; and the decision must be justified and grounded in arguments of proportionality to the danger faced and rationality. Also, the judiciary must review such decisions and decide if they comply with rule of law.

The closure of non-essential activities has posed great strain on many businesses that are unable to open in Mexico, especially in Mexico City, because the traffic light strategy for the reopening of social, educational, and economic activities, has remained in red. Some business owners, for example restaurant owners, see lack of equality in the strategy since some businesses are allowed to open and others are not, without a clear explanation of why (Ferri 2021 and Ramírez 2021). Local or federal government have not legally argued the proportionality or rationality of maintaining certain businesses closed and others open. They have not given arguments based on scientific evidence that show that businesses such as restaurants imply more contagion than others. The measures then, can be thought of as arbitrary measures. Private schools are facing similar situation; many threatened to reopen on March 1 (Rodríguez, 2021 and Wong, 2021), they did not. In both examples, the measures are not automatically subject to judicial review as would be measures taken under a declaration of state of emergency or similar. The expected arguments based on proportionality and rationality, the objective reason or motivation of the measures is missing. This means that political operations are not automatically subject to legal control as is required in case of limitations or restrictions on human rights, unless individuals seek on a personal basis judicial review.

Regarding schools and education, another dimension of the COVID-19 response concerns the right to education. Learning and education has been disrupted. Students are now required to do online learning or learning through television. But, not all communities, families or social groups are ready for this transition. There is not adequate internet access in all of Mexico or even adequate access to television (Alfaro, 2021). Yet, there is no discussion about the proportionality of the measure that would allow legal justification to affect the right to education.

In the case of other extraordinary measures taken such as home confinement that relates to freedom of transit, the Ministry of Health urges people to comply but the measures are not obligatory. There has been much debate about these measures, one point of view considers that they are needed measures and should be obligatory. This has led to governors of federal entities to issue administrative regulations that

limit freedom to transit, such as the governors of the states of Sonora,<sup>15</sup> Jalisco<sup>16</sup> and Michoacán,<sup>17</sup> to name a few that first adopted such measures. Here again we note lack of regard for the rule of law. Although state governors are sanitary authorities (Health Law, 1984, article 4), and both federation and local states can exercise simultaneously their powers regarding some health issues, when it comes to establishing exceptional measures due to serious epidemic diseases or the invasion of infectious diseases, it is an attribution that corresponds only to the Ministry of Health. Furthermore, regarding infectious diseases, although both the Ministry of Health and the state governors are competent, General Health Law provides for the isolation of the sick, for their exclusion from meeting places (Health Law, 1984, Articles 139-137 Bis 16), but not for the isolation or confinement of the un-sick population. So, not even the Ministry of Health has legal attribution to mandate general confinement of the un-sick population. State governors cannot legally limit or restrict human rights, only the federal executive with the approval of congress can legally do so. And although all authorities have the obligation to promote, respect, protect and to guarantee human rights, they are supposed to do so within the scope of their legal attributions (Constitution, 1917, article 1). Local state governors cannot legally unilaterally decide to protect public health by obliging confinement of a healthy population. Besides, international human rights instruments also require

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<sup>15</sup> Decreto por el que la titular del poder ejecutivo del Estado de Sonora, emite la declaratoria de emergencia y contingencia sanitaria-epidemiológica y por el que se dictan las medidas urgentes encaminadas a la conservación y mejoramiento de la salubridad pública general del Estado de Sonora y en donde se ordenan diversas acciones para prevenir, controlar, combatir y erradicar la existencia y transmisión del COVID-19 [Decree by which the executive of the State of Sonora, issues the declaration of emergency and sanitary contingency and dictates urgent measures for the conservation and improvement of general public health of the State of Sonora and where various actions are ordered to prevent, control, combat, and eradicate the existence and transmission of COVID-19], *Boletín Oficial, del Gobierno del Estado de Sonora* [Official Bulletin of the Government of the State of Sonora], March 25, 2020 (Sonora, Mex.).

<sup>16</sup> Acuerdo del ciudadano gobernador constitucional del Estado Libre y Soberano de Jalisco, mediante el cual se emiten diversas medidas de seguridad sanitaria para el aislamiento social, de carácter general y obligatorio, con motivo de la pandemia COVID-19 [Agreement of the governor of the State of Jalisco, through which various sanitary measures for social isolation are issued, on the occasion of the pandemic COVID-19], *Periódico Oficial. El Estado de Jalisco* [Official Newspaper of the State of Jalisco], April 19, 2020 (Jalisco, Mex.).

<sup>17</sup> Decreto por el que se declara el aislamiento obligatorio ante la pandemia del virus SARS-CoV2 (COVID-19) [Decree that establishes compulsory isolation due to the pandemic virus SARS-COV2], *Periódico Oficial del Gobierno constitucional del Estado de Michoacán de Ocampo*. [Official Newspaper of the State of Michoacán], April 20, 2020.

special conditions similar to those in Mexican constitution in order to restrict or limit human rights. One of these conditions is that political operations be subject to judicial control. Local state governors cannot then argue that they are complying with international legislation when they take such measures.

In trying to explain what is happening, we can recall that the political system is sensitive to irritations and it is receiving much irritations due to the situation caused by COVID-19 and a weak health system. Governors may be pressured by their citizens and that leads them to take such decisions; or, there is a political power play between federal government and state governments. In any case, the result is that the political system is threatening human rights and that the rule of law is less and less a common value of the political and human rights system.

In sum, the binding decisions regarding suspension of non-essential activities and the restriction of other human rights was not taken in accordance to the rule of law. The decision affects the human rights system but also the economic system when people are not allowed to work or commerce.

On another note, the administrative agreement issued by the General Health Council that declares a health emergency due to *force majeure*, caused by COVID-19 is of interest because of its implications to labor law. Interference in labor law is also noted in the agreement issued by the Ministry of Health that sets out preventive measures, as noted before.

The agreement that declares a health emergency due to *force majeure* is of doubtful legality. Although it could have been done in good faith and with good intentions (maintain employment relationships and workers' income), as with the other administrative legislation mentioned, it creates legal uncertainty. There is a legal framework in labor law to deal with the temporary suspension of work due to health contingency declared by health authority (Ley Federal del Trabajo [Labor Law], 1970, Articles 42 Bis, 427 section VII, and 429 section IV). However, a health contingency has not been explicitly declared. COVID-19 disease has been referred to as a sanitary emergency not as a contingency. If a health contingency is declared (which is different to a state of emergency, although a health contingency can cause a state of emergency) by the Ministry of Health and there is work suspension due

to it, according to the Federal Labor Law, workers would only be guaranteed one month of minimum salary equivalent to \$3,696.00 Mexican pesos per month, that is \$155.68 United States dollars at the exchange rate of May 08, 2020. This can cause an economic problem so measures should be taken, but they should be measures consistent with the rule of law.

General Health Council declared a sanitary emergency due to *force majeure* without legal basis. *Force majeure* not attributable to employer is a cause of temporary suspension and termination of work relations (Labor Law, 1979, Articles 42 Bis, 427 section I and 434 section I) thus, said declaration opens the possibility for an employer to suspend the employment relationship or terminate it. This means that if the intention was to prevent employers to end work relationships, the measure, apart from its questioned legality, is not an effective measure. Besides, as previously mentioned, legislature makes provisions for events such as those caused by COVID-19, there is no need to issue regulation contrary to the rule of law. The pandemic does cause an economic problem but decisions must not be arbitrary. There may be the need to take other measures to avoid economic problems to individuals involves, but that does not mean rule of law should be dismissed. When measures to combat COVID-19 pandemic dismiss previously established legislation, the right to legal certainty is violated and when that happens, legal system and human rights system do no perform their function to protect and stabilize functionally differentiated systems and protect individual spheres of action, and dictate what is legal. Therefore, human rights system loses its character as communication platform and there is risk of regression of differentiation.

Is not argued here for or against the restriction or limitation of some human rights, it might be necessary and there may be many arguments to justify such measures. Also, such measures are not exclusive to Mexico. Many countries are taking such measures, and some are being questioned (Gebrekidan, 2020). The Interamerican Commission on Human Rights have noted that regarding containment measures to face and prevent the effects of the pandemic, some human rights have been suspended and restricted. In some cases, “states of emergency” or “states of exception” have been declared. In yet other cases, “state of catastrophe due to public calamity” or “health emergency” have been declared. These declarations have been issued on many occasions through presidential decrees and regulations

of various legal nature (Interamerican Commission on Human Rights, 2020, p. 4).

That other countries take such measures is also a source of stress for the political system, along with the internal stress it already has due to the politicization of the situation. For example, in Latin America, on 18 March 2020, Chile declared a constitutional state of exception of catastrophe, due to public calamity for 90 days.<sup>18</sup> Under said state of constitutional exception, as provided by article 41 of Chile's constitution, Chilean government was enabled to restrict certain fundamental rights, such as the right of assembly, freedom of movement and could also order the requisition of goods, establish limitations on the exercise of the right to property and adopt extraordinary measures of an administrative nature, which deem necessary for the restoration of normality. Chile restricted rights through its constitutional mechanisms. Another example in the Latin American context is Ecuador. Ecuador first declared a state of exception on March 16, 2020.<sup>19</sup> Nonetheless, the third declaration of exception, Executive Decree 1212 issued on the 21 of December 2020 that declared a state of exception due to public calamity due to the serious increase in the contagion of COVID-19 due to crowds, as well as exposure to a mutation with greater imported virulence from the United Kingdom, and that sought to contain the spread of the coronavirus and its negative consequences on public health, was declared unconstitutional by the constitutional court of Ecuador.

It is not our intention to analyze the legality or constitutionality of the measures taken by the countries in the examples mentioned because it exceeds the purpose of this paper. Yet, in the examples mentioned, constitutional and international mechanisms to suspend or restrict rights were used. Besides, the mechanisms provided for the intervention of the legal system, the constitutional courts, and thus, the differentiation of systems remained. Each country case should be examined separately conditions, legal, economic, social, are different and decisions should be taken according to each country's particular context, they should be tailored

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<sup>18</sup> Decreto 104. Declara estado de excepción constitucional de catástrofe, por calamidad pública, en el territorio de Chile, [Decree 104. Declaration of constitutional state of exception of catastrophe, due to public calamity, in the territory of Chile], *Diario Oficial de la República de Chile* [Official Journal of the Republic of Chile], March 18, 2020. The state of emergency was extended three times through other decrees.

<sup>19</sup> Decreto Ejecutivo No. 1017 [Executive Decree No. 1017], *Registro Oficial del Ecuador* [Official Registry of Ecuador], March, 16, 2020

decisions and well justified. In any case, if the decision to restrict or limit human rights is taken, it should be taken according to law, that is, with the prevalence of the rule of law, complying with all constitutional and international human rights requirements. In the two examples mentioned, there are mechanisms of checks and balances because there is participation not only of the executive. That is what allowed the state of exception in Ecuador de be declared unconstitutional. Thus, there is differentiation of the human rights system and the political system.

Measures do not have to be taken through declaring state of exception or state of emergency, that decision depends on country context and on the legal and constitutional framework. For example, Spain's constitution<sup>20</sup> and *Ley Orgánica* (Organic Law) 4/1981 provide for the declaration of a state of alarm (different from a state of emergency and a state of siege which are also provided for) in the case of a natural disasters, health crises, when public essential services are paralyzed or when there is shortage of goods of primary necessity. Even so, state of alarm can only be declared when the competent authorities cannot ensure the return to normality by using of their ordinary prerogatives and there is participation of congress in such declaration (Organic Law 4/1981, article 1.1).

In the case of Belgium, its Constitution does not provide specifically for the declaration of state of emergency, in fact, it states explicitly that the Constitution cannot be suspended in whole or in part (Belgium Constitution, 1831, article 187). But it provides for a mechanism of special powers that permits Belgian parliament to delegate legislative powers to the government after some conditions be met (Belgium Constitution, 1831, article 105). These special powers are subject to judicial review so it limits arbitrariness and the differentiation between the legal and human rights system from the political system remains.

What can be seen in Mexico is that through administrative rulings the political system is subsuming the different social processes, jeopardizing institutionalized

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<sup>20</sup> Article 116 states that an organic law shall regulate the states of alarm, emergency and siege and the corresponding competences and limitations. That a state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days and that the Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorization the said period may not be extended.

protection mechanisms such as human rights and the rule of law, and leaving citizens in a state of fragility. This means that like health system, human right system is no longer able to perform its function: protect and stabilize functionally differentiated systems and protect individual spheres of action. Also, it means that human rights system may be losing its character as communication platform. With that, also comes the risk of regression of differentiation, putting at risk the dominant structure of modern society in Mexico.

In extraordinary situations or instances of emergency as the present caused by COVID-19 and a weak health system, we can remember Justice Brennan (cited by Bringham), who said that there is little to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security and that after each perceived security crisis ended, the United States realized that the abrogation of civil liberties was unnecessary. He mentions that this has proven unable to prevent itself from repeating the error when another crisis came along. He spoke about the United States and about civil liberties but the warning also applies to other countries such as Mexico and to economic, social and cultural rights.

The dilemma between protection of public health and protection of other human rights is a false dilemma. Mexican constitution and international human rights instruments provide for the restriction or limitation of some human rights in the event of a state of emergency. But they also provide for clear rules and defense mechanisms which are not present when human rights are suspended or restricted *de facto* without a declaration of state of emergency. Thus, the institutionalized state of emergency can be considered an instrument for the defense of the constitution and the protection of human rights in extraordinary conditions. It also means that in the event of restriction or suspension, there are check and balances since the participation of the executive the legislative and the judiciary is required. In such scenario, there is less opportunity for arbitrariness in the decision making by the political system. When human rights are limited or restricted without consideration of rule of law, there is a risk for the regression of differentiation of systems in society.

## V. CONCLUSIONS

1. COVID-19 pandemic and a weak Mexican health system, in fact or in perception, irritate functionally differentiated systems, especially the political system, human rights system and economic system.
2. Administrative regulations that contain measures to deal with COVID-19 pandemic restrict human rights without a declaration of state of emergency as required by Mexican law and international human rights, thus there is no consideration for rule of law.
3. The political system, through administrative regulations is subsuming different social processes, jeopardizing human rights and the rule of law, and leaving citizens in a state of fragility.
4. Society differentiation is at risk of regression of differentiation, with administrative rulings that do not respect rule of law.

## BIBLIOGRAPHY

Acuerdo del ciudadano gobernador constitucional del Estado Libre y Soberano de Jalisco, mediante el cual se emiten diversas medidas de seguridad sanitaria para el aislamiento social, de carácter general y obligatorio, con motivo de la pandemia COVID-19 [Agreement of the governor of the State of Jalisco, through which various sanitary measures for social isolation are issued, on the occasion of the pandemic COVID-19], Periódico Oficial. El Estado de Jalisco [Official Newspaper of the State of Jalisco], April 19, 2020 (Jalisco, Mex.).

Acuerdo por el que el Consejo de Salubridad General reconoce la epidemia de enfermedad por el virus SARS-CoV2 (COVID-19) en México, como una enfermedad grave de atención prioritaria, así como se establecen las actividades de preparación y respuesta ante dicha epidemia [Agreement by which General Health Council recognizes COVID-19 as a serious

disease of priority attention], *Diario Oficial de la Federación* [Official Journal of the Federation], March 23, 2020 (Mex.).

Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV2 (COVID-19) [Agreement that declares disease COVID-19 as a health emergency of force majeure], *Diario Oficial de la Federación* [Official Journal of the Federation], March 30, 2020 (Mex.).

Acuerdo por el que se establece una estrategia para la reapertura de las actividades sociales, educativas y económicas, así como un sistema de semáforo por regiones para evaluar semanalmente el riesgo epidemiológico relacionado con la reapertura de actividades en cada entidad federativa [Agreement establishing a strategy for the reopening of social, educational and economic activities, as well as a traffic light system by regions to weekly assess the epidemiological risk related to the reopening of activities in each federal entity], *Diario Oficial de la Federación* [Official Journal of the Federation], May 14, 2020 (Mex.).

Acuerdo por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2 [Agreement that establishes extraordinary actions to attend to the health emergency generated by SARS-CoV2], *Diario Oficial de la Federación* [Official Journal of the Federation], March 31, 2020 (Mex.).

Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implican la enfermedad por el virus SARS-CoV2 (COVID-19) [Agreement by which preventive measures are established to mitigate and control the risks to health that COVID-19 implies], *Diario Oficial de la Federación* [Official Journal of the Federation], March 24, 2020 (Mex.).

Acuerdo por el que se modifica el similar por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2 [Agreement that modifies agreement that established extraordinary actions to attend to the health emergency generated by

- SARS-CoV2], *Diario Oficial de la Federación* [Official Journal of the Federation], April 24, 2020 (Mex.).
- Alfaro, Y. (February 8, 2021). Por falta de internet, 1 de cada 4 alumnos no tiene acceso a la educación a distancia. *Milenio*. Retrieved March 9, 2021 from <https://www.milenio.com/negocios/mexico-25-alumnos-acceso-educacion-distancia>
- American Convention on Human Rights “Pact of San Jose, Costa Rica”, Nov. 22, 1969 S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).
- Belgian Constitution, Belgian Official Gazette, updated following the sixth institutional reform, January 31, 2014.
- Binder, K., et. Al. (2020). States of emergency in response to coronavirus crisis: Situation in certain Member States. European Parliamentary Research Service. Retrieved March 3, 2021 from [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652002/EPRS\\_BRI\(2020\)652002\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652002/EPRS_BRI(2020)652002_EN.pdf)
- Bringham, T H. *The sixth sir David Williams Lecture. Rule of Law* [PDF Archive]. Retrieved August 20, 2020 from <https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf>
- Camhaji, E. (December 21, 2020). Más de un centenar de hospitales en México están al 100% de su capacidad. *El País*. Retrieved January 02, 2021 from <https://elpais.com/mexico/2020-12-22/mas-de-un-centenar-de-hospitales-en-mexico-estan-al-100-de-su-capacidad.html#:~:text=Se%20trata%20de%20uno%20de,todo%20M%C3%A9xico%2C%20seg%C3%BAAn%20datos%20oficiales>.
- Constitución Española [Spanish Constitution], as amended, Boletín Oficial del Estado [Official State Bulletin], December 29, 1978 (Sp.).
- Constitución Política de los Estados Unidos Mexicanos [Constitution], as amended, *Diario Oficial de la Federación* [Official Journal of the Federation], February 5, 1917 (Mex.).
- Decreto por el que la titular del poder ejecutivo del Estado de Sonora, emite la declaratoria de emergencia y contingencia sanitaria-epidemiológica y

por el que se dictan las medidas urgentes encaminadas a la conservación y mejoramiento de la salubridad pública general del Estado de Sonora y en donde se ordenan diversas acciones para prevenir, controlar, combatir y erradicar la existencia y transmisión del COVID-19 [Decree by which the executive of the State of Sonora, issues the declaration of emergency and sanitary contingency and dictates urgent measures for the conservation and improvement of general public health of the State of Sonora and where various actions are ordered to prevent, control, combat, and eradicate the existence and transmission of COVID-19], *Boletín Oficial, del Gobierno del Estado de Sonora* [Official Bulletin of the Government of the State of Sonora], March 25, 2020 (Sonora, Mex.).

Decreto por el que se declara el aislamiento obligatorio ante la pandemia del virus SARS-CoV2 (COVID-19) [Decree that establishes compulsory isolation due to the pandemic virus SARS-COV2], *Periódico Oficial del Gobierno constitucional del Estado de Michoacán de Ocampo*. [Official Newspaper of the State of Michoacán], April 20, 2020.

Decreto por el que se declaran acciones extraordinarias en las regiones afectadas de todo el territorio nacional en materia de salubridad general para combatir en la enfermedad grave de atención prioritaria generada por el virus SARS-CoV2 (COVID-19) [Decree that declares extraordinary actions to combat the serious disease of priority attention generated by COVID-19], *Diario Oficial de la Federación* [Official Journal of the Federation], March 27, 2020 (Mex.).

Decreto por el que se sanciona el Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (COVID-19) [Decree that sanctions the agreements that establishes preventive measures to mitigate and control the risks to health that COVID-19 implies], *Diario Oficial de la Federación* [Official Journal of the Federation], March 24, 2020 (Mex.).

- Dicey, A V. (1959). *Introduction to the study of the law of the constitution*. London: Macmillan.
- Duran, V. (April 26, 2020). *Covid-19. El mapa del desabasto*, Mexicanos contra la Corrupción y la Impunidad. Retrieved August 02, 2020 from <https://contralacorrupcion.mx/mapa-desabasto-hospitales-mexico-covid-19/>
- Ferri, P. (January 12, 2021). Los restauranteros de Ciudad de México elevan el tono: “Con todo lo que hemos invertido, ¿por qué no nos dejan abrir?”. *EL PAÍS*. Retrieved March 9, 2021 from <https://elpais.com/mexico/economia/2021-01-13/los-restauranteros-de-ciudad-de-mexico-elevan-el-tono-con-todo-lo-que-hemos-invertido-por-que-no-nos-dejan-abrir.html>
- Gebrekidan, S. (April 14, 2020). For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power. *New York Times*. Retrieved September 02, 2020 from <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>
- Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/ C /21 /Rev.1/Add.11 (2001).
- Instituto Nacional de Estadística y Geografía. (2019). *Encuesta Nacional de Salud y Nutrición 2018*. Retrieved May 02, 2020 from [https://ensanut.insp.mx/encuestas/ensanut2018/doctos/informes/ensanut\\_2018\\_presentacion\\_resultados.pdf](https://ensanut.insp.mx/encuestas/ensanut2018/doctos/informes/ensanut_2018_presentacion_resultados.pdf)
- Interamerican Commission on Human Rights. (2020). Pandemic and Human Rights in the Americas. RESOLUTION 1/2020. Retrieved March 4, 2020 from <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>
- International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).
- International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

- Jessop, B. (2007). *The Relevance of Luhmann's Systems Theory and of Laclau and Mouffe's Discourse Analysis to the Elaboration of Marx's State Theory* [PDF Archive]. Retrieved April 05, 2020 from [https://www.researchgate.net/publication/318543419\\_The\\_relevance\\_of\\_Luhmann's\\_systems\\_theory\\_and\\_of\\_Laclau\\_and\\_Mouffe's\\_discourse\\_analysis\\_to\\_the\\_elaboration\\_of\\_Marx's\\_state\\_theory](https://www.researchgate.net/publication/318543419_The_relevance_of_Luhmann's_systems_theory_and_of_Laclau_and_Mouffe's_discourse_analysis_to_the_elaboration_of_Marx's_state_theory).
- Ley del Seguro Social [Social Security Law], as amended, *Diario Oficial de la Federación* [Official Journal of the Federation], Dec 21, 1995 (Mex.).
- Ley Federal del Trabajo [Labour Law], as amended, *Diario Oficial de la Federación* [Official Journal of the Federation], April 1, 1970 (Mex.).
- Ley General de Salud [Health Law], as amended, *Diario Oficial de la Federación* [Official Journal of the Federation], February 7, 1984 (Mex.).
- Ley Orgánica 4/1981 de 1 de junio, de los estados de alarma, excepción y sitio. [Organic Law], as amended, *Boletín Oficial del Estado* [Official State Bulletin], July 5, 1981 (Sp.).
- Lino, M. (August, 31, 2020). Centro de la UNAM critica respuesta a la pandemia. *Eje Central*. Retrieved January 02, 2021 from <https://www.ejecentral.com.mx/centro-de-la-unam-critica-respuesta-a-la-pandemia/>
- Luhmann, N. (1984). *Social systems*. Stanford: Stanford University Press.
- Luhmann, N. (1992). Operational Closure and Structural Coupling: The Differentiation of the Legal System. *Cardozo Law Review*, (13), 1419–1441.
- Mattheis, C. (2012). The System Theory of Niklas Luhmann and Constitutionalization of the world society. *Goettingen Journal of International Law*, 4(2), 625–647. Retrieved July 05, 2020 from [https://www.gojil.eu/issues/42/42\\_article\\_mattheis.pdf](https://www.gojil.eu/issues/42/42_article_mattheis.pdf)
- Monroy, J. (April 28, 2020). Secretaría de Gobernación. Van 47 agresiones contra personal de salud en México; Jalisco es la entidad con más eventos. *El Economista*. Retrieved May 25, 2020 from <https://www.economista.com.mx/politica/Van-47-agresiones-contra-personal-de-salud-en-Mexico-Jalisco-es-la-entidad-con-mas-eventos-20200428-0087.html>

- OECD. (2019). *Health at a Glance 2019: OECD Indicators*. Paris: OECD Publishing, <https://doi.org/10.1787/4dd50c09-en>
- ONU México. (April 23, 2020). La ONU en México condena las agresiones contra los profesionales de la salud que lucha contra el coronavirus. *Noticias ONU*. Retrieved May 02, 2020 from <https://news.un.org/es/story/2020/04/1473372>
- Ramírez, B. (February 4, 2021). Cacerolazo de restauranteros en el Monumento a la Revolución. *La Jornada*. Retrieved March 9, 2021 from <https://www.jornada.com.mx/notas/2021/02/04/capital/cacerolazo-de-empleados-de-restaurantes-en-el-monumento-a-la-revolucion/>
- Rodríguez, D. (February 22, 2021). Las escuelas privadas de México desafían al Gobierno: anuncian el regreso a clases presenciales el 1 de marzo. *EL PAÍS*. Retrieved March 9, 2021 from <https://elpais.com/mexico/2021-02-22/las-escuelas-privadas-de-mexico-desafian-al-gobierno-anuncian-el-regreso-a-clases-presenciales-el-1-de-marzo.html>
- Roth, S. & Schütz, A. (2015). Ten Systems: Toward a Canon of Function Systems. *Cybernetics and Human Knowing*, 22(4), 11–31. Retrieved April 02, 2021 from <https://steffenroth.files.wordpress.com/2016/04/ten-systems.pdf>.
- Ruiz-Healy, E. (April 8, 2020). El sector salud carece del personal necesario para tratar a los que enfermen gravemente de COVID-19. *El Economista*. Retrieved May 22, 2020 from <https://www.eleconomista.com.mx/opinion/El-sector-salud-carece-del-personal-necesario-para-tratar-a-los-que-enfermen-gravemente-de-COVID-19-20200408-0121.html>
- Secretaría de Salud. (2020a). Conferencia COVID-19 en México – 28 de diciembre 2020. Retrieved January 02, 2021 from <https://www.youtube.com/watch?v=87AQLuz3rBY>
- Secretaría de Salud. (2020b). 077. Se confirma en México caso importado de coronavirus COVID- 19. Retrieved April 01, 2020, from <https://www.gob.mx/salud/prensa/077-se-confirma-en-mexico-caso-importado->

- de-coronavirus-covid-19#:~:text=En%20la%20conferencia%20matutina%20encabezada,antecedentes%20de%20viaje%20a%20Italia
- The Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).
- United States Courts. Overview - Rule of Law. Retrieved May 13 2020, from <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law>
- Verschraegen, G. (2002). Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory. *Journal of Law and Society*, 29(2), 258–281. Retrieved July 05, 2020 from <https://doi.org/10.1111/1467-6478.00218>
- WHO. (2020a). *2019 Novel Coronavirus (2019-nCoV) Strategic Preparedness and Response Plan for the South-East Asia Region*. India: WHO, Retrieved February 28, 2020 from [https://www.who.int/docs/default-source/searo/whe/coronavirus19/covid-19-sprp-whe-searo-feb-2020.pdf?sfvrsn=9ee49760\\_2](https://www.who.int/docs/default-source/searo/whe/coronavirus19/covid-19-sprp-whe-searo-feb-2020.pdf?sfvrsn=9ee49760_2)
- WHO. (2020b). Rolling updates on coronavirus disease (COVID-19). Retrieved February 28, 2020, from <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>
- WHO. (2020c). WHO Director General's remarks Launch of Appeal: Global Humanitarian Response Plan - 25 March 2020. Retrieved March 30, 2020, from <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-launch-of-appeal-global-humanitarian-response-plan---25-march-2020>
- Wong, A. (February 22, 2021). Colegios particulares del país buscan reanudar clases presenciales en marzo. *Milenio*. Retrieved March 9, 2021 from <https://www.milenio.com/politica/colegios-particulares-buscan-reanudar-clases-presenciales>
- Ximénez-Fyvie, L. (2021). *Un daño irreparable. La criminal gestión de la pandemia en México*. México: Planeta.