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IV. EMERGENCY STATE BY *AGREEMENT*

1. *Administrative Arrangements and Legislative Authority*

The *agreement* is a figure of administrative law. In 1917 the Constitution referred to "regulations, decrees and orders" of the president, and in 1981 "agreements" were introduced, after decrees and before orders. "Agreement" is a polysemy in Mexican law, as will be seen below.

In the original text of the Constitution, it was possible to distinguish the meaning of each of the aforementioned elements. The regulation corresponded to the development of a norm emanating from Congress, the decree consisted of rules promulgated by the president, and the order was a command addressed to some subordinate authority. This set of instruments gave rise to the multiplication of presidential legislative acts. To overcome the disorder, a reform to Article 49 of the Constitution became necessary in 1938, at the initiative of President Lázaro Cárdenas, who denounced the abuse in the issuance of decrees to the detriment of congressional powers.

The concentrating force of presidential power did not yield to the limits imposed by this reform, and a mechanism was found to circumvent the restriction. The incorporation and development of the "agreement" allowed presidents to have at their disposal an unregulated instrument that has proved very useful for exercising normative powers outside political control.

The figure of the agreement in the Organic Law of the Federal Public Administration has several meanings: providence with effects for third parties; provision with internal scope in a collegiate body; associative mechanism between two or more in-

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stitutions for the achievement of a shared purpose; rule of organization or internal functioning of a public body; provisional procedural or procedural measure. In the international order it is usually used as a synonym for a treaty or as a preliminary element to reach it. As can be seen from the multiplicity of meanings, it is a legal figure about which it is necessary to provide criteria that delimit its possible contents and establish a minimum of formalities, so that it does not continue to be just another mechanism of political discretion.

The proliferation of agreements became ostensible during the health crisis because it acquired the characteristics of emergency legislation from an administrative source, in contravention of Article 49 of the Constitution. This precept prescribes:

> The Supreme Power of the Federation is divided, for its exercise, into Legislative, Executive and Judicial.
>
> Two or more of these Powers may not be combined in a single person or corporation, nor may the Legislative Power be deposited in an individual, except in the case of extraordinary powers to the Executive of the Union, in accordance with the provisions of Article 29. In no other case, except as provided in the second paragraph of Article 131, shall extraordinary powers to legislate be granted.

Article 29 regulates the form and scope of the emergency state. It has not been applied since the Second World War. However, since then there have been many cases of de facto limitation of fundamental rights. Regarding Article 131, it refers to presidential powers to impose taxes and quotas on trade movements. To circumvent the application of these provisions, the issuance of *agreements became a* substitute for extraordinary powers to legislate.

The Organic Law of the Federal Public Administration lacks a definition section, which leads to the use of the same word with different meanings. This is the case of *agreement*, which has at least the following meanings: presidential provision of a specific nature (Articles 7, 21, 41); presidential provision of a general nature (Ar-

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ticle 43); internal instruction of a government agency addressed to particular officials (Article 16); resolution of the governing body of a State enterprise or agency (Article 46); agreement between different public entities (Article 30); collective resolution (Article 32); international agreement (Article 38).

In its broadest sense, the *agreement* is given a character comparable to that of a decree. This is what happens with Article 43 of the Law, which refers to the powers of the Office of the Legal Counsel of the Executive. In its section XI, it establishes that it is incumbent upon this Office: "To exercise, when so requested by a Secretary of State, and in accordance with the *regulatory laws* and *general agreements* issued for that purpose by the President of the Republic...". Here the regulatory laws and the "general agreements" are mentioned as binding bases for action that contain directives applicable to the entire administration.

The use of *agreements* facilitates decisions of normative content, although it lacks constitutional or legal regulation. Its empirical development is evident in at least half a dozen different applications that appear in the aforementioned Public Administration Law. In this way, a legislative practice was generated, propitiated by the hegemonic conditions of the exercise of power and by the extreme concentration of powers vested in the President of the Republic. It should not be overlooked that this law was published in 1976, at a zenith moment of party hegemony.

In the Mexican constitutional system, there is no collective body called *government* and, as Article 80 of the Constitution provides, all executive power is vested in a single person. The Constitution makes several references to *government* as a function but does not define the organ. Therefore, the concentration of powers results directly from the constitutional system.

Several examples illustrate the use of the legislative modality of the *agreement*. One is the militarization of the civilian function of the police; another is the set of decisions directly related to the pandemic, none of which passed through Congress and not even

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after the emergency will have to be submitted to the knowledge and assessment of the representatives of the Nation.

2. *Pandemic Decrees and Agreements*

On March 24 (2020), the President of the Republic issued a decree ratifying an agreement of the same date issued by the Health Secretary, invoking constitutional Article 73-XVI, to establish measures for epidemiological surveillance and the prevention and control of risks associated with COVID-19.

The aforementioned constitutional precept presents an extravagant wording since 1917, since among the powers of Congress, section XVI was included, which alludes to the functions of the General Health Council, "a direct dependency of the President of the Republic", and of the Health Secretary (originally the Department of Health), also a presidential office. Apart from this technical error, the Secretariat is empowered to issue provisions that must be "obeyed by the administrative authorities of the country".

The effect of this section of Article 73 of the Constitution is that, during epidemics and pandemics, an auxiliary body of the President is transformed into an authority that cannot be challenged in all administrative areas of the country. However, the agreement issued by the Health Secretary was not limited to giving orders to administrative authorities; it also imposed them on judicial authorities and political representative bodies, in addition to extending them to the social and private sectors. In this, it contravened the constitutional norm and exercised *de facto* actions only possible through Article 29 of the Constitution, usurping powers reserved to the President of the Republic with the prior authorization of the Congress of the Union.

Article 2 of the Health Secretary's agreement ordered that the "preventive measures" be applied in an obligatory manner by "the public, social and private sectors. It expressly included

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the suspension of activities in educational and work centers, in public spaces and in "other crowded places" "of the public, social and private sectors. This is an extraordinary case in which a single person arrogated to himself the power to paralyze an entire country. The unconstitutionality of the agreement is evident: the document does not stand up to even a commonsense analysis.

It is unobjectionable that the Constitution mandates that the determinations of the Health Secretary in the context of a health emergency be "obeyed by the administrative authorities of the country", except that congresses and courts are not "administrative authorities", any more than are unions, factories, businesses, families, or individuals. There is no possibility whatsoever of understanding the constitutional power in the sense in which the Health Secretary applied it. It had the effect of immobilizing the organs of power, slowing down national economic activity, and preventing the performance of work, except in the areas that the agreement itself determined.[23]

A measure of this magnitude, contrary to the express letter of the Constitution, implies the risk of de-constitutionalizing the country. It is difficult to find another example of such an obvious violation and of such obsequious acceptance. The latter gives an idea of the magnitude of the emotional impact of the emergence of the pandemic, but also of the decreasing value of the Constitution. From a socio-legal point of view, it is an example of the anomic tendency that Mexico is experiencing. The course corre-

[23] *Agreement of the Health Secretary Establishing the Preventive Measures to be Implemented for the Mitigation and Control of Health Risks Posed by the SARS-CoV2 Virus Disease (COVID-19)*, published in the *Official Gazette of the Federation*, March 24, 2020. Article 2-c says: "In the private sector will continue to work companies, businesses, commercial establishments and all those that are necessary to deal with the contingency, by way of example, hospitals, clinics, pharmacies, laboratories, medical, financial, telecommunications, and media services, hotel and restaurant services, gas stations, markets, supermarkets, miscellaneous, transportation services and gas distribution, as long as they do not correspond to closed spaces with agglomerations".

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sponds to a cumulative process that began decades ago and has been accentuated in recent years.

The extraordinary actions were reinforced by a presidential decree of March 27. Four major actions aimed at combating the effects of the COVID-19 pandemic were established, all of which were entrusted to the Health Secretary. The first consisted of the power to "use as auxiliary elements all the medical and social assistance resources of the public, social and private sectors existing in the affected and adjacent regions" (Article 2). Here, it was striking that the President authorized one of his agencies to make use of "medical resources" from the social and private spheres. By this type of resources could be understood facilities, equipment, medicines and even personnel.

A power of that caliber does not find constitutional support in the norms invoked as the basis of the decree: the regulatory power of the President (Article 89-I), the obligation of the State to protect the health of Mexicans (Article 4), and the provisions related to the General Health Council and the Health Secretary itself (Article 73-XVI). In the first case, because it did not regulate any law; in the second, because the duty to protect health refers only to the organs of the State; and in the third, because the Constitution limits the binding nature of the decisions of the Secretariat to "the administrative authorities of the country. The decree-imposed limitations on the right to property and freedom of work. While they were justified considering the emergency, they should have been the subject of a declaration provided for by the Constitution in Article 29.

The presidential decree then empowered the Office to "acquire all types of goods and services, nationally or internationally, including medical equipment, diagnostic agents, surgical and healing materials and hygienic products, as well as all types of goods and objects that are necessary to address the contingency, without the need to carry out the public bidding procedure, for the amounts or concepts necessary to address it. The decree was only countersigned by the head of the Health Secretary,

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who lacks the authority to transfer and dispose of the budgetary resources required for unforeseen acquisitions and the power to modify the legal procedures corresponding to the bids. In accordance with Article 92 of the Constitution, for this decree to have been obeyed, it should also have been countersigned by the heads of the Finance Secretary and the Public Administration Secretary.

As for "importing and authorizing the importation, as well as the acquisition in the national territory of the goods and services mentioned in the previous section, without the need to exhaust any administrative procedure, for the amounts or concepts necessary to confront the contingency that is the object of this Decree", the decree included, as in the previous case, a matter that is not the responsibility of the Health Secretary, thus violating the provisions of the Constitution and various laws, including the Federal Public Administration Law, by giving the Health Secretariat express powers of the Treasury and the Economy Secretariats, in addition to the fact that the set of provisions contained in the decree altered the budgetary provisions approved by the Chamber of Deputies.

Irregular was also the fourth power conferred on the Health Secretary: "to carry out the necessary measures to prevent price speculation and the stockpiling of essential inputs necessary for the goods and services referred to in section II of this article.

An oversight led to the fact that three days later, on March 30, the Head of Government of Mexico City issued a decree copied from the presidential decree, which went so far as to empower the Health Secretary and the Water System of the capital to "import and authorize the import, as well as the acquisition in the national territory of the goods and services mentioned in the previous section without the need to exhaust any administrative procedure, for the amounts or concepts necessary to address the contingency object of this Decree". By her own decision, the Head of Government assumed and delegated federal powers, which showed the lightness with which the legal system was af-

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fected at a time when the greatest possible care was required in the decisions taken.

Three days after the Health Secretary promulgated his agreement, the General Health Council in turn issued another[24] containing two articles, the first declaring the health emergency and the second empowering the Secretary to determine "all actions necessary to address the emergency". In other words, the Secretary acted before the emergency was declared. This was not all. This declaration of emergency was intended to be based on various precepts of the General Health Law: Article 3º, section XV, which indicates that sanitary matters include the prevention and control of communicable diseases; 4º, section II, which states that the Council is a sanitary authority; 17, section IX, which empowers the Council to exercise "The other [powers] that correspond to it according to section XVI of Article 73 of the Political Constitution of the United Mexican States and this Law". Sections II and XIV of Article 134, which respectively state that the Health Secretary and the governments of the federal entities, within their spheres of competence, shall carry out epidemiological surveillance, prevention and control actions for epidemic influenza and "others" determined by the General Health Council; Section 140, which states:

> Non-health authorities shall cooperate in the exercise of action to combat communicable diseases, establishing the measures they deem necessary, without contravening the provisions of this Law, those issued by the General Health Council and the official Mexican standards issued by the Health Secretary.

Section 141, which states: "The Health Secretary shall coordinate its activities with other public agencies and entities and with the governments of the federative entities, for the research, prevention and control of communicable diseases".

24 *Official Journal of the Federation*, March 30, 2020.

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None of the legal provisions invoked empowers the Council to issue a declaration of sanitary emergency since the Constitution only says, in relation to that Council, in Article 73-XVI:

> 1st. 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.
>
> ....
>
> 4th. The measures that the Council has put into effect in the Campaign against alcoholism and the sale of substances that poison the individual or degenerate the human species, as well as those adopted to prevent and combat environmental pollution, shall later be reviewed by the Congress of the Union in the cases that fall within its competence.

As can be seen, neither in the Constitution nor in the Law is there any norm that attributes to the Council the power to establish a sanitary emergency or to empower the Health Secretary to act accordingly. On the other hand, Article 73-XVI of the Constitution states:

> 2. In case of serious epidemics or danger of invasion of exotic diseases in the country, the Secretariat of Health shall have the obligation to immediately dictate the indispensable preventive measures, subject to be later sanctioned by the President of the Republic.

In turn, Article 181 of the General Health Law provides:

> In the event of an epidemic of a serious nature, danger of invasion of communicable diseases, emergency situations or catastrophes affecting the country, the Secretariat of Health shall immediately dictate the indispensable measures to prevent and combat damage to health, subject to such measures being subsequently sanctioned by the President of the Republic.

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What happened? Why so many and so serious confusions? The answer does not lie in legal imperfection; it was not reasonable for experienced officials to have it; the underlying problem is the exacerbation of a regime built on a premise that is incompatible with a mature democratic society: that of *political verticalism*, which among other effects has the effect of inhibiting subordinates from making their superiors see the mistakes they are making.

3. *Archaic Regulations in a Pluralistic Society*

Extraordinary health action is provided for in the Law in a very broad manner. This is the text:

> Article 184. *Extraordinary action in matters of general health shall be exercised by the Health Secretariat*, which shall integrate and maintain permanently trained and updated special brigades that shall act under its direction and responsibility and shall have the following attributions:
>
> I. To entrust federal, state and municipal authorities, as well as professionals, technicians and assistants of 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 gatherings of people, entry and exit of them in the towns and with the special hygienic regimes to be implemented, according to the case;
>
> III. To *regulate* land, sea, and air traffic, as well as to freely dispose of all state-owned and public service means of transportation, regardless of the legal regime to which the latter are subject;
>
> IV. *Use freely and on a priority basis* the telephone, telegraphic and postal services, as well as radio and television transmissions, and
>
> V. *The others* determined by the Secretariat itself.[25]

That article made it clear that emergency powers were vested in the Secretariat, not in the Council.

[25] The Emphasis added are mine.

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The General Law was drafted in 1982 and published in 1984, in a cultural context that had already changed radically. Four decades ago, Mexico lived a very different reality from the one that prevails at the beginning of the third decade of the 21st century. At that time, there was an extreme concentration of powers and constitutional pluralism was in an incipient phase. Today it is a socio-political reality that contrasts with the still prevailing juridical-political structure. Although there are many other expressions of such contradiction, none had become as ostensible as that of 2020, because of its effects on the daily life of the entire population.

One of the data that corroborates the perceptual deterioration with respect to the order is the high level of disobedience of the home isolation order, which in turn had an adverse impact on the speed and dimension of contagion, and on the consequent lethality of COVID-19. Mexico's rate was among the highest in the world.

As can be seen in the transcription of article 184 of the Health Law, the participation of Congress is not foreseen. In the political, legal, and cultural reality of the eighties of the previous century, such an omission could be understood. The political reform of 1977 was beginning to take shape and its consolidation required numerous successive adjustments throughout the following two decades, in accordance with a gradualist style that was highly favored in Mexico. However, the incremental trend was interrupted after 2000, with few exceptions, such as the constitutional inclusion of the parliamentary question and interpellation and the coalition government, which are still not practiced, and the congressional reelection, which can become inconsequential due to lack of regulation. However, the core problem of a one-man government regime, without internal controls and with very weak external political controls, remains.

These archaic rules do not fit into the national normality. In a pluralistic society and in a hyper-communicated world, the presence of a one-man government structure is an anachronism. The

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complexity of state and government affairs; the growing multiplication of formal and informal groups that demand to be heard, and the differentiation of political positions and attitudes based on the exercise of freedoms, cannot be processed by concentrating power in the old way. Beyond any doctrinaire argument, the dysfunctionality of *monocracy* is obvious and has harmful effects on individual and collective life. Even in the United States, the cradle of the presidential system, the antiquated forms of the exercise of power have become a crisis.

The concentrating inertia is fed by the absence of political and even administrative controls. The Health Secretariat was not satisfied with applying the terms of article 184, but legislated for its own benefit. In the secretary's agreement of March 27, it states, unambiguously, that "in addition to the provisions of Article 184, the following extraordinary actions" are adopted. In other words, he assumed legislative powers directly and expressly.

The Constitution is clear: extraordinary powers to legislate are only allowed under the terms of Articles 29 and 131, and in both cases, they can only be exercised by the President of the Republic with the control of Congress. With this agreement, the Health Secretary set himself up as the supreme authority in the country.

On May 14 (2020), the Health Secretary published a new agreement with multiple objectives: to establish a strategy for the reopening of social and economic activities; to introduce a sanitary *traffic light*; and to adopt extraordinary actions. On that day, the number of deaths due to COVID-19 was 294. It was determined that as of June 1, construction industries and transportation equipment factories, as well as mining, could resume their activities. On June 3, the death toll was reported at 1,091 people. The decisions were processed according to confidential data and without listening to the opinion of experts outside the administration or the states. One more case of a very concentrated and discretional exercise of power.

The health emergency demonstrates that Mexico's institutional emergency also needs to be addressed.

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