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## HIV/AIDS and Human Rights in Mexico

by Fernando González-Martín\*

The “Official Mexican Regulation for the Prevention and Control of Infection by the Human Immunodeficiency Virus” (*Norma Oficial Mexicana para la Prevención y Control de la Infección por Virus de la Inmunodeficiencia Humana*), which went into effect on January 17, 1995, represents a concerted effort by Mexican authorities to address the HIV/AIDS epidemic within the parameters of the right to health guarantees, *inter alia*, enshrined in Mexico’s almost 80-year-old constitution. This forward-looking legislation is the result of unprecedented cooperation between a wide array of societal actors, including 17 governmental bodies and 19 NGOs.

The cooperation which enabled the *Norma Oficial* to be enacted stems in part from the debate within Mexico regarding the scope of human rights protections in Mexican society. Mexico’s constitution guarantees the rights of individuals (*garantías individuales*) against the government. As with most constitutions, however, many of these guarantees are simply “programmatic” in nature, that is, they are not rights which are enforceable by the courts against the State. In order to keep the constitution from becoming a dead-letter document, national governments often complement the guarantees with appropriate legislation which the courts are free to apply. Such is the case with the “right to health protection” (*derecho a la protección de la salud*) included in Article 4 of the Mexican Constitution. The General Health Law (*Ley General de Salud*), which attempts to define this right, came into effect on

**Forced testing has the effect of denying innocent Mexicans their fundamental rights.**

July 1, 1984. This “general” legislation itself has, in turn, been further defined, often amongst great controversy, through the adoption of Official Mexican Regulations (*Normas Oficial Mexicana*), each of which concentrates on a particular body of law.

In order to fully understand the innovation of the *Norma Oficial* regarding HIV, it is important to retrace a number of the events that led to the consensus that its adoption was urgent. Human rights became a major issue for both Mexico and her neighbors during negotiations

regarding Mexico’s entry into the North American Free Trade Agreement (NAFTA). Despite its 1981 ratification of the main international and regional human rights treaties, Mexico nonetheless retained a reputation for housing a “culture of impunity” regarding human rights violations. Conscious of this reputation and of its potential negative effect on the NAFTA negotiations, in 1990 the Mexican Federal Government created the National Human Rights Commission (*Comisión Nacional de Derechos Humanos* or CNDH). This new institution, with local branches in each of the 32 Mexican states, symbolized the Mexican government’s willingness to address human rights issues. Several complications, however, have plagued the efforts of the CNDH to enforce the

existing legal mechanisms for protecting human rights. The most important stumbling block has been the inability or unwillingness of the national authorities in Mexico to enforce existing laws and legislation.

Given this background, the new HIV legislation is an important step forward. For example, the *Norma Oficial* confronts the widespread use of mandatory testing which existed before its passage. Although designed to prevent the spread of AIDS, such forced testing has the effect of denying innocent Mexicans their fundamental rights. For example, in the early 1990s several jurisdictions either enacted or upheld measures requiring prospective employees, persons in need of surgery, couples seeking marriage licenses, and school applicants, to submit to testing for the HIV anti-body. Refusal to comply with this prerequisite would often result in the withholding of medical treatment or the



A collage of international AIDS awareness posters.

denial of employment, marriage licenses, or admission to particular schools.

Experts estimate that such repressive measures are usually ineffective in preventing the transmission of the virus and are extremely costly to society. In a country where health care resources are already scarce, mandatory testing is even less justifiable.

Compulsory testing as a prerequisite for the issuing of a marriage license is a clear example of culture and religion triumphing over rationality. This requirement is premised on the belief among many members of Mexican society, including those charged with the enforcement and interpretation of its laws, that couples do not engage in premarital sex. Even assuming the former were true, measures requiring mandatory testing would not necessarily be the most effective way of fighting the disease. This wholly mistaken

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conclusion has not only lead to a violation of the fundamental right to marry guaranteed in Article 4 of the Mexican Constitution, but also has added to the general climate of fear surrounding the virus.

The *Norma Oficial* addresses these problems in unequivocal language in Section 6.3, which states:

"6.3.1. All HIV testing shall be governed by the following principles:

6.3.2. It shall not be a prerequisite to engage in any activity, to have access to goods or services, for marriage, employment, enrollment in school, or to receive medical treatment;

6.3.3. It shall not justify the rescission of labor contracts, being expelled from school, eviction from a dwelling, the entry and exit from the country of nationals or foreigners."

Measures requiring mandatory testing would not necessarily be the most effective way of fighting the disease.

Other important issues addressed in the *Norma Oficial* include confidentiality of all information pertaining to a person's seropositive status. This is a particularly important issue in light of recently documented cases of extortion involving threats to publicly disclose a person's seropositive status. In addition, the law reaffirms the right to receive counselling from "institutions in the health sector" once the person has been informed that they have contracted the virus, with a view to helping them cope with the situation. The *Norma Oficial* also deals with lamentable living conditions in state prisons and other institutions, which could potentially constitute a violation of the internee's human rights.

Finally, since HIV/AIDS is a disease subject to epidemiological surveillance under Article 134 of the General Health Law, the nearest health authority must be advised of any newly-diagnosed case, usually by the treating physician or his/her personnel. Although the *Norma Oficial* maintains this obligation on the part of physicians, it provides that disclosure of this information must respect the dignity of those affected and safeguard the person's right to equal treatment, privacy, and non-discrimination, as well as take into account the need to protect public health from communicable diseases.

Whether the *Norma Oficial* will succeed in preventing the transmission of the AIDS

virus depends on the ability of the national authorities to enforce its provisions. Given its recent adoption, it is difficult to assess the true impact of the *Norma Oficial* at this time. Nevertheless, certain predictions as to its effect on the rights of persons living with HIV can be made.

Under the Mexican Constitution, the *Norma Oficial* takes precedence over any state law. From a strictly legal perspective, therefore, where the *Norma Oficial* applies, the lower courts must enforce it over state legislation. In practice, however, this does not always occur. One might ask then what additional measures might be taken to ensure that the new legislation is enforced. The CNDH has played only a limited role in reducing the number of human rights violations, primarily because it is not vested with the power to prosecute human rights violators. Furthermore, from its inception, the CNDH has not had jurisdiction over violations of electoral and labor rights, which constitute a large number of alleged human rights violations in Mexico. Finally, most of the recommendations handed down by the CNDH have been only partially implemented.

In 1992, the Mexican Congress, through an amendment to the constitution, granted the CNDH constitutional rank as an independent governmental institution. The amendment also authorized the establishment of state-commissions in an effort to decentralize the efforts of the CNDH by allowing persons to bring their complaints at the local level. The effectiveness and efficiency of this approach, however, has been seriously challenged. It has simply added yet another tier to the justice system. It may well also have made the monitoring of the human rights situation in Mexico, both nationally and internationally, even more difficult.

The actual effect of the constitutional amendment was to narrow further the CNDH's powers, essentially turning it into an appellate body for complaints brought before the state-commissions. The amendment did not give the CNDH the authority to prosecute, nor did it change the CNDH's original mandate. The amendment also placed limits on the ability of victims of human rights abuses to bring cases by requiring all such cases to be brought before the CNDH within the statutory period of one year. Finally, the amendment prohibits the CNDH from hearing cases which challenge the final judgments of administrative tribunals.

In conclusion, Mexico's adoption of comprehensive legislation designed to

protect the human rights of persons living with HIV is an accomplishment in itself. The question remains, however, whether there is a true commitment on the part of the government to go beyond an effort to better its image in the international public eye, now that Mexico has become a member of NAFTA. 🌐

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