2021 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Chavero v. Vadaluz

BENCH MEMORANDUM

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INTRODUCTION

Vadaluz has several features in common with other Latin American countries. During the second half of the 20th century, its government abused states of emergency. Despite never having had a military or civil-military dictatorship, there is a strong military influence in Vadaluz; for instance, it still has compulsory military service. Different branches of the government have been marred by corruption scandals. Like many Latin American countries in the 1980s and 1990s, Vadaluz adopted a modern constitution for a social and democratic state governed by the rule of law, with a defined system of checks and balances and a generous catalog of rights. However, perhaps the most predominant common feature that Vadaluz shares with other Latin American countries is inequality. Inequality manifests itself in many ways, but it is most evident in access to the right to health care.

Situations like pandemics are commonly known to exacerbate inequality. This may have the unintended effect of focusing only on how to mitigate the effects of the pandemic and not on how to reduce the inequality that precedes and will follow it. In democratic societies, policies to overcome inequality are built collectively, always considering the rights of vulnerable people, minorities, and groups of people that have historically faced discrimination. The main issue in this case is not specifically about access to health care, but about an arrest during a social protest supporting the right to health care.

During 2019 and 2020, the region saw many countries go through episodes of intense social and political protest. The United States, Haiti, Bolivia, Ecuador, Chile, Colombia, Argentina, Peru, and Venezuela, among others, witnessed the mobilization of diverse social groups such as students, peasants, workers, people of African descent, indigenous peoples, and women, advancing causes they consider just. Unfortunately, the protests were often accompanied by the excessive use of force, stigmatizing messages, and arbitrary acts by the authorities and security forces.

Exceptional situations such as a pandemic require exceptional measures. However, regardless of the gravity of the situation or the urgency of taking special measures, the standards, obligations, and parameters of human rights and the suspension or restriction of guarantees, as well as the principles of the rule of law and democracy, must be observed. Otherwise, no matter how legitimate the purpose to be protected or necessary the measures to be adopted may be, the sacrifice inherent in the restriction of rights may be disproportionate. Under these circumstances, the judiciary must set an example and take the lead in preventing arbitrariness and keeping the other branches of government from violating the rule of law or human rights through their actions.

ADMISSIBILITY

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
    a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
    b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
    c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
    d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.
2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
    a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
    b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
    c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Although it is clear from the facts of the case that the Inter-American Commission on Human Rights (IACHR) found the case admissible and, after its report on the merits, submitted the petition to the Inter-American Court of Human Rights (Inter-American Court), it is worth briefly considering what the IACHR's analysis might have been in declaring the individual petition admissible.

Claudia filed an individual petition with the IACHR on March 5, 2020, the same day she unsuccessfully attempted to file a *habeas corpus* petition through the judiciary's website. The reason Claudia could not file the *habeas corpus* was that the court was closed and the judicial system's server was down. The following day, March 6, 2020, Claudia was able to file a writ of *habeas corpus* and an unconstitutionality action. The former was adjudicated on March 15, 2020; the Federal Supreme Court ruled on the latter on May 30, 2020.

In examining the admissibility of the petition, there are three levels of analysis to consider: first, whether the remedies filed were appropriate for addressing the alleged violation; second, whether the domestic remedies and the individual petition were timely filed; and third, whether any of the exceptions provided for in Article 46.2 of the American Convention on Human Rights (ACHR) apply.

Appropriateness of remedies

First, it is unnecessary to exhaust *all* available remedies within the domestic legal system. It is sufficient to exhaust remedies that are normally available and appropriate for remedying the alleged violation. In the words of the IACHR:

> The rule on the exhaustion of remedies provided by Article 46.1(a) of the American Convention establishes that remedies generally available and appropriate in the domestic legal system must be pursued first. Such remedies must be secure enough; that is, accessible and effective in resolving the situation in question. The IACHR has established that the requirement to exhaust all domestic remedies does not necessarily mean that alleged victims are obligated to exhaust all remedies at their disposal. If an alleged victim pursued the matter through one of the valid and appropriate options in accordance with the domestic legal system, and the State had the opportunity to remedy the matter in its jurisdiction, the objective of international law has been achieved.[1]

The IACHR has consistently maintained that "*habeas corpus* is the appropriate remedy in all cases in which a person believes that he or she has been illegally deprived of his or her liberty."[2] It has also established that an unconstitutionality action may be a suitable remedy to challenge legislative provisions that directly affect the rights of alleged victims.[3] Therefore, it is clear that Claudia exhausted the appropriate domestic remedy (*habeas corpus*) for Pedro's situation.

Timing of the exhaustion of domestic remedies

The State might argue that the domestic remedies were adjudicated after the initial petition was filed. While this is true in this case, the exhaustion of domestic remedies is verified at the time of the admissibility decision and not before. The IACHR has said:

> [Regarding the State's questioning about the fact that the exhaustion occurred after the petition was presented], the Commission also reaffirms that what should be taken into account in determining whether domestic remedies have been exhausted is the situation at the time of the ruling on admissibility, because the time of presentation of the complaint differs from the time of the ruling on admissibility.[4]

Applying this to the present case, as stated in the clarification questions, the IACHR adopted the admissibility report on August 30. By that time, the *habeas corpus* and the unconstitutionality action had been decided and, therefore, domestic remedies had been exhausted.

Exceptions to the exhaustion requirement

There is no need to examine whether in the specific case there was an exception to the exhaustion of remedies, since the appropriate domestic remedies were exhausted. However, given that Claudia could not file the writ of *habeas corpus*—either in person or online—due to a circumstance attributable to the State, we might also consider the application Article 46.2(b), which establishes an exception to the requirement when "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them."

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[1] IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, para. 12.
[2] IACHR, Report No. 16/08, Petition 12.359. Admissibility. Cristina Aguayo Ortiz *et al.* Paraguay. March 6, 2008, para. 79; I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 65.
[3] IACHR, Report No. 51/18, Petition 1779-12. Admissibility. Kaqchikuel Maya Indigenous Peoples of Sumpango et al. Guatemala. May 5, 2018, paras. 13-14; 16.
[4] IACHR, Report No. 4/15, Petition 582-01. Admissibility. Raúl Rolando Romero Feris. Argentina. January 29, 2015, para. 40.

GENERAL COMMENTS ON STATES OF EMERGENCY

The jurist Pedro Cruz Villalón has noted that a state of emergency entails the maximum effort to extend the rule of law to emergency situations.[5] This mechanism seeks to grant special powers to the State and impose limits on its actions in response to exceptional situations that threaten the independence, security, or very existence of the State and, in this way, to overcome the situation or return to the previous state of normality. It is a concept through which the constitution and international law regulate the actions of the State in exceptional or emergency situations—a law of exception for exceptional situations.

However, in many Latin American countries, the concept of states of emergency has been distorted. They have been invoked for a prolonged periods of time, in situations that do not constitute real threats to the State or its population, and instead of seeking to protect human rights, they have been used to give greater leeway to arbitrary actions.[6]

Leandro Despouy, former United Nations Special Rapporteur on human rights and states of emergency, spoke of a sort of paradox of states of emergency, referring to the possibility of suspending rights "for the sole and unique purpose of restoring normality and guaranteeing the exercise of the most fundamental human rights."[7] Despouy also emphasized that international law admits such concessions, subject to the law. Article 4 of the International Covenant on Civil and Political Rights provides for exceptional derogation from international obligations. This standard was further developed by the Human Rights Committee in its General Comment No. 29. Under the American Convention, the suspension of guarantees is provided for in Article 27.

Both the declaration of a state of emergency and the measures the State takes to suspend the exercise of permitted rights must state the grounds on which they are based to ensure that they comply with domestic and international law. The suspension of guarantees is therefore not an escape from the rule of law, but a justified and temporary subjection to an exceptional legal framework.

In general, a state of emergency authorizes the executive branch to issue exceptional regulations on the exercise of the suspended rights, for the time strictly necessary. It does not give the executive branch carte blanche. Hence, states of emergency and the suspension of guarantees are normally subject to the following controls under both domestic and international law:

1. Parliamentary political oversight, through the consideration of its approval (or not) by the legislative branch;
2. Judicial review, before the constitutional court (in some countries, even *sua sponte*); and

[5] PEDRO CRUZ VILLALÓN, *Estados Excepcionales y Suspensión de Garantías* [States of Emergency and the Suspension of Guarantees], Tecnos, Madrid, 1984, p. 31.
[6] JUANA GOIZUETA VERTIS, *Los Estados de Excepción en América Latina: los controles desde el derecho internacional* [States of Emergency in Latin America: international legal oversight], p. 187.
[7] Report of the Special Rapporteur on human rights and states of emergency, Leandro Despouy. United Nations, Distr. GENERAL, E/CN.4/Sub.2/1997/19, 23 June 1997, para. 42.

3. International oversight, by providing reasoned notice of the measures taken to other States parties to the human rights treaties. Under the ACHR, such notice is given through the Secretary General of the OAS.

An important aspect to consider is that suspending the guarantee or exercise of rights does not amount to a hollowing out or invalidation of the right. This would be contrary not only to human rights but also to the rule of law and democracy itself. Suspension is a more severe and temporary restriction due to the nature of its causes, but never the elimination or complete hollowing out of the right. This exceptional regulation is normally assigned in national constitutions to the executive branch, but under the aforementioned limits and controls.

To avoid this absolutist or unlimited notion of the extraordinary regulation of guarantees, some modern constitutions and scholars (Brewer Carías and García Belaunde, among others) have called these extraordinary regulations of rights in states of emergency "restrictions."

Thus, two types of restrictions on rights would be admissible: under normal circumstances and under states of emergency. Within the inter-American human rights system, ordinary restrictions are subject, at a minimum, to the three-part test developed in the case law of the Inter-American Court of Human Rights; while, in the case of extraordinary restrictions under states of emergency, some elements may be relaxed, such as the principle of "*reserva de ley*" [whereby certain matters must be regulated exclusively by the legislature], which temporarily and exceptionally enables the executive branch to take measures through decrees with the force of law.

An initial criterion of analysis in cases of the "suspension" of rights is to ascertain the **reasons** for the state of emergency to determine the objective existence of the factual grounds that justify its declaration. Article 27.1 of the ACHR provides as legitimate reasons: war, public danger, or other emergency that threatens the independence or security of a State Party. Another factor to be analyzed is the strict **time frame of the measures** with a view to returning to normality as soon as possible. To this end, during states of emergency, only those exceptional measures that are strictly necessary are taken. Under Article 27.1 of the ACHR, States may "take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation."

SUSPENSION OF GUARANTEES

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

The suspension of guarantees may be decisive in adjudicating the case. If the State is considered to have validly declared a state of emergency or the measures adopted are considered true *suspensions*, these measures can be examined under the abovementioned framework and the criteria used by the Inter-American Court in its Advisory Opinion No. 8 and in cases such as *Zambrano Velez v. Guatemala* and *J. v. Peru*, to wit: the nature, intensity, extent, and particular context of the emergency, as well as the proportionality and reasonableness of the measures taken in response to the emergency.

But if the State did not validly declare a state of emergency or, as the Federal Supreme Court held (see clarifying questions), that the measures are not suspensions but merely ordinary *restrictions* that require weighing rights, they can be examined using the tests developed by the Inter-American Court in cases such as *Kimel v. Argentina* and *Álvarez Ramos v. Venezuela.*

Article 27 of the ACHR establishes, first, several requirements for the suspension of rights or guarantees, and second, a set of rights that may not be suspended under any circumstances. The Court has developed specific standards on states of emergency and their limits, particularly in Advisory Opinions OC-8/87 and OC-9/87. However, the case law on the analysis of an alleged violation of Article 27 of the ACHR has been more limited.

Limited time and extent of the emergency (art. 27.1)

The Inter-American Court has insisted that States must justify the declaration of states of emergency on the basis of objective and non-discretionary criteria. Accordingly:

> [i]t is the obligation of the State to determine the reasons and motives that lead the domestic authorities to declare a state of emergency and it is up to these authorities to exercise appropriate and effective control over this situation and to ensure that the

> suspension decreed is limited "to the extent and for the period of time strictly required by the exigencies of the situation," in accordance with the Convention. States do not enjoy an unlimited discretion; it is up to the Inter-American system's organs to exercise this control in a subsidiary and complementary manner, within the framework of their respective competences.[8]

The Inter-American Court has similarly held that:

> bearing in mind that Article 27(1) establishes different situations and that the measures adopted in any of these emergencies must be adapted to "**the requirements of the situation**," it is clear that what is permissible in one of them, may not be permissible in others (emphasis added).[9]

Regarding measures adopted within the framework of a state of emergency, the Court has indicated that:

> The legality of the measures adopted to deal with each of the special situations referred to in Article 27(1) will depend on the nature, intensity, complexity, and particular context of the emergency, as well as on the **proportionality and reasonableness** of the measures adopted in relation to it (emphasis added).[10]

The reasons for declaring a state of emergency must be analyzed case-by-case and the measures adopted must adhere strictly to the exigencies of the situation; this entails observing the criteria stated above.

The emergency situation

First, we should consider whether the reason given by Vadaluz constitutes a situation of public danger or other legitimate emergency that threatens the independence or security of the State.

The facts of the case show that the State declared a state of emergency because of the threat to public health posed by a pandemic caused by a previously unknown virus that apparently originated in pigs. The declaration of a state of emergency was made in light of the World Health Organization's (WHO) warning that the virus was highly contagious and was triggering acute respiratory infections that could, in extreme cases, cause death.

Based on a literal interpretation of Article 27, it could be argued that a pandemic, although extremely serious for public health, does not appear to pose a real and direct threat to the independence or security of the State in a strict and abstract sense. This argument is supported by the language of the ACHR itself, which seems directed at situations of domestic unrest or war that threaten States' sovereignty and political control over their territory. This argument can also point

[8] I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 47.
[9] I/A Court H.R., *Case of J. v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 139.
[10] I/A Court H.R., *Case of J. v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 139.

to other circumstances, such as the truly exceptional nature of the suspension of guarantees, to assert that it is unnecessary to declare a state of emergency in order to adopt suitable measures to address this phenomenon.

Using an evolutionary and progressive interpretation of what is meant by the State and multidimensional security, which includes traditional threats as well as *new threats* (including diseases and other health risks),[11] it can be argued that a pandemic does constitute a situation that threatens the State—first and foremost because the population is one of the three existential elements of the State: territory, population, and government. This argument can be supported by the OAS Declaration on Security in the Americas, which sets forth the concept of multidimensional security.[12]

Along the same lines, other statements and principles can be cited to highlight the vital importance of protecting public health. For example, referring to Article 45(h) of the OAS Charter, on developing an efficient social security policy, the Inter-American Court has pointed out that there is "an interrelationship between the undertaking of States to ensure an efficient social security policy and their obligation to ensure health care, especially in the context of endemic diseases."[13] The Inter-American Court has recognized that health is an autonomous human right.[14] In the words of the Court:

> [H]ealth is a fundamental human right essential for the adequate exercise of the other human rights, and that every individual has the right to enjoy the highest attainable standard of health that allows him or her to live a full life, understanding health not only as the absence of disease or illness, but also as a state of complete physical, mental and social well-being, derived from a lifestyle that allows the individual to achieve an overall balance.[15]

In addition, the Siracusa Principles on the derogation and limitation of the provisions of the International Covenant on Civil and Political Rights provide that public health may be invoked to address a serious threat to the health of the population and take measures specifically aimed at preventing disease or providing care for the sick.[16]

Depending on one's interpretation of security or emergency, Vadaluz may or may not have *articulated* a valid reason for declaring a state of emergency.

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[11] Organization of American States, Declaration on Security in the Americas, OEA/Ser.K/XXXVIII CES/dec.1/03 rev. 1, 28 October 2003.
[12] Organization of American States, Declaration on Security in the Americas, OEA/Ser.K/XXXVIII CES/dec.1/03 rev. 1, 28 October 2003.
[13] I/A Court H.R., *Case of Cuscul Pivaral et al. v. Guatemala.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No. 359, para. 99.
[14] I/A Court H.R., *Case of Cuscul Pivaral et al. v. Guatemala.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No. 359, para. 105.
[15] I/A Court H.R., *Case of Cuscul Pivaral et al. v. Guatemala.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No. 359, para. 105.
[16] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights United Nations/Economic and Social Council, Commission on Human Rights, 41st session.

Legality of measures

Analyzing the legality of measures requires a review of the following criteria: the nature, intensity, extent, and particular context of the emergency, as well as the proportionality and reasonableness of the measures taken in response to the emergency. Regarding Article 27 of the ACHR, the Inter-American Court has not elaborated further on the nature, intensity, extent, and particular context of the emergency, so it is up to the competition's participants to explain how these criteria apply to the specific case.

With respect to the particular context of the emergency, it can be emphasized that the full effects of the pandemic were unknown when the state of emergency was declared. This uncertainty can be a strong argument for defending the need to declare a state of emergency to protect the public health of the population.

However, regardless of the lack of case law developments on these parameters, Article 27 (suspension of guarantees) provides greater leeway to the State than other provisions of the ACHR, such as Article 30 (restriction of rights). It is therefore reasonable to assume that the level of scrutiny should be higher than it is for examining the restriction and weighing of rights under normal situations.

It should also be taken into account that the Inter-American Court itself has recognized that, although the ACHR provides for the suspension of certain guarantees and rights, in practice, rights cannot be stripped of their content because they are inherent to all persons. In the words of this court:

> An analysis of the terms of the Convention in their context leads to the conclusion that we are not here dealing with a "suspension of guarantees" in an absolute sense, nor with the "suspension of… (rights)," for the rights protected by these provisions are inherent to man. It follows […] that what may only be suspended or limited is their full and effective exercise.

With this understanding, it can be argued that the suspension of guarantees is a restriction of rights of high or heightened intensity due to the exceptional and serious situation that threatens the State and its population.

Principle of nondiscrimination

Article 27.1 stipulates that the measures adopted cannot involve any type of discrimination.

Decree 75/20 established that:

> The movement of persons outside authorized times and places; public meetings and demonstrations of more than three people; large-scale public events such as concerts, cinemas, and entertainment […] are strictly prohibited.

One possible argument that could be put forward is that the measures could have disproportionate impacts and thus indirectly violate the *jus cogens* principle relating to the prohibition of discrimination.[17] Such is the case of unhoused persons, street vendors, sex workers, and people with psychosocial disabilities. This argument could be built on the premise that, under the ACHR, both direct and indirect discrimination are prohibited. Regarding the latter, the Inter-American Court has held that:

> a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups.[18]

It is important to clarify that not every difference in treatment is discriminatory[19] and therefore contrary to the ACHR. This argument is supported by the Court's finding that:

> [I]n cases of prejudicial differential treatment, that is, when the differentiating criteria correspond to one of the categories protected by Article 1(1) of the Convention which relate to: (i) permanent personal traits that an individual cannot dispose of without losing his or her identity; (ii) groups that are traditionally marginalized, excluded or subordinated, and (iii) irrelevant criteria for the equitable distribution of property, rights or social benefits, the Court considers that there is evidence that the State has acted arbitrarily.[20]

Abuse of power

Another way to allege a violation of the principle of nondiscrimination in the measures taken is to invoke the concept of abuse of power. In the case of *Miguel Sosa v. Venezuela*, the Inter-American Court developed the concept in these terms:

> To the extent that an act of covert persecution, discrimination, or reprisal or an arbitrary or indirect interference in the exercise of a right is alleged, the motive or purpose of a given act of State authorities becomes relevant to the legal analysis of a case. A motivation or purpose other than the one provided in the law empowering the State authority to act may demonstrate whether the action can be considered arbitrary or an abuse of power.[21]

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[17] I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 101.
[18] I/A Court H.R., *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 235.
[19] I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 66.
[20] I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 66.
[21] I/A Court H.R., *Case of San Miguel Sosa et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348, para. 191.

Rather than emphasizing whether the measures are reasonable and proportional, or whether, for example, the State could use a punitive measure to protect a legitimate aim, this concept looks to the reasons behind the decision to introduce a restrictive measure. Abuse of power is based on the premise that, behind the apparent motives of a measure, there was discrimination or an intent to persecute or retaliate. In addition, by relying on the presumption of legality of administrative acts, the State deliberately adopted measures that indirectly sought to pursue an unlawful aim.

Following this reasoning, it could be argued that Decree 75/20 did not seek to protect public health, and that, instead, the State took advantage of the pandemic to establish measures with the aim and *deliberate* intent to quell the social protests that had brought the country to a standstill. Here, decisions such as that of the German Constitutional Court can be cited to support the position that an absolute ban on public protest is not valid—even in a pandemic—and that restrictions must be analyzed case-by-case, based on the circumstances.[22]

To refute the alleged abuse of power, the State could provide explanations based on the seriousness of the pandemic, which to a certain extent was unforeseeable, and which required extraordinary measures to protect the country's population. This is particularly relevant if we consider that, at the date of publication of Decree 75/20, the consequences of the virus for human health were unknown, so it was reasonable for the State to have a duty to prevent further harm that could even lead to death. Moreover, it is not clear from the facts of the case that there was a deliberate intent to quell the pandemic protests.

Territorial scope

Decree 75/20 did not have a specific geographical scope. Therefore, it can be assumed that its scope of application is the entire national territory of Vadaluz. It is not inferred from the facts of the case that the nationwide application of Decree 75/20 is disproportionate or unreasonable because the threat to public health is global and widespread. It should be noted, however, that the Inter-American Court has examined this limit in cases involving the use of military forces for domestic security tasks.[23]

Temporal scope

Regarding temporal scope, Article 27 of the ACHR is clear in stating that the suspension of guarantees must be strictly limited in time by the exigencies of the situation. Article 2 of Decree 75/20 established a "state of emergency […] for the duration of the swine pandemic." In some specific measures, it also indicated that the restrictions would be "until further notice." Here it is important to consider that a phenomenon such as a pandemic does not simply disappear all at

[22] The case stemmed from the announcement by a group of people of a protest under the slogan "Strengthen health instead of weakening fundamental rights. Protection against viruses, not against people," in which about thirty people reportedly participated. They had organized to maintain safe distancing as required by the coronavirus ordinance (with markings on the ground indicating the position of the participants). "*TC Federal alemán defiende derecho de manifestación, también en tiempos de pandemia*" [Germany's Federal Constitutional Court upholds right to demonstrate, even during a pandemic], April 20, 2020, *Diario Constitucional*, available at: https://www.diarioconstitucional.cl/2020/04/20/tc-federal-aleman-defiende-derecho-de-manifestacion-tambien-en-tiempos-de-pandemia/

[23] I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 94.

once but can last over time and evolve in stages. The ambiguity surrounding the duration of the state of emergency raises questions such as: What is considered the end of the pandemic? Who determines the end of the pandemic? What are the objective parameters by which it is determined?

In practice, then, the phrase "for the duration of the swine pandemic" is a future and uncertain—but determinable—dispositive condition. This means that the period for the suspension of guarantees cannot be predetermined with a fixed date, and, therefore, there is no express certainty regarding its strict temporal scope. What is certain is that the state of emergency cannot last beyond the swine pandemic.

By not setting a precise, fixed, and determined time limit, it can be argued that the measures risk ceasing to be exceptional or going beyond the exigencies of the situation. In a scenario that lasts over time—like a pandemic—these measures should be evaluated progressively, objectively, and periodically. In this regard, it can be argued that Executive Decree 75/20 did not satisfy the requirement of setting a time limit for the suspension of guarantees.

On the other hand, the State may argue that, precisely because of the uncertainty inherent in a phenomenon such as a pandemic, measures must be established for the duration of the pandemic, which is unknowable in advance. It could also be argued that the fact that the suspension of guarantees is subject to a condition does not mean that the objective exigencies of its limited duration in time are being exceeded, and that to assume otherwise would be to unfairly presume bad faith on the part of the State.

Material scope (art. 27.2)

Analyzing the material scope of the restriction involves examining whether non-derogable rights have been suspended.[24] According to Article 27.2, these are:

> Right to Juridical Personality, Right to Life, Right to Humane Treatment, Freedom from Slavery, Freedom from Ex Post Facto Laws, Freedom of Conscience and Religion, Rights of the Family, Right to a Name, Rights of the Child, Right to Nationality, and Right to Participate in Government, or of the judicial guarantees essential for the protection of such rights.

A careful reading of Decree 75/20 shows that the State did not *formally* suspend any of the guarantees enshrined in Article 27.2. Instead, it adopted measures on rights that may be suspended, such as personal liberty and the right of assembly. Given the nature of infectious diseases, it could be argued that the measures taken were within the scope of Article 27.2 and were appropriate to protect public health and prevent further contagion. Based on this reasoning, the State could even contend that, if it had not taken strict measures, it could have incurred international responsibility

[24] I/A Court H.R., *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8; I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9; I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 53.

for failing in its duty to reasonably prevent violations of the right to health. Thus, the State could claim it is not responsible for violating Article 27.2 of the ACHR.

However, it could be argued—not based on its formal declaration, but because of its material impact in practice—that the decree suspended *de facto* two guarantees that cannot be suspended, to wit: essential trial rights and the principle of legality. In Advisory Opinion 8, the Inter-American Court concluded that the phrase "or of the judicial guarantees essential for the protection of such rights" contained in Article 27.2 covers Articles 7.6 and 25.1 and the filing of writs of *habeas corpus* and *amparo* [petitions for a constitutional remedy].[25] These provisions of the ACHR are reprinted below:

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 7. Right to Personal Liberty

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

It is clear from the facts of the case that, at the request of the judicial union, the executive branch did not include the justice system as an essential service, except for the family judicial police stations, which only have jurisdiction to hear complaints of gender-based violence. This meant that when Claudia went to court on March 4 to file a writ of *habeas corpus* and challenge the constitutionality of Decree 75/20, she found the buildings closed and the lights off. Certainly. Decree 75/20 did not suspend the filing of writs to challenge the legality of Pedro's detention. Indeed, it established that "all judicial remedies provided for in the legal system shall be available to challenge administrative detention for the violation of paragraph 3 of this Decree." However, to the extent that the decree failed to ensure the functioning of the courts, it could be considered that Pedro could not timely file an effective remedy to have a competent judge or court rule on the legality of his detention.

[25] I/A Court H.R., *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paras. 44-45.

On this point, the Inter-American Court has insisted that judicial remedies must not only be provided for in the State's legal system but must also be readily available and effective in practice:

> The remedy must be suitable to address the violation and the competent authority must be able to enforce it effectively. Moreover, (…) an effective judicial remedy means that the competent authority's analysis of a judicial remedy cannot be reduced to a mere formality but must examine the reasons invoked by the plaintiff and address them expressly. This is not to say that the effectiveness of a remedy is evaluated on the basis of whether it produces a favorable outcome for the plaintiff.[26]

The Human Rights Committee noted in its General Comment No. 29 that:

> Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation […] to provide a remedy that is effective.[27]

Following this logic, it could be argued that, although States may avail themselves of Article 27 of the ACHR to suspend guarantees for the time and to the extent strictly necessary in emergency situations, they may not interrupt the functioning of the judiciary, as this would affect not only democracy and the rule of law but also essential rights and guarantees that cannot be suspended even in emergency situations, such as judicial protection from arrest or legal challenges to acts that violate rights protected under the Convention. Despite the challenges that may arise during a pandemic, the administration of justice must be considered an essential public service that cannot be suspended.

There are two considerations regarding the alleged material suspension of the principle of legality. The first relates to the lack of a congressional decision on the validity of the state of emergency; the second concerns the administrative penalty of deprivation of liberty.

From the facts of the case and the clarification questions, it is clear that Congress did not issue a decision on the legality of the declaration of the state of emergency within eight days, as required under the domestic law of Vadaluz. In fact, several months after the publication of the decree, Congress is still debating the validity of virtual sessions (see clarification questions). We should recall that the declaration of a state of emergency is not a license to disregard the legal requirements of the domestic legal system.

In General Comment No. 29, the Human Rights Committee noted that:

> When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.[28]

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[26] / A Court H.R., *Case of Dismissed Employees of Petroperú et al. v. Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344, para. 155.

[27] Human Rights Committee of the International Covenant on Civil and Political Rights, General Comment No. 29, States of emergency (Article 4), adopted at the 1950th meeting, on 24 July 2001, para. 14.

[28] Human Rights Committee of the International Covenant on Civil and Political Rights, General Comment No. 29, States of emergency (Article 4), adopted at the 1950th meeting, on 24 July 2001, para. 14, para. 2.

Along these lines, one possible argument to allege that the principle of legality was materially suspended in violation of Article 27.2 of the ACHR is to cite the lack of a decision by the Vadaluz Congress.

To refute this argument, the State can contend that it was imperative to take measures to address the pandemic and to safeguard public health and that the executive branch could not wait until the legislature was in session to do so. The unwillingness of the members of congress to meet—out of fear of exposure to the virus—can even be understood as an indication of the urgency of taking measures to prevent the spread of the virus. In addition, as noted in the clarification questions, the Federal Supreme Court of Vadaluz itself urged Congress to resume its activities.

Regarding an alleged material suspension of the principle of legality through the administrative penalty, the answer to clarification question 22 stated that the executive branch did not have the authority to establish criminal offenses. It could be argued that, although the administrative penalty is not a criminal penalty strictly speaking, it is a punitive measure: deprivation of liberty. Therefore, its enactment and enforcement in this case could violate the principle of legality enshrined in Article 27.2 of the ACHR.

A counter argument could be made that it is precisely the declaration of a state of emergency that grants extraordinary powers to the executive branch, and that the publication of Decree 75/20 satisfied the principle of legality to the extent that it imposed an administrative penalty, which was in effect at the time of its enforcement, and which entailed the suspension of a right that may be suspended, i.e., personal liberty.

Notice to the OAS as a collective guarantee mechanism (art. 27.3)

Finally, Article 27.3 establishes a duty to notify the other States Parties to the ACHR of the suspension of guarantees, through the Secretary General of the Organization of American States (OAS). The minimum essential content of this duty to inform is set out in Article 27.3: to inform the other States "of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension." The OAS website provides an official list of the States that have complied with this international reporting obligation.

In addition, several European States adopted extraordinary measures restricting rights due to the COVID-19 pandemic, based on ordinary legislation, without formally declaring a state of emergency or state of exception.

The Inter-American Court has held that this obligation is a collective guarantee mechanism:

> [T]he international obligation of States Parties to the American Convention under Article 27(3) constitutes a mechanism within the framework of the notion of collective guarantee underlying this treaty, which aim and purpose is the protection of human beings. Such obligation also constitutes a safeguard to prevent the abuse of the exceptional powers of the suspension of guarantees and allows other State Parties to evaluate if the scope of this suspension is consistent with the provisions of the Convention. Therefore, the non-

> compliance of this duty to inform implies a breach of the obligation set forth in Article 27.3.[29]

It is not entirely clear whether the content of this obligation is limited to *informing* other States of the measures taken, or whether this is also done for purposes of substantive oversight, so that the other States can exercise a kind of international scrutiny or monitoring. If it is a mere duty to inform with no consequence, it could be creating an incentive for States to invoke states of emergency or exception casually. If it is the latter, perhaps we could speak of an international reporting obligation so the other States parties to the ACHR can provide an effective collective guarantee.

In practice, States have tended to provide formal notification without any consequences or significant discussions. However, in 2020, in the Permanent Council of the OAS, the Member States had an exchange on measures taken to deal with the COVID-19 pandemic. In a cross-border scenario such as a pandemic, the comparative experience of countries can be very valuable in terms of the respect and guarantee of people's rights.

It is clear from the facts of the case that the State did notify the OAS of Decree 75/20, informing it of the reasons for declaring the state of emergency and the measures to deal with the pandemic. However, the State did not specify which guarantees of the ACHR were expressly suspended or the exact duration of their suspension. Therefore, based on a reading of Decree 75/20, it could be argued that the State partially violated Article 27.3.

The lack of a formal suspension of guarantees has given rise to what former Rapporteur Leandro Despouy called *de facto* states of emergency. Despouy maintained that there may be irregularities or anomalies in the exercise of power that result in *de facto* states of emergency. This can occur in two scenarios: (1) when emergency measures are adopted without previously proclaiming a state of emergency; and (2) when such measures are maintained despite the official lifting of the state of emergency.[30]

Former Rapporteur Despouy drew up a list of countries in *de facto* states of emergency and included those whose legal systems authorized administrative detentions, limitations on freedom of expression, freedom of assembly, and freedom to demonstrate, and the imposition of severe penalties for noncompliance, without it being necessary to declare a state of emergency.[31]

Despouy also emphasized that, although the state of emergency had been "the legal means of 'legalizing' the worst abuses and the most pernicious forms of arbitrariness," it had gradually been consolidated as a true institution of the rule of law.[32]

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[29] I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 70.
[30] Report of the Special Rapporteur on human rights and states of emergency, Leandro Despouy. United Nations, Distr. GENERAL, E/CN.4/Sub.2/1997/19, 23 June 1997, para. 117.
[31] Report of the Special Rapporteur on human rights and states of emergency, Leandro Despouy. United Nations, Distr. GENERAL, E/CN.4/Sub.2/1997/19, 23 June 1997, para. 123.
[32] Report of the Special Rapporteur on human rights and states of emergency, Leandro Despouy. United Nations, Distr. GENERAL, E/CN.4/Sub.2/1997/19, 23 June 1997, paras. 3-8.

Applying these concepts to the case at hand, the State of Vadaluz could argue that, consistent with the rule of law and to avoid creating a *de facto* state of emergency, it formally declared a state of emergency through Decree 75/20.

The State could reiterate in its defense that it did declare a state of emergency and that, although it did not formally mention the articles of the guarantees it had suspended, in practice it is clear which ones they were; and that it complied with its duty to inform the other States through the OAS. This was done precisely to avoid a *de facto* state of emergency, which is contrary to international law.

FREEDOM OF THOUGHT AND EXPRESSION, RIGHT OF ASSEMBLY, AND FREEDOM OF ASSOCIATION IN RELATION TO THE PRINCIPLE OF LEGALITY

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a. respect for the rights or reputations of others; or
    b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

The facts of the case state that the executive branch restricted protests consisting of more than three people, in the interest of protecting public health. They also mention that the country was facing intense social upheaval due to the televised death of Maria, and that students were also continuing the protests that had brought the country to a standstill before the start of the pandemic. These circumstances may suggest that, because freedom of assembly was restricted in such a widespread and indiscriminate manner, freedom of expression, the right of assembly, and freedom of association could also have been violated. These rights are therefore discussed together in this section. The Inter-American Court has recognized that:

> Although each of the rights contained in the Convention has its own sphere, meaning and scope, it sometimes becomes necessary to analyze them together, owing to the specific circumstances of the case or the necessary interrelation among certain rights, in order to make an appropriate assessment of the possible violations and their consequences.[33]

The rights to freedom of expression, assembly, and association are interrelated because they are essential for the consolidation of a democratic society and make the democratic process possible;[34] hence, as the German Constitutional Court has held, blanket prohibitions of these rights are unlawful, and their authorization or denial must therefore be decided case-by-case and in a reasoned manner, according to the circumstances.[35]

[33] I/A Court H.R., *Case of Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 171.
[34] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 160.
[35] The case stemmed from the announcement by a group of people of a protest under the slogan "Strengthen health instead of weakening fundamental rights. Protection against viruses, not against people," in which about thirty people reportedly participated. They had organized to maintain safe distancing as required by the coronavirus ordinance (with markings on the ground indicating the position of the participants). "*TC Federal alemán defiende derecho de manifestación, también en tiempos de pandemia*" [Germany's Federal Constitutional Court upholds right to demonstrate, even during a pandemic], April 20, 2020, *Diario Constitucional*, available at:

Freedom of expression has been considered "a cornerstone upon which the very existence of a democratic society rests."[36] The Inter-American Democratic Charter declares freedom of expression to be one of the essential components of democracy.[37] This right has been extensively developed in the case law of the Inter-American Court. Broadly speaking, it protects the right to seek, receive, and impart ideas and information of all kinds, as well as the right to receive and know information and ideas disseminated by others.

Regarding the content of *freedom of assembly*, the Inter-American Court has said that:

> This right includes private meetings and also meetings in public places, whether they are static or involve movement. The ability to protest publicly and peacefully is one of the most accessible ways to exercise the right to freedom of expression and can contribute to the protection of other rights. Therefore, the right of assembly is a basic right in a democratic society and should not be interpreted restrictively.[38]

On the *right of association*, the Court has held that:

> [T]he American Convention establishes that those who are subject to the jurisdiction of the States Parties have the right and the freedom to associate freely with other persons, without the intervention of the public authorities limiting or obstructing the exercise of this right. In other words, this is the right to associate in order to achieve a legitimate common objective, without pressure or interference that could alter or denature this objective.[39]

In *Escher v. Brasil*, the Inter-American Court provided the following explanation with regard to freedom of association:

> Contrary to freedom of association, the right of assembly does not necessarily involve the creation of or participation in an entity or organization but can be expressed in a sporadic meeting or assembly for very diverse purposes, while it is peaceful and in keeping with the Convention.[40]

Below, we examine restrictions on these rights and reflect on a few aspects of the case.

Restrictions on these rights

A common feature of Articles 13, 15, and 16 of the ACHR is that their wording includes restrictions to protect legitimate aims such as public health, as long as they are provided for by law. These articles should be analyzed in light of Article 30 of the ACHR, which establishes that:

https://www.diarioconstitucional.cl/2020/04/20/tc-federal-aleman-defiende-derecho-de-manifestacion-tambien-en-tiempos-de-pandemia/

[36] I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70.

[37] Inter-American Democratic Charter, art. 4.

[38] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 167.

[39] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 185.

[40] I/A Court H.R., *Case of Escher et al. v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, para.169.

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

The Inter-American Court developed Article 30 in Advisory Opinion 6, specifying that the word "law" should not be interpreted as synonymous with any legal norm, but specifically:

> [T]he word "laws," used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.[41]

In this advisory opinion, the Court also acknowledged the constitutional possibility of legislative delegations, provided that:

> such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention.[42]

In examining the hypothetical case, it must be determined whether the executive branch of Vadaluz was authorized by an act of congress to restrict public demonstrations by more than three people or whether it had sufficient legislative delegation.

It is clear from the facts of the case and the clarification questions that the executive branch was not statutorily authorized to ban demonstrations by more than three people; nor did it have sufficient legislative delegation. The party representing the victims may argue that the restriction was arbitrary, since it did not adhere to the parameters established in Articles 13, 15, 16, or 30 of the ACHR.

Given this requirement, the State could rely on the fact that, constitutionally, when a state of emergency is declared, the executive branch is empowered or authorized to issue exceptional regulations on the suspended or restricted rights. In other words, when the principle of "*reserva de ley*" [whereby certain matters must be regulated exclusively by the legislature], is suspended or restricted under a state of emergency, the executive branch may issue exceptional regulations governing the exercise of the rights suspended under the state of emergency, for the time and through the measures strictly necessary.

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[41] I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 27.

[42] I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Right*s. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 30, 36.

Based on the facts of the case, it can also be argued that Congress was not in session and that it was imperative to take special measures that were necessary and urgent to protect the public, so it was forced to dispense with the enactment of a statute and acted by means of executive orders. In fact, the State can say that the unwillingness of the members of Congress to meet out of concern for their lives and well-being demonstrated the need and urgency of adopting extraordinary measures. In addition, as stated in the clarification questions, the Federal Supreme Court had to urge Congress to resume its activities.

Whether or not the State could dispense with a law to restrict rights, it is important to consider whether the restrictions adopted were compatible with the ACHR. Here, the State restricted several rights and imposed an administrative penalty of deprivation of liberty which, in our opinion, is punitive.

In its case law—specifically, in cases like *Kimel* and *Álvarez*—the Inter-American Court has been developing and refining a test to weigh the use of criminal law to protect the honor of public officials, on one hand, against the rights associated with freedom of expression, on the other. We think this test can be applied to the case, considering that Pedro was subject to a punitive sanction and that the right of public assembly is a vehicle for exercising freedom of expression.[43]

According to the test, the restriction must: (i) be previously established by law, in the formal and material sense; (ii) pursue an objective permitted by the American Convention, and (iii) be necessary in a democratic society, for which it must satisfy the requirements of legality, necessity and proportionality.[44]

(i) Strict legality

Examining whether the restriction to a right is precisely formulated in a law necessarily involves a reference to the principle of legality, established in the ACHR in these terms:

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

The Inter-American Court has underscored the importance of addressing this principle in criminal matters, holding that:

> crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum*

[43] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 167.
[44] I/A Court H.R., *Case of Álvarez Ramos v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019. Series C No. 380, para. 104.

> *crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.[45]

Although the case did not involve a criminal penalty for a "crime," strictly speaking, but rather an "administrative" penalty, it is reasonable to assert that it is a manifestation of the punitive power of the State, since Pedro was punished by being deprived of his liberty for failing to comply with a law. Therefore, in our opinion, the same rigorous standard should be applied as would be applied to a criminal provision; it should be strictly defined and punished by statute.

In *Fernández Prieto v. Argentina*, the Inter-American Court held that, where restrictions to personal liberty are involved because of the warrantless arrest of a suspect in alleged *flagrante delicto*, it is not enough for the law to provide for the grounds and conditions of the arrest; it must also define the punishable conduct in clear and detailed terms. In the words of the Court:

> Article 7(2) of the Convention requires not only the existence of regulations that establish the "causes" and "conditions" that authorize the deprivation of physical liberty, but also that these be sufficiently clear and detailed, so that they respect the principle of legality and prior legal definition of offenses as this has been understood by this Court in its case law.[46]

Our case requires an analysis of whether Articles 2.3 and 3 of Decree 75/20 clearly establish: (i) whether an executive order could create an administrative offense punishable by the deprivation of personal liberty; and (ii) whether the punishable conduct was defined to distinguish it from other acts and to specify the grounds and conditions for imposing the penalty of deprivation of liberty.

Regarding (i), we reiterate that the executive branch did not rely on a statute. Therefore, it can be deemed not to have satisfied the requirement of strict legality. However, the executive branch can argue in response that Congress was not in session and that it was imperative to take special measures that were necessary and urgent to protect the public, so it was forced to dispense with the enactment of a statute and acted by means of executive orders. The State can say that the unwillingness of the members of Congress to meet out of concern for their lives and well-being demonstrated the need and urgency of adopting extraordinary measures.

Regarding point (ii), a quick reading may suggest that articles 2.3 and 3 of Decree 75/20 are clear in prohibiting demonstrations of more than three people and imposing the respective penalty. However, the provisions under review do not fully comply with the principle of legality or the

[45] I/A Court H.R., *Case of Castillo Petruzzi et al. v. Peru.* Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 121.
[46] I/A Court H. R., *Case of Fernández Prieto and Tumbeiro. v. Argentina.* Merits and Reparations. Judgment of September 1, 2020. Series C No. 411, para. 89.

prior legal definition of criminal offenses. To give some examples, the rules do not establish whether the demonstrations must be in person or whether they can be carried out by virtual means. They also fail to mention whether more than three people, while observing the rules of social distancing and other safeguards such as masks, can meet and demonstrate publicly within a limited time and space; nor how much distance there can be between one group of three demonstrators and another, or whether the rule also applies to the police officers in charge of enforcing the rules.

Note: Solely to continue with the explanation of the full test, it will be assumed that the provisions under review do respect the principle of legality.

(ii) Purpose of the restriction

The Inter-American Court has established that this step requires verifying that the restriction pursues an objective permitted by the ACHR,[47] such as the protection of national security, public order, public morals, or public health. Here, the measure was adopted to protect public health in the face of the pandemic, which is a purpose compatible with the ACHR.

(iii) Necessity in a democratic society

Suitability

In this step, the analysis turns to whether prohibiting more than three people from demonstrating (restriction) is suitable to prevent the spread of infection and thus protect public health (a purpose compatible with the Convention).

One argument in favor of the suitability of this measure could be that it discourages people from insisting on face-to-face demonstrations which, by gathering several people in the same space, increase the risk of contagion.

However, it could also be said that the rule did not specify how much distance there could be between the people in the three-person group or how much distance there could be between one group and another group. In practice, the standard might not be a suitable means of mitigating infection risk either.

Note: To explain the full test, we will assume that the provisions do pursue legitimate aims, such as public health, under the ACHR.

Necessity

The necessity analysis requires an examination of whether there are alternative measures to achieve the legitimate aim and whether they are necessary and reasonable in a democratic society.[48] At the same time, when weighing different options to achieve the same end, the one that is the least

[47] I/A Court H.R., *Case of Álvarez Ramos v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2019. Series C No. 380, para. 104.
[48] I/A Court H.R., *Case of Kimel v. Argentina.* Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 74.

restrictive to the exercise of the right must be selected. In our specific case, the question is whether the executive branch could have resorted to different and less harmful measures to prevent the spread of the virus than banning demonstrations of more than three people and punishing violations with the deprivation of liberty.

The executive branch had alternative measures in place to mitigate the risk of contagion, such as requiring the mandatory use of masks and prudent distancing between demonstrators, a limited number of people, an authorized route and procedure, etc. It also had alternative penalties to detention, such as warnings and fines.

The Inter-American Court has held that "criminal law is the most restrictive and harshest means to establish liability for […] illegal conduct."[49] Again, although in this case the penalty was administrative rather than criminal, it is reasonable to assume that the same standard should be applied because it was a custodial sentence; Pedro was deprived of his liberty for violating an administrative rule that may be considered a punitive measure.[50]

Even if there was an imperative need to protect public health during a pandemic, the State chose the most restrictive measure. It did so despite having less harmful alternatives, or in any case, the ability to weigh them on a case-by-case basis, according to the circumstances. Therefore, the measure in the terms set forth in the decree was not strictly necessary.

Note: To explain the full test, it will be assumed that no less harmful alternatives were available, so it was essential to resort to an administrative penalty consisting of the deprivation of liberty.

Proportionality

An analysis is required to determine whether the restriction is strictly proportional to the aim pursued, so the sacrifice it entails is not exaggerated or disproportionate to the advantages obtained by the limitation.[51]

The Inter-American Court has established that the right of assembly is closely related to democracy and the right to defend democracy.[52] The Court has also held that the right to demonstrate is a means of exercising freedom of expression:

> The ability to protest publicly and peacefully is one of the most accessible ways to exercise the right to freedom of expression and can contribute to the protection of other rights. Therefore, the right of assembly is a basic right in a democratic society and should not be interpreted restrictively.[53]

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[49] I/A Court H.R., *Case of Kimel v. Argentina.* Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 76.
[50] In its case law, the Inter-American Court has examined administrative measures involving the deprivation of liberty, calling them punitive measures. On this point, *see* /A Court H.R., *Case of Vélez Loor v. Panama.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 170.
[51] I/A Court H.R., *Case of Kimel v. Argentina.* Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 83.
[52] I/A Court H.R., *Case of López Lone et al. v. Honduras.* Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 185.
[53] I/A Court H.R., *Case of López Lone et al. v. Honduras.* Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 167.

Restricting the right of assembly can thus undermine the exercise of freedom of expression and weaken democracy itself, "[creating] fertile ground […] for authoritarian systems to take root."[54]

Even if the measure was strictly necessary because there were no less harmful alternatives, the sacrifice involved in the measure seems exaggerated in relation to the advantages of the restriction.

In light of this test, it is clear that the restriction on the right of assembly was incompatible with the ACHR.

Alleged violation of freedom of expression

The facts of the hypothetical case mention that before the pandemic was confirmed, Vadaluz was undergoing an intense period of protests that had brought the country to a standstill. In this context, we should analyze whether the restriction on the right of assembly directly or indirectly violated the right to freedom of expression.

The Inter-American Court has said that the right of assembly is a way of exercising freedom of expression;[55] moreover, together with freedom of association, these rights are closely related to each other and to democracy.[56]

The question to be answered: Is it necessary to suspend freedom of expression through public protest to deal with a pandemic? Or to what extent and under what conditions would it be necessary?

In *Cepeda Vargas v. Colombia*, in relation to the extrajudicial execution of a political leader, the Inter-American Court found that the victim's right to freedom of expression and association was also violated. In its analysis, the Court stated that:

> [F]reedom of expression may be unlawfully restricted by *de facto* conditions that directly or indirectly place those who exercise it at risk or in a situation of increased vulnerability.[57]

Recognizing that there may be *de facto* conditions that unlawfully restrict freedom of expression, it bears asking whether Pedro's right to freedom of expression was violated. This is considering that it has already been determined that restricting the right of assembly and imposing a custodial sentence for noncompliance was incompatible with the ACHR.

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[54] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 165.
[55] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 165.
[56] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 165.
[57] I/A Court H.R., *Case of Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, para. 172.

If a State restricts the right of assembly—meaning the peaceful demonstration of people on public thoroughfares to demand the protection of other rights—and it is determined that such restriction was unlawful and incompatible with the ACHR, it also constitutes an unlawful restriction on freedom of expression. Regardless of the content, we should remember that the expression of opinions, the dissemination of information, and the articulation of grievances are central objectives of protests[58] and that the right to freedom of expression is exercised through public demonstrations and protests; hence, there is a strong interconnection between these rights.[59]

An outright and absolute ban on the right to public protest does not seem consistent with international standards. It does not seem necessary, unless the circumstances are examined and justified in each specific case, to prohibit something like a protest limited to a small group of people, with social distancing, etc.

Applying these concepts to the case at hand, if it is determined that the ban imposed by Decree 75/20 unlawfully restricted the right of assembly, and that Pedro was detained under this decree for demonstrating along with other people, it can be asserted that his right to express himself—in this case, in support of the right to health—was also violated.

Alleged violation of freedom of association

Given its importance in the democratic process, freedom of association is also closely related to political rights, freedom of expression, and the right of assembly.

In *López Lone*, which was related to the dismissal of a group of judges who called the removal of then President Zelaya a coup d'état, the Inter-American Court found that the penalty imposed affected the petitioners' ability to belong to the Association of Judges for Democracy.[60] For this reason, it found a violation of Article 16 of the ACHR.

Thus, to declare a violation of the right to freedom of association, it must be proved that the violation was motivated by the legitimate exercise of this right or that the real possibility of exercising this right was affected.

Before the pandemic was confirmed, demonstrations throughout Vadaluz brought together various groups, such as indigenous people, transportation workers, and peasants. Only a few associations, like "More Students, Fewer Soldiers," "Public and Private University Law and Political Science Students," and "Students for a Secular State" deliberately continued to protest *after* the publication of Decree 75/20.

It cannot be inferred from the facts of the case that Pedro was detained for exercising his legitimate right to associate rather than for demonstrating in a group of more than three people in violation

[58] Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State, para. 18.
[59] Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State, para. 2.
[60] I/A Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 186.

of Decree 75/20. However, assuming that the purpose of the association was to demonstrate in support of the right to health, it can be argued that Pedro's arrest indirectly affected his continued membership in the association.

RIGHT TO PERSONAL LIBERTY IN RELATION TO TRIAL RIGHTS AND THE PRINCIPLE OF LEGALITY

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

In general terms, the Inter-American Court has said the following with regard to personal liberty in the ACHR:

> [T]he essential content of Article 7 of the American Convention is the protection of the liberty of the individual against any arbitrary or illegal interference by the State. This article contains two types of very different regulations, one general and the other specific. The general one is included in the first paragraph: "Every person has the right to personal liberty and security." While the specific one is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7.2) or arbitrarily (Article 7.3), to be informed of the reasons for the detention and of the charges against the person detained (Article 7.4), to judicial control of the deprivation of liberty and to the reasonableness of the length of pre-trial detention (Article 7.5), to contest the legality of the detention (Article 7.6) and not to be detained for debt (Article 7.7).[61]

In its case law, the Inter-American Court has also maintained that "any violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7.1 thereof."[62]

[61] I/A Court H. R., *Case of Fernández Prieto and Tumbeiro. v. Argentina.* Merits and Reparations. Judgment of September 1, 2020. Series C No. 411, para. 65.
[62] I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 54.

With particular regard to personal liberty, the ACHR guarantees the principle of *nullum crimen nulla poena sine lege*, not only in Article 9 but also in Article 7.2, which provides that no one may be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution and the laws. Hence, establishing the grounds for a physical deprivation of individual liberty requires a formal and material law, in the terms established by the Inter-American Court of Human Rights.

In this case, the police allegedly arrested Pedro *in flagrante delicto* for demonstrating with more than three people, in violation of Decree 75/20. The first step in analyzing whether his detention was unlawful or arbitrary is to review whether the law invoked to justify his detention complied with the principle of legality and the prior definition of criminal offenses.

Although Decree 75/20 did not create a "criminal" offense, but rather a punitive administrative sanction, the same standard must be applied as for criminal provisions. Under the ACHR, warrantless arrests *in flagrante delicto* are not prohibited, but they are related to criminal offenses. Hence, the Inter-American Court has been categorical in establishing that such an arrest refers to a person who is the likely perpetrator of a crime:

> [T]hose provisions that include and enable conditions that permits a detention without a court order or *in flagrante delicto*, in addition to meeting the requirements of legitimate purpose, appropriateness and proportionality, must establish the existence of objective elements so that it is not mere police intuition or subjective criteria, that cannot be verified, that are the reasons for a detention. This means that the purpose of the legislation enabling this type of detention must be for the authorities to exercise their powers when faced with the existence of real, sufficient and concrete acts or information that, concurrently, would permit an objective observer to reasonably infer that the person detained was probably the perpetrator of a criminal offense or misdemeanor.

Article 7.2—as well as Article 9—of the ACHR requires that criminal offenses and penalties be established by law in the formal and material sense. At first sight, Decree 75/20 cannot be considered a "formal law" (statute), since it was not enacted by the democratically elected legislature. It also bears repeating that it is not enough for the punishable conduct to be pre-established in the law; it must be defined clearly and in detail.[63]

Articles 2.3 and 3 of Decree 75/20 do not clearly define the punishable conduct, leaving its enforcement to the discretion of police officers. For example, they do not establish what type of demonstrations are meant (artistic, social, etc.), nor whether the demonstrations must be in person, or whether they can be carried out virtually. Nor do they mention how much distance there can be between people in a group of three demonstrators or between one group and another, or whether the rule also applies to the police officers in charge of enforcing the decree.

Assuming that the law pursued a legitimate aim (such as protecting public health), and assuming that the imposition of a custodial penalty is a suitable means to discourage demonstrations, the

[63] I/A Court H. R., *Case of Fernández Prieto and Tumbeiro. v. Argentina*. Merits and Reparations. Judgment of September 1, 2020. Series C No. 411, para. 89.

provisions under review do not explain in detail the causes and conditions for imposing the respective penalty, which prevents an assessment of the proportionality of its application. For these reasons, Decree 75/20, under which Pedro was deprived of his liberty, was vague and in violation of Article 7.2 of the ACHR.

Regarding the guarantee provided for in Article 7.5, it is important to mention that the ACHR does not require that the detainee be brought before a judge, since it allows the alternative of being brought before "[another] officer authorized by law." However, Article 7.5 also requires that such other officer be authorized by law "to exercise judicial power." In this case, Pedro was arrested, taken to police headquarters, and charged with an "administrative offense," which could raise the question of whether the police or administrative authority were competent "to exercise judicial power" in accordance with Article 7.5 of the ACHR.

The proceedings at the police headquarters must also be governed by the principles of due process or the right to a fair trial enshrined in Article 8 of the ACHR. The Inter-American Court has been adamant in establishing that:

> (…) Although Article 8 of the American Convention is entitled "Right to a Fair Trial," its application is not limited strictly to judicial remedies, "but to a series of requirements that must be observed by the procedural bodies" so that a person may defend himself adequately against any act of the State that could affect his rights.[64]

The administrative authority before which Pedro was presented, charged, tried, and convicted, should have, at all times, respected due process guarantees, i.e., "the procedural requirements that should be observed" so that individuals can adequately defend their rights in the face of any State action that may affect them.[65] On this point, the Inter-American Court has held that:

> [D]omestic legislation must ensure that the official legally authorized to conduct judicial functions fulfills the requirements of impartiality and independence that should govern anybody authorized to determine the rights and obligations of persons.[66]

Here, the police failed to observe the guarantee of impartiality and independence, since the police authorities who arrested Pedro were the same ones who prosecuted him and sentenced him to four days of deprivation of liberty. It stands to reason that, having arrested Pedro and charged him with the administrative offense, the police had a preconceived idea of his responsibility.[67] Certain facts of the case can be used to support this argument, such as the statements of the police officers to the effect that "the students were being careless by continuing to protest and that Pedro's

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[64] I/A Court H.R., *Case of Ivcher Bronstein v. Peru.* Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 102.
[65] I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.
[66] I/A Court H.R., *Case of Vélez Loor v. Panama.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 108.
[67] The Inter-American Court used this reasoning in a case involving an administrative penalty of the dismissal and disqualification of an elected official. *See* I/A Court H. R., *Case of Petro Urrego v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406.

detention was meant to send a message." In conclusion, the State violated Article 7.5 in relation to Article 8 of the ACHR.

Unlike Article 7.5, Article 7.6 of the ACHR establishes that all persons deprived of their liberty have the right to go before a court or judge for a prompt decision on the lawfulness of their detention. Therefore, a challenge to the legality of the detention must be reviewed by a judge. According to the Inter-American Court:

> Article 7.6 of the Convention is clear when it establishes that the authority who must decide on the lawfulness of the "arrest or detention" must be a judge or court. The Convention is thereby ensuring that control of deprivation of liberty must be of a judicial nature.[68]

The facts show that Pedro's defense attorney was unable to file a writ of *habeas corpus* on March 4 and 5, preventing him from challenging the lawfulness of the administrative penalty before a judge. Consequently, it could be argued that there was a material violation of Article 7.6 in relation to Article 8.2 of the ACHR.

RIGHT TO A FAIR TRIAL

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
    a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
    b. prior notification in detail to the accused of the charges against him;
    c. adequate time and means for the preparation of his defense;
    d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
    e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
    f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
    g. he right not to be compelled to be a witness against himself or to plead guilty; and
    h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

[68] I/A Court H.R., *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 128.

In the previous section it was demonstrated that Pedro was not judged by an independent and impartial authority. He also could not challenge the lawfulness of his detention before a judge. This violates Articles 8.1 and 8.2(h) of the ACHR. This section will examine other guarantees established in this article, as well as particular duties developed in the inter-American case law.

Granting the defendant adequate time and means to prepare his defense

The facts of the case show that Claudia Kelsen, Pedro Chavero's lawyer, was only able to see him 15 minutes before he was brought before the chief of police at the police headquarters. In *Ruano Torres v. El Salvador*, the Inter-American Court found a violation of Article 8.2 considering, among other things, that counsel for the defense were prevented by police from working efficiently.[69] Because of this precedent, the actions of the police arguably rendered Claudia unable to provide adequate legal representation to her client, which violated Article 8.2 of the ACHR.

Duty to state the grounds for a decision

Based on Article 8 of the ACHR, the Inter-American Court has held that:

> The reasoning of a ruling and certain administrative acts should reveal the facts, reasons and norms on which the organ that issued them based itself in order to take its decision so that any indication of arbitrariness can be dismissed, while proving to the parties that they have been heard during the proceedings. In addition, it should show that the arguments of the parties have been duly taken into account and that all the evidence has been examined.[70]

Applying this to the case, it can be argued that the chief of police did not provide sufficient reasons for his decision, for example, to explain why he imposed the maximum detention provided for in Decree 75/20—four days—rather than a shorter period.

A defendant acquitted in a final judgment may not be tried again on the same facts

Article 3 of Decree 75/20 establishes the penalty of deprivation of liberty without prejudice to prosecution for the crime of failure to comply with public health measures, as established in the Criminal Code. This means a person could be punished with the administrative penalty under Decree 75/20 and then face criminal prosecution for the same conduct.

These are two different aspects of responsibility: administrative and criminal. A single act, such as torture by a police officer, may simultaneously give rise to disciplinary sanctions such as dismissal from office as well as the appropriate criminal penalty—and even civil liability for damages.

[69] I/A Court H.R., *Case of Ruano Torres et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 303, para.161.
[70] I/A Court H.R., *Case of Flor Freire v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315, para. 182.

However, in the case of a single act that is both a criminal offense and simultaneously prohibited by a punitive administrative sanction, the nature of the penalty could give rise to a violation of Article 8.4 of the ACHR. It can be argued that, given the nature of the penalty (deprivation of liberty), it would constitute a material violation of the principle of *non bis in idem*.

JUDICIAL PROTECTION AND ACCESS TO JUSTICE

AMERICAN CONVENTION ON HUMAN RIGHTS

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
    a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
    b. to develop the possibilities of judicial remedy; and
    c. to ensure that the competent authorities shall enforce such remedies when granted.

It has been shown that the State failed to provide an effective remedy for Pedro to challenge his deprivation of liberty under Decree 75/20. On March 4, 2020, Claudia tried to file a writ of *habeas corpus* in person but could not do so because the courts were closed. The next day, on March 5, 2020, she tried to file the writ online but was unsuccessful because the server was down. On March 6, 2020, Claudia was finally able to file the *habeas corpus*. However, by the time it was adjudicated, Pedro had been released, so it was dismissed. This violates the right to judicial protection, since it is not enough for remedies to exist formally; ensuring effective judicial protection requires being able to actually file them.

The main objective of the analysis of Article 25 of the ACHR is for the participants to explain how opportunities for an effective judicial remedy and access to justice should be provided during a pandemic. Since the region—and the world—has not faced a global phenomenon such as the pandemic since the creation of the ACHR, there were no specific standards on issues such as virtual access to justice or the electronic filing of petitions for constitutional remedies. However, general principles and standards on effective judicial protection should guide responses to this challenge. Reports from various international bodies, agencies, and organizations have begun to provide recommendations and standards on effective judicial protection during the pandemic.[71]

[71] CEJA, CEJA Report, *Estado de la Justicia en AL bajo el COVID19. Medidas generales adoptadas y uso de TICs en procesos judiciales* [State of Justice in LA under COVID19. General measures adopted and use of ICT in judicial proceedings], May 2020; International Commission of Jurists, Videoconferencing, Courts and COVID-19 Recommendations Based on International Standards, November 2020; *Asociación Civil por la Igualdad y la Justicia*-ACIJ (Argentina) Chilean National Association of Judges of the Judiciary (Chile) Claudia Escobar Mejía (Guatemala) International Commission of Jurists-ICJ (Colombia) *Fundación Construir* (Bolivia) *Fundación Tribuna Constitucional* (Bolivia) *Fundación Salvadoreña para el Desarrollo Económico y Social* - FUSADES (El Salvador) *Fundación para la Justicia y el Estado Democrático de Derecho*-FJEDD (Mexico) Legal Defense Institute-IDL (Peru) *Observatorio Derechos y Justicia*-ODJ (Ecuador) Due Process of Law Foundation-DPLF (Regional), *Funcionamiento de la Justicia en la Pandemia por COVID-19* [Operation of the Justice System during the COVID-19 Pandemic], October 2020.

It is important to clarify that the challenges are numerous and are not limited to the electronic filing of actions or petitions. The IACHR and the UN rapporteur on the independence of judges and lawyers issued a press release in January 2021 calling for the broadest possible access to justice as a fundamental means to protect and promote human rights and fundamental freedoms. They highlighted multiple challenges, including the suspension of judicial and prosecutorial activity, the suspension of deadlines and procedural steps in court cases, remote work, the digital divide, the use of digital platforms, the holding of hearings by videoconference, and guaranteeing the principles of openness and transparency in the processes for the selection of judges.[72]

It is also important to acknowledge that the virtual environment has certain advantages, but also its own challenges and sometimes undesired effects. During the meeting with civil society organizations at the 178th session of the IACHR, various stakeholders underscored the importance of bringing detainees directly before a judge to prevent torture and other cruel treatment. Organizations reported that holding "custody" hearings by video has allowed cases of torture and cruel treatment to occur, with a disproportionate impact on people of African descent. We therefore consider that this type of hearing must always respect the principle of immediacy and be held in the presence of a judge.

OTHER ISSUES

The case raises other issues that, while not closely connected to the main dispute, warrant analysis.

Directive No. 1 of 2020

The association of women justice authorities contended that continuing to provide in-person services at the family police stations was creating a disproportionate impact on the family. This was because 90% of the staff of the family judicial police stations were women with school-age children and, given persistent gender inequality, caregiving tasks continued to fall mostly on women.

In response, the governing body of the judicial union—composed mainly of men—said that it could not assign judges from other jurisdictions to the family judicial police stations, as this would violate the principle of irremovability of judges.

This principle establishes that:

> "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[73]

Transferring judges from other jurisdictions or specialties in a situation such as the one in this case does not *per se* violate the principle of irremovability of judges. We must consider the conditions

[72] IACHR, Press Release 15/21, Joint declaration on access to justice in the context of the COVID-19 pandemic, January 27, 2021.
[73] United Nations, Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Principle 12.

for judges to be transferred during a pandemic: residence, family, transportation, protective measures at work, etc. Under certain circumstances, taking the necessary precautions could prove to be a valuable measure for adapting the justice system to adverse situations such as the pandemic.

However, this type of measure must be taken with caution, ensuring that it does not constitute retaliation against a particular justice authority to favor impunity or impede ongoing cases. Other issues may be reviewed, such as the temporary nature of the measure and the specialization most closely related to that required for the transfer. Particular considerations may also be examined in relation to the cases being heard by the person to be transferred.

In a case such as this one, the judiciary would be expected to transfer men to the family police stations, tacitly and expressly recognizing that the justice system must combat gender stereotypes and inequality.

Militarization of public safety

During the COVID-19 pandemic, we have seen how several States have resorted to the militarization of borders or the deployment of military forces for operations that should be carried out by civilian police forces.

Military forces are not suitable for public safety work, as they operate under a friend-or-foe mentality and are trained primarily to use lethal force.[74] Several international bodies (including the IACHR, the Inter-American Court, the UN Human Rights Committee, the Office of the High Commissioner for Human Rights, and the UN Special Rapporteur on Torture) have cautioned that these situations should be dealt with by civilian police forces subject to accountability and oversight mechanisms.

As the IACHR has said:

> [I]n a democratic system it is essential to make a clear and precise distinction between internal security as a function for the police and national defense as a function for the armed forces, since they are two substantively different institutions, insofar as the purposes for which they were created and their training and preparation are concerned. The history of the hemisphere shows that, broadly speaking, the intervention of the armed forces in internal security matters is accompanied by violations of human rights in violent circumstances. Therefore, practice teaches us that it is advisable to avoid the intervention of the armed forces in matters of internal security since it carries a risk of human rights violations.[75]

Military forces are ill-suited for dealing with situations involving common crime precisely because these situations do not constitute a threat to the sovereignty of the State.[76] Moreover, in our opinion, their use during a pandemic is not an appropriate measure for protecting public health.

[74] I/A Court H.R., *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220, para. 88.
[75] IACHR, *Report on the Situation of Human Rights in Venezuela,* OEA/Ser.L/V/II.118Doc.4, 2003, para. 272; *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II.Doc.57, 2009, para. 101.
[76] IACHR, *IReport on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II. Doc. 7 rev. 1, 1998, para. 403.

On the contrary, it can be a counterproductive measure, insofar as the concentration of soldiers and their subsequent deployment can increase the number of infections.

The request for a precautionary measure and provisional measure

Precautionary measures are based on Article 25 of the IACHR Rules of Procedure. In turn, this rule refers to Article 41(b) of the ACHR, Article 18(b) of the Statute of the Commission, and Article XIII of the Inter-American Convention on Forced Disappearance of Persons. Broadly speaking, it is a mechanism available to the IACHR to recommend that States take measures to protect an individual or group of individuals. This is done after verifying the "seriousness" and "urgency" of a situation that presents a risk of "irreparable harm." The IACHR has primarily granted precautionary measures in situations that pose a serious risk to the rights to life and personal integrity, given the irreparable nature of the harm caused by the violation of these rights.

Provisional measures, on the other hand, are a mechanism of the Inter-American Court based on Article 63.2 of the ACHR. The IACHR may request provisional measures if the matter is not before the Inter-American Court, or by the representatives of the victims if the matter is before the Inter-American Court. Provisional measures may be adopted after verifying the existence a situation of "extreme gravity and urgency."

Considering the interest of the proposed beneficiary, and knowing that the IACHR ultimately administers the right of access to the Inter-American Court, a scenario could arise in which the request for precautionary measures is not granted by the IACHR under its criteria and standards, but it decides to ask the Inter-American Court to adopt provisional measures. This would give the victims the opportunity not only to gain access to the Inter-American Court, but also to participate as beneficiaries and be able to supplement their arguments, petitions, and evidence. A similar situation occurred in the *Matter of Edwin Leonardo Jarrín Jarrín, Tania Elizabeth Pauker Cueva and Sonia Gabriela Vera García regarding Ecuador,*[77] where the IACHR, having declined to grant the requested precautionary measures, submitted a request for provisional measures to the Inter-American Court.

The IACHR and the Inter-American Court have addressed the protection of personal liberty in their decisions on the merits and judgments, respectively, as in the case of *María Elena Loayza Tamayo*. But the inter-American system has not yet developed the precautionary protection of the right to personal liberty in cases of arbitrary detention, instead focusing on the protection of life and humane treatment in connection with conditions of detention. The matter that has come closest to this in the Inter-American Court was the case of *Milagro Sala*. In that matter, the petitioner had requested alternative confinement that was less restrictive of her rights, since the circumstances of her detention were causing serious harm to her health, personal integrity, and life.[78] The Court considered the exceptional nature of pretrial detention and the direct verification

[77] I/A Court H.R., *Matter of Edwin Leonardo Jarrín Jarrín, Tania Elizabeth Pauker Cueva and Sonia Gabriela Vera García regarding Ecuador. Request for Provisional Measures.* Order of the Inter-American Court of Human Rights of February 8, 2018, see conclusions of law para. 25.

[78] I/A Court H.R., *Matter of Milagro Sala regarding Argentina.* Request for Provisional Measures. Order of the Inter-American Court of Human Rights of November 23, 2017. In operative paragraph 1, the Court decided: "[…] to replace Ms. Sala's pretrial detention

of her situation by an IACHR delegation that traveled to Argentina to learn first-hand about her case.

In our hypothetical case, the IACHR declined to grant the precautionary measures Claudia had requested after it determined that the situation was not serious and urgent enough to put Pedro's rights to life and personal integrity at risk. However, the IACHR could find—although it was not convinced that the precautionary measure was appropriate—that Pedro's situation warranted examination by the Inter-American Court for it to potentially grant a provisional measure.

with the alternative measure of house arrest, to be served at her home or place of habitual residence, or with any other alternative measure to pretrial detention that is less restrictive of her rights than house arrest […]."