

VENEZUELA: COVID-19 + DICTATORSHIP + COMPLEX HUMANITARIAN EMERGENCY

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SUMMARY: I. Introduction. II. State of alarm decree regulations. III. State of alarm decree flaws and constitutional violations. IV. The paralysis of justice. V. The de facto state of emergency is arbitrary and violates human rights. VI. Venezuela: the pandemic of all pandemics.

I. INTRODUCTION

In the wake of the COVID-19 pandemic, Venezuela's Nicolás Maduro issued decree No. 4.160 on March 13, 2020 (Official Gazette No. 6.519 of March 13, 2020) declaring a state of alarm, one of three different states of emergency provided for in the Venezuelan Constitution. This state of alarm has been renewed successively every thirty days since it went into effect.

The Venezuelan Constitution provides that states of emergency, may be declared by the President of the Republic in Council of Ministers (National Executive), when social, economic, political, natural or ecological circumstances occur that seriously affect the security of the Nation, its institutions and citizens, and the institutional capacity to deal with these circumstances is insufficient (art. 337). In states of emergency the Constitution empowers the National Executive to temporarily restrict constitutional guarantees, except those concerning the rights to life, prohibition of incommunicado detention or torture, due process, free access to information, and "other intangible human rights" (art. 337). In any case, state of emergency decrees must comply with the requirements, principles, and guarantees enshrined in

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the International Covenant on Civil and Political Rights and in the American Convention on Human Rights (art. 339).

State of emergency decrees may be extended for a period of time equal to that for which they were originally issued. The National Executive or the National Assembly (or its Delegate Commission) may revoke these decrees before their expiration, when the reasons for enacting the state of emergency cease to exist (art. 339).

These state of emergency decrees are subject to two levels of review, by the parliament and the judiciary. When it comes to parliamentary review, these decrees and their extensions must be submitted to the National Assembly for consideration and approval within eight days of being issued (arts. 338 final section, 339). As for judicial review, these decrees must be submitted within the period previously indicated, to the Constitutional Chamber of the Supreme Court of Justice so that it may rule on their constitutionality (art. 339).

Pursuant to the constitutional mandate contained in the final section of article 338, states of emergency are regulated in the Organic Law on States of Exception (Official Gazette No. 37.261 of August 15, 2001).

The state of alarm is a state of emergency to deal with “catastrophes, public calamities or other similar events that seriously endanger the security of the Nation or its citizens.” This type of state of emergency can last for thirty days and may be extended for up to an additional thirty days (art. 338).

Currently, Venezuela is simultaneously subject to two states of emergency: a state of alarm and a state of economic emergency. In effect, the new state of alarm in response to COVID-19 was added to the state of economic emergency that the Maduro regime decreed in 2018 and that is still in force. This state of economic emergency has been intermittently used to issue executive orders on economic matters, despite the fact that this is one of the subject matters and competencies constitutionally reserved for the National Assembly.

II. STATE OF ALARM DECREE REGULATIONS

The state of alarm decree issued in response to the COVID-19 pandemic establishes a series of measures to restrict activities and rights, and delegates the authority for adopting further measures. The most relevant measures are the following:

- a) The suspension of activities: (i) school and academic (art. 11); (ii) public shows, exhibitions, concerts, conferences, sporting events, and in general, any type of public gathering that involves an agglomeration of people (art. 12); (iii) limitations on establishments dedicated to the sale of food and beverages (arts. 12, 13); and finally, (iv) the closure of all public and private parks, beaches and spas (art. 14).
- b) The regulation of people, consisting of quarantine or temporary isolation measures for those: (i) suspected of having contracted the Coronavirus (ii) who have been confirmed to have contracted the Coronavirus; and (iii) who have been exposed to patients suspected or confirmed to have contracted the Coronavirus (arts. 23-29).
- c) The inspection of establishments, persons or vehicles: public security bodies are authorized to carry out any inspections they deem necessary in establishments and of persons or vehicles, when they have a well-founded suspicion that the provisions of this decree have been violated. These security bodies are authorized to “take immediate measures that guarantee the mitigation or disappearance of any risk of spread or contagion of the Coronavirus, COVID-19” (art. 28).

Although not explicitly mentioned in the state of alarm decree, these measures restrict a wide variety of constitutional and treaty rights such as the rights to free movement, public assembly, demonstrate and protest, education, free entry and exit from the national territory, entertainment, access to public spaces, and work and the freedom of religion and worship and to conduct economic activities.

III. STATE OF ALARM DECREE FLAWS AND CONSTITUTIONAL VIOLATIONS

The state of alarm decrees issued in response to the COVID-19 pandemic contain a series of constitutional violations, such as: the absence of regulations of rights that are not explicitly enumerated, but which have been restricted; the presidential self-authorization of legislative powers; the delegation of regulatory powers to ministers; and the breach of the duty to submit decrees to the National Assembly for its consideration (approval or disapproval). Even before the publication of the first decree in the official gazette, some of the measures restricting the movement of people and international flights had been adopted.

1. *The failure to comply with the duty to submit decrees to the National Assembly for approval*

During states of emergency the effective operation of governmental authorities that provide checks and balances on Executive Power—the Legislature and Judiciary—is more important than ever. The Constitution of Venezuela itself explicitly provides that “the declaration of a state of emergency does not interrupt the functioning of bodies of Governmental Authority” (emphasis added) (Art. 339).

Ever since parties in opposition to Nicolás Maduro’s regime won the majority of the National Assembly (NA) in Venezuela’s December 2015 parliamentary elections, the Maduro regime has subjected the NA to an unconstitutional “siege” that affects the body’s operations and the exercise of its powers. This siege has been carried out through more than 150 decisions handed down by the Supreme Court of Justice, especially through its Constitutional Chamber (CC). These judicial decisions usurped the NA’s constitutional power to control acts of the National Executive, including approving budgets, contracts of national interest and even the President’s annual message to the Republic, and reassigned this power to the CC. The NA’s constitutional powers were also usurped through the unconstitutional convocation, election, and installation of a National Constituent Assembly (NCA) in 2017. Not only did the NCA commandeer the NA’s constitutional powers to legislate and control the Executive Power, it also dismissed and then unconstitutionally appointed new senior government officials such as the Attorney General of the Republic. Since 2018 Nicolás Maduro has also issued a series of executive orders based on the state of economic emergency that encroach on the NA’s legislative powers.

Compounding this ruptured constitutional order, the state of alarm decree only provides for its referral to the CC of the Supreme Court of Justice, and not to the NA (Eleventh Provision), violating the express constitutional duty to send the state of emergency (alarm) decree to the NA for its consideration within eight days after it is issued (art. 339). The successive decrees to extend the state of alarm have also failed to require their referral to the NA for parliamentary review, as is expressly required by the Constitution (art. 338).

Ultimately, the National Executive’s non-referral of the state of alarm decree and its extensions to the NA invalidates said decrees, making them unconstitutional.

2. *Defects in the content of the decree and adopted measures*

The state of alarm and measures adopted in response to the emergency contain a series of substantive and procedural defects about which the Academy of Political and Social Sciences, amongst others, warned and which are summarized below:

A. *Even before the decree was published measures were adopted to restrict flights and the movement of people*

The Maduro regime began to adopt measures related to the restriction of free movement and suspension of work activities on Friday, March 13, 2020, even before the official publication of the state of alarm decree. The Official Gazette No. 6.519 dated March 13, 2020 was not publicly disclosed until March 17, 2020.

The duty to publish emergency decrees prior to the adoption of measures for their execution was breached. Therefore, the acts were adopted without any legal basis and therefore unlawful and arbitrary.

In addition to the above, de facto restrictions were imposed on the right to movement within certain areas or geographic zones, as well as entry and exit from these zones, without the National Executive having issued decrees published in the Official Gazette or having provided for alternative measures to allow for the circulation of vehicles or pedestrians in cases of emergency. These unlawful, arbitrary measures in no way contribute to overcoming the current crisis.

B. *Delegation to the Vice President of the power to suspend “other activities”*

The decree delegates the power to order the suspension of “other activities” beyond those it expressly enumerates to the Executive Vice President of the Republic (in consultation with the Ministers of People’s Power with competence in the matter). This rule contradicts the one contained in article eight of the same decree, which establishes that it is the President of the Republic—not the Vice President—who may order the suspension of activities in certain zones or geographic areas.

This delegation of power to the Executive Vice-president itself is also unconstitutional. In effect, article 337 of the Constitution establishes that it

is the President of the Republic in the Council of Ministers who may decree states of emergency and that said decree must contain regulations corresponding to the exercise of the right being restricted (art. 339). According to this constitutional reading and in line with the provisions of the Organic Law of States of Emergency (OLSE), it is the President of the Republic in Council of Ministers who is responsible for issuing the “measures” that regulate states of emergency. Therefore, once the state of emergency and its regulatory measures have been decreed, in accordance with the OLSE, the only thing that the President of the Republic can delegate is the decree’s “execution” to the authorities designated by the National Executive (art. 16), not the adoption of the measures themselves. In any case, the delegation of powers, in circumstances permitted by the legal system, must follow the necessary requirements, guidelines and parameters, which is not the case here.

C. The decree gives law enforcement agencies a “blank check”

The decree puts the inspection of people, establishments and vehicles in the hands of law enforcement agencies without providing justification or objective parameters for conducting these inspections. Law enforcement officials must simply consider there to be a well-founded suspicion that a provision of the decree has been violated in order to justify conducting a search. The aim of this rule is to authorize law enforcement to take immediate measures to guarantee the mitigation or disappearance of the risk of spread or contagion of the Coronavirus without any protocols for action (Art. 28).

The decree constitutes a blanket, excessive empowerment of law enforcement officials. It also puts police officers at risk of contracting infections arising from the activities they carry out without having established the appropriate personal protection protocols.

D. The president empowers himself to enact other “convenient” measures

In the decree the president gave himself the power to enact other measures that he deems “convenient” (First Final Provision). However, the extraordinary measures that can be enacted in a state of emergency are only those strictly “necessary and suitable” in the face of social, economic, political, natural or ecological circumstances that seriously affect the Nation, its

institutions and citizens, when “the powers available to them to deal with such situations are insufficient” (art. 337, Constitution).

Therefore, a restrictive executive measure that is simply “convenient”, but is not “necessary” and least of all suitable, does not meet the constitutional threshold required for a measure to be issued through an executive decree during a state of emergency.

E. The suspension of administrative procedures

The decree establishes that the suspension or interruption of an administrative procedure as a consequence of enacted measures suspending activities or restricting movement may not be considered a cause attributable to the party concerned, and may not be invoked to justify either a failure or delay in the fulfillment of governmental obligations (Sixth Final Provision).

This provision should be more precise, indicating which administrative procedures and limitation or prescription periods it is justifiable to suspend or interrupt and which are not, for example, due to urgency or in the interest of the individuals’ rights.

Furthermore, the decree has had to take into account other situations of legal uncertainty, such as labor and tax related issues, that Venezuelans are confronting due to the serious situation posed by the Coronavirus pandemic and the decree’s extraordinary measures restricting such activities and the freedom of movement.

IV. THE PARALYSIS OF JUSTICE

The Venezuelan judiciary lacks independence and impartiality according to all the United Nations and Organization of American States (OAS) reports. In this context, the Supreme Court of Justice (SCJ) ordered that from March 13, 2020 no court in the country could perform any judicial activities (“des-pache”) until May 13, 2020. This resolution has been extended successively.

The SCJ resolved that during the pandemic all cases will remain on hold and procedural terms would not run, which, according to the resolution, would not prevent urgent actions from being handled to ensure the rights of the parties. The courts that handle criminal matters will only deal with “urgent” matters, although the term “urgent” has not been precisely defined. When it comes to matters of constitutional rights’ protection (“amparo”), the courts are considered authorized and obliged to process and

decide cases, although the resolution does not specifically indicate which courts are in charge of this task. In the remaining courts, the presiding judges should adopt appropriate measures to guarantee access to justice. In regards to the operation of the SCJ, the resolution provides that the Constitutional and Electoral Chambers will continue to function during the state of emergency, but not the Court's other chambers (Civil Cassation and Criminal and Social Cassation).

To date, the country's courts remain largely paralyzed and measures have not been taken to prevent the suspension of the administration of justice.

The information regarding the operation of criminal courts is contradictory, but it seems that what currently exists is a rotation of "on call" courts that attend to "urgent matters." As previously noted, it is unclear what issues qualify as "urgent." The courts on duty only hear flagrante delicto cases and prosecutors are filing charges within legal deadlines to avoid freeing detained persons. In addition, courts are accepting petitions from parties, but these are only resolved when the respective court is on call.

Overall, the operation of criminal courts is very limited. There are no rulings in cases that are in the second and third phases of proceedings and the intermediate and trial phases are not taking place. In this regard, it is notable that the first section of Article 156 of the Organic Code of Criminal Procedure (OCCP) provides that "the administration of criminal justice is a permanent function of the State, consequently, it may not be interrupted by collective vacations or any other measure that affects compliance with procedural periods...".

The SCJ announced that a "Pilot Program" would be initiated in flagrante delicto cases through the implementation of "virtual hearings" and "electronic filing." However, that same announcement indicates that for now the first stage of the Pilot Program will only consist of basic connectivity tests. Therefore, at present hearings must take place in person, observing social distancing and using physical files. Despite various resolutions adopted in previous years and announcements regarding the possibility of electronic procedures and digitized files, these have not been implemented.

In conclusion, the effective operation of the Venezuelan justice system has not been guaranteed during the pandemic, and the internet-based modalities that do not require physical presence and are currently being adopted in other countries face serious obstacles in Venezuela, starting with the connectivity of government telecommunication company CANTV's internet service.

V. THE DE FACTO STATE OF EMERGENCY IS ARBITRARY AND VIOLATES HUMAN RIGHTS

On April 9, 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet, expressed her concern that “certain countries [have adopted] emergency powers that are unlimited and not subject to review” which has meant that in some cases “the epidemic is being used to justify repressive changes to regular legislation, which will remain in force long after the emergency is over”. In relation to Venezuela, ten UN Rapporteurs warned on April 30, 2020 that the health emergency is not an excuse to continue restricting human rights. These independent UN experts expressed their alarm at the increase in threats, attacks and charges against journalists, health workers and others in Venezuela, which could discourage those working to safeguard human rights.

Venezuela’s authoritarian regime has adopted a series of *arbitrary measures during the state of emergency* such as the detention of journalists and doctors, for sharing information or opinions concerning the pandemic in Venezuela. All of these are clear violations of rights such as those to personal freedom and freedom of expression, which according to Venezuelan law, cannot be restricted even during states of emergency. In any case, these measures are not legally justified, necessary, reasonable or proportional. The following are examples of the arbitrary measures that violate human rights:

- According to the NGO Provea, between March 4 and April 7, 2020 within the framework of the state of alarm, 34 arbitrary arrests were registered, at least 7 medical professionals were jailed and the list continues to grow.
- According to information from the NGO Foro Penal Venezolano, by March 2020 when the state of alarm was decreed, there were 362 political prisoners and from March 13, 2020 to May of same year, a total of 99 people had been arbitrarily detained and 16 persons forcibly disappeared. Many of these arrests have been carried out against opposition politicians, social leaders, and citizens in popular sectors that protested the suspension of public water or electricity services and the restriction of the gasoline supply.
- According to data from the National Union of Press Workers and from the NGO Espacio Público, under the state of alarm, between March 16 and May 3, 2020, there were 22 arbitrary arrests of jour-

nalists and photojournalists, 21 cases of attacks and 9 acts of censorship with the closure of 6 media outlets.

In light of this situation, journalist Delvalle Canelón, General Secretary of the National College of Journalists, stated that “the Government seeks to instill fear in journalists so that the media censors itself.” Indeed, since the end of February 2020, information about the pandemic has been restricted, and opinions about the spread of the Coronavirus in Venezuela have generated reprisals, threats and intimidation. Furthermore, reports of potential Coronavirus cases were met with attacks and insults meant to discredit journalists’ work.

The Maduro government and other authoritarian regimes have used the COVID-19 pandemic as a pretext to declare de facto states of exception and emergencies in order to introduce arbitrary measures that threaten human rights. For this reason, several international human rights bodies, including the United Nations High Commissioner for Human Rights, the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), and the Council of Europe have issued alerts, have begun to work on specialized human rights standards and have created special monitoring groups.

Scientific investigations

Through the joint Resolution issued by the Ministry of Health and Ministry of Science and Technology on April 16 (Official Gazette No. 41.863 of April 21, 2020), under the guise of addressing the COVID-19 pandemic, essential rights associated with the freedom of scientific research were unnecessarily and disproportionately restricted in violation of the Constitution and human rights treaties.

Under the pretext of the state of alarm, these state agencies were given powers that they do not possess to restrict the freedom to seek, receive, and disseminate information and ideas of all kinds. Article 3 of this Resolution provides that any scientific research project related to COVID-19 must have a government “registry” to which “all the requested information must be provided”. The nature of information that must be provided is not known with certainty and is not indicated in the Resolution. In addition, COVID-19 research must be approved by the research Ethics Committees (although these committees specialize in evaluating projects specifically focused on human and animal experimentation).

VI. VENEZUELA: THE PANDEMIC OF ALL PANDEMICS

The COVID-19 pandemic has reached Venezuela at the worst moment in its contemporary history: when the country has no rule of law or democracy. Abuses of power in Venezuela are unchecked, and the separation of powers, judicial independence and guarantee of rights are nonexistent.

1. *The Complex Humanitarian Emergency*

Venezuela suffers from a complex humanitarian emergency that has had dramatic consequences for the vast majority of its population and is characterized by: extremely high levels of malnutrition; lack of medical attention due to a crisis in public health services; shortage of medicines and basic foods; and the prolonged absence, suspensions and interruptions of basic public services such as water and electricity. In short, the Venezuela of today is a picture of poverty and exclusion. The responsibility of the State and specifically of the regime in causing this complex humanitarian emergency, as well as its lack of adequate responses to the emergency, is evident. Despite the government's democratic illegitimacy, it has an obligation to adopt urgent, effective and necessary measures to protect and preserve the health of Venezuelans, guarantee the timely, effective and efficient care of the affected individuals, all while respecting fundamental rights.

On April 2, 2020, the Academy of Physical, Mathematical and Natural Sciences of Venezuela warned that the National Institute of Hygiene was the only laboratory authorized to process the tests of patients suspected of having contracted COVID-19, despite the fact that other labs across the country also had capacity to conduct and process these tests. The Academy viewed this as not only causing an excessive focus and burden on one laboratory, but also as elevating the risk for the distortion of information. The public health system in Venezuela has collapsed. Most of the country's hospitals are not equipped to deal with COVID-19—they lack water, disinfectants and protective medical equipment. The existing capacity of intensive care units barely reached 84 hospital beds in the entire country. Malnutrition and food insecurity in large sectors of the population place them in a highly vulnerable situation. Most of the population does not have the economic capacity to accumulate food for several days, making

it impossible for them to abide by the quarantine rules, as they must live day-to-day and frequent markets. There are also serious restrictions on the supply of drinking water—only 11% of the population has an uninterrupted supply—, which makes it difficult and at times impossible to follow the World Health Organization’s recommended hygiene standards.

Although Venezuela has been one of the most important oil producing countries in the world, in the last 20 years its oil industry has been destroyed to the point of going from the production of approximately 3.5 million barrels per day to about 600,000. Internally, the situation is also extremely serious, and Venezuelans are suffering from an extreme shortage of gasoline due to the irresponsible management of PDVSA, the state-owned oil company, and the progressive destruction of its refineries in the last two decades. These gasoline shortages affect not only the movement of people, transportation, and access to health services, but also the production of goods and the transport and distribution of food. This situation puts the country at risk of complete paralysis. According to the Academy of Physical Sciences, the supply of gasoline has been reduced by 99%, 87% of food markets have reported shortages of supplies, and medical and hospital staff have had difficulties, including at times being unable to travel to and from their workplaces.

2. *Limited internet connectivity*

In response to the pandemic, Venezuelans have had to resort to teleworking and other means of working virtually by using the internet. In Venezuela, internet connectivity is extremely limited and of poor quality. This affects the exercise of rights such as those to education, justice and political participation. According to a recent study by Speedtest Global Index, a portal that measures the speed of the internet around the world, connectivity in Venezuelan homes is abysmal. The study covers 176 countries and Venezuela ranks second-to-last in the world: 175th with 3.67 Mbps, with the world average download speed being 74.64 Mbps (<https://www.speedtest.net/global-index>). Even considering the global impact of COVID-19 on internet connectivity, with an average of -2% drop in Mbps as of April 27, 2020, in the case of Venezuela it has reached -17% in fixed broadband and on cellphones. (Tracking COVID-19’s Impact on Global Internet Performance (Updated April 27): <https://www.speedtest.net/global-index>).

3. *Prisoners in general and political prisoners*

Prisoners in general have become one of the most vulnerable groups in the pandemic due to the risks of contagion in places of detention. According to reports from the IACHR and the UN, Venezuelan prisons are among the most violent in the world. In the middle of the Coronavirus, a massacre took place on May 1, 2020 in the “Los llanos” Penitentiary Center in Guanare, in the state of Cojedes. The massacre left at least 46 dead and hundreds injured. Conditions of detention in Venezuela are also appalling due in part to overcrowding, unsanitary conditions, and a lack of medical services, food, and internal security. In the midst of the critical situation caused by the pandemic, both regional bodies (the IACHR and IACtHR) and the UN’s Office of the High Commissioner for Human Rights have required States to adopt special measures to guarantee the health and lives of persons deprived of liberty, including instituting reasonable advanced release policies. In Venezuela, some early releases have been carried out, albeit on a sporadic basis.

Among those in Venezuela who suffer from these extreme conditions in detention and vulnerability during the COVID-19 pandemic are 362 political prisoners. In this regard, the UN High Commissioner for Human Rights Bachelet on March 2020 reiterated her “call for the unconditional release of all those detained for political reasons.” However, with some exceptions, political prisoners in Venezuela remain unjustifiably detained and at great risk of contracting the Coronavirus.

4. *Forced migration, refugees, and returns*

Due to the pandemic and the complex humanitarian emergency described above, the Venezuelan population has been forced to migrate abroad in search of subsistence, food, and medicine. This forced migration represents approximately 17% of the country’s population, equivalent to more than five million people.

This Venezuelan migrant population has become a vulnerable group in destination countries which are mainly in Latin America. As the pandemic has hit Latin American countries hard, the Venezuelan migrant population has been particularly affected, losing their means of subsistence and in some cases having to return to Venezuela. Venezuelans who return home have been stigmatized by the regime, which has referred to them as “biological weapons”. Upon their return to Venezuela, these individuals,

including minors, are subject to prolonged arbitrary detention and detention under inadequate conditions.

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The measures that the Maduro regime has enacted in order to deal with COVID-19 are primarily aimed at controlling the activity of the population, not at improving health and epidemiological systems, quality and non-interruption of essential public utilities, including water, electricity and gasoline, or removing obstacles to the production, importation and distribution of food, all of which are essential and important in minimizing the fatal effects of COVID-19. To be clear, these measures are mostly arbitrary and designed to control the population, not to effectively confront the causes of COVID-19 or the effects of the pandemic.

In Venezuela, the coincidence of the COVID-19 pandemic, the complex humanitarian emergency and the authoritarian policies of the regime have had catastrophic consequences for and put the Venezuelan population in imminent danger. As the Secretary General of the UN, Antonio Guterres warned, the COVID-19 health crisis “is rapidly turning into a human rights crisis”.

Ultimately, the only way to effectively deal with the COVID-19 pandemic is through the rule of law and democracy, so that public policies and measures that are issued respect, guarantee, and protect the human rights of the population.