CASE OF PEDRO CHAVERO

PETITIONERS

v.

THE FEDERAL REPUBLIC OF VADALUZ

RESPONDENT

MEMORIAL FOR THE PETITIONERS

TABLE OF CONTENTS

STATEMENT OF FACTS

I. A STATE OF EMERGENCY IN VADALUZ

1. During the latter part of the twentieth century, the Federal Republic of Vadaluz ("**Vadaluz**") experienced major institutional and social problems[1]. The organs of state were frequently paralysed[2], and institutional and social reform proved impossible[3]. To overcome the political impasse, the executive branch of Vadaluz repeatedly took advantage of lax controls in the 1915 Constitution of Vadaluz to invoke states of emergency to assume extraordinary powers[4]. These states of emergency were often subject neither to congressional approval nor judicial review[5].

2. In response to these problems, and massive social mobilisation calling for constitutional reform, Vadaluz adopted a new Constitution in 2000. The popularly-endorsed 2000 Constitution promised Vadaluz's commitment to democracy and human rights, and established the constitutional status of ratified human rights treaties[6]. Shaped by the then-recent abuse of constitutional states of emergency, the 2000 Constitution emphasised strict limits on the executive branch's ability to declare states of emergency[7]. Among other

[1] Hypothetical, [2]
[2] *Ibid.*, [4]
[3] *Ibid.*, [3]
[4] *Ibid.*, [5]
[5] *Ibid.*, [5]
[6] *Ibid.*, [6]
[7] *Ibid.*, [7]

requirements, all declarations of states of emergency must be approved or rejected by Congress within 8 days.

3. Twenty years after its adoption, the 2000 Constitution has not brought the transformations it promised. Vadaluz is still beset with enormous social inequalities, and high rates of poverty, corruption, and violence[8]. A key concern, for example, is universal access to healthcare. Currently, only a small group of people of sufficient means can promptly access quality health services. People living in rural areas are, for practical purposes, deprived of access to health services.

4. There is now a democratic crisis of faith among the people of Vadaluz. Most of Vadaluz believe that their public institutions do not work in society's interest[9]. The legislative and executive branches are extremely unpopular, and the judiciary has been intensely criticised for its involvement in corruption scandals and allegations of structural racism, and sexual and workplace harassment. Simply, citizens deeply mistrust the State[10].

5. On 15 January 2020, protests against the government erupted across Vadaluz, triggered by deep public outrage over the inequitable death of Maria Rodriguez on national television after she waited for over eight hours to receive emergency medical care[11]. The protests received

[8] Hypothetical, [8]
[9] *Ibid.*, [9]
[10] *Ibid.*, [9]
[11] *Ibid.*, [11]

massive support from university students, and also involved almost all the trade associations and unions. Eventually, the nationwide protests evolved into an acute democratic crisis that paralysed Vadaluz on 1 February 2020, as tens of thousands of protesters took to the streets and demanded that the government keep the promises of the 2000 Constitution, especially universal health coverage[12]. That same day, the World Health Organisation ("**WHO**") confirmed rumours of a swine flu pandemic and recommended social distancing measures[13].

6. Overnight, in the face of a nascent pandemic, and the unprecedented democratic crisis[14], the executive branch imposed a constitutional state of emergency through Executive Decree 75/20 and assumed extraordinary powers. Decree 75/20 instituted exceptional measures to, *inter alia*, suspend school and higher education, prohibit social gatherings, public meetings and demonstrations, and authorise the use of the military to deal with serious breaches of public order.

7. Alarmingly, the 2000 Constitution's strict limits on states of emergency have not been adhered to. As of 26 February 2021, more than a year on, Congressional scrutiny and oversight of Decree 75/20 is still absent.

II. FACTS SURROUNDING PEDRO CHAVERO

[12] Hypothetical, [15]
[13] *Ibid.*, [16]
[14] *Ibid.*, [17]

8. The petitioner Pedro Chavero ("**Pedro**") was arrested and detained by the police for 4 days under Decree 75/20 while protesting for the right to health in a socially-distanced demonstration. The demonstration contravened Article 2(3), Decree 75/20, which strictly prohibited all public demonstrations of more than 3 people. After Pedro's arrest, the police used tear gas grenades to break up and disperse the rest of the demonstration.

9. On 3 March 2020, several student associations arranged through social media to hold a peaceful protest for the right to health. 42 students, including Pedro and his classmate Estela Martinez ("**Estela**"), eventually participated. They planned to walk, while socially-distanced, to the downtown area where Congress, the Presidential Palace, and the Federal Supreme Court were located.

10. Only 30 minutes after the socially-distanced procession began walking down San Martin Avenue, the students encountered a group of police officers at the intersection with Bolivar Avenue. The police officers first tried to interrupt the protest by asking the students to go home. The students refused, believing in and emphasising their right to protest peacefully while maintaining social distance. The police then threatened to make arrests under Decree 75/20 in order to break up the demonstration.

11. The students persisted in their protest for the right to health, and continued their walk downtown. An officer then stated that they could break up the protest by arresting a few

students[15]. Soon after, Pedro was seized by the arms and wrested into a patrol car by the police. Estela cried for the other students to help, causing some of them to throw items at the police in a desperate attempt to save Pedro from imminent arrest. In a disproportionate response, the police unleashed tear gas grenades on the students and dispersed the demonstration.

12. Pedro was then detained at Police Headquarters No. 3 ("**Police HQ3**"), where he was immediately charged with the administrative offense in Article 2(3) and Article 3 of Decree 75/20. Pedro was given only 24 hours to answer the charge and present his defence.

13. Estela, Pedro's father and mother, and their trusted family lawyer Claudia Kelsen ("**Claudia**") rushed to Pedro's aid at Police HQ3. They were informed that Pedro was in good health and that his right to be treated with dignity was being respected. However, the police refused to release him for another four days, claiming that they intended for Pedro's detention to send a message to the students who continued to protest[16].

14. 24 hours after his arrest, on 4 March 2020, Pedro was finally brought before the chief of Police HQ3. Although Pedro was duly accompanied by his lawyer Claudia, troublingly, Claudia could only see Pedro for a short 15 minutes immediately before his defence[17]. Claudia was thus forced to prepare a hasty defence based on (i) Pedro's lawful exercise of his right to

[15] Hypothetical, [21]
[16] Hypothetical, [22]
[17] *Ibid.*, [23], CQ64

protest, and (ii) the police officer exceeding his authority in arresting Pedro and punishing Pedro with up to four days' detention.

15. Despite Claudia's efforts, within only an hour after the proceedings, Pedro was served with a police order establishing that:

    i. Pedro admitted to the acts committed, because he never denied that he was protesting in a public thoroughfare;
    ii. Pedro's protesting in a public thoroughfare violated Article 2(3) of Decree 75/20;
    iii. Under Article 3 of Decree 75/20, Pedro was therefore subject to the penalty of four days in jail.

    In the same administrative action, Pedro was informed that he had recourse to all legal actions provided under the laws of Vadaluz.

16. Accordingly, after the proceedings, Claudia attempted to file (i) a writ of *habeas corpus* against Pedro's detention under Decree 75/20, and (ii) a constitutional challenge against Decree 75/20. However, she was prevented from commencing these urgent challenges against Decree 75/20.

17. That very morning, on 4 March 2020, the judicial union announced that it had agreed with the President to suspend the judicial branch's in-person services, with the notable exception of family judicial police stations (which do *not* have the jurisdiction to hear writs of *habeas*

corpus)[18]. Claudia would normally have been able to (and indeed, she did try to) file the actions at the Palace of Justice. However, all courts in the city including the Palace of Justice were dark and shuttered.

18. Instead, all lawsuits and pleadings were supposed to be filed via the judiciary's website. The judiciary's website was to be a complete substitute for the suspended in-person judicial services. The Superior Council for the Administration of Justice ("**SCAJ**"), an independent public entity overseeing the judiciary of Vadaluz, argued against the suspension of in-person judicial services, citing Vadaluz's yawning digital divide. Nevertheless, it expressly stated that writs of *habeas corpus* and constitutional actions to review the state of emergency could similarly be filed through the judiciary's website.

19. However, when Claudia tried to file her action digitally the next day, the judiciary's website spat out an error indicating that 'the server was down'. Faced with the error, Claudia had no recourse other than to postpone her filing.

20. Claudia eventually managed to file the writ of *habeas corpus* and the unconstitutionality action via the website in the early hours of 6 March 2020. In the writ of *habeas corpus*, Claudia requested the adoption of an urgent precautionary measure *in limine litis*. The urgent precautionary measure was dismissed the next day as unnecessary, on the basis that Pedro would be released later that day.

[18] Hypothetical [26], CQ7

21. The writ of *habeas corpus* was dismissed on 15 March 2020, 10 days after Claudia's initial filing. The court found that the issue was moot as Pedro had already been released from his detention. On 30 May 2020, the Federal Supreme Court ("**Supreme Court**") denied Claudia's constitutional challenge against Decree 75/20, finding no constitutional violation.

III. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

22. On 5 March 2020, Claudia filed an individual petition on behalf of Pedro with the Inter-American Commission on Human Rights ("**IACHR/the Commission**)[19]. The Commission declared Claudia's individual petition admissible on 30 August 2020[20] and adopted a report on the merits on 30 October 2020. In its report on the merits, the Commission found that Vadaluz violated Articles 7 (right to personal liberty), 8 (right to a fair trial), 9 (freedom from ex post facto laws), 13 (freedom of thought and expression), 15 (freedom of assembly), 16 (freedom of association), 25 (judicial guarantees) and 27 (suspension of guarantees) of the ACHR to the detriment of Pedro Chavero, in relation to Articles 1(1) and 2 of the ACHR[21].

23. The Commission issued several recommendations to Vadaluz regarding (i) the reparation of the harm caused to Pedro and (ii) the adaptation of the Decree and other State measures to the

[19] Hypothetical [36]
[20] CQ12
[21] Hypothetical, [38]

standards of the ACHR. In view of the rare opportunity to establish valuable precedent with respect to acceptable emergency measures for the evolving pandemic, the Commission referred the case to the Inter-American Court of Human Rights ('**IACtHR/the Court**') shortly thereafter, on 8 November 2020, pursuant to Article 45(1) of the ACHR[22].

[22] *Ibid.*, [38], Art 45(1) ACHR

LEGAL ANALYSIS

I. STATEMENT OF JURISDICTION

24. Vadaluz ratified without reservation the American Convention on Human Rights ("**ACHR/the Convention**") and recognised the contentious jurisdiction of the IACtHR in 2000[23]. All material facts in the present case occurred after Vadaluz's recognition of the IACtHR's contentious jurisdiction. Therefore, this Honourable Court is competent in the terms of Article 62(3) of the ACHR[24] to rule on this case.

25. It is also considered that this Honourable Court has *ratione personae*, *ratione materiae*, *ratione loci* and *ratione temporis.*

[23] Hypothetical, [6]
[24] Art 62(3), ACHR

II. ADDRESSING PRELIMINARY OBJECTIONS AND ADMISSIBILITY

A. Omission of Friendly Settlement Procedures

26. Article 48(1)(f) of the ACHR provides that the Commission 'shall place itself at the disposal of parties' interested in reaching a friendly settlement. Past preliminary objections to petitions have been filed on the basis that the Commission did not promote a friendly settlement in alleged contravention of Article 48(1)(f)[25].

27. Any such preliminary objection cannot stand in the circumstances. The Court's consistent position has been that the friendly settlement procedure is 'not obligatory and an omission to carry it out does not contravene the admissibility or jurisdiction of the Court'[26]. Further, even where the Court finds that the Commission's omission of the procedure was without basis, the Court has ruled that the State's objection was unacceptable because the State enjoys the very same power to request a friendly settlement procedure under Article 40 of the Commission's Rules of Procedure. Per the Court, '[o]ne cannot demand of another an action that one could have taken under the very same conditions but chose not to'[27]. On the facts, Vadaluz showed no interest in reaching a friendly settlement[28]. The State cannot be heard to object on the basis that the Commission omitted to initiate a friendly settlement agreement.

[25] The Practice and Procedure of the Inter-American Court of Human Rights, pg 107
[26] Chitay Nech et. al. v Guatemala [39]
[27] *Caballero Delgado and Santana v. Colombia* (No. 17, 1994) Preliminary Objections at [30]
[28] Hypothetical, [37]

B. Exhaustion of Domestic Remedies

28. Article 46(1) of the ACHR states that for a petition to be admissible, remedies under domestic law should be pursued and exhausted[29]. However, domestic remedies must be adequate, appropriate, and effective to remedy the violation alleged[30]. On the facts, all possible domestic remedies (writ of *habeas corpus*, administrative appeal and unconstitutionality actions[31]) are either inadequate or ineffective to remedy the violations, or have been pursued and exhausted.

29. The initial petition was submitted on 5 March 2020. The Commission only declared the petition admissible on 30 August 2020, *after* domestic judgments were entered for the writ of *habeas corpus* (15 March 2020) and the constitutional challenge (30 May 2020)[32].

30. Other than the writ of *habeas corpus*, there is no other remedy available under Vadaluz law for the protection of personal liberty[33]. The writ of *habeas corpus* was pursued while it was initially adequate, as it was filed while Pedro was still detained. However, once Pedro was released, the writ of *habeas corpus* ceased to be adequate. Per this Court, '[a]dequate domestic remedies are those which are suitable to address an infringement…'[34]. Once Pedro was released, the writ of *habeas corpus* would not have been able to remedy the deprivation of

[29] Art 46(1) ACHR
[30] *Garibaldi v. Brazil* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, 23 September 2009, Ser. C, No. 203, [46]; *Chitay Nech et al. v. Guatemala* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, 25 May 2010, Ser. C, No 212, [31]
[31] CQ20
[32] *Castillo Petruzzi et al. v Peru* (Preliminary Objections) IACtHR, 4 September 1998, Ser. C, No. 41 [54]-[55]
[33] CQ3
[34] *Godinez Cruz v. Honduras* (Merits), IACtHR, 20 January 1989, Ser. C, No. 5, [67]

personal liberty already suffered by Pedro. Further, an appeal against the 15 March 2020 dismissal of the writ, though formally available, would have been futile and meaningless as there was no longer a detained person to bring before the court – 'A norm… should not be interpreted in such a way as to lead to a result that is manifestly absurd or unreasonable'[35].

31. An administrative appeal, though admittedly not pursued by the petitioners, would have been ineffective – that is, not 'capable of producing the result for which it was designed'[36]. An administrative appeal challenges only the legality of an administrative act[37]. Under domestic law, if expressly authorised, the police may arrest a person *in flagrante delicto* and impose short-term administrative detention[38]. Since Pedro's detention was imposed in accordance with Decree 75/20, which has the force of law in the domestic legal system[39], administrative appeal of Decree 75/20, and the administrative actions taken pursuant to it, would necessarily fail.

32. Indeed, the only available *domestic* remedy to challenge a rule/regulation like Decree 75/20 (whose provisions have the force of law) is an unconstitutionality action[40]. Claudia's unconstitutionality action, filed on 6 March 2020, was dismissed by the Federal Supreme

[35] *Ibid.*, [67]
[36] *Velasquez Rodriguez v. Honduras* (No. 4 1988), [66]
[37] CQ20
[38] CQ6, CQ59
[39] CQ20
[40] CQ20

Court, the apex judicial authority [41] in Vadaluz, on 30 May 2020. The remedy of unconstitutionality has thus been exhausted.

C. State's Preliminary Objections are Time-barred

33. Even if the petitioners have not exhausted their domestic remedies, the case is nevertheless admissible. The State has *not* raised preliminary objections[42] during the admissibility stage before the Commission, despite exercising its right to defence in the debates leading to the admissibility and merits reports[43]. It is well-established by this Court that if the State does not raise preliminary objections during the admissibility stage before the Commission, then the State is taken to have tacitly waived the defence and the objection is time-barred[44]. The State is estopped from raising preliminary objections at this stage of the proceedings.

D. State's Objections to the Commission's Decision to Submit the Case

34. The State objected that it had not had the opportunity to hear the complaint or to make reparations to the alleged victims at the domestic level[45]. The IACHR referred the case to this Court on 8 November 2020, allowing only 9 days for the State to adopt the recommendations in the report on the merits.

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[41] CQ25
[42] CQ29
[43] CQ23
[44] *Uson Ramirez v. Venezuela* [2009] IACtHR, [22]
[45] Hypothetical, [37]

35. This Court has affirmed that the IACHR's assessment as to whether a case should be submitted is 'an attribution that is solely and autonomously of the Commission', and that 'the reasons it had for [submitting] it cannot be subject to a preliminary objection'[46]. Nevertheless, if the IACHR omits or violates 'all or some of the procedural steps enshrined in Article 50 and 51 of the Convention' and causes prejudice to one party[47], then a preliminary objection may be sustained.

36. There have been no alleged omissions or violations of the procedural steps in Article 50 and 51 by the Commission. Notably, the Court stated in *Gomes Lund v. Brazil* that there is no 'minimum time period established from the time when the State presents its response to the [Commission's recommendations], for the Commission to decide whether to submit the case before the Court'[48]. On the contrary, there is a three-month *deadline* under Article 51 for the Commission to refer the case to the Court.

37. Further, the Commission is only required to wait if the Commission grants the State a period to comply with the recommendations[49]. On the facts, the Commission did not grant the State a period to comply with its recommendations. Rather, the Commission chose to expedite the current petition, to establish useful precedent for emergency measures that may be taken in relation to the swine pandemic[50].

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[46] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, (No. 219, 2010), [27]
[47] *Ibid.*
[48] *Ibid.*, [28]
[49] *Ibid.*, [30]
[50] Hypothetical, [36]

38. This Court has also specified that the Commission's decision to submit the case under Article 51 is 'not discretionary, but rather must be based upon the alternative that would be most favourable for the protection of the rights established in the Convention'[51]. Considering the quick onset of the swine pandemic in the Americas, the Commission's decision to refer the case to this Court post-haste was undoubtedly the most favourable for the protection of the rights in the ACHR.

39. In any case, the State is not prejudiced by the lack of time to comply with the Commission's recommendations. International responsibility for illicit acts contrary to the ACHR arises immediately after the illicit act takes place; the State's desire and/or concrete actions to remedy the violation do *not* prevent the Court from hearing the case[52].

[51] *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights).* Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, [49]
[52] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, (No. 219, 2010), [31]

III. MERITS

A. Vadaluz violated the right to personal liberty (Art. 7) and freedom from ex post facto laws (Art. 9) in conjunction with Art. 1(1) of the ACHR by detaining Pedro Chavero under Decree 75/20

1. Art 7(2) was violated as the deprivation of liberty is not formal law under Vadaluz's constitution.

41. The basis of Pedro's arrest and subsequent detention was not a legal disposition, but rather, an Executive Decree that declared the suspension of "movement outside authorized times and places", as well as the prohibition of gatherings of "more than 3 people". This lacks conformity with the procedural norms Vadaluz has set out to pass valid law. In this regard, the Court has held that the deprivation of liberty must be "expressly defined by law", which requires "strict adherence to the procedures objectively set forth in the law (formal aspect)"[53]. An all-encompassing reading of "strict adherence" is required, given that liberty is always the rule, and limitation or restriction of personal liberty is always the exception[54].

42. Representative democracy is a principle reaffirmed by the American States in the OAS Charter, with the Convention itself expressly recognizing political rights (Art. 23) as included among those rights that cannot be suspended under Article 27. This is thus indicative of the importance of representative democracy in the system[55].

[53] *Gangaram Panday v. Suriname* [1994] IACtHR, [47]
[54] *Chaparro Alvarez Iniguez v. Ecuador* [2007] IACtHR, [53]
[55] *Advisory Opinion OC-6/86, The Word "Laws" In Article 30* at [34]

43. Further, this Court has established that a "law" is "a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of (the State)"[56]. The very purpose of the interpretation of "law" to only include formal law, ie, law that has been established through representative democracy and the Legislature, is to prevent the imposition of restrictions by mere executive decrees[57]. This Court has reiterated that if the substantive and formal aspects of the domestic laws are not observed when depriving a person of his liberty, this deprivation will be illegal and contrary to the American Convention[58] in light of Article 7(2) (**J v. Peru** (2013) at [126]). Personal liberty can only be deprived according to a legislative statute or constitutional provision[59] (**The American Convention on Human Rights: Essential Rights** at pg. 148).

44. Under Vadaluz's constitution, any emergency decree that is passed is subject to the checks and balances offered by Congress within 8 days[60]. An enforcement of a law that has not been subject to the usual checks and balances offered by the Constitution is against Vadaluz's constitutional requirements to pass valid law, as this measure was put in place *precisely* because of the previous abuse of power by the Executive[61]. This is especially egregious in

[56] *Ibid.,* [35]
[57] The American Convention on Human Rights, Crucial Rights and their Jurisprudence, p33
[58] *J v Peru* [2013] at [126]
[59] The American Convention on Human Rights: Essential Rights, p148
[60] Hypothetical, [7]
[61] *Ibid.,* [5]

light of the disparity in treatment of students under Executive Decree 75/20, which suggests that the reason for the Decree was to stifle the protestors. Religious groups are allowed to gather whilst bars and other entertainment venues, which are frequented by students, are closed[62]. Schools are suspended at specifically the middle, secondary and higher education levels, whereas not at the primary level[63]. It is thus manifestly obvious that Decree 75/20 disproportionately restricts the rights of university students, who comprise a significant proportion of the protestors' numbers.

45. Conveniently, the Executive branch decided to pass Decree 75/20 the day after mass protests had brought Vadaluz's economic activity to a standstill[64]. This is despite the World Health Organisation ("**WHO**") not recommending such unjustifiably broad restrictions on human rights; they merely suggested "urgent social distancing measures"[65]. The cumulative effect of these facts therefore points to an irresistible inference that the Executive branch leveraged on the pandemic as an excuse to implement Decree 75/20 to use it to stop the protests. Thus, Decree 75/20 cannot be enforced without Congressional approval, especially when it is in contravention of the fundamental principle of personal liberty.

[62] *Ibid.*, [19]
[63] *Ibid.*, [17]
[64] *Ibid.*, [17]
[65] *Ibid.*, [16]

2. Pedro's detention was arbitrary as it did not serve a legitimate purpose, and therefore was unnecessary and disproportionate in the circumstances.

46. Regardless of the legality of Pedro's detention under domestic law, the detention was arbitrary as it was not necessary and proportionate in the circumstances. The ECHR has held that the notion of "arbitrariness" extends beyond the lack of conformity with domestic law, and extends to situations whereby the deprivation of liberty may be contrary to an applicable international Convention[66].

47. Similarly, this Court has held that although Art 7 rights can be derogated, they (i) must not go beyond what is strictly necessary, in that they must be *"*proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it*"*[67]. It is only (ii) justifiable in the absence of another alternative for resolving a serious emergency[68]. It must be (iii) for a legitimate purpose, and *"must not result from the exercise of rights"*[69]. These principles have also been endorsed specifically in the context of public health emergencies[70].

48. In *Lysias Fleury*, it was found that the purpose of the arrest and subsequent detention by the State was never to press charges or to bring him before a judge for his alleged or possible perpetration of an unlawful act. Rather, they wanted to intimidate and punish him to dissuade

[66] *Creangă v. Romania*, § 84; *A. and Others v. the United Kingdom* [GC], § 164
[67] *Castillo Petruzzi v. Peru* [1999] at [109]
[68] 1983 Report on Nicaragua, [125]-[126]
[69] *Lysias Fleury et al. v. Haiti* [2011] at [59]
[70] *Working Group on Arbitrary Detention, Deliberation No. 11* at [10]-[17]

him from carrying out his work as a human rights defender. This detention was held to be arbitrary. Similarly, in *Velez Loor v. Panama*, the victim was detained on the basis that he was a "threat to public security"[71] with no justification as to why he posed such a threat. The State failed to show why there was a legal basis for such a measure[72], neither did they consider the possibility of less restrictive measures to achieve the same purpose[73]. Therefore, this Court found that the detention was arbitrary.

49. In *Enhorn v. Sweden*[74], the ECHR specifically outlined the proportionality approach in the case of detention to prevent the spread of infectious diseases. The ECHR held that the criteria to take into account is (i) whether the spreading of the infectious disease is dangerous to public health or safety, and (ii) whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest[75]. On the facts, the first criteria was satisfied as HIV was a sufficiently dangerous disease that would endanger public safety[76]. However, the ECHR disagreed that the second criteria was satisfied, despite the victim having spread HIV to multiple people. They found that the government had not considered alternative, less restrictive measures before resorting to the deprivation of liberty[77]. It is therefore clear

[71] *Velez Loor v. Panama* [2010], IACtHR at [112]
[72] *Ibid*., [161]
[73] *Ibid*., [171]
[74] *Enhorn v. Sweden* (2005), ECHR
[75] *Ibid*, [44]
[76] *Ibid*, [45]
[77] *Ibid*, [55]

that there is an extremely high threshold for the deprivation of liberty to be considered proportionate to the danger of the spread of an infectious disease.

This threshold is not met in the present case. The fact that Pedro has been caught *in flagrante delicto* according to a domestic Executive Decree is, strictly speaking, irrelevant; Vadaluz bears the burden of proving that the applicable requirements under the Convention for the arrest and detention of Pedro have been satisfied[78]. In this regard, Vadaluz has failed to show why there is a need to subject Pedro to detention for peaceful protest, a fundamental right that is accorded to all persons under Arts 13 and 15 of the ACHR, especially where the protest was socially-distanced and was not shown/alleged to pose any public health concern. It has not been demonstrated in any manner whatsoever by Vadaluz that Pedro was endangering public health.

50. It thus follows that the mandatory detention order for 4 days that Pedro was subject to should not and cannot be the rule when the citizens of Vadaluz contravene Article 3 of Executive Decree 75/20. Vadaluz should assess each case individually, and consider alternatives before resorting to a measure that deprives their citizens of fundamental human rights. It is only after these measures have been explored and proven inadequate that the alleged offenders should be charged with offences, and subsequently deprived of their liberty when convicted.

[78] *Palamara Iribane v. Chile* (2005), IACtHR at [198]

Therefore, Pedro's liberty was arbitrarily deprived, in contravention of Art 7(3), and consequently, Art 7(1) of the ACHR.

3. Since Decree 75/20 is not valid law, Vadaluz violated the freedom from ex post facto laws (Art . 9) by enforcing Decree 75/20

51. It is trite law of this Court that the principle of *nullum poena sine lege* governs Art 9. In that regard, a quintessential part of the interpretation of "law" is that it must be passed in (i) accordance to Vadaluz's constitution, and (ii) must not be contrary to Vadaluz's other international obligations such as the ACHR (as demonstrated above). Since Decree 75/20, in addition to having been passed contrary to Vadaluz's own constitutional provisions, is also contradictory to the ACHR, Pedro cannot be subject to the provisions under it.

52. Having said that, it is apposite to note that this Court does not always apply the legality requirement[79]. Indeed, this Court stated in *Fontevecchia and D'Amico v. Argentina* that "while the certainty of the law is highly desirable, it may bring with it excessive rigidity"[80]. Having said that, this was specifically in the context of vague laws whose interpretation and application are questions of practice[81]. In the present case, Vadaluz's laws are clearly defined – congressional approval is clearly required for a law to be formally passed and have

[79] see, for *eg*, *Herrera Ulloa v. Costa Rica* (2004), IACtHR at [136]
[80] *Fontevecchia and D'Amico v. Argentina* (2011), IACtHR at [90]
[81] *Ibid.*

constitutional effect[82]. Therefore, these concerns do not apply; Executive Decree 75/20 is not formally and materially law as it is both contrary to Vadaluz's domestic procedures to implement laws, as well as the ACHR. Subjecting Pedro to a penalty under this Decree is thus a violation of Art. 9 as his actions do not legally constitute an offence in Vadaluz.

B. Vadaluz violated the right to personal liberty (Art. 7) and the right to a fair trial (Art. 8) by detaining Pedro under Decree 75/20 without respecting due process guarantees

53. Vadaluz did not respect due process guarantees because (i) The Chief of Police Headquarters No. 3 is not an independent and impartial judicial authority, (ii) who failed to substantiate the reasons for having found Pedro guilty properly and (iii) did not provide Pedro with adequate time and means for the preparation of his defence.

54. It is trite law of this Court that the due process of law must be respected in any act on the part of the State bodies in a proceeding, whether of a punitive administrative, or of a judicial nature[83]. In that regard, Arts 8 and 25 extend to all administrative detentions that "may affect the rights of persons"[84], including that of personal liberty.

[82] *Hypothetical* at [7]
[83] *Baena Ricardo v. Panama* (2001), IACtHR at [124]
[84] *Ibid*, [127]

1. The Chief of Police HQ3 is not an independent and impartial judicial authority.

55. This Court has held that in cases of an arrest *in flagrante delicto*, there must be immediate judicial supervision of the arrest[85]. The supervision must be by a judicial authority who satisfies the requirements of competence, impartiality and independence[86]. If there is a failure to do so, the detention will be considered arbitrary[87].

56. The State official must hold a position that is independent of other state bodies to be considered impartial[88]. The definition of impartiality was explored further in *Cantoral Benavides v. Peru* (2000) ("***Cantoral Benavides"***). In that case, the victim was subject to hearings in front of faceless military tribunals. This Court held that this constituted a violation of Art 8(1) as the military engaged in anti-terrorism enforcement and prosecuted terrorist groups, so they could not impartially adjudicate charges of terrorism[89]. Impartiality further includes that the judicial authority's members are "free from any prejudices and that no doubts whatsoever may be cast on the exercise of (its) functions"[90].

57. The Chief of Police Headquarters No. 3 is not independent as the police officers are under the control of the Executive branch of Vadaluz, since they are expressly granted the power to

[85] *Lopez Alvarez v. Honduras* (2006), IACtHR at [64]
[86] *Palamara Iribarne v. Chile* (2005), IACtHR, [222]
[87] *Lopez Alvarez v. Honduras* (2006), IACtHR, [64]
[88] *The American Convention on Human Rights, Crucial Rights and their Jurisprudence*, pg. 264
[89] *Cantoral Benavides v. Peru* (2000), IACtHR, [115]
[90] *Palamara Iribane v. Chile* (2005), IACtHR, [147]

arrest and sentence persons to administrative detention when authorised[91]. Similar to the case of ***Cantoral Benavides***, as the police engage in enforcement of the guidelines under Decree 75/20, they cannot impartially adjudicate charges under the very same decree. In addition, it is clear that the police already had preconceived notions, and therefore, prejudices, towards Pedro's guilt. Thus, their impartiality can be doubted. From the very outset, the police mentioned that they would be detaining Pedro for 4 days "in order to send a message"[92], despite Pedro not having had his hearing yet. Furthermore, the Police Chief contemplated the case for less than an hour[93], and did not allow adequate time for the defence lawyer, Claudia Kelsen, to present the case for Pedro[94]. These facts point towards the implication that the police did not even consider the merits of Pedro's case; rather, they had already made up their minds from the start. Therefore, since Pedro was not put in front of an independent and impartial judicial authority, there was no immediate judicial supervision of his arrest and subsequent detention. As a result, his detention was arbitrary. Vadaluz thus breached its Art 7 and 8 obligations.

2. Vadaluz failed to substantiate the reasons behind Pedro's guilt adequately

58. The material scope of the right to be heard, protected in Art 8(1) of the ACHR, is violated if an administrative procedure is ineffective, in light of what had to be determined when an

[91] CQ6
[92] *Hypothetical,* [22]
[93] *Ibid,* [23]
[94] *Ibid*

incomplete examination of the merits of the petitions is carried out[95] . A principal element of the right to be heard under Art 8(1) is the duty to state grounds[96]. This Court has explained that the duty to state grounds entails that "the argumentation of administrative acts must make it possible to know what were the facts, motives and norms on which the authority was based to make its decision"[97]. In addition, it must show that "the allegations of the parties have been duly taken into account"[98] and that "the body of evidence has been analyzed"[99]. This is also applicable to administrative and public authorities[100].

59. On the facts, the police order is woefully inadequate at explaining why Pedro was subject to the penalty of 4 days in jail. It merely stated Pedro's lack of denial, and found him guilty of the administrative offence under Decree 75/20. It is therefore evident that The Chief of Police Headquarters No. 3 did not take Claudia's arguments into account; the legal basis of the police officer's authority and the lawful exercise of the right to protest most certainly cannot be decided within less than an hour.

3. Vadaluz did not accord Pedro adequate time and means for the preparation of his defence.

[95] *Barbani Duarte et al. v. Uruguay* (2011), IACtHR, [142]
[96] *The American Convention on Human Rights, Crucial Rights and their Jurisprudence*
[97] *García Ibarra et al. v. Ecuador* (2015), IACtHR, [151]
[98] *Ibid*, [151]
[99] *Ibid*, [151]
[100] *Yatama v. Nicaragua* (2005), IACtHR, [149]

60. In subparagraph (c), Article 8(2) establishes that the accused has a right to adequate time and means to prepare a defence. The right to defence "must be exercised as from the moment a person is accused of being the perpetrator or participant of an illegal act and ends when the jurisdiction thereby ceases"*[101]*. In *Castillo Petruzzi*[102], the victim was charged with treason. The defence counsel of the victim was allowed to view the file for a period of 12 hours. This Court held that in that regard, "the participation of the defence attorneys were mere formalities" as they were "shackled" by the numerous restrictions put in place in Peruvian law[103]. There was thus a violation of Art 8(2). In this case, Claudia was allowed merely 15 minutes to view the case files of Pedro. If 12 hours is not sufficient to constitute "adequate time", 15 minutes is indubitably not enough. Therefore, Vadaluz violated Art 8(2) to the detriment of Pedro.

C. Vadaluz violated the right to recourse to a competent court (Art. 7(6)) and the right to judicial protection (Art. 25) by failing to ensure that the judiciary was able to decide on the lawfulness of Pedro's detention quickly and effectively.

61. It is trite law of this Court that judicial guarantees, including the writ of *habeas corpus*, cannot be suspended even in times of emergency[104]. The relationship between Arts 7(6) and Art 25 is that of genus to species, with *habeas corpus* under Art 7(6) being the species[105]. The right under Art 7(6) of the ACHR is not exercised with the mere formal existence of the remedies

[101] *J v. Peru* (2013), IACtHR, [30]
[102] *Castillo Petruzzi et. al. v. Peru* (1999), IACtHR
[103] *Castillo Petruzzi et. al. v. Peru* (1999), IACtHR, [141]
[104] *Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations*, [44]
[105] *Ibid*, [33] – [34]

it governs. These remedies must be effective[106]. An effective remedy under Art 7(6) must be "capable of producing the result for which it was designed"[107]. It must also accord the individual with the effective possibility of "filing a simple and prompt remedy that enables attainment, if appropriate, of the judicial protection requested"*[108]*.

In that regard, this Court has explicitly stated that a remedy of *habeas corpus* will not be truly effective "if it is not decided within a time frame that enables the violation being claimed to be corrected in time"[109]. It therefore has to be decided "without delay"[110]. In *Bayarri v. Argentina*, this Court held that "almost one week" violated the "without delay" principle[111]. Although it is apposite to note that this was in the context of Art 7(5), since the same wording is used in the authoritative Spanish text, it can be interpreted in a similar manner with respect to Art 7(6). It thus follows, *a fortiori*, that Pedro's writ of *habeas corpus* was excessively delayed. Although it was filed on 6 March 2020[112], it was only adjudicated on 15 March 2020[113], nine days after the filing of the *habeas corpus*. If one week is a violation of the "without delay" principle, nine days most certainly is. Vadaluz has thus violated Arts 7(6) and 25 of the ACHR.

[106] *Suárez-Rosero v. Ecuador* (1997), IACtHR, [63]
[107] *Godinez Cruz v. Honduras* (1989), IACtHR, [69]
[108] *Tibi v. Ecuador* (2004), IACtHR, [114]
[109] *Juvenile Reeducation Institute v. Paraguay* (2004), IACtHR, [247]
[110] Art. 7(6), ACHR
[111] *Bayarri v. Argentina* (2008), IACtHR, [66]
[112] *Hypothetical*, [30]
[113] *Hypothetical*, [32]

D. Vadaluz violated the right to freedom of expression (Art. 13) in conjunction with Art. 1(1) of the ACHR by arresting and detaining Pedro Chavero.

62. Vadaluz violated the right to freedom of expression in Art. 13 of the ACHR by arresting and detaining Pedro for his participation in a public protest, pursuant to Art. 2(3) of Decree 75/20.

1. The police arrest and detention of Pedro Chavero to stop the students' protest, constituted 'prior censorship' within the ambit of Art 13(2).

63. Per this Court in *Compulsory Membership,* 'prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13 [except for Art. 13(4)] … *any preventive measure inevitably amounts to an infringement of the freedom*' [emphasis added].

64. The police arrest and detention of Pedro to break up the students' protest also constituted 'prior censorship'. The police officers involved in the arrest were heard to have suggested arresting one of the students as a method of breaking up the protest[114]. Pedro's arrest was not *bona fide* for the purpose of enforcing Decree 75/20's prohibition and penalty but was rather aimed at silencing the protest. This is supported by the fact that the entire group of police officers only arrested Pedro, despite the presence of 41 other students *in flagrante delicto*. This suggests that Pedro's arrest was mainly a preventive measure to stop the students' protest downtown, near Congress, the Federal Supreme Court, and the Presidential Palace.

[114] Hypothetical, [21]

65. After Pedro's arrest, the police officers at Police HQ3 informed Pedro's parents and Claudia that they would detain him for 4 days, even before his hearing before the chief of Police HQ3. They also stated that they intended for Pedro's detention to send a message to the other students who had continued to protest[115]. On the available evidence, a reasonable conclusion is that Pedro's detention was intended, even before the hearing determining his guilt, to intimidate and discourage other student protestors (including Pedro himself) from participating in another protest.

66. The police arrest and detention thus constitute 'prior censorship', as they sought to (i) suspend the right to protest, (ii) prevent the student protestors (including Pedro) from completing their protest and exercising their freedom of expression, and (iii) intimidate and discourage the student protestors (including Pedro) from participating in future protests. This had the effect of impairing the right of the Vadaluz public at large to be well-informed about the struggle for access to healthcare, and engages the fundamental democratic rationale of the freedom of expression[116].

E. Vadaluz violated the right to freedom of expression (Art. 13), right of assembly (Art. 15), and freedom of association (Art. 16) by issuing and enforcing Decree 75/20

[115] *Ibid.*, [22]
[116] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, [1985], [54]

67. This Court stated unequivocally in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* ("***Compulsory Membership***") the importance of the right to freedom of expression – the '[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests'[117]. Further, this Court also recognised the generous protections and robust guarantees of Art. 13 and rejected the invoking of 'restrictions contained in [other] international instruments… to limit the exercise of the rights and freedoms that the [ACHR] recognises'[118]. These 'just demands of democracy'[119] must guide the Court's application of the ACHR to the novel facts of the instant case.

68. The right of assembly and right to freedom of association are complementary rights that together form the foundation of any democratic society. Per *Lopez Lone v Honduras*, ''[the political rights of freedom of expression, right of assembly and freedom of association] taken as a whole, make the democratic process possible"[120]. The ability to protest publicly and peacefully is fundamental to the exercise of the right to freedom of expression, and can contribute to the protection of other rights[121].

1. Decree 75/20's restrictions were not necessary in a democratic society.

[117] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism OC-5/85, [70]
[118] *Ibid.*, [52]
[119] *Ibid.*, [44]
[120] *Lopez Lone v Honduras* [2015], IACtHR, [160]
[121] *Ibid.*, [167]

69. Per *Lopez Lone v Honduras*, the rights to freedom of expression, assembly and association are not absolute and can be limited. However, the limitations[122]:

    i. cannot be arbitrary;

    ii. have to be in accordance with the law;

    iii. pursuant to a legitimate purpose; and

    iv. must be 'necessary in a democratic society' (i.e. comply with the requirements of suitability, necessity and proportionality)

70. With regards to (ii), the limitations must be expressly established by law, in both the *formal* and *substantive* sense ('a law that has been passed by democratically elected and constitutionally legitimate bodies, and is tied to the general welfare'[123]). With regards to (iii), Decree 75/20 was issued ostensibly to deal with the evolving swine flu pandemic (i.e. public health).

71. Decree 75/20's restrictions clearly do not meet the requirement of being 'necessary in a democratic society'. In balancing public health against the right to freedom of thought and expression (and the specific rights of assembly and association that manifest the right to freedom of thought and expression), it is not sufficient to show that the law serves a 'useful

[122] *Ibid.,* [168]
[123] *The Word 'Laws' in Article 30 of the American Convention*, [37]

or desirable purpose'[124]. The restriction selected must be the restriction which least restricts the rights, and must also be proportionate to the countervailing interest[125].

72. Decree 75/20's restrictions were not strictly necessary as there was a viable alternative that was less restrictive. On the facts, Art. 2(3) of Decree 75/20 creates a complete suspension of the right to assemble and right to protest, the most fundamental species of the right to freedom of thought and expression; it strictly prohibits all public meetings and demonstrations. Yet on the other hand, Art 2(4) of Decree 75/20 created an explicit exception for religious groups, indicating that the right to practice one's religion can be safely exercised with appropriate social-distancing measures[126]. It is clear that the State believed that the pandemic threat could be managed with appropriate social-distancing measures and precautions – even in its own assessment, the State did not consider the pandemic justified a complete lockdown. Accordingly, given the relative importance and fundamentality of the rights to freedom of thought and expression, assembly and association, the restrictions in Art. 2(3) could not have been strictly necessary.

73. Other aspects of Decree 75/20 also warrant closer examination. In particular, Art. 2 suspended academic and school activities at the middle, secondary and higher education levels, but did *not* suspend academic and school activities at the primary education level. There is no

[124] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* [1985], [46]
[125] *Ibid.*
[126] CQ36

evidence that suggests that primary school children are less susceptible to the swine flu, or are incapable of spreading the swine flu. Further, Art. 8 provides that the country's military units would be activated to deal with serious breaches of public order. It is difficult to understand why the State saw the need to militarize domestic security just one day after the announcement of a pandemic, when no serious public order concerns stemmed from the pandemic yet. Even now, there is no evidence indicating that the pandemic has caused any public order concerns to justify the militarisation of domestic security.

74. Rather, the totality of the evidence suggests that Decree 75/20 was drafted to deal not with the pandemic, but rather with the nationwide protests that began on 15 January 2020. The suspension of school only at the middle, secondary and higher education levels conveniently affect the student movements leading many of the protests. The militarisation of domestic security would also allow the government to suppress another 1 Feb 2020 situation should it arise, where tens of thousands of protestors took to the streets and paralysed Vadaluz.

75. The restrictions in Decree 75/20 were also disproportionate. It provided for short-term administrative detention *and* subjected the offender to possible future criminal prosecution[127] for noncompliance with public health measures. In *Uson Ramirez v. Venezuela*, the Court pointed out that 'Criminal Law is the most restrictive and severe means to establish liabilities for illicit behaviour, particularly when sanctions involve deprivation of liberty. *Therefore, the*

[127] CQ18

use of the criminal way shall respond to the principle of minimum intervention'[128] [emphasis added].

76. Further, the expression and speech in the current case merit special consideration and protection from the Court. In *Canese v Paraguay*, the Court stated, in the context of statements about public officials, that 'a different threshold of protection should be applied… [based on] the characteristic of public interest inherent in the activities or acts of a specific individual'[129]. Though Art. 13 protects all expression 'of all kinds'[130], expression involving the public interest most engages the fundamental democratic rationale for the right, and this justifies special protection for expressions involving the public interest.

77. Pedro's demonstration, the subject of the State's violation, was a protest for the right to health in a country where the issue of access to healthcare had only just triggered furious nationwide protests. Further, Pedro's protest was predicated on facts about the dismal lack of access to healthcare[131], and not mere opinion. Pedro's exercise of his freedom of expression, assembly, and association could not more clearly relate to the public interest of Vadaluz, and therefore merits special protection. As this Court put it in no uncertain terms in *Lopez Lone v Honduras*, "[p]rotests and related opinions in favour of democracy should be ensured the *highest*

[128] *Uson Ramirez v Venezuela* [2009], IACtHR [73]
[129] *Canese v Paraguay* [2004], IACtHR, [103]
[130] Art 13(1) ACHR
[131] Hypothetical, [8]

protection and, depending on the circumstances, may be related to all or some of the said rights"[132].

78. Balancing the sanctions in Decree 75/20 against the invaluable speech and expression in the instant case, the sanctions in Decree 75/20 are clearly disproportionate and seriously inhibit the rights to freedom of expression, assembly and association. The restrictions in Decree 75/20 are not necessary in a democratic society, and they therefore violate Arts. 13, 15, and 16 read in conjunction with Art. 1(1) of the ACHR.

IV. PRAYER FOR RELIEF

79. Based on the foregoing submissions, the Petitioner respectfully requests this Honourable Court to declare the present case admissible and to rule that Vadaluz has violated Arts 7, 8, 9, 13, 15, 16, 25 and 27 read in conjunction with Art 1(1) of the ACHR. Additionally, the Petitioner respectfully requests that this Honourable Court:

1. DECLARE that Executive Decree 75/20 is contrary to the Convention;
2. DECLARE that Vadaluz award pecuniary compensation to Pedro for the unlawful loss of his liberty;

3. DECLARE that Vadaluz award pecuniary compensation to Pedro for being subject to ex post facto laws;

[132] *Lopez Lone v Honduras* [2015], IACtHR, [160]

4. DECLARE that Vadaluz award pecuniary compensation to Pedro for unlawfully restricting his political rights;

5. ORDER that Vadaluz remove the deprivation of liberty as a penalty for administrative acts;

6. ORDER that Vadaluz disallow police or other state agents from exercising judicial powers under its Constitution;

7. ORDER that Vadaluz facilitate access to justice and bridge the digital divide in all sectors of the population;

8. ORDER that Vadaluz convene virtual sessions of Congress to act as checks and balances against the Executive;

9. ORDER that Vadaluz allow for socially-distanced protests;

10. ORDER that Vadaluz follow international standards for the prevention of the spread of infectious diseases

11. ORDER that Vadaluz publish the full judgment in a national newspaper, and

12. ORDER that Vadaluz publicly acknowledge international responsibility for human rights violations