





1. Decree 75/20's restrictions were not necessary in a democratic society..... 35  
IV. PRAYER FOR RELIEF..... 40

## STATEMENT OF FACTS

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### 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<sup>1</sup>. The organs of state were frequently paralysed<sup>2</sup>, and institutional and social reform proved impossible<sup>3</sup>. 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<sup>4</sup>. These states of emergency were often subject neither to congressional approval nor judicial review<sup>5</sup>.
2. In response to these problems, and massive social mobilisation calling for constitutional reform, Vadaluz adopted a new Constitution in 20006BDC q0.00000912 0 612 792 reW.13 676.42 T





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,

students<sup>15</sup>. 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<sup>16</sup>.
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<sup>17</sup>. Claudia was thus forced to prepare a hasty defence based on (i) Pedro’s lawful exercise of his right to

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<sup>15</sup> Hypothetical, [21]

<sup>16</sup> Hypothetical, [22]

<sup>17</sup> *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*)<sup>18</sup>. 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.

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<sup>18</sup> 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 WLDO

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 (**'IAChR/the Court'**) shortly thereafter, on 8 November 2020, pursuant to Article 45(1) of the ACHR<sup>22</sup>.

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<sup>22</sup> *Ibid.*, [38], Art 45(1) ACHR

## LEGAL ANALYSIS

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### 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<sup>23</sup>. 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<sup>24</sup> to rule on this case.
25. It is also considered that this Honourable Court has *ratione personae*, *ratione materiae*, *ratione loci* and *ratione temporis*.





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’<sup>35</sup>.

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’<sup>36</sup>. An administrative appeal challenges only the legality of an administrative act<sup>37</sup>. Under domestic law, if expressly authorised, the police may arrest a person *in flagrante delicto* and impose short-term administrative detention<sup>38</sup>. Since Pedro’s detention was imposed in accordance with Decree 75/20, which has the force of law in the domestic legal system<sup>39</sup>, 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<sup>40</sup>. Claudia’s unconstitutionality action, filed on 6 March 21991utionali0utionali0utionali0utiol/M0.000003.000003.n5 m



Court, the apex judicial authority<sup>41</sup> in *Vadaluze*, 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<sup>42</sup> during the admissibility stage before the Commission, despite exercising its right to defence in the debates leading to the admissibility and merits reports<sup>43</sup>. 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<sup>44</sup>. 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<sup>45</sup>. 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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<sup>41</sup> CQ25

<sup>42</sup> CQ29

<sup>43</sup> CQ23

<sup>44</sup> *Uson Ramirez v. Venezuela* [2009] IACtHR, [22]

<sup>45</sup> 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'<sup>46</sup>. 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<sup>47</sup>, 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'<sup>48</sup>. 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<sup>49</sup>. 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<sup>50</sup>.

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





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 close

**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<sup>66</sup>.

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 <sup>67</sup>. It is only (ii)

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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<sup>78</sup>. 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.

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 *nu000917(prin)4( )umprincs enforciP*



**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<sup>85</sup>. The supervision must be by a judicial authority who satisfies the requirements of competence, impartiality and independence<sup>86</sup>. If there is a failure to do so, the detention will be considered arbitrary<sup>87</sup>.
56. The State official must hold a position that is independent of other state bodies to be considered impartial<sup>88</sup>. The definition of impartiality was explored further in *Cantoral Benavides v. Peru* (2000) (“  
”). 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<sup>89</sup>. 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”<sup>90</sup>.
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

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<sup>85</sup> *Lopez Alvarez v. Honduras* (2006), IACtHR at [64]

<sup>86</sup> *Palamara Iribarne v. Chile*

arrest and sentence persons to administrative detention when authorised<sup>91</sup>. 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"<sup>92</sup>, despite Pedro not having had his hearing yet. Furthermore, the Police Chief contemplated the case for less than an hour<sup>93</sup>, and did not allow adequate time for the defence lawyer, Claudia Kelsen, to present the case for Pedro<sup>94</sup>. 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

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<sup>91</sup> CQ6

<sup>92</sup> *Hypothetical*, [22]

<sup>93</sup> *Ibid*, [23]

<sup>94</sup> *Ibid*



60. In subparagraph (c), Article 8(2) establishes that the accused has a right to adequate time and

it governs. These remedies must be effective<sup>106</sup>. An effective remedy under Art 7(6) must be “capable of producing the result for which it was designed”<sup>107</sup>. 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”<sup>108</sup>.

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”<sup>109</sup>. It therefore has to be decided “without delay”<sup>110</sup>. In *Bayarri v. Argentina*, this Court held that “almost one week” violated the “without delay” principle<sup>111</sup>. 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<sup>112</sup>, it was only adjudicated on 15 March 2020<sup>113</sup>, 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.

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<sup>106</sup> *Su rez-Rosero v. Ecuador* (1997), IACtHR, [63]

<sup>107</sup> *Godinez Cruz v. Honduras* (1989), IACtHR, [69]

<sup>108</sup> *Tibi v. Ecuador* (2004), IACtHR, [114]

<sup>109</sup> *Juvenile Reeducation Institute v. Paraguay* (2004), IACtHR, [247]

<sup>110</sup> Art. 7(6), ACHR



**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<sup>114</sup>. 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.

65. After Pedro's arrest, the

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’<sup>117</sup>. 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’<sup>118</sup>. These ‘just demands of democracy’<sup>119</sup> 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,



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

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<sup>126</sup>.

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<sup>127</sup> 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*

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<sup>127</sup> CQ18

*use of the criminal way shall respond to the principle of minimum intervention*<sup>128</sup> [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’<sup>129</sup>. Though Art. 13 protects all expression ‘of all kinds’<sup>130</sup>, expression involving the public

protection and, depending on the circumstances, may be related to all or some of the said rights”<sup>132</sup>.

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**

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