

Democratization



Year 4, Issue 19

Judicial Power and Democratic
Erosion in Venezuela

Ramón Cardozo A.

Corruptio optimi pessima: Notes on
autocracy and Judicial Power
in Venezuela

Juan Miguel Matheus

Carmen Alguíndigue Morles:
“We cannot afford impunity”

Pedro Pablo Peñaloza

Legal control of States of Exception:
the case of Venezuela

Carlos García Soto

JUNE 2022

Democratization

June 2022

Year 4, Issue 19

Judicial Power and Democratic Erosion
in Venezuela

Ramón Cardozo A.

Corruptio optimi pessima: Notes on
autocracy and Judicial Power
in Venezuela

Juan Miguel Matheus

Carmen Alguíndigue Morles:
“We cannot afford impunity”

Pedro Pablo Peñaloza

Legal control of States of Exception:
the case of Venezuela

Carlos García Soto

Caracas.

Edited by Instituto FORMA

Legal control of States of Exception: the case of Venezuela

Carlos García Soto

Introducción

The Venezuelan socioeconomic crisis and the health crisis derived from Covid-19 have led to declarations of States of Exception in Venezuela. Even when the 1999 Constitution subjects the State of Exception Decrees to political control (by the National Assembly) and legal control (by the Constitutional Chamber of the Supreme Tribunal of Justice), the reality has been that State of Exception Decrees in economic and health matters were subject to minimal examination by the Constitutional Chamber, which did not lead to a true legal control over the Decrees of States of Exception and their multiple extensions¹.

This brief paper aims to show the position of the Constitutional Chamber regarding both the Economic Emergency Decrees

1 This essay only refers to the Economic Emergency Decrees that were issued and extended from 2016 to 2021, and to the State of Alarm Decrees that were issued and extended from 2020 to 2021. Thus, other State of Exception Decrees issued, for example, on the occasion of the recent rains are excluded from this analysis: Decree No. 4682, by which the State of Emergency is declared in the states of Mérida, Zulia, Trujillo, Táchira, the Bolivarian Libertador Municipality of the Capital District, and the Greater Caracas; as a consequence of the intense and recurring rains

extended multiple times for years, as well as the State of Alarm Decrees extended for several months.

1. Brief note on the political and legal controls of the States of Exception in Venezuela

In accordance with the Constitution and the Organic Law on States of Exception (LOEE for its Spanish acronym), the State of Exception Decree is a presidential decree issued in the Council of Ministers, which aims to establish exceptional measures to address circumstances of social, economic, political, natural or ecological order, that seriously affect national, institutional and civil security², and for which the ordinary powers available to deal with these events are insufficient³.

To deal with certain extraordinary situations through extraordinary measures, the Constitution allows in its article 337 that by means of a State of Exception Decree some constitutional guarantees be restricted, except those related to the right to life, the prohibition of incommunicado detention or torture, the right to due process, the right to information, and other intangible human rights⁴.

Therefore, the Decree that declares a State of Exception supposes (i) the adoption of extraordinary State measures to face

that occurred in said territories, for a period of ninety (90) days (Official Gazette No. 42364 of April 27, 2022).

- 2 According to Article 2 of the LOEE: *"States of exception are circumstances of social, economic, political, natural or economical order, that seriously affect the security of the nation, its citizens or its institutions"*.
- 3 In that sense, Article 2 of the LOEE states: *"States of exception can only be declared when facing grave objective situations which render the State's ordinary mediums to face them insufficient"*.
- 4 Article 7 of the LOEE expands the limits of the States of Exception, from the perspective of constitutional rights, by warning that, in accordance with the provisions of articles 339 of the Constitution, 4.2 of

an extraordinary situation and (ii) the restriction of constitutional rights through a Decree.

However, the intensity of the restrictions that the declaration of States of Exception may entail on constitutional rights has traditionally meant that such Decrees are subject to political and legal controls, even in the case of extraordinary measures for extraordinary situations.

In the Venezuelan case, both the Constitution and the LOEE subject the Decrees of States of Exception to political and legal control⁵. Indeed, the State of Exception Decree, on the one hand, must be subject to the approval of the National Assembly, and, on the other hand, to the legal control of the Constitutional Chamber, as will be further explained.

2. The legal control of the Constitutional Chamber of the Supreme Tribunal of Justice and other courts of the Republic

According to article 339 of the Constitution, and articles 31 and following of the LOEE, the Decree declaring the State of Exception must be presented to the Constitutional Chamber of the Supreme Tribunal of Justice so that it can rule on its constitutionality. It is,

the International Covenant of Civil and Political Rights, and 27.2 of the American Convention on Human Rights, the guarantees of the rights to (i) life; (ii) recognition of legal personality; (iii) protection of the family; (iv) equality before the Law; (v) nationality; (vi) personal freedom and the prohibition of the practice of forced disappearance of persons; (vii) personal, physical, mental, and moral integrity; (viii) not be subjected to slavery or servitude; (ix) freedom of thought, conscience and religion; (x) the legality and non-retroactivity of Laws, especially criminal Laws; (xi) due process; (xii) constitutional protection; (xiii) participation, suffrage and access to public office, and (xiv) information may not be restricted.

5 See Gabriel Sira Santana, *El Estado de Excepción a partir de la Constitución de 1999*, (Caracas: CIDEP-EJV, 2017).

therefore, no longer a political control, but a legal control, which must be carried out strictly in accordance with legal criteria, specifically constitutional. The LOEE establishes the specific procedural rules by which the decision of the Constitutional Chamber will be produced.

In summary, such rules are as follows:

- i) Both the Decree that declares the State of Exception, as well as the Decree that agrees to its extension, or the Decree that increases the number of restricted guarantees on the occasion of the State of Exception, must be sent by the President of the Republic within eight continuous days following the day in which it was issued, to the Constitutional Chamber of the Supreme Tribunal of Justice, in order for it to rule on its constitutionality (article 31 of the LOEE);
- ii) Likewise, within the term of eight continuous days, the National Assembly must send the Agreement through which it has approved the Decree of State of Exception to the Constitutional Chamber (article 31 of the LOEE);
- iii) If the President of the Republic and/or the President of the National Assembly do not comply with the referral mandate, the Constitutional Chamber will rule ex officio (article 31 of the LOEE);
- iv) The Constitutional Chamber counts to issue its pronouncement with a period of ten continuous days counted from the receipt of the communication from the President of the Republic and the President of the National Assembly, or from the expiration of eight continuous days for it to be sent the Decree by the President of the

Republic and the Agreement by the President of the National Assembly (article 32 of the LOEE);

- v) If the Constitutional Chamber does not rule within a fixed period, the Magistrates incur disciplinary responsibility and are subject to dismissal (article 32 of the LOEE);
- vi) If the National Assembly or the Delegate Commission disapproves the State of Exception Decree or denies its extension, the Constitutional Chamber will omit its pronouncement and declare the instance extinguished (article 33 of the LOEE);
- vii) Those interested in demonstrating the constitutionality or unconstitutionality of the Decree that declares the State of Exception, that puts forth its extension, or increases the number of restricted guarantees, may, during the first five days of the ten-day period available to the Constitutional Chamber to decide, consign before the Constitutional Chamber the allegations and elements of conviction that they consider (article 34 of the LOEE);
- viii) Within the two days following the expiration of the five-day period, the Constitutional Chamber will admit the arguments and evidence that are pertinent and will discard those that are not, a decision against which no appeal will be admitted (article 35 of the LOEE);
- (ix) The Constitutional Chamber must decide on the constitutionality of the Decree within the three days following the day in which it has ruled on the admissibility of the allegations and the evidence presented by the interested parties (article 36 of the LOEE);

- x) When the Decree that declares the State of Exception, agrees to its extension or increases the number of restricted guarantees does not comply with the principles of the Constitution, international treaties on human rights and the LOEE itself, the Constitutional Chamber will declare the total or partial nullity of the Decree (article 37 of the LOEE);
- (xi) The nullity decision that can be issued by the Constitutional Chamber:
 - Will have retroactive effects;
 - Must immediately restore the general legal situation infringed, which will be achieved through the annulment of all the acts issued in execution of the Decree;
 - Individuals have the right to request the reestablishment of their individual legal situation and to exercise all the actions that may be appropriate, and
 - The decision must be published in its entirety in the Official Gazette (article 38 of the LOEE);
- (xii) Every day and hour will be working for this procedure (article 39 of the LOEE);
- (xiii) In any case, article 40 of the LOEE warns that all the judges of the Republic, within the scope of their jurisdiction under constitutional protection, are empowered to control the justification and proportionality of the measures adopted based on the state of emergency.

In this way, the control of the Constitutional Chamber is materialized through a constitutional procedure regulated in the LOEE. Through this procedure, the Constitutional Chamber can exercise extensive legal control over the Expropriation Decree, over the Decree that agrees to its extension, or over the Decree that increases the number of restricted guarantees, as well as over the Agreement of the National Assembly that approves those decrees.

Naturally, the control that is carried out on each of these three types of Decrees (the one that declares the State of Exception as such, the one that extends it, or the one that increases the number of restricted guarantees) will be subject to the particularities of each one of these types of decrees. Thus, for example, in the case of the Decree declaring the extension, it will be very important for the Constitutional Chamber to assess the temporal proportionality of the measures based on the circumstances on which they are based. In the case of the Decree that increases the restricted guarantees, it will be important to assess whether the extraordinary circumstances effectively require an increase in the restrictions on those specific guarantees that are now added to the list of restricted guarantees.

On the other hand, the legal control that corresponds to the Constitutional Chamber can be exercised both from the ex officio control carried out by the Chamber, and from the arguments and evidence presented by interested parties in declaring the constitutionality or unconstitutionality of such Decrees, as per each cases.

Naturally, the purpose of control over the Decree is to determine (i) on the one hand, the veracity of the factual and legal reasons for which the Decree was issued, as well as (ii)

whether the restrictions on constitutional rights and guarantees conform to the Constitution. In this sense, the analysis of the proportionality between the measure taken and the content of the right or guarantee, as well as respect for the guarantee of the essential content of the right, will be key to determining the constitutionality of the Decree.

Finally, in accordance with article 40 of the LOEE, the legal control over the Decrees of States of Exception is not limited to the control described to be exercised by the Constitutional Chamber of the Supreme Tribunal of Justice, but rather it reaches the control that can be exercised by all judges of the Republic when, exercising their jurisdiction under constitutional protection, they are empowered to control the justification and proportionality of the measures adopted based on the state of emergency.

3. The legal control of the Economic Emergency Decrees (2016-2021)

Based on the Executive Power's political narrative of the "Economic War", the President of the Republic issued in 2016 an Economic Emergency Decree that was unconstitutionally extended for several years until February 2021 to supposedly face the aforementioned war.

A. Decree No. 2184 of Economic Emergency

The first Economic Emergency Decree⁶ would be published under No. 2184⁷.

6 See Anabella Abadi M. & Carlos García Soto, "Decodificando el Decreto de Emergencia Económica", in *Prodavinci*, January 16, 2016.

7 Extraordinary Official Gazette No. 6,214 of January 14, 2016.

This Economic Emergency Decree broadly empowered the President of the Republic to

“adopt the appropriate measures to effectively address the exceptional, extraordinary, and conjunctural situation that the Venezuelan economy is going through and to ensure the public their full enjoyment of rights and free access to fundamental goods and services, and also to mitigate the effects of induced inflation, speculation, fictitious value of the currency, the sabotage of the distribution systems of goods and services, as well as counteracting the consequences of the oil price war, which has managed to germinate in the heat of the volatile current international geopolitical situation, bringing forth a serious economic crisis” (article 1) [Own translation].

Pursuant to article 2 of the Decree, the President was empowered to dictate the following measures:

- i) Dispose of the resources from the budgetary savings of the financial year 2015;
- ii) Assign extraordinary resources to projects foreseen or not in the Budget Law to the organs and entities of the Public Administration;
- iii) Design and implement special measures, of immediate application, to reduce tax evasion and avoidance;
- iv) Dispense from the modalities and requirements of the public contracting regime to the contracting bodies and entities in certain sectors;
- v) Waive the paperwork, procedures and requirements for the importation and nationalization of merchandise;

- vi) Implement special measures to expedite the transit of goods through ports and airports throughout the country;
- vii) Dispense with the exchange procedures established by CENCOEX and by the Central Bank of Venezuela, to organs and entities of the public or private sector;
- viii) Require public and private sector companies to increase their production levels as well as the supply of certain foods or essential goods production centers;
- ix) Adopt all necessary measures to ensure the timely access of the public to food, medicine and other essential goods, as well as to all the necessary services for the full enjoyment of their rights;
- x) Adopt the necessary measures to stimulate foreign investment for the benefit of the development of the national productive apparatus, as well as exports of non-traditional items;
- xi) Develop, strengthen, and protect the System of Missions and Great Socialist Missions.

But, together with the provisions of article 2, article 3 empowered the President in a general way to dictate other measures, not identified in the Decree:

“Article 3. The President of the Republic may dictate other measures of social, economic or political nature deemed appropriate in the circumstances, in accordance with articles 337, 338, and 339 of the Constitution of the Bolivarian Republic of Venezuela, with the purpose to resolve the extraordinary

and exceptional situation that constitutes the object of this Decree and prevent the extension of its effects.

In any event, the measures adopted by the National Executive in response to the economic emergency that this Decree regulates will be aimed at protecting and guaranteeing the rights and good living of families, children, adolescents and senior adults” [Own translation].

B. Order No. 4 of January 20, 2016 of the Constitutional Chamber that declares the constitutionality of Decree No. 2184

As established, in accordance with article 339 of the Constitution and article 31 of the LOEE, once the State of Exception Decree has been issued, it must be sent by the President of the Republic to the Constitutional Chamber of the Supreme Tribunal of Justice, to rule on its constitutionality. Order No. 4 of January 20, 2016, of the Constitutional Chamber declared the constitutionality of Decree No. 2184 without further examination of the correspondence of the Decree with the Constitution.

Firstly, the Order establishes what the nature of the State of Exception Decree would be in the system of sources of Law, to indicate that

“The Decree that declares the state of exception is an act of a special nature, with the rank and force of law, of temporary order, with authentic value that incorporates it into the block of legality and that is, therefore, covered with the applicable characteristics of acts that have legal status ordinarily, and more particularly, conceived in the category of acts of government. This would have its basis in the very special factual situations under which it is adopted and the effects

that it must have with the immediacy imposed by the seriousness or entity of the effects that the Public Power, with temporary extraordinary powers derived from the Decree itself, is obliged to attend” [Own translation].

The Judgment then declared the constitutionality of the Decree in these terms:

“This Supreme Tribunal of Justice in the Constitutional Chamber, rules on the constitutionality of the Decree under examination, which was issued in compliance with all the parameters provided for by the Constitution of the Bolivarian Republic of Venezuela and the Organic Law on States of Exception and other applicable regulations, preserving Human Rights and in protection of the Basic Text, the State, its institutions and the people, which motivates the organic support of this sentencing body of the highest level of the Constitutional Jurisdiction towards the measures contained in the Decree subject to examination of constitutionality issued by the citizen President of the Republic, in the Council of Ministers, in recognition of its relevance, proportionality and adequacy, which comes to support, with solid legal foundations and high popular significance, the safeguarding of the people and their harmonious development in the face of unprecedented and extraordinary adverse events in our country, in accordance with the Constitution of the Bolivarian Republic of Venezuela; without prejudice to the subsequent control that this Chamber may carry out in accordance with its constitutional powers” [Own translation].

With that statement, the Constitutional Chamber renounced to exercise the legal control that the Constitution empowers over the State of Exception Decrees. That is, the Order did not rule on

the general authorization given in article 3 to the President of the Republic to dictate measures in execution of the State of Alarm Decree, which authorized the President to extend the scope of matters which restrict the rights of citizens without any limit, in violation of the Constitution.

C. The Agreement of January 22 of the National Assembly by which it disapproves Decree No. 2184

Despite the fact that the Constitutional Chamber declared the constitutionality of Decree No. 2184, in accordance with the provisions of articles 339 of the Constitution and 26 of the LOEE, it was up to the National Assembly to exercise political control over the Economic Emergency Decree and, consequently, decide to approve or disapprove it.

In accordance with the provisions of the Report presented by the Special Commission appointed to examine Decree No. 2184, the National Assembly decided to exercise political control, and decided to disapprove Decree No. 2184 of Economic Emergency.

Naturally, once the National Assembly declared its disapproval of Decree No. 2184, the problem of the validity of the Economic Emergency Decree was raised.

The rational interpretation of article 339 of the Constitution was that if the National Assembly disapproved the Economic Emergency Decree, it lost its validity immediately, because the approval constitutes in this case a condition of validity of the Decree.

In fact, such is the interpretation that derives from the content of the Statement of Motives of the 1999 Constitution itself, that when referring to the political control that the National Assembly

can exercise over the State of Exception Decree, it warns that from what is provided in article 339 of the Constitution, “as a deliberative and representative instance par excellence of popular sovereignty, it can revoke it if it considers that the circumstances invoked do not justify the declaration of a state of exception or if it considers that the measures planned to face it are excessive”.

D. Order No. 7 of February 11, 2016, of the Constitutional Chamber that reaffirms the Decree's validity

The Constitutional Chamber, however, when resolving an appeal for constitutional interpretation, declared through Order No. 7 of February 11 that Decree No. 2184 entered into force from the time it was issued and that its legal-constitutional legitimacy, validity, and effectiveness remained “irrevocably intact”, despite the disapproval of the National Assembly.

Indeed, through Order No. 7 of February 11, 2016, the Constitutional Chamber, upon hearing a constitutional interpretation appeal on articles 339 and 136 of the Constitution and articles 27 and 33 of the LOEE, decided:

- (i) the political control of the National Assembly over the decrees that declare states of exception does not affect their legitimacy, validity and legal effectiveness;
- (ii) the Decree that declared the state of economic emergency throughout the national territory for a period of 60 days entered into force since it was issued and its legal-constitutional legitimacy, validity and effectiveness remains "irrevocably intact", and

- (iii) the National Assembly did not comply in a timely manner and within the constitutional and legal limits, with the political control of the aforementioned decree.

Thus, in summary, the Constitutional Chamber considered that even though the National Assembly, exercising the political control provided for in article 339, disapproved the Economic Emergency Decree and decided that it should not remain in force, according to the Constitutional Chamber the Economic Emergency Decree should be considered as legitimate, valid, in force and effective from the legal point of view.

Thus, the Constitutional Chamber violated the Constitution by ruling on the Agreement of the National Assembly. As established in article 33 of the LOEE, the Constitutional Chamber could not assess the decision made by the National Assembly when exercising political control over the Economic Emergency Decree, since in accordance with that rule, the Constitutional Chamber of the Supreme Tribunal of Justice will omit all pronouncement, if the National Assembly or the Delegate Commission disapproves the state of emergency decree or denies its extension, declaring the instance extinguished.

E. Decree No. 2270 of Economic Emergency

In accordance with articles 338 of the Constitution and 12 of the LOEE, the Economic Emergency Decree can be issued for a period of sixty days, extendable for another sixty days.

Through Decree No. 2770, published in the extraordinary Official Gazette No. 6219 of March 11, 2016, an extension of the validity of Decree No. 2184 would be issued for sixty days.

F. Order No. 184 of March 17 of the Constitutional Chamber that declares the constitutionality of Decree No. 2270 of Economic Emergency

Through Order No. 184 of March 17, 2016, the Constitutional Chamber declared the constitutionality of Decree No. 2270, which had established the sixty-day extension of Decree No. 2184, without exercising any limitation on the content of the decision.

G. Decree No. 2323 of Economic Emergency

When the extension granted to the first Economic Emergency Decree lost its validity, the legal consequence was that the President of the Republic could not issue a new Economic Emergency Decree. To the extent that articles 338 of the Constitution and 12 of the LOEE only allow a State of Economic Emergency to be dictated for sixty days, extendable for another sixty days, a State of Economic Emergency can only last a maximum of 120 days.

However, to avoid this constitutional prohibition, when the extension of the first Economic Emergency Decree expired, the President chose to issue a second Economic Emergency Decree, a fraud against the Constitution, which, however, was not legally controlled by the Constitutional Chamber.

This is even more serious if one considers that, for example, by enumerating the different measures that could be ordered by the President in articles 2 and others, the range of measures is broader than that which had been foreseen in the first Decree of Economic Emergency.

- H. The Agreement of the National Assembly by which it disapproves Decree No. 2323 of Economic Emergency

On May 16, 2016, the National Assembly issued an agreement by which it disapproved the content of Decree No. 2323, in exercise of its powers provided for in articles 339 of the Constitution and 26 of the LOEE. In this Agreement, the National Assembly established some more critical considerations than those it had indicated in its agreement disapproving the first Economic Emergency Decree.

- I. Order No. 411 of May 19, 2016 of the Constitutional Chamber that declares the constitutionality of Decree No. 2323 of Economic Emergency

Order No. 411 of May 19, 2016, of the Constitutional Chamber declared the constitutionality of Decree No. 2323, in very similar terms to what the Chamber had established in Order No. 7 of February 11 through which it declared the constitutionality of the first Economic Emergency Decree, without exercising any legal control over the Economic Emergency Decree, and without considering, from a constitutional point of view, the fraud caused by issuing a new Economic Emergency Decree immediately after the extension of the first Economic Emergency Decree expired.

- J. The continued constitutional fraud of Economic Emergency Decrees for a lustrum

This practice of issuing successive Economic Emergency Decrees that were extended, in order to later issue a new Economic Emergency Decree, continued until 2021⁸, that is, five years after the first Economic Emergency Decree was issued, when the last extension of the State of Exception of Economic Emergency Decree

8 Extraordinary Official Gazette No. 6,615 of February 23, 2021.

was issued on February 23, 2021 . Of course, this meant a fraud against articles 338 of the Constitution and 12 of the LOEE, which only allow a State of Economic Emergency to be dictated for sixty days, extendable for another sixty days, so a full period of State of Economic Emergency can only last a maximum of 120 days⁹.

Indeed, as has been pointed out, in accordance with the provisions of articles 338 of the Constitution and 12 of the LOEE, the State of Economic Emergency, as a modality of State of Exception, can only be issued once, and is extendable only once.

Such limitation attends to the extraordinary nature of any State of Exception. This extraordinary nature derives precisely from the fact that the Economic Emergency Decree is intended to deal with an extraordinary or exceptional situation. But, at the same time, it represents a guarantee for citizens, who should only be subject to a state of exception regimes for a certain period of time.

There is nothing to prevent, for instance, two States of Emergency within a constitutional period addressing two different situations separated in time. Although the Constitution does not

9 See Anabella Abadi M. & Carlos García Soto, "Los poderes ejecutivo, legislativo y judicial ante la "Emergencia Económica", in *Revista de Derecho Público*, N° 147-148, (Caracas: July-December, 2016). See also Anabella Abadi M. & Carlos García Soto, "La Asamblea Nacional, la economía y la "emergencia económica" in 2016, in *Revista Electrónica de Investigación y Asesoría Jurídica*, N° 7, (Caracas: January, 2017); Anabella Abadi M. & Carlos García Soto, "Pasado, presente y futuro del Decreto de Emergencia", in *Prodavinci*, May 18, 2016; Anabella Abadi M. & Carlos García Soto, "Decodificando los tres decretos de emergencia económica", in *Prodavinci*, October 6, 2016; Anabella Abadi M. & Carlos García Soto, "La AN y la emergencia económica: un balance", in *Prodavinci*, January 9, 2017, and Anabella Abadi M. & Carlos García Soto, "La "emergencia económica" entre enero de 2016 y mayo de 2017: un balance", in *Prodavinci*, May 24, 2017.

establish a specific term, it could be considered reasonable that, due to different circumstances, an Economic Emergency Decree be issued at the beginning of a constitutional period and another at the end of the same constitutional period.

It is a completely different matter to issue successive Economic Emergency Decrees, just days after the expiration of the extension of a previous Economic Emergency Decree, as has happened in the cases studied.

Therefore, waiting for the completion of the extension of an Economic Emergency Decree, in order to practically immediately proceed to issue another one, in fact can be considered as a case of "fraud against the Constitution", in the measure in which, although the completion of the extension of the first Emergency Decree is formally respected, a new one is immediately issued again to address the same alleged emergency situation for which the first Decree was issued.

As will be seen, the Constitutional Chamber declared the constitutionality of each and every one of the Economic Emergency Decrees and their extensions, with which it renounced exercising the legal control required by the Constitution.

K. The Economic Emergency Decrees as a fraud to the Constitution for implying a covert Enabling Law assumption

The studied Economic Emergency Decrees commit yet another fraud against the Constitution.

In accordance with the regime provided for in the Constitution and in the LOEE, the Economic Emergency Decree, as a State of Exception Decree, must expressly indicate what the measures through which the extraordinary situation that the Decree intends

to attend are. For example, for the particular case of the State of Economic Emergency, article 11 of the LOEE states:

“Article 11. The decree declaring the state of economic emergency shall provide for the appropriate measures, aimed at satisfactorily resolving the abnormality or crisis and preventing the extension of its effects” [Own translation].

That is to say, the Economic Emergency Decree itself must establish the measures dictated, based on the restriction of the rights that it considers necessary to restrict (articles 339 of the Constitution and 6 of the LOEE)¹⁰. In this way, the State of Exception Decree must not only indicate which rights are restricted and to what extent (articles 339 of the Constitution and 1 and 11 of the LOEE), but must also expressly indicate what measures are to be executed to deal with the situation that led to the declaration of the State of Exception. Such is the interpretation that must also be derived from article 15 of the LOEE, by which the President is empowered to dictate the necessary measures in the Council of Ministers, which will be expressed through the State of Exception Decree.

On the contrary, in each of the Economic Emergency Decrees studied, the President has been attributed in Articles 2 and 3 the power to dictate subsequent measures to address the economic emergency situation. In fact, the meaning of article 11 of the LOEE is that the President should dictate the measures in the text of the Decree, without empowering himself to dictate subsequent and indeterminate measures. In that sense, the Economic Emergency Decrees incurs in a fraud to the Constitution, since the figure is

¹⁰ See Carlos García Soto, “Notas sobre el ámbito y requisitos del estado de excepción”, in *Revista de Derecho Público*, N° 143-144, (Caracas: July-December, 2015), pp. 9-12.

distorted and transformed into an authorization for subsequent measures not indicated in the Decree.

This fraud against the Constitution was never subject to the control of the Constitutional Chamber.

4. The legal control of the State of Alarm Decrees (2020-2021)

Due to the health crisis caused by the COVID-19 pandemic, in March 2020 a State of Alarm Decree was issued that would be extended, after which a State of Alarm Decree would be issued again, then extended, and so on until February 2021.

A. Decree No. 4160 of the State of Alarm

Indeed, on March 13, 2021, Decree No. 4160 (the State of Alarm Decree) was published, by which the emergency is declared¹¹.

11 "Decree No. 4160, by which the State of Alarm is decreed throughout the national territory, given the circumstances of a social order that seriously jeopardize the public health and safety of the citizens of the Bolivarian Republic, so that the National Executive adopts the urgent, effective and necessary measures to protect and preserve the health of the Venezuelan population, in order to mitigate and eradicate the risks of an epidemic related to the coronavirus (COVID-19) and its possible strains, guaranteeing timely, effective and efficient attention to the cases that arise (Extraordinary Official Gazette No. 6,519 of March 13, 2020)" (Extraordinary Official Gazette No. 6,519 of March 13, 2020). See the study on the Decree by Allan R. Brewer-Carias, *"El Decreto del Estado de Alarma en Venezuela con ocasión de la pandemia del Coronavirus: inconstitucional, mal concebido, mal redactado, fraudulento y bien inefectivo"*, in AVEDA Library, Available at: <https://www.aveda.org.ve/wp-content/uploads/2020/04/covid-abc.pdf> and Gabriel Sira Santana, *"El Estado de Alarma en el Derecho venezolano, a propósito del COVID-19"*, in *Blog of Law and Society*. See also the Pronouncement of the Academy of Political and Social Sciences on the State of Alarm decreed by virtue of the Coronavirus pandemic (COVID-19), of the Academy of Political and Social Sciences, in *Blog of Law and Society*, and the Statement from the Human Rights Center of the Andrés Bello Catholic University. The

Even though the original State of Alarm Decree circulated in the Official Gazette on March 18, several of the measures provided for in the Decree were implemented between March 13 and 17, while others were implemented in the following months by National, State and Municipal Public Power agencies and entities¹².

Article 1 of the State of Alarm Decree establishes its purpose:

“Article 1. The State of Alarm is decreed throughout the National Territory, given the social circumstances that seriously jeopardize the public health and safety of the citizens living in the Bolivarian Republic, so that the National Executive takes urgent, effective and necessary measures to protect and preserve the health of the Venezuelan population, in order to mitigate and eradicate the risks of an epidemic related to the coronavirus (COVID-19) and its

Academy of Political and Social Sciences has published a collective book with studies on the State of Alarm and the subsequent acts that have been issued: *Estudios jurídicos sobre la pandemia del Covid-19*, Academia de Ciencias Políticas y Sociales-Editorial Jurídica Venezolana Internacional, Caracas, 2020.

- 12 The first restriction in this matter was the decision of “social quarantine”, announced on Sunday, March 15, 2020, applicable in Caracas and six states: Miranda, Vargas, Zulia, Cojedes, Táchira, and Apure. Subsequently, on the night of Monday, March 16, 2020, a national quarantine was announced starting Tuesday, March 17, at 5 in the morning. However, such measures were not published in the Official Gazette. Several Mayors and Governors issued Decrees to establish preventive measures, similar to those provided for in the Presidential Decree. Some of those circulated before Decree No. 4160. Indeed, the Governor of the Miranda issued Decree No. 2020-0054 on March 13, 2020. Likewise, he issued Decree No. 2020-0055 on March 14, 2020. The Governor of Aragua issued Decree No. 7156. In Carabobo State, the Governor issued Decree No. 1341. In the Valencia Municipality of Carabobo, Decree No. DA/0080/2020 was issued, published in Municipal Gazette No. 20/7568. For his part, the Mayor of the Chacao Municipality in Miranda issued Decree No. 13. In El Hatillo Municipality of Miranda, Decree No. 2 was issued.

possible strains, guaranteeing timely, effective and efficient care in the arising cases” [Own translation].

On the other hand, in accordance with article 4 of the Decree, the Vice President and the Ministers can issue decisions to develop the measures provided for in the State of Alarm Decree. This means that the measures to be taken to deal with the pandemic will not be restricted to those provided for in the alarm decree.

In addition, in its First Final Provision, the Decree warns that the President may dictate other social, economic and health measures that he deems appropriate according to the circumstances presented, in accordance with articles 337, 338 and 339 of the Constitution, with the purpose to continue dealing with the extraordinary and exceptional situation. In this case, it would be presidential decrees that would establish additional measures to those contained in the State of Alarm Decree.

In this way, in accordance with the LOEE and the Presidential Decree, three authorities can dictate measures to develop the content of the State of Alarm Decree: (i) the President himself; (ii) the Vice President, and (iii) the Ministers appointed therein.

This was contrary to the Constitution, since articles 337 to 339 of the Constitution establish that (i) both the measures that are considered essential to face the situation that gives rise to the state of exception and (ii) the temporary restrictions on constitutional guarantees must be contained in the text of the State of Exception Decree.

- B. Order No. 0057 of January 24 of the Constitutional Chamber declaring the constitutionality of Decree No. 4,160 regarding the State of Alarm

The Constitutional Chamber of the Supreme Tribunal of Justice, for its part, would issue Order No. 0057 of March 24, 2020, by which it would declare the “constitutionality” of Decree No. 4160. In that decision, the Constitutional Chamber would point out:

“It is appreciated that the declaratory measure of the state of emergency obeys the meritorious need to protect the Venezuelan people and the institutions, a direct expression of the Public Power, since a threat to the people is presented through the virus known as Coronavirus (COVID-19) which has already decreed by the World Health Organization as a pandemic. As can be seen, the citizen President of the Republic Nicolás Maduro Moros responded promptly to an alarming and serious situation, generated by the affectation that is occurring worldwide, which has already manifested itself in our country as announced as of March 13th, 2020, in a communicational news event, taking into account the events that the media have been reporting and the pertinent actions with the measures adopted by the National Executive” [Own translation].

On the other hand, the Constitutional Chamber warned:

“It should be noted that the State of Alarm decree seeks to guarantee the protection of society, in the face of such a serious situation as a pandemic, it must be taken into account that the National Executive is obliged to safeguard all constitutional guarantees, and that in cases of State of Alarm he can restrict some to safeguard the health of the

people. In order to comply with what is dictated in the aforementioned decree, the State must guarantee everyone the enjoyment of human rights as established in article 19 of the Constitution of the Bolivarian Republic of Venezuela, also the right to life which is inviolable, as established in article 43 of the Constitutional Text, to guarantee free transit, without prejudice to the necessary restrictions and even partial or total closures that the National Executive may dictate, for reasons of prevention and safeguarding of health and consequently life under the principle of balancing rights and guarantees; Articles 53 and 55 of the Magna Carta also establish what pertains to the security that the National Executive must provide to the right of assembly, that is, the one that every person has linked to free access and meeting in public or private places; however, due to the purpose of this exceptional state of alarm, the restriction aimed at gatherings of people is valid and necessary to guarantee their health and prevent or reduce the spread of the virus known as Coronavirus (COVID-19), declared, as indicated, a pandemic by the World Health Organization, all this to prevent the vulnerabilities of the inhabitants of the Republic from emergencies or enhancements and in full exercise of its role as State guarantor of rights, each of these articles are concatenated with article 338 of the Constitution of the Bolivarian Republic of Venezuela” [Own translation].

The Constitutional Chamber then considered that the State of Alarm Decree was in accordance with the Constitution, as follows:

“It is observed that the aforementioned decree, subject to constitutionality examination, preserves and ratifies the full validity of the constitutional rights and guarantees provided for in the legal system, resulting in the configuration of

another element in the constitutionality examination, in favor of the full adaptation to the precepts and limits that are inferred from the Basic Text, to be observed when the Head of State exercises the powers of declaring States of Exception. The decree also protects and, therefore, does not imply a restriction of those rights whose guarantees cannot be limited by express constitutional mandate, namely, those referring to the rights to life, the prohibition of incommunicado detention or torture, the right to due process, the right to information and other intangible human rights, as provided in articles 337 of the Basic Text and 7 of the Organic Law on States of Exception.

(...)

In conclusion, examined as Decree 4160 dated March 13, 2020, published in the Extraordinary Official Gazette No. 6519, this Constitutional Chamber evidences that it complies with the principles and regulations contained in the Constitution of the Bolivarian Republic of Venezuela, in international treaties on human rights validly signed and ratified by the Republic and in the Organic Law on States of Exception” [Own translation].

One of the last sentences stands out in that decision, according to which:

“Violations of the content of the State of Alarm Decree will be considered contempt and subject to constitutional illicit sanctions, at the headquarters of the Constitutional Chamber of the Supreme Tribunal of Justice, in exercise of its constitutional jurisdiction” [Own translation].

C. The succession of constitutional fraud of successive State of Alarm Decrees and their extensions for several months

As occurred with the case of the Economic Emergency Decrees, in the case of the State of Alarm, the unconstitutional practice of issuing State of Alarm Decrees was again incurred, which was extended once, and upon expiration of the extension, it was decided to issue a new State of Alarm Decree, and so on.

In effect, Decree No. 4160 was extended by Decree No. 4186¹³. Then, Decree No. 4198¹⁴ was later issued. This Decree was extended by Decree No. 4230¹⁵. When Decree No. 4230 expired, Decree No. 4247¹⁶ was issued, and so on until the last State of Alarm Decree was issued, on February 28, 2021¹⁷.

In the same way as it happened with the Economic Emergency Decrees that were issued between 2016 and 2021, the practice from March 2020 to February, the practice in the field of the State of Alarm, once the extension of a Decree expired, has been to dictate a new one, which is extended. And when this extension expires, a “new” one is issued, which is then in turn extended. And so on.

D. The subsequent rulings of the Constitutional Chamber that have endorsed the constitutionality of the State of Alarm Decrees and the waiver of exercising legal control over the State of Alarm

The Constitutional Chamber has issued judgments to declare the “constitutionality” of each of the other State of Alarm Decrees

13 Extraordinary Official Gazette No. 6,528 of April 12, 2020.

14 Extraordinary Official Gazette No. 6,535 of May 12, 2020.

15 Extraordinary Official Gazette No. 6,542 of June 11, 2020.

16 Official Gazette No. 6,554 of July 10, 2020.

17 Extraordinary Official Gazette No. 6,618 of February 28, 2021.

that were disposed to extend the validity of the State of Exception from March 2020, without controlling, for example, the contrary practice to the Constitution by the President of the Republic to extend for more than once the validity of the State of Alarm Decree.

In this way, the Constitutional Chamber has issued decisions No. 0058 of April 22, 2020; No. 0063 of May 21, 2020; No. 0074 of June 19, 2020, and No. 0081 of July 22, 2020, to declare the constitutionality of Decrees No. 4186; 4,198; 4230, and 4247.

As noted, even after the State of Alarm Decree was issued –and before it circulated in the Official Gazette– other bodies and entities of the National, State and Municipal Public Power issued different state acts to “execute”, “develop” or “complement” the provisions of the State of Alarm Decree. In reality, the constitutional discipline of the State of Alarm requires that the extraordinary measures that are required to be implemented to deal with the alarm situation must be contained in the State of Alarm Decree itself, so that neither the National Executive itself nor State or Municipal Power could dictate subsequent state acts to “execute” the measures contained in the State of Alarm Decree.

E. The State of Alarm Decrees were not submitted to the political control of the National Assembly

It should be noted that neither the State of Alarm Decree nor its "extensions" were submitted to the approval of the National Assembly, approval required by articles 338 and 339 of the Constitution, which vitiates the State of Alarm Decree and the subsequent state acts issued in his “execution”.

Not only did the National Assembly not approve the State of Alarm Decree or its “extensions”, in addition, the so-called

“National Constituent Assembly” issued the Pronouncement to the Venezuelan People on the detection of the Coronavirus in the Bolivarian Republic of Venezuela and the State Decree of Constitutional Alarm issued by the Bolivarian Government presided over by Nicolás Maduro Moros, Commander in Chief of the FANB, Head of State and Government, to Protect the People, Prevent, Confront, and Defeat this World Pandemic¹⁸, for which he had no jurisdiction, and which constitutes an act further vitiated by nullity of that instance.

18 Official Gazette No. 41,840 of March 16, 2020. See Allan R. Brewer-Carías & Carlos García Soto (Compilers), *Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017*, (Bogotá: Editorial Temis-Editorial Jurídica Venezolana, 2017).