

When the Exception Becomes the Rule: A look at penal reforms and their impact on civil liberties

Over the last two years several legal reforms have been introduced that affect the procedural guarantees for individuals. More than 30 legislative decrees have modified different laws, primarily in the area of criminal law.

Most of these reforms have taken place in the context of the implementation of the Regime of Exception (RE) starting on March 27, 2022¹. The ER initially implied the suspension of four constitutional rights: time limit for administrative detention, right to defense in the first proceedings, freedom of association and assembly, and inviolability of the home. The right to association was later deleted in the fifth extension².

The implementation of the state of exception, however, has led to the violation of constitutional rights that were not suspended (presumption of innocence, inviolability of the home, the right to legal detention and the right to life and physical integrity³). In practice, there have been violations of procedural guarantees such as legal detention, the presumption of innocence, the right to defense and, in general, due process.

This has meant that in addition to the RE a de facto violation of human rights and procedural guarantees has occurred, which, when carried over to reforms to the criminal justice system, become permanent. In other words, even if the Regime of Exception is no longer extended, individuals being prosecuted will continue to be held under a system of diminished guarantees.

Instituting a Criminal Law based on the Enemy

Most of the penal reforms were passed in three sets: the first one in March 2022, another one between September and October 2022 and the last one between July and August 2023. A significant part of the reforms entail violations of procedural guarantees, contrary to universally recognized standards.

The reforms involve a return to prior criminal law focused on the perpetrator and not on the crime itself. This is the creation of criminal law based on an enemy⁴, a criminal policy that identifies this enemy as a threat to the State, the Constitution or society, and limits guarantees

¹ Legislative Assembly (2022). D.L. 333 of 03/27/22, published in the D.O. Number 62, Volume 434 dated 03/27/22.

² Legislative Assembly (2022). D.L. 476 of 08/17/22, published in the D.O. Number 152, Volume 436 dated 08/17/22.

³ Reports by Cristosal and other human rights organizations have documented violations of these rights. You can access the reports at this link: <https://cristosal.org/ES/category/estado-de-derecho/>

⁴ JAKOBS, Günther. Derecho penal del ciudadano y derecho penal del enemigo in JAKOBS Günther and CANCIO MELIÁ, Manuel (2005) Derecho Penal del Enemigo. Universidad Externado de Colombia, Bogotá.

and replacing the rule of law with a state of exception, whose antecedents go as far back as the Nazi genocide.

The reforms accentuate the application of criminal law against the enemy in El Salvador, a policy that had begun in previous years with legal reforms that established a dual procedural standard for dealing with gangs, and which is now being applied to thousands of innocent people.

Once a person is called a gang member, there are no legal guarantees

The reforms undermine the presumption of innocence. It is enough for someone to be accused of being a gang member to be presumed guilty. The reforms allow the use of a police report, a police report or the confession of a third party to incriminate someone. A single anonymous complaint can be used for an arrest.

The group of people prosecuted by the RE accused of being gang members are subjected to a different standard which violates the right to equality. They can be detained for an indefinite period of time until the process is completed. They are not allowed alternative measures to detention. They can be convicted in absentia. If they are juveniles, they can be prosecuted, even at fourteen years of age, and be treated as adults, in violation of the Constitution and international treaties that establish a special legal treatment distinct from that of adults.

Taking advantage of vague definitions of illicit associations and terrorist groups, they are put under the jurisdiction of ad hoc judges who hear and sentence (they are both judge and jury), whose identity is unknown to them (faceless judges), and they have difficulty in accessing a quality defense. The Attorney General's Office can group cases at its discretion, including any person within a clique, and decide which court will hear the case, violating the principle of jurisdictional authority.

The set of penal reforms carried out under the RE has exacerbated the different standard of procedural guarantees for those who are prosecuted under the RE. This is the straightforward implementation of criminal law against the enemy. This is the convergence of arbitrary practices contrary to international standards and the attempt to normalize them through legal reforms. It is justified as an exception but later becomes permanent.

The only guarantee left to a person prosecuted under the RE is the possibility that there are still independent judges who fulfill their role of oversight, although it should be noted that judicial independence has been seriously damaged by the attacks and co-optation that the judicial system has suffered by the political power in the last four years.

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