



*AEQUITAS - VENEZUELA*

# **ALTERNATIVE REPORT OF AEQUITAS<sup>1</sup> CONCERNING VENEZUELA**

**Crimes and punishment established by decree-laws issued by the President of the  
Republic in Venezuela**

**Human Rights Committee  
One hundred and fourth session  
114<sup>o</sup> period de sessions  
From the 29th of June to the 24th of July of 2015**

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<sup>1</sup> *AEQUITAS* is an NGO created with the purpose of the promotion of studies and juridical publications of themes related to human rights, rule of law and democracy. It was established in Venezuela in the year 2003, duly registered in the Registry Office. The preparation of seminars and the publication of books related to human rights, such as freedom of expression, civil participation and judicial independence are amongst the principal activities of the NGO.



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## **Violations of the principle of legality: article 15 of the International Covenant on Civil and Political Rights**

Through decree-laws issued by the President of the Republic a number of crimes and punishment that involve deprivation of liberty have been created, in clear violation of the principle of legality and the principle of legal reserve in criminal matters, enshrined in the article 15 of the International Covenant on Civil and Political Rights (here in after “Covenant”) and in other international instruments. Those decree-laws dictated by the President are based on enabling laws anticipated in the Constitution<sup>2</sup>. But in any case all acts of the State shall be subject to international obligations under human rights instruments.

### **1. The crimes and criminal offenses created through Decree-Law**

The matter related with the creation of crimes and criminal offenses through-out decree-laws issued by the President of the Republic (National Executive) based on an enabling laws in Venezuela was incorporated in the list of issues of the seventy five session of the Human Rights Committee (CCPR/C/VEN/98/3) in 2000<sup>3</sup>. However, it is relevant to take into account the situation regarding the criminal offenses created in Venezuela through decree-law (*law ranking decree*) after the year 2000 for this alternative report, which are contrary to the principle of legality enshrined in the Covenant.

The principle of legality is enshrined in the article 15 of the Covenant: “*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, **under national or international law**, at the time when it was committed*” (emphasis added).

This Human Rights Committee in its decision in “Nicholas vs. Australia” Case No. 1080/2002 expressed its position on the article 15 pointing out that such criminal conducts:

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<sup>2</sup> Constitution of the Bolivarian Republic of Venezuela: “Article 203: Enabling laws are the ones that are approved by three fifth parts of the National Assembly members, with the means of establishing the guidelines and purposes of the matters that are being delegated to the President of the Republic, with rank and value of law. Enabling laws must determine its term of practice”.

<sup>3</sup> The third paragraph pointed out: “*The Constitution states that one of the responsibilities of the President of the Republic is to issue law-ranking decrees, subject to authorization by an enabling act. Please explain whether there are constitutional or legal restrictions on such enabling acts; in what way the exercise of this responsibility is supervised; whether this provision has already been put into practice; and, if so, whether the enabling act permits the issue of decrees concerning human rights*”.



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“requires any ‘act or omission’ for which an individual is convicted to constitute a ‘criminal offence’”<sup>4</sup>.

Additionally the General Comment No. 32 of this Human Rights Committee established that States must respect the guarantees of the Covenant regardless of their domestic law and cannot invoke the provisions of its internal law as justification for its failure to perform its obligations under the Covenant.

In this particular case Venezuela has violated the rights of all the persons enshrined in the principle of legality by creating crimes and criminal offenses through decree-law and in consequence submitting individuals to crimes and criminal sanctions (involving deprivation of liberty) created by the Executive Branch instead of formal laws created by the legislative branch of the State.

In this sense, it is relevant to mention that the Inter-American Court of Human Rights in the Advisory Opinion OC-6 has endorsed the matter of the understanding of the word “law” for the restriction of the rights when analyzing the article 30 of the American Convention on Human Rights. This regional tribunal elaborated the following: “*The Court concludes that the word ‘laws,’ used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State*”<sup>5</sup>.

In regards to the principle of legality in criminal matters and its incompatibility with those acts of the state of inferior rank that create crimes and punishments the Inter-American Court has expressed the importance of this principle in a democratic society:

*107. In sum, under the rule of law, the principles of legality and non-retroactivity govern the actions of all bodies of the State in their respective fields of competence, particularly when the exercise of that punitive power where the State manifests with the maximum strength one of its most serious and intense functions vis-à-vis human beings: repression, applies.*<sup>6</sup>

The Constitution of the Bolivarian Republic of Venezuela establishes the competence of the President of the Republic -jointly with the Council of Ministries- to dictate Decree Laws

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<sup>4</sup> Human Rights Committee, Case *Nicholas vs. Australia*, Communication No. 1080/2002, paragraph. 7.5

<sup>5</sup> Inter-American Court of Human Rights, Advisory Opinion Oct-6/86 May the 9th 1986, The expression “laws” within the article 30 of the American Convention on Human Rights available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_06\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_06_esp.pdf)

<sup>6</sup> IACHR, Case of Baena Ricardo et al v. Panama, Judgement of February 2<sup>nd</sup> 2001, Merits, Reparations and Cost, paragraph 107.



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(article 236 paragraph 8<sup>7</sup>) in those matters that he has been authorized in a enabling law. Even though this legislative power has no limits or restriction on any matters, it has to be interpreted according to the provisions of the Covenant, since on the contrary, this constitutional provision has such a wide range that is not in compliance with the obligations recognized in the Covenant as it has caused repeatedly violations to the human right enshrined in the principle of legality.

### 2. The crimes and penalties issue through decree-law

A. In November of 2000 the General Assembly dictates the “*Law that authorizes the President of the Republic to dictate Decree Law in the matters that are being delegated*”<sup>8</sup>. Under the aforementioned law, the President of the Republic issues the Decree Law for the Partial Reform of the General Banking and other Financial Institutions<sup>9</sup>. This Decree Law incorporated criminal offenses which penalties of imprisonment vary from three to eleven years: article 430: misappropriation (from 8 to 10 years); 431: misappropriation of credits (from 8 to 10 years); article 432: appropriation or distraction of resources (from 8 to 10 years); article 433: document frauds (from 9 to 11 years); article 434: false or misleading information to perform banking transactions (from 8 to 10 years); article 435: manipulation of financial information (from 8 to 10 years); article 436: simulation of capital replenishment (from 9 to 11 years); article 437: non-compliance of external auditors (from 8 to 10 years); article 438: non-compliance of technical assessors (from 8 to 10 years); article 439: false offer (from 8 to 10 years); article 440: trust responsibility (from 8 to 10 years); article 441: contravention within a trustee (from 9 to 11 years); article 442: false information in the trust (from 3 to 10 years); article 443: conceal information in the institutional declaration (from 8 to 10 years); article 444: disclosure of confidential information (from 8 to 10 years); article 445: electronic fraud (from 8 to 10 years); article 446: appropriation of the clients information (from 8 to 10 years); article 447: appropriation of information through electronic media (from 8 to 10 years); and article 448: spread of misinformation (from 9 to 11 years).

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<sup>7</sup> Article 236 paragraph 8 of the Constitution of the Bolivarian Republic of Venezuela: “*The powers and duties of the President of the Republic: 8. Issue prior authorization by an enabling law, decrees with the force of law*” available at: [http://www.cne.gob.ve/web/normativa\\_electoral/constitucion/titulo5.php#cap2](http://www.cne.gob.ve/web/normativa_electoral/constitucion/titulo5.php#cap2)

<sup>8</sup> Law authorizing the President of the Republic to issue Decree with Rank and Force of Law in the matters that are delegated, Official Gazette of the Bolivarian Republic of Venezuela N° 37.076, November 13 2000, available at: <http://historico.tsj.gob.ve/gaceta/noviembre/131100/131100-37076-01.html>

<sup>9</sup> Decree No. 1526 by which the Decree with Rank Value and Power Law on Banking law and other financial institutions is issue, November 3<sup>rd</sup> 200, available at: <http://www.bcv.org.ve/c3/leybancos.pdf>



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- B. In the year 2010, days before the end of the National Assembly's Period (2005-2010), the National Assembly issued on December 17<sup>th</sup> of the aforementioned year a new enabling law named: Law authorizing the President to Dictate Law Ranking Decree in the matters that are being delegated<sup>10</sup>. This Law enables the President to dictate law ranking decree for a period of 18 months in economic, housing and public services matters, including explicit authorization for "establishing laws that anticipate crimes that must apply in case of the commission of punishable acts" (art. 1 paragraph 6)<sup>11</sup>. Under this Law, the President issued on March 2<sup>nd</sup> 2011 the Decree with Rank, Value and Power of Law for the Partial Reform of the Institutions of the Banking Sector, throughout they were created new crimes and criminal sanctions, whose penalties of imprisonment vary from three to fifteen years: article 195: document frauds (from 9 to 11 years); article 196: trust responsibility (from 8 to 10 years); article 197: appropriation of the clients information (from 8 to 10 years); article 216: appropriation or distraction of resources/ false or misleading information to perform banking transactions (from 10 to 15 years); and 228: spread of misinformation (from 9 to 11 years).
- C. In the year 2013 was issued the Law authorizing the President to dictate Decree with Rank, Value and Power of Law<sup>12</sup>. This enabling law authorizes the President of the Republic to: "*b) Dictate and/or reform rules destined to deepen and strengthen the mechanism of **criminal**, administrative, civil and disciplinary sanctions in order to avoid injury or improper use of the public patrimony and to prevent acts of corruption*" (emphasis added). Now, since the Enabling Law was dictated 57 decree laws were issued, among them 45 decree laws were issued in the Official Gazette of the 18th of November of 2014, one day before the expiration of the Enabling Law, considering that the term was for 12 month. It is relevant to mention that official appearance of those decree laws circulated after the expiration of the Enabling Law.
- Throughout the following Decree Laws issued by the President of the Republic they were created crimes and sanctions that involved deprivation of liberty:

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<sup>10</sup> Law authorizing the President to Dictate Law Ranking Decree in the matters that are being delegated, Official Gazette N° 6.009 Extraordinary, December 17th 2010, available at: <http://historico.tsj.gov.ve/gaceta/diciembre/17122010/17122010-3028.pdf#page=1>

<sup>11</sup> Decree No. 8.079 by which the Decree with Rank, Value and Power of Law for the Partial Reform of the Institutions of the Banking Sector is issue, Official Gazette N° 39.527, March 2nd 2011, available at: <http://historico.tsj.gov.ve/gaceta/marzo/232011/232011-3087.pdf#page=2>

<sup>12</sup> Law that authorizes the president to dictate Decree with Rank Value and Power of Law, Official Gazette No. 6112 Extraordinary, November 19<sup>th</sup> 2013, available at: [http://historico.tsj.gov.ve/gaceta\\_ext/noviembre/19112013/E-19112013-3843.pdf#page=1](http://historico.tsj.gov.ve/gaceta_ext/noviembre/19112013/E-19112013-3843.pdf#page=1)



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**a) Decree Law of the Organic Tax Code<sup>13</sup>**

- i. Article 122. Whom with prior knowledge of the initiation of a procedure for the determination of taxes or collection of tax obligations or sanctions, causes or exacerbates the insolvency of its own or for a third party, frustrating in whole or in part the execution of these benefits, will be penalized with imprisonment from one (1) to five (5) years.
- ii. Article 123. Who publicly incites or fulfills concerted maneuvers intending to organize the collective denial of the compliance of tax obligations, will be penalized with imprisonment from one (1) to five (5) years.

**b) Decree Law of the Currency Exchange Law and its Violations<sup>14</sup>**

- i. The presentation of documents or false or counterfeit information  
Article 16.  
Whom for the purposes of participating or developing operations related to the currency exchange regimen, presents or subscribes balances, financial statements, and in general, documents or collections of any kind or type that prove to be false or forged, or that provide information or data that do not reflect the reality of the financial or commercial situation, will be penalized with imprisonment from one (1) to three (3) years, and with an additional fine equivalent to five tenths of the tax unit (0.5 T.U.) in force on the date of the liquidation, for each dollar of the United States of America or its equivalent in any other currency, of the corresponding amount to the operation involved.
- ii. Promotion of currency exchange violations  
Article 19.  
Whom directly or indirectly promotes or further stimulates the perpetration of any of the currency exchange violations provided for in this Decree with the Range, Value and Force of Law, will be penalized with imprisonment from two (2) to six

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<sup>13</sup> Decree No. 1.434 by which the Decree with Rank and Force of Organic Law of the Organic Tax Code is issue, Gazette No. 6152 Extraordinary, November 18<sup>th</sup> 2014, available at:  
[http://historico.tsj.gob.ve/gaceta\\_ext/noviembre/18112014/E-18112014-4142.pdf#page=1](http://historico.tsj.gob.ve/gaceta_ext/noviembre/18112014/E-18112014-4142.pdf#page=1)

<sup>14</sup> Decree No. 1.403 by which the Decree with Rank Value and Power Law on Currency Exchange Law and its violation is issue, Gazette No. 6150 Extraordinary, November 18<sup>th</sup> 2014, available at:  
[http://historico.tsj.gob.ve/gaceta\\_ext/noviembre/18112014/E-18112014-4141.pdf#page=1](http://historico.tsj.gob.ve/gaceta_ext/noviembre/18112014/E-18112014-4141.pdf#page=1)



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(6) years, and with an additional fine equivalent to five tenths of the tax unit (0.5 T.U.) in force on the date of the liquidation, for each dollar of the United States of America or its equivalent in any other currency, of the corresponding amount to the operation involved.

**c) Decree Law on Fair Costs and Prices<sup>15</sup>**

**i. Resale of Basic Food Supplies<sup>16</sup>.**

Article 62. Whoever buys products declared as basic food supplies, seeking for profit by selling them for superior prices than those established by the State, by direct regulations or by guidelines that pursue the establishment of fair costs and prices, will be penalized with imprisonment from one (1) to three (3) years, and with a fine of two hundred (200) to ten thousand (10,000) Tax Units, and the confiscation of the merchandise. That whom further re-offends in the perpetration of this crime, the criminal sanction will be applied to the fullest, and the fine will be doubled to its limit.

**d) Decree Law of Anti-Corruption<sup>17</sup>**

**i. Article 47. Whom for him or herself or through the intervention of a third party, offers or grants to directives, administrators, employees or company collaborators, partnerships, associations, foundations or organizations a benefit or advantage of any kind, beneficial for him or her or a third party with regard to others, violating his or her obligations in the acquisition or sale of the merchandise or in the provision of services, will be penalized with imprisonment from two (2) to six (6) years.**

The same sanction will be applied to punish the directive, administrator, employee, or collaborator, that who for him or herself or through the intervention of a third party, receives, requests, or accepts this benefit or advantage.

Additionally, the competent decentralized body for the defense of the socioeconomic rights may impose the sanction of suspension of the Unique

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<sup>15</sup> Decree No. 1.467 by which the Decree with Rank and Force of Law of Fair Prices is issue, Gazette No. 6156 Extraordinary, November 19<sup>th</sup> 2014, available at: [http://historico.tsj.gob.ve/gaceta\\_ext/noviembre/19112014/E-19112014-4232.pdf#page=1](http://historico.tsj.gob.ve/gaceta_ext/noviembre/19112014/E-19112014-4232.pdf#page=1)

<sup>16</sup> It was previously anticipated as an administrative penalty now it has been incorporated as a criminal sanction.

<sup>17</sup> Decree No. 1.410, by which the Decree with Rank, Value and Force of Law for the partial reform of the Law Against Corruption is issue, Gazette No. 6155 Extraordinary, November 19<sup>th</sup> 2014, available at: [http://historico.tsj.gob.ve/gaceta\\_ext/noviembre/19112014/E-19112014-4233.pdf#page=1](http://historico.tsj.gob.ve/gaceta_ext/noviembre/19112014/E-19112014-4233.pdf#page=1)



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Registry, in the terms established in the Law that regulates the subject of fair costs and prices of goods and services.

- ii. Article 85. Whom for him or herself or through the intervention of a third party promises, offers or grants a public official of another State, directly or indirectly, on behalf of its nationals, people that have main residence in his or her territory and companies there domiciled, any object with economic value or other benefits, including but not limited to handouts, favors, promises, advantages aimed for that public official to develop or omit any act, in the performance of his or her public functions, related to a transaction of economic, commercial or any other nature, will be penalized with imprisonment from six (6) to twelve (12) years.

More recently, on the 15th of March of 2015, a new enabling law was issued: "*Law authorizing the President of the Republic to dictate Decrees with Rank, Value and Force of Law in matters which are delegated to reinforce and guaranteed sovereignty rights and protection of the Venezuelan people and the constitutional order of the Republic*"<sup>18</sup>. Such Act, authorizes the President of the Republic to: " 5. *Standardize guidelines aimed to strengthening the system of civil , administrative and **criminal proceedings** that might arise in defense of the principles, values and constitutional rules set forth in this law.*" (emphasis added).

### 3. Conclusion

In relation to the violation of the right and the principle of legality and legal reserve in criminal matters for the acts of State that create crimes and criminal offenses that involve deprivation of liberty throughout acts different from a formal law, in the year 2013 and once again in the year 2014, the Inter-American Commission on Human Rights has expressed its concern regarding the issuance of the enabling law in Venezuela, in particular, because it grants "powers to the President to legislate in matters of crimes and punishment that are exclusive of the parliamentary legal reserve"<sup>19</sup>.

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<sup>18</sup> Law authorizing the President of the Republic to issue Decrees with Rank, Value and Force of Law in matters which are delegated to the reinforce and guaranteed sovereignty rights and protection of the Venezuelan people and the constitutional order of the Republic, Gazette No. 6178 Extraordinary, March 15<sup>th</sup> 2015, available at: [http://historico.tsj.gob.ve/gaceta\\_ext/marzo/1532015/E-1532015-4236.pdf#page=1](http://historico.tsj.gob.ve/gaceta_ext/marzo/1532015/E-1532015-4236.pdf#page=1)

<sup>19</sup> See: IACHR, Annual Report 2013, Chapter IV of Venezuela, paragraph 518 and Annual Report 2014, Chapter IV of Venezuela, paragraph 572, available at: <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap4-Venezuela.pdf>



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It should be noted that the crimes established through these decree-law issued by the Executive Branch are incompatible with the principle of legality. This principle constitutes a fundamental pillar for the contemporary criminal law<sup>20</sup>, and its inderogable nature it's enshrined explicitly in the Covenant and other international human rights treaties<sup>21</sup> and reaffirmed by other international human rights bodies<sup>22</sup>.

This principle means that the definitions of criminal penalties must be clear and precise provisions in the law<sup>23</sup>. As it was mentioned by the Special Rapporteur on the independence of judges and lawyers, vague definitions are contrary to the international human rights law and "its other international obligations"<sup>24</sup>. When these definitions allow the criminalization of legitimate behavior under the international human rights law, these infringe the principle of legality.

The Human Rights Committee has emphasized that every deprivation of liberty that intends to criminalize a legitimate right or a fundamental right is incompatible with the Covenant. In those countries where forms of expression or opposition of the governmental politics has being issue as crime, the Committee has recommended that the criminal act is subject to revision<sup>25</sup>.

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<sup>20</sup> See: for example: Rome Statute of the International Criminal Court (article 22) and the reports of the International Law Commission of the General Assembly of the United Nations, 1993 (Supplement N° 10 (A/48/10), p.81) y 1994 (Supplement N° 10 (A/49/10), p.321).

<sup>21</sup> See: The International Covenant on Civil and Political Rights (article 4.2); and the European Convention on Human Rights (article 15); Arab Charter on Human Rights (article 4 (b)) and the Inter-American Convention on Human Rights (article 27).

<sup>22</sup> See: Human Rights Committee, *General Comment N° 29, States of Emergency* (article 4), paragraph 7; *Concluding observations of the Human Rights Committee : Estonia*, 15/04/2003, CCPR/CO/77/EST, paragraph 8; Inter-American Court of Human Rights, Decision of May 30<sup>th</sup> 1999, *Case Castillo Petruzzi et al vs Peru*, paragraph 119 and ff; Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22<sup>nd</sup> 2002, paragraph 218.

<sup>23</sup> See, among others, Human Rights Committee, *General Comment N° 29, States of Emergency* (article 4), paragraph 7; *Concluding observations of the Human Rights Committee to: Democratic People's Republic of Korea*, CCPR/CO/72/PRK of the 27<sup>th</sup> of August 2001, paragraph 14; *Belgium*, CCPR/CO/81/BEL, August 12<sup>th</sup> 2004, paragraph.24, *Iceland*, CCPR/CO/83/ISL, April 25<sup>th</sup> 2005, paragraph 10; *Estonia*, CCPR/CO/77/EST, April 15<sup>th</sup> 2003, paragraph 8; *Canada*, CCPR/C/CAN/CO/5 April 20<sup>th</sup> 2006, paragraph 12; and Morocco, CCPR/CO/82/MAR December 1<sup>st</sup> 2004, paragraph 20.

<sup>24</sup> United Nations Document, E/CN.4/1998/39/Add.1, paragraph 129. See also, *Concluding observations of the Human Rights Committee: Portugal (Macau)* CCPR/C/79/Add.115, November 4<sup>th</sup> 1999, paragraph 12; *Argelia*, CCPR/C/79/Add.95, August 18<sup>th</sup> 1998, paragraph 11; *Egypt*, CCPR/C/79/Add.23, August 9<sup>th</sup> 1993, paragraph 8; *Peru*, CCPR/C/79/Add.67, July 25<sup>th</sup> 1996; *Democratic People's Republic of Korea*, CCPR/CO/72/PRK, August 27 2001, paragraph 14, *Belgium*, CCPR/CO/81/BEL August 12 2004, paragraph 24; *Iceland*, CCPR/CO/83/ISL, April 25 2005, paragraph 10; *Estonia*, CCPR/CO/77/EST April 15 2003, paragraph 8; *Canada*, CCPR/C/CAN/CO/5 April 20 2006, paragraph 12, United States of America, CCPR/C/USA/CO/3/Rev.1 December 18<sup>th</sup> 2006, paragraph 11.

<sup>25</sup> See, for example, *Concluding observations of the Human Rights Committee: Syria*, CCPR/CO/71/SYR April 24 2001, paragraph 24, and *Iceland*, CCPR/CO/83/ISL April 24 2005, paragraph 10.