
Other Topics

# Coronavirus in Latin America

## Opportunity or Threat for the Rule of Law?

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In Latin America, the impact of the coronavirus on the rule of law will largely depend on how governments in the region exercise their power in this time of crisis. If Latin America's rulers abuse their authority in order to consolidate power, the future looks bleak for the rule of law in Latin America. Whereas, if they exercise their power with moderation and demonstrate good leadership in bringing their countries out of the crisis, they may be able to win back the trust that was thought to be lost forever. One thing we know for sure is that the coronavirus will change the rules of the political game.

**Introduction**

By the end of March 2020, COVID-19 had reached every country in Latin America. This was later than in Europe and the number of cases initially was at a manageable level. Yet, if the situation worsens, many governments fear their national health systems would find it even harder to cope than their counterparts in Europe. That is why most governments in the region wasted no time in imposing drastic restrictions to contain the spread of the virus. Some declared a state of emergency, and almost all imposed temporary curfews. Even though these measures may be justified, there is still a danger that power will be concentrated in the hands of populist or even authoritarian rulers who could deliberately exploit the crisis in unfettered pursuit of their political aims at the expense of democracy and rule-of-law institutions. Many constitutional states in Latin America are already quite fragile. Will the coronavirus pandemic place them at even greater risk? Or could it provide an opportunity to restore trust in the rule of law?

**Before the Pandemic: Deficits in the Rule of Law and the Welfare State**

Let us take a look at the situation before the outbreak of the pandemic. Even then, rule of law in Latin America was facing many challenges. Ever since the colonial era, the continent has been characterised by a yawning gap between rich and poor. In some states and regions, corrupt elites, parapolitics, and violent organised crime, often linked to drug trafficking, can have a greater impact on people's lives than the parliamentary laws that apply to everyone in equal measure. People are unlikely to obey the law if the state itself ignores or fails to enforce it. This is exacerbated by inadequate pensions and healthcare, in many cases weak or non-existent social security systems, the lack of educational opportunities and infrastructure, and an astonishing degree of impunity. So it was hardly surprising to see citizens taking to the streets to vent their anger *en masse* at the end of 2019. In Chile, Ecuador, and Colombia some of these protests resulted in vandalism, looting, and deaths. The reasons behind the protests in the region cannot all be lumped together, but they were certainly fuelled by the systemic and endemic shortcomings of social policies and the rule of law in Latin America.

It is true that the virus is "fair" in that it infects everybody equally, but it is the region's poor who are most badly affected.[1] Countries like Venezuela were already in the grip of a "complex humanitarian emergency" long before the outbreak of coronavirus. 87 per cent of the country's population live in poverty or extreme poverty and health care is virtually nonexistent.[2] How can a country that was already in dire straits suddenly cope with the challenges posed by the coronavirus? Even Latin American nations on a somewhat stronger footing had

reason to fear that their health systems would collapse under COVID-19, not to mention the economic consequences. The first gruesome pictures of such a collapse have already reached us in April 2020 from the city of Guayaquil in Ecuador, where hundreds of corpses were pilled up in the streets. The funeral parlours were completely overwhelmed.[3]

We should also remember that more than half of Latin America's working population toil in the informal economy, meaning they have no access to social welfare systems. Over the last months, even employees in the formal economy have been sent on unpaid leave – including in the public sector – or simply been laid off. The state aid promised in many places got off to a slow

No escape: People accept that they might catch the virus as they squeeze onto their megacity's overcrowded public transport system. Source: © Amanda Perobelli, Reuters.

start, and the need for ventilators increased. In mid-May, the metropolitan region of Santiago de Chile reported an occupancy rate of 95 per cent of its intensive care beds. Yet health care in Latin America is not all bad – if you can pay, you get excellent treatment. The well-equipped private clinics in wealthy urban districts stand in stark contrast to the precarious and sparse health facilities that exist in rural areas. Accordingly, with the outbreak of the corona-crisis, fears arose that the region's few intensive care beds will not be allocated according to age or underlying medical conditions, but according to the patient's bank balance and their residence. In Brazil, the country with the highest number of infected people in Latin America[4], this is already reality. More than half of all corona-virus testing is carried out by private laboratories, but only against payment.[5]

When it comes to the coronavirus, this basic inequality runs deeper still. The slum-dwellers of Latin America often have inadequate access to drinking water and sanitary facilities. The coronavirus means "luxuries" like face masks and sanitisers are hard to come by. For people who have nothing, governments telling them to remain with their whole family in cramped homes, often with no daylight and unbearable daytime temperatures, is a travesty. Instead, they accept that they might catch the virus as they squeeze onto their megacity's overcrowded public transport system in an attempt to at least earn enough money to feed their families. In other words, it is society's poorest who have a higher risk of infection, while also having less access to medical treatment. The situation in Latin American prisons is particularly concerning. High numbers of prisoners are packed into the most confined spaces, often in inhumane conditions. The first prison riots have already broken out.[6] The Colombian government has responded by releasing petty criminals from prison.[7] Even the indirect consequences of the coronavirus, such as recession and price increases, are likely to hit the poor much harder in the coming months or even years and could cost more lives than the virus itself. Social unrest seems to be inevitable.[8]

**Emergency Measures and Restrictions on Liberal Freedoms**

The global pandemic and the social realities of Latin America as outlined above – particularly the deficiencies in health care – explain why many governments on the continent imposed drastic restrictions on basic freedoms, even while infection rates remain low. Virtually all Latin American countries ordered border closures, bans on public events and meetings, and total lockdowns and other restrictions on movement. At least ten countries declared a state of emergency.[9]

**Restrictions on the freedom of movement entail other violations of fundamental rights, such as the de facto suspension of the freedom of assembly and association.**

In order to effectively respond to emergency situations – which in the past mainly constituted wars, military coups, or terrorist attacks – and their consequences, constitutions normally provide for the expansion of governmental powers. This may involve temporarily suspending laws and the ability to pass decrees with legal force without the involvement of parliament – but of course only for a limited period in order to manage the crisis. Many countries' constitutions permit deploying the military within their national borders to implement the emergency measures. When properly and responsibly applied, the purpose of such emergency clauses is to protect or even strengthen democracy in situations of extreme crisis.

Anyone attempting to downplay the situation, whether left-wing populists like Mexican President López Obrador or Nicaragua's authoritarian President Daniel Ortega, or those in the right-wing populist camp, such as Brazil's President Jair Bolsonaro or, initially, US President Donald Trump, seems to ignore science or fails

to recognise the extent of the crisis. For example, Jair Bolsonaro has dismissed the virus as "flu" and thus failed to put in place any far-reaching measures to protect the health of his people, even in view of rapidly increasing case numbers; he justified his decision by citing the need to protect the economy. Of course, it is necessary to ensure that such measures are proportionate, but this lack of action simply cannot be reconciled with the state's duty to protect the life and health of its citizens and the principles of a constitutional state.

On the other hand, the substantive legal consequences of the extreme emergency measures led to unprecedented restrictions in civil liberties. These included measures that would be unacceptable in normal times, such as the wide-ranging restrictions on the right to freedom of movement and circulation in particular.[10] Restrictions on freedom of movement entail other violations of fundamental rights, such as the de facto suspension of the freedom of assembly and association. What is more, many Latin American countries were already reporting a spike in domestic violence, particularly against women and children, during the first few days of quarantine.[11] Then there is the right to work, as enshrined in so many of the region's constitutions. This was suspended for anyone whose work was not covered by one of the exceptions, or who could not switch to teleworking due to the nature of their job. The closure of all non-essential businesses and public institutions also means that the legal protection of fundamental rights is until now difficult or even impossible to achieve in many countries throughout the region.[12] On top of this, we should not underestimate the psychological impact that being alone and totally isolated for months on end can have especially on the elderly and vulnerable members of society.

Many of the adopted measures were and still are necessary[13] to prevent things from getting even worse. However, in Latin America, too, it is important to take a close look at whether the measures imposed are proportionate and examine their legal basis.[14] Unfortunately, most of the region's heads of government seemed to have little interest in doing so. For example, their sole justification for the extreme measures was that the restrictions were "necessary and cannot be delayed". Why should Colombians not be allowed to return to their country because of strict border closures, when Germans can generally do so? Why are Peruvians not allowed to walk alone in the park so long as they respect a safe distance of two metres? How are children in remote rural villages supposed to switch to online schooling when neither they nor their teachers have access to the internet or computers? Every constitutional state faces the challenge of finding a balance between protecting their citizens' health and upholding individual freedoms in a way that is proportionate and generally perceived as "fair",[15] but the "basic right to health" anchored in the constitutions of many Latin American states does not mean that other basic rights can be restricted without constraints. After all, the principle of legality still applies in times of crisis – perhaps even more so.

Isolated during times of crisis: We should not underestimate → the psychological impact that being alone and totally isolated for months on end can have especially on the elderly.
Source: © Manaure Quintero, Reuters.

**Emergency Measures as a Cover for the Consolidation and Expansion of Power**

With fragile states, weak institutions, and presidential systems that generally allow power to be monopolised by *caudillos*[16] more readily than is the case in Europe's parliamentary or semi-presidential systems, Latin America is also at greater risk than Western nations of witnessing the unlawful exploitation of these emergency measures. For instance, long before the coronavirus pandemic, American political scientists Steven Levitsky and Daniel Ziblatt warned in their book "How Democracies Die" against "would-be autocrats" who use economic crises, natural disasters and security threats to justify their anti-democratic policies. One of the great ironies of how democracies die is that the very defense of democracy is often used as a pretext for its subversion.[17]

Once Pandora's box has been opened and parliament legally excluded, expanded and unfettered presidential authority in the wrong hands offers endless opportunities for consolidating power or implementing measures that parliament would never have approved of in normal times. Perhaps there are some who have been waiting for just such a crisis to push through their pre-formulated laws as quickly and painlessly as possible. This allows decisions on life and death to be entrusted to leaders with no parliamentary scrutiny.[18] It is not without reason that human rights experts at the United Nations have issued strong warnings about abuses of power in the context of COVID-19.[19] In the worst-case scenario, states of emergency give carte blanche to tyrants and unjust regimes. For Latin America, the term "emergency legislation" does not generally evoke positive memories. During the military dictatorships or authoritarian regimes that dominated Brazil, Argentina, Chile, and Uruguay in the 1970s and 1980s and Peru in the 1990s, illegal repressive measures were often issued by emergency decree, for example, to counter "terrorist threats" from left-wing guerrilla groups or members of the opposition.[20]

Thus, the beginning of the corona-crisis encouraged Latin America's demagogues to bring themselves into position, especially in Venezuela. The country has been sliding towards dictatorship for some time, but particularly since the judicial system was forced to toe the line and parliament suspended. Venezuelan president Nicolás Maduro has sealed the country's borders, supposedly in response to the coronavirus, but it is a deliberate means of consolidating his power and persecuting his opponents still further. He also ramped up military deployment, ostensibly to protect public health.[21] Journalists and doctors who pointed out the Venezuelan health system's complete dysfunctionality with regard to the COVID-19 crisis, were faced with systematic threats and persecution. The government has a monopoly on information about the crisis, which it conveys to its people in a fragmented and manipulated fashion since the beginning of the crisis. State aid is only granted to those who have a Homeland card (*carnet de la patria*), thus demonstrating their loyalty to the party line.

The militarisation of public safety[22] along with a kind of "penal populism" can be observed in other parts of Latin America, too. Soldiers have been deployed to fight the pandemic and secure the borders, and this even includes reserve units. As with the police and other security agencies, many countries have made the military responsible for monitoring compliance with quarantine measures and granted them extensive powers to question and arrest anyone breaking the rules. Although this may be a psychological burden for those who feel reminded of past military dictatorships, the presence of the military is not, in itself, an immediate cause for concern. On the contrary, it is necessary to maintain public order and safety, and many of the region's constitutions explicitly provide for this in the event of an emergency.

**For it is precisely when military power is coupled with demagogy that the rule of law is at risk.**

The extended powers become questionable, however, when the military and police confuse the pandemic with a state of war and use their powers disproportionately against their own people. Incidents of this kind had already occurred during the mass protests in Chile, Colombia, and Ecuador in late 2019 to early 2020. It seems likely this will only continue in light of the fact that security personnel are often poorly trained and underpaid.[23] Peru, for example, amended its penal laws to make its military and national police force totally exempt from criminal responsibility for killings and bodily injuries, insofar as these are carried out in the context of fighting the coronavirus and in order to fulfil their constitutional mandate. The Inter-American Commission on Human Rights has tweeted that this is a violation of human rights. In addition, intimidating people with

threats of high fines or even prison sentences for violating mandatory quarantine measures appears to have become a populist instrument of power. According to media reports, at the end of March 2020 in excess of 25,000 people in Peru were under temporary arrest for disregarding the mandatory lockdown.[24] By early April 2020, this had risen to over 50,000 people. In El Salvador, too, there have been similar mass arrests. This looks like a case of using a sledgehammer to crack a walnut. The arrests seem to be a disproportionate response and are counterproductive if the aim is to prevent people from coming into close contact. After all, there are unlikely to be enough single cells to house these 50,000 temporary prisoners in jail. The region's presidents would be well advised to trust in the civil obedience of their citizens rather than immediately resorting to wielding the iron fist. For it is precisely when military power is coupled with demagogy that the rule of law is at risk.

Another source of irritation for autocrats and populists is the press. This is because freedom of opinion and information also includes the duty of the state to provide transparent, objective information. The coronavirus provides the perfect opportunity to further restrict these rights with impunity. For example, the Human Rights Ombudsman in El Salvador, José Apolonio, warned that the military and police in this Central American country are destroying journalists' information materials relating to the coronavirus by forcing them to delete photos and videos.[25] We recall how, only shortly before, President Nayib Bukele allowed the military to occupy parliament so as to persuade parliamentarians to agree to a loan. He also tweeted that he did not recognise three rulings by the Constitutional Chamber of the Supreme Court in April 2020, which qualified the above-mentioned detentions for failure to comply with quarantine measures as human rights violations.[26] Even in a relatively stable constitutional state like Colombia, it was recently alleged that the press has itself ended up in intensive care because of the coronavirus.[27] Several reporters who criticised the government were summarily dismissed in early April 2020. The quarantine measures mean that many journalists are unable to conduct their own independent research and reporting for months, so they have to rely on government information. To some extent, the de facto exclusion of the press has been and is still being instrumentalised to conceal the true state of the crisis. Moreover, some Asian countries, notably China, have shown how the pandemic can be exploited to make the public provide information via digital media and apps, for example about their health. Governments can then use this for other purposes, such as election campaigns or other forms of surveillance or manipulation of their own population.[28] When there is a health emergency, freedom of opinion and a transparent information policy are essential for saving lives. If China's government had not systematically suppressed the warning voices of some Chinese doctors who cautioned against the repercussions of the coronavirus in Wuhan back in December 2019, the world might have been spared a great deal of suffering.[29]

**Even in democracies, some politicians are using the coronavirus to delay events that may be politically undesirable.**

In other, less drastic cases – sometimes even in robust democracies – the pandemic is a rather convenient way of delaying events that may be politically undesirable. In Chile, where the government declared a "state of disaster" at an early stage, the constitutional referendum planned for 26 April 2020 was postponed until 25 October 2020. Further mass protests failed to materialise due to quarantine measures that were imposed. Bolivia's Supreme Electoral Tribunal too has postponed the elections scheduled for 3 May 2020, without naming a new date. This benefits interim president, Jeanine Áñez, who can consolidate her recently announced presidential candidacy. In the past, we have seen how wars and terrorist attacks tend to


State of exception: The extended powers of military and police become questionable, as soon as they use their powers disproportionately against their own people. Source: © Carlos Garcia Rawlins, Reuters.

make the public rally around the flag,[30] and government approval rates soar. Why shouldn't this also be the case for an interim president during the coronavirus pandemic?

**Consequences for the Rule of Law in Latin America**

The reasons behind the imposition of emergency measures in the case of COVID-19 may be different from measures taken during times of war or to (allegedly) counter terrorist threats, however extreme caution is still required. Of course, extraordinary times call for extraordinary measures, but they should still be subject to democratic legitimacy as well as checks and balances.

It is, therefore, important to pay particular attention to ensuring that regulatory bodies can continue to do their work, particularly the constitutional courts, and encourage a critical, watchful spirit on the part of the civilian population.[31] It is precisely in times of crisis that


democracy pays twice for any mistakes. Many measures are being rushed through that might have taken years to approve in normal times. Some parliaments are in a state of temporary paralysis. The population is distracted, preoccupied with protecting themselves, and alleviating the personal consequences of the crisis. As a result, the legality of the measures is rarely a subject of public debate. Approval rates for the emergency measures are (still) – with the exception of Brazil – generally high. So why worry about their proportionality?

Once governments have escaped unpunished or even been politically lauded for their courageous actions, there is a danger that they will continue to order unbridled and substantial interventions in civil liberties, especially freedom of movement, in times of less serious crisis. That is why it is essential to conduct a legal reappraisal of what has happened.[32] We should welcome the fact that Brazil's Constitutional Court has declared one of President Jair Bolsonaro's decrees to be unconstitutional. It aimed to restrict access to public information during the coronavirus pandemic. It is also a positive sign that Colombia's Constitutional Court, one of the most prestigious and significant in the region, is reviewing whether the emergency measures enacted by President Iván Duque were constitutionally sound. At the end of May, the Court found constitutional the president's decree on social and economic emergency. Further presidential decrees adopted under the state of emergency are still under revision by the Constitutional Court.[33]

**The greatest danger for the rule of law in Latin America is that the emergency measures will not be reversed once the crisis has passed.**

However, the greatest danger for the rule of law in Latin America is that the emergency measures will not be reversed once the crisis has passed. Because if they are not quickly rescinded, they become the status quo. Therefore, new autocrats in the region could soon become too fond of their new powers and be reluctant to give them up.[34] The past has shown that emergency laws often remain in place for many years after a crisis has ended. Emergency anti-terrorism laws passed in the US and France, but also in Colombia, Chile and Peru, are still in force today. The state of emergency becomes the new normal. Thus, if power falls into the wrong hands, governments may not only restrict individual freedoms, but

also bring civic life, politics and the economy under their sole control for years to come.

In Latin America, the legal and political consequences of the coronavirus pandemic will largely depend on how the governments of the region exercise their power in this time of crisis. If Latin America's rulers abuse their authority in order to consolidate their power and further their personal ambitions, the future looks bleak for the rule of law in Latin America. Faith in democracy and the rule of law will decline even further. Inequalities will persist or even increase, and the wave of protest that has been temporarily suppressed will resume with renewed vigour.

However, if governments exercise their power with moderation and demonstrate good leadership in bringing their countries out of the crisis, not only will they win votes but may also be able to restore the trust of their citizens in state institutions – a trust that seemed lost forever. In particular, this should involve conducting a judicial review of the emergency measures taken and ensuring that health care systems are well equipped to face future crises. Perhaps the crisis also affords an opportunity for constitutional states in Latin America to focus more strongly on democracy, solidarity, and the welfare of their citizens. Because one thing we know for sure is that the coronavirus will change the rules of the political game. It is now up to Latin American governments to decide what direction they will take.

*–translated from German–*

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