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Judicial Power and Democratic Erosion in Venezuela

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Last week, The National Assembly of Venezuela, controlled by the ruling PSUV party, appointed the 20 magistrates who will make up the Supreme Tribunal of Justice for the period 2022-2034[1]. Perhaps for a good part of Venezuelans, who are overwhelmed by the economic and social crisis experienced in the country, this appointment of the Supreme Tribunal of Justice went unnoticed as a simple episode that only affects those who deal with politics. However, and although it may not seem so at first glance, these appointments have as many implications for the future of the country as the election of a new chief executive could have.

Despite the fact that Nicolás Maduro described the appointment of the Supreme Tribunal of Justice magistrates as an "exemplary" process, this new appointment has been strongly criticized and questioned by jurists, civil organizations for the protection of human rights, opposition parties and important international bodies. Among the many criticisms, these have been highlighted: non-compliance with the periods established

1 National Assembly. *Designación de las Magistradas y los Magistrados principales y suplentes del Tribunal Supremo de Justicia*. Official Gazette of the Bolivarian Republic of Venezuela No. 6,696 Extraordinary dated April 27, 2022, 2022.)

for the appointment of magistrates; the opacity of the process; the appointment of judges who exceed the maximum time of 12 years of permanence in the position; and the lack of a true renovation of the Supreme Tribunal of Justice. In this paper, we are going to comment on some implications of judicial continuity for Venezuelan democracy.

According to the Venezuelan Observatory of Justice, 60% of the members of the "new" Supreme Tribunal of Justice are magistrates from the previous court who, active or on "service commission", have given important signs of their support for Chavismo. For the Observatory, this designation guarantees the continuity of the Supreme Tribunal of Justice's support for Maduro's government, both for its members and for the way in which the magistrates were distributed in each of the key chambers of the high court[2].

Of the 20 magistrates appointed by the National Assembly of Venezuela, 12 were re-elected and 8 are new. Of these, 18 are pro-government. The distribution of these magistrates in the Board of Directors and by Chambers is as follows[3]:

- In the Board of Directors: of its three (3) members, 100% (3) are pro-government magistrates and two (2) of them are re-elected judges.

2 Acceso a la justicia. El Observatorio venezolano de la justicia. «#AlertaLegal La designación hecha por la Asamblea Nacional (AN) del "nuevo" #Supreme Tribunal of Justice garantiza la continuidad de su apoyo al Gobierno de Maduro.» Twitter. April 27th, 2022a. https://twitter.com/AccesoaJusticia/status/1519291751076347909.

3 Acceso a la justicia. "El «nuevo» Supreme Tribunal of Justice en cifras". *Infografias*. 2022b. https://accesoalajusticia.org/nuevo-Supreme Tribunal of Justice-cifras/ (Latest access: April 28th, 2022).

- In the Constitutional Chamber: of its five (5) members, 100% (5) are pro-government magistrates and all of them are re-elected judges.
- In the Political-Administrative Chamber: of its three (3) members, 100% (3) are pro-government magistrates, and all of them are re-elected judges.
- In the Electoral Chamber: of its three (3) members, 100% (3) are pro-government magistrates, and two (2) of them are re-elected judges.
- In the Criminal Cassation Chamber: of its three (3) members, 100% (3) are pro-government magistrates, and two (2) of them are re-elected judges.
- In the Civil Cassation Chamber: of its three (3) members, 100% (3) are pro-government magistrates, and one (1) of them is a reelected judge.
- In the Social Cassation Chamber: of its three (3) members, one (1) is a pro-government magistrate, as well as is re-elected.

Democracy and independence of the Supreme Tribunal of Justice

In her study "Courts and the Constitutional Erosion of Democracy in Latin America"[4], researcher Azul A. Aguiar-Aguilar from the Western Institute of Technology and Higher Studies (ITESO) from the University of Guadalajara points out that recent studies on modern autocracies trends show that many of them have not been established through coups or revolutions, but

4 Aguiar-Aguilar, Azul. *Courts and the Constitutional Erosion of Democracy in Latin America* (V Dem Institute of the University of Gothenburg, 2020).

through a progressive internal erosion of electoral democracies. Today, would-be dictators come to power through elections and then undermine them from within by manipulating the rules of democracy. This is what Adam Przeworski, Professor Emeritus of the Department of Politics at New York University (NYU), has called the "subversion of democracy on the sly"[5].

In these processes of democratic erosion, the control of the highest court of justice by the executive power plays a decisive role. Aguiar-Aguilar says that powerful and independent courts are a roadblock for populist leaders seeking to control other institutions and prolong their time in office. For this reason, modern anti-democrats choose to dominate the constitutional or Supreme Tribunal to legitimize changing the rules of the democratic process. With the court on its side, its manoeuvres against the institutions take on constitutional garb. This is how democratic erosion begins in an imperceptible way for most citizens[6].

Fall of the independence of the Judiciary Power in Venezuela

The data collected by the Varieties of Democracy Institute of the University of Gothenburg (V-Dem), and presented by Aguiar-Aguilar in her aforementioned study, show that the loss of independence of the Venezuelan Supreme Tribunal of Justice began with Hugo Chávez's government in 2000.

According to Asdrúbal Aguiar, a Venezuelan jurist and politician, and former judge of the Inter-American Court of

5 Przeworksi, A. *Crisis of Democracy* (Cambridge: Cambridge University Press, 2019).

6 Aguiar-Aguilar, Azul. *Courts and the Constitutional Erosion of Democracy in Latin America* (V Dem Institute of the University of Gothenburg, 2020), 7-13.

Human Rights, the beginning of the fall of Venezuelan judicial independence occurred at the moment in which the National Constituent Assembly, promoted and controlled by Chávez, created a Judicial Emergency Commission that decided upon the immediate dismissal of all judges in Venezuela and their immediate replacement by provisional judges. These judges, of course, had no independence since they did not have stability in the position as they were appointed discretionally and could be removed without subjecting themselves to pre-established procedures[7].

In 2004, through the law reforming the Supreme Tribunal, President Chávez "incorporated 12 Chavista judges, took control of the majority and turned the court into an appendage of the Executive", as denounced by José Miguel Vivanco, then Director of the Division of the Americas of Human Rights Watch[8]. In the 2004 HRW report "Rigging the Rule of Law", it was also pointed out that, since 2003, Chávez "had been taking steps to control the country's judicial branch, undermining the separation of powers and the independence of the judiciary in ways that violate basic principles of Venezuela's constitution and international human rights law"[9].

For Aguiar, another illustrative event of this ongoing process of loss of judicial independence in Venezuela was the speech by the

7 Aguiar, Asdrúbal. *Interview given to Ramón Cardozo on April 28, 2022*. 2022.

8 Vivancos, José. "Chávez se hace con el control de los jueces". *Diario El Pais. Entrevista dada a Francisco Peregil*. 2022 de septiembre de 2008. https://elpais.com/diario/2008/09/19/internacional/1221775204_850215.html (Latest access: April 26th, de 2022).

9 Human Rights Watch. "Manipulando el Estado de Derecho. Independencia del Poder Judicial amenazada en Venezuela". *Informe*. June 16th, 2004. https://www.hrw.org/es/report/2004/06/16/manipulando-el-estado-de-derecho/independencia-del-poder-judicial-amenazada-en (Latest access: April 29th, de 2022).

plenary magistrate of the Supreme Tribunal of Justice Fernando Vegas Torrealba on the occasion of the opening of the judicial year 2011[10] . In his speech, Judge Vegas explained that, in Venezuela, socialism had taken the place of capitalism and, consequently,

> (…) the Venezuelan judiciary has the duty to give its contribution for the effective execution, within the scope of its competence, of the State policy carried out by the national Government, [in the sense of developing] a deliberate and planned action to lead a Bolivarian and democratic socialism (...) This Supreme Tribunal of Justice and the rest of the courts must severely apply the laws to sanction conducts or redirect causes that are detrimental to the construction of Bolivarian Socialism[11] (own underlining).

The deterioration of judicial independence in Venezuela has continued uninterruptedly until today, according to researcher Aguiar-Aguilar. For the year 2020, V-Dem data shows Venezuela and Nicaragua as the Latin American countries with the lowest levels of judicial independence[12].

This decline has been warned and denounced by international organizations that investigate the violation of human rights. In the report of the Independent Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela of the United Nations presented in 2021, it reads:

10 Aguiar, Asdrubal. *Interview given to Ramón Cardozo on April 28, 2022*. 2022.

11 Vegas-Torrealba, Fernando. *Discurso de Orden. Sesión Solemne Apertura de actividades judiciales para el año 2011.* Vol. Serie Eventos Nro. 35. Caracas: Tribunal Supremo de Justicia, 2011, 42-44.

12 Aguiar-Aguilar, Azul. *Courts and the Constitutional Erosion of Democracy in Latin America* (V Dem Institute of the University of Gothenburg, 2020), 14.

> "Insider sources revealed that judges from the Supreme Tribunal of Justice routinely receive orders with respect to how to decide judgments. (...) In addition to instructions received via political actors, judges were subjected to pressure from within the Supreme Tribunal of Justice hierarchy. Judges were convened to meetings of the Plenary Chamber where they were presented with pre-prepared judgments to be signed by them"[13].

Moreover, the Inter-American Commission on Human Rights (IACHR), in its 2020 annual report, reiterated its concern:

> (...) from the way in which processes for appointing the magistrates of the Supreme Tribunal of Justice have been carried out and the lack of guarantees of the permanence of judges in their positions, harming judicial independence and impacting the population's access to justice (...), judicial independence remains severely limited, as many judges hold provisional appointments. <u>According to the case law of the Constitutional Chamber of the Supreme Tribunal of Justice</u>, provisional judges can be appointed and dismissed at will. Research journalists and civil society organizations estimate that 85.39% of judges were provisional in 2019, higher than the 80% in 2018. The figure ranged between 66% and 80% between 2007 and 2017[14] (own underlining).

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13 Independent International Fact-Finding Mission of the UN. Statement by the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. September 13th, 2021. https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMV/A.HRC.48.69_ES.pdf (Latest access: April 28th, de 2022), 7.

14 Inter-American Commission on Human Rights (CIDH), OEA. "Comunicado de Prensa No. 151/20". *CIDH-OEA*. June 27th, 2020. https://www.oas.org/es/cidh/prensa/comunicados/2020/151.asp (Latest access: April 28th, de 2022), 716.

The democratic erosion in Venezuela: 1999-2022

The lack of judicial independence during the period 1999-2022 has greatly contributed to the erosion of fundamental political freedoms in Venezuela. Throughout these last 22 years, there are multiple judgments of the Supreme Tribunal of Justice that have been questioned in this regard. Some illustrative examples will allow the reader to verify these facts:

Against the freedom of expression of thought and the right to information, the Supreme Tribunal of Justice issued judgment 1942 dated July 15, 2003[15], which denied the annulment appeal for unconstitutionality of the Venezuelan Penal Code articles (141, 148, 149, 150, 151, 152, 223, 224, 225, 226, 227, 444, 445, 446, 447 and 450) that punished offensive expressions towards public officials and State institutions with jail time. According to the plaintiff attorney Rafael Chavero Gazdik, these punitive norms –generally called "desacato laws"– violate the citizen's right to freedom of thought and expression, which is protected by the National Constitution and by the American Convention on Human Rights[16]. Chavero maintains that these rules of contempt produce the "dissuasive effect of inhibiting political debate and criticism of the actions of public officials, which has been considered the true essential and impenetrable core of the right to freedom of expression"[17]. Likewise, he refers to the Declaration of Principles

15 Supreme Tribunal of Justice, "Sentencia 1942 de la Sala Constitucional del Tribunal Supremo de Justicia". July 15th, 2003. http://historico.Supreme Tribunal of Justice.gob.ve/decisiones/scon/julio/1942-150703-01-0415.HTM (Latest access: May 11th, de 2022).

16 Organization of American States (OAS). "Convención Americana sobre Derechos Humanos «Pacto de San José de Costa Rica»". November 22nd, 1969. https://www.refworld.org.es/docid/57f767ff14.html (Latest access: May 10th, de 2022, Article 13.

17 Supreme Tribunal of Justice, "Sentencia 1942 de la Sala Constitucional del Tribunal Supremo de Justicia". July 15th, 2003. http://historico.tsj.

on Freedom of Expression, which establishes in its 11th principle that "Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as «desacato laws», restrict freedom of expression and the right to information"[18].

Another decision of the Supreme Tribunal of Justice questioned is sentence 1013, issued on June 12, 2001, by the Constitutional Chamber of the highest court (Supreme Tribunal of Justice 2001), which restricted the right of reply in Venezuela. This sentence established that the aforementioned right corresponds to citizens and not to the media or journalists, which contradicts article 58 of the National Constitution, which establishes that the right of reply corresponds to "every person". For his part, Aguiar considers that this ruling also opened the door for jurisprudential regulation of freedom of the press freedom in Venezuela[19]. Another decision criticized for its effects on press freedom was the unruling issued in August 2021 by the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela of the appeal for review requested by the newspaper El Nacional regarding the decisions that ordered Diosdado Cabello to be paid the equivalent of 13.3 million dollars in compensation "for non-pecuniary damage"[20]. The Inter-American Commission on Human Rights (IACHR) and

gob.ve/decisiones/scon/julio/1942-150703-01-0415.HTML (Latest access: May 11th, de 2022).

18 Inter-American Commission on Human Rights (CIDH), OEA. "Declaración de Principios sobre Libertad de Expresión. Adoptada por la CIDH en su 108° período ordinario de sesiones celebrado del 2 al 20 octubre del 2000". October 20th, 2000. https://www.refworld.org.es/docid/5aec98074.html (Latest access: April 28th, de 2022), 11.

19 Aguiar, Asdrubal. *Interview given to Ramón Cardozo on April 28, 2022*. 2022.

20 Supreme Tribunal of Justice, "Sentencia 0302 de la Sala Constitucional del Tribunal Supermo de Justicia (Supreme Tribunal of Justice)". July 22nd, 2021. http://historico.tsj.gob.ve/decisiones/scon/julio/312756-0302-22721-2021-21-0234.HTML (Latest access: May 10th, de 2022).

its Office of the Special Rapporteurship for Freedom of Expression (RELE) expressed their concern about this decision through a press release, since the existence of this type of mechanism and "*their disproportion constitute a permanent risk to freedom of the press in Venezuela, but its activation by a person with the responsibility and power of a deputy is contrary to inter-American human rights standards*"[21].

Against the freedom of association and participation of political parties, the Inter-American Commission on Human Rights denounced that the Supreme Tribunal of Justice, through a ruling of June 15, 2020, suspended the board of directors of the opposition political party Democratic Action (AD) to appoint, in its place, an authorized ad hoc board of directors to use the electoral card, the emblem, the symbols, the colors and any other concept of the political party[22]. The following day, on June 16, the Supreme Tribunal of Justice issued a second sentence that ordered exactly the same in relation to the opposition political party Movimiento Primero Justicia (PJ)[23]. With the same objective, on July 7 of that same year, the Constitutional Chamber of the Supreme Tribunal of Justice decreed a precautionary measure of

21 Inter-American Commission on Human Rights (CIDH), OAS and Relatoría Especial para la Libertad de Expresión (RELE). "Comunicado de Prensa No. 096/21". *OEA-CIDH*. 2021. https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2021/096.asp (Latest access: May 12th, 2022).

22 Supreme Tribunal of Justice, 2020a) Supreme Tribunal of Justice, "Sentencia 071 de la Sala Constitucional del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". June 15th, 2020a. http://historico.tsj.gob.ve/decisiones/scon/junio/309873-0071-15620-2020-18-0458.HTML (Latest access: May 15th, de 2022).

23 Supreme Tribunal of Justice, "Sentencia 072 de la Sala Constitucional del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". June 16th, 2020b. http://historico.tsj.gob.ve/decisiones/scon/junio/309874-0072-16620-2020-20-0026.HTML (Latest access: May 10th, de 2022).

constitutional protection that suspended the national leadership of the opposition party Voluntad Popular (VP), and appointed an ad hoc board[24].

Against the independence of the Electoral Power and freedom of choice, the Supreme Tribunal of Justice, through Judgment 0070, dated June 12, 2020, appointed the rectors of the National Electoral Council[25]. The Inter-American Commission on Human Rights (IACHR) rejected this appointment in a press release stating that "*the highest judicial body appealed to the figure of «legislative omission», and, in this way, it was attributed the competence to appoint the governing persons of the National Electoral Council (CNE) which, according to the Constitution of Venezuela, corresponds to the Legislative Power*"[26]. For its part, the Human Rights Watch (HRW) organization denounced that "*all the members appointed by the Council were pro-government supporters, including two former Supreme Court justices who have handed down several rulings in favor of the government*"[27].

24 Supreme Tribunal of Justice, "Sentencia 077 de la Sala Constitucional del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". July 7th, 2020c. http://historico.tsj.gob.ve/decisiones/scon/julio/309922-0077-7720-2020-20-0053.HTML (Latest access: May 8th, de 2022).

25 Supreme Tribunal of Justice, "Sentencia 070 de la Sala Constitucional del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". June 12th, 2020d. http://historico.tsj.gob.ve/decisiones/scon/junio/309872-0070-12620-2020-20-0215.HTML (Latest access: May 10th, de 2022).

26 Inter-American Commission on Human Rights (CIDH), OAS and Relatoría Especial para la Libertad de Expresión (RELE). "Comunicado de Prensa No. 096/21". *OEA-CIDH*. 2021. https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2021/096.asp (Latest access: May 12th, 2022).

27 Human Rights Watch. "Venezuela: Sentencias Ponen en Jaque Elecciones Libres y Justas". *HRW-News*. July 7th, 2020. https://www.hrw.org/es/news/2020/07/07/venezuela-sentencias-ponen-en-jaque-elecciones-libres-y-justas (Latest access: April 29th, de 2022).

Against the independence of the Legislative Power, in 2015, the Supreme Tribunal of Justice began to issue a set of rulings that progressively emptied the constitutional attributions of the recently elected Legislative Power, according to Juan Miguel Matheus, a constitutionalist and deputy from the opposition party Primero Justicia. A few days after the new National Assembly was installed, elected with an opposition majority, the High Court, through ruling 01, dated January 11, 2016[28], ignored four of its deputies and ordered the National Assembly to proceed to disincorporate them under penalty of contempt, which would result in all acts of the legislative power being null. Subsequently, through ruling 09 dated March 1, 2016, the Constitutional Chamber limited the comptroller function of the parliament[29]. The following year "*the Constitutional Chamber of the Supreme Tribunal of Justice issued decisions No. 155*[30] *and 156*[31]*, through which it lifted the parliamentary immunities of the deputies of the National Assembly, establishing that their acts constitute treason against the country, granted the Executive Power very broad discretionary powers, and, on the other hand, assuming the powers of the Legislative Power, decided that said powers will be exercised directly by the Constitutional Chamber or by*

28 Supreme Tribunal of Justice, "Sentencia 01 de la Sala Electoral del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". 11 de enero de 2016. (Latest access: May 10th, de 2022).

29 Supreme Tribunal of Justice, "Sentencia 09 de la Sala Constitucional del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". March 14th, 2016. http://historico.tsj.gob.ve/decisiones/scon/marzo/185627-09-1316-2016-16-0153.HTML (Latest access: May 8th, de 2022).

30 Supreme Tribunal of Justice, "Sentencia 155 de la Sala Constitucional del Tribunal Supremo de Justicia". March 28th, 2017. http://historico.tsj.gob.ve/decisiones/scon/marzo/197285-155-28317-2017-17-0323.HTML (Latest access: May 11th, de 2022).

31 Supreme Tribunal of Justice, "Sentencia 156 de la Sala Constitucional del Tribunal Supremo de Justicia (Supreme Tribunal of Justice)". March 19th, 2017b. http://historico.tsj.gob.ve/decisiones/scon/marzo/197364-156-29317-2017-17-0325.HTML (Latest access: May 10th, de 2022).

the body that said chamber disposes" as indicated the Inter-American Commission on Human Rights in its 2020 annual report[32]. For its part, Acceso a la Justicia recorded that, between 2015 and 2019, the Supreme Tribunal of Justice had issued 97 rulings aimed at "liquidating the National Assembly" elected in 2015[33]. According to the calculations of this organization, the decisions of the Supreme Tribunal of Justice would have annulled almost 93% of the laws that were approved by that National Assembly[34].

Conclusion

This set of sentences illustrates how the Venezuelan Supreme Tribunal of Justice, from the beginning of Chávez's mandate and up to the present day, has progressively and continuously undermined freedom of expression, freedom of choice, freedom of association and independence of powers in Venezuela.

Given this process of democratic erosion, it is understandable that great frustration has been generated in the country by the appointment of this "new" Supreme Tribunal of Justice. These designations have set aside both the recommendations of international bodies, as well as the aspirations of Venezuelan

32 Inter-American Commission on Human Rights (CIDH), OEA. "Informe anual 2020". *Capítulo IV.B, Venezuela*. 2020. http://www.oas.org/es/cidh/docs/anual/2020/capitulos/IA2020cap.4b-VE-es.pdf ((Latest access: April 27th, de 2022), 218.

33 Acceso a la Justicia, "El Tribunal Supremo ha dictado 97 sentencias para liquidar a la Asamblea Nacional". *Artículos*. May 13th, 2019. https://accesoalajusticia.org/el-tribunal-supremo-ha-dictado-97-sentencias-para-liquidar-a-la-asamblea-nacional/ (Latest access: May 10th, 2022).

34 Acceso a la Justicia, "Parcialidad en cifras del Ejecutivo venezolano y del Supreme Tribunal of Justice respecto de la AN en su primer año de gestión según quién la controle". *Infografías*. December 10th, 2021. https://accesoalajusticia.org/parcialidad-cifras-ejecutivo-venezolano-Supreme Tribunal of Justice-respecto-an-primer-ano-gestion-segun-quien-controle/ (Latest access: May 10th, 2022).

citizens regarding having an independent judiciary capable of helping to get the country out of the crisis in which it is immersed.

Hopefully other Latin American countries can learn from this Venezuelan experience in relation to the need to preserve the independence of the high courts of Justice as an antidote to populist attempts to erode democracies.

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

Juan Miguel Matheus

> *"Corruptio optimi pessima"*
> (The corruption of the best is the worst of all)
> Latin phrase,
> Anonymous.

The purpose of this article is to outline some thoughts on autocracy and judicial power in Venezuela. We will do so in three segments: first, we will point out some ideas about the role of judges in democracy and the rule of law. Second, we will comment the autocratization of judges and the risks that this brings to a democracy. And third, we will expose the autocratic deployment of Chavismo-Madurismo over the Venezuelan Judiciary, assessing the appointment of "new" magistrates of the Supreme Tribunal of Justice of Venezuela made by the ruling party on April 26, 2022.

I. Judges and constitutional democracy (*Optimi*)

It's been seven years since Justin Collings coined the expression "Democracy's Guardians" to refer to German constitutional

judges[1]. The German democratic tradition inaugurated after the Second World War with the Bonn Basic Law, which made the Federal Constitutional Court the key element for safeguarding the rule of law and human rights. It also understood it as the institution which was to channel the will of the majorities, without risking surrendering to totalitarianism. The Federal Constitutional Court was designed, in short, to help preserve the democratic freedom of the German nation and to guarantee its historical existence apart from autocracies, *caudillismos* and ideological fanaticism.

But the creation of a maximum body of constitutional jurisdiction far exceeds the institutional ingenuity of a specific people –in this case, the German people. Instead, it answers to the universal need to adequately resolve an inescapable tension of constitutional democracies, namely: the tension between the people and the constitution[2]. This is at the base of any constitutional democracy order. To the extent that its institutional, political and cultural treatment give rise to the possibility of warding off or not the risks of autocracy, caudillismo and ideological fanaticism that perennially haunt (and will haunt) democracy.

To be more enlightening, we must delve into the terms and implications of the tension stated previously. To start, we must raise a couple of questions that seem theoretical, but are predominantly practical: In a healthy constitutional democracy, does the "democratic" element of the popular will have primacy, regardless of its content, will or mechanisms of expression? Or, on the contrary, does the "normative-axiological" element

1 Justin Collings, *Democracy's Guardians. A History of the German Federal Constitutional Court. 1951-2001*, Oxford University Press, New York, 2015.

2 Juan Miguel Matheus, *Ganar la República Civil, Pueblo y Constitución*, La Hoja del Norte, Caracas, 2014.

represented by the Constitution and constitutionalism have primacy, to whose forms the power of the people must submit?

There is abundant literature in this regard within the political and constitutional traditions of Europe and America[3] . All of them with very varied and multiform responses to these questions. We, however, accept as a valid thesis that in a healthy democracy the primacy/centrality is in the normative-axiological element represented by the Constitution and by constitutionalism, and not in the mere power of the people or in the popular will.

The foregoing does not discredit the peoples or the electorates –which are the institutional expression of the peoples– as eminent political subjects of constitutional democracies. What it means instead, as Walter Murphy has pointed out[4], is that the peoples must commit much less to power for power's sake, and much more to the values of freedom, human rights and the market economy that stem from –and in turn nurture– both constitutions and constitutional cultures. This is the so-called "paradox of constitutionalism" according to which the true power of the people is only genuinely exercised through the forms and values established in the Constitution[5]. And democracy, in these terms, is a firm commitment by citizens to cling to the content of justice and freedom of the constitutions, which must necessarily be transformed into a solid political culture[6].

3 As a summary of the debate, we can cite the well-known work by Carl Schmitt, *Constitutional Theory*, Alianza Editorial, Madrid, 2015.

4 Walter F. Murphy, *Constitutional Democracy. Creating and Maintaining a Just Political Order*, The Jhon Hopkins University Press, Baltimore, 2007.

5 Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism*, Oxford University Press, Nueva York, 2007.

6 Konrad Hesse, *Escritos de Derecho Constitucional*, Centro de Estudios Políticos y Constitucionales, Madrid, 1992.

Thus, the need for constitutional designs with a certain separation of powers emerges realistically so that the peoples adhere to the Constitution and the constitutional culture in question. Or, put another way: separation of powers so that the peoples, in their constitutional delusions or in their autocratic deviations, do not become enemies of democracy itself[7]. And the need for a Judiciary at the top of which is an organ of constitutional jurisdiction also sprouts realistically, which restrains the people as a majority power to, on the one hand, help them cling to the Constitution and, on the other, prevent them from becoming a source of autocracy, *caudillismo* and ideological fanaticism.

The role of judges in a democracy is, therefore, to defend an order of objective constitutional values that is far from the pernicious variants of the so-called democratic relativism, capable of restraining the people. Judges, in a democracy, are protectors of the people[8]: a role that generates inevitable tensions with political power[9] and generates greater responsibilities when it comes to constitutional judges because they are called to be the best (*optimi*) of the public power structure in a democracy.

II. Judges and autocracy (*Pessima*)

But the corruption of the best is the worst of all, prays the Latin phrase. Judges, and specifically constitutional judges, can be corrupted. The long arm of autocracies can get to them. In those cases, disarray arises within a constitutional democracy. Roles and

7 Yascha Mounk, *El pueblo contra la democracia. Por qué nuestra Libertad está en peligro y cómo salvarla*, Paidós, 2018.

8 Helle Krunke, *Courts as Protectors of the People: Constitutional Identity, Popular Legitimacy and Human Rights*,en *Judges as Guardians of Constitutionalism and Human Rights*, Elgar, 2015, p. 71.

9 Carlos Guarnieri and Patrizia Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy,* Oxford University Press, 2002.

institutions are denatured. The so-called guardians of democracy become executioners of democracy. Judicial executioners. This is what history shows. Not only because they become horror jurists who tolerate or endorse the arbitrary exercise of power against human dignity and the objective standards of democracy, all under supposed legality established by the autocratic regime in question, but because those same corrupt judges form an essential part of the autocratic scaffolding.

The phenomenon of the judicial executioners of democracy is more typical of the 21st century than of the 20th century. In general terms, the autocracies of the last century were less refined in their simulations of legal and constitutional forms[10]. That's why they gave less authoritarian use to the jurisdictional bodies. But on this point it is convenient to insist with a tone of clarification: it is not about the autocrats of the 20th century not controlling or copying the jurisdictional bodies, but rather that they used them less in the formal justification of their injustices and violations of the legal order. On the other hand, the autocracies of the 21st century –less ideologized, more dependent on propaganda apparatuses that nestle in the midst of a more sensitive and scrupulous universal cultural ethos regarding the observance of democratic forms, respect for the rule of law and the validity of human rights– are considerably more likely to resort to judiciaries and judges. They use them more because they need them as a source of constitutional legitimacy or, at least, as validators of situations of deconsolidation, regression or democratic bankruptcy. They need them so that Law and the juridical are the language of the

10 Robert Barros, *Constitutionalism and Dictators,* Cambridge University Press, New York, 2004.

powerful under a scheme of "post-truth" and distance from the reality of things[11].

However, the judicial executioners of democracy are so intertwined with the autocracies of the 21st century that they become part of the nature of the latter. This deserves a more in-depth explanation, in several ways.

In general, the autocracies of the 21st century appear as constitutional regimes or aspire to simulate it. The autocrats of today seek to justify each of the conjunctures demarcated by the exercise of their absolute power. But they do not do it in a formal, laughable or not very credible way, in the style of Italian fascism or Caribbean dictators. They do it in a cynical, Machiavellian and hypocritical way. Constitutions are passed –even widely endorsed by popular support[12]– to use them as "autocratic operations manual"[13] and turn them into false cornerstones of constitutionality, if perhaps that classic doctrinal concept of Constitutional Law can be used analogously in this analysis.

As a consequence of the use of constitutions as "autocratic operations manual", the need for autocratic judges appears; of judges who affirm that the Constitution and the constitutional order are or say what suits the autocratic power; of judges who exercise a role of social control and give an appearance of legitimacy that leads to a kind of economy in the use of violence by the apparatus of repression. Although perhaps it is more accurate

11 Moises Naím, *La revancha de los poderosos. Cómo los autócratas están reinventando la política en el siglo XXI*, Debate, 2022.

12 David Landau, *Populist Constitutions,* The University of Chicago Law Review, Vol. 85, Num 2, 2018.

13 Tom Ginsburg and Alberto Simpser, *Constitution in Authoritarian Regimes,* Cambridge University Press, 2013.

to say that these judges are a substantive part of the repressive apparatus.

On the other hand, while delving into these jurisdictional bodies, two relevant characteristics should be noted: one regarding its legitimacy, and another regarding its ideological mood.

Let us first examine the question of its legitimacy. The categorization that distinguishes between normative legitimacy and social or sociological legitimacy of jurisdictional bodies is well known. The first category refers to the provisions of the jurisdictional bodies and their functions in constitutional texts or other legal texts. It is, so to speak, a certain legitimacy endorsed by the constituent or by the legislator, as the case may be. The second category is related to the social acceptance of the courts; to the prestige of judges and the judicial function before the common population, coupled with citizen awareness of the importance of the Judiciary in maintaining freedom, justice and peace within the social order.

In this sense, normative legitimacy is insufficient to justify the actions of jurisdictional bodies, and even more so if it is a normative legitimacy from ad hoc constitutional or legal texts, formulated to suit autocrats, as explained above. *Autocratic legalism*[14] doesn't license judges to undermine democracy and human rights. What is decisive in order to judge the judicial legitimacy in these cases is to complement the normative with the legitimacy of exercise, that is, that there is concordance between the real institutional action and the legal norms that attribute powers for that action. And regarding sociological or social legitimacy, unfortunately autocratic regimes, including their courts and tribunals, can

14 Kim Lane Schepple, *Autocratic Legalism,* The University of Chicago Law Review, Vol. 85, Num 2, 2018.

enjoy high levels of social acceptance. Therefore, the popularity of judges in autocracies must be nuanced by objective standards of independent and legal action such as those provided for in the well-known *World Justice Project Rule of Law Index*[15].

Let's turn to the question of the ideological character (or not) of servile courts in autocratic environments: one of the characteristics of autocracies in the 21st century –especially in the recent waves of autocratization– is their non-ideological character. Maybe they are ideological, or maybe they are not. They are not necessarily left-wing or right-wing. Its end is a form of power that rises above ideologies. Its nature is much more determined by attitudes towards the armed forces, by solidarity with autocratic powers in the world, by the relationship with organized crime and terrorism, by communicational hegemonies, much more than by ideological references. The key point is to understand that, in general, when autocracies are ideological so are their courts and tribunals; and when autocracies are not ideological, neither are their courts and tribunals.

Finally, we must comment on the autocratization of the actions of the judicial bodies and its relationship with the loss of quality of democracy. Today, political science has warned against the sustained deterioration of particular democratic orders and of democracy in the global order[16]. Democracy is fragile and authoritarianism reigns internationally[17]. This means that the deterioration of democracy brings with it deterioration of the Judiciary. Either because judges are unable to resist autocratic attacks sufficiently, or because they deliberately give

15 https://worldjusticeproject.org/rule-of-law-index/

16 Larry Diamond and Marc F. Plattner, *Democracy in Decline?* Johns Hopkins University Press, Baltimore, 2018.

17 Larry Diamond, *Authoritarianism Goes Global: The Challenge to Democracy,* Johns Hopkins University Press, Baltimore, 2018.

in to the seduction of authoritarianism[18]. In any case, the fight for constitutional democracy is necessarily, and at the same time, a fight for the health of justice systems.

III. The case of Venezuela: Judicial Reform, Supreme Tribunal of Justice and Bolivarian Revolution (*Corruptio optimi pessima*)

This section is intended to approach the current situation of autocratization of the Judiciary in Venezuela, especially the Supreme Tribunal of Justice. For this, we will consider the preliminary process of democratic erosion that led to the emergence of Hugo Chávez. Then, we will refer to some ups and downs to which the Judiciary has been subjected during the years of the Bolivarian revolution. And, finally, we will assess the judicial reform which established a new Supreme Tribunal of Justice, appointed in May 2022.

1. Preliminary issue: democratic erosion in Venezuela, the emergence of Hugo Chávez Frías and the 1999 Constitution

Hugo Chávez was not a historical coincidence. His rise to power was framed in a certain Venezuelan political culture −basically from the 19th century− of militarism, caudillismo, rupture and constitutional seismicity. A complementary explanation to his rise to the stage can also be found on a set of structural and conjunctural causes that we will present below.

The first structural cause of the Chavista phenomenon was the declining performance of the previous political system. Puntofijo democracy was unable to reform itself. It was not efficient

18 Ann Applebaum, *El ocaso de las democracias. La seducción del autoritarismo,* Debate, Ciudad de México, 2021.

adapting to the demands of the new times, nor did it know how to update its legitimacy before the citizenry. On the one hand, political parties stopped representing citizens, causing a great crisis of representativeness. On the other hand, administrative corruption led to a kleptocracy abhorred by public opinion, which discredited the Judiciary and the judges of the Republic.

The second structural cause has to do with the economic system. By 1998, Venezuela was an extractive economy. It fundamentally depended on the wealth which stemmed from the mono-production of oil and its derivatives. In fact, it was considered the only country with an extractive economy within the framework of a constitutional democracy. But the democracy of Puntofijo could not hold up in the face of a rentier State with economic power independent of the taxation of citizens. The relationship of the State with the citizens was perverted and the effectiveness of the democratic system of checks and balances was lost. Thus emerged a strong but corrupt State, weakening democracy and suffocating the citizenry.

The third structural cause was the weakening of democratic culture: citizens lost their faith in the democratic system, and began to aspire to the necessary gendarme and the use of force to the reform the political system. And the political elites, for their part, were incapable of translating their democratic commitment into institutional reforms that would serve as an escape valve for the social pressures that were hollowing out the democracy of Puntofijo.

Finally, it is convenient to bring up a conjunctural cause that explains the advent of the Bolivarian Revolution: the generalized surrender of political and social institutions, and of

their actors. The then Supreme Tribunal of Justice[19] , the media, the businessmen: they all gave in to Hugo Chávez's ground-breaking proposal. The Puntofijo democracy and the 1961 Constitution had no one to defend them. After attempting a coup on February 4, 1992, Chávez rose meteorically to power. He won the presidential elections on December 6, 1998, and on December 15, 1999, he approved a new Constitution. Venezuela suffered the perfect democratic reversal[20]. Venezuela weathered the perfect constitutional regression...

2. Some ups and downs of the Judiciary during the Bolivarian Revolution

Hugo Chávez turned against the Venezuelan Judiciary early on. In this regard, four select episodes should be remembered not as mere political anecdotes, but milestones in the destruction and autocratization of the Venezuelan Judiciary.

During the 1998 electoral campaign, the general idea, entrenched in public opinion, was that the Venezuelan Judiciary was corrupt. And in his electoral speech against corruption, Chávez did not hesitate to raise the flags of judicial reform and a strong hand against all corrupt individuals, including judges. It was, so to speak, a speech that made the country even more tense, that laid the foundations that would justify the later takeover of the Judiciary and predisposed the citizenry more seriously against judicial institutions.

19 Miguel Mónaco, *La oportunidad pérdida para salvar una Constitución, en La muerte de una Constitución,* ed. Allan Brewer-Carías, Editorial Jurídica Venezolana, Caracas, 2022.

20 Paola Bautista de Alemán, *El fin de las democracias pactadas: Venezuela, España y Chile*. Editorial Dahbar, Caracas, 2021.

Then came the two rulings of the former Supreme Tribunal of Justice in January 1999, referring to the supra-constitutionality of the Constituent Power over the Constituent Power. In a nutshell: Hugo Chávez's main electoral promise in 1998 was the call for a National Constituent Assembly in order to repeal the 1961 Constitution and re-establish the Venezuelan State. But the 1961 Constitution did not provide for the convening of a Constituent Assembly. The constitutional mutation mechanisms provided for in that text were amendment and reform. However, Chávez's jurists coined the thesis according to which, although the 1961 Constitution did not provide for the convening of a Constituent Assembly, it could be convened if a referendum was held and the people-electorate (Constituent Power) so ordered; against which the public powers in exercise (Constituted Power) could not oppose. Given this situation, the Supreme Tribunal of Justice was responsible for hearing two appeals for interpretation of the Chavista thesis of supra-constitutionality. And after a wave of institutional and public opinion pressure promoted by the then President-elect Hugo Chávez, judgments number 18 and 19 dated January 19, 1999, were issued, which allowed the calling of a popular referendum to see if the Venezuelan electorate wanted the convening of a Constituent Assembly. It unraveled as we already know: the itinerary that led to the approval of the 1999 Constitution and the death of the 1961 Constitution began[21], which had become vulnerable in a political context of autocratization[22].

21 Alessandro Pace, *La muerte de una Constitución*, en *La muerte de una Constitución,* ed. Allan Brewer-Carías, Editorial Jurídica Venezolana, Caracas, 2022.

22 Jesús María Casal, *Constitución y justicia constitucional*, Universidad Católica Andrés Bello, Caracas, 2014, p. 56.

Moving forward, we encounter the "plasta[23]". April 11 and 12, 2002, saw a series political upheavals that led to the temporary departure of Hugo Chávez from power. Protests, mobilizations, institutional pronouncements and speeches by the high military command of the Republic. Things calmed down, Chávez returned to power and resumed the exercise of his presidential functions. Then, he set forth his revenge, as he punished those actors who contributed to Chavismo losing power for a few hours. The logic of the revolution was to come down, among others, on the members of the military high command who spoke out against Chávez. For this reason, accusations were made before the Supreme Tribunal of Justice in order to request a prior trial of merit against the officers involved in an alleged "coup d'état". But the Supreme Tribunal of Justice declared that the prior trial of merit was not admissible because there was no such coup, but rather "a power vacuum". The officers were acquitted. Chavez's wrath was immediately unleashed, and he declared that the sentence was a "plasta". And after a judicial defeat, Chávez attacked the Supreme Tribunal of Justice. The ruling party promoted the reform of the Organic Law of the Supreme Tribunal of Justice, approved in 2004. It increased the number of magistrates from twenty to thirty-two and provided for greater mechanisms of institutional domination against the Supreme Tribunal of Justice. Thus, the ruling party definitively captured the highest court of the Republic to use it politically, especially the Constitutional Chamber.

Finally, we cannot fail to mention the "use" that Nicolás Maduro gave to the Supreme Tribunal of Justice by emptying the National Assembly elected on December 6, 2015, of its powers, destroying the Venezuelan Parliament. The democratic opposition reached a qualified majority of two thirds in the aforementioned

23 Slang for "shit" in Venezuela.

elections. One hundred twelve deputies out of one hundred sixty-seven (112/167). For Madurismo, it was inconceivable that the opposition was to govern the National Assembly. For this reason, the ruling party advanced what Jesús María Casal has called the "authoritarian demolition"[24] of the National Assembly. More than sixty "judicial decisions" against the Venezuelan Parliament and the deprivation of the exercise of the power to appoint Magistrates of the Supreme Tribunal of Justice that the National Assembly constitutionally possesses. With judicial autocracy, Maduro prevented the electoral results of December 2015 from being translated into an institutional deployment of Parliament's powers to favor political change and the democratization of Venezuela.

3. The judicial reform of May 2022

2021 and 2022 have been years in which the Nicolás Maduro regime has used its communication apparatus to simulate the realization of alleged institutional reforms that point to the democratic re-institutionalization of Venezuela. And, of course, the Judiciary is included among those simulations. The pseudo reform of the Organic Law of the Supreme Tribunal of Justice was approved in a second discussion by the National Assembly of Jorge Rodríguez on January 18, 2022, and then the "new" Magistrates of the Supreme Tribunal of Justice were sworn in on April 26, 2022. In this regard, we offer six assessments:

- The so-called "judicial reform" is, in reality, an autocratic entrenchment of the Nicolás Maduro regime in the Supreme Tribunal of Justice. There has been no change in

24 Jesús María Casal, *Asamblea Nacional: conquista democrática vs. Demolición institucional. Elementos de la argumentación y práctica judicial autoritaria de la Sala Constitucional del Tribunal Supremo de Justicia*, Universidad Católica Andrés Bello, Caracas, 2017.

the official policy of authoritarian use of the highest judges of the Republic. On the contrary, it can be said that, having reduced the number of Magistrates from thirty-two to twenty, the control over the Supreme Tribunal of Justice is even more severe at this time.

- Maduro continues to tightly control the Constitutional Chamber, the Electoral Chamber and the Criminal Cassation Chamber. With the first, he perpetrates political outrages in the strict sense; with the second, electoral outrages; and, with the third, criminal prosecution outrages.

- The supposed judicial reform was carried out behind the country's back: without public consultations, without the participation of civil society or interested universities and unions. It was, from the reform of the law to the appointment of the Magistrates, a true imposition on Venezuelan society.

- It is worrying that this supposed reform is only the beginning of further reforms. The regime has announced the reform of the entire justice system, in the terms provided for in article 253 of the Constitution. It is therefore foreseeable that the cancer which allowed the kidnapping of the Supreme Tribunal of Justice will metastasize in other bodies such as courts of first instance, the Public Ministry and criminal investigation bodies. All for the autocratic perpetuation of Madurismo.

- The execution of the supposed judicial reform of the regime leaves aside the considerations and exhortations of the Electoral Observation Mission of the European Union on the Regional and Municipal Elections of November 21,

2021. Among them, the need to achieve better institutional conditions of the State of Law that make truly free and democratic elections possible in Venezuela. The current Supreme Tribunal of Justice seems servile to the electoral injustices that Madurismo wants to carry out in the future...

- Finally, the judicial reform of the regime occurs in the midst of a negotiation process between the ruling party and the opposition: the so-called Mexico negotiation. A balanced Supreme Tribunal of Justice at the service of the re-institutionalization of the country, with a potential impact on the next elections to be held in Venezuela, would have been a desirable object of such a negotiation; the beginning of true institutional reforms. But the door has been momentarily closed to this by the regime. It is therefore appropriate to continue fighting to make the negotiation possible and to advance genuine institutional reforms that lead to the democratization of Venezuela. There will be no consolidated and stable democracy without rescuing the Judiciary, especially the Supreme Tribunal of Justice[25].

25 Siri Gloppen, Roberto Gargarella and Elin Skaar, *The Accountability Functions of the Courts in New Democracies,* en *Democratization and the Judiciary*, Frank Cass, Oregon, 2005.

Carmen Alguíndigue Morles: "We cannot afford impunity"

More than a change in Miraflores, the country must go back to the Constitution and the Rule of Law to achieve justice, insists the university professor and lawyer accredited before the International Criminal Court (ICC).

Pedro Pablo Peñaloza

"It is understandable that, given the situation of the last two decades, we are tired, frustrated, dissappointed, misunderstood, angered and discouraged in regards to justice, but forgetting the purpose of achieving justice is not an alternative". Words by Professor Carmen Alguíndigue Morles, specialist in Criminal Science and Criminology and accredited lawyer before the International Criminal Court (ICC) since 2019.

–Taking into account the reality of Venezuela and the observations made by international organizations, what elements should a justice system reform in the country include?

It is imperative to return to the political system provided for in the Constitution, to the rule of law, so as to be able to re-establish justice from there. All the institutions that make up the justice system must be included in order to achieve this, because its correct administration depends on all of them.

This will require the experience and follow-up of multilateral organizations that have knowledge on these institutional and political transformations.

The goal must be the creation of a justice system that guarantees access to justice, that promotes and protects Human Rights, that is easily accessible to those who do not have money, that is timely, effective, fair and transparent. And for this, the autonomy of its members is essential.

A new justice system inevitably goes through ensuring independence, both political and technical, preventing and containing its possible abuse of authority with the surveillance and control of equally solid institutions, also endowed with the necessary resources and participation of civil society.

Many of these parameters already exist. The democratic world and the international institutions for the protection of human rights have developed a full range of minimum standards for the different institutions of justice, which are contained in normative instruments and even have temporary monitoring mechanisms. We are fortunate enough to not have to start from scratch; the challenge is to reach concrete and sincere agreements, and itineraries to put them into practice.

Latin America has gradually gone through justice system reform processes; basically we all enjoy regulatory mechanisms. The question is: why are there differences regarding the respect towards rights and guarantees? Because of the possibility that they will be assimilated and put into practice by institutions –although not completely perfect, committed to the constitutional scaffolding, to the counterweight of civil society.

–In developed countries and with advanced democracies such as the United States and Spain, to mention two cases, there is talk of the politicization of justice. Isn't it too much to ask Venezuela for a justice that is immune to partisan quotas?

No, it is not. Our political parties also have the responsibility and the duty to transform themselves and respect constitutional dynamics. Many of our most serious problems, such as corruption and abuse of power, are the consequence of the collapse of the values that should govern us as a society: moral authority. If we really want to get out of the current quagmire that prevents the construction of a solid democracy, that has to end.

The exercise of criminal action is the potentially most dangerous mechanism of social control. It is thus imperative that the actions of the penal system not be subject to any kind of pressure or guide other than what was previously agreed upon and expressed in a law of a formal nature.

–With this level of dispute and distrust between political actors, it really was impossible for the parties to agree to renew the Supreme Tribunal of Justice and reform the Justice System. In cases like these, are international bodies the only ones left for there to be justice in the country?

There is no international body that can meet the need for internal justice in all its areas. Relying on justice passes through the political will to do so, the will to place common good as a goal. This brings us back to the need for transformation, to the metamorphosis of politics in our country, so that, without consideration or pressure, and acting free of pettiness, only with true adherence to the established constitutional order, we can achieve a robust, independent and transparent justice system that

establishes responsibilities in all pending issues. This is due to criminal violence, corruption and all the scaffolding imposed by "power crimes", among which are serious violations of Human Rights.

The ICC is an international court that judges war crimes and crimes against humanity, and aims to provide justice and reparation to the victims of such crimes. That is its mandate, and based on that it started an investigation in Venezuela. It is not true that international justice changes, or that it perfects political regimes.

Betting and giving hope with the results that cannot be obtained from international justice is to create despair and greater disillusionment. On the contrary, it is up to us to voice and lead considerate, realistic and responsible action. Supporting our victims with the truth is preventing their instrumentalization and, therefore, their re-victimization.

While international justice has precise powers, it is also complementary. Because of its mission, capacity, and resources, it is extraordinarily selective and focuses its resources on high-ranking perpetrators of crimes against humanity. This is a reality and it means that its action will be focused on few cases.

The Rome Statute contemplates the principle of prevention in its backbone, as well as the preference for internal justice systems to investigate and establish responsibilities with the requirement of compliance with international standards.

The internal justice system deserves to take over its institutions to re-establish them, because it is there where most of the investigations will take place, as well as the establishment of

responsibilities and reparations in the different pending matters, with the support and follow-up of international bodies.

–For there to be justice in Venezuela, should there be a change in the Presidency of the Republic?

Even if Presidents change, situations can remain the same, and even worsen.

I insist on what I said at the beginning of the interview about the need to return to the political system provided for in the Constitution. From there, justice can be rebuilt. Consequently, legitimizing once again the main institutional components of the rule of law is essential, so that the State model provided in the Constitution is maintained.

–Now that there are so many negotiation attempts, it is said that the opposition must be willing to bite bullets to achieve a democratic transition. Is one of those bullets impunity? How much justice can be sacrificed to transition towards democracy?

No, it is precisely impunity that we cannot afford. Impunity seen from the point of view of establishing responsibilities, recognizing the victims, repairing the damage and making the guarantee of non-repetition effective, is an issue that cannot be sacrificed, and neither can other constitutional values. Therefore, persecution and revenge in all its forms, and the generation of more violence, must be excluded.

The allocation of responsibilities is essential. Other historical experiences have already walked down this path, so it could be possible to explore innovative ways always focused on the values of justice and democracy.

–How is Venezuela's case progressing before the ICC?

We could be close to starting the process of submitting observations by victims before the ICC. This is a golden test to influence and demonstrate organization and commitment to justice and, therefore, to the establishment of responsibilities and reparations.

We do not yet know which cases the investigation will focus on, but it will always be aimed, according to its mandate, at representatives of the high chains of command. There will be investigations that will not be included and will have to face international protocols in an independent justice system.

–Can organized society influence the efforts to recover justice in Venezuela?

One of the most important factors achieved with the accusatory system had been to endorse citizen participation and social control. However, jury trials were eliminated almost immediately, followed by courtroom trials, to finally deprive civil society organizations of the possibility of representing victims. Today, the draft Law on International Cooperation poses new restrictions for its operation.

Even acknowledging the mistakes and the perception that any alternative seems to be alien to the common good and rather plagued by an appetite for power in all its forms, we have to seize the ideology of the realization of human rights and make it ours from individual and collective action, each one from their field and possibilities.

We must transform euphoria or disenchantment into proactive, useful and strategic actions. Apathy and disagreement are ruled out in the future of the country we yearn for.

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 extensions[1].

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 security[2], and for which the ordinary powers available to deal with these events are insufficient[3].

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 rights[4].

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 control[5]. 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,

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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 Decree[6] would be published under No. 2184[7].

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 2021[8], 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 days[9].

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 declared[11].

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 entities[12].

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 emergences 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. 4186[13]. Then, Decree No. 4198[14] was later issued. This Decree was extended by Decree No. 4230[15] . When Decree No. 4230 expired, Decree No. 4247[16] was issued, and so on until the last State of Alarm Decree was issued, on February 28, 2021[17].

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 Pandemic[18], 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 (Compilators), *Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017,* (Bogotá: Editorial Temis-Editorial Jurídica Venezolana, 2017).

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