

Democratization



Year 4, Issue 19

Judicial Power and Democratic
Erosion in Venezuela

Ramón Cardozo A.

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

Juan Miguel Matheus

Carmen Alguíndigue Morles:
“We cannot afford impunity”

Pedro Pablo Peñaloza

Legal control of States of Exception:
the case of Venezuela

Carlos García Soto

JUNE 2022

Democratization

June 2022

Year 4, Issue 19

Judicial Power and Democratic Erosion
in Venezuela

Ramón Cardozo A.

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

Juan Miguel Matheus

Carmen Alguíndigue Morles:
“We cannot afford impunity”

Pedro Pablo Peñaloza

Legal control of States of Exception:
the case of Venezuela

Carlos García Soto

Caracas.

Edited by Instituto FORMA

Judicial Power and Democratic Erosion in Venezuela

Ramón Cardozo A.

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 2022-2034¹. 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 court².

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 follows³:

- 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/AccesoJusticia/status/1519291751076347909>.

3 Acceso a la justicia. “El «nuevo» Supreme Tribunal of Justice en cifras”. *Infografías*. 2022b. [https://accesoalajusticia.org/nuevo-Supreme Tribunal of Justice-cifras/](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 citizens⁶.

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 Przeworski, 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 procedures⁷.

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 Watch⁸. 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 2011¹⁰. 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 Socialism¹¹ (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 independence¹².

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. According to the case law of the Constitutional Chamber of the Supreme Tribunal of Justice, 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 2017¹⁴ (own underlining).

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, 2003¹⁵, 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 Rights¹⁶. 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.SupremeTribunal of Justice.gob.ve/decisiones/scon/julio/1942-150703-01-0415.HTM](http://historico.SupremeTribunalofJustice.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 Venezuela¹⁹. 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 Supremo 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 party²². 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 board²⁴.

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 Council²⁵. 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, 2016²⁸, 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 parliament²⁹. The following year *“the Constitutional Chamber of the Supreme Tribunal of Justice issued decisions No. 155³⁰ and 156³¹, 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 report³². 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 2015³³. 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 Assembly³⁴.

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-contrale/> (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.