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

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> *"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].

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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.

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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.