

A Tale of two (Supreme) Courts?
Emergence, Rivalry and Consequences for Venezuela's Rule of Law
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**Paper presented at the Bingham Centre for the Rule of Law,
London, 19 November 2018**

Introduction

If there was one word to summarize Venezuela's current conundrum it would be 'scarcity'. It has now become common for the press to continually highlight how the country is running short of food and medicine², health supplies³, contraceptives⁴ and local currency⁵. As public services continue to deteriorate, Venezuelans struggle with frequent electricity cuts⁶ and interruptions of running water⁷. Even when it comes to people the numbers are dwindling due to the massive flows of Venezuelans seeking greener pastures, mostly in neighboring countries in South and Central America, as well as the Caribbean, as recorded by the United Nations Refugee Agency⁸ and the International Organization for Migration⁹. When David Beasley, the World Food Program's Executive Director, visited the border between Venezuela and Colombia in March 2018 he witnessed droves of famished Venezuelans fleeing to Cúcuta, a Colombian city near the border, and referred to the crisis as a "*humanitarian catastrophe*"¹⁰.

Paradoxically, this is the same country that -according to the Organization of Petroleum Exporting Countries- holds the largest proven crude reserves in the world¹¹. Venezuelan soil is also rich in iron ore, gold, bauxite and diamonds¹² and the country ranks eighth globally when it comes to proved reserves of natural gas in cubic meters¹³. Water resources are also abundant, although mostly located in regions distant from populated areas and industrial hubs¹⁴.

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² <https://www.pbs.org/newshour/show/venezuelans-suffer-deadly-scarcity-food-medicine>

³ <https://edition.cnn.com/2018/03/28/americas/venezuela-hospitals-report/index.html>

⁴ <https://www.bbc.com/news/world-latin-america-42620379>

⁵ <https://www.theguardian.com/world/2017/nov/30/venezuela-cash-economy-nicolas-maduro>

⁶ <https://www.newsweek.com/sun-causes-venezuelas-power-outages-maduro-ally-963209>

⁷ <https://www.economist.com/the-americas/2018/05/10/how-chavismo-makes-the-taps-run-dry-in-venezuela>

⁸ <https://www.unrefugees.org.au/about-us/news/unhcr-ramps-up-support-for-venezuelan-refugees/>

⁹ <https://www.iom.int/news/un-migration-agency-launches-regional-action-plan-strengthen-response-venezuelan-outflows>

¹⁰ <https://www.dw.com/en/venezuela-un-agency-warns-of-humanitarian-catastrophe/a-42950654>

¹¹ https://www.opec.org/opec_web/en/data_graphs/330.htm

¹² https://www.opec.org/opec_web/en/about_us/171.htm

¹³ <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2253rank.html>

¹⁴ http://www.fao.org/nr/water/aquastat/countries_regions/VEN/

Justice and the rule of law are also in dangerously short supply, as stated by former United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein: "*For years now, institutional checks and balances and the democratic space in Venezuela have been chiseled away, leaving little room to hold the State to account*".¹⁵ He even went as far as stating "*(...) the rule of law is virtually absent in Venezuela*".¹⁶

In addition to the vast natural resources, and in perplexing contrast with the former United Nations human rights chief's alarming statements, there is another area in which Venezuela has impressive, albeit deeply troubling, numbers: its institutions. The country has witnessed a sustained increase in the number and size of State institutions, spanning the legislature, the executive branch and -allegedly- the judiciary. Unfortunately, the way in which some of these institutions have been established, public officials appointed, mandates observed (or disregarded) and resources allocated, has triggered cut-throat political, legal and bureaucratic battles with actors on all sides claiming to be 'legitimate' and casting aside rivals as 'illegitimate'.

According to the Oxford Dictionary 'legitimate' means "*conforming to the law or to rules*"¹⁷, and to Black's Law Dictionary "*that which is lawful, legal, recognized by law, or according to law*"¹⁸. These definitions suggest there is an overlap between 'lawful' and 'legitimate'. Some legal scholars have pointed out, however, that the latter is far more complex. Archibald Cox, an American legal scholar and practitioner, referred to 'legitimacy' as "*the power to command acceptance and support from the community so as to render force unnecessary, or necessary only upon a small scale against a few recalcitrants*"¹⁹. Cox further alerted that a judiciary lacking legitimacy "*(...) would be exceedingly vulnerable to assaults and reprisals from other branches of government*"²⁰.

While this paper will provide an overview of how the aforementioned battles are undermining the rule of law in Venezuela, it will focus with deeper emphasis on the battle for the helm of the Venezuelan Judicial Power. The analysis will be mostly based on the Venezuelan constitutional and statutory framework and will seek to determine whether Supreme Court judges were lawfully appointed between 2015 and 2017 and how an alleged Supreme Court in exile came about. Final conclusions addressing the battle's impact on Venezuelan rule of law will be outlined.

For the purposes of this paper, and in addition to Lord Bingham's acute observation of the need for the State to comply with international law²¹, the 'rule of law' will be understood as a system that upholds the four principles identified by the Washington, D.C.-based non-governmental organization World Justice Project (hereinafter "WJP")²²:

¹⁵ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23242&LangID=E>

¹⁶ Ibid.

¹⁷ <https://en.oxforddictionaries.com/definition/legitimate>

¹⁸ <http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf> p1046

¹⁹ Cox, Archibald. *The Court as a Legitimate Institution*. Article included in "*Courts, Law and Judicial Processes*" edited by S. Sidney Ulmer. (1981) p 203

²⁰ Ibid. p 204

²¹ <https://binghamcentre.biicl.org/schools/ruleoflaw>

²² World Justice Project. *Rule of Law Index (2017-2018)*, p 11

https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf

- (i) Both the government and private actors are accountable under the law.
- (ii) Laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
- (iii) The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.
- (iv) Justice is delivered timely by competent, ethical, and independent representatives and neutrals that are accessible, have adequate resources, and reflect the makeup of the communities they serve.

I. Rule of Law Crisis: An Overview

Venezuela's Rule of Law Performance

In a report on human rights violations in Venezuela issued in June 2018 the Office of the United Nations High Commissioner for Human Rights (hereinafter “OHCHR”) pointed out that “[t]he erosion of the rule of law has accelerated since August 2017 as the Government further dismantled the institutional checks and balances essential to maintaining democracy”. As OHCHR correctly suggests this phenomenon has been taking place for quite some time.

Tracking a country’s rule of law performance over the years and comparing it with that of other countries can be helpful to understand the magnitude of the challenges it faces. The WJP has been publishing an annual ‘Rule of Law Index’ since 2008 that ranks countries according to their rule of law performance. This report includes notably wealthy and stable countries (e.g. Switzerland and the Scandinavian States), countries at war (e.g. Afghanistan), countries enduring humanitarian crises (e.g. Myanmar and Bangladesh), poor countries (e.g. Haiti) and small island-States (e.g. Grenada). The following table summarizes a global comparison and clearly highlights the degree to which Venezuela’s performance has worsened.

Summary of Venezuela’s rule of law performance according to the World Justice Project’s Rule of Law Index (2011-2018)

Year(s) of Publication	Performance: Rankings and Remarks
2011 ²³	Global ranking in the “ <i>Limited Government Powers</i> ” and “ <i>Effective Criminal Justice</i> ” categories: 66/66 Global ranking in “ <i>Regulatory Enforcement</i> ” and “ <i>Access to Civil Justice</i> ” categories: 60/66. “ <i>[Venezuela] is the worst performer in the world in accountability and effective checks on executive power. Corruption appears to be widespread (ranking 54th), crime and violence are common (ranking 66th), government institutions are non-transparent, and the criminal justice system is ineffective and subject to political influence (ranking 66th).</i> ”
2012-2013 ²⁴	“ <i>Venezuela is the weakest performer in the [Latin America and the Caribbean] region in most dimensions of the rule of law. Government accountability is weak (ranking third to last in the world), corruption is widespread (ranking eighty first), crime and violence are common (ranking ninetieth), government institutions are not transparent, and</i>

²³ Ibid. (2011), p 26, 104

https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf

²⁴ Ibid. (2012-2013), p 48, 153

https://worldjusticeproject.org/sites/default/files/documents/WJP_Index_Report_2012.pdf

	<i>the criminal justice system is ineffective and subject to political influence (ranking last in the world).”</i>
2014 ²⁵	Global ranking: 99/99 <i>“At 99th, Venezuela is the weakest performer among all indexed countries, showing downward trends in performance across many areas since last year. The country is ranked last in government accountability, owing to an increased concentration of executive power and a debilitated system of checks and balances. Corruption is commonplace (ranking 90th overall and last in the region); administrative agencies suffer from inefficiencies and lack of transparency; and the justice system, although relatively accessible, loses positions on the back of increased political interference.”</i>
2015 ²⁶	Global ranking: 102/102
2016 ²⁷	Global ranking: 113/113
2017-2018 ²⁸	Global ranking: 113/113

This section will elaborate on this dismal rule of law performance by analyzing 4 different branches of government, with a focus on establishment of institutions, appointment of public officials, observance (or disregard) of mandates and allocation of resources.

The Legislature

The National Assembly (hereinafter “AN”²⁹) is experiencing an unprecedented gridlock, partly due to the creation of and agenda pursued by a parallel structure known as the ‘National Constituent Assembly’ (hereinafter “ANC”³⁰), and partly due to rulings and decisions issued by the Supreme Court of Justice (hereinafter “TSJ”³¹).

The Venezuelan Constitution provides for the creation of an ANC to “*create a new legal framework and draft a new Constitution*”³². The Constitution further provides, albeit with a rather confusing wording, that “*the Venezuelan people are the original constituent power depositary*”³³. That is, if a government is interested in establishing an ANC to reform the Constitution³⁴, it must first carry out a consultative referendum asking citizens whether they agree with the idea of reviewing -and approving or rejecting- a proposal for a new Constitution. Only upon receiving the approval of the electorate can candidates run for office as ANC members. The electorate would then need to approve or reject the ANC’s proposal for a new Constitution in the ballot box through an additional referendum.

²⁵ Ibid. (2014), p 38, 49, 173 <https://worldjusticeproject.org/sites/default/files/documents/RuleofLawIndex2014.pdf>

²⁶ Ibid. (2015), p 6, 20, 155 https://worldjusticeproject.org/sites/default/files/documents/roli_2015_0.pdf

²⁷ Ibid. (2016), p 21, 156 https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf

²⁸ Ibid. (2017-2018), p 2, 156 https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf

²⁹ For its Spanish acronym.

³⁰ Ibid.

³¹ Ibid.

³² Constitution of the Bolivarian Republic of Venezuela (1999), Article 347.

³³ Ibid.

³⁴ Ibid. Articles 71 and 348.

This multi-stage process, which was observed when former President Hugo Chavez called upon the establishment of an ANC in 1999³⁵, was circumvented by the Maduro administration by calling upon directly for an election for ANC members through Presidential Decrees Nos. 2,830 and 2,831 on May 1, 2017, published on the Extraordinary Official Gazette No. 6,295 on the same date. Both the issuance and the enforcement of such decrees directly contravened the rule of law principles of accountability, fair enforcement of the law and timely justice.

The terms under which the elections for ANC members took place, including eligibility requirements for both candidates and voters³⁶, were also challenged as unconstitutional by Venezuelan civil society organizations. The Academy of Political and Social Sciences, for example, issued a public statement claiming that “*the imposition of candidates and voters by exclusionary ‘sectors’ and the territorial representation by municipalities without due regard to the population size breached the universality and equality of the vote*”³⁷. Therefore, the ANC members did not reflect the makeup of the communities they should have represented, in detriment to the rule of law.

In addition to its establishment, the ANC’s functioning has also been problematic, to the extent that some of its acts have been viewed as *ultra vires*. When analyzing the decisions taken by the ANC, the Inter-American Commission on Human Rights (hereinafter “IACHR”), an autonomous organ of the Organization of American States (hereinafter “OAS”), warned that a decree issued by the ANC on August 8, 2017³⁸ sought to (i) subordinate all branches of government to the ANC (i.e., all government organs would be obliged to comply with and enforce ANC rulings); (ii) allow the ANC to decree measures setting forth such organs’ powers; and (iii) retain the discretionary right to dismiss public officials³⁹. The IACHR rightfully went on to condemn these measures on the grounds that “*(...) they go beyond the powers of a constituent body and impair the principle of the separation of powers and representative democracy*”⁴⁰.

The Executive Branch

The executive branch has also grown exponentially and become highly dysfunctional. Whereas in February 1994 the cabinet was made up of 27 ministers⁴¹, by August 2017 it had risen to 32⁴². More recently, President Maduro further expanded the executive branch by splitting the ‘Ministry of Popular Power for Eco-socialism and Water’ into two different

³⁵ <http://www4.cne.gob.ve/web/documentos/estadisticas/e010.pdf>

³⁶ Presidential Decree No. 2,878, dated May 23, 2017, published in the Official Gazette No. 41,156 on the same date.

³⁷ Academy of Political and Social Sciences. Statement on the un-Constitutionality and un-Conventionality of Electoral Terms decreed for the election of the National Constituent Assembly (June 20, 2017)

[http://www.acienpol.org.ve/cmacionpol/Resources/Pronunciamentos/Pronunciamento%20sobre%20Bases%20Comiciales%20de%20la%20ANC.%20\(.pdf](http://www.acienpol.org.ve/cmacionpol/Resources/Pronunciamentos/Pronunciamento%20sobre%20Bases%20Comiciales%20de%20la%20ANC.%20(.pdf)

³⁸ Published on Extraordinary Official Gazette No. 6,323 dated August 8, 2017.

³⁹ Inter-American Commission on Human Rights. Country Report: Democratic Institutions, the Rule of Law and Human Rights in Venezuela (2017). p 73

⁴⁰ Ibid. p 74

⁴¹ <http://www.eltiempo.com/archivo/documento/MAM-30889>

⁴² <http://www.venamcham.org/wp-content/uploads/2017/09/WHO-IS-WHO-ACTUALIZADO.pdf>

entities⁴³. In addition, the current administration modified the Organic Law of Public Administration and granted legal status to the so-called ‘Sectorial Vice-presidencies’, arguing in the law’s recitals that they were needed to “*control the upper level of the Public Administration, ensure appropriate policy implementation and efficient administration of resources (...), granting them a superior level of functional, administrative and budgetary supervision and control over the ministries of popular power (...)*.” It is worth noting that the Venezuelan Constitution only provides for the Office of the Vice-Presidency⁴⁴. Further, when former President Hugo Chavez proposed a referendum to modify the Constitution⁴⁵, the majority of Venezuelans rejected the concept of several vice-presidencies at the ballot box in 2007⁴⁶.

Unconstitutional structures and potential contradictions and overlaps are also evident at lower levels of the Venezuelan public administration, with lawfully elected governors having to compete with politically appointed ‘protectors’ (yet another figure not provided under the Venezuelan constitutional and statutory framework) for budget, infrastructure and, ultimately, ‘legitimacy’⁴⁷.

The Citizen Power

According to Articles 136 and 273 of the Constitution, the members of the ‘Citizen Power’ are the Prosecutor General, the Comptroller General and the Ombudsman. When referring to the Venezuelan government’s reaction to several motions filed by Ms. Luisa Ortega Díaz in her capacity as Venezuelan Prosecutor General, the British newspaper *The Economist* noted on June 20, 2017 “*Mr. Maduro would no doubt sack his turbulent attorney-general if he could, but under the constitution only the national assembly can do that*”⁴⁸. Eight days later the TSJ addressed a motion filed by Mr. Pedro Carreño, in his capacity as Deputy of the AN (and member of the government-controlling political party), and decided, through ruling No. 44, to freeze the Prosecutor General’s assets (including and without limitation bank accounts) and ban her from leaving the country⁴⁹. When referring to the aforementioned ruling, the OHCHR Spokesperson alerted on June 30, 2017 that the TSJ’s decisions “*appear to seek to strip her Office of its mandate and responsibilities as enshrined in the Venezuelan Constitution, and undermine the Office’s independence*”⁵⁰. Shortly thereafter, on August 4, 2017 the TSJ issued ruling No. 65 through which it determined that there were sufficient grounds to prosecute the Prosecutor General, suspended the Prosecutor General -for the duration of the proceedings from her position and prohibited her from performing in any other capacity as a public servant. Further, the

⁴³ Presidential Decree No. 3,466, dated June 15, 2018, published in the Extraordinary Official Gazette No. 6,382 on the same date.

⁴⁴ Constitution of the Bolivarian Republic of Venezuela (1999), Articles 238 through 241.

⁴⁵ <http://cdn.eluniversal.com/2007/08/16/reformaconstitucional2.pdf>

⁴⁶ https://elpais.com/internacional/2007/12/03/actualidad/1196636401_850215.html

⁴⁷ <http://www.vicepresidencia.gob.ve/index.php/2017/10/23/designados-protectores-bolivarianos-en-zulia-nueva-esparta-merida-y-anzoategui/>

⁴⁸ <https://www.economist.com/the-americas/2017/06/20/the-rebellion-of-venezuelas-top-prosecutor>

⁴⁹ <https://www.civilisac.org/civilis/wp-content/uploads/Sentencia-44-Sala-Plena-28-6-17-Antejuicio-de-m%C3%A9rito-Fiscal-General-de-la-Republica.pdf>

⁵⁰ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21818&LangID=E>

TSJ notified the ANC and deferred to the ANC to make the decisions it deemed appropriate⁵¹.

Following these TSJ rulings, the ANC issued back-to back decrees on August 5, 2017 through which it removed Ms. Ortega Díaz from office and appointed Mr. Tarek William Saab as Prosecutor General⁵². The ANC argued that it was duly authorized to remove Ms. Ortega Díaz from office based on Article 279 of the Constitution, which reads as follows: “*The members of the Citizen Power shall be removed by the National Assembly, subject to a previous statement issued by the Supreme Court of Justice, and pursuant to the law*”.

Ms. Ortega Díaz fled the country claiming she feared for her safety⁵³ and has since sought the protection of international organizations, including the IACHR⁵⁴. While Mr. Saab, with the endorsement of the Venezuelan government, TSJ and ANC, unlawfully portrays himself as the ‘legitimate’ Prosecutor General, Ms. Ortega Díaz attempts (and sometimes achieves) to rally support from the international community⁵⁵. Strangely enough, his personal website notes that his current post is Governor of Anzoátegui State⁵⁶, while her Twitter bio identifies her as Prosecutor General⁵⁷.

The Judiciary

The Venezuelan Constitution provides that the “*superior values*” of its legal framework include liberty, justice, democracy and the preeminence of human rights⁵⁸. It further specifies that (i) the State must guarantee a gratuitous, accessible, impartial, ideal, transparent, autonomous, independent, responsible, equitable and expedite justice⁵⁹; (ii) due process must be strictly observed in all judicial and administrative actions⁶⁰; (iii) the judiciary must be independent;⁶¹ and, to ensure their impartiality and independence, (iv) judges, prosecutors and public defenders may not carry out political activism⁶². The importance of the latter was highlighted by Cox: “*Nothing can hurt the Court more than for a Justice to continue to maintain political or professional ties with members of the Executive or Legislative Branch or with private organizations*”⁶³.

Contrary to the aforementioned constitutional and statutory provisions referring to independence and impartiality, which are very much in sync with WJP’s rule of law principles, the International Commission of Jurists (hereinafter “ICJ”), a Geneva-based

⁵¹ <https://www.accesoalajusticia.org/que-dice-la-sentencia-n-65-del-tribunal-supremo-de-justicia/>

⁵² https://www.cpzulia.org/ARCHIVOS/Gaceta_Oficial_05_08_17_num_6322.pdf

⁵³ <https://www.aljazeera.com/news/2017/08/luisa-ortega-fearing-life-flees-colombia-170819053144164.html>

⁵⁴ http://www.oas.org/en/iachr/media_center/PReleases/2017/115.asp

⁵⁵ <https://www.hrw.org/news/2017/06/19/cancun-oas-and-venezuelas-prosecutor-general>

⁵⁶ <http://tarekwilliamsaab.net.ve/hoja.html> (accessed November 10, 2018)

⁵⁷ <https://twitter.com/lortegadiaz?lang=en> (accessed November 10, 2018)

⁵⁸ Constitution of the Bolivarian Republic of Venezuela (1999), Article 2

⁵⁹ Ibid. Article 26

⁶⁰ Ibid. Article 49

⁶¹ Ibid. Article 254

⁶² Ibid. Article 256

⁶³ Cox, Archibald. *The Court as a Legitimate Institution*. Article included in “*Courts, Law and Judicial Processes*” edited by S. Sidney Ulmer. (1981) p 206

non-governmental organization, has alerted about a deeply rooted and troubling trend in the judiciary by stating as follows:

*“The [ICJ] has been following the situation in Venezuela for several years and has been able to verify the loss of independence of the judiciary, the vertiginous and systematic deterioration of human rights and fundamental freedoms and, in general, the decline of the rule of law. Thus, the ICJ has been able to attest that over the course of 18 years, despite constitutional and legal guarantees, the judicial branch has ceased to be an independent and impartial organ of public authority.”*⁶⁴

The case of Judge María Lourdes Afiuni bleakly illustrates this trend. Human Rights Watch⁶⁵ and Amnesty International⁶⁶, have reported that she has been (i) harassed by former President Chavez through national television, who demanded she be imprisoned for 30 years (the maximum allowed, as per the Constitution⁶⁷); (ii) arrested for ordering the allegedly unlawful release on bail of a banker (his detention had been declared arbitrary by the United Nations Working Group on Arbitrary Detention⁶⁸); (iii) charged with corruption, abuse of authority, aiding escape and association to a commit crime; (iv) held in prison for over a year, during which time she was raped and suffered physical and psychological violence, including death threats from other inmates; (v) transferred to house arrest; and (vi) granted conditional release (i.e., she has to appear in court every 15 days, is not allowed to travel abroad, give statements to national and international media, nor have an active presence on social media networks). The United Nations Working Group on Arbitrary Detention has determined that actions against Judge Afiuni have been “*measures of reprisal*”⁶⁹ and that her detention has been arbitrary⁷⁰.

The OHCHR has echoed the non-governmental organizations’ sentiment by recommending to the Venezuelan government and other public authorities the following actions as part of a series of institutional and policy reforms concerning the justice system, rule of law, and law enforcement:

“The [Venezuelan] Government should refrain from interfering in the independence of the judiciary; they should take measures to restore the independence of the justice system; inter alia, judges should be selected following international standards, their tenure should be guaranteed, and

⁶⁴ International Commission of Jurists. ‘The Supreme Court of Justice of Venezuela: and Instrument of the Executive Branch (2017). p 2-3 <https://www.icj.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf>

⁶⁵ <https://www.hrw.org/news/2013/09/18/joint-icj-hrw-statement-judge-afiuni-human-rights-council>

⁶⁶ <https://www.amnesty.org/en/press-releases/2013/06/venezuela-conditional-freedom-judge-afiuni-not-enough/>

⁶⁷ Constitution of the Bolivarian Republic of Venezuela (1999), Article 44(3)

⁶⁸ United Nations Working Group on Arbitrary Detentions. Opinion No. 10/2009. p 172-179 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/116/72/PDF/G1011672.pdf?OpenElement>

⁶⁹ Ibid. Report of the Working Group on Arbitrary Detention. A/HRC/30/36 July 10, 2015. p 14

⁷⁰ Ibid. Opinion No. 20/2010. p 92-101 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/115/98/PDF/G111598.pdf?OpenElement>

*they should be protected against restrictions, improper influences, threats or interferences, direct or indirect, from any quarter or for any reason;”*⁷¹

Of note, both the Constitution⁷² and the Organic Law of the Supreme Court of Justice⁷³ (hereinafter “LOTSJ”⁷⁴) include the following wording: “*Justice will not be sacrificed because of the omission of non-essential formalities*”. It is worth noting that neither instrument identifies what are essential and non-essential formalities. This vague language undermines the rule of law by contradicting the principle of clear rules and potentially generating uncertainty as regard courts’ views on whether a substantial or procedural matter may be disregarded.

The TSJ

The legal framework clearly establishes that the TSJ, which dates back to the year 2000⁷⁵ with the enactment of the 1999 Constitution, is (i) an autonomous entity⁷⁶; (ii) the highest court in the land⁷⁷; (iii) the final interpreter of the Constitution⁷⁸; (iv) seated in Caracas⁷⁹; and (v) made up of 32 principal judges, 7 in the Constitutional Chamber and 5 in each of the remaining Chambers (Political Administrative, Civil Cassation, Penal Cassation and Social Cassation)⁸⁰. The LOTSJ establishes that principal judges are appointed for one twelve-year term⁸¹ and alternate members (also 32) for renewable 6-year terms⁸². Further, it specifies the competences of each Chamber, including the Plenary Chamber, which is consists of all 32 principal judges⁸³.

Human rights⁸⁴ and rule of law⁸⁵ watchdogs first rang the alarms about governmental efforts to undermine the TSJ’s independence with the coming into force of a 2004 law that expanded the total number of judges from 20 to the current 32⁸⁶. In 2009 concerns shifted to the TSJ’s discretionary power vis-à-vis the removal of judges of lower courts, with the United Nations Special Rapporteur on the Independence of Judges and Lawyers alerting

⁷¹ Office of the United Nations High Commissioner for Human Rights. Human rights violations in the Bolivarian Republic of Venezuela: a downward spiral with no end in sight. (2018) p 54
https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018_EN.pdf

⁷² Constitution of the Bolivarian Republic of Venezuela (1999), Article 257

⁷³ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 85

⁷⁴ For its Spanish acronym.

⁷⁵ Acceso a la Justicia. Annual Report (2017), p 25 <http://www.accesoalajusticia.org/wp-content/uploads/2018/07/Informe-anual-Acceso-a-la-Justicia-2017-ingl%C3%A9s.pdf>

⁷⁶ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 2

⁷⁷ Ibid. Article 3

⁷⁸ Ibid. Article 4

⁷⁹ Ibid. Article 6

⁸⁰ Ibid. Articles 7, 8

⁸¹ Ibid. Article 38

⁸² Ibid. Article 45

⁸³ Ibid. Article 7

⁸⁴ <https://www.hrw.org/news/2004/06/21/court-packing-law-threatens-venezuelan-democracy>

⁸⁵ International Commission of Jurists. ‘The Supreme Court of Justice of Venezuela: and Instrument of the Executive Branch (2017). p 3 <https://www.icj.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf>

⁸⁶ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 37,042 on May 19, 2004

that that TSJ was taking decisions “(...) *without neither a justified cause nor disciplinary proceedings guaranteeing the fairness of the dismissal*”⁸⁷.

Since 2010, and as further explained in this paper, there have been several claims of unlawful appointments (TSJ judges allegedly not meeting eligibility requirements provided under the Constitution and the LOTSJ, as well as alleged irregularities in their appointment process)⁸⁸, coupled with claims of TSJ judges pressured to retire well in advance of the expiration of their term⁸⁹.

On a July 2017 report the ICJ observed that “*for several years [the TSJ] has been the executive branch and ruling party’s political instrument of choice to annul the legislative action of the AN*”⁹⁰ and alerted that TSJ decisions that undermined the AN “*constituted a veritable coup and a flagrant departure from the rule of law in Venezuela*”⁹¹. This departure was further exacerbated on August 15, 2017 when Mr. Maikel Moreno delivered a provocative speech, on behalf of the TSJ, at the AN’s premises in which he declared that the ANC was “*supreme, constitutional, legitimate and sovereign*” and the judiciary, including each of the TSJ judges, was subordinated to the ANC⁹². In the same speech Mr. Moreno also advised the ANC to increase the maximum imprisonment term from 30 to 50 years for certain crimes, including “*treason to the motherland*”⁹³. With the TSJ bowing down to the ANC, the principle of separation of powers was disregarded and the rule of law weakened, if not obliterated, due to the ANC being completely unaccountable under the law.

A Supreme Court of Justice in Exile?

The TSJ has been active on Twitter since December 2010 via the @TSJ_Venezuela handle, which displays the following bio: “*Official account of the Supreme Court of Justice of the Bolivarian Republic of Venezuela*”⁹⁴. On August 2017, however, the @TSJ_Legitimo (“Legitimate TSJ” in Spanish) Twitter handle was created⁹⁵ with a bio that reads “*Judges of the Supreme Court of Justice of the Republic of Venezuela. Independent and autonomous. Official account*”⁹⁶.

⁸⁷ Despouy, Leandro. Report of the Special Rapporteur on the independence of judges and lawyers. A/HRC/11/41. March 24, 2009. p 18 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/125/63/PDF/G0912563.pdf?OpenElement>

⁸⁸ http://www.el-nacional.com/noticias/oposicion/magistrados-del-tsj-designados-partir-2010-son-ilegitimos-origen_188358

⁸⁹ International Commission of Jurists. ‘The Supreme Court of Justice of Venezuela: and Instrument of the Executive Branch (2017). p 4 <https://www.ici.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf>

⁹⁰ Ibid. p 5

⁹¹ Ibid. p 3

⁹² <https://www.youtube.com/watch?reload=9&v=x0t-cKStonM>

⁹³ Ibid.

⁹⁴ https://twitter.com/tsj_venezuela?lang=en (accessed November 21, 2018)

⁹⁵ https://twitter.com/tsj_legitimo?lang=en (accessed November 21, 2018)

⁹⁶ Ibid.

Twitter is of the view that they “*should not be the arbiter of truth*”⁹⁷ and “*do not have scalable solutions to determine and action what’s true or false*”⁹⁸. Is there, in effect, a functioning court in exile?

⁹⁷ Twitter via the @TwitterSafety handle on August 7, 2018.

⁹⁸ Ibid.

II. Appointment of TSJ Judges

Constitutional Eligibility Requirements

Article 263 of the Constitution provides the following eligibility requirements for TSJ judges: (i) Venezuelan nationality by birth; (ii) no additional nationalities; (iii) be a citizen of recognized repute; (iv) be a professional of recognized competence and reputation (recognized prestige in the performance of his/her duties); (v) have practiced law for at least 15 years and have a postgraduate university degree in legal matters; or have been a law university professor for a minimum of 15 years; or have served as a superior judge for a minimum of 15 years in the area of law corresponding to the Chamber for which s/he is nominated; and (vi) any other requirements established by law.

Statutory Eligibility Requirements

The LOTSJ builds up on the constitutional requirements -sometimes redundantly- by stipulating under its Article 37 that a TSJ judge, whether principal or alternate, must (i) be a citizen of unimpeachable moral and ethical conduct; (ii) be a lawyer of recognized honor and competence; (iii) have full mental capacity; (iv) not have been convicted by a definitive judgment or administratively sanctioned; (v) renounce any political partisanship; (vi) not have a relationship of up to the second degree of consanguinity or the third degree of affinity with other TSJ judges, the President of the Republic, Executive Vice-President, Ministers, Prosecutor General, Ombudsman, General Public Defender, Comptroller General, Rectors of the National Electoral Council and the Attorney General; (vii) not be married or maintain a de facto marriage with any other judge; (viii) not carry out any activity incompatible with the functions and powers of the judges; and (ix) have a specialization, masters or doctorate degree in law.

Constitutional Appointment Procedure

Article 264 of the Constitution establishes a four-stage procedure for the appointment of judges, as follows: (i) candidates may nominate themselves or they may be nominated by law-related organizations; (ii) a first screening must be conducted by the Judicial Nominations Committee (hereinafter “CPJ”⁹⁹) taking into consideration input from the “community”; (iii) a second screening must be conducted by the Citizen Power; and (iv) final screening and appointment must be carried out by the AN. The Article further states that citizens may object to any of the nominations submitted before the CPJ, or before the AN.

Contrary to the wording of Article 264 vis-à-vis the role of the AN, the Constitution provides under Article 270 that the CPJ is an advisory body to the judiciary for the purposes of nominating and appointing judges. This contradiction raises concerns as regard the rule of law principle of clear rules.

Statutory Appointment Procedure

⁹⁹ For its Spanish acronym.

The LOTSJ expressly provides that, for the purposes of nominating and appointing judges, the CPJ is an advisory body to the AN (not the judiciary)¹⁰⁰. Consequently, there is also a contradiction between the Constitution and the LOTSJ in this regard. It is clear, however, that of the 11 members of the CPJ, 5 must be AN Deputies¹⁰¹.

The CPJ's role includes posting the vacancy notice in no less than 3 newspapers¹⁰². Upon expiration of the nominating term (as indicated in the vacancy notice), the CPJ will post in 1 newspaper the names of the pre-selected nominees and allow for citizens to submit objections in the following 15 continuous days¹⁰³. The law stipulates the CPJ's procedure for evaluating objections, including the need to hold a hearing for the nominee to defend him or herself against the objections raised against him/her¹⁰⁴.

The importance of the CPJ's role is further acknowledged under Article 67 by stating that the Citizen Power, who needs to conduct the second screening of the initial list of nominees from the CPJ¹⁰⁵, is obliged to “*respect*” the CPJ's screening results unless there is “*grave cause*”, as set forth in the LOTSJ.

In terms of the final appointment by the AN, the LOTSJ provides under Article 38 that the favorable vote of 2/3 of Deputies convened in plenary session is required. Upon 3 sessions of failing to achieve the 2/3 threshold, Deputies may appoint principal judges by the favorable vote of the “*simple majority*”. The “*absolute majority*” of Deputies present in the respective session may appoint alternate judges, pursuant to Article 45 *ejusdem*.

Article 40 further provides that judges must be sworn-in before the AN within the next 10 days following their appointment (those unable to attend the swearing-in ceremony must be sworn in before the TSJ) and incorporated into the TSJ the day after the swearing-in ceremony or on the date instructed by the entity that conducted the swearing-in ceremony.

December 2010 Appointment

The ICJ noted that appointment of TSJ judges in December 2010 raised serious concerns as regard to nominees meeting the eligibility requirements provided under the Constitution and the LOTSJ, particularly on the issue of political partisanship:

“The appointments were made to ensure that judges sympathetic to the ruling party were elected while the necessary votes were available in the legislature (because during the next legislature, the ruling party would not be able to count on having the votes of two thirds of the deputies). Thus, of the nine principal judges appointed in 2010, at least five had

¹⁰⁰ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 64

¹⁰¹ Ibid. Article 65

¹⁰² Ibid. Article 70

¹⁰³ Ibid. Article 71

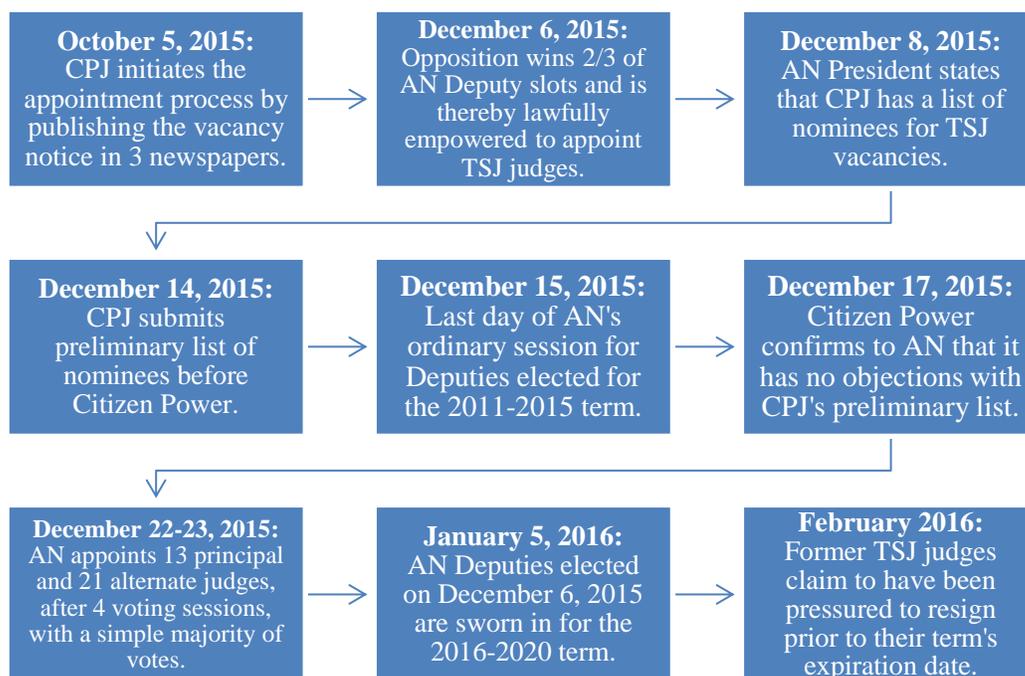
¹⁰⁴ Ibid.

¹⁰⁵ Ibid. Article 74

been [AN] deputies and members of the United Socialist Party of Venezuela (the ruling party); one had been a deputy to the Andean Parliament, a member of the government's party, and had previously been the ambassador to Canada by the appointment of the President of the Republic; and another had previously been the Attorney General of the Republic, a member of the executive branch, appointed by the President of the Republic.”¹⁰⁶

December 2015 Appointment

The 2015 appointment process was also largely driven by political partisanship, to the extent that the screening instances hurriedly adopted decisions in contravention of the legal framework and in anticipation of parliamentary elections that resulted in a new opposition-controlled legislature as of January 2016. The following flowchart illustrates some dates and facts that are relevant to understand the circumstances under which such appointments took place:



Sources:

- (i) Asamblea Nacional. Informe Final de la Comisión Especial para el Estudio y Análisis del Proceso de Selección de Magistrados Principales y Suplentes del Tribunal Supremo de Justicia. (2016) <http://www.asambleanacional.gob.ve/actos/informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia>
- (ii) <https://www.theguardian.com/world/2015/dec/09/venezuela-election-opposition-coalition-secures-supermajority> and Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 38

¹⁰⁶ International Commission of Jurists. ‘The Supreme Court of Justice of Venezuela: and Instrument of the Executive Branch (2017). p 4 <https://www.icj.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf>

- (iii) <https://www.elnuevoherald.com/noticias/mundo/america-latina/venezuela-es/article48740275.html>
- (iv) Asamblea Nacional. Informe Final de la Comisión Especial para el Estudio y Análisis del Proceso de Selección de Magistrados Principales y Suplentes del Tribunal Supremo de Justicia. (2016) <http://www.asambleanacional.gob.ve/actos/informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia>
- (v) Constitution of the Bolivarian Republic of Venezuela, Article 219.
- (vi) Asamblea Nacional. Informe Final de la Comisión Especial para el Estudio y Análisis del Proceso de Selección de Magistrados Principales y Suplentes del Tribunal Supremo de Justicia. (2016) <http://www.asambleanacional.gob.ve/actos/informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia>
- (vii) <https://www.dw.com/es/el-parlamento-chavista-saliente-nombra-13-nuevos-magistrados/a-18937820>
- (viii) <https://foreignpolicy.com/2016/01/06/an-ominous-opening-for-venezuelas-new-parliament/>
- (ix) <http://runrun.es/nacional/venezuela-2/248932/ex-magistrados-del-tsj-denunciaron-que-fueron-extorsionados-y-amenazados-para-dejar-sus-cargos.html>

Acceso a la Justicia (hereinafter “AJ”), a Venezuelan rule of law watchdog, published a report on July 2016¹⁰⁷ claiming that several 2015 appointees failed to meet certain eligibility requirements and that it was not possible to determine whether they complied with others due to the opacity of the appointment proceedings (e.g., whether appointees had other nationalities¹⁰⁸ or whether they renounced political partisanship¹⁰⁹). Perhaps the most startling allegations disclosed by AJ pertain to Mr. Maikel Moreno. The report states he (i) had been investigated for homicide (twice)¹¹⁰; (ii) served time in prison (twice)¹¹¹; (iii) was temporarily suspended from his post while serving as a judge at the appellate instance¹¹²; (iv) was later removed from such post for refusing to enforce a decision issued by the TSJ’s Constitutional Chamber¹¹³; and (v) was appointed as commercial *attaché* at the Venezuelan embassies in Italy and later in Trinidad & Tobago¹¹⁴. Reuters, a news agency, published an investigation on Mr. Moreno’s background on November 15, 2017 echoing these allegations¹¹⁵.

Another 2015 appointee called Calixto Ortega had served as *chargé d'affaires* at the Venezuelan embassy in Washington, D.C., was declared *persona non grata* by the United States government and expelled¹¹⁶. According to AJ, Mr. Ortega declared to have performed as a litigator for 15 years prior to obtaining a law degree¹¹⁷ and was a candidate for the AN during the December 2015 elections (i.e., 18 days before being appointed as a TSJ judge)¹¹⁸.

¹⁰⁷ Acceso a la Justicia. Report on compliance with compulsory requirements for TSJ judges. (2016) <http://www.accesoalajusticia.org/wp-content/uploads/2016/07/Perfil-de-magistrados-del-TSJ-julio-2016.pdf>

¹⁰⁸ Ibid. p 6

¹⁰⁹ Ibid. p 28

¹¹⁰ Ibid. p 8

¹¹¹ Ibid.

¹¹² Ibid. p 9

¹¹³ Ibid.

¹¹⁴ Ibid. p 34

¹¹⁵ <https://www.reuters.com/article/us-venezuela-politics-court-specialreport/special-report-how-a-defrocked-judge-became-the-chief-legal-enforcer-for-maduros-venezuela-idUSKBN1DF1P0>

¹¹⁶ <https://edition.cnn.com/2013/10/01/politics/venezuela-diplomats-expelled/index.html>

¹¹⁷ Acceso a la Justicia. Report on compliance with compulsory requirements for TSJ judges. (2016) p 14 <http://www.accesoalajusticia.org/wp-content/uploads/2016/07/Perfil-de-magistrados-del-TSJ-julio-2016.pdf>

¹¹⁸ Ibid. p 30



Mr. Maikel Moreno

Source: <https://www.caracaschronicles.com/2017/02/27/el-moreno-maikel/>

The report, which does not include an analysis of alternate judges, concludes that 16 principal judges do not meet the eligibility requirements provided under the Constitution and the LOTSJ. It further states that there are reasonable doubts on whether another 6 principal judges meet them¹¹⁹. Observance of the rule of law principles of fair enforcement of the law and neutrality of government representatives would have therefore required the CPJ, as first screening instance, to dismiss nominations of candidates that did not meet the eligibility requirements, regardless of whether civil society submitted any lawful objections requesting the dismissal.

The appointment procedure was also seriously flawed. The nominations term, which according to the CPJ began on October 5, 2015¹²⁰, was extended¹²¹ beyond the 30-day limit imposed by law¹²². Further, pursuant to Article 65 of the LOTSJ, the resignation of the CPJ's president, who was appointed by the AN, should have triggered a new appointment by the AN, rather than an *ad hoc* designation by other CPJ members¹²³. In addition, a group of attorneys (including former TSJ judges) submitted individual objections before the CPJ as regard the 382 nominees¹²⁴, which should have triggered the hearing procedures for nominees to defend themselves. The AN opted to disregard the objections and, prior to the

¹¹⁹ Ibid. 41

¹²⁰ http://eeuu.embajada.gob.ve/index.php?option=com_content&view=article&id=461:comite-de-postulaciones-judiciales-376-abogados-venezolanos-aspiran-a-ser-magistrados-del-tsj-&catid=3:noticias-de-venezuela-en-el-mundo&Itemid=19&lang=es

¹²¹ Ibid.

¹²² Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 70

¹²³ Asamblea Nacional. Informe Final de la Comisión Especial para el Estudio y Análisis del Proceso de Selección de Magistrados Principales y Suplentes del Tribunal Supremo de Justicia. (2016) http://www.asambleanacional.gob.ve/actos/_informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia

¹²⁴ <http://efectocucuyo.com/politica/proxima-asamblea-podra-revisar-la-designacion-de-magistrados-afirma-blanca-rosa-marmol-de-leon/>

end of the term provided under the LOTSJ to submit objections, proceed with the appointments¹²⁵.

In an interview in June 2017, Dr. Pedro Rondón Hazz, a former TSJ principal judge of the Constitutional Chamber (2000-2010) and alternate judge of the Social Cassation Chamber (2000)¹²⁶, went as far as stating that all judges, whether principals or alternates, that had been appointed as of 2010 were “*illegitimate*”¹²⁷. While this may be an overstatement, it is indisputable that the appointment of judges on December 23, 2015 did not conform to the applicable legal framework. The tension between compliance and pursuance of a partisan political agenda was evident, with the latter becoming the driving force behind the 2015 appointments in utter disregard of both the legal framework and the ballot results. Further, and also in detriment to the rule of law, these appointments blatantly demonstrated that both nominees and screening instances were not accountable to the electorate. Consequently, following these appointments, there was reason to be concerned that the TSJ would not have competent, ethical and independent representatives reflecting the makeup of the communities they are expected to serve in their capacity of judges.

The unlawful appointment of judges spurred a procedural debate¹²⁸ on whether the AN could remove the 2015 appointees by declaring appointment proceedings null and void or needed to follow removal procedures. Proponents of the former referred to Article 25 of the Constitution, which provides as follows:

“Any act issued in the exercise of Public Power that violates or impairs the rights guaranteed by this Constitution and the law is null; and public officials who order or execute it incur in criminal, civil and administrative responsibility, as the case may be, without being excused by superior orders.”

In their view, unlawful appointments violated the rights of all citizens, as it was reasonable for every citizen to expect lawful appointments of public officials. They also argued that removal proceedings, pursuant to the LOTSJ, are appropriate only for judges’ actions and/or omissions after being appointed, rather than their actions as candidates or the actions of those who appointed them.

Advocates of the latter disregarded the before and after appointment distinction and referred to the AN’s constitutional authority to remove judges with 2/3 of the Deputies’ votes. The Constitution, however, also stipulates as conditions precedent that the Citizen Power must first determine that the judge(s) in question incurred in “*grave cause*”¹²⁹, as

¹²⁵ Asamblea Nacional. Informe Final de la Comisión Especial para el Estudio y Análisis del Proceso de Selección de Magistrados Principales y Suplentes del Tribunal Supremo de Justicia. (2016)

<http://www.asambleanacional.gob.ve/actos/informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia>

¹²⁶ <https://www.el-carabobeno.com/doctor-pedro-rondon-haaz-nombrado-miembro-de-la-academia-de-ciencias-politicas-y-sociales/>

¹²⁷ http://www.el-nacional.com/noticias/oposicion/magistrados-del-tsj-designados-partir-2010-son-ilegitimos-origen_188358

¹²⁸ <https://www.accesoalajusticia.org/magistrados-revocados-o-botados/>

¹²⁹ Constitution of the Bolivarian Republic of Venezuela, Article 265.

defined in the LOTSJ¹³⁰, and judges have a right to a hearing to defend themselves¹³¹. “*Grave cause*” includes judges infringing any of the prohibitions established under the Constitution and applicable laws¹³².

The AN opted to create special commissions and instructed them to conduct a comprehensive investigation of the 2015 appointment proceedings, issue a report outlining the investigation’s results¹³³, and -based on such report- issue recommendations to the AN plenary regarding the measures the AN needed to adopt in order to ensure the lawful appointment of judges¹³⁴.

On June 15, 2016 the AN submitted to Mr. Tarek William Saab, then Ombudsman and head of the Citizen Power¹³⁵, the report recording the irregularities of the appointment process¹³⁶. One year later, and as a reminder that Mr. Saab’s office had remained silent on the matter, Deputy Carlos Berrizbeitia circulated via Twitter a picture revealing an envelope -allegedly containing the report- sealed “received” by Mr. Saab’s office on the date of submission¹³⁷.

On July 14, 2016 the AN decided to endorse and act upon the recommendations issued by the “*Special Commission to Rescue the Institutionalism of the Supreme Court of Justice*”, which included declaring null and void the 2015 appointment of 13 principal and 21 alternate judges¹³⁸ and appointing new CPJ members. The latter, however, were not sworn-in until June 13, 2017¹³⁹.

July 2017 Appointment

The 2017 appointment process was part of the response of the opposition-controlled legislature to the flawed 2015 appointment process and, therefore, was hardly exempt from a political agenda. The following flowchart illustrates relevant dates and facts of the 2017 appointments:

¹³⁰ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 62

¹³¹ Constitution of the Bolivarian Republic of Venezuela, Article 265.

¹³² Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 62(17)

¹³³ Asamblea Nacional. Informe Final de la Comisión Especial para el Estudio y Análisis del Proceso de Selección de Magistrados Principales y Suplentes del Tribunal Supremo de Justicia. (2016) <http://www.asambleanacional.gob.ve/actos/informe-final-de-la-comision-especial-para-el-estudio-y-analisis-del-proceso-de-seleccion-de-magistrados-principales-y-suplentes-del-tribunal-supremo-de-justicia>

¹³⁴ Comisión Especial para el Rescate de la Institucionalidad del Tribunal Supremo de Justicia. Informe Final. <https://supremainjusticia.org/wp-content/uploads/2016/07/INFORME-FINAL-COMISION-ESPECIAL-PARA-EL-RESCATE-DEL-TSJ.pdf>

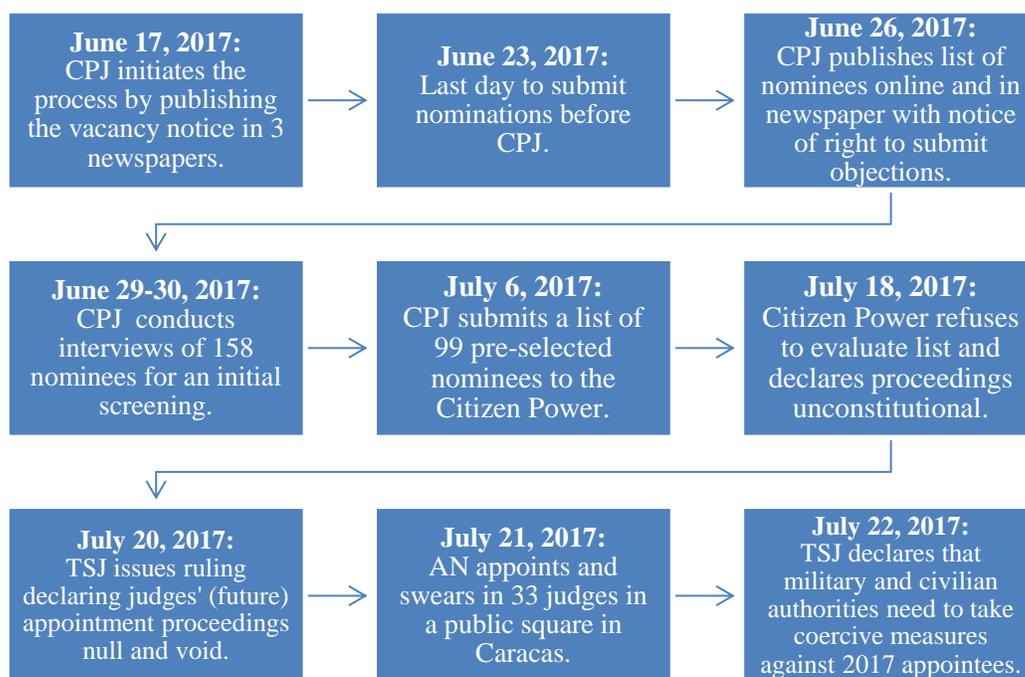
¹³⁵ Pursuant to Article 273 of the Constitution, the “Republican Moral Council” is the entity in charge of conducting the affairs of the Citizen Power. Mr. Saab, as Ombudsman, had been appointed president of the Council and, therefore, head of the Citizen Power.

¹³⁶ Deputy Carlos Berrizbeitia via his Twitter handle @Ceberrizbeitia on July 13, 2017.

¹³⁷ Ibid.

¹³⁸ <http://www.venezolano.com/2016/07/14/aprobado-la-an-informe-la-comision-especial-rescate-institucionalidad-del-tsj/>

¹³⁹ Report issued by the National Assembly (undated) and published by Transparency International’s Venezuela Chapter. <https://transparencia.org.ve/comite-postulaciones-judiciales-consigno-informe-final-eleccion-nuevos-magistrados/>



Sources:

- (i), (ii), (iii), (iv) Comisión de Postulaciones Judiciales de la Asamblea Nacional. Informe. <https://transparencia.org.ve/comite-postulaciones-judiciales-consigno-informe-final-eleccion-nuevos-magistrados/>
- (v) Deputy Carlos Berrizbeitia via his Twitter handle @Ceberizbeitia on July 8, 2017.
- (vi) <http://www.mppf.gob.ve/poder-moral-republicano-rechazo-designacion-de-magistrados-hecha-por-la-asamblea-nacional/>
- (vii) Allan R. Brewer-Carías. Lo último de la dictadura judicial en contra de la Asamblea Nacional: la anulación en “juicio sumario” de la futura elección de magistrados del Tribunal Supremo, y el sometimiento de los mismos a juicio militar. (2017) <http://allanbrewercarias.com/wp-content/uploads/2017/07/169.-doc.-Brewer.-LO-%C3%9ALTIMO-DE-LA-DICTADURA-JUDICIAL-CONTRA-AN.-24-7-2017.pdf>
- (viii) <http://tsjlegitimo.org/juramentacion/>
- (ix) http://www.el-nacional.com/noticias/politica/tsj-organos-civiles-militares-deben-actuar-contra-magistrados-ilegitimos_194477

While determining whether 2017 appointees meet the eligibility requirements is challenging due to the lack of information available to the public (the www.tsj.legitimo.com website provides a brief summary of each appointee’s resume), the appointment proceedings themselves clearly give rise to questions. The Centro de Divulgación del Conocimiento Económico para la Libertad, a Venezuelan think tank that monitors the legislature, claimed that the establishment of the CPJ was not transparent (i.e., citizens were not informed, with due time, of the list of nominees or the criteria to be selected as a CPJ member) and that the CPJ complied (only) with the minimum mandatory terms for each of the stages of the appointment proceedings, as provided under the

LOTSJ¹⁴⁰. The latter suggests that, like in 2015, there was an interest in accelerating the appointment proceedings to prevent political opponents from interfering.

The lack of the Citizen Power's endorsement of the CPJ's list of nominees is also evident and, therefore, the multi-stage screening process provided under the legal framework was not completely observed. Whether "*justice would be sacrificed*" with the Citizen Power's deliberate omission to review the list, and whether its role should be construed as a "*non-essential formality*", should be both subject to legal and political assessments. Arguably, justice would be sacrificed as the omission hinders the possibility of having lawfully appointed judges. However, it is also reasonable to infer that legislators considered all the screenings essential for judges' appointments, especially considering that there are different branches of government involved. Regardless of the assessments, the rule of law principle of fair and efficient enforcement of the law was not observed.

The TSJ's Constitutional Chamber ruling No. 545 of July 20, 2017 also encumbered the AN's decisions by declaring null "*the appointment proceedings initiated by the [AN], as well as any and all acts carried out by the [AN] for said appointments.*"¹⁴¹ Allan Brewer-Carías, a Venezuelan legal scholar, is of the view that this ruling most likely broke the world record as the speediest review of an alleged unconstitutional act, as it took less than 24 hours for the TSJ to accept it had jurisdiction over the claim, review the facts and the law, and issue a decision¹⁴². He further noted that the ruling was flawed as it declared future acts null¹⁴³.

Another issue arises upon reviewing the recording of 2017 appointees being sworn-in before the AN. While the report endorsed by the AN recommended the appointment of 13 principal and 21 alternate judges¹⁴⁴, Deputy Julio Borges, in his capacity as AN President, asked the 33 appointees the following potentially misleading question:

*"Do you swear to faithfully abide by the Constitution and the laws of the Bolivarian Republic of Venezuela, as well as by the duties inherent to the role of principal judges of the Supreme Court of Justice for which you have been appointed pursuant to Article 264 of the Constitution and Article 8 of the Organic Law of the Supreme Court of Justice?"*¹⁴⁵

¹⁴⁰ CEDICE. Informe Legislativo. Todo lo que ha pasado en la Asamblea Nacional (Abril - Septiembre 2017) p 5-6 <http://cedice.org.ve/observatoriolegislativo/wp-content/uploads/2017/11/INFORME-LEGISLATIVO-Abril-Sept-2017.pdf>

¹⁴¹ <http://www.accesoaljusticia.org/wp-content/uploads/2017/07/sentencia-N%C2%BA-545.pdf>

¹⁴² Allan R. Brewer-Carías. Lo último de la dictadura judicial en contra de la Asamblea Nacional: la anulación en "juicio sumario" de la futura elección de magistrados del Tribunal Supremo, y el sometimiento de los mismos a juicio militar. (2017) p 2-3 <http://allanbrewercarias.com/wp-content/uploads/2017/07/169.-doc.-Brewer.-LO-%C3%9ALTIMO-DE-LA-DICTADURA-JUDICIAL-CONTRA-AN.-24-7-2017.pdf>

¹⁴³ Ibid. p 1

¹⁴⁴ Comisión Especial para el Rescate de la Institucionalidad del Tribunal Supremo de Justicia. Informe Final. <https://supremainjusticia.org/wp-content/uploads/2016/07/INFORME-FINAL-COMISION-ESPECIAL-PARA-EL-RESCATE-DEL-TSJ.pdf>

¹⁴⁵ <http://tsjlegitimo.org/juramentacion/> Minute 16:00 through 16:48 out of 20:25.

III. From Exile to @TSJ_Legitimo

Persecution, Repression and Exile

The TSJ Constitutional Chamber's ruling No. 545 of July 20, 2017 also served as a warning to the would-be judges by stating that, pursuant to the Venezuelan Criminal Code, they could incur in the crime of “*encroachment of duties*”¹⁴⁶. The next day Mr. Juan José Mendoza Jover, a TSJ judge from said Chamber, went further by stating that AN Deputies, CPJ members and the 2017 appointees had incurred in “*treason to the motherland*”, and instructed not only civil but also military authorities to adopt the “*applicable coercive measures*”¹⁴⁷. On July 23 President Nicolas Maduro echoed the threats and orders of the TSJ by threatening that the 2017 appointees would be jailed, their assets seized and accounts frozen¹⁴⁸.

Security forces swiftly apprehended an appointee (who was presented before a military court, deprived of his right to appoint counsel and imprisoned without communication), sought additional arrest warrants and recorded another appointee declaring that he had not accepted the appointment¹⁴⁹. This aggressive reaction by the executive branch and the TSJ, which did not observe due process and disregarded the security of persons and property, triggered an exodus of 2017 appointees to other countries (such as the United States and Colombia)¹⁵⁰ while other sought refuge in the embassies of Chile, Panama and Mexico in Caracas¹⁵¹.

*The Washington Declaration*¹⁵²

On August 22, 2017, the 2017 appointees published a document titled “*The Washington Declaration*” from the OAS's headquarters in Washington, D.C. through which they refused to recognize the ANC, as they considered it an illegitimate and disruptive actor that undermines the rule of law in Venezuela.

Invoking several constitutional provisions that refer to “*fundamental principles*”, citizens' duties and the TSJ, signatories further pledged to work for the restoration of democracy and the rule of law (including the separation of powers), and called upon the “*national and international community*” to form an alliance in defense of Venezuela's “*superior values*”, as set forth in its legal framework, and support civil and peaceful resistance of Venezuelans. While the calling carries a strong political and advocacy connotation, signatories also made sure to frame the document under Articles 333 and 350 of the

¹⁴⁶ <http://www.accesoalajusticia.org/wp-content/uploads/2017/07/sentencia-N%C2%BA-545.pdf>

¹⁴⁷ <https://www.diariolasamericas.com/americas-latina/supremo-venezolano-pide-carcel-nuevos-magistrados-designados-el-parlamento-n4127447>

¹⁴⁸ <https://www.voanews.com/a/venezuela-president-threatens-to-imprison-supreme-court-judges/3956351.html>

¹⁴⁹ Acceso a la Justicia. Annual Report (2017), p 16-17 <http://www.accesoalajusticia.org/wp-content/uploads/2018/07/Informe-anual-Acceso-a-la-Justicia-2017-ingles-C3%A9s.pdf>

¹⁵⁰ <https://www.reuters.com/article/us-venezuela-politics-magistrates-idUSKBN1AR1VB?il=0>

¹⁵¹ CEDICE. Informe Legislativo. Todo lo que ha pasado en la Asamblea Nacional (Abril - Septiembre 2017) p 28 <http://cedice.org.ve/observatoriolegislativo/wp-content/uploads/2017/11/INFORME-LEGISLATIVO-Abril-Sept-2017.pdf>

¹⁵² TSJE via its Twitter handle @TSJ_Legitimo on August 27, 2017.

Constitution (both of which refer to citizens' duties to uphold and defend the Constitution). Of note, signatories identified themselves as the "*legitimate judges of the Supreme Court*".

*The Charter*¹⁵³

On September 20, 2017 some of the 2017 appointees signed a document¹⁵⁴ titled "*Constitution of the Supreme Court of Justice in Exile*" (hereinafter "Charter") through which they "*constituted the Supreme Court of Justice in Exile*" (hereinafter "TSJE¹⁵⁵") and echoed the statements of the Washington Declaration, including their refusal to recognize the ANC and their support to the AN. While signatories acknowledged that it was not possible for them to perform as judges in Venezuela (because of the persecution), they also argued in the Charter that exile should not be an impediment for them to fight for democracy and human rights.

The 2017 appointees invoked, as the Charter's legal basis, Articles 333 and 350 of the Constitution and Article 6 of the OAS's Inter-American Democratic Charter¹⁵⁶ (citizens' right to participate in democracy). In their view, the Constitutional articles supported the TSJE's establishment and the OAS treaty allowed the TSJE to enforce the results of a referendum organized by the National Assembly (NA) and Venezuelan civil society that took place on July 2017 requesting "*renewal of public institutions*". They further argued that judges appointed prior to 2017 had resigned from their posts through Mr. Moreno's August 15, 2017 speech recognizing the ANC and subjecting TSJ judges' posts to the ANC's authority¹⁵⁷.

AN's Endorsement

Three weeks after the Charter was signed, the AN issued a public letter addressed to the "*Honorable Judges of the Supreme Court of Justice*"¹⁵⁸ through which it (i) recognized them as the "*legitimate judges*"; (ii) saluted their courage and commitment to justice; (iii) referred to the AN and them as representing the "*Legitimate Powers*" and (iv) wished them a successful "*installation of the Supreme Court*".

Inauguration

The day after the AN issued the aforementioned letter then TSJE President Mr. Miguel Angel Martin Tortabu delivered a speech¹⁵⁹ at the OAS's headquarters "*inaugurating*" the

¹⁵³ <http://tsjlegitimo.org/wp-content/uploads/2018/01/ACTA-DE-CONSTITUCION-TSJ.pdf>

¹⁵⁴ Those that sought asylum protection in embassies in Caracas were not able to sign.

¹⁵⁵ For its Spanish acronym.

¹⁵⁶ Article 6 provides as follows: "*It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.*"

¹⁵⁷ <https://www.youtube.com/watch?reload=9&v=x0t-cKStonM> (minutes 1:38 through 2:07). Mr. Moreno stated as follows: "*I submit to the consideration of the [ANC] the posts of TSJ judges, including my own post as TSJ President*".

¹⁵⁸ Junta Directiva de la Asamblea Nacional a los Honorables Magistrados del Tribunal Supremo de Justicia en fecha 12 de octubre de 2017. Via Mr. Jose Vicente Haro through his personal Twitter handle @JoseVicenteHaro on August 1, 2018.

¹⁵⁹ <http://tsjlegitimo.org/apertura/>.

TSJE's activities. He argued that the TSJE had "*democratic legitimacy*" on the grounds that (i) 7,676,894 citizens participated in the aforementioned referendum and endorsed the "*renewal of public institutions*"; (ii) Article 6 of the OAS's Inter-American Democratic Charter, as well as Articles 333 and 350 of the Constitution, further reinforced the validity of the referendum's results; and (iii) TSJ judges appointed prior to 2017, through Mr. Moreno's August 15, 2017 speech before the ANC, had allegedly resigned from their posts. While labeling the TSJE's activities as an "*exercise of democracy*" and identifying the TSJE as an "*unprecedented court*", he also argued that it would operate within the parameters of the Venezuelan legal framework and public international law.

In terms of the TSJE's objectives, Mr. Martin Tortabu declared an ambitious and politically-dense agenda that included fighting for independence and freedom, restoring the credibility of the judiciary and other public powers, guaranteeing the separation of powers, achieving the rule of law, safeguarding Venezuelans' human rights, prosecuting perpetrators of human rights violations, and consolidating democracy. The speaker further claimed that the TSJE would stand ready to intercede for the "*up-coming changes in Venezuela*" and called upon politicians to engage in a sincere and fruitful negotiation to address the political and humanitarian crises.

IV. TSJE: legally grounded or politically motivated?

Articles 333 and 350 of the Constitution

The Washington Declaration and the Charter, in the 2017 appointees' views, are grounded in Articles 333 and 350 of the Constitution, which provide as follows:

Article 333:

“This Constitution shall not lose its validity if it ceases to be observed by act of force or because it is repealed by any means other than those provided for herein. In such an eventuality, all citizens, whether vested with authority, will have the duty to collaborate in the restoration of its effective validity.”

Article 350:

“The Venezuelan people, loyal to their republican tradition, to their struggle for independence, peace and freedom, shall not abide by any regime, legislation or authority that contravenes democratic values, principles and guarantees or undermines human rights.”

The aforementioned Constitutional provisions shift the burden from State institutions created specifically to enforce the Constitution to that of each individual person. Further, they underscore citizens' individual and collective duty to comply with the Constitution, regardless of whether they are in a position of “*authority*”. It is less clear, however, how each individual citizen is expected to uphold and defend it -and against whom- in the midst of a complete breakdown of the rule of law, as is the case in Venezuela. After all, actions by civil society directed towards strengthening the rule of law are effective to the extent that State institutions are willing to listen to and accommodate -at least some of- the demands of those challenging policies and practices that undermine the rule of law. Likewise, actions taken from within State institutions -whether by those in a position of “*authority*”- that are directed towards strengthening the rule of law, will be effective to the extent that the bureaucracy at large acts in a coordinated fashion to that end. In both of these scenarios people would need to subject themselves to the limits set forth under the Constitution, which would require them to relinquish power.

In response to an interpretation request submitted by a group of citizens before the TSJE, the TSJE's Constitutional Chamber issued a ruling on March 20, 2018 in which it sought to establish the scope of Article 350 and recognized the urgent need for clarity in view of the Venezuelan crises¹⁶⁰. In the TSJE's view, several governmental decisions had indeed undermined human rights as well as contravened “*democratic values, principles and guarantees*”, therefore triggering the need to enforce Article 350. The TSJE also stated that such Article refers not only to a duty but also a “*natural*”, “*universal*” and “*human*” right,

¹⁶⁰ <http://tsjlegitimo.org/wp-content/uploads/2018/06/Sentencia-del-TSj-relativa-a-la-interpretacion-de-Art.-350-CRBV.pdf>

and that it is not limited to taking but also refraining from taking action. In that regard it stressed that enforcement of Article 350 translated into “*civil resistance*”, which could take the form of public protests and advocacy activities against, but also the refusal to comply with, unlawful governmental rules and decisions. Despite the highly political nature of its content, the TSJE did not hesitate to label Article 350 as the “*juridical instrument*” that would allow Venezuelans to recover the rule of law, and “*civil resistance*” as the lawful mechanism for the re-establishment of the rule of law.

It is worth noting that the TSJE went beyond interpreting Article 350 (repeating the *ultra vires* behavior of the ANC) and directly instructed judges of lower courts and public prosecutors, as well as military and police officers, to disregard any unlawful instruction issued by public powers (including the executive branch) in order to allow for the “*reestablishment of the rule of law*”. As an incentive, the TSJE ensured that all those public servants that abide by the ruling would be granted “*applicable*” legal protection.

The Inter-American Democratic Charter

Article 6 of the treaty reads as follows:

“It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

While a powerful political statement, Article 6 could hardly be enforced without an active participation of State institutions for the same arguments as outlined for the Constitutional articles. Civil society can, to some extent, promote and foster diverse forms of participation by raising awareness and exercising pressure over State institutions but the latter would need to be willing to engage with civil society in good faith.

AN Endorsement

The letter issued by the AN did not refer to any constitutional or statutory provisions, nor provide an explanation of what “*installation*” entails. In addition, the letter does not include a signatory. Given the ambiguous wording (arguably frequent in political statements that seek to avoid specific commitments), it is not entirely clear whether the AN was actually referring to the incorporation of the 2017 appointees as TSJ judges, as set forth under Article 40 of the LOTSJ, or openly endorsing the Charter and, consequently, recognizing the TSJE as the highest court of the land.

From alternates to principals

By signing the Charter and establishing the TSJE, and as correctly pointed out by AJ Director Laura Louza, the 2017 appointees went beyond their mandates because their appointment did not seek to create a new TSJ nor to replace the existing one¹⁶¹. Further,

¹⁶¹ <http://www.accesoalajusticia.org/dudas-y-respuestas-sobre-el-tsj-en-el-exilio/>

2017 appointees were meant to join other lawfully appointed judges in Caracas¹⁶². In addition, the 2017 appointees disregarded the capacity in which some of them were appointed by unilaterally deciding, to “*elevate*” the 21 alternates to principals in order to reach the number of judges needed for a Plenary Chamber (i.e., 32 principal judges)¹⁶³.

There are, however, divergent views in this regard even amongst 2017 appointees. On September 13, 2017 Mr. Gonzalo Álvarez Domínguez, one of the 2017 appointees, declared before the Colombian House of Representatives that judges were appointed to “*complete*” the TSJ, rather than to “*integrate it*”. He also recognized that the remaining 19 TSJ judges (i.e. principal judges appointed prior to 2017 excluding the 13 principal judges appointed on December 2015) had been lawfully appointed¹⁶⁴.

While being interviewed by Deutsche Welle, Germany’s public international broadcaster, Mr. Álvarez Domínguez stated on February 21, 2018 that, in his view the idea of establishing the TSJE was symbolic, as it was supposed to serve as an advisory organ that would share opinions and ideas, rather than issue decisions. He also stated that the TSJE does not have legitimacy to issue enforceable decisions and that there is a functioning TSJ in Venezuela (albeit operating in an irregular fashion)¹⁶⁵. Mr. Álvarez Domínguez recognized in the same interview that some colleagues differed from his views: they considered that, as the “*legitimate*” Supreme Court, the TSJE’s rulings were enforceable¹⁶⁶. The latter was confirmed when the TSJE issued a letter on February 25, 2018 dismissing Mr. Álvarez Domínguez’s statements by claiming that he opted not to participate in TSJE meetings and had expressed an interest in not being further involved with the TSJE’s activities to “*rescue liberty and the Rule of Law in Venezuela*”. The letter also set forth that TSJE rulings were referred to international organizations for their enforcement (i.e., the TSJE itself would not enforce its rulings).

Seat(s) & Venue(s)

In light of their forced diaspora, the 2017 appointees expressly included in the Charter that the TSJE’s Plenary Chamber had the authority to “*set its seat in countries supportive of the republican democratic cause or at the headquarters of international organizations*”¹⁶⁷. In their view this reinforced the Charter’s legitimacy as it was simultaneously executed from the OAS’s headquarters in Washington DC, as well as from Bogotá and Santiago de Chile¹⁶⁸. In addition, and with the endorsement of the Inter-American Bar Association, the Panamanian Bar Association and the Panamanian Commission for Human Rights (a governmental board), the TSJE established a regional seat in Panama City¹⁶⁹. Further, the

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ <https://www.youtube.com/watch?reload=9&v=SOfxpmjwXEI> Minute 15

¹⁶⁵ <https://www.caracaschronicles.com/2018/02/21/double-or-nothing/> Via Naky Soto’s personal Twitter handle @Naky on February 21, 2018

¹⁶⁶ Ibid.

¹⁶⁷ Constitución del Tribunal Supremo de Justicia en el Exilio, p 3 <http://tsjlegitimo.org/wp-content/uploads/2018/01/ACTA-DE-CONSTITUCION-TSJ.pdf>

¹⁶⁸ Ibid, p 5

¹⁶⁹ La Razon newspaper via its Twitter handle @LaRazon_ on April 25, 2018.

TSJE has opted to hold public hearings from the Colombian Congress¹⁷⁰, the main auditorium of the Colombian Universidad Sergio Arboleda¹⁷¹ and the Bogotá-based think tank Sociedad Económica Amigos del País¹⁷², the Miami-based think tank Interamerican Institute for Democracy¹⁷³, and the Doral-based Doral Government Center¹⁷⁴. Several of these hearings have been livestreamed via YouTube and have been further supported by Skype meetings between 2017 appointees participating from different countries¹⁷⁵.

The LOTSJ, however, provides that the TSJ's Plenary Chamber has the authority to allow for the TSJ to temporarily operate from locations other than its seat in Caracas but within national borders¹⁷⁶.



TSJE's regional seat in Panama City

Source: <https://www.el-carabobeno.com/tsj-en-el-exilio-establecio-su-sede-en-panama/>

Recognition v. Support

While the Venezuelan government only recognizes the TSJ, the international support landscape has been very heterogeneous. Recognition¹⁷⁷ and support, however, are not the same as only the former could potentially translate into enforcement of rulings. The LOTSJ provides, for example, that the TSJ's Political Administrative Chamber is competent to enforce rulings issued by foreign entities, subject to applicable international treaties and Venezuelan law¹⁷⁸. Support, on the other hand, signals a political will to engage and may be more associated with Harvard University Professor Joseph Nye's "*soft power*" notion (i.e., ability to persuade through means other than military or economic coercion).

¹⁷⁰ TSJE via its Twitter handle @TSJ_Legitimo on August 13, 2018.

¹⁷¹ Ibid, on August 4, 2018.

¹⁷² Ibid, on August 8, 2018.

¹⁷³ Ibid, on August 13, 2018.

¹⁷⁴ Ibid, on August 14, 2018.

¹⁷⁵ Ibid, on August 12, 2018.

¹⁷⁶ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 6

¹⁷⁷ According to the Oxford Dictionary "*recognition*" means "*acknowledgement of the existence, validity, or legality of something*". (<https://en.oxforddictionaries.com/definition/recognition>)

¹⁷⁸ Organic Law of the Supreme Court of Justice, published on Official Gazette No. 39,522 on October 1, 2010. Article 26(23)

There are several expressions of support. Agreeing to host TSJE hearings in an organization's facilities, as identified above, could be construed as an expression of support of the 2017 appointees and even the TSJE itself. The same could be said for public figures accepting to be photographed with 2017 appointees and agreeing to have their photographs posted and circulated via social media. Such is the case of former Presidents Andrés Pastrana¹⁷⁹ from Colombia and Oscar Arias¹⁸⁰ from Costa Rica, as well as United States Senator Marco Rubio¹⁸¹. Others have opted to issue "*expressions of solidarity*" and display them on institutional websites, as is the case with Ernesto Blume Fortini, President of the Peruvian Constitutional Court¹⁸².

A few have opted for a straight forward approach. Mr. Luis Almagro, in his capacity as OAS Secretary General, has strongly advocated for recognition of the TSJE. While addressing the United Nations Security Council, via an Arria formula meeting¹⁸³ (i.e., an informal gathering), on November 13, 2017 he vouched for the TSJE's legitimacy, urged the international community to support it as such, and warned that "(...) *silence, methodological or procedural excuses, absences, neutral or condescending language and keeping silent or disqualifying claims are the main cause of the Venezuelan regime continuing to torture, murder, persecute and have prisoners of conscience*"¹⁸⁴. On July 10, 2018, the Chilean Senate echoed Mr. Almagro's concerns and requested President Sebastián Piñera to issue a formal statement recognizing the "[TSJ] appointed by the [AN] on July 21, 2017"¹⁸⁵.

Six days after the Chilean Senate's request, Mr. Maikel Moreno participated in the commemoration of the 20th anniversary of the adoption of the Rome Statute of the International Criminal Court (hereinafter "ICC") at The Hague, where he gave a speech in his alleged capacity as TSJ President¹⁸⁶. Notably, he stressed the importance of the ICC respecting national criminal jurisdictions and States parties to the Rome Statute refraining from interfering in another State's internal affairs or threatening its political independence¹⁸⁷.

On August 20, 2018, Mr. Almagro reacted again but this time by issuing a letter addressed to Mr. Omar Barboza, AN President, asserting that (i) the TSJE is legitimate, both in origin and in the exercise of its functions; (ii) the AN granted legitimacy to the TSJE; (iii) support and confidence in the TSJE is essential "*for a transition to democracy in Venezuela through justice and re-institutionalization*"; (iv) "*formalisms*" should not delay the enforcement of the TSJE's rulings and (iv) disregarding the TSJE's rulings translates into becoming a "*dictatorship accomplice*"¹⁸⁸.

¹⁷⁹ TSJE via its Twitter handle @TSJ_Legitimo on August 27, 2017.

¹⁸⁰ Ibid, on November 24, 2017.

¹⁸¹ Ibid, on April 17, 2018.

¹⁸² <http://www.tc.gob.pe/tc/public/institucion/notaprensa/nota/institucion/not-8fb72633d94e0d011ee0b4492e30f18a>

¹⁸³ <http://www.un.org/en/sc/about/methods/bgarriformula.shtml>

¹⁸⁴ http://www.oas.org/es/acerca/discurso_secretario_general.asp?sCodigo=17-0169

¹⁸⁵ <http://www.senado.cl/sesion-31-ordinaria-en-martes-10-de-julio-de-2018/senado/2018-07-14/012409.html>

¹⁸⁶ <https://www.icc-cpi.int/itemsDocuments/20a-ceremony/20180717-venezuela-speech.pdf>

¹⁸⁷ Ibid, p 2-3

¹⁸⁸ Luis Almagro, OAS Secretary General. Letter OSG/388-18 dated August 20, 2018.

Conclusions

- Per the Venezuelan legal framework, there can only be one TSJ and it must be seated at Caracas. References to two Supreme Courts are therefore associated with a Manichean narrative that reflects, to some extent, the on-going political polarization in Venezuela.
- Some of the relevant provisions of the Venezuelan legal framework are contradictory (e.g., whether CPJ advises the legislature or the judiciary) while others are ambiguous and could be interpreted in ways that favor partisan agendas to the detriment of the rule of law (e.g., Articles 333 and 350 of the Constitution, as well as references to justice v. “*non-essential formalities*”).
- Eligibility requirements and appointment procedures for judges, whether principals or alternates, are established under the Constitution and the LOTSJ and are based on the premise that each individual nominee must meet, or ideally surpass (if applicable), each of the requirements and be appointed pursuant to the applicable procedure. That is, each judge must comply with the eligibility requirements and those in charge of appointing judges must comply with the applicable legal framework governing the appointment procedure. The latter can be particularly challenging given all the stakeholders involved.
- Had the rule of law prevailed in 2015, judges would have only been appointed (i) upon former judges’ terms expiring on the date set forth in their respective appointment notifications and employment contracts; (ii) upon the nomination of a lawfully established CPJ; (iii) upon the endorsement of the three screening instances (i.e., CPJ, Citizen Power and AN); (iv) pursuant to applicable constitutional and statutory eligibility requirements; (v) after allowing objections to nominees from civil society, if any, within the time limits set forth in the legal framework; and, consequently, (vi) by the AN after January 5, 2016.
- While it may be problematic to enforce rulings issued by 2015 appointees, as they further undermine the rule of law, invalidating all such rulings would most likely be greatly disruptive as well.
- Had the rule of law prevailed in 2017, (i) the AN would have disclosed more information regarding the appointment of CPJ members; (ii) the Citizen Power would have agreed with the AN’s assessment as regard the 2015 appointments; (iii) the AN and the Citizen Power would have acted in a coordinated fashion regarding the 2015 appointments (perhaps by declaring appointments of unlawfully appointed judges null); (iv) all persons and entities involved would have observed the constitutional and statutory provisions as regard eligibility requirements and appointment proceedings; (v) a number of judges sufficient to replace the unlawfully appointed judges would have been sworn-in before the AN and at AN premises as either principals or alternates, as appropriate; and (vi) lawfully

appointed judges and the executive branch would not have interfered with the 2017 appointments.

- While the Charter may very well be a powerful political statement and an important advocacy platform for 2017 appointees to raise awareness of Venezuelan rule of law's dire state, it does not conform to the Venezuelan legal framework because (i) removal proceedings of judges unlawfully appointed in 2015 were, at the least, questionable; (ii) the 2017 appointment process in itself was flawed; (iii) only 13 judges should have been lawfully appointed on 2017 as principals (i.e., there are 19 other principal judges whose appointments have not been challenged by the AN) and the rest as alternates; and (iv) appointed judges were meant to join other lawfully appointed judges at the TSJ in Caracas.
- The persecution, repression and exile of the 2017 appointees triggered a series of decisions that they, along with the AN, adopted as a political, rather than a juridical, response. It is worth noting, however, that decisions have been adopted while consistently appealing to the ambiguous and hardly enforceable articles of the Constitution (333 and 350) that call upon citizens to defend and uphold it.
- The AN's political endorsement of the TSJE, as evidenced in the letter sent on October 12, 2017, does not translate into a legally grounded administrative act through which the TSJE lawfully replaces the TSJ and is vested with legitimacy.
- The 2017 appointees, despite of their openly divergent views, have been extremely courageous. Further, their advocacy efforts in favor of Venezuelan rule of law and democracy have been laudable and are desperately needed (the same holds true for Mr. Almagro's firm stance). These efforts should be encouraged in the understanding that (i) they are acting as advocates (rather than as judges) and (ii) their rulings, while potentially even in Venezuela's best interests from a rule of law standpoint, are not enforceable.