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## The Death of the Autonomous Venezuelan Judiciary

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# THE DEATH OF THE AUTONOMOUS VENEZUELAN JUDICIARY

Amid Bennaim\*

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\* My name is Amid Bennaim. I was born in Venezuela and have been living in Miami so long I'm practically a local now. I have a bachelor's degree in Classical Civilizations from Boston University. As a third-year law student at the University of Miami, it has been a great privilege to be on the Executive Board of the Inter-American Law Review for the academic year 2019-2020. This experience has been the best academic experience of my life and I hope that you enjoy reading my Note as much as I enjoyed drafting it. I'd like to thank my colleagues in the Law Review and my faculty adviser for their corrections and support, without them publication of this Note would not have been possible.

*Access to impartial and effective courts is the cornerstone of democratic civil society. When the intention of political actors is to extinguish democratic civil society, they often wear away at the autonomy of the judiciary. International law and the constitutions of many states throughout the world guarantee access to autonomous courts. Despite having such guarantees in place, the government of the Bolivarian Republic of Venezuela has consistently attacked the judiciary in order to erode its autonomy and bring it under political control. Strategies used to achieve that goal include purging judges, intimidating them, and preventing judges from getting tenure. As a result, today there are two parallel Venezuelan judiciaries competing for authority while citing to the same constitution. This article will present evidence regarding the methods through which the autonomy of Venezuela's courts was intentionally destroyed by the Chavista government. It will begin by looking at the history of the judicial power created by the Constitution of 1999, analyze the specific acts that led to the politicization of the courts, and explore the effects of that politicization on Venezuelan constitutional government.*

## I. INTRODUCTION

The autonomous judiciary is a fundamental component of the administration of justice. For that reason, guaranteeing access to fair, independent, and autonomous courts is a basic human right. Article 10 of the United Nations' Universal Declaration of Human Rights entitles all humans "in full equality to a fair . . . hearing by an independent and impartial tribunal."<sup>1</sup> The International Covenant on Civil and Political Rights guarantees that no person shall be deprived of liberty without due process of law, it guarantees speedy trials for the accused, and prohibits inhuman

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, art. 10 (1948).

treatment for prisoners.<sup>2</sup> Such rules ensure the autonomy of the courts as well as the independence from judges' influence. But what happens when politicians intentionally blur the lines separating the branches of government to the point that judicial autonomy and independence is effectively extinguished? That is the case of the supreme court (*Tribunal Supremo de Justicia* or "TSJ") of the Bolivarian Republic of Venezuela, a country which has adopted and ratified both the UN's Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Venezuelan politicians undermined the independence of the judicial branch of government by ignoring the separation of powers set forth in the country's constitution.<sup>3</sup> In doing so, they violated obligations under international treaties and the nation's constitution. The current Venezuelan constitution was adopted in 1999 (the "Constitution of 1999") and completely reformed the judicial, executive, and legislative branches of government.<sup>4</sup> The Constitution of 1999 intended to create a socialist republic that guaranteed democratic, human, and social rights.<sup>5</sup> In practice, however, the new constitution weakened the institutions of government<sup>6</sup> while the executive branch steadily grew more powerful. The year 2017 became a watershed year when the TSJ nullified the legislature and ruled that the nation's president may unilaterally convene a constituent assembly to craft a new

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<sup>2</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175-76 (1966).

<sup>3</sup> See generally THE CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Dec. 20, 1999. See also *Acceso a la Justicia califica al TSJ como politizado y parcializado*, RUNRUN.ES (Jan. 10, 2017), <https://runrun.es/nacional/292643/acceso-a-la-justicia-califica-al-tsj-como-politizado-y-parcializado/>.

<sup>4</sup> Marion J. Garcia-Serra, *The Enabling Law: The Demise of the Separation of Powers in Hugo Chavez's Venezuela*, 32 U. MIAMI INTER-AM. L. REV. 265, 274.

<sup>5</sup> Reportajes (Vive Television broadcast Feb. 02, 1999), YOUTUBE (Feb. 02, 2011), <https://www.youtube.com/watch?v=1s7rtjHqwnQ>.

<sup>6</sup> Garcia-Serra, *supra* note 4, at 275.

constitution.<sup>7</sup> By nullifying the legislature, the judicial power in Venezuela effectively cut the string of constitutional democratic government and participated in an internal coup. As a result, opposition politicians established a parallel legislature and judicial in exile.<sup>8</sup>

This article will present evidence regarding the methods through which the autonomy of Venezuela's courts was intentionally destroyed. It will begin by looking at the history of the judicial power created by the Constitution of 1999, analyze the specific acts that led to the politicization of the courts, and explore the effects of that politicization on Venezuelan constitutional government. Part II of this article will explore the promulgation of the Constitution of 1999 and the historical context that led to its downfall. Part III will delve into the intentional undermining of democratic government through the erosion of judicial independence by the Venezuelan government, looking specifically at the Organic Law of the TSJ, the practice of appointing judges to untenured temporary positions, the ouster of judges, and the case of Judge Maria Lourdes Afuni. Part IV will delve into the final collapse of the Venezuelan judicial, when the TSJ cut the string of constitutional government in Venezuela and shattered its legitimacy. Lastly, Part V will sum up the current state of the Venezuelan judiciary and democratic government as established by the Constitution of 1999.

## II. BACKGROUND

### A. *A History of the Constitution of 1999*

The story of the Venezuelan Constitution of 1999 begins “with the fall of the Perez Jimenez dictatorship in January of 1958.”<sup>9</sup> The change in regime led to the Constitution of 1961, which ushered in

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<sup>7</sup> Allan R. Brewer-Carias, *El Juez Constitucional vs. El Pueblo Como Poder Constituyente Originario*, 119 EDITORIAL JURIDICA VENEZOLANA, at 3-5 (2017)(Sp.).

<sup>8</sup> *Acceso a la Justicia califica al TSJ como politizado y parcializado*, *supra* note 3.

<sup>9</sup> Garcia-Serra, *supra* note 4, at 266.

an extended period of prosperity and “an uninterrupted sequence of peaceful and democratic transitions of power.”<sup>10</sup> From the outside, Venezuela seemed to be a model democratic society compared to its neighbors in Latin America.<sup>11</sup> However, internally, many Venezuelans felt excluded from the political process.<sup>12</sup> Political life was dominated by two centrist parties, *Accion Democratica* (“AD”) and *Copei*.<sup>13</sup>

Both political parties—along with a third party called the *URD* that did not survive the 1970s—came to a power-sharing agreement, by which they committed themselves to democratic government and procedures when in power, and to serve as the “loyal opposition” when out of power.<sup>14</sup> An agreement called the Pact of Punto Fijo.<sup>15</sup> The Constitution of 1961 lent itself to the duopoly of the Pact of Punto Fijo because that constitution was loosely modeled on the United States’ Constitution. It had a tripartite system in which a *Presidente* headed the executive, the legislature was a bicameral institution called the *Congreso Nacional* (National Congress), and the judicial branch was headed by a *Corte Suprema de Justicia* (Supreme Court).<sup>16</sup>

The Supreme Court established by the Constitution of 1961 was a continuation of the Supreme Court first established by the Constitution of 1830, which was the first constitution enacted after Venezuela split from Simon Bolivar’s unified Gran Colombia that same year.<sup>17</sup> That Supreme Court was originally made up of a chief magistrate and four other magistrates.<sup>18</sup> When there was a vacancy in the court, the president would nominate three potential magistrates for each open seat, which were narrowed to two

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Ricardo Combellas, *El Proceso Constituyente y la Constitucion de 1999*, 30 *POLITEIA* 183, 184 (2003).

<sup>13</sup> Garcia-Serra, *supra* note 4, at 267.

<sup>14</sup> *Id.* at 268.

<sup>15</sup> *Id.*

<sup>16</sup> *See generally* VENEZ. CONST. OF 1961.

<sup>17</sup> *Constitucion de Venezuela de 1830 cumple 184 anos* (Sep. 22 2016); MINISTERIO DEL PODER POPULAR PARA LA COMUNICACIÓN Y LA INFORMACIÓN, <http://www.minci.gob.ve/constitucion-de-venezuela-de-1830-cumple-186-anos/>.

<sup>18</sup> *See generally* VENEZ. CONST. OF 1830, tit. 20.

candidates by the *Camara de Representantes* (analogous to the United States House of Representative); then the *Senado* (analogous to the United States Senate) would elect a final candidate from amongst those two.<sup>19</sup> This procedure for selecting judges incorporated the will of the people through the important roles reserved for each house of the National Congress as well as the presidency.<sup>20</sup> While the Constitution of 1961 doubled the total number of magistrates in the Supreme Court, the method for selecting magistrates and required qualifications remained the same as under the Constitution of 1830.<sup>21</sup>

However, the people's confidence in the institutions established by the Constitution of 1961 was eroded by widespread nepotism and public corruption, which was rarely prosecuted.<sup>22</sup> By the 1980s, an insular political class had formed and many Venezuelans felt that the political class was increasingly unable to effectively respond to the nation's woes.<sup>23</sup> In that context of political cronyism and corruption, the judicial branch of government was often questioned for its ineffectiveness and partiality.<sup>24</sup>

Although the Constitution of 1961 was not replaced until 1999, there were many attempts to reform the Constitution of 1961 before the rise of *Chavismo*—with criticism of the *Corte Suprema* being one of the main driving forces in favor of reform.<sup>25</sup> By 1984, the *Congreso Nacional* had created a commission to reform the laws governing the judiciary.<sup>26</sup> Those reforms proved to be insufficient and in 1989 the National Congress formed another commission with the express mandate to propose amendments to the Constitution of 1961.<sup>27</sup> (At that point the constitution had already been amended in 1973 and 1983, but those amendments

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<sup>19</sup> *Id.*

<sup>20</sup> Combellas, *supra* note 12, at 184.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 186.

<sup>26</sup> *Id.* at 185.

<sup>27</sup> *Id.*

had not affected the judiciary.)<sup>28</sup> The 1989 commission released an extensive list of proposed amendments just two years later.<sup>29</sup> However, that list bitterly divided the members of the government and constitutional reform was never adopted.<sup>30</sup>

The ruling parties' inability to deal with the problems facing Venezuelan society became clear on three separate occasions, which compounded and simmered for nearly a decade: "Black Friday," the *Caracazo*, and the failed military coup of 1992.<sup>31</sup> Those events shook the foundations of Venezuelan civil society to the core and eventually resulted in the overhaul of the entire Venezuelan government by a young lieutenant coronel who was unknown at the time.

February 18, 1983 was "Black Friday."<sup>32</sup> The Venezuelan currency, the *Bolivar*, "was severely devalued as a result of high level of foreign debt and the declining price of oil. Most Venezuelan's [sic] living standards were affected detrimentally and the flow of 'petro-dollars' that had financed generous social policies and helped maintain the political patronage machines of the two major political parties began to recede."<sup>33</sup> The inability to pay for social programs, let alone expand them to draw in new voters, further undermined respect for the political duopoly that had dominated Venezuela since the Pact of Punto Fijo.<sup>34</sup>

Then, on February 27, 1989, popular frustration with the traditional elite boiled over.<sup>35</sup> Carlos Andres Perez, a one-time president from the 1970s, won the presidency once more with promises of increasing prosperity.<sup>36</sup> He pushed reforms that reduced government spending, but were very unpopular with the struggling lower classes.<sup>37</sup> An increase to the price of bus fare "ignited a three day riot [in Caracas], resulting in extensive looting

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<sup>28</sup> *Id.* 185 n.2.

<sup>29</sup> *Id.* at 185.

<sup>30</sup> *Id.* at 186.

<sup>31</sup> *Id.* at 184.

<sup>32</sup> Garcia-Serra, *supra* note 4, at 267.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 268.

<sup>37</sup> *Id.*



and over 1000 deaths,” which needed to be put down with the use of military force.<sup>38</sup> The Venezuelan people had shown deep-rooted discontent with the political elite. Speaking of the *Caracazo* some years later, President Rafael Caldera (*Copei*), who served from 1995-1999, said that “Venezuela has been a sort of pilot country. At this moment, it is what the North Americans call a show window . . . . That show window was shattered with fists, stones, and sticks, by the hungry inhabitants of the *barrios* of Caracas.”<sup>39</sup>

President Caldera had tapped into a latent, yet incredibly powerful sentiment in Venezuelan society: that the government was rotten from the inside and needed rebuilding.<sup>40</sup> In time, a young army lieutenant coronel named Hugo Chávez Frias would learn how to harness that political energy and remake the country. Chávez was the leader of “a small cadre of junior military officers, that had earlier complained of the politicized system of promotions and of their new found duties of repressing popular protests, [which] organized themselves as the Movimiento Bolivariano Revolucionario – 200 (“MBR – 200”).”<sup>41</sup> With no official political ideology, the cadre was united by a shared sense that the government was failing the people and that a great change was necessary.<sup>42</sup> On February 1992, the MBR – 200, leading about a tenth of all army units in the country, mutinied and attempted to take over the government.<sup>43</sup> Shortly after it began, the rebellion was quelled and the coup plotters arrested.<sup>44</sup> Chávez was incarcerated for his role in the coup.

#### *B. Constitutional Reform in 1999*

Hugo Chávez attained the status of a political celebrity and within a few years of MBR – 200’s attempted coup, President Rafael Caldera released Chávez from prison.<sup>45</sup> By the time of his

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<sup>38</sup> *Id.* at 269.

<sup>39</sup> Combellas, *supra* note 12, at 184.

<sup>40</sup> *Id.* at 193.

<sup>41</sup> Garcia-Serra, *supra* note 4, at 270.

<sup>42</sup> *Id.* at 270.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 271.

<sup>45</sup> *Id.* at 272.

release from prison, Chavez was a hero to the poor and disenfranchised of Venezuela.<sup>46</sup> The way was clear for an ambitious political outsider to sweep aside the duopoly of *AD* and *Copei* in the 1998 presidential elections.

Chávez was an optimistic visionary, who presented a persuasive and idealistic vision of what the country could be.<sup>47</sup> He promised to spread the wealth from the nation's vast reserves of natural resources on programs to help the poor; to create a more equitable and gentler nation where the poor and the historically-marginalized indigenous population could have access to prosperity.<sup>48</sup> Canny observers noticed that “[h]is message of overturning the entire political and economic order proved to have . . . appeal to the impoverished masses who were eager for dramatic change.”<sup>49</sup> Chávez named his vision “21<sup>st</sup> Century Socialism,” and assembled a political coalition which came to be called the *Movimiento Quinta Republica* (Movement for a Fifth Republic, the “MVR”). This vision was wildly popular, and Chávez's United Socialist Party of Venezuela (“PSUV”) swept aside all other parties to triumph on election day in 1998.<sup>50</sup>

The vehicle through which Hugo Chávez sought to implement 21<sup>st</sup> Century Socialism was a new constitution.<sup>51</sup> While campaigning for the presidency, he turned the convocation of a constituent assembly tasked with drafting a new constitution into a central issue of the election.<sup>52</sup> He intended to hold a referendum to ensure that his proposed new constitution had a popular mandate, but the Constitution of 1961 did not establish a mechanism for such popular referendums.<sup>53</sup>

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<sup>46</sup> Lauren Castaldi, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 *GEO. J. INT'L L.* 477, 479 (2006).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Combellas, *supra* note 12, at 188.

<sup>52</sup> *Id.*

<sup>53</sup> Allan R. Brewer-Carias, *La Configuración Judicial del Proceso Constituyente en Venezuela de 1999 o de Como el Guardian de la Constitución*

Already throughout the 1998 presidential campaign, the Supreme Court had cast doubts as to the legality of such a referendum. The Supreme Court had to weigh the underlying principles of democratic participation against their obligation to uphold the Constitution of 1961.<sup>54</sup> In January 1999, that court handed the MVR a limited victory by holding that a referendum could take place, but that such a referendum could not vest the government with the authority to create institution tasked with drafting a new constitution.<sup>55</sup> Instead, the referendum could only be used to gauge the people's wishes as to whether they wanted a new constitution and what types of guarantees that constitution should provide.<sup>56</sup>

The referendum was held in April 1999 and resulted in an overwhelming victory for the MVR government.<sup>57</sup> Demonstrating his strong political support, Chávez was able to win the referendum by a margin of 92% in favor and 8% in opposition.<sup>58</sup> In July of the same year, another election was held for representatives to the Constituent Assembly.<sup>59</sup> Chávez's coalition of leftist parties, the Polo Patriótico, was able to win 121 out of a total of 128 members (the assembly had a total of 131 seats, 3 of those being reserved for representatives from indigenous groups).<sup>60</sup> With about 60% of the total votes, the Polo Patriótico won over 90% of available seats.<sup>61</sup>

However, it is worth noting that there was widespread abstention by the Venezuelan electorate. Slightly less than 38% of eligible voters participated in the July election.<sup>62</sup> For comparison, about 64% of the electorate participated in the 1998 presidential

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*Abrió el Camino a Su Violación y Para su Propia Extinción*, N° 77-80 REVISTA DE DERECHO PUBLICO, 453 (1999).

<sup>54</sup> *Id.* at 456.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Garcia-Serra, *supra* note 4, at 273.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Combellas, *supra* note 12, at 193.

<sup>61</sup> *Id.* at 193.

<sup>62</sup> *Id.* at 192 n.17.

election.<sup>63</sup> Those high rates of abstention in the elections for members of the Constituent Assembly are in large part due to the questionable legality of the Constituent Assembly of 1999. Given that there was no mechanism for establishing such an assembly in the Constitution of 1961, the binding nature and legitimacy of the referendum were widely questioned by the opposition to the MVR government.<sup>64</sup>

After their overwhelming electoral victories, the MVR government barred Congress from sitting in the Venezuelan Capitol and from meeting and passing new laws.<sup>65</sup> They then removed eight judges from the bench.<sup>66</sup> Opposition legislators who attempted to enter the Venezuelan Capitol were removed by armed forces.<sup>67</sup> Finally, Cecilia Rosa, the Chief Justice of the Supreme Court, who had just months earlier given the Constituent Assembly a limited mandate that expressly prohibited the dissolution of the Congress and the Supreme Court, resigned, “stating that the court would commit suicide rather than wait to be killed by the [Constituent] Assembly.”<sup>68</sup> Allan Brewer-Carias, a renowned and influential Venezuelan jurist, who participated in the 1999 Constituent Assembly as an independent scholar, called the Supreme Court’s decision to allow the referendum, which created the “death sentence” of the autonomous judicial power in Venezuela.<sup>69</sup>

The 1999 Constituent Assembly operated under a theory of super-sovereignty, the idea that because the Constituent Assembly was the result of a popular referendum and the leaders were all

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<sup>63</sup> *Bolivarian Republic of Venezuela 1998 Presidential Election Results*, GEORGETOWN UNIVERSITY: BASE DE DATOS POLITICOS DE LAS AMERICAS (Apr. 5, 2006) <http://pdba.georgetown.edu/Elecdata/Venezuela/pre98.html>; *Venezuelan 1998 Presidential Election Results*, ELECTIONGUIDE.ORG (Mar. 17, 2005), <https://web.archive.org/web/20050317052156/http://www.ifes.org/eguide/results/um/venezuelares3.htm>.

<sup>64</sup> Brewer-Carias, *supra* note 53, at 27.

<sup>65</sup> Garcia-Serra, *supra* note 4, at 273.

<sup>66</sup> *Id.* at 274.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Brewer-Carias, *supra* note 53, at 1.

elected, the Constituent Assembly was the supreme representation of the popular will and sovereignty.<sup>70</sup> Under this theory, the traditional branches of government were all subservient to the Constituent Assembly. The Constituent Assembly used that claim to authority to replace Congress as the nation's legislative body.<sup>71</sup> Those usurped legislative powers were then used to pass an Enabling Law<sup>72</sup> that gave President Chávez expanded emergency powers to enact laws that would otherwise have needed legislative approval.<sup>73</sup> President Chávez argued that the expanded powers were necessary to combat the “emergencies” of high inflation and a 10% unemployment rate. While Enabling Laws were permitted under the Constitution of 1961 in cases of emergency, this was the first time that such a law was passed without the participation of Congress and the first time that the emergency powers were not limited by scope and duration.<sup>74</sup>

The Constitution of 1999 was approved in a referendum by 71% of participating voters.<sup>75</sup> However, due to the controversies surrounding the Constitution of 1999, its reception was mixed. On its face, the Constitution of 1999 is inherently democratic and respects human rights.<sup>76</sup> However, the years have shown that implementation of the constitution has failed to ensure those ideals.<sup>77</sup>

The Constituent Assembly itself undermined the constitutional system that it had recently established. Not only did the Constituent Assembly intentionally undermine the legislative and judicial branches of government, it also suspended the local elections for the year 2000, failed to follow adequate formalities

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<sup>70</sup> Combellas, *supra* note 12, at 195.

<sup>71</sup> *Id.*

<sup>72</sup> An enabling law is, a “law that permits what was previously prohibited or that creates new powers; esp., a congressional statute conferring powers on an executive agency to carry out various delegated tasks.” ENABLING LAW, Black's Law Dictionary (11th ed. 2019).

<sup>73</sup> Garcia-Serra, *supra* note 4, at 274.

<sup>74</sup> *Id.* at 274-75.

<sup>75</sup> *Id.* at 276.

<sup>76</sup> See generally CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, (Venez.).

<sup>77</sup> Combellas, *supra* note 12, at 205.

(going so far as to change the text of the constitution after it was approved by referendum), and created a transitional government that was not elected, but appointed.<sup>78</sup> By its acts, the Constituent Assembly condemned the newly renamed Bolivarian Republic of Venezuela to caudillo-style leadership.<sup>79</sup> “One political observer described [the Constitution of 1999] as establishing a political and economic model that was ‘part Arab oil kingdom, part European cradle-to-grave welfare state, with a dash of Latin American authoritarianism thrown in.’”<sup>80</sup>

The Constitution of 1999 was an expansive document with 350 articles.<sup>81</sup> The articles covered the structure and form of government, as well as a wide array of social policies, rights, and protections. For example, it gave the government increased powers to intervene in the economy for the benefit of workers and stipulated that the national oil company could not be privatized, as its revenue was intended to pay for social programs.<sup>82</sup> It overturned existing labor laws and set a minimum wage that must be based on the price of a basket of basic goods.<sup>83</sup> The Constitution of 1999 guaranteed universal healthcare, education, pension, and employment.<sup>84</sup>

The Constitution of 1999 significantly changed the structure of government. The Supreme Court was replaced by the TSJ.<sup>85</sup> The bicameral Congress was replaced with the unicameral National Assembly which had the power to pass Enabling Laws that gave the president the power to enact legislation by decree.<sup>86</sup> Aside from such expanded powers, the president was given the right to call referendums on national issues at will and to dissolve the National Assembly.<sup>87</sup>

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<sup>78</sup> *Id.* at 206.

<sup>79</sup> *Id.*

<sup>80</sup> Garcia-Serra, *supra* note 4, at 275.

<sup>81</sup> Combellas, *supra* note 12, at 203.

<sup>82</sup> Garcia-Serra, *supra* note 4, at 275.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See generally* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, (Venez.).

<sup>86</sup> Garcia-Serra, *supra* note 4, at 276.

<sup>87</sup> *Id.*

Many years after the adoption of the Constitution of 1999, the famous Venezuelan jurist Allan Brewer-Carias wrote that the actions of the Constituent Assembly constituted an internal coup d'état.<sup>88</sup> This was partially because there were widespread irregularities in the process to draft a new constitution. The referendum calling for the Constituent Assembly was called well before the Supreme Court ruled that such a vote was constitutionally permissible under the Constitution of 1961, and was therefore illegally organized.<sup>89</sup> When the Supreme Court allowed the referendum, it gave the Constituent Assembly a limited mandate which the Constituent Assembly ignored under the theory of super-sovereignty.<sup>90</sup> The dissolution of the Congress as well as the disregard of the Supreme Court by the Constituent Assembly meant that the Constituent Assembly had violated the Constitution of 1961, which was still in effect despite the Constituent Assembly's belief that it outranked the institutions of government created by the 1961 Constitution.<sup>91</sup>

Another important component of the Constitution of 1999 is Title III Chapter I, which states in clear and unequivocal terms that the Constitution of 1999 recognizes and shall comply with human rights obligations under national law as well as international treaty.<sup>92</sup> It provides that human rights protections guaranteed by treaty obligations shall be guaranteed to the people, even when those protections are more expansive than the guarantees provided under the 1999 Constitution.<sup>93</sup> As signatories to such treaties, Venezuela's obligations include guaranteeing fair and public trials as well as procedural guarantees of due process. The Constitution also states that equal protection under the law shall be given to all Venezuelans regardless of political opinion so that all Venezuelans are granted equality of human rights and liberties.<sup>94</sup>

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<sup>88</sup> Brewer-Carias, *supra* note 53, at 1-2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 52.

<sup>91</sup> *Id.* at 53.

<sup>92</sup> CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 19 (Venez.).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

After winning a majority in Congress in 1999, MVR politicians isolated the Supreme Court. Ivan Rincon Urdaneta, a supporter of President Chavez, argued that the Supreme Court had impermissibly limited the Constituent Assembly.<sup>95</sup> Foreseeing imminent destruction, the justices of the Supreme Court dissolved the institution. After the adoption of the Constitution of 1999, Mr. Rincon was rewarded for his loyalty by being appointed as the president of the newly created the TSJ.<sup>96</sup>

### III. ASSAULT: HOW THE MVR GOVERNMENT USED INTIMIDATION TO DESTROY JUDICIAL AUTONOMY.

The Constitution of 1999 did not create a judicial branch that was subservient to the other branches of government per se; instead, the actions of MVR politicians undermined judicial autonomy. This section will look at the practices of the PSUV government that served to destroy any notion of judicial autonomy and independence in Venezuela.

Judicial autonomy is a requirement for democratic government because the judiciary is the branch of government which ensures that constitutional rules are followed. In a jurisdiction where the judiciary is subservient to any or all other branches of government, there is no institution which can hold the rest of the government accountable. Absent a judiciary that is equal to the other branches of government, the trappings of government serve as nothing more than mere camouflage for despotism and tyranny. Judges protect the people from those who would otherwise usurp the state's monopoly of force to become untouchable. That protection is not only fundamental for democratic governance, it is an important human right that countries must respect under international law.

#### A. *The Organic Law of 2004*

Chapter III of the Constitution of 1999 established the nation's judiciary in about twenty articles, which created a set of complex

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<sup>95</sup> Brewer-Carias, *supra* note 53, at 52.

<sup>96</sup> *Id.*



rules for the judiciary.<sup>97</sup> The rules created an independent judiciary where magistrates have tenure for twelve years and are chosen through popular participation.<sup>98</sup> The Constitution expressly sets minimum qualifications and coopted Venezuela's legal scholar community to ensure that judges elected by the masses were qualified to hold their title.<sup>99</sup> Article 267 set behavioral and professional guidelines as well as a mechanism for the ouster of tenured judges.<sup>100</sup> According to its text, the judicial branch created by the Constitution of 1999 was an independent and professional institution which combined novel ideas of popular and academic participation with the generally-political process of nominating and ratifying judges. However, within five years, political turmoil led to the promulgation of the Organic Law of the TSJ, which undermined the guarantees of judicial autonomy and independence in the Constitution of 1999.<sup>101</sup>

An organic law is a law that functions as the framework for implementation of a constitutional regime.<sup>102</sup> The concept of organic laws is foreign to American jurisprudence,<sup>103</sup> but such laws are common throughout the world. Under the framework established by the Constitution of 1999, they regulate and structure government.<sup>104</sup> Under the Venezuelan Constitution of 1999, organic laws required a two-thirds majority to be enacted.<sup>105</sup>

Without securing a two-thirds majority, the MVR government enacted the Organic Law of the TSJ in 2004 (*Ley Orgánica del*

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<sup>97</sup> See generally CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 19 (Venez.).

<sup>98</sup> *Id.*

<sup>99</sup> See generally CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 255 (Venez.).

<sup>100</sup> *Id.* at 267.

<sup>101</sup> Daniel Wilkinson, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, 16 HUMAN RIGHTS WATCH 1, 17 (2004).

<sup>102</sup> ORGANIC LAW, Black's Law Dictionary (11th ed. 2019).

<sup>103</sup> According to the U.S. Code, the organic laws of the United States of America are: the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance of 1787, and the United States Constitution of 1787.

<sup>104</sup> CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 203 (Venez.).

<sup>105</sup> *Id.*

*Tribunal Supremo de Justicia de la República Bolivariana de Venezuela*) supported by only a simple majority in the legislature.<sup>106</sup> According to Human Rights Watch, a non-governmental organization which monitors and reports on international human rights, there were other procedural problems as well, such as the changing of the law's text after it had been approved in the legislature and the combining of multiple articles to avoid debate in the legislature.<sup>107</sup>

The 2004 Organic Law of the TSJ had three important provisions: it permitted the nullification of temporary and provisional magistrates (discussed at length below); it raised the number of magistrates of the TSJ from twenty to thirty-two; and it changed the vote threshold for appointment of new magistrates.<sup>108</sup> Before the reform, half of the twenty magistrates were allied with the PSUV while the other half were in opposition, resulting in an equilibrium where decision were not entirely predictable.<sup>109</sup> However, after the reform, the twelve magistrates added to the TSJ were firmly allied with the MVR.<sup>110</sup> Whereas the original twenty magistrates appointed under the Constitution of 1999 were all confirmed by a two-thirds majority, under the Organic Law, new magistrates and judges at all levels were appointed by a simple majority of the MVR-controlled legislature.<sup>111</sup> This put the TSJ and all of its committees firmly in the hands of the MVR.

The Organic Law was the MVR's response to the TSJ's supposed betrayal of the nation in 2002 and 2003. Despite having widespread support, President Chávez had a powerful and stubborn opposition. In April 2002, the opposition attempted a coup d'état against President Chávez.<sup>112</sup> Though the coup seemed successful at first, within forty hours the PSUV government was restored.<sup>113</sup>

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<sup>106</sup> Wilkinson, *supra* note 101, at 17.

<sup>107</sup> *Id.*

<sup>108</sup> Wilkinson, *supra* note 101, at 1.

<sup>109</sup> Francisco Peregil, *Chavez Se Hace con Control de los Jueces*, EL PAIS (Sep. 19, 2008), [https://elpais.com/diario/2008/09/19/internacional/1221775204\\_850215.html](https://elpais.com/diario/2008/09/19/internacional/1221775204_850215.html)

<sup>110</sup> *Id.*

<sup>111</sup> Wilkinson, *supra* note 101, at 17-18.

<sup>112</sup> Peregil, *supra* note 109, at 2.

<sup>113</sup> *Id.*

Then, in 2003, there were mass protests on the streets and a general strike against the government which cost billions of dollars in lost oil revenues for the state.<sup>114</sup> As a result of those events, especially the failed coup, Chávez began dismantling the very Constitution he had fathered.<sup>115</sup>

Four months after the failed coup in 2002, the TSJ ruled (in an eleven to nine decision) that it did not have jurisdiction to initiate an investigation against four high-ranking military generals suspected of being involved in the failed coup.<sup>116</sup> President Chávez quickly organized street protests throughout the country, calling the decision a counterattack to his socialist revolution.<sup>117</sup> He attacked the judicial vigorously, calling them “immoral,” “monstrous,” “a stain [on the country],” and calling for a book to be published with the pictures of the eleven magistrates who voted against investigation so that the people may know who they are.<sup>118</sup> In a post published at the time in an official MVR blog, Chávez’s son-in-law and current Venezuelan Minister of Foreign Affairs Jorge Arreaza, wrote that the TSJ was not a legitimate institution and claimed that the TSJ was biased and reached their decision based on the magistrates’ personal political views.<sup>119</sup> However, in the same blog post he also concedes that the Attorney General made ineffective arguments.<sup>120</sup>

Then, just a few months later, opposition politicians organized a general strike, which included a strike by workers of the state-owned petroleum company, PDVSA.<sup>121</sup> The PSUV government

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<sup>114</sup> Wilkinson, *supra* note 101, at 2.

<sup>115</sup> Peregil, *supra* note 109, at 3.

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *Chavez convoca una marcha contra el Supremo por exculpar a los golpistas*, EL PAIS (Aug. 18, 2002), [https://elpais.com/internacional/2002/08/18/actualidad/1029621606\\_850215.html](https://elpais.com/internacional/2002/08/18/actualidad/1029621606_850215.html).

<sup>118</sup> *Id.*

<sup>119</sup> Jorge Arreaza, *Consecuencias de la decisión del TSJ del 14 de agosto 2002*, APORREA (Apr. 09, 2002, 1:44 P.M.) <https://www.aporrea.org/actualidad/a342.html>.

<sup>120</sup> *Id.*

<sup>121</sup> *Chavez convoca una marcha contra el Supremo por exculpar a los golpistas*, *supra* note 117.

considered the strike to be “petroleum terrorism” and an “economic coup d’état.”<sup>122</sup> This led to another showdown with the judicial branch of government because the MVR believed that the lower courts—which were administered by the TSJ in accordance with the Constitution of 1999—did not prosecute participants in the strike with sufficient zealotry and severity.<sup>123</sup>

The strategy employed by the *Chavistas* in 2004 was unconstitutional, but far from unique. Julius Caesar increased the Roman Senate from 600 members to 900 members to reduce opposition against him.<sup>124</sup> Such actions are clearly designed to undermine the institution’s ability to assert autonomy in ways that are contrary to the politicians’ desires. One must also consider the effects that flaunting of constitutional norms can have on the courts. Courts are institutions that thrive on stability and establishment of rigorous norms. The combination of increasing the number of magistrates and disregarding the required procedure for appointing new magistrates are fatal blows to judicial stability. Unfortunately, these acts constitute the least egregious steps taken to undermine judicial autonomy. The discrete undermining of judicial authority would evolve into an open war of conquest against the judiciary.

*B. Lack of Tenure: Temporary and Provisional Judges Become the Norm*

Judges are given tenure to prevent those who oversee them from exerting influence on the courts by using their power of appointment as leverage over individual judges. That is why many consider tenure to be an indispensable aspect of judicial autonomy. For example, in the United States, justices to the Supreme Court have tenure and politicians are powerless to stop a justice who “flips” and follows a different ideology from the one expected of him or her by the party that nominated them. In Venezuela, the

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<sup>122</sup> MINISTERIO DEL PODER POPULAR PARA LA COMUNICACIÓN Y LA INFORMACIÓN, *BATALLA POR LA SOBERANÍA NACIONAL: DEL TERRORISMO PETROLERO AL GOLPE ECONÓMICO* (2012).

<sup>123</sup> Wilkinson, *supra* note 101, at 12-14.

<sup>124</sup> *See generally* FRANK FROST ABBOT, *A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS* 137 (Elibron Classics, 1<sup>st</sup> Ed. 1901).

Constitution of 1999 created a regime which granted tenure to judges for twelve years and ensured their independence, but authorities dispensed with those constitutional guarantees for political convenience.<sup>125</sup>

Of the tools used by the MVR government to bring the judicial under its control, the misuse of untenured temporary and provisional appointments is amongst the most effective. According to the Constitution of 1999, there are three ways to appoint magistrates to the TSJ. The first is intended to be the norm established by the constitution: legislative ratification of magistrates for tenured twelve-year terms through a public competition process.<sup>126</sup> The second way, alternatively, is when a permanent position in the TSJ is vacated, it can be filled by a “provisional” appointment until that provisional judge can be confirmed through the public competition process established in the constitution and given tenure.<sup>127</sup> The third type of appointments are “temporary” judges, those appointed to serve as substitutes for magistrates that are taking temporary leaves of absences for things like health reasons or parental leave.<sup>128</sup>

Under the Constitution of 1999, the Judicial Commission of the TSJ has the power to appoint temporary and provisional judges.<sup>129</sup> It also has the power to dismiss temporary appointments without cause, but not provisional appointments.<sup>130</sup> However, the Commission exercises that authority to dismiss provisional judges summarily, though that would apparently violate the Constitution, which specifically grants provisional judges a right to due process before being dismissed.<sup>131</sup> Nevertheless, summary dismissal of provisional judges occurs as well. This gives the Judicial Commission significant power over judges. When the Commission has a judge’s career in their hands to do with as they please, it

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<sup>125</sup> See generally CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 255 (Venez.).

<sup>126</sup> Wilkinson, *supra* note 101, at 18.

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.* at 9-11.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

becomes easier to ensure that judge's compliance in exchange for receiving or retaining a judicial position.

The effect of the policy of appointing mostly untenured judges is that "the independence of provisional [and temporary] judges is significantly destabilized, preventing them from making rulings based on the law rather than the desire of powerful outside actors."<sup>132</sup> The system of temporary and provisional appointments increases the leverage that politicians have over judges and forces judges to consider the political implications of their decisions before making them. It effectively gives the Judicial Commission, which is presided by a loyal *Chavista*, the ability to replace judges at will. There is no recourse for affected judges when the head magistrate of the TSJ is also a renown PSUV partisan.

The president of the TSJ was Mr. Rincon, the very man who bent the Supreme Court to the *Chavista*'s will in 1998, and the president of the Judicial Commission of the TSJ, Luis Velazquez Alvaray, was a legislator and member of the PSUV before joining the TSJ.<sup>133</sup> Together, they held the TSJ in a tight vice.

In 2003, 80% of the judges in Venezuela held provisional or temporary positions.<sup>134</sup> This means that out of the 1,772 judges in the country, only 183 were tenured.<sup>135</sup> This represents a significant increase in the proportion of untenured judges since 1997.<sup>136</sup> <sup>137</sup> At first, President Chávez initiated a recruitment drive to hire judges to fill the positions held temporarily or provisionally, but the process was slow due to the strict standards set by the Constitution of 1999.<sup>138</sup> By 2003, the government abruptly ended the attempt to fill the bench with tenured judges ostensibly because the process

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<sup>132</sup> Castaldi, *supra* note 46, at 496.

<sup>133</sup> Peregil, *supra* note 109, at 3.

<sup>134</sup> Castaldi, *supra* note 46, at 495.

<sup>135</sup> *Id.*

<sup>136</sup> Note that under the Constitution of 1961, provisional appointments could be made by the president if the legislature was unavailable. The abuse of this system was one of the common criticisms of the Corte Suprema under the Constitution of 1961. Therefore, it is fair to point out that this phenomenon was not new, but rather that the MVR increased the use of this practice and further politicized it.

<sup>137</sup> Wilkinson, *supra* note 101, at 10.

<sup>138</sup> *Id.* at 10-11.

was not working sufficiently well.<sup>139</sup> However, opponents of the government argue that the recruitment drive was stopped shortly after the failed coup in 2002 so that the Judicial Commission of the TSJ could hold political control over the judicial by naming and removing judges at their discretion.<sup>140</sup> The recruitment drive was never restarted.

Meanwhile, the Judicial Commission has exercised its powers to appoint and remove nontenured judges by fiat. In 2004, it nullified the appointment of three Caracas judges who held temporary appointments without any due process, hearing, or notice.<sup>141</sup> Other judges have reported to the Inter-American Commission on Human Rights that they found their appointments revoked when they ruled against the government.<sup>142</sup> While a magistrate may only be removed with two-thirds approval from the National Assembly, under the 2004 Organic Law, “nullification” of a temporary appointment can be achieved through a simple majority.<sup>143</sup> The Organic Law allowed the purging of the Venezuelan judiciary to begin in earnest.

The practice of using temporary appointments to control the judiciary violates the human rights of both the judge and the party who is seeking redress from the tribunal. Under the United Nations’ Universal Declaration of Human Rights, “[e]veryone is entitled in full equality to fair and public hearing by an *independent and impartial tribunal*, in determination of his rights and obligations.”<sup>144</sup> Here, the person seeking recourse from the court is deprived of the ability to seek redress from an independent and impartial body where judges can adjudicate disputes free from outside influence and based solely on the application of law to facts. As for the judges, their performance is judged by the same political operators who appointed them. Those judges have no due

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<sup>139</sup> *Id.* at 1.

<sup>140</sup> *Id.*

<sup>141</sup> Castaldi, *supra* note 46, at 495.

<sup>142</sup> *Id.* at 496.

<sup>143</sup> See Wilkinson, *supra* note 101, at 18-20.

<sup>144</sup> U.N. Universal Declaration of Human Rights art. 10., Dec. 10, 1948 (emphasis added).

process right to seek protection from arbitrary dismissal and many suspect that they were dismissed for political reasons.<sup>145</sup>

The effect of such practices is very detrimental to judicial autonomy and democracy. Lack of tenure affects judges on a personal level, and without job security many of the brightest jurists in the country seek careers outside the judicial system and sometimes outside the country, where they will not be subject to the whims of the political class. The bright minds that decide to stay feel compelled by their careers to support *Chavista* political ideology in order to obtain temporary and provisional appointments. For those who stay within the judiciary and serve as judges, political oversight is a reality, and decisions are made not based on equity and the rule of law, but for the self-interest of the judge and the politicians who control his or her employment. When one considers that only a handful of exemplary victims are often enough to bring others into line, it becomes apparent just how powerful a tool the untenured appointments are for exercising control over the judicial.

### C. *The Purge: Summary Ousting of Judges*

After the failed coup in 2002, there was plenty of kindling to feed the fire that eventually consumed the Venezuelan judicial. The MVR blamed the judiciary for siding with the coup plotters, as the ten opposition-aligned TSJ magistrates of the twenty serving at the time had sided with the plotters during the attempted coup by declaring it legal.<sup>146</sup> By 2004, Chávez and the MVR were secure enough to lead a counterattack against the judiciary.<sup>147</sup> That is why in 2004, they instituted a regime of nullification through the aforementioned Organic Law of the TSJ which allowed the National Assembly to “nullify” appointments to the TSJ with a simple majority.<sup>148</sup> As PSUV legislator Iris Varela said at the time, the regime of nullification was created specifically to expel the ten magistrates who had sided with the coup plotters.<sup>149</sup> Her words

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<sup>145</sup> Castaldi, *supra* note 46, at 479-80.

<sup>146</sup> Wilkinson, *supra* note 101, at 20.

<sup>147</sup> *Id.*

<sup>148</sup> *See id.* at 18-20.

<sup>149</sup> *Id.* at 20.



were an explicit confirmation that the goals of the controls placed on the judiciary in 2004 were to exercise political control over TSJ decisions and to punish magistrates accused of being aligned with the opposition.<sup>150</sup> To that end, no tool was more useful than the ousting of sitting judges.

The ousting of three Caracas trial judges for political reasons in 2004 ushered in the era of summary dismissals. Miguel Luna, Petra Jimenez, and Maria Trastoy were dismissed on March 2004 after receiving letters from TSJ President Ivan Rincon Urdaneta “informing them that the TSJ Judicial Committee had decided to nullify their appointments.”<sup>151</sup> They were removed “due to observations that were before [the TSJ Judicial Committee].”<sup>152</sup> However, those observations were never made public, and Human Rights Watch instead suggests that the firing was politically motivated.<sup>153</sup> All three judges had released detainees who had allegedly participated in that year’s social unrest because there was insufficient evidence to warrant the ongoing detention of the suspects.<sup>154</sup> The group included two opposition legislators.<sup>155</sup> Notably, the decisions of each judge were affirmed by the appellate court. When asked about the dismissals by Human Rights Watch, Ivan Rincon Urdaneta argued that the three judges were temporary appointments, and as such were not entitled to a hearing before dismissal.<sup>156</sup> However, none had temporary appointments. Instead, Luna and Trastoy were provisional appointments specifically entitled to due process under the Constitution of 1999, while Jimenez was appointed as a “Special Substitute” and had been serving at her post for more than three years at the time of her dismissal.<sup>157</sup>

All three judges appealed their dismissal, but only Luna received a response (first she was reinstated and then summarily

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 12.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 13.

<sup>157</sup> *Id.*

dismissed once more shortly thereafter).<sup>158</sup> Particularly worrisome is the fact that the Caracas judges' rulings enforced the laws correctly—as shown by their subsequent confirmation on appeal—and were only problematic because of their political significance. Also worrisome is that their nullifications used a law that, according to PSUV legislator Iris Valera, was created specifically for the removal of opposition-aligned judges.<sup>159</sup> Such arbitrary dismissal of judges with the express intent to undermine judicial autonomy is both unconstitutional and in violation of Venezuela's human rights treaty obligations to ensure that people have access to autonomous and independent courts that will adjudicate questions of rights and obligations.

Although provisional judges are entitled to due process hearings before being dismissed, the TSJ showed in 2004 that it would not apply such protections and treat provisional appointments the same as temporary ones. In a country where about 80% of the judges serve under either provisional or temporary appointments, this means that the vast majority of judges can be removed with no explanation or opportunity to defend themselves.<sup>160</sup> In other words, “the constitutional regime does not apply to a majority of the judges on the bench in Venezuela.”<sup>161</sup>

Before the dismissal of the three Caracas judges, an early victim of the opening salvo of the war against judicial autonomy was temporary Judge Mercedes Chocron. Judge Chocron attempted to carry out a judicial inspection of a military base where an opposition-aligned general was being held to ensure that his detention complied with human rights treaty obligations set by the Inter-American Commission on Human Rights.<sup>162</sup> After that, she was dismissed by the TSJ Judicial Commission, which gave no reasoning other than their absolute authority to dismiss temporary

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 20.

<sup>160</sup> Castaldi, *supra* note 46, at 495.

<sup>161</sup> *Id.* at 496.

<sup>162</sup> Wilkinson, *supra* note 101, at 13.

judges.<sup>163</sup> They noted that such dismissals “cannot be questioned or subject to review.”<sup>164</sup>

In other cases, MVR politicians intimidated entire courts and then dismissed them altogether. Such was the fate of the First Administrative Court (“CPCA”), the second highest court in Venezuela, which had national jurisdiction over cases involving challenges to administrative actions by the government.<sup>165</sup> Due to its occasional rulings against MVR policies, President Chávez publicly denounced the CPCA on several occasions. For example, in response to a 2003 ruling that Cuban doctors sent by the Cuban government to work as volunteers in poor communities could not practice medicine in Venezuela without first being certified by the Venezuelan medical association, he called it “judges who shouldn’t be judges,” even telling it to go shove their rulings “where you want,” and encouraging the people to ignore CPCA decisions.<sup>166</sup>

Before taking the drastic step of dissolving the CPCA, the MVR government attempted to intimidate that court into submission. Aside from the insults mentioned above, President Chávez called the chief judge of the CPCA a “criminal.”<sup>167</sup> Intelligence services arrested one of the judge’s driver and held him in prison for thirty-five days.<sup>168</sup> The driver was charged with mishandling documents under the pretense that the documents that he carried on the day of his arrest, which were seized by police officers during the arrest, had fallen into the hands of third parties (i.e. the arresting officers themselves). Despite the driver’s later acquittal by the TSJ (which at this point still had only twenty magistrates), the arrest is viewed by many as an attempted intimidation.<sup>169</sup> Later that year, the public prosecutor conducted a

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 14.

<sup>165</sup> *See id.*

<sup>166</sup> *Id.* at 15.

<sup>167</sup> *Id.* at 15.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

surprise search of the CPCA courthouse accompanied by heavily armed police.<sup>170</sup>

In 2003, the TSJ shut down the CPCA and dismissed its four sitting judges.<sup>171</sup> Based on a recommendation submitted to it by the Inspector General of the Judiciary, the TSJ determined that an “inexcusable error” in a decision rendered the year before was grounds for the dismissal of the judges.<sup>172</sup> Three of the judges appealed the decision, but their appeals were ignored by the TSJ.<sup>173</sup> When asked why the appeals had been ignored, TSJ President Rincon Urdaneta explained that their appeals were “not a high priority” and asserted that new judges would be appointed to take over the CPCA.<sup>174</sup> However, to this day, the CPCA remains shut.<sup>175</sup> This political maneuver has had the effect of entirely removing the means for popular redress against administrative laws, reducing overall access to justice for the Venezuelan people and seriously undermining the principles of democratic government.

The summary firing of judges is effective because it works on many different levels simultaneously. On the most basic level, firing a “problematic” judge gets rid of a political enemy. To those who do not value the independent judicial and see the judicial as another branch of government in which to wage partisan warfare, that goal presents sufficiently strong motivation. The flip side of it is yet another benefit for the partisan politicians, as the MVR can fill empty seats with government supporters who will tow the party line. While summarily dismissed judges are visible victims of the government’s policy, those who remain are the silent victims that must suffer intimidation constantly. Every fired judge becomes yet another example to sitting judges of the consequences of incurring the government’s wrath. The fear of losing one’s job becomes amplified as empty posts are filled with partisans who are searching for new “traitors.” “Furthermore, because they can be

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 16.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 16.

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*

freely removed, . . . judges are more susceptible to both political and private pressures” when making rulings.<sup>176</sup> The ultimate effect of the policy of arbitrary dismissal of judges is that judicial autonomy is significantly undermined, preventing judges from making ruling based on the law rather than the desires of powerful outside actors.<sup>177</sup>

*D. All the Strategies Come Together: The Case of Judge Maria Lourdes Afiuni*

Although the war against the independent judiciary in Venezuela first gained steam in the years following the failed coup of 2002, it continued uninterrupted for many years after that. Not only did the events mentioned above still affect judges many years later, but new attacks against judges and efforts to politicize the judiciary were launched. Perhaps none is as illustrative, colorful, and heartbreaking as the case of Judge Maria Lourdes Afiuni.

On December 2009, Judge Maria Lourdes Afiuni was imprisoned on charges of fraud after incurring the wrath of President Hugo Chávez.<sup>178</sup> The president’s anger was forceful and aggressive. He called her a “bandit” and demanded that the judge “be sentenced to a [thirty]-year prison term, even if new legislation was required to achieve that result.”<sup>179</sup> The charges against Judge Afiuni came just days after she granted habeas corpus and conditionally released Eligio Cadeño, a prominent *Chavista* banker who was awaiting trial for evading government currency controls and diverting resources by requesting twenty-seven million (USD) in foreign currency to import goods which he never imported to the country.<sup>180</sup>

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<sup>176</sup> Castaldi, *supra* note 46, at 496.

<sup>177</sup> *Id.*

<sup>178</sup> *Rights Group Says Caracas Attacks Judicial Freedom*, REUTERS (Apr. 08, 2010), <https://www.reuters.com/article/us-venezuela-rights/rights-group-says-caracas-attacks-judicial-freedom-idUSTRE6375A020100408>.

<sup>179</sup> *Venezuelan Leader Violates Independence of Judiciary – UN Rights Experts*, UNITED NATIONS NEWS (Dec. 16, 2009) <https://news.un.org/en/story/2009/12/324512-venezuelan-leader-violates-independence-judiciary-un-rights-experts>.

<sup>180</sup> *Venezuelan Bank President Detained in Crack Down on Illegal Dollar Transactions*, INTERNATIONAL HERALD TRIBUNE (Feb. 09, 2007),

Under Venezuelan law, a suspected criminal may be held in pretrial detention for a maximum of two years before charges must be pressed or the suspect released.<sup>181</sup> By his release on December 2009, Mr. Cedeño had spent two years and ten months in pretrial detention without a trial being undertaken against him.<sup>182</sup> This was a violation of Mr. Cedeño's constitutional rights as well as international treaty obligations to guarantee speedy trials where an accused could defend himself against the charges alleged against him. By the time of his release, Mr. Cedeño's imprisonment had been noticed and condemned by multiple international human rights organizations. Independent experts on human rights from the United Nation's Working Group on Arbitrary Detention had condemned Mr. Cedeño's treatment as early as September of that year.<sup>183</sup> Judge Afiuni granted Cedeño conditional release while awaiting trial, and just a few days later she "was arrested by intelligence police officers."<sup>184</sup> Her crime, according to observers, was enforcing Venezuela's constitutional and international due process obligations against the wishes of President Chávez.<sup>185</sup>

According to media reports, President Chávez had a special interest in the case against Mr. Cedeño, and an ax to grind against the defendant. In 2003, Rosa Virginia, one of Chávez's two daughters began dating Gustavo Arraiz, a business partner of Mr. Cedeño.<sup>186</sup> During that time, Rosa Virginia and Gustavo allegedly

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<https://web.archive.org/web/20070216032021/http://www.iht.com/articles/ap/2007/02/10/business/LA-FIN-Venezuela-Dollar-Crackdown.php>; *see also* *Venezuela: UN Expert Condemns Further Sentence Against Judge Afiuni, Says Clearly Act of Reprisal*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (March 26, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24405&LangID=E>.

<sup>181</sup> *Rights Group Says Caracas Attacks Judicial Freedom*, *supra* note 178.

<sup>182</sup> *Wikileaks Venezuela: las dos caras de Eligido Cedeno*, SEMANA (Jun. 23, 2011), <https://www.semana.com/mundo/articulo/wikileaks-venezuela-dos-caras-eligido-cedeno/241839-3>.

<sup>183</sup> *Venezuelan Leader Violates Independence of Judiciary – UN Rights Experts*, *supra* note 179.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Wikileaks Venezuela: las dos caras de Eligido Cedeño*, *supra* note 182.

filmed themselves having intimate relations.<sup>187</sup> Local media reported that the video found its way to the hands of President Chávez, who accused Mr. Cedeño of using the video to blackmail the President.<sup>188</sup> After this alleged attempt to blackmail, Mr. Cedeño was imprisoned without trial until his release by Judge Afiuni.<sup>189</sup> Immediately upon release, Cedeño fled to the United States where he was given asylum.<sup>190</sup>

The truth of the media allegations is unproven, since the matter was never brought to trial. What is beyond dispute, however, is that Mr. Cedeño was held without trial for a period of ten months beyond the allowable maximum time.<sup>191</sup> MVR politicians failed to see that the problem was not Judge Afiuni, who followed the law, but those who attempted to do something which was illegal. The punishment meted out to Judge Afiuni for her refusal to aid and abet the government in violating the law was a travesty.

Judge Afiuni was imprisoned from 2009 until 2013 because of her actions in the Cedeño Case.<sup>192</sup> Shortly after her arrest by intelligence forces, President Chávez appeared on national television and radio calling her a bandit, asking for new legislation that would allow the government to punish Judge Afiuni more severely, and expressly instructed the attorney general and president of the TSJ to punish her as severely as possible “to prevent similar actions by other judges.”<sup>193</sup> Afiuni was charged with corruption, accessory to an escape, criminal conspiracy, and abuse of power.<sup>194</sup>

Mr. Cedeño’s lawyers were publicly accused of engaging in criminal conduct.<sup>195</sup> One of those attorneys, as well as the two

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<sup>187</sup> Emili J. Blasco, *Los escoltas y Errejon, las pasiones de las hijas de Chavez*, ABC (Mar. 17, 2015 <https://www.abc.es/estilo/gente/20150313/abc-hias-chavez-pasiones-escoltas-201503122001.html>).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Wikileaks Venezuela: las dos caras de Eligido Cedeno*, *supra* note 182.

<sup>191</sup> *Id.*

<sup>192</sup> Blasco, *supra* note 187.

<sup>193</sup> *Venezuelan Leader Violates Independence of Judiciary – UN Rights Experts*, *supra* note 179.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

bailiffs that escorted Mr. Cedeño out of court were briefly arrested as well.<sup>196</sup> Judge Afiuni was imprisoned in a women's prison along with many convicts that she had sent to that same prison.<sup>197</sup> In the same year, another judge from the court of appeals was demoted after ruling that Mr. Cedeño's pretrial detention had exceeded the legal limit.<sup>198</sup>

International non-governmental organizations were quick to condemn the actions taken by the government against Judge Afiuni as violations of her human rights. Human rights experts from the UN called the treatment of Judge Afiuni "a blow by President Hugo Chávez to the independence of judges and lawyers in the country."<sup>199</sup> They further stated that "[r]eprisals for exercising their constitutionally guaranteed functions and creating a climate of fear among the judiciary and lawyers' profession serve no purpose except to undermine the rule of law and obstruct justice . . . . The immediate and unconditional release of Judge Afiuni is imperative."<sup>200</sup>

In response to the Afiuni Case, the Inter-American Commission of Human Rights criticized "the absence of an effective separation and independence of the public branches of power in Venezuela."<sup>201</sup> The international watchdog Human Rights Watch also criticized the detention as it led to the "dramatic erosion of judicial independence in Venezuela under Chávez" and considered that "it is very difficult to expect that she will get a fair trial."<sup>202</sup>

Judge Afiuni's treatment is a clear violation of her human rights to recourse to a fair tribunal and protection from torture. Judge Afiuni, who has since been conditionally released, claims that she was the victim of physical, emotional, and sexual

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<sup>196</sup> *Id.*

<sup>197</sup> *Rights Group Says Caracas Attacks Judicial Freedom, supra* note 178.

<sup>198</sup> *Venezuelan Leader Violates Independence of Judiciary – UN Rights Experts, supra* note 179.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Rights Group Says Caracas Attacks Judicial Freedom, supra* note 178.

<sup>202</sup> *Id.*



torture.<sup>203</sup> In a 2015 filing to the United Nations in Geneva, Judge Afiuni and her lawyers alleged, and presented evidence to prove, that authorities destroyed her anus, vagina, and bladder by raping and sexually torturing her.<sup>204</sup> She claims that once she was beat with such savagery that a boot kick from a National Guardsman destroyed one of her breasts as well.<sup>205</sup> According to Afiuni, prison officials intentionally placed women she had convicted in the cell next to hers and that those women would regularly beat her and on multiple occasions threw gasoline into her cell in order to light a fire and roast her alive.<sup>206</sup> Prison authorities did nothing to stop the harassment when she complained.<sup>207</sup> On another occasion, Judge Afiuni was transferred to a hospital for a gynecological procedure and was forced to strip naked in front of 20 National Guardsmen.<sup>208</sup> Attorney General Luisa Ortega Diaz denied Afiuni's claims in a UN hearing.<sup>209</sup>

Judge Afiuni was conditionally released in 2013 and is prohibited from leaving the country.<sup>210</sup> She describes her treatment by saying that “in six years they destroyed my life, my daughter’s life, and my whole family.”<sup>211</sup> Surely, few people would risk exposing themselves to the horrors that Judge Afiuni faced.

Judge Afiuni’s case brings together all the strategies employed by the MVR government since 1999 to undermine judicial autonomy and destroy democracy in the country. She was removed from office easily, thanks to her untenured position and the

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<sup>203</sup> *Id.*

<sup>204</sup> *Afiuni rompe el silencio: Destruyeron su vagina y ano en violación en INOF*, MADURADAS (Jul. 01, 2015, <https://maduradas.com/lo-ultimo-afiuni-rompe-el-silencio-destruyeron-su-vagina-y-ano-en-violacion-en-inof-audio/>).

<sup>205</sup> Redacción Carabobo, *Jueza Afiuni rompe el silencio ante declaraciones de Fiscal en la ONU: “En 6 años destruyeron mi vida,”* NOTICIAS-AHORA (Jul. 01, 2015, <http://www.noticias-ahora.com/jueza-afiuni-rompe-silencio-declaraciones-fiscal-onu/>).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Jueza Afiuni rompe el silencio ante declaraciones de Fiscal en la ONU: “En 6 años destruyeron mi vida,”*, *supra* note 205.

<sup>211</sup> *Id.*

executive's authority to do so under the Organic Law of 2004. Her court was bullied and intimidated when one of the lawyers involved and the bailiffs who released Cadeño were arrested. Judge Afiuni was publicly criticized, then arrested and intimidated through torture. The message to all other judges in the country was clear: the president expected compliance from the judiciary, and he would stop at nothing to get it.

Judge Afiuni's case illustrates how the use of the strategies discussed above undermine constitutional government to such an extent as to turn an otherwise-democratic government into a despotic tyranny. When a president has so much power to control the judiciary, it cannot be said that such a president may be bound by the democratic limitation placed upon them by their nation's constitution. Consequently, this reality violates the people's human right to access fair courts that will apply due process of law.

#### IV. 2017: THE YEAR THE TSJ AND CONSTITUTIONAL GOVERNMENT BROKE DOWN

From the establishment of the TSJ in 1999 until 2017, the various attacks against the Venezuelan judicial ate at its foundations like termites until it collapsed. In 2017, the TSJ removed the final façade of constitutional legitimacy by allowing President Maduro to unilaterally call another Constituent Assembly and by a series of rulings that held that the legislative powers of the National Assembly now belonged to the unilaterally-convened Constituent Assembly.<sup>212</sup>

President Maduro was the hand-picked successor of Hugo Chavez who died of cancer in March 2013 after a long fight with the disease.<sup>213</sup> Nicolas Maduro, a high school drop-out turned union organizer took over the reins of power in Venezuela.<sup>214</sup>

President Maduro's use of the Venezuelan judiciary as a weapon in his war against opposition politicians began after the

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<sup>212</sup> See generally GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, N° 6.295 Extraordinario art. 1. (Sp.).

<sup>213</sup> Blasco, *supra* note 187.

<sup>214</sup> Jeff Wallendfeldt, *Nicolas Maduro Moros*, ENCICLOPEDIA BRITANNICA (Jul. 1, 2019) <https://www.britannica.com/biography/Nicolas-Maduro>.

2015 elections, which saw the MVR lose control of the legislature for the first time in their sixteen years of power.<sup>215</sup> After that election, Maduro began to strike at the legislature by expanding executive power further than Chavez ever had.<sup>216</sup> Taking advantage of the economic crisis facing the country, President Maduro unilaterally granted himself emergency powers for sixty days.<sup>217</sup> Under Article 339 of the 1999 Constitution, Maduro was well within his rights to do so, as well as to unilaterally extend those emergency powers for another sixty-day term.<sup>218</sup> However, the constitution explicitly prohibits the extension of the term beyond 120 days without approval by the National Assembly.<sup>219</sup>

After the 120-day period of his initial declaration, President Maduro simply gave himself unilateral emergency powers for another sixty days, extended that power another sixty days, and repeated the process as needed.<sup>220</sup> In this way, President Maduro has maintained emergency powers for over two years, executing over thirteen emergency decrees in that time.<sup>221</sup> During that time, President Maduro exercised both executive and legislative powers, passing laws that had little to do with fixing the crisis-stricken economy and took few steps to solve the economic emergency that served as the pretext for his expanded powers.<sup>222</sup>

Despite the blackletter law of Article 339 that clearly prohibits the president from unilaterally invoking emergency powers for more than 120 days, the TSJ ruled that those powers may be renewed perennially by President Maduro.<sup>223</sup> As a matter of fact, while the Constitution explicitly grants the National Assembly the right to revoke emergency powers under Article 339, the TSJ prohibited the National Assembly from exercising that power,

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<sup>215</sup> *TSJ concreto disolución de la Asamblea Nacional en 2017*, ACCESO A LA JUSTICIA (Jan. 15, 2018), <https://www.accesoalajusticia.org/tsj-concreto-disolucion-de-la-asamblea-nacional-en-2017/>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

using the argument that the National Assembly was illegal and therefore did not have that right.<sup>224</sup> *Acceso a la Justicia*, a Venezuelan NGO which tracks justice and judicial independence in Venezuela, explained the TSJ's actions eloquently when they wrote that it is "very clear that the [TSJ] performs a role opposite of its mandate, by permitting the disintegration of the Carta Magna [Constitution] with unconstitutional states of exception [i.e. emergency powers] when its function under Article 334 is to ensure the integrity of the Constitution."<sup>225</sup>

Following the opposition's electoral victory in the legislative elections of December 2015, the TSJ took the unusual step of nullifying the election of four opposition-aligned legislators from the state of Amazonas before they could swear-in the following January, on the grounds that "irregularities" had taken place in their elections.<sup>226</sup> Without those four deputies, the opposition fell short of a two-thirds majority in the legislature.<sup>227</sup> The TSJ decision came just one day after a petition claiming irregularities in the election process was filed by Nicia Maldonado, a former minister of the environment in Chávez's cabinet who had lost the election against one of the four legislators now barred from office.<sup>228</sup> Many jurists and NGOs were quick to criticize the TSJ decision, as the election had already been completed and ratified, so according to the Constitution of 1999, the TSJ's jurisdiction over electoral affairs did not apply to the case at hand.<sup>229</sup> Further, the TSJ decision came over the National Assembly's Christmas vacation and there was no way for a fair hearing to be held before the inauguration of the new legislature in early January.<sup>230</sup>

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<sup>224</sup> See CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 339 (Venez.).

<sup>225</sup> TSJ concreto disolución de la Asamblea Nacional en 2017, *supra* note 215.

<sup>226</sup> *El viacrucis judicial de los disputado de Amazonas*, ACCESO A LA JUSTICIA (Jan. 02, 2018), <https://www.accesoalajusticia.org/el-viacrucis-judicial-de-los-diputados-de-amazonas/>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

Therefore, the National Assembly allowed the deputies from Amazonas to take their office.<sup>231</sup>

In January, the TSJ ordered the National Assembly to expel the four deputies in question or be dissolved.<sup>232</sup> This was again in response to a request by Ms. Maldonado which was reviewed and ruled on within a mere four days by the Electoral Committee of the TSJ.<sup>233</sup> The National Assembly was forced to comply, and the deputies were suspended from their posts.<sup>234</sup> The deputies that were suspended appealed to the TSJ, which took 211 days to answer their appeal by merely confirming that they were currently suspended.<sup>235</sup> The decision was “contrary to the express justice in favor of the PSUV.”<sup>236</sup> The seats remained empty for the duration of the National Assembly’s term, until that entire body was subsequently ordered to dissolve by the TSJ.<sup>237</sup>

At this early point in the legislative wars, a series of TSJ decisions clarified its PSUV-aligned stance. Early in 2016 the TSJ confirmed the constitutionality of President Maduro’s perennial unilateral grant of emergency powers.<sup>238</sup> They cited statutes to argue that, despite the text of the Constitution, those statutes prohibited the TSJ from intervening in cases where emergency powers are invoked.<sup>239</sup> Around the same time, the TSJ rendered another decision that directly contradicted the text of the Constitution, which established a process by which the executive must present a periodic accounting of his or her actions to the legislature.<sup>240</sup> They ruled that the National Assembly had no authority to oversee the executive and that President Maduro was not legally required to account for his actions to the legislature, just to himself.<sup>241</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

The TSJ's August 2016 decision to dissolve the National Assembly was a watershed moment in the constitutional history of Venezuela. Seizing on the purported irregularities in the election of the deputies from Amazonas, the TSJ refused to confirm the new legislature.<sup>242</sup> This limbo lasted until the summer, when the President of the National Assembly submitted the credentials of the deputies elected to the National Assembly yet again, but this time excluding the deputies from Amazonas.<sup>243</sup> Five days later, the TSJ dissolved the entire National Assembly and declared it "invalid [and] inexistent"; its laws having no judicial enforceability.<sup>244</sup> It argued that the second inauguration of the deputies had been irregular and therefore every legislation passed by it was invalid.<sup>245</sup> In early 2017, the National Assembly held another inauguration where it tried to appease the TSJ and obtain its approval.<sup>246</sup> However, the TSJ found new irregularities in the process and dissolved the National Assembly once more, ruling that all National Assembly decisions and legislation in 2017 were voided as well.<sup>247</sup>

During this period, the TSJ struck down the National Assembly often. In 2016, it closed an investigation into corruption in the national petroleum company (known by its Spanish-language acronym, PDVSA) undertaken by opposition deputies arguing that the investigation "was not in the country's best interest."<sup>248</sup> Instead, it directed the executive branch to investigate Deputy Freddy Guevara, the legislator who had spearheaded the investigation into PDVSA.<sup>249</sup> In another decision they allowed the executive to incur debts and sell state assets without legislative approval as required by law.<sup>250</sup> In 2016 the TSJ began filling empty seats in the National Election Council—the supposedly

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *TSJ concreto disolución de la Asamblea Nacional en 2017, supra note 215.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

independent branch of government that is tasked with overseeing elections—though that power was expressly granted to the National Assembly by the Constitution. However, during this period the most consequential ruling of the TSJ was the approval of the Constituent Assembly.<sup>251</sup>

In a decree published on May 2017, President Maduro invoked the powers of the presidency to unilaterally invoke a Constituent Assembly to craft a new constitution.<sup>252</sup> The Constitution of 1999 sets clear rules for both the amending and the replacement of that constitution.<sup>253</sup> It requires that any change be approved by the president, a two-thirds majority in the National Assembly, and a majority vote in a referendum where at least fifteen percent of registered voters participated.<sup>254</sup> The 2017 decree did not have the latter two approvals.<sup>255</sup> Instead, the TSJ relied on an inexplicably absurd interpretation of the language, based on the positioning of a single comma in the text of the constitution read entirely outside the context of the document, to rule that the requirements above are necessary for an amendment to the constitution but not for replacing it entirely.<sup>256</sup> That interpretation completely ignored the text of the constitution, which explicitly states elsewhere that the popular will must be manifested before a constituent assembly can be called.<sup>257</sup> The TSJ's interpretation effectively created an entirely new procedure for replacing the constitution that was not included in the constitution.<sup>258</sup> Brewer-Carias plainly calls the ruling a "constitutional fraud."<sup>259</sup> He points out that according to the TSJ's decision, there would need to be a popular referendum, two-thirds legislative approval, and executive approval to change a single letter in the constitution, but that the constitution can be wholly thrown out and replaced based only on the president's unilateral

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<sup>251</sup> *Id.*

<sup>252</sup> GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, N° 6.295 Extraordinario art. 1. (Sp.)

<sup>253</sup> Brewer-Carias, *supra* note 53, at 2.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 2-3.

<sup>256</sup> *Id.* at 3-4.

<sup>257</sup> *Id.* at 2.

<sup>258</sup> *Id.* at 3.

<sup>259</sup> *Id.* at 4.

decree.<sup>260</sup> He calls the decision a “constitutional aberration” and a “usurpation of popular will” that is “arbitrarily assigned to the President.”<sup>261</sup> The 1999 Constitution, which placed a large emphasis and importance on popular participation, is incompatible with the TSJ ruling.<sup>262</sup>

The TSJ supported President Maduro’s efforts to create Constituent Assembly at every turn. Aside from their interpretation granting legality to the president’s decree, other rulings ensured that the MVR retained actual power.<sup>263</sup> The first decision dealt with the election of members for the Constituent Assembly.<sup>264</sup> President Maduro had proposed a voting system by which voters are divided into economic sectors and voting groups were based on a voter’s profession.<sup>265</sup> Despite another law, which stipulated that the popular will shall be measured in a popular vote, the TSJ ruled that no voting system is perfect and Maduro’s proposal was legal.<sup>266</sup> Observers were quick to note that members of the poor working classes that traditionally supported *Chavismo* had an insurmountable advantage when they could vote in this way.<sup>267</sup> Indeed, Maduro’s partisans won every single seat in the Constituent Assembly.<sup>268</sup> Once elected, the exclusively *Chavista* Constituent Assembly was invested with full legislative powers.<sup>269</sup> It now sits in “illegal substitution of parliament” and approves laws, including the national budget, strips National Assembly deputies of their parliamentary immunity, orders investigations,

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<sup>260</sup> *Id.* at 7.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> See generally *Cuatro nuevas sentencias del TSJ vs. Soberanía del pueblo*, ACCESO A LA JUSTICIA (Jul. 11, 2017), <https://www.accesoalajusticia.org/cuatro-nuevas-sentencias-del-tsj-vs-soberania-del-pueblo/>.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Cuatro nuevas sentencias del TSJ vs. Soberanía del pueblo*, *supra* note 263.

<sup>269</sup> *TSJ concreto disolución de la Asamblea Nacional en 2017*, *supra* note 215.



and carries out other activities reserved for the National Assembly under the Constitution.<sup>270</sup>

When the Constituent Assembly was vested with legislative powers, the constitutional order had broken down irreparably. Luisa Ortega Diaz, the attorney general who denied Judge Afiuni's torture allegations just a couple of years before, left her post and attempted to fight the new order through the courts, but achieved very little success.<sup>271</sup> Her husband, a legislator from the PSUV, joined her in protesting the new order.<sup>272</sup> He was stripped of his parliamentary immunity by the TSJ and indicted on corruption charges.<sup>273</sup>

As a response to the subordination of the judicial power in Venezuela, and as a result of the TSJ's lack of legitimacy, an opposition-aligned TSJ was inaugurated at the OAS headquarters in Washington D.C.<sup>274</sup> The National Assembly's eighteen nominees to the TSJ, which had been rejected because the TSJ considered the National Assembly nullified, began working in the parallel TSJ along with another fifteen magistrates.<sup>275</sup> President Maduro immediately ordered the arrest of all thirty-three magistrates on charges of usurping the judicial power.<sup>276</sup> All of the magistrates escaped, except for one magistrate who was arrested by intelligence services before escaping the country and charged with treason in a military court, despite the fact that he was not a member of the military.<sup>277</sup> According to the International Human Rights Court, military jurisdiction must be limited to members of

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Sergio Gómez Maseri, *TSJ 'paralelo' buscara anular jornada electoral del domingo*, EL TIEMPO (Oct. 13, 2017), <https://www.eltiempo.com/mundo/venezuela/tribunal-supremo-de-venezuela-se-instala-en-la-sede-de-la-oea-140822>.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *El juez del TSJ detenido al que designo la oposición venezolana inicia una huelga de hambre*, EUROPA PRESS (Jul. 25, 2017), <https://www.europapress.es/internacional/noticia-juez-tsj-detenido-designo-oposicion-venezolana-inicia-huelga-hambre-20170725114121.html>.

the military or to “crimes or offenses that based on their own nature threaten the juridical rights of the military order itself.”<sup>278</sup> The parallel TSJ holds session outside of Venezuela, and its rulings are binding to the extent that they are recognized by international organizations.<sup>279</sup>

#### V. CONCLUSION: THE CURRENT AND FUTURE VENEZUELAN JUDICIARY

At what point must one acknowledge that judicial independence and democracy in Venezuela does not exist? Surely, in its current state with a parallel supreme court and parallel legislatures, there is no escaping the conclusion that the current state of the Venezuelan judiciary is in utter disrepair and representative democracy does not exist.

The first blow to the judiciary was not ill-intentioned and did not necessitate the final collapse, it was the election of Chávez and the subsequent creation of the Constitution of 1999. That constitution respected the separation of powers and guaranteed human rights to the people of Venezuela. It came after decades of neglect of the poor by the political class and was intended to ensure a more equitable country. However, by replacing rather than amending the old constitution, the door was left open to the imposition of charisma over law. The decisions to bend the rules to ensure their political goal of a new constitution confirmed to the MVR that while they remained popular, they could undermine the institutions of government. The new constitution also created the Constituent Assembly process for drafting a new constitution. This power was ultimately usurped by President Maduro and used to sideline the National Assembly.

The next blow came with the Organic Law which the MVR enacted illegally and used to pack the court with their supporters. It opened the door to the widespread use of untenured appointments and nullification of magistrates. Unlike the Constitution of 1999, the Organic Law could not be said to be the product of good

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<sup>278</sup> Radilla-Pacheco v. Mexico, Inter-Am. Ct. H.R., ¶ 172 (Nov. 03, 2009).

<sup>279</sup> Gómez Maseri, *supra* note 274.

intentions. The goal of the law was specifically to ensure the loyalty of the judiciary and to give the MVR the ability to remove judges that did not follow directions. It was clearly intended for the exercise of political control over the judiciary.

The widespread use of temporary appointments was a blow to judicial independence and freedom. One that was much more damaging than those which preceded it. The decision to appoint judges temporarily and provisionally so as to deny them tenure is largely responsible for the current state of the Venezuelan judicial. Judges became afraid to make rulings according to their conscience. Eventually, the careers of over eighty percent of the country's judges depended on the whims of those in power.<sup>280</sup> Politicians used that power to nefariously control the judiciary.

The ouster of judges had a similar and intertwined detrimental effect on the Venezuelan judiciary. The ousting of judges goes hand-in-hand with the temporary appointments because the Organic Law permitted the nullification of untenured posts. However, failure to renew a post does not have the same effect as firing a person from that post. Seeing the ouster of judges who were supposed to be protected by the constitution was a powerful deterrent against ignoring the will of the MVR.

The case of Judge Afiuni is similarly terrifying from the perspective of a judge in Venezuela. Ms. Afiuni was punished for following the law in accordance with a prisoner's human rights. For that "crime" she was imprisoned for many years, tortured, and raped. This is a textbook example of using force as a deterrent, except that it was perversely applied to a judge and not a criminal. By extension, it was also applied to all judges in Venezuela, because they all witnessed the sacrificial lamb on its way to slaughter.

If the Venezuelan judiciary can be said to have survived the early 2000s and the Afiuni case, there is no dispute that it did not survive the legislative war of 2016-2017. By that point, the TSJ was so eroded that they simply used circular logic to ensure whatever outcome was politically palatable. Its attempts to delegitimize the National Assembly had that very effect on itself.

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<sup>280</sup> Castaldi, *supra* note 46, at 495.

The judiciary pushed the country towards having parallel legislatures and parallel supreme courts.

While the Constitution of 1999 was not destined to fail, the way that it has been implemented means it must be entirely replaced. Although the public participation for selecting judges may be salvaged from the Constitution of 1999, any new constitution should do away with provisional judgeships, should ensure that all judges and citizens be entitled to due process under the law, and should prohibit acts of public intimidation to influence judges. However, first there must be a political revolution to wrestle power away from the MVR and return it to the people.