





# **The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch**

The Report was written by Alejandro Salinas Rivera, Commissioner (Chile), and Federico Andreu-Guzmán, Representative of the ICJ in South America. The Report was written in Spanish and the translation to English was made by Leslie Carmichael.

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## INTRODUCTION

In March 2017, the Supreme Court of Justice (SCJ) of the Bolivarian Republic of Venezuela made two decisions<sup>1</sup> that suspended the constitutional powers of the National Assembly (NA). Legislative power was arrogated, and sweeping powers were granted to the executive branch over social, political, military, criminal, legal, economic, and civil issues. Parliamentary immunity was abolished; and it was declared that the opposition deputies—who make up the majority in the NA— had committed a “crime against the Homeland” for having passed on March 21, 2017, the Agreement on the Reactivation of the Enforcement Process of the Inter-American Democratic Charter of the OAS, as the mechanism for peaceful conflict resolution to restore constitutional order in Venezuela.

On April 3, 2017, at an extraordinary session, the Permanent Council of the Organization of American States (OAS) declared that the Supreme Court’s decisions were “inconsistent with democratic practice and [...] an alteration of the constitutional order of the Bolivarian Republic of Venezuela.”<sup>2</sup> The Inter-American Commission on Human Rights (IACHR) has considered that the decisions of the Supreme Court “constitute a usurpation of legislative functions by the judicial and executive branches, and a de facto nullification of the popular vote by which the National Assembly deputies were elected [...], grave interference by the judicial branch in the National Assembly. [...] These two rulings jeopardize the effective exercise of human rights and basic democratic principles, due to the concentration of power in the executive and judicial branches and the violation of the principle of separation of powers in a democratic system.”<sup>3</sup>

The United Nations High Commissioner for Human Rights, Zeid Raad Al Hussein, expressed deep concern about the SCJ’s decision and noted that “[t]he separation of powers is essential for democracy to function, and keeping democratic spaces open is essential to ensure human rights are protected. [...] Venezuelan citizens have the right to participate in public affairs through their freely chosen representatives, as set out in the *International Covenant on Civil and Political Rights*, which Venezuela has ratified. Duly elected members of parliament should also be able to exercise the powers given to them by the Venezuelan Constitution.”<sup>4</sup>

The decisions by the Supreme Court constituted a veritable coup and a flagrant departure from the rule of law in Venezuela.

Demonstrations against the SCJ’s decisions have been violently repressed. Between April 4 and June 20, 2017, more than 90 people have died violently at demonstrations because of actions by Venezuelan State security forces and armed groups of civilians who back the government. Hundreds of people have also been arbitrarily detained, many of whom have been sent to military prisons, security agency facilities, or maximum-security prisons. Numerous detainees have reported beatings, cruel and inhumane treatment, as well as torture. At least 500 civilians are on trial before military courts, accused of Military Code offenses such as rebellion and treason. In many cases, defense lawyers are only allowed to see the defendants in the courtroom; they may only speak to the defendants for a few minutes before the hearings, and their access to the charges is restricted.

The International Commission of Jurists (ICJ) has been following the situation in Venezuela for several years and has been able to verify the loss of independence of the judiciary, the vertiginous and systematic deterioration of human rights and fundamental freedoms and, in general, the decline of the rule of law.<sup>5</sup> Thus, the ICJ has been able to attest that over the

<sup>1</sup> Constitutional Chamber: Judgment of 27 March 2017, Case. No. 17-0323; and Judgment of 28 March 2017, Case. No. 17-0325.

<sup>2</sup> Resolution on the Recent Events in Venezuela, CP/RES.1078 (2108/17) of 3 April 2017, para. 1.

<sup>3</sup> Press Release No. 041/17, “IACHR Condemns Supreme Court Rulings and the Alteration of the Constitutional and Democratic Order in Venezuela,” 31 March 2017.

<sup>4</sup> Press Release, “Preserve separation of powers, Zeid urges Venezuela,” 31 March 2017.

<sup>5</sup> See, among others, the ICJ reports: *Venezuela: The Sunset of the Rule of Law*, 2015 (<https://www.icj.org/wp-content/uploads/2015/10/Venezuela-Sunset-of-Rule-of-Law-Publications-Reports-2015-ENG.pdf>) and *Strengthening the Rule of Law in Venezuela*, 2014 (<https://www.icj.org/wp-content/uploads/2014/11/Venezuela-Strengthening-the-RoL-Publications-Reports-2014-Eng.pdf>). See also: Shadow Report by the International Bar

course of 18 years, despite constitutional and legal guarantees, the judicial branch has ceased to be an independent and impartial organ of public authority. Different factors have contributed to this, such as: the interim and provisional nature of the vast majority of judges; the non-application of constitutional and legal guarantees in the process of making these appointments; and retaliation and punishment, without due process, against judges who rule against the interests of the executive branch.

But the most critical aspect of the loss of independence of the judiciary concerns its highest body: the Supreme Court of Justice (SCJ). The first troubling signs were recorded in 2004. That year, the Organic Law of the Supreme Court (LOSCJ) was issued, which increased the size of the Supreme Court from 20 to 32 judges, who must be elected by two thirds of the National Assembly,<sup>6</sup> which was dominated by the government's party. Thus, as the United Nations Special Rapporteur on the Independence of Judges and Lawyers reported in 2005, this "allowed the coalition in power in the National Assembly to appoint 12 judges, obtaining a large majority of judges in the Supreme Court [...] [and creating] a highly politicized judiciary."<sup>7</sup>

In December 2010, new SCJ judges were appointed right after the election of National Assembly deputies in September of that year, but before the new legislative session began in January 2011. The appointments were made to ensure that judges sympathetic to the ruling party were elected while the necessary votes were available in the legislature (because during the next legislature, the ruling party would not be able to count on having the votes of two thirds of the deputies). Thus, of the nine principal judges appointed in 2010, at least five had been NA deputies and members of the United Socialist Party of Venezuela (the ruling party); one had been a deputy to the Andean Parliament, a member of the government's party, and had previously been the ambassador to Canada by the appointment of the President of the Republic; and another had previously been the Attorney General of the Republic, a member of the executive branch, appointed by the President of the Republic.

On December 6, 2015, the opposition gained two thirds of the deputies of the NA to be established in January of the following year. Despite the required favourable vote of two thirds of the deputies of the NA for the election of the judges<sup>8</sup>, the ruling party in the NA immediately initiated, in December 2015, the hasty election, by a simple majority of the deputies, of thirteen main judges and three alternate judges of the SCJ, asserting once again the political control of such a high court. In that sense, it should be stressed that, prior to that new election of judges, the Plenary Chamber of the SCJ, on December 14, 2015, had approved the resignations of 13 judges<sup>9</sup>. Nevertheless, as it would become publicly known at a later stage on February 17, 2016, through a declaration made by two of them — judges Carmen Elvigia Porras and Luis Ortíz Hernández — before the new evaluation commission on the appointment on SCJ judges (*Comisión de Evaluación sobre la Designación de Magistrados del TSJ*) of the NA, that all 13 judges had been pressured to apply for their retirements a year before their constitutionally-established terms ended, in order to create vacancies for pro-government judges to be appointed in December,<sup>10</sup> before

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Association's Human Rights Institute (IBAHRI), the International Association of Judges (IAJ) and the International Commission of Jurists (ICJ), submitted to the UN Human Rights Committee on Venezuela's compliance with the *International Covenant on Civil and Political Rights*, ahead of the Committee's 114th session from 29 June to 24 July 2015. Report available in Spanish only; and Shadow Report concerning Venezuela (Bolivarian Republic of). United Nations Universal Periodic Review, Second Cycle, Human Rights Council, by the International Bar Association's Human Rights Institute (IBAHRI), the International Association of Judges (IAJ) and the International Commission of Jurists (ICJ), 2016. Report available in Spanish only.

<sup>6</sup> LOSCJ, article 8, 2004, and LOSCJ, article 38, 2010.

<sup>7</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, submitted in Accordance With Commission on Human Rights Resolution 2004/33 - Addendum: Situations in specific countries or territories, E/CN.4/2005/60/Add.1 of 18 March 2005, para. 167. Free translation

<sup>8</sup> LOSCJ 2004 allows, after the National Assembly has convened four plenary sessions to elect judges to the Supreme Court, if a two-thirds majority of votes is not reached, then the election may be done with a simple majority. As the IACHR has noted, LOSCJ 2004 "did away with the requirement of broad political consensus for their election" (*Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 of 30 December 2009, para. 198).

<sup>9</sup> "TSJ aprobó jubilación anticipada de 13 de sus miembros," *El Universal*, 14 October 2015. Available at: <http://www.eluniversal.com/nacional-y-politica/151014/TSJ-aprobo-la-jubilacion-anticipada-de-13-de-sus-miembros>.

<sup>10</sup> National Assembly, Accord by which Principal and Deputy Justices are Appointed to the Supreme Court of Justice, *Official Gazette* No. 40,816 of 23 December 2015. In Spanish. Available



the opposition majority took their seats in the NA, pursuant to the December 2015 elections.<sup>11</sup>

Currently, the great majority of Supreme Court judges are members of the United Socialist Party of Venezuela (PSUV) and/or former government officials.<sup>12</sup> Many of them hold significant positions on the SCJ. Thus, gradually but steadily, the government's party has coopted the SCJ and turned it into an appendage of the executive branch.

With the December 2015 elections, the composition of the NA changed radically.<sup>13</sup> Of the 167 deputies in the National Assembly, 112 are from the opposition coalition (Democratic Unity Roundtable) and 55 belong to the government's coalition ("Simón Bolívar" Great Patriotic Pole), whereas since 2000 and until that point, the ruling party and its coalition had dominated the NA.

As from January 2016, the executive branch and deputies from the ruling party coalition have intensified their actions to boycott legislative proceedings and, in particular, to block any bill contrary to the government's policy. The judiciary has played a key role: The executive branch has coopted the SCJ. By means of legal mechanisms, such as the "request for a ruling on constitutionality prior to giving approval" provided by article 214 of the Constitution, Maduro has, almost systematically, challenged before the Supreme Court, the laws that the NA has passed. The SCJ has become the instrument of the executive branch and the ruling party. Its rulings have not been made "impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason,"<sup>14</sup> as prescribed by the *Basic Principles on the Independence of the Judiciary*, but rather in accordance with the judges partisan loyalty and ideology.

In this context, the SCJ decisions of March 2017 were not an isolated event. For several years, the SCJ has been the executive branch and ruling party's political instrument of choice to annul the legislative action of the NA. This was exacerbated by the radical change in the political composition of the NA in December 2015.

This study analyzes several of the SCJ's decisions and rulings issued since December 2015, which illustrate how the Supreme Court has progressively stripped the National Assembly of its constitutional powers, violating the principle of separation of powers and the rule of law in Venezuela, as well as manipulating justice in favor of the executive branch.

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at: [http://www.mp.gob.ve/c/document\\_library/get\\_file?p\\_l\\_id=6939463&folderId=10513904&name=DLFE-10701.pdf](http://www.mp.gob.ve/c/document_library/get_file?p_l_id=6939463&folderId=10513904&name=DLFE-10701.pdf).

<sup>11</sup> "Ex magistrados del SCJ denunciaron que fueron extorsionados y amenazados para dejar sus cargos", [www.RunRun.es](http://www.RunRun.es), 17 February 2016, available at: <http://runrun.es/nacional/venezuela-2/248932/ex-magistrados-del-SCJ-denunciaron-que-fueron-extorsionados-y-amenazados-para-dejar-sus-cargos.html>; and "Ex magistrada: Maikel Moreno y presidenta del SCJ me presionaron para adelantar mi jubilación", [www.RunRun.es](http://www.RunRun.es), 1 March 2016, available at: <http://runrun.es/rr-es-plus/251041/audio-ex-magistrada-maikel-moreno-y-presidenta-del-SCJ-me-presionaron-para-adelantar-mi-jubilacion.html>

<sup>12</sup> For example, SCJ President Maikel José Moreno Pérez; Second SCJ Vice-President and President of the Constitutional Chamber, Juan José Mendoza Jover; President of the Political-Administrative Chamber, María Carolina Ameliach Villarroel; President of the Civil Chamber, Yván Bastardo Darío Flores; Justice Calixto Ortega Ríos, PSUV deputy to the Latin American Parliament (2000-2005) and NA deputy (2006-2010); Electoral Chamber Justice Jhannett María Madriz Sotillo, a member of the PSUV Bolivarian Movement's Superior Council; and Justices Arcadio Delgado Rosales, Malaquías Gil Rodríguez, and Christian Zerpa.

<sup>13</sup> In the previous election of NA deputies in 2011, the PSUV had won 98 of the 165 seats, while the opposition coalition (Democratic Unity Roundtable) won 65 seats.

<sup>14</sup> Principle 2.

## CHAPTER I: THE SCJ AND NATIONAL ASSEMBLY DEPUTIES

Between December 2015 and August 2016, the Supreme Court handed down four judgments concerning the status of deputies elected in the State of Amazonas during the legislative elections of 2015. Their status was not of little consequence, as noted by the Inter-American Commission on Human Rights (IACHR): “[o]f the 112 seats obtained by the opposition in the national assembly in the December 6, 2015 election, the Electoral Chamber ordered the divestment of three indigenous opposition deputies and one pro-government deputy from Amazonas State, with which the opposition lost its super majority in the National Assembly.”<sup>15</sup> In July 2016, the IACHR expressed concern over the lack of representation of indigenous peoples in the National Assembly (NA).<sup>16</sup> The National Assembly made the decision to disregard the order to divest the deputies. Subsequently the Supreme Court pointed to this situation as the grounds to overturn and annul the laws that the NA had passed.

Initially an administrative appeal and a preventive appeal were brought before the Supreme Court’s Electoral Chamber to challenge these elections, seeking to have the voting declared invalid. Specifically, the appeals claimed that the right to vote and political participation had been violated, affecting the voters’ freedom to express their political preferences, and the trustworthiness of the count, because of the alleged manipulation of the electors’ right to vote freely and secretly in Amazonas State.

The incident that gave rise to the appeal was a report “circulating on social media with a recording in which the secretary of the governor of Amazonas State, Victoria Franchi, may be heard talking to an unidentified person about various amounts of money paid to voters to vote for opposition candidates, furthermore the abovementioned citizen refers to the voters in degrading terms and it is absolutely clear how she undertook actions to manipulate assisted voting for senior citizens and others who have a physical condition or other impediment that makes it difficult for them to exercise their right to vote.”

### 1. The 2015 Judgment

In its first judgment in December 2015,<sup>17</sup> the SCJ’s Electoral Chamber made use of an instrument that would become the basis for further decisions on this matter: the court ordered a precautionary measure, which is preventive in nature and aims to temporarily restore the enjoyment and exercise of constitutional rights, until a final judgment has been made on a case.

What was remarkable about the Supreme Court’s decision was that the so-called “communicational fact,”<sup>18</sup> which was the grounds for the complaint that motivated the legal action, in the court’s view “does not need to be proven” despite not being a notorious fact. This meant that the court’s decision was based on something not known, much less proven, only alleged by the party that brought the legal action. The Supreme Court declared that “a communicational fact, as having a kind of evidence, may be considered as true by the judge without having to be proven on record.” However, citing an earlier ruling by the Constitutional Chamber,<sup>19</sup> it also noted that “[t]he communicational fact may be proven by the judge or by the parties by demonstrating the media in which it was published, or recordings or videos, for example, of radio broadcasts or audiovisual media, demonstrating the dissemination of the fact, its uniformity in the various media and its consolidation.”

The strange reasoning of the Supreme Court was to consider the communicational fact as a notorious fact, even though there was no evidence for this. The Supreme Court’s Electoral Chamber considered “that public and consistent dissemination of said communicational fact was serious preliminary evidence of the presumption of proper right or *fumus boni iuris* of

<sup>15</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, “Venezuela,” para. 74.

<sup>16</sup> Press Release No. 107/16, “IACHR Expresses Concern about Lack of Representation of Indigenous Peoples in National Assembly of Venezuela,” July 29, 2016.

<sup>17</sup> Judgment No. 260 of 30 December 2015, Case No. AA70-E-2015-000146, Judge Indira M. Alfonzo Izaguirre.

<sup>18</sup> The complaint that prompted the appeal.

<sup>19</sup> Constitutional Chamber in Judgment No. 98 of 15 March 2000, ratified repeatedly and without opposition. (See, Judgments No. 280 of 28 February 2008 and No. 210 of 16 March 2009).

an alleged violation of the constitutional right to vote and the political participation of voters in Amazonas State in the elections held on December 6, 2015 in that area for the election of National Assembly deputies,” reason for which it declared the request for an precautionary measure admissible.

It is also curious that no testing was done of the recording, such as voice biometrics to verify the identity of the persons alleged to be speaking or those named in it; nor was consideration given to the fact that the recording was obtained illegally, because the alleged persons identified in the audio never authorized the recording.

The precautionary measure failed to clarify whether payments were actually made for votes during the election, let alone whether those alleged payments, if proven to have taken place, had any decisive impact on the election outcome. Mere conjecture, based on an illegal recording that was made before the elections, was the only grounds to validate the disproportionate and unjustified precautionary measure.

The Supreme Court’s Electoral Chamber also failed to explain why the measure would be needed to protect the outcome of the main trial, and to avoid doing irreparable damage to the rights it claims to protect. On the contrary, the decision violated the right to political participation for voters and the rest of the inhabitants of Amazonas State, whose representatives to the legislature were stripped of office, thus it also violated the right to elect and be elected by universal, direct, and secret elections, as established in articles 62 and 63 of the Constitution.

With these precedents, the Electoral Chamber ordered the temporary and immediate suspension of the effects of the acts of tabulation, assignation and proclamation that had been issued by the subordinate bodies of the National Electoral Council, regarding the candidates elected by uninominal vote, voting lists, and indigenous representation from southern region (Amazonas and Apure) in the balloting held on December 6, 2015 in Amazonas State for the election of deputies to the NA.

With this “precautionary” ruling (which still remains in effect a year and a half later, as this report is being written), the opposition coalition (MUD) lost its two thirds majority in the legislature and this prevented them from appointing officials to fill vacancies at a number of important state entities, among them, the heads of the National Electoral Council.

## **2. Ruling of Contempt**

When the new NA was established on January 5, 2016, a majority in the legislature decided the following day, to accredit the three deputies from Amazonas State, in exercise of the constitutional role proper and exclusive to the NA to “pass on the qualifications of its members,” in accordance with the provisions of article 187, paragraph 20, of the Constitution.<sup>20</sup>

Faced with this decision of the National Assembly, the same authors of the electoral appeal that originated with the earlier Judgment No. 260 of December 2015, filed a new appeal with the SCJ’s Electoral Chamber. In it the plaintiffs requested compliance with Judgment No. 260 of 2015 and for the election of the three opposition deputies to be declared unconstitutional, and they invoked the right to judicial oversight.<sup>21</sup> Deputies sympathetic to the government<sup>22</sup> asked to be considered interested parties in the case, and called for the National Assembly be declared in contempt for failing to comply with Judgment No. 260. The justification for the alleged contempt was that the decision had not yet been finalized, despite the fact that notification of the judgment had been made to the National Assembly, the National Electoral Council and the Office of the Attorney General. According to the plaintiffs, the problem was that, despite Judgment No. 260, the NA had decided to induct the new deputies into the legislature.<sup>23</sup> This action by the National Assembly was allegedly in violation of the principles of jurisdiction, separation of government powers, and constitutional supremacy. As such, the challenge sought the annulment of the proceedings

<sup>20</sup> Article 187 of the Constitution: It is the function of the National Assembly: Para. 20: “To pass on the qualifications of its members and take notice of their resignation. The temporary separation of a deputy from his or her office shall only be decided by a two-thirds vote of those present.”

<sup>21</sup> Article 26 of the Constitution.

<sup>22</sup> Members of the Bloque de la Patria.

<sup>23</sup> July Haron Ygarza, Nirma Guarulla, and indigenous candidate for deputy Romel Guzamana.

in which these (sworn) deputies had been involved. It requested that the laws on which the deputies had voted be declared null and void. It also requested a declaration that the deputies did not meet the legal requirements to be legislators, so they should not have legislative immunity.

Three days after filing the appeal, the Supreme Court's Electoral Chamber issued its ruling.<sup>24</sup> The chamber considered that it was admissible for third parties to bring the challenge, describing the intervention as joint litigation or autonomous third-party intervention. According to the chamber, the intervening deputies showed that they had vested interest in the matter of dispute.

The SCJ considered admissible the following given/communicational facts: 1) the installation of the NA once its members were accredited; 2) the installation and swearing-in of 163 deputies, not 167; and 3) the swearing-in, on January 6, 2016, of the three deputies by the Board of NA, despite the court's precautionary measure.

According to the Chamber, the NA had failed to obey the constitutional precautionary measure ordered in Judgment No. 260. It also noted that the NA must uphold the Constitution's guidelines and abide by the provisions and decisions that other branches of government issue or prohibit, according to their own constitutional and legal powers. It also found that there were sufficient grounds to determine that the application for a declaration of contempt should be treated as a matter of law.

According to the Electoral Chamber, the Board of the National Assembly and the deputies concerned acted in contempt of Judgment No. 260. The chamber decided to declare admissible the application for a declaration of contempt of Judgment No. 260, and ordered the Board of the NA to proceed immediately to divest the three elected deputies, and declared absolutely null the laws that the NA had issued or enacted while these three persons were part of the legislature.

It should be noted that the SCJ's Electoral Chamber does not have jurisdictional authority to review legislative acts issued by the NA, as most of these acts are under the jurisdiction of the Supreme Court. Meaning, that the SCJ's Electoral Chamber annulled the NA's future actions, without even having the authority to do so.

### 3. The SCJ's Constitutional Chamber

On January 12, 2016, the Deputy Prosecutor General of the Republic filed an appeal of unconstitutionality by legislative omission before the Supreme Court's Constitutional Chamber for the NA's contempt of Judgments No. 260 of 2015 and No. 1 of 2016. In addition, the plaintiff argued that the President of the Republic could not fulfill the constitutional mandate that orders him "within the first 10 days following the installation of the National Assembly, in ordinary session, the President of the Republic, shall present personally to the Assembly a message by which [he] will render account of the political, economic, social and administrative aspects of [his] administration during the past year,"<sup>25</sup> because the NA may not issue valid laws until it had divested the three people elected as deputies in the State of Amazonas, as per the SCJ's Electoral Chamber Judgment No. 1 of 2016.

On January 14, 2016, the Supreme Court's Constitutional Chamber handed down its judgment.<sup>26</sup> The Constitutional Chamber declared that it was within its authority, under the provisions of the Constitution,<sup>27</sup> to examine whether the legislature could be declared in breach of the Constitution for having failed to pass laws or adopt the necessary measures to ensure compliance with the Constitution. The chamber considered it appropriate to issue its ruling on the underlying issue, without undertaking any hearings, considering it as a matter of law.

The Constitutional Chamber considered that in light of Judgment No. 1 of 2016 by the Supreme Court's Electoral Chamber, the National Assembly was disqualified from exercising its constitutional powers of oversight of political performance and therefore the President of

<sup>24</sup> Judgment No. 1 of 11 January 2016, Case No. AA70-X-2016-000001, Joint opinion.

<sup>25</sup> Article 237 of the Constitution.

<sup>26</sup> Judgment No. 3 of 14 January 2016, Case No. 20160003, Joint opinion.

<sup>27</sup> Article 336 (7) of the Constitution.

the Republic should not give his presentation of accountability to the legislature, as provided by the Constitution.

Furthermore, the Constitutional Chamber stated that it had learned of a communicational notorious fact: On January 13, 2016, in regular session, the Board of Directors of the National Assembly had complied with the orders of Electoral Chamber Judgments No. 260 of 2015 and No. 1 of 2016, annulling the session that had taken place on January 6, 2016 and divesting the three people elected as deputies. In this way, it expressly voided their swearing-in and the decisions that had been made since the start of the NA session. Therefore, the chamber decided that there was no impediment for the President of the Republic to make his presentation to the legislature on his performance in 2015.

#### **4. New Ruling of Contempt**

On July 28, 2016, one of the deputies who brought the petition for the annulment of the December 6, 2015 legislative elections, filed a new petition on the same case, asking that the National Assembly be declared in contempt, since on that date the NA's Board of Directors had agreed to incorporate and swear-in the three deputies-elect from Amazonas State.<sup>28</sup>

On August 1, 2016, the Electoral Chamber handed down its judgment.<sup>29</sup> The chamber considered that the content of the precautionary measure of Judgment No. 260 of 2015 constituted a nationwide communicational notorious fact. The chamber noted that the main case, Case No. 260 of 2015, had been handled in compliance with the constitutional guarantees of effective judicial protection, access to justice, right to defense, and due process. In addition, the chamber indicated that various media, publicly and consistently, reported on July 28, 2016, the news of the failure to apply the precautionary measure ordered in Case No. 260 of 2015.

Citing the Constitutional Chamber's case law,<sup>30</sup> the Electoral Chamber found "usurpation of authority, consistent with the invasion of Public Power by persons who do not have the authority to govern, is considered without effect and the laws passed shall be considered null." The Supreme Court declared that the judicial, executive and legislative branches, as well as other branches of government, are subject to rules and constitutional limits. The Supreme Court concluded that a "flagrant violation of the constitutional public order" had taken place, for which reason it reiterated "the absolute nullity of its object, the act [by the National Assembly] passed during the session held on July 28, 2016."

Thus, the Supreme Court declared that the National Assembly was in contempt of Electoral Chamber judgements No. 260 of 2015 and No. 1 of 2016. At the same time, the Supreme Court declared invalid, non-existent, and without effect, the NA's laws, because the ceremony to swear-in the questioned deputies constituted a flagrant violation of constitutional order.

#### **5. No Reversal of the Declaration of Contempt**

It is important to point out that the SCJ has used the argument of contempt to annul the great majority of the NA's legislative acts, disregarding the NA's constitutional powers and even its very existence. With unjustified rulings that have annulled the NA's current and future acts, it has disregarded the will expressed by the Venezuelan people in the December 2015 legislative elections.

This unusual and unprecedented argument of contempt, as the Supreme Court has used it, does not appear in and therefore is not regulated in Venezuelan law. The Supreme Court invented and shaped it to prevent the NA, made up mostly of deputies in opposition to the government, from operating.

In fact, a mechanism that refers to contempt is enshrined in articles 122 and 123 of the Organic Law of the Supreme Court, but the only thing that it specifies is that anyone who

<sup>28</sup> It decided to do so because more than six months had passed and the SCJ's Electoral Chamber still had not ruled on the objections to the precautionary measure that ordered the divestment of the deputies from Amazonas, despite the fact that the law provides that a ruling must be made within 11 days, according to the provisions of article 187 of the Organic Law of the Supreme Court.

<sup>29</sup> Judgment No. 108 of 1 August 2016, Case AA70-X-2016-000007, Joint Opinion.

<sup>30</sup> Constitutional Chamber, Judgment No. 9 of 1 March 2016.

fails to comply with a decision by the SCJ may be subject to a fine of up to 200 tax units, or 300 tax units if the offense is repeated. In other words, for failing to uphold a decision by the SCJ, the only response that is legally foreseen is that a fine may be levied, but not the annulment present and future legislative acts, since under the constitutional rule of law there are no ancillary penalties that allow for all the actions of a public corporation to be disregarded, much less those of the most representative body in the democratic system.

The figure of contempt is not defined as a crime in Venezuelan legislation. But the failure to comply with a judgment may be equated with disobedience of authority, which is considered an offense under criminal law; or failure to uphold an order for protection of constitutional rights.<sup>31</sup> However it is obvious that these applications refer to individuals who refuse to abide by a judicial decision, and never refer to an institution or the seat of public power.

But, as we have seen, the SCJ considered that because the NA failed to apply the precautionary rulings that ordered the divestment of the NA deputies, therefore all of the NA's legislative acts should be considered void, even though there is not a single constitutional or legal provision that prescribes this disproportionate penalty.

It should be noted that on several occasions in 2016, the NA did divest the deputies from Amazonas, obeying the controversial ruling that suspended the induction of these legislators, so that the SCJ would respect their constitutional authority. However, the SCJ has rejected the divestments with simple formal arguments in order to prevent the NA from carrying out its legislative functions. Meaning that the obligation was alleged, but could not be fulfilled.

In effect, Judgment No. 113 of 20 March 2017 by the SCJ's Constitutional Chamber declared that the divestment of the deputies from Amazonas State could not take place at an ordinary legislative session, but must be done at a session specially convened for that purpose. The most serious thing was that it furthermore considered that the current Board of Directors of the NA could not divest the Amazonas deputies, since this Board of Directors had been elected while the NA was in contempt, thus disregarding the authority of the NA's current (2017) Board of Directors.

As such, with this argument, the SCJ eliminated the legislature from Venezuela's constitutional system, by preventing the alleged contempt from being rectified, and disregarding the new Board of Directors that took office in January 2017.<sup>32</sup> Meaning that the SCJ intends for the original NA Board of Directors to order the divestment of the Amazonas deputies, at a special session convened for this purpose, which would be concretely impossible to do, seeing as the NA elected a new Board of Directors in January 2017.

These judgments by the Supreme Court have drawn the attention of the Inter-American System, specifically OAS Secretary General Luis Almagro, and the IACHR, who have expressed their criticism of the arbitrariness of the decisions by Supreme Court's Electoral and Constitutional Chambers. On May 30, 2016, Almagro presented to the OAS Permanent Council a report in which he described this action by the Supreme Court as an "alteration of constitutional order that seriously affects democratic order" in Venezuela, with reference to article 20 of the Inter-American Democratic Charter. In the report, Almagro cited these judgments as examples of the violation of the principle of separation and independence of powers, since they "suspended the effects" of the acts of tabulation, assignation and proclamation, without having heard the National Electoral Council nor the evidence of the divestment of the affected deputies, "leaving Amazonas State without voice in the legislature." In addition, the Secretary-General stated that "by law, no act may be annulled by means of a precautionary measure and nor may future acts," which may only take place "after a trial in which due process is respected and at which the parties present their evidence."

On July 29, the IACHR issued a press release expressing its concern that the indigenous peoples of the state of Amazonas and the southern indigenous region would have no representation in the NA, until a "judicial decision has been adopted declaring the election result or said election to be null and void. The mere fact that the legal challenge to the injunction has to run its course should not result in all the indigenous peoples of the region

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<sup>31</sup> Article 31, Organic Law To Protect Constitutional Rights and Guarantees.

<sup>32</sup> The Board of Directors of the National Assembly is elected annually.

being left without representation in the National Assembly for such a long and indefinite amount of time.”<sup>33</sup> As this report is being written, after more than a year and a half since the legislative elections of December 5, 2015, and following the precautionary measure that on December 30 of that year suspended the three deputies from Amazonas State, SCJ’s Electoral Chamber has not issued a ruling on the merits of this case, with the result that these deputies have not been able to carry out their duties, and the inhabitants of Amazonas State, and an entire indigenous region, have been left without representation in the legislature. Furthermore, it is obvious that in the event that these elections are partially annulled, and it is therefore necessary to call a new election to choose deputies for Amazonas State and the southern indigenous region, this is unlikely to take place before the end of the four-year period for which these deputies were elected. Meaning that an irreparable situation has been created.

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<sup>33</sup> IACHR, Communiqué 107/16: IACHR Expresses Concern about Lack of Representation of Indigenous Peoples in National Assembly of Venezuela. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2016/107.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/107.asp)

## CHAPTER II: THE SUPREME COURT AND THE POWERS AND FUNCTIONING OF THE LEGISLATURE

### 1. National Assembly Regulation Reform

In 2010, the National Assembly (NA) amended its Interior and Debates Regulations.<sup>34</sup> By that time, the NA was composed of a majority of deputies from the ruling party. The amendment reduced opportunities for the deputies to participate in debates; increased the powers of the president of the National Assembly; limited the mechanisms for legislative oversight; eliminated certain guarantees for the regulation of the NA and the permanent committees; and introduced summary proceedings, without due process, to repeal legislative immunity. The amendment also made it mandatory for the NA, in the process of the creation, discussion, and passage of laws, to consult with other state bodies, the citizens and organized communities to hear their opinions and, when legislating on matters of state, to consult the state legislative councils. In short, the reform strengthened the interference of the executive and the people's power in the legislative process.

Several opposition deputies challenged the reform in an action for annulment, filed before the Supreme Court in March 2011. The plaintiffs also requested, as a precautionary measure, that the reform be suspended. The SCJ would take five years before admitting the case, as there was clearly no rush to examine a reform that pro-government legislators had already approved.

When the government lost the December 2015 legislative elections, the case was reactivated. That is why, on April 21, 2016 in Judgment No. 269,<sup>35</sup> the SCJ admitted the case. The SCJ granted the precautionary measure, suspending several articles, but it declined to apply this suspension to the provisions on legislative process. The Supreme Court decided to postpone making its ruling on the request for the precautionary suspension of article 25 of Regulations, concerning the modification of the procedures for legislative immunity. The Supreme Court also did not rule on the request for the suspension of paragraph 4 of article 64 of the Regulations, concerning the absolute prohibition against amending the agenda for National Assembly sessions, nor the provisions by which authorizations requested by the executive branch would be exempt from debate by the legislature.

It is a very unusual that after five years without admitting the case, the SCJ suddenly considers that there is "imminent urgency" that now requires a precautionary measure, in order to suspend the provisions of the Regulations and to interpret other legal provisions at its whim.

As such, in terms of the NA's obligation to consult with other state bodies concerned, as per the Constitution<sup>36</sup> and the amendment of the Interior and Debates Regulations, the Supreme Court considered that this should be interpreted as the "compulsory coordination that must exist between the National Assembly and other state bodies during the discussion and passage of laws." The Supreme Court said that any bill, "article by article [...] should be discussed together with the People's Power and other state bodies." The Supreme Court also considered that any bill having "economic and budgetary impact and effect" would require "obligatory consensus-building [...] between the Legislative and Executive Powers," and the Vice President of the Republic must be involved, "for the purpose of determining [the] economic feasibility" of the bills. According to the SCJ, intervention by the Vice President of the Republic would not be limited to bills during debates but "even those passed as of the date of publication of this ruling," which opened the door to the review laws already passed by the NA.

The Supreme Court also considered that the National Assembly's obligation to consult with "the citizenry and organized society to hear their opinion about the same," established by

<sup>34</sup> Partial Amendment of the National Assembly Interior and Debates Regulations, published in the *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6014, 23 December 2010.

<sup>35</sup> Constitutional Chamber Judgment No. 269 of 21 April 2016, Case 2011-000373, Judge Juan José Mendoza Jover.

<sup>36</sup> Article 211 of the Constitution states: "During the process of debating and approval of bills, the National Assembly or Standing Committees shall consult with the other organs of the State, the citizenry and organized society to hear their opinion about the same."



the Constitution, was to be done “through social parliamentarianism in the streets, assemblies in communities, forums, workshops, and other mechanisms for participation, in coordination with community councils and other People’s Power forms of organization.” In other words, it made coordination with the “People’s Power” a condition for the consultation. It is worth noting that the Constitution states that it falls to the NA “to organize and promote citizen participation in matters within its competence”<sup>37</sup> and it does not refer to the “People’s Power,” which it is defined under the Organic Law of the People’s Power.<sup>38</sup>

By equating consultation with consensus-building, imposing the urgent intervention of other state bodies—such as the executive branch and People’s Power—in the legislative process and making consultation with citizens through coordination with People’s Power a condition, the Supreme Court limited the autonomy of the NA and made its legislative work contingent upon the intervention of other powers, undermining the principle of separation of powers.

In the face of such arbitrary interference of the SCJ, the opposition deputies who brought the action for annulment that gave rise to Judgment No. 269 of 2016, gave formal notice on May 10, 2016 of the withdrawal of the action for annulment. On May 17, 2016, the representative of the NA presented a written statement, opposing the precautionary measures ordered in SCJ Judgment No. 269.

The deputies made their decision to withdraw the action because the Supreme Court had not ruled on several precautionary measures they had requested. Specifically, the Supreme Court did not rule on the suspension of article 25 of the Regulations that modifies the procedures for lifting legislative immunity, which gave rise to the possibility of stripping legislators of immunity without due process. Similarly, the Supreme Court had not ruled on the precautionary measure to suspend paragraph 4 of article 64 of the Regulations, concerning the absolute prohibition against amending the agenda for National Assembly sessions, nor the provisions by which authorizations requested by the executive branch would be exempt from debate by the legislature. On this matter, the plaintiffs declared that “it is unreasonable to establish an absolute prohibition on the possibility of amending the agenda of the session, not taking into account that in some cases urgent matters occur that must be to be included unexpectedly” and that the exemption from debate of authorizations requested by the executive branch “is a serious limitation on legislative action, because it prevents the prior oversight necessary for the validity of acts that correspond to the National Assembly.” In relation to article 57 of the Regulations, concerning which the Supreme Court had agreed to the precautionary measure of extending to 48 hours the period for convening legislative sessions to ensure the presence of the deputies, the plaintiffs indicated that this measure was no longer applicable, given that since January 2016, the National Assembly had established that the sessions would be held regularly every Tuesday and Thursday, “making it possible for all members to schedule their attendance of the aforementioned sessions.” Finally, the plaintiffs referred to Judgment No. 269, that orders organs outside the NA, such as the Vice President of the Republic, to intervene in the legislative process, noting that this affects the “principle of separation of powers enshrined in the Constitution.”

On June 14, 2016, the Supreme Court<sup>39</sup> denied the application for withdrawal, considering that constitutionality is a matter of public order and may be declared, even if the petitioner desists. The Supreme Court considered that the contested legislation (Interior and Debates Regulations) pertains to “an organ of the National Public Power in the exercise of its constitutional functions, this being the National Assembly [...] [which] is of interest to the People’s Power which is where national sovereignty resides [...] [and that] the role of the national legislature is the responsibility of the people’s power with whom national sovereignty resides” and therefore is not subject to negotiation nor can the withdrawal be approved.

The Supreme Court also considered that the National Assembly’s decision of January 2016 to hold regular sessions on Tuesday and Thursday of each week, disregarding the precautionary measure ordered in Judgment No. 269, and constituted “evasion”. As we can

<sup>37</sup> Article 187 (4) of the Constitution.

<sup>38</sup> Published in *Official Gazette* No. 6011 of 21 December 2010.

<sup>39</sup> Constitutional Chamber Judgment No. 473 of 14 June 2016, Case 11-0373, Judge Juan José Mendoza Jover.

see, the SCJ commented on the legislative agenda, violating the very essence of the NA's constitutional autonomy and the principle of the separation of powers.

In terms of the role of the National Assembly's representation, the Supreme Court considered that although the Interior and Debates Regulations<sup>40</sup> stipulates that the President of the National Assembly exercises the representation of the legislature, this power is limited to "affairs of the functioning of the Legislative Power" and does not extend to legal representation on behalf of the legislature. According to the SCJ, that function corresponds to the Office of Attorney General of the Republic, because of the principle of unity and collaboration among the organs of public power. However, it should be noted that the Constitution does not grant said function to the Attorney General's Office, as it is rather an advisory body of the executive branch. The constitutional provision stipulates that this body "advises, defends and represents in and out of court the property interests of the Republic,"<sup>41</sup> but by no means does it grant authority to represent the legislative branch legally.

With this second decision, the Supreme Court refused to grant the NA the authority to regulate its functioning autonomously, as established by the Constitution.<sup>42</sup> Thus, the SCJ stripped the presidency of the legislature of the authority to exercise judicial representation, assigning this to an organ of the executive branch, the Office of the Attorney General of the Republic.<sup>43</sup> In doing so, the SCJ violated the principle of separation of powers.

## 2. National Assembly Sessions and Motion of Censure

In May 2016, several members of the government caucus filed a petition before the Supreme Court requesting an annulment for unconstitutionality, calling for precautionary measures against several National Assembly sessions held in April and May 2016, during which three bills were approved in their first readings<sup>44</sup> and a motion of censure or vote of non-confidence against the Minister of People's Power for Food. The deputies argued that the sessions were convened 24 hours before they were held, and not 48 hours as instructed by the Supreme Court in its Judgment No. 269 of 2016; that the addition to the agenda of the discussion of two bills<sup>45</sup> was done at the last minute; and, given that the minister who was the object of the motion of censure was an active General in the Bolivarian National Armed Forces (FANB), he had to be summoned through the President of the Republic, in his capacity as Commander in Chief of the FANB.

In August 2016, the SCJ<sup>46</sup> admitted the application for annulment and granted the precautionary measures requested, suspending the effects of the challenged NA sessions and the decisions that had been made during these sessions. The Supreme Court limited itself to ratifying the precautionary measures regarding the conditions for convening NA sessions, and the prohibition against making modifications to the agenda of the session, as ordered in Judgment No. 269.

The SCJ would reiterate its position days later,<sup>47</sup> in a ruling on another application for an annulment for reasons of unconstitutionality and request for precautionary measures, against the National Assembly sessions held on April 26 and 28, 2016, filed by several deputies from the government's caucus in May 2016. With this ruling, the Supreme Court prevented the NA from carrying out its constitutional functions, among these the possibility of challenging executive branch officials, and investigating the organs and representatives

<sup>40</sup> Article 27 of the Regulations.

<sup>41</sup> Article 247 of the Constitution.

<sup>42</sup> Article 187 (19 and 23) of the Constitution.

<sup>43</sup> The Attorney General is appointed by the President of the Republic, with the approval of the National Assembly (articles 187.14, 236.15 and 249 of the Constitution.); attending, with the right to speak, meetings of the Cabinet of Ministers (art. 250 of the Constitution.); this is one of the "high consultative bodies at the central level of the National Public Administration" (article 44 of the Organic Law of Public Administration); receives instructions from the Ministers, "on matters in which intervention should take place on matters within the jurisdiction" of the ministries (art. 78.17 of the Organic Law of Public Administration); and reviews the bills that Ministers submit to the National Assembly (art. 88 of the Organic Law of Public Administration).

<sup>44</sup> Bill on Protection and Compensation of Users for Power Failures, Bill on Partial Reform of the Telecommunications Act, and Agreement To Dignify Minimum Wage for Workers in Venezuela.

<sup>45</sup> Bill on Partial Reform of the Telecommunications Act and Agreement To Dignify Minimum Wage for Workers in Venezuela.

<sup>46</sup> Constitutional Chamber Judgment No. 449 of 20 August 2016, Case 16-0449, Judge Juan José Mendoza Jover.

<sup>47</sup> Constitutional Chamber Judgment No. 797 of 19 August 2016, Case 16-0449, Judge Juan José Mendoza Jover.

of public power, including military officials, to call for political accountability and ask that pertinent actions be taken.<sup>48</sup>

### 3. Constitutional Amendment

On March 15, 2016, in response to different reports in “communication and information” media, according to which the opposition bloc would seek, through a constitutional amendment, to cut the presidential term from six to four years, a request for interpretation of article 340 of the Constitution was filed before the Supreme Court. The lawsuit argued that the opposition, under the pretext of introducing a constitutional amendment on the presidential term in office, intended to carry out a recall referendum on President Nicolás Maduro Moros, in overt “constitutional evasion.”

It should be noted that the Constitution provides two different measures: first, constitutional amendment (arts. 187.2, 340 and 341), and second, the recall referendum (art. 72). The purpose of the former “is to add or modify one or more articles of this Constitution, without altering the fundamental structure of the same”<sup>49</sup> and may be undertaken by the NA,<sup>50</sup> among other state bodies, and then must be put to a referendum by the electoral authority. The latter is meant to revoke elected officials, once after half of the term for which they were elected has passed, and at the request of at least 20% of the electors in the respective constituency.<sup>51</sup>

Thirty-five days after the request for interpretation was filed, and one day before the SCJ was to hand down its ruling, on April 20, 2016 Constitutional Amendment Bill No. 2 was approved in its first reading, having been submitted by 109 deputies in accordance with the provisions of the Constitution.<sup>52</sup> The bill proposed a limit of four years for the term in office of the president of the republic, governors, and mayors.

On April 21, 2016, the SCJ<sup>53</sup> issued its judgment on interpretation of article 340 of the Constitution. The Supreme Court acknowledged that “the modification of the constitutional term by the organs of government is perfectly feasible through the mechanism of the amendment, provided that it complies fully with the procedures for passage.” However, oddly invoking the principle of non-retroactive applicability, used in criminal and civil law, the Supreme Court held that the constitutional amendment “may not have retroactive effects or be applied immediately,” because this “would constitute an unquestionable breach of the exercise of sovereignty [and ...] would be in disregard of the will of the people.” So, according to the SCJ, the term for which officials were elected would “remain unalterable by any subsequent amendment that is made, and it would only be applicable to future elections or appointments.”

The Supreme Court concluded that “attempting to use the figure of the constitutional amendment to immediately shorten the exercise of an elected office, such as that of the President of the Republic, is clearly evasion of the Constitution, which provides an effective political mechanism for said purpose, this being the exercise of the recall referendum contemplated under article 72 of the Constitution.”

### 4. The NA and the International Community

On June 3, 2016, the Prosecutor General of the Republic - *Procuraduría General de la República* - (PGR) filed a suit before the Supreme Court requesting a constitutional precautionary measure against the NA’s President, the Board and the majority of deputies who “circumstantially make up the National Assembly,” over threats of carrying out, “a coup d’état, under a denied veneer of legitimacy.” According to the PGR, the petition was based on criticisms that members of the NA had made about the executive branch; “legislative and non-legislative actions (such as legislative accords not in the form of laws), inclusive overstepping authority, which have been aimed at destroying the credibility of the national government and clearly, illegitimately and illegally hindering its performance;” and

<sup>48</sup> Article 187 of the Constitution.

<sup>49</sup> Article 340 of the Constitution.

<sup>50</sup> Article 341 of the Constitution.

<sup>51</sup> Article 72 of the Constitution.

<sup>52</sup> Article 341 (1) of the Constitution.

<sup>53</sup> Constitutional Chamber, Judgment No. 274 of 21 April 2016, Case 2016-0271, Judge Arcadio Delgado Rosales.

promoting “public disturbances and violence against the Public Powers” all with the aim of creating “a climate of fear and ungovernability, with the overt and frankly declared intention to depose all public authorities and ‘renew’ them with people in keeping with their political movement or who would bow to their instructions.” The PGR also considered that the following actions by the NA, among others, constituted threats of a coup: the passage of laws contrary to the national executive branch’s public policy on economic and social protection matters; summons to demand accountability of officials from the executive cabinet or officials who hold strategic positions in companies and institutions that are strategic in the functioning of the national economy; usurping functions of the executive branch; and calling for the removal of the President of the Republic as the only way of surmounting the economic crisis.

In particular, the PGR considered that two acts passed by the National Assembly, requesting the cooperation of the international community to surmount the crisis in Venezuela and the establishment of political dialogue, constituted an attempted coup. In the first act (*Agreement urging compliance with the Constitution, and on the responsibility of the National Executive Power, the Supreme Court of Justice, and the National Electoral Council for the preservation of peace and toward democratic change in Venezuela*), adopted on May 10, 2016, the NA denounced that the executive branch, the Supreme Court, and the National Electoral Council were in violation of constitutional and democratic order; it requested that the President of the Republic release the political prisoners and accept humanitarian aid in food and medicines; it urged “the Inter-American Commission on Human Rights, the United Nations (UN) High Commissioner for Human Rights, the Secretary General and Permanent Council of the Organization of American States (OAS), as well as organs of the Southern Common market (MERCOSUR), and the Union of South American Nations (UNASUR) to exercise their powers, issue statements, and take appropriate measures aimed to demand that the Public Powers uphold the effective enforcement of fundamental rights in Venezuela;” and it urged the Latin American Parliament and the Mercosur Parliament “to exercise its powers speak out and take measures conducive to the exercise of representative democracy in Venezuela and collaborate with the National Assembly in efforts to ensure that the political rights of Venezuelans are respected.” In the second act, entitled *Agreement that supports the interest of the international community of G-7, OAS, UNASUR, MERCOSUR and the Vatican, in the Venezuelan crisis*, adopted on May 31, 2016, the NA upheld initiatives that proposed that the Venezuelan situation should be examined by the OAS Permanent Council and the meeting of MERCOSUR Foreign Ministers, as well as through the efforts of the Vatican, UNASUR, and former presidents Rodríguez Zapatero, Fernández, and Torrijos in order to surmount the political crisis and establish dialogue between the parties. The PGR considered that these two acts by the NA constituted an infringement of the functions of other public authorities and were an attempt to destabilize the government.

Finally, the PGR asked the Supreme Court to issue “such acts as it deems necessary to restore the violated legal situation and exhort the National Legislative Power to cease usurping the functions of other Public Powers, cease its attempt to destabilize the National Government, and its actions against peace and constitutionality of the Republic.”

On June 14, 2016, the Supreme Court ruled on the precautionary measure.<sup>54</sup> While acknowledging that the petition was not based on the violation of constitutional rights, as prescribed by the Constitution,<sup>55</sup> and consequently should not have been admitted, the Supreme Court maintained that it had the authority to rule since this was a “constitutional controversy”<sup>56</sup> concerning the “violation of constitutional authority and powers inherent to the National Executive Power (‘usurpation of functions’), by the President, the Board and the majority of deputies in the National Assembly.” Thus, *motu proprio*, the Supreme Court decided to turn the precautionary measure into a constitutional controversy.

Regarding the request by the PGR for the Supreme Court to issue the orders necessary to halt the “usurpation of functions,” the SCJ considered that this was a request for

<sup>54</sup> Constitutional Chamber, Judgment No. 478 of 14 June 2016, Case 16-0524, Joint opinion.

<sup>55</sup> Article 27 of the Constitution.

<sup>56</sup> Article 336 (9) of the Constitution.

precautionary measures and that, in light of the Organic Law of the Supreme Court of Justice,<sup>57</sup> it had broad powers to issue these of its own accord.

The SCJ focused its decision on the two acts by the National Assembly: the *Agreement urging compliance with the Constitution, and on the responsibility of the National Executive Branch, the Supreme Court of Justice, and the National Electoral Council for the preservation of peace and toward democratic change in Venezuela*, and the *Agreement that supports the interest of the international community of G-7, OAS, UNASUR, MERCOSUR and the Vatican, in the Venezuelan crisis*.

The Supreme Court considered that both of the NA's acts were aimed at the international community and its agencies, which is the exclusive domain of the executive branch. The Supreme Court emphasized that, in accordance with the Constitution, it is the domain of the President of the Republic "[t]o direct the international relations of the Republic and sign and ratify international treaties, agreements and conventions."<sup>58</sup> The Supreme Court also gave an interpretation of article 226 of the Constitution,<sup>59</sup> considering that the presidential function entails sovereignty with regard to other states and international organizations.

The Supreme Court concluded that "in this action of constitutional controversy [...] one observes indications that might show that the legislature has assumed powers that constitutionally are proper to the Executive Power." The Supreme Court also ordered, as a precautionary measure, the suspension of the two acts by the NA, to ensure that "future acts do not entail probable encroachments of functions attributed to the national executive branch."

Curiously, the SCJ did not consider specific constitutional provisions that assign international affairs functions to the legislature,<sup>60</sup> nor how the Constitution stipulates that "[t]he international policy and actions of the Republic"<sup>61</sup> are the competence of the National Public Power—to which the legislative branch belongs.<sup>62</sup> In this regard, the Foreign Service Law<sup>63</sup> reminds that in addition to the President's powers on foreign policy, "the Constitution gives the National Assembly competence as a decision-making body on foreign service and foreign policy."<sup>64</sup> It is not without reason that the NA has a Permanent Committee on Foreign Policy, Sovereignty and Integration.

Thus, with its decision, the Supreme Court disregarded the constitutional and legal provisions that authorize the NA to make statements of that nature.

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<sup>57</sup> Article 130.

<sup>58</sup> Article 236 (4) of the Constitution.

<sup>59</sup> Article 226 stipulates that "The President of the Republic is the Head of Head of State and of the National Executive, in which latter capacity he directs the action of the government."

<sup>60</sup> For example: to ratify international treaties and conventions (arts. 73, 154 and 187 (18).); to authorize the operation of Venezuelan military missions abroad or foreign military missions within the country (art. 187 (11).); and to authorize contracts with foreign states or official entities (art. 187 (9)).

<sup>61</sup> Article 156 (1) of the Constitution.

<sup>62</sup> Article 136 of the Constitution.

<sup>63</sup> Published in *Official Gazette* No. 37,254 of 6 August 2001.

<sup>64</sup> Article 2.

### CHAPTER III: SUPREME COURT, LEGISLATIVE POWERS, AND LEGISLATIVE CONTROL

#### 1. Amendment of the Law on the Central Bank of Venezuela

On March 17, 2016, the President of the Republic asked for a “ruling on constitutionality prior to giving approval” concerning the Law on Partial Reform of Decree No. 2179 Partial Reform of the Law of the Central Bank of Venezuela, enacted by the National Assembly on March 3, 2016. In his petition to the Supreme Court’s Constitutional Chamber, the President argued that the law was politically motivated, that it sought “to impose from the Legislative Power a domain not contained in the mandate from the constituents,” which would allow the opposition bloc to intervene “directly in the public policies of the National Executive, competence of its exclusive exercise,” and consolidate the NA’s control of “the appointment of members of the Board of the Central Bank of Venezuela (CBV).” According to the President, the Constitution does not authorize the NA “to appoint part of the Board, but only to ‘participate’ in it,” nor does it allow for the legislature to have “a monopoly on the evaluation of the merits and credentials of candidates.” In addition, the President argued that the law undermined the powers of the Government, since the CBV “is a body constitutionally vital in nature to contribute to achieving the economic policy objectives designed by the National Government [...] [which] is called to contribute with the National Executive on the harmonization of monetary and fiscal policy, facilitating the attainment of macroeconomic objectives through the creation and maintenance of the monetary conditions required to achieve the structural change of the Venezuelan economy that the President of the Republic has proposed [...].” Finally, the President argued that this law “is aimed at disrupting and distorting the socioeconomic and financial system of the country” and constitutes “a misuse of powers, since the purpose of the amendment is to ensure control of the Central Bank of Venezuela by the parliamentary group in the National Assembly which currently makes up the majority of the deputies, over the rest of the Public Powers and beyond the powers conferred to it under the Constitution.”

On March 31, 2016, the SCJ’s Constitutional Chamber, after admitting all the arguments of the Head of State, declared the law unconstitutional.<sup>65</sup> In a strange interpretation of the Constitution, the Supreme Court held that although the CBV is not subordinate to the executive branch, it “is obliged to direct its policies according to the National Development Plan and cooperate with the National Executive as a technical agency in the design and implementation of macroeconomic, financial and fiscal policies,” while being “part of what is called the Administration with functional autonomy” and that its degree of autonomy is conditioned, among other factors, by its “relationship with the government.”

In general, the Supreme Court held that “the participation of the National Assembly in the matter of the appointment of the highest authorities of the public powers, is not absolute and may even be replaced by the will of the people.” Thus, completely veering away from what is prescribed by the Constitution, the Supreme Court held that the NA may not appoint the CBV board members “without the involvement of another Public Power.” Paradoxically, noting that “the system of separation of powers, checks and balances, determines that supervisory bodies do not interfere in the decision-making processes of the overseen bodies,” the Supreme Court concluded that since the NA “holds the function of overseer of the policies” of the CBV, “the possibility of the legislature appointing board members would constitute interference in the active management of the Bank.” At the same time, the Supreme Court considered that having the President of the CBV appear before the NA to render accounts of his performance would be against the law. Furthermore, the Supreme Court considered that the NA was not authorized to ratify the appointment of persons to those jobs. The Supreme Court interpreted paragraph 8 of temporary provision 4 of the Constitution in the sense that the power of appointment rests with the executive branch, and the legislature “only participates in it, meaning, collaborates, cooperates, helps, contributes or intervenes,” in which, it can neither appoint members of the Board of the CBV, nor ratify its president, nor those persons appointed by the executive branch. Finally, the Supreme Court considered that “legislative acts that may interfere with the actions of the National Executive during the time of a validly declared state of economic emergency,

<sup>65</sup> Constitutional Chamber Judgment No. 259 of 31 March 2016, Case 2016-000279, Judge Calixto Ortega Ríos.

may intentionally make nugatory the functions of the National Executive, demonstrating a misuse of power." With which the Supreme Court concluded that the passage of this law constituted a "misuse of power" by the NA.

With its decision, the Supreme Court flatly disregarded the constitutional regulations governing the CBV and states of emergency. Indeed, the Constitution states that: "[t]he law shall provide that the Executive Power shall have the power to designate no less than half of the Directors as well as the Chairman of the Venezuelan Central Bank, and shall establish the terms for participation by the Legislature Power in the designation and ratification of these authorities."<sup>66</sup> (emphasis added); the CBV "is a public-law juridical person with autonomy to formulate and implement policies within its sphere of competence";<sup>67</sup> "[I]n performing its functions, the Central Bank of Venezuela shall not be subject to directives from the National Executive and shall not be permitted to endorse or finance deficit fiscal policies"<sup>68</sup> (emphasis added); the CBV shall "perform its functions in coordination with general economic policy, in the interest of attaining the higher objectives of the State and the Nation";<sup>69</sup> "[T]he coordinated actions of the National Executive and the Venezuelan Central Bank shall be achieved through an annual policy agreement [...]";<sup>70</sup> and the CBV "shall be governed by the principle of public responsibility, to which end it shall render an accounting of its actions, goals and the results of its policies to the National Assembly, in accordance with law. It shall also issue periodic reports on the behavior of the country's macroeconomic variables and on any other matters concerning which reports may be requested, including sufficient analysis to permit its evaluation."<sup>71</sup> (Emphasis added). The Constitution also states that "[t]he declaration of a state of exception does not interrupt the functioning of the organs of Public Power."<sup>72</sup>

Thus, the Constitution gives the National Assembly powers to appoint directors for the CBV and to ratify the CBV President and Directors appointed by the President of the Republic, as the entity that oversees the CBV. The Supreme Court ruled arbitrarily in accordance with the interests of the executive branch and not the law, in contempt of constitutional regulations, stripping the NA of its constitutional powers and subordinating the CBV to the executive branch.

## 2. The Food and Drug Coupon Law

On April 14, 2016, the President of the Republic requested a review of constitutionality prior to giving approval to the Law on the Food and Drug Coupon for Pensioners and Retirees, passed by the National Assembly on March 30, 2016.<sup>73</sup> In his application made to the Supreme Court's Constitutional Chamber, the President argued that: i) according to the Constitution, the administration of the National Public Treasury is the prerogative of the President of the Republic<sup>74</sup> and that although "additional budget credit items may be ordered to cover essential unforeseen expenses or items that had not been adequately funded,"<sup>75</sup> a prior vote in favor by the Council of Ministers was needed, in addition to the authorization of the NA; ii) the Organic Law of the Financial Management of the Public Sector does not authorize acquiring "commitments for which there are no budgetary allocations, nor are credits available for purposes other than those foreseen";<sup>76</sup> and iii) that according to the National Assembly's Interior and Debates Regulations, during the process of developing, debating and approval of bills, the NA should consult with the other organs of the State.<sup>77</sup> The President concluded that with this law, the "Legislature [...] seeks to co-

<sup>66</sup> Paragraph 8 of the Fourth Temporary Provision of the Constitution.

<sup>67</sup> Article 318 of the Constitution.

<sup>68</sup> Article 320 of the Constitution.

<sup>69</sup> Article 318 of the Constitution.

<sup>70</sup> Article 320 of the Constitution.

<sup>71</sup> Article 319 of the Constitution.

<sup>72</sup> Article 339 of the Constitution.

<sup>73</sup> It is important to stress that through the use of preventive control of the constitutionality of laws adopted by the NA, the SCJ has avoided an adversarial judgement, where the NA or third parties can make their cases advocating for the challenged. And this has also been a constant for all other proceedings paraded before the SCJ, since in nearly all decisions contrary to the NA decisions are issued without regular and adversarial proceedings, in a clear breach of the right to defence and to due process.

<sup>74</sup> Article 236 of the Constitution.

<sup>75</sup> Article 314 of the Constitution.

<sup>76</sup> Article 21.

<sup>77</sup> Article 101.

administer with the National Treasury with the Executive Power [...] [and] impose new spending commitments not within the Budget Law for the financial year [...]” which would appear to be “prejudicial to constitutional order” and constitute a “deviation of the Legislative Power.”

In its judgment of April 28, 2016, the SCJ<sup>78</sup> adopted an unusual position. On the one hand, the Supreme Court declared the law “conceptually CONSTITUTIONAL” and, on the other hand, it annulled the entry into force of the law’s final article because the “entry into force of this law is subject to economic feasibility.”

The Supreme Court considered that “the law that was passed [...] may not impose an onerous situation upon society” and that its articles “appear to favor the private sector in regards to the public sector.” The Supreme Court also considered that laws “must be feasible and effective, they must be made in a way that they actually meet the finality of the guarantees for which they were exhibited [...] [and] they should not be instruments that create false hopes, worsen the economic situation, harm social sectors, aggravating crisis merely to increase political power at the expense of the weakest, to foster conflicts internally in the community, and much less to promote the institutional and political destabilization of the country to the detriment of development, social order and peace.”

According to the SCJ, given that the administration of the National Treasury is the prerogative of the President of the Republic, and given the budgetary implications of the law, the NA had disregarded “the inalienable authority of the rector of the National Treasury [...] [and it violated] the principles of budgetary legality, transparency, responsibility and fiscal balance, as well as the principles of autonomy of powers and constitutional supremacy.” In addition to considering that the law “would create an imbalance in fiscal accounts that would affect compliance with the implementation of the goals of other social sectors,” the Supreme Court said that it violated “the obligation of the Legislature to reach agreement with the Executive Power before passing any legal text” that could have economic and/or fiscal impact, as is set forth in article 103 (3) of the NA’s Interior and Debates Regulations.

The paradox is that neither the Constitution<sup>79</sup> nor the NA’s Interior and Debates Regulations give the NA the obligation to “agree on” its legislative bills with the executive branch. Indeed, although the Constitution establishes that “[d]uring the process of debating and approval of bills, the National Assembly or Standing Committees shall consult the other organs of the State [...]”<sup>80</sup> this is not to “agree on” the bill with the executive branch. Furthermore, article 103 (3) of the NA’s Interior and Debates Regulations only provides that every bill should include, among others, “[t]he budgetary and economic impact and effect, or in any case, the report of the National Assembly’s Economic and Financial Advisory Bureau.” This is an impact study and a report produced by an agency of the legislature, but in no regard does the regulation concern an alleged duty of legislature to “agree on” the bill with the executive branch.

Thus, the SCJ ruling would control the activity of the NA by requiring bills to be consulted with the executive branch, overtly disregarding constitutional provisions and the National Assembly’s Interior and Debates Regulations. The SCJ would make the executive branch a co-legislator, flagrantly violating the principle of separation of powers and the independence and autonomy of the legislative branch.

### **3. Law on Granting Property Titles**

On April 23, 2016, the President of the Republic asked the SCJ’s Constitutional Chamber for a ruling on constitutionality prior to giving approval to the Law Granting Property Titles to the Beneficiaries of the Great Venezuela Housing Mission and other Public Sector Housing Programs, passed by the National Assembly on April 13, 2016. The purpose of the law was to issue property titles, free of charge, for the housing units provided by the Great Venezuela Housing Mission and other state programs, so that the beneficiaries could register their corresponding property deeds. At the same time, among other provisions, the law pardoned debts incurred by the housing beneficiaries.

<sup>78</sup> Constitutional Chamber Judgment No. 327 of 28 April 2016, Case 16-363, Joint opinion.

<sup>79</sup> Articles 186 and 203 et seq. of the Constitution.

<sup>80</sup> Article 211 of the Constitution.



In his request, the President argued that this was a “rightist” law, that prioritized “the land business” and not families’ right to housing, and that it would “cause a financial bubble [...] inciting the revival of a wave of invasion, encouraging people to occupy private areas [...] and inciting the citizens to act in anarchy.” The President also considered that the law violated the Constitution, the Law on Registry and Notaries, and the Organic Law on Missions and Great Missions, as well as progressive rights. Furthermore, the President said that during the legislative process, the NA did not observe the guidelines on the development of the laws established by the SCJ,<sup>81</sup> and that no mandatory consultation was held with the Government, in accordance with the Constitution<sup>82</sup> and as provided in paragraph 3 of article 103 of the National Assembly’s Interior and Debates Regulations. The Attorney General’s Office backed the President’s request and arguments, and furthermore added that the NA had an obligation to consult with the People’s Power.

On May 6, 2016, accepting the arguments of the President of the Republic, the Supreme Court declared the law unconstitutional.<sup>83</sup>

The Supreme Court held that the NA did not “measure the socioeconomic impact” of the law and did not consult the text with the Executive Power, as required by article 211 of the Constitution, considering that there must be “mandatory consultation [...] between the powers, Legislative and Executive.”

Moreover, the Supreme Court stressed that it was necessary to have a “weighting of rights,” namely the right to housing<sup>84</sup> and the right to property,<sup>85</sup> along with the protection of the family.<sup>86</sup> The Supreme Court stated that “the constitutional right to housing is linked to the protection of families” and is of a social “welfare nature,” whereas the “right to property [...] refers to purely individual freedoms,” and is not welfare and nor is it of an “absolute nature.” Although the State is obliged to ensure that families have “access to decent housing,” this does not signify per se granting the right to the ownership of that housing. Thus, the Supreme Court considered that giving families property rights to the housing that they were given through public policies—and meaning that they could dispose of it—would violate the right of families to have access to housing. The Supreme Court also considered that “giving ownership of the housing units, with the express intention that the awardees who are given the property may dispose of it [...] is a redirection of the social function for which the allocation of housing units by the State was conceived [...] giving rise to unjust enrichment and undermining the achievement of the purposes of the Democratic and Social State of Law and Justice.”

The Supreme Court also held that the law, by creating “registration” privileged “the right to property rather than the right to housing, limiting the state’s involvement in protecting the latter,” which would be regressive and in violation of article 19 of the Constitution, which enshrines “the principle of progressiveness of human rights, in conjunction with the prohibition of regressiveness.”

Finally, the Supreme Court considered that since this referred to housing from the state’s Great Venezuela Mission Program, by forgiving the awardees their debts, the legislature was usurping the functions of the executive branch, which is the director of the Public Treasury, according to the Constitution.

With this judgment, the Supreme Court reaffirmed its position that the executive branch is a co-legislator and the NA is obliged to “agree on” bills with the government, and not simply “consult” it, as established by the Constitution and the National Assembly’s Interior and Debates Regulations. The Supreme Court considered that the legislative function is shared between the executive branch and the NA, in breach of the principle of separation of powers. In this way, the principle of separation of powers was violated, and the Supreme Court unconstitutionally split the legislative function between the executive branch and the NA, giving control to the former.

<sup>81</sup> Judgment No. 269 of 21 April 2016.

<sup>82</sup> Articles 208, 311, 312, 313 and 314 of the Constitution.

<sup>83</sup> Constitutional Chamber Judgment No. 343 dated 6 May 2016, Case 2016-000397, Judge Lourdes Benicia Suárez Anderson.

<sup>84</sup> Article 82 of the Constitution.

<sup>85</sup> Article 115 of the Constitution.

<sup>86</sup> Article 75 of the Constitution.

#### 4. Legislative Oversight of Contracts of Public Interest

In July 2016, a request for constitutional interpretation<sup>87</sup> was filed before the Supreme Court's Constitutional Chamber, regarding the legislature's oversight of contracts of public interest signed by the Central Bank of Venezuela (CBV). The request was made in a particular context: the CBV had requested a loan from the Latin American Reserve Fund (FLAR), and it entailed signing a contract in the national public interest, subject to approval by the NA. The petition argued that prior legislative approval would violate the functional autonomy of the CBV, "as the monetary and centralizing authority and administrator of international reserves," and that the signing of the loan agreement did not require the prior review of the NA, because "the CBV is not an organ of the Executive and not every CBV operation involves the signing of a contract of national interest." The legal representative of CBV joined the petition, as a "third party."

On July 20, 2016, the Supreme Court ruled on case.<sup>88</sup> Considering that the author of the petition for constitutional interpretation had not demonstrated sufficient justification to make this petition, the Supreme Court declared that application inadmissible. However, the Supreme Court admitted the request of the legal representative of the CBV, even though he was acting as a "third party."

In its decision, the Supreme Court considered that the CBV "is a legal entity under public law, established under the Constitution, endowed with autonomy to implement policies within its competence, which is neither part of the Central Administration nor the operative Decentralized Administration, but rather [...] is part of what is known as the Administration with functional autonomy." The Supreme Court considered that the Decree with the Rank, Value and Force of Organic Law on the Financial Administration of the Public Sector was applicable to the CBV, as a "legal person part of the National Public Power." This law lists, among "public credit operations [...] opening credits of any kind"<sup>89</sup> and it prescribes that the CBV would be exempt from the prior authorization of the NA for credit transactions.<sup>90</sup> Based on this law, the Supreme Court considered that the CBV did not require prior authorization from the NA for public credit operations.

According to the SCJ, although the relationship between the legislature and the CBV, established by the Constitution, "is that of a comptroller and a controlled entity [...] the control is not supposed to meddle in the operations carried out by the Central Bank of Venezuela."

After enumerating what constitute contracts in the national public interest, according to its own case law, the Supreme Court said without further explanation that the potential loan contract between the CBV and FLAR "should not be considered as a contract in the national public interest" and therefore, it is not subject to prior review by the legislature.

It is worth mentioning that the Constitution declares that entering into contracts in the national public interest requires the approval of the NA.<sup>91</sup>

Thus, restricting the powers that the Constitution gives the National Assembly, the Supreme Court gave the Decree with the Rank, Value and Force of Organic Law on the Financial Administration of the Public Sector, supra-constitutional value.

#### 5. Law on Gold Exploration and Mining

On August 19, 2016, the President of the Republic asked the Constitutional Chamber of the SCJ for a ruling on constitutionality prior to giving approval on Law on the Partial Reform of Decree No. 2165 of the Rank and Force of Organic Law, which Reserves for the State Activities of Gold Exploration and Mining, as well as the Ancillary Activities and Others Related to These. In the request, the President argued that the law was invalid, because the SCJ's Electoral Chamber<sup>92</sup> had annulled the swearing-in of three persons elected to the NA,

<sup>87</sup> Specifically, in connection with the interpretation of articles 150, 187.9, 236.14 and 247 of the Constitution.

<sup>88</sup> Constitutional Chamber Judgment No. 618 of 20 July 2016, Case 16-0683, Joint opinion.

<sup>89</sup> Article 80 of the Decree with the Rank, Value and Force of Organic Law on the Financial Administration of the Public Sector.

<sup>90</sup> Article 101 of the Decree with the Rank, Value and Force of Organic Law on the Financial Administration of the Public Sector.

<sup>91</sup> Articles 150 and 198 (9) of the Constitution.

<sup>92</sup> Judgments No. 260 December 2015 and No. 1 of 11 January 2016.

out of the 167 deputies in the legislature, and “the unconstitutionality would derive from the National Assembly’s ineligibility to enact valid laws while it was in contempt of the ruling by the Judicial Power.”

On September 2, 2016, the Supreme Court handed down its judgment, fully accepting the arguments put forward by the Head of State.<sup>93</sup> The SCJ went even further: not only did it declare null and void the Law on the Partial Reform of Decree No. 2165, but all laws “of any kind,” including laws issued or passed by the NA while the three people whose swearing-in was overturned by the SCJ’s Electoral Chamber continued to serve as deputies. Thus, the Supreme Court stripped the legislature of its powers and functions.

Rightly, the Inter-American Commission on Human Rights considered that by making this decision that declared null and void the validity and legal effects of all decisions by the National Assembly, the Supreme Court was “violating the principle of separation of powers that is necessary for a democratic society.”<sup>94</sup>

## 6. Legislative Powers in Judicial Matters

On April 7, 2016, the National Assembly passed the Law on the Partial Reform of the Organic Law of the Supreme Court. The President requested that the SCJ’s Constitutional Chamber make a ruling on constitutionality prior to giving his approval for this law. In his petition, the Head of State said that “there arises in the undersigned serious doubts about the authority of the members of the National Assembly to submit bills to the Legislature and thus begin the process of lawmaking provided in our Constitution; since, in our understanding, this competence falls exclusively and solely to the Supreme Court, in accordance with the provisions of article 204 of the Constitution.”

In May, the Supreme Court’s Constitutional Chamber issued its decision,<sup>95</sup> declaring the Law on the Partial Reform of the Organic Law of the Supreme Court unconstitutional. The Supreme Court considered that a bill on this matter corresponds solely to the judicial branch, according to article 204 of the Constitution. The Supreme Court concluded that, on judicial matters, the initiative to present bills corresponds to the judicial branch “exclusively and solely.”

The Supreme Court also declared that article 211 of the Constitution “requires consultation on the subject with ‘judges that the Supreme Court of Justice delegates, representing the Judicial Power,’ to hear their opinions about a bill that concerns them, during the process of discussion and approval.” The Supreme Court considered that “it is [...] in any case a requirement to hear the opinion of the Court in the drafting of law.” Although the NA called a consultation about the bill with the Supreme Court and the executive director of the Judiciary, the Supreme Court considered that it had not been announced in due time and that “neither the President nor the other members of the Constitutional Chamber could give an opinion on the bill, given that this task corresponds to the same prior and subsequent review referred to in the Constitution.”

The Supreme Court considered that, as an amendment of an organic law, it must be adopted by a qualifying vote of the two thirds of the NA, in accordance with the Constitution.<sup>96</sup> However, the previous jurisprudence of the TSJ had exempted from that requirement to the laws that the Constitution itself describes as “organic”, as would be the case of the Organic Law of the Supreme Court.

Thus, when the NA was dominated in number by deputies sympathetic to the government, the Supreme Court had made another interpretation of those constitutional clauses and had issued a judgment with the completely opposite conclusion. In 2000, the Supreme Court had declared that, according to article 204 of the Constitution, the National Assembly had powers to legislate on judicial matters and that the bill on this subject was not the exclusive domain of the Supreme Court.<sup>97</sup> Also in 2004, the Supreme Court denied the need for a

<sup>93</sup> Constitutional Chamber Judgment No. 808 of 2 September 2016, Case 16-0831, Joint opinion.

<sup>94</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, “Venezuela”, para. 83. See also: Press Release No. 132/16, “IACHR Expresses Concern Regarding Restrictions in the Exercise of Fundamental Rights in Venezuela,” of September 14, 2016.

<sup>95</sup> Judgment No. 341 of 5 May 2016, Case. 160396, Joint opinion.

<sup>96</sup> Article 203 of the Constitution.

<sup>97</sup> Judgment No. 1088 of 27 September 2000, Case. No. 002163, Judge José M. Delgado Ocando.

qualifying vote of the two thirds of the NA concerning the Organic Law of the Supreme Court, passed the same year.<sup>98</sup>

Furthermore, without further explanation or justification, the Supreme Court considered that increasing the number of judges on the Supreme Court, as proposed by the challenged partial reform, was “unjustified” and “violates the principles of autonomy and independence of the judicial branch (articles 136, 137, 253 and 267), constitutional supremacy (article 7), judicial protection of the Constitution (article 335), and the democratic principle (articles 2 and 6), all expressly contained in the Constitution.” It should be noted that the Constitution does not prescribe the number of judges on the Supreme Court, leaving that task to the legislature.

With its ruling declaring the unconstitutionality of the Law on the Partial Reform of the Organic Law of the Supreme Court, the Supreme Court interpreted the constitutional clauses based on the balance of power within the NA, and in response to partisan political interests of the Executive Branch.

## 7. Legislative Oversight

On February 17, 2016, three lawyers filed a petition for constitutional interpretation before the SCJ’s Constitutional Chamber on the scope of legislative oversight provided for in the Constitution,<sup>99</sup> in relation to the Law on the Regime for Public Officials or Private Individuals To Appear Before the National Assembly or its Committees (Summons Law). The request was made based on “a public and communicational fact that, during recent months, the National Assembly, through various communications from the President, First Vice President and Second Vice President and the various legislative committees, had called upon the highest authorities of the National Executive to appear.” According to the plaintiffs, the NA’s action gave rise to the judicial remedy because “it did not specify the actual purpose of the summons and has merely stated that such hearings are intended ‘to meet to discuss the economic future of the country,’ ‘to dialogue with them to make decisions to solve the problems affecting the country’ and ‘to clarify questions for the country and to produce diagnostics on the country’s current situation concerning each of the production sectors and, as a result, to design public policy and administrative lines of action to be developed by the Executive Power on the issue debated.”

It should be noted that the Summons Law authorizes the NA to: make agreements with all civil servants on appearances before the plenary or the committees;<sup>100</sup> summon officials, other than its own superiors;<sup>101</sup> and summon “members of the Citizen Power: Ombudsman, Prosecutor General and Comptroller General of the Republic; from the Electoral Power: Directors of the National Electoral Council; from the Judicial Power: Judges of the Supreme Court of Justice, as well as from the Executive Power: Executive Vice President of the Republic, and the Ministers.”<sup>102</sup> Likewise, the law establishes penalties for those who have been summoned and do not attend or who offer excuses without justification.<sup>103</sup>

In March, the Supreme Court issued its judgment.<sup>104</sup> The Supreme Court considered that legislative oversight would be limited to the government and the national public administration only, “that is, the National Executive Power [...] and not the rest of the Public Powers (Judicial, Citizen and Electoral).” The Supreme Court also limited the ways in which the duties of legislative oversight could be exercised: they “must be directed precisely at the officials and other persons subject to that oversight, indicating the justification and legal basis that supports it, the precise and rational reason and scope of the same [...] and finally, be guided by the principles of utility, necessity, reasonableness, proportionality and cooperation between public powers (without purporting subrogation in the design and implementation of public policy that inherently falls within the scope of the National Executive Power).”

<sup>98</sup> Judgment No. 34 of 26 January 2004, Case. 0 3-2109, Judge José M. Delgado Ocando.

<sup>99</sup> Articles 187, 222, 223 and 224 of the Constitution.

<sup>100</sup> Article 3.

<sup>101</sup> Article 11.

<sup>102</sup> Article 12.

<sup>103</sup> Article 21.

<sup>104</sup> Judgment No. 9 of 1 March 2016, Case. No. 160153, Judge Arcardo Delgado Rosale.

It is clear that this interpretation was restrictive and even contrary to the letter and spirit of the Constitution, and it suppressed one of the NA's main functions: its fundamental role to combat corruption and abuse of power. The ruling favored the arbitrary exercise of public powers, and prevented the legislature from pursuing investigations and exercising oversight.

The Supreme Court considered that the National Assembly's creation of the Special Committee To Evaluate the Appointment of Judges violated the Constitution, even though the appointment and removal of SCJ judges was within the competence of the legislative body.<sup>105</sup>

Finally, the Supreme Court ordered the "disabling" of articles 3, 11, 12 and 21 to 26 of the Summons Law and article 113 of the National Assembly's Interior and Debates Regulations. Eliminating ("disabling" in the SCJ's language) the regulations that allowed the NA to exercise political oversight of the government and the administration, seriously affected the balance of powers and removed a factor that was essential in preventing arbitrariness. Thus, the Supreme Court decreased the powers of political oversight of the only institutional body tasked with exercising control over the government and the national public administration.

### **8. The NA and Removal of SCJ Judges**

On July 15, 2016, several NA deputies sympathetic to the government asked the SCJ's Constitutional Chamber to annul the Act of Approval of the Final Report of the Special Committee for the Rescue of Institutionality of the Supreme Court, adopted by the NA on July 14, 2016. The report recommended rescinding the appointment of 13 Supreme Court judges and 21 substitutes that had been done hastily by the outgoing NA that was controlled by the ruling party, during its session of December 23, 2015, on the grounds that the procedures and requisites specified by the Constitution and the law were not followed. The plaintiffs considered that this was in contempt of Supreme Court Judgment No. 9 of March 1, 2016 and a flagrant violation of the Constitution.

Four days after the appeal was filed, on July 19, 2016 the Supreme Court issued its ruling.<sup>106</sup> The Chamber argued that the removal of judges corresponds to the Citizen Power and that the creation of a special committee of the National Assembly "to review appointments of senior officials of another branch" was "clearly unconstitutional and/or illegal." Accordingly, the Supreme Court declared null: the Special Committee, the act that created it, its actions and reports; any "committee or other device" to rescind the appointment of the Supreme Court judges; and the convening and acts issued by the NA at its regular session on July 14, 2014. In addition, the Supreme Court declared the full validity of the legislative act that the NA had adopted during the session on December 23, 2015, which appointed and swore-in the 34 judges to fill vacancies in the SCJ, and therefore they would remain in their positions at the top court for the constitutional term.

It should be noted that the Constitution provides: that the NA elects the Supreme Court judges, after a selection process in which the Judicial Nominations Committee of the NA and Citizen Power are involved;<sup>107</sup> the NA may remove SCJ judges with a qualified two-thirds majority of members in the case of serious misconduct already characterized as such the Citizen Power.<sup>108</sup> The Constitution empowers the National Assembly to create "ordinary and special Standing Committees."<sup>109</sup>

Thus, the Supreme Court validated the irregular proceedings used on December 23, 2015 to appoint the Supreme Court judges (see Introduction), annulling also, for the first time in its constitutional case law, the act of creating a legislative committee.

<sup>105</sup> Articles 264 and 265 of the Constitution.

<sup>106</sup> Judgment No. 614 of 2016 of 19 July 2016, Case. No. 16-0153, Judge Gladys Gutiérrez Alvarado.

<sup>107</sup> Article 264 of the Constitution.

<sup>108</sup> Article 265 of the Constitution.

<sup>109</sup> Article 193 of the Constitution.

## CHAPTER IV: THE SUPREME COURT AND STATES OF EXCEPTION

In January 2016, the government declared a state of economic emergency throughout Venezuela for a period of 60 days, by means of Decree No. 2184.<sup>110</sup> The declaration invoked the existence of an “economic war” and “strategies of economic destabilization” against the country. In addition to granting precise powers to take action in certain sectors or on certain matters, the decree gave the executive branch broad powers to enact “measures of social, economic or political order as it deems appropriate.”<sup>111</sup> The state of economic emergency was extended by Decree No. 2270. In May 2016, in Decree No. 2323, the government declared a State of Exception and Economic Emergency.<sup>112</sup> Since then, the State of Exception and Economic Emergency has continued to be extended, despite the fact that the Constitution allows only one extension.

According to the Constitution, the decree declaring the State of Exception must comply “with the requirements, principles and guarantees established in the International Covenant on Civil and Political Rights and the American Convention on Human Rights”<sup>113</sup> and be “submitted within eight days of promulgation for consideration and approval by the National Assembly, or Delegated Committee.”<sup>114</sup> The Constitution also stipulates that “[t]he declaration of a state of exception does not interrupt the functioning of the organs of the Public Power.”<sup>115</sup> For its part, the Organic Law on States of Emergency<sup>116</sup> states that “[t]he decree declaring a state of exception, [...] shall be adopted by an absolute majority of the deputies present in a special session to be held without prior notice, within forty-eight hours of the decree having been made public,”<sup>117</sup> and that the SCJ’s Constitutional Chamber “shall desist from making any pronouncement, if the National Assembly or Delegated Committee disapproves the state of exception decree or declines its extension, declaring the measure extinguished.”<sup>118</sup>

### 1. Declaration of the State of Economic Emergency

In accordance with the measures to review the constitutionality of declarations of states of exception, as provided for by the Constitution,<sup>119</sup> the Supreme Court’s Constitutional Chamber examined Decree No. 2184.

In its ruling of January 2016, the Supreme Court declared constitutional the declaration of a State of Economic Emergency.<sup>120</sup> According to the SCJ, the declaration “addresses as a priority aspects of economic security, finding reasons, furthermore, in the current Latin American and global economic environment, and is proportional, relevant, useful and necessary for the integral exercise and development of the constitutional right to social protection by the State.” SCJ also considered that “the extremes of necessity, suitability and proportionality of the emergency measures decreed have been verified, they are deemed necessary, appropriate and proportional for the restoration of socioeconomic conditions allowing the country’s economic stabilization and to mitigate the inflation induced.”

In no way did the Supreme Court rule on the general power of the executive branch to enact the “measures of social, economic or political order, as it deems appropriate,” nor how said measures meet the criteria of appropriateness and proportionality required by both national<sup>121</sup> and international law.<sup>122</sup>

<sup>110</sup> Decree No. 2184, published in *Official Gazette*, Extraordinary No. 6214 of 14 January 2016, which declared a nationwide state of economic emergency lasting 60 days.

<sup>111</sup> Article 3 of Decree No. 2184.

<sup>112</sup> Decree No. 2323, declaring a state of exception and economic emergency due to extraordinary social, economic, political, natural, and ecological circumstances gravely affecting the national economy. Published in *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6227 of 13 May 2016.

<sup>113</sup> Article 339 of the Constitution.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Published in the *Official Gazette of the Bolivarian Republic of Venezuela*, No. 37,261 of 15 August 2001.

<sup>117</sup> Article 27.

<sup>118</sup> Article 34.

<sup>119</sup> Articles 336 (6) and 339 of the Constitution.

<sup>120</sup> Judgment No. 4 of 20 January 2016, Case No. 16-0038, Joint opinion.

<sup>121</sup> Article 339 of the Constitution and Organic Law on States of Exception.

Although the decree referred only to the right to access essential goods and services and the “rights and well-being of families, children and adolescents, and the elderly,” the Supreme Court considered that the decree “preserves and ratifies the full exercise of constitutional rights and guarantees and others provided in the law” and upheld “the principles and regulations contained in the Constitution [...] in international human rights treaties validly signed and ratified by the Republic, and the Organic Law on States of Exception.”

## 2. Interpretation on States of Exception

In February 2016, the Supreme Court’s Constitutional Chamber the issued a ruling of interpretation<sup>123</sup> on the scope, specificities and consequences of article 136 (Public Power) of the Constitution<sup>124</sup> and the Organic Law on States of Exception, pursuant to a petition filed by civil society organizations sympathetic to the government.<sup>125</sup> It should be noted that on January 22, 2016, the National Assembly (NA) had declined to approve Decree No. 2184 that declared a state of economic emergency. The plaintiffs argued that, according to the Organic Law on States of Exception,<sup>126</sup> the NA had 48 hours to give its approval or disapproval, but it only made its pronouncement on January 22, and thus the legislature had created “a situation of fear in some sectors of the nation.”

In its judgment, the Supreme Court held that “the National Assembly’s approval or disapproval of the state of exception decree affects it from the perspective of political control and thus conditions it politically, but not from the juridical-constitutional perspective, because, otherwise, it would not make sense that the constituent, in accordance with the principles of constitutional supremacy and the Constitutional State (not the former Legislative Rule of Law), would require, in addition to that control, a review of constitutionality of the same, by this Chamber, as the highest protector of Constitutionality.” Thus, the Supreme Court declared that the decree had entered into force because it had been issued and “its legal-constitutional legitimacy, validity, effectiveness and efficiency were irrevocably intact.”

The Supreme Court also considered that the NA had failed to abide by the deadline of 48 hours mandated by the Organic Law on States of Exception and therefore the legislature had violated the legal proceedings, legal certainty and due process enshrined in article 49 of the Constitution, whereupon the decision of disapproval of Decree No. 2184 was null and void because it was unconstitutional. The reference to article 49 of the Constitution was strange, since this article regulates the right to due process for individuals, among their civil rights. Thus, the Supreme Court held that the decision of disapproval on Decree No. 2184 shall be “understood as non-existent and having no legal-constitutional effect.”

With this decision, the Supreme Court would establish an interpretation on the powers of the state of exception that was contrary to the Constitution itself and had serious and profound consequences. Indeed, the SCJ gave supra-constitutional hierarchy to the Organic Law on States of Exception, even though the Constitution gives a deadline of eight days, once a decree with a declaration of a State of Exception has been issued, for the NA to decide whether to give its approval.<sup>127</sup> In issuing its ruling, the SCJ broke the Organic Law on States of Exception, since this law provides that if the NA does not approve the decree of a state of exception, the high court must refrain from ruling and declare the measure terminated<sup>128</sup>. The SCJ stripped the NA of its constitutional power to annul the legal effects of the declaration of a state of exception. Finally, the SCJ ignored and

<sup>122</sup> Article 4 of the *International Covenant on Civil and Political Rights* and *General Comment No. 29, States of Emergency* (article 4) by the Human Rights Committee. It is noteworthy that article 339 of the Venezuelan Constitution stipulates that the decree of the declaration of a state of exception must comply “with the requirements, principles and guarantees established in the International Covenant on Civil and Political Rights.”

<sup>123</sup> Judgment No. 7 of 11 February 2016, Case 16-0117, Joint opinion.

<sup>124</sup> Article 136 reads: “Public Power is distributed among Municipal Power, that of the States Power and National Power. National Public Power is divided into Legislative, Executive, Judicial, Citizen and Electoral. Each of the branches of Public Power has its own functions, but the organs charged with exercising the same shall cooperate with one another in attaining the ends of the State.”

<sup>125</sup> Community Councils, comunas and other organized grassroots social movements.

<sup>126</sup> Article 27.

<sup>127</sup> Article 339 of the Constitution.

<sup>128</sup> Article 34.

supplanted the powers of control that the Constitution assigns to the NA on States of Exception.

In March, the Supreme Court reaffirmed its interpretation. On March 11, 2016, the government issued Decree No. 2270, extending the State of Economic Emergency,<sup>129</sup> declared in Decree No. 2184. On the same date, the President of the Republic asked the Supreme Court to rule on the constitutionality of the extension, on the grounds that the structural crisis of the income-based model, caused by falling oil prices, made it imperative to continue the State of Economic Emergency. On March 17, the Supreme Court's Constitutional Chamber issued its ruling,<sup>130</sup> declaring the constitutionality of Decree No. 2270. From then on and until the end of this report, the SCJ continued to assume the function of approving without reservation all states of exception and emergency and their successive extensions, in open violation of the Constitution..

### 3. State of Exception and Economic Emergency

On May 18, 2016, the President of the Republic asked the Supreme Court to rule on the constitutionality of the State of Exception and Economic Emergency declared by Decree No. 2323 of May 2016. According to this decree, the declaration of a state of exception was based on: "attacks on the Venezuelan economy, with the aim of promoting discontent against the National Government; creating a climate of uncertainty in the population, with the intent of destabilizing the institutions of the state;" declaring that since January 5, 2016, the majority in the NA had been deputies "in opposition to the Bolivarian Revolution, who, as of their electoral platforms and in their most recent actions under the guise of formality, have purported to disregard all of the Public Powers and particularly promoting the disruption of the presidential term established in the Constitution by any mechanism at their disposal, outside the constitutional order, even making threats and insulting the highest authorities of all the Public Powers;" and alleging the existence of national and foreign economic aggression.

Decree No. 2323 granted broad powers to the Bolivarian National Armed Forces (FANB), state security bodies, People's Power organizations, "citizen security organs," and the Local Supply and Production Committees (CLAP) to exercise security and citizen control, including the "proper distribution and marketing of food and basic necessities." It should be noted that the Inter-American Commission on Human Rights (IACHR) considered that "the armed forces was not properly trained to do citizen security work, it was the responsibility of civilian police, duly trained and respectful of human rights, to guarantee safety and maintain public order domestically."<sup>131</sup>

Decree No. 2323 was not only meant to address the serious social and humanitarian crisis, marked by shortages and scarcity of food and medicines. Using broad and ambiguous language, the executive branch granted itself discretionary powers "to dictate measures and implement special plans for public security [... against] destabilizing actions that aim to interrupt the country's internal life or its international relations;"<sup>132</sup> prevent "foreign interference in the internal affairs of the Venezuelan State;"<sup>133</sup> and suspend financing to individuals and organizations.<sup>134</sup> The IACHR had warned that this emergency legislation would possibly be used to restrict fundamental freedoms and suspend funding of civil society organizations, as well as how it "could compromise respect for the rule of law and separation of State powers."<sup>135</sup> The decree also contained a veritable impunity clause, by establishing the "temporary and exceptional suspension of the execution of sanctions of

<sup>129</sup> Published in the *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6219 of 11 March 2016.

<sup>130</sup> Judgment No. 184 of 17 March 2016. Case No. 16-0038, Joint opinion.

<sup>131</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, "Venezuela," para. 42; and Press Release No. 71/16, "IACHR Expresses Concern Regarding the Declaration of a 'State of Exception and Economic Emergency,'" of June 1, 2016.

<sup>132</sup> Decree No. 2323, article 2 (16).

<sup>133</sup> *Ibid.*

<sup>134</sup> Decree No. 2323, article 2 (18).

<sup>135</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, "Venezuela," para. 56; and Press Release No. 71/16, "IACHR Expresses Concern Regarding the Declaration of a 'State of Exception and Economic Emergency,'" of June 1, 2016.



a political nature against the highest authorities of government and other senior officials, when such sanctions could [...] undermine the security of the nation.”<sup>136</sup>

It should be noted that on May 17, 2016, in exercise of the powers to approve or disallow states of exception, as enshrined in the Constitution,<sup>137</sup> the National Assembly adopted a resolution rejecting the Declaration of a State of Exception and Economic Emergency, considering that it violated the constitutional requirements.

On May 19, the Supreme Court upheld the constitutionality of Decree No. 2323,<sup>138</sup> even though the Organic Law on States of Exception provides that, when the NA has disallowed the state of emergency decree or refused its extension, the highest judicial body shall decline to make any pronouncement.<sup>139</sup>

In its ruling, the Supreme Court plainly and simply validated the arguments of the executive branch, without examining the issue of broad emergency powers, nor the relation, proportionality and legitimacy of the measures and powers enacted. And until the end of this report, the SCJ continued to do so with successive extensions, in violation of the Constitution.

#### 4. Special Law To Address the National Health Crisis

On May 3, 2016, the National Assembly passed the Special Law to Address the National Health Crisis, “to establish mechanisms for the National Executive, in coordination with other public powers, to resolve the National Health Crisis, fulfilling its role as guarantor of the right to life, the right to health, and timely access to effective, safe and quality medicines and appropriate treatment.”<sup>140</sup> The law authorized the executive branch to establish a “Priority Care Plan for the National Health Crisis” and stated that the national executive would report regularly to the NA about its implementation and progress.

On May 26, 2016, the President of the Republic challenged the constitutionality of this law before the Supreme Court.

In June, the Supreme Court declared the Special Law to Address the National Health Crisis<sup>141</sup> unconstitutional. The Supreme Court said that “with the state of exception in effect, the National Assembly maintains its authority to legislate on matters other than those included in the scope of circumstances contained in the act by which the State of Exception and Economic Emergency is declared, thus its legislative authority is preserved” and that “the exceptional regime ‘does not interrupt the functioning of the organs of Public Power,’” as established by article 339 of the Constitution and article 3 of the Organic Law on States of Exception. Nevertheless, the Supreme Court held that this constitutional and legal device “does not imply that these [organs of public authority] may issue regulations or laws to address the emergency situation, since the authority conferred on the National Executive under the state of exception does not allow for redundancy and temporarily blocks the powers of other bodies to legislate on the same subject as the special regime.” Thus, the Supreme Court considered that the NA had usurped the powers of the President of the Republic by establishing mechanisms for legislative oversight other than those provided for in the Constitution.

In addition, the Supreme Court considered that in the process of passing the law, the National Assembly had not complied with the procedures for drafting laws set forth in the National Assembly’s Interior and Debates Regulations.

With its decision, the Supreme Court cut off the National Assembly’s legislative powers during a state of state of exception, and legislative oversight provided for in the Constitution.<sup>142</sup>

<sup>136</sup> Decree No. 2323, article 2 (7).

<sup>137</sup> Article 339 of the Constitution.

<sup>138</sup> Judgment No. 411 of 19 May 2016, Case No. 16-0470, Joint opinion.

<sup>139</sup> Article 34.

<sup>140</sup> Article 1 of the Special Law to Address the National Health Crisis.

<sup>141</sup> Judgment No. 460 of 9 June 2016, Judge Calixto Ortega Ríos.

<sup>142</sup> Article 222 of the Constitution.

## 5. Extension of the State of Exception and Economic Emergency

On July 12, 2016, with Decree No. 2371, the government extended the State of Exception and Economic Emergency that had been declared in Decree No. 2323, in order to “continue to provide protection for Venezuelans against the economic war.”<sup>143</sup> The President asked the SCJ’s Constitutional Chamber to rule on the constitutionality of the extension decree.

On July 16, 2016, the Supreme Court issued its ruling declaring Decree No. 2371 constitutional.<sup>144</sup>

The Supreme Court reminded that Decree No. 2323 had been declared constitutional<sup>145</sup> and that it was “an act of a special nature, with the rank and force of law, temporary, with real value that makes it legal and that is, therefore, vested with the characteristics of acts of regular legal status, and more particularly conceived in the category of acts of government.” In addition, the Supreme Court considered that Decree No. 2323 “appears compatible with the need to achieve the essential purposes of the State pursuant to article 3 of the Constitution, as well as with macroeconomic and macro-social goals and the achievement of the general objectives and strategies adopted in the Plan of the Homeland, Second Socialist Plan for Economic and Social Development of the Nation, 2013-2019.” Thus, the SCJ turned a tool for exceptional circumstances into an ordinary resource for government policies.

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<sup>143</sup> Article 1 of Decree No. 2371.

<sup>144</sup> Judgment No. 615 of 19 July 2016, Case No. 16-0470, Joint opinion.

<sup>145</sup> Judgment No. 411, doc. cit.

## CHAPTER V: THE SUPREME COURT AND THE AMNESTY LAW

On March 29, 2016, the National Assembly (NA) passed the Law on Amnesty and National Reconciliation, in order to “lay the foundations for national reconciliation and social peace.”<sup>146</sup> Amnesty was granted for “acts performed in the exercise of civil liberties for political purposes, which have led or may lead” to investigation, prosecution and conviction as “incidents linked to investigations, allegations, accusations or criminal convictions, or administrative sanctions, which have occurred under circumstances that undermine confidence in the impartial administration of justice or about which it may be concluded that these owe to political persecution.”<sup>147</sup> The law granted also amnesty for crimes and offenses committed in connection with the coup against President Hugo Chávez (April 11-14, 2002), as well as those “directly related to the call for a general or national strike, work stoppage or other similar actions undertaken during the national and oil sector strike that was declared and took place during 2002 and early 2003,”<sup>148</sup> to which the amnesty decreed by President Hugo Chávez in 2007<sup>149</sup> had not applied.

Excluded from the amnesty were “war crimes, genocide and crimes against humanity, [as well as] offenses involving serious human rights violations”<sup>150</sup> and the crimes of homicide and/or serious or very serious injury committed in relation or connection with crimes eligible for amnesty.<sup>151</sup> To monitor its implementation, the law specified the establishment of a “Special Committee for Reconciliation, of politically plural composition,”<sup>152</sup> authorized to recommend the creation of a truth commission.

The Constitution regulates the figure of amnesty.<sup>153</sup> The Constitution provides that it shall be the function of the National Assembly “to order amnesties.”<sup>154</sup> While the Constitution does not specify that amnesty may only be granted for political crimes, it excludes crimes against humanity, serious human rights violations, and war crimes.<sup>155</sup> Finally, the Constitution stipulates that amnesty laws may not be abrogated by referendum.<sup>156</sup>

During the legislative process and after the Law on Amnesty and National Reconciliation was passed, the President publicly announced that he would not approve the law. On April 7, 2016, the President challenged the constitutionality of the law before the Supreme Court. The President argued that with this law, the NA intended “to undermine the Venezuelan State; end the legitimately constituted government [...and] ensure impunity for common crimes committed by the sectors that currently control the national legislature,”<sup>157</sup> and that the Constitution only provides amnesty for “crimes of a political type.”

### 1. The Supreme Court Ruling

On April 11, 2016, the Constitutional Chamber of the Supreme Court declared the Law on Amnesty and National Reconciliation unconstitutional.<sup>158</sup> The Supreme Court based its decision essentially on two arguments: one political and the other “legal.”

First, the Supreme Court held that the constitutional authority of the National Assembly to grant amnesties was limited “to true moments of rupture and the need to establish a political community.” According to the SCJ, this was not the situation taking place in Venezuela. As such, the Supreme Court held that the misuse of amnesty could “represent a marker that would ruin the public sphere, weaken democratic institutions and destroy the

<sup>146</sup> Article 1 of the Law on Amnesty and National Reconciliation.

<sup>147</sup> Article 2 of the Law on Amnesty and National Reconciliation.

<sup>148</sup> Article 10 of the Law on Amnesty and National Reconciliation.

<sup>149</sup> Decree No. 5790 with Rank, Value and Special Force of Law on Amnesty, of 31 December 2007, published in *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 5870 of 31 December 2007.

<sup>150</sup> Article 3 of the Law on Amnesty and National Reconciliation.

<sup>151</sup> Article 7 of the Law on Amnesty and National Reconciliation.

<sup>152</sup> Article 28 of the Law on Amnesty and National Reconciliation.

<sup>153</sup> Articles 29, 74 and 187 (5).

<sup>154</sup> Articles 187 (5).

<sup>155</sup> Article 29.

<sup>156</sup> Article 74.

<sup>157</sup> Selected comments cited in Supreme Court Constitutional Chamber Judgment No. 264 of 11 April 2016.

<sup>158</sup> Constitutional Chamber Judgment No. 264 of 11 April 2016, Case No. 16-0343, Joint opinion.

rule of law and justice enshrined in the Constitution, not being a means of achieving social peace, but rather a reason to impose violence and impunity on society, including for the purpose of establishing a legal framework to enable or facilitate real anomie, that would allow the implementation of plans for destabilization or disregard of the Democratic State.” The Supreme Court considered that the law represented “an arbitrary activity by the legislature, which is not acting on behalf of the general interest of society [...] but seeks to impose real hegemony of sectoral interests over constitutional principles [...] taking advantage of legitimacy derived from indirect representation exercised within the framework of the powers of the Legislative Organ. [...] The National Assembly seeks to impose and reproduce a social reality in the framework of a process of establishing a hegemonic position [...] by imposing anti-values such as impunity and disobedience of the law through a legal and institutional framework.”

Second, the Supreme Court considered that the amnesty could only be granted for “political crimes exclusively,” meaning “those that are against the State and its institutions” and that are defined as such in the Criminal Code.<sup>159</sup> According to the SCJ, common crimes,<sup>160</sup> even if committed for political reasons or in connection with these, would not be eligible for amnesty as that would “imply denying that Venezuela is a democratic and social State of Law and Justice.” Thus, the Supreme Court held that “acts performed in the exercise of civil liberties and for political purposes” covered by the Law on Amnesty and National Reconciliation were not included in the figure of “strictly political crime.” The Supreme Court furthermore considered that to grant amnesty for these acts would constitute “an invitation that would set a terrible precedent, which instigates the rebellion of the individual against the will of the law [...] [and] as to protest demonstrations as the ‘*exercise of civil liberties and for political purposes*,’ this is not permissible under the constitutional lens because it would disregard the fact that Venezuela is a democratic and social State of Law and Justice.”

To support its decision, the Supreme Court cited the two amnesty laws issued in Venezuela, one by the National Assembly (when it was controlled by a pro-government majority) in April 2000 and another by Presidential Decree in December 2007.<sup>161</sup> According to the Supreme Court, these only granted amnesties for “political crimes exclusively.” However, the text of both laws says otherwise. For example, the April 2000 amnesty law also granted amnesty for “crimes [...] related to political offenses” or committed “for political reasons.”<sup>162</sup> For its part, Decree 2007 made eligible for amnesty several common crimes when committed for political reasons, such as unlawful detention and search of residence.<sup>163</sup> It should also be noted that article 187 of the Constitution refers only to the general power of the NA to decree amnesties, without restricting these exclusively to political offenses and, by express constitutional provision,<sup>164</sup> the only crimes to which amnesty may not be applied are crimes against humanity, serious human rights violations, and war crimes. Furthermore, neither the Criminal Code, the Organic Code of Military Justice, nor the Criminal Procedures Code strictly limit amnesty for to political crimes.

The SCJ’s main argument was that the Amnesty Law included crimes that could not be considered “political,” and ruled to strike down the entire law, and not just the articles or crimes that it considered inapplicable, thus the principles of proportionality and upholding legal standards were violated.

With this decision, the SCJ put an end to one of the main promises that the deputies elected to the NA had made, which was to seek national reconciliation, among other things, by freeing the political prisoners.

<sup>159</sup> See Criminal Code: Title I, Book II, Offenses against the independence and security of the Nation; Chapter I; Treason and other crimes against the Homeland; Chapter II: Offenses against National Powers and States; and Chapter III: Crimes against international law; which contain illegal actions aimed at changing the existing political or social order in a State.

<sup>160</sup> For example: resisting authority; disobedience of authority; obstruction of public roads; offending a public official; crimes of defamation or libel; crimes of insulting the President or other public officials; crimes of creating unrest by spreading information considered false; criminal defamation of the Armed Forces; escape of detainees.

<sup>161</sup> Decree No. 5790 with Rank, Value and Special Force of Law on Amnesty of 31 December 2007, published in *Official Gazette*, Extraordinary No. 5870 of 31 December 2007.

<sup>162</sup> Article 1 of the Law on General Political Amnesty (2000).

<sup>163</sup> Article 1 of Decree No. 5790 with Rank, Value and Special Force of Law on Amnesty of 31 December 2007.

<sup>164</sup> Article 29 of the Constitution.

## 2. International Legal Framework

International law regulates amnesty in two ways. On the one hand, it prohibits amnesty from being applied to certain crimes and, on the other, it authorizes and promotes amnesty for political crimes and for people persecuted for political reasons.

International law absolutely prohibits amnesties that prevent investigation and/or exonerate the authors and other perpetrators of criminal responsibility for gross violations of human rights, crimes against humanity, genocide and war crimes.<sup>165</sup> This prohibition has been extensively reiterated in international case law,<sup>166</sup> by the Inter-American system,<sup>167</sup> the United Nations Security Council,<sup>168</sup> and the United Nations Secretary General.<sup>169</sup> Even when these crimes have been committed for political motives or reasons, political motivation is not taken into account for purposes of prosecution and punishment of these crimes, which is why they are not eligible for amnesties, extradition is obligatory, and asylum or refugee status may not be granted to the alleged perpetrators. In this context, the Law on Amnesty and National Reconciliation is not only consistent with the restrictions of article 29 of the Constitution of Venezuela, but also with the prohibitions on amnesties stipulated by international law.

International law not only permits but encourages amnesties or similar measures for political crimes and common crimes committed in relation to these.<sup>170</sup> Thus, the United Nations General Assembly,<sup>171</sup> the former United Nations Commission on Human Rights,<sup>172</sup> the Human Rights Committee,<sup>173</sup> and the Inter-American Commission on Human

<sup>165</sup> This fundamental rule of international law also has been enshrined in various international instruments: *Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights*, held in Vienna under the auspices of the United Nations in June 1993 (DPI/1394 -48164-October 1993/M, Section II, paragraph 60, p. 65); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 19); *Declaration on the Protection of All Persons from Enforced Disappearance* (art. 18); *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (Principles 22 and 24); *Statute of the Special Court for Sierra Leone* (art. 10); and *Statute of the Special Tribunal for Lebanon* (art. 6).

<sup>166</sup> See, among others: Human Rights Committee (*General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant; General Comment No. 20 (44) on article 7; and Concluding Observations to Argentina*, CCPR/C/79/Add.46; A/50/40 and CCPR/CO/70/ARG; Lebanon, CCPR/C/79/Add.78; Niger CCPR/C/79/Add.17; Peru (CCPR/CO/70/PER; Senegal, CCPR/C/79/Add.10; Republic of Congo, CCPR/C/79/Add.118; Republic of Croatia, CCPR/CO/71/HRV; and Uruguay, CCPR/C/79/Add.19); Committee against Torture (*General Comment 2, Implementation of Article 2 by States Parties*); International Criminal Tribunal for the former Yugoslavia, (Judgment of 10 December 1998, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T 10); and Special Court for Sierra Leone (Decision on preliminary motion on jurisdiction, 25 May 2004, *The Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72 (e) and Judgment of 3 March 2004, *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72 (E)).

<sup>167</sup> See, among others: Inter-American Commission on Human Rights (Report No. 34/96, Case 11.228 et al, Chile, October 15, 1996; Report No. 25/98, Case 11.505 et al, Chile, April 7, 1998; Report No. 136/99, Case 10.488, El Salvador, December 22, 1999; Report No. 1/99, Case 10.480, El Salvador, January 27, 1999; Report No. 26/92, Case 10.287, El Salvador, September 24, 1992; Report No. 28/92, Case 10.147 and others, Argentina, October 2, 1992; and Report No. 29, Uruguay, 1992) and Inter-American Court of Human Rights (Judgment of October 25, 2012, *Case of the Massacres of El Mozote v. El Salvador*, Series C No. 252; Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of September 26, 2006, *Case of Almonacid Arellano et al v. Chile*, Series C No. 154; and Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95).

<sup>168</sup> See, among others: Resolutions No. S/RES/1529 (2004) of 29 February 2004, S/RES/1479 of 13 May 2003, S/RES/1464 (2003) of 4 February 2003 and S/RES/1464 (2003) of 4 February 2003.

<sup>169</sup> *Seventh Report of the United Nations Secretary-General on the Observers' Mission in Sierra Leone*, S/1999/836, of 30 July 1999; *Report of the Secretary-General: The Establishment of a Special Court for Sierra Leone*, S/2000/915, of 4 October 2000; *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, S/2004/616, 20 July 2004; and *Report pursuant to resolutions 1160(1998), 1199(1998) and 1203(1998) of the Security Council*, S/1999/99 of 29 January 1999.

<sup>170</sup> Special Rapporteur on amnesty laws and their role in the safeguard and promotion of human rights, Mr. Louis Joinet, *Study on amnesty laws and their role in the safeguard and promotion of human rights*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1985/16 of 21 June 1985.

<sup>171</sup> See, for example, Resolutions No. 32/116 of 16 December 1977 (Southern Rhodesia-Zimbabwe), 32/65 of 8 December 1977 (South Africa), 32/182 of 21 December 1978 (Namibia), 38/38 of 13 December 1978 (Southern Rhodesia), 34/93 of 12 December 1979 (South Africa), 47/144 of 18 December 1992 (Myanmar), 50/194 of 22 December 1995 (Myanmar), 53/164 of 9 December 1998 (Kosovo), 55/117 of 4 December 2000 (Democratic Republic of Congo), 55/112 of 4 December 2000 (Myanmar) 64/238 of 24 December 2010 (Myanmar), and 68/183 of 18 December 2013 (Democratic Republic of Congo).

<sup>172</sup> See, for example, Resolution 1993/69, *Situation in Equatorial Guinea*, of 10 March 1993.

<sup>173</sup> See, for example, *Concluding Observations of the Human Rights Committee on: Morocco* of 23 November 1994, CCPR/C/79/Add.44, para. 6; *Syrian Arab Republic* of 24 April 2001, CCPR/CO/71/SYR, para 3; *Armenia* of 19 November 1998, CCPR/C/79/Add.100, para. 6; and *Libyan Arab Jamahiriya* of 23 November 94, CCPR/C/79/Add.45, para. 7.

Rights<sup>174</sup> have recommended the release of the perpetrators of political crimes, as well as granting amnesty or similar measures. In addition, international humanitarian law also recommends amnesties be granted to those who have fought against a government in the context of an internal armed conflict.<sup>175</sup>

Although international law does not provide a definition of political crime, this legal figure is widely recognized in international law and case law,<sup>176</sup> with a special regime on amnesties, extradition (prohibition of extradition),<sup>177</sup> and granting of asylum or refugee status. In international law and case law, it may be seen that the concept of political crime is broad and not restricted to crimes described as political crimes in national legislations. In international law, the concept of political crime encompasses both political crimes *sensu stricto*—meaning those classified as such in domestic legislation—as well as common crimes committed in connection with political crimes or common crimes committed for political reasons. It also addresses criminal persecution for political reasons.

Thus, for example, regarding the prohibition of extradition for political offenses, a number of international instruments specify in this prohibition “an offense related [to a political offense], or an ordinary criminal offense prosecuted for political reasons,”<sup>178</sup> as well as “common offenses connected to [political offenses].”<sup>179</sup> On the subject of asylum, for purposes of granting this protection, the *Convention on Territorial Asylum*, adopted in Caracas (1954), refers to “acts which may be considered as political offenses”<sup>180</sup> and “common offenses committed for political ends.”<sup>181</sup> The *American Convention on Human Rights* enshrines “the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”<sup>182</sup>

International bodies and proceedings have defined criteria to objectively assess when a political crime has taken place, in the broadest sense of the term, irrespective of national classifications of criminal acts. The Inter-American Commission on Human Rights (IACHR) describes certain common crimes as political crimes, regardless of whether they have been classified as political offenses under national law, provided that certain characteristics to constitute a political offense are met.<sup>183</sup> Thus, the IACHR has considered that the criminalization, in ordinary criminal law, of legitimate forms of political dissent and/or the exercise of the freedom of opinion, expression, association or assembly, constitutes a form of political crime. In *Study on amnesty laws and their role in safeguard and promotion of human rights*, Mr. Louis Joinet established generally accepted criteria to distinguish between political crime and common crime.<sup>184</sup> The Special Rapporteur noted that acts committed during economic and social conflicts (such as street demonstrations and agrarian conflicts) and crimes of opinion, as well as conducts subject to prosecution or conviction as criminal

<sup>174</sup> See, for example, the *Report on the Situation of Human Rights in the Republic of Nicaragua*, OEA/Ser.L/V/II.53, doc. 25 of June 30, 1981, Recommendations 3 and 5.

<sup>175</sup> Article 6 (5) of the *Additional Protocol to the Geneva Conventions of 12 August 1949 regarding the protection of victims of non-international armed conflicts (Protocol II)*.

<sup>176</sup> See, for example, *Concluding Observations of the Human Rights Committee on: Syrian Arab Republic* of 24 April 2001, CCPR/CO/71/SYR; Committee against Torture *Concluding Observations and Recommendations: China* of 26 June 1993, A/48/44, paras. 387-429; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Cuba*, OEA/Ser.L/V/ II.4 Doc. 2 of March 20, 1962; *Annual Report of the Inter-American Commission on Human Rights -1997*, OEA/Ser.L/V/II.98 Doc. 6 of February 17, 1998.; *Annual Report of the Inter-American Commission on Human Rights -2000*, OEA/Ser.L/V/II.111 doc. 20 rev. of April 16, 2001; and Report 49/01, Case 11.826 (*Leroy Lamey*), 11.843 (*Kevin Mykoo*), 11.846 (*Milton Montique*) and 11.847 (*Dalton Daley*) v. Jamaica, of April 4, 2001.

<sup>177</sup> See, among others: *United Nations Model Treaty on Extradition* (art. 3a), adopted by the United Nations General Assembly through Resolution 45/116 of 14 December 1990; *American Convention on Extradition* (art. 4); and *Treaty on International Penal Law* (art. 23), Montevideo, 1889.

<sup>178</sup> Article 4 of the *American Convention on Extradition*.

<sup>179</sup> Article 23 of the *Treaty on International Penal Law* signed at Montevideo in 1889.

<sup>180</sup> Article II.

<sup>181</sup> Article IV.

<sup>182</sup> Article 22 (7).

<sup>183</sup> See, for example, *Report on the Situation of Human Rights in the Republic of Cuba*, OEA/Ser.L/V/II.4, doc. 2, of March 20, 1962; and *Annual Report of the Inter-American Commission on Human Rights - 1997*, OEA/Ser.L/V/ II.98, doc. 6 of February 17, 1998: Report No. 49/01 of April 4, 2001, Case No. 11.826 (*Leroy Lamey*), 11.843 (*Kevin Mykoo*), 11.846 (*Milton Montique*) and 11.847 (*Dalton Daley*) v. Jamaica, paras. 131 and 137.

<sup>184</sup> E/CN.4/Sub.2/1985/16 of 21 June 1985, paras. 47 and 48.

offenses motivated by political reasons, should be eligible for amnesty.<sup>185</sup> For its part, the Standing Committee of the UN High Commissioner for Refugees (UNHCR) has stated that “[f]or a crime to be regarded as political, its political objective must also, for purposes of this analysis, be consistent with the exercise of human rights and fundamental freedoms.”<sup>186</sup> On the subject, the UNHCR has stated that “[i]n determining whether an offence is ‘non-political’ or is, on the contrary, a ‘political’ crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character.”<sup>187</sup>

Under international human rights law, the legitimate exercise of fundamental freedoms—such as those of expression, association and assembly, and the right to strike—legally may not be classified as crimes because the law is only supposed to prohibit conducts that are harmful to society.<sup>188</sup> Under international law, and only within a specific framework defined in it, may the exercise of certain fundamental rights and freedoms be restricted. In this regard, the Human Rights Committee considers that any deprivation of liberty to punish the legitimate exercise of a right or a fundamental freedom, such as those of opinion, expression, association and assembly, is incompatible with the *International Covenant on Civil and Political Rights*.<sup>189</sup> In countries where certain forms of expression or political opposition have been defined as offenses under criminal law, the Committee has recommended that legislation should be revised.<sup>190</sup> In the same vein, the United Nations General Assembly has urged states to repeal laws that “penalize the free expression of competing views and ideas.”<sup>191</sup>

For its part, the UNHCR has warned that “to criminalize legitimate activities of political opponents, [is] in a manner amounting to persecution.”<sup>192</sup> For its part, the UN Working Group on Arbitrary Detention has described arbitrary detention as the deprivation of liberty resulting from the exercise of the freedoms of thought, expression, assembly and association, and political rights.<sup>193</sup> In this sense, for example, the Working Group has said “that participating in a march for political reasons or exercising one’s right to freedom of expression during a march [...], does not constitute an offence that justifies the detention of a speaker or a participant.”<sup>194</sup>

Regarding Venezuela, the UN Working Group on Arbitrary Detention has termed the imprisonment of numerous opposition politicians, human rights defenders, and Venezuelan protesters arbitrary detention, and has called for their immediate release.<sup>195</sup> The Working Group has determined the existence of a pattern of arbitrary detention of political opponents and dissidents.<sup>196</sup> The Working Group has observed the use of Venezuelan

<sup>185</sup> Special Rapporteur on amnesty laws and their role in the safeguard and promotion of human rights, Mr. Louis Joinet, *Study on amnesty laws and their role in the safeguard and promotion of human rights*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1985/16 of 21 June 1985, paras. 47, 48, 49, 52 and 56.

<sup>186</sup> *Note on the Exclusion Clauses*, EC/47/SC/CRP.29 of 30 May 1997, para. 17.

<sup>187</sup> *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.1, January 1992, para. 152.

<sup>188</sup> Georges Levasseur, “Justice et Sûreté de l’Etat” (*Justice and State Security*) in *Journal of the International Commission of Jurists*, Winter 1964, Vol. V, No. 2, p. 264.

<sup>189</sup> See, among others: *General Comment No. 35: Article 9 (Liberty and security of person)*; and *General Comment No. 34: Article 19, Freedoms of opinion and expression*.

<sup>190</sup> See, for example, *Concluding observations of the Human Rights Committee on: Syrian Arab Republic*, CCPR/CO/71/SYR of 24 April 2001, para. 24, and *Iceland*, CCPR/CO/83/ISL of 25 April 2005, para. 10.

<sup>191</sup> Resolution No. 50/195, Situation of human rights in Iraq, of 22 December 1995, para. 10. See also: Resolution No. 56/171, Situation of human rights in the Islamic Republic of Iran, of 19 December 2001; Resolution No. 55/115, Situation of human rights in Iraq, of 4 December 2000; and Resolution No. 47/139, Situation of human rights in Cuba, of 18 December 1992.

<sup>192</sup> *Notes on International Protection*, A/JAC.96/965 of 11 September 2002, para. 39.

<sup>193</sup> Paragraph 8 (b) of *Methods of work the Working Group on Arbitrary Detention*, A/HRC/30/69 of 4 August 2015

<sup>194</sup> Opinion No. 26/2014 (Leopoldo López Mendoza), para. 54.

<sup>195</sup> See, among others, Comments: No. 62/2011 (Sabino Romero Izarra); No. 47/2013 (Antonio José Rivero González); No. 51/2014 (Maikel Giovanni Rondón Romero y otras 316 personas); No. 26/2014 (Leopoldo López Mendoza); No. 30/2014 (Daniel Omar Ceballos Morales); No. 1/2015 (Vincenzo Scarano Spisso); No. 26/2015 (Gerardo Ernesto Carrero Delgado, Gerardo Rafael Resplandor Veracierta, Nixon Alfonso Leal Toro, Carlos Pérez y Renzo David Prieto Ramírez; and No. 7/2015 (Rosmit Mantilla).

<sup>196</sup> Opinion No. 7/2015 (Rosmit Mantilla), para. 28.

criminal law to prosecute political opponents. In one case, the Working Group found that “[t]he extreme ambiguity of the charges brought against a leading member of a political party opposed to the Government allows the Working Group to consider that the detention stemmed from Mr. Rivero’s political affiliation. The charges of ‘involvement in acts of violence’ (unspecified), ‘public incitement to hatred’ and ‘criminal association,’ with no decision on, or explanation of, the material fact of which he is accused, leave the Working Group no option but to conclude that the deprivation of this individual’s liberty results from the legitimate exercise of the human rights to freedom of opinion, expression, assembly, association, and participation in public affairs.”<sup>197</sup>

In the same vein, the Committee against Torture has urged the Venezuelan Government to release immediately several political opponents and “all those who have been arbitrarily detained for having exercised their right to self-expression and peaceful protest.”<sup>198</sup> Likewise, regarding Venezuela’s political prisoners, High Commissioner for Human Rights Zeid Raad Al Hussein said in 2015 that he was “seriously concerned about the legality and conditions of people who have been detained for peacefully exercising freedom of expression and of assembly”<sup>199</sup> and he reiterated that they should be “promptly and unconditionally released.”<sup>200</sup>

The Commission has recommended that the Venezuelan State “[r]efrain from taking reprisals or using the punitive power of the State to intimidate or sanction individuals based on their political opinions, and guarantee the plurality of opportunities and arenas for democratic activity, including respect for gatherings and protests held in exercise of the right of assembly and peaceful protest”<sup>201</sup> and “prevent the use of criminal proceedings to inhibit free democratic debate on matters of public interest and the full exercise of political rights.”<sup>202</sup>

In summary, under international law it is lawful and legitimate to grant amnesties for common crimes committed for political ends or in connection with political offenses. The only exclusions from offenses of a political nature are crimes against humanity, war crimes, genocide and serious human rights violations. Likewise, persons who are prosecuted and/or convicted for the legitimate exercise of rights—such as political rights, the right to strike and/or fundamental freedoms, such as freedom of expression, association and assembly—under the application of criminal law, are considered to be political prisoners. This is how the IACHR<sup>203</sup> and the Working Group on the Universal Periodic Review<sup>204</sup> of the United Nations Human Rights Council have described this situation. Moreover, sometimes the behaviors for which they are charged or convicted are not even criminal offenses. In such cases, it is clear that prosecution and/or conviction are politically motivated and constitute a twisted form of political persecution.

As such, the Law on Amnesty and National Reconciliation was not only in accordance with constitutional provisions,<sup>205</sup> but also with international law. The Supreme Court’s decision to declare it unconstitutional was not due to legal arguments, but essentially for political motives, further violating the provisions of the Venezuelan Constitution.

<sup>197</sup> Opinion No. 47/2013 (Antonio José Rivero González), para. 32.

<sup>198</sup> *Concluding observations on the combined third and fourth periodic reports of the Bolivarian Republic of Venezuela*, CAT/C/VEN/CO/3-4 of 12 December 2014, para. 9.

<sup>199</sup> *Opening Statement by Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 29th Session*, 15 June 2015.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Annual Report of the Inter-American Commission on Human Rights, 2014*, Chapter IV, “Venezuela,” para. 699.

In the same vein, see: *Annual Report of the Inter-American Commission on Human Rights, 2015*, Chapter IV, “Venezuela,” para. 385 (8); and *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV, “Venezuela,” para. 240.

<sup>202</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV, “Venezuela,” para. 240.

<sup>203</sup> *Annual Report of the Inter-American Commission on Human Rights, 2015*, Chapter IV, “Venezuela,” paras. 87, 89 and 142; and *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV, “Venezuela,” paras. 79 and 99.

<sup>204</sup> *Report of the Working Group on the Universal Periodic Review - Bolivarian Republic of Venezuela*, A/HRC/34/6 of 27 December 2016, paras. 133.125, 133.136 and 133.188.

<sup>205</sup> Articles 29, 74, and 187 (5).



## CHAPTER VI: THE 2017 JUDGMENTS: THE SCJ DEALS THE FINAL BLOWS

Adding to the tide of decisions that were gradually stripping the NA of all of its functions, in March 2017, the SCJ's Constitutional Chamber handed down Judgments No. 155 and 156,<sup>206</sup> which represented a clear and direct general rupture of constitutional order, and which sparked reaction from civil society and the international community.<sup>207</sup>

### 1. Judgment No. 155 of 2017

This judgment ruled on a petition for nullity on the grounds of unconstitutionality presented by a pro-government deputy, against "the legislative act approved by the National Assembly on March 21, 2017, called the Agreement on the Reactivation of the Process of Implementation of the OAS Inter-American Charter, as a mechanism for the peaceful resolution of conflicts to restore constitutional order in Venezuela." To make its ruling on the petition, the SCJ's Constitutional Chamber cited what it referred to as "unnamed oversight of constitutionality," a mechanism that does not exist in Venezuela's legal system.

A particularly serious aspect of the judgment is that it did not recognize parliamentary immunity for opposition deputies. The ruling addressed article 200 of the Constitution, and the chamber reiterating its declaration of contempt: "... parliamentary immunity only protects [...] the acts undertaken by the deputies in exercise of their constitutional attributions (which is not compatible with the current situation of contempt in effect in the National Assembly) and, furthermore, in no case, [is it applicable] to constitutional and criminal offenses."

The SCJ's Constitutional Chamber declared the NA's Agreement unconstitutional, and it ordered two measures that are against Venezuelan law. First, the Constitutional Chamber ordered the President of the Republic to: Take such international measures as he deems pertinent and necessary to safeguard constitutional order; take the civil, economic, military, criminal, administrative, political, legal, and social measures he deems pertinent and necessary to guarantee the country's governance; and in the context of the State of Exception and in the face of the contempt and continued legislative omission by the NA, exceptionally to review substantive and adjective legislation (including the Organic Law against Organized Crime and the Financing of Terrorism, the Anti-Corruption Law, the Criminal Code, the Organic Code of Criminal Procedure and the Code of Military Justice). This entailed the serious proposal to try political dissidents under the military justice system (more than 500 civilians are on trial before military courts).

Second, concerning the session held at the Permanent Council of the OAS, the Constitutional Chamber ordered the President of the Republic "to evaluate the behavior of the international organizations to which the Republic belongs, which could be undertaking actions similar to those that have been exercised by the current Executive Secretary of the Organization of American States [...]."

It should be noted that in addition to the serious problem of the unconstitutionality of the judgment, the court clearly contradicted itself in ruling on the "legal matter" of the case at

<sup>206</sup> Judgment No. 155 of 27 March 2017, Case. No. 17-0323, Joint opinion, and No. 156 of 28 March 2017, Case. No. 17-0325, Joint opinion.

<sup>207</sup> European Union Delegation to Venezuela, *Statement by the Spokesperson on the recent developments in Venezuela*, de 30 March 2017 ([https://eeas.europa.eu/headquarters/headquarters-homepage/23833/statement-spokesperson-recent-developments-venezuela\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/23833/statement-spokesperson-recent-developments-venezuela_en)); Ministry of Foreign Affairs of Panama, *Comunicado del Gobierno de Panamá sobre situación en Venezuela*, 30 March 2017 (<http://www.mire.gob.pa/index.php/en/noticias-mire/10193->); Ministry of Foreign Affairs and Worship Argentine Republic, *Recent Events in Venezuela*, 29 March 2017 (<http://www.mrecic.gov.ar/en/recent-events-venezuela>); Ministry of Foreign Affairs of Peru, *Perú condena la ruptura del orden democrático en Venezuela*, 30 March 2017 ([http://www.rree.gob.pe/SitePages/comunicado\\_oficial.aspx?id=CO-007-17](http://www.rree.gob.pe/SitePages/comunicado_oficial.aspx?id=CO-007-17)); U.S. Department of State, *Venezuelan Supreme Court Decision Greatly Undermines Democratic Institutions*, March 30, (<https://www.state.gov/r/pa/prs/ps/2017/03/269332.htm>); OAS, *Venezuela: OAS SG Denounces Self-inflicted Coup d'État*, March 30, 2017 ([http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-019/17](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-019/17)); and IACHR, *Press Release No. 41/2017: IACHR Condemns Supreme Court Rulings and the Alteration of the Constitutional and Democratic Order in Venezuela*, March 31, 2017 ([http://www.oas.org/en/iachr/media\\_center/PReleases/2017/041.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/041.asp))

the same time as it issued precautionary measures, whose purpose is to safeguard a legal right until a ruling on the underlying matter has been made.

## 2. Judgment No. 156 of 2017

Judgment No. 156 refers to a request for interpretation of article 33 of the Organic Law on Hydrocarbons, filed by the Venezuelan Petroleum Corporation, with the purpose of eliminating the requirement to get authorization from the NA in order to enter public-private joint ventures on hydrocarbons, as that law requires. With this ruling, the SCJ dealt its final blow to the rule of law, resolving that not only was the NA's authorization not required, but also declaring that: "... so long as the situation of contempt and invalidity of the National Assembly's proceedings is in effect, this Constitutional Chamber shall ensure that legislative powers are exercised directly by this Chamber or by the body that it delegates, to ensure the rule of law." This clearly demonstrated the judiciary's lack of independence, the rupture of constitutional order and serious risk for the personal freedom of the NA deputies, whose immunity had been overturned, and for any dissidents of the Venezuelan regime.

Faced with the strong national and international reaction, and especially the Attorney General's criticism of judgments No. 155 and 156,<sup>208</sup> the President of the Republic declared that he had no knowledge of the judgments or the Attorney General's declarations,<sup>209</sup> and he decided to convene the Defense Council of the Nation to resolve what he called an "impasse" between the Office of Public Prosecutions (Ministerio Público) and the SCJ.<sup>210</sup> It is inexplicable how the Defense Council of the Nation, the top body for planning and advising the public power on matters of "integral defense of the Nation,"<sup>211</sup> would be the jurisdiction to settle an alleged "controversy" between the Supreme Court and the Attorney General, nor how it would have the powers to do so.

## 3. Judgments No. 157 and 158 of 2017

On the morning of April 1, 2017, it was learned that the Defense Council had met the previous night. The President of the National Assembly had not been invited to attend the meeting, although the Constitution provides that he should have been invited.<sup>212</sup> That morning, the President of the Republic announced: "We have reached an agreement to resolve this controversy and I can say that with the reading of this communiqué and the publication of the clarification and respective corrections of Judgments 155 and 156, this controversy has been surmounted, demonstrating the capacities of dialogue and resolution that may be activated under our Constitution."<sup>213</sup>

In fact, the Supreme Court of Justice, following instructions from a state body that had no authority, on April 1 issued Judgments No. 157 and 158, as "clarifications unto itself" of Judgments No. 155 and 156, respectively. Judgment No. 157, which "clarified" the content of Judgment No. 155, suppressed or revoked the precautionary measure calling for the use of military justice, as well as that which referred to the elimination of parliamentary immunity. Judgment No. 158 revoked the authorization that had been given to the President of the Republic to modify the Organic Law on Hydrocarbons and that which referred to the possibility of having the SCJ's Constitutional Chamber exercise the powers of the NA directly.

<sup>208</sup> "Fiscal General Luisa Ortega: en sentencias del TSJ se evidencian varias violaciones del orden constitucional," *Panorama*, 31 March 2017 (<http://www.panorama.com.ve/politicaeconomia/Fiscal-general-de-la-Republica-Luis-Ortega-Existe-una-lamentable-pugna-institucional-20170331-0038.html>).

<sup>209</sup> "Maduro: No sabía de las declaraciones de Ortega ni de la sentencia del TSJ," *El Nacional*, 31 March 2017 ([http://www.el-nacional.com/noticias/gobierno/maduro-sabia-las-declaraciones-ortega-sentencia-del-tsj\\_88373](http://www.el-nacional.com/noticias/gobierno/maduro-sabia-las-declaraciones-ortega-sentencia-del-tsj_88373)); "Maduro: No sabía nada de la sentencia 156 ni del discurso de la Fiscal", *CNN*, 31 March 2017 (<http://edition.cnn.com/videos/spanish/2017/03/31/cnee-conclusiones-brk-maduro-no-sabia-nada-de-sentencia-156.cnn>).

<sup>210</sup> "Maduro convocó al Consejo de Seguridad de la Nación por sentencia del TSJ," *El Nacional*, 31 March 2017 ([http://www.el-nacional.com/noticias/gobierno/maduro-convoco-consejo-seguridad-nacion-por-sentencia-del-tsj\\_88372](http://www.el-nacional.com/noticias/gobierno/maduro-convoco-consejo-seguridad-nacion-por-sentencia-del-tsj_88372)); "Maduro convoca a Consejo de Seguridad de la Nación para solventar 'impasse' entre el MP y TSJ," *Globovisión*, 31 March 2017 (<http://globovision.com/article/maduro-convoca-a-consejo-de-seguridad-de-la-nacion-para-solventar-impase-entre-el-mp-y-tsj>).

<sup>211</sup> Article 323 of the Constitution.

<sup>212</sup> Article 323 of the Constitution.

<sup>213</sup> "Consejo de Defensa exhorta al TSJ revisar sentencias 155 y 156," *El Nacional*, 1 April 2017 ([http://www.el-nacional.com/noticias/gobierno/consejo-defensa-exhorta-tsj-revisar-sentencias-155-156\\_88454](http://www.el-nacional.com/noticias/gobierno/consejo-defensa-exhorta-tsj-revisar-sentencias-155-156_88454)); "Venezuela: el Consejo de Defensa pide al Tribunal Supremo de Justicia que revise sus decisiones sobre la Asamblea Nacional," *BBC Mundo*, 1 April 2017 (<http://www.bbc.com/mundo/noticias-america-latina-39402013>).

These rulings made it entirely clear that the Supreme Court of Justice is at the service of the executive branch, because it was at the order of the President of the Republic that the SCJ's Constitutional Chamber decided to clarify and modify its rulings unto itself, in flagrant violation of the principles of separation of powers and independence of the judiciary, as established by the Constitution.

Although the SCJ's Constitutional Chamber decided "unto itself" to clarify or modify Judgments No. 155 and 156, and particularly its decision to assume the powers of the NA, the rest of the decisions by the SCJ remain in effect and, as such, the powers and faculties of the NA continue to be impeded by the dozens of sentences that the SCJ has handed down since January 2016.<sup>214</sup>

Likewise, and following the Attorney General's strong rejection of these rulings, the SCJ has lashed out not only against the NA, but also against the Attorney General herself. For example, the SCJ has made rulings that impede the exercise of the functions inherent to the Office of Public Prosecutions (Ministerio Público);<sup>215</sup> the SCJ appointed the deputy Attorney General,<sup>216</sup> despite that fact that this action is the exclusive domain of the Attorney General herself, with the authorization of the NA; and it is in the process of an administrative proceeding to remove the Attorney General from her position. In sum, in response to the Attorney General's questioning of the SCJ's decisions, it has decided to eliminate this institution of the Venezuelan State too.

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<sup>214</sup> For example, in a ruling on 10 July 2017, the SCJ's Constitutional Chamber, citing the questioned Judgment No. 156, authorized the national executive branch to directly create a mixed public-private enterprise, despite this being the exclusive domain of the NA. <http://historico.tsj.gob.ve/decisiones/scon/julio/200937-533-10717-2017-17-0731.HTML>

<sup>215</sup> In a ruling on 12 July 2017, SCJ's Constitutional Chamber issued a precautionary measure to impede and place conditions on the authority of the Office of Public Prosecutions (Ministerio Público) to bring charges, after the Attorney General's Office brought charges against some officials from the executive branch and their relatives. <http://historico.tsj.gob.ve/decisiones/scon/julio/201056-537-12717-2017-17-0658.HTML>

<sup>216</sup> <http://historico.tsj.gob.ve/decisiones/scon/julio/200783-532-3717-2017-17-0665.HTML>

## CHAPTER VII: INTERNATIONAL FRAMEWORK AND RECOMMENDATIONS

It is a general principle that, irrespective of the form and type of democratic regime which it adopts, every state must guarantee certain basic and fundamental elements: i) the full observance of the rule of law, and the principles of separation of powers and legality in the actions of its authorities; ii) independence and impartiality of the judiciary; iii) the observance of human rights and fundamental freedoms; and iv) democracy and political pluralism.

As such, the state is not entitled to act with absolute discretion, and it must organize its state apparatus in such a way as to be compatible with the obligations to ensure the full observance of the rule of law, the independence and impartiality of the judiciary, and international rights and freedoms. These obligations have been widely upheld in international case law,<sup>217</sup> as well as by intergovernmental political bodies. Thus, for example, in the *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, the United Nations General Assembly reminded that “the rule of law applies to all States equally [...] [and] the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.”<sup>218</sup> For its part, the General Assembly of the Organization of American States has reminded that “governments have the ultimate responsibility for upholding the rule of law and implementing their human rights obligations.”<sup>219</sup>

### 1. Separation of Powers and the Judiciary

The principle of separation of powers is a fundamental element of the rule of law and the observance of human rights and democracy. This has been reiterated repeatedly by the United Nations General Assembly in reaffirming that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”<sup>220</sup> In its *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, the General Assembly reminded that “respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions” and that “the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.”<sup>221</sup>

For its part, on several occasions the Human Rights Committee (HRC) has emphasized the need for states party to the *International Covenant on Civil and Political Rights*, to ensure the effective separation of the executive, legislative and judicial branches, the existence of an independent and impartial judiciary, and the full force of the principle of legality.<sup>222</sup> The HRC has noted that “the lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy.”<sup>223</sup> Thus, the HRC has recommended that

<sup>217</sup> See, among others: Human Rights Committee (General Comment No. 2, para. 2 and Concluding observations to Romania, 28 July 1999, CCPR/C/7/Add.111, paras. 9 and 10; Peru, 15 November 2000, CCPR/CO/70/PER, para. 10; Tunisia, 10 November 1994, CCPR/C/79/43, para. 14; and Nepal, 10 November 1994, CCPR/C/79/Add.42, para. 18); and Inter-American Court of Human Rights (*Case of Velásquez Rodríguez*, Judgment of July 29, 1988, Series C No. 4, para. 166; *Case of Godínez Cruz*, Judgment of January 20, 1989, Series C No. 5, para. 175; *Exceptions to the Exhaustion of Domestic Remedies (arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights* Advisory Opinion OC-11/90 of August 10, 1990, Series A No. 11, para. 23; and *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of May 9, 1986, Series A No. 6, para. 21).

<sup>218</sup> Resolution No. 67/1 of 24 September 2012.

<sup>219</sup> AG/Res. 2753 (XLII-O/12) of 4 June 2012.

<sup>220</sup> See, among others: Resolutions “The rule of law at the national and international levels,” No. 62/70 of 6 December 2007, No. 64/116 of 16 December 2009, No. 65/32 of 6 December 2010, and No. 67/97 of 14 December 2012; and Resolutions “Support by the United Nations system to the efforts of Governments to promote and consolidate new or restored democracies,” No. 64/12 of 9 November 2009 and No. 66/285 of 3 July 2012.

<sup>221</sup> Resolution No. 67/1 of 24 September 2012.

<sup>222</sup> See, among others, *General Comment No. 29 on States of emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, para. 16.

<sup>223</sup> *Concluding Observations of the Human Rights Committee: Slovakia*, CCPR/C/79/Add.79, para. 3.

states adopt legislation and measures to ensure that there is a clear distinction between the executive branch and the judiciary.<sup>224</sup>

"Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government." Article 3 of the *Inter-American Democratic Charter*.

In the Americas, the Inter-American Court of Human Rights has reiterated that the rule of law is "essential [...] to the Inter-American system and in particular to the system for the protection of human rights contained in the Convention [*American Convention on Human Rights*]."<sup>225</sup> The Inter-American Court has also declared that "[i]n a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad."<sup>226</sup> For its part, the Inter-American Commission on Human Rights (IACHR) has indicated that the protection of human rights implies the existence of institutional guarantees of the supremacy of the law, upholding and respecting the rule of law, which depends on three fundamental principles, namely: the principle of limits on power, the principle of legality, and the principle of recognition of fundamental rights. The IACHR has also noted that the rule of law is rendered null when the separation of executive, legislative, and judicial powers is not real, but merely a formality.<sup>227</sup>

## 2. Independent, Impartial and Integral Judiciary

The full observance of the rule of law and human rights presupposes the existence of an independent, impartial and integral judiciary. The United Nations General Assembly has reminded that United Nations member states have the duty, under the *Charter of the United Nations*, to ensure the rule of law by promoting the independence and integrity of the judiciary, keeping it free from interference and corruption.<sup>228</sup>

Independence and impartiality of the courts is a universal principle that is recognized in international treaties and instruments<sup>229</sup> and has been reaffirmed by the *Basic Principles on the Independence of the Judiciary*.<sup>230</sup> This principle stems from the basic principles of the rule of law, specifically the principle of separation of powers, according to which the executive, legislative and judicial branches constitute three separate and independent branches of the state. The different organs of the state have exclusive and specific responsibilities. The United Nations Special Rapporteur on the independence of judges and lawyers has emphasized that "the principle of the separation of powers [...] is the bedrock

<sup>224</sup> Concluding Observations of the Committee to: Romania, 28 July 1999, CCPR/C/79/ Add.111, para. 10; Peru, 15 November 2000, CCPR/CO/70/PER, para. 10; El Salvador, 18 April 1994, CCPR/C/79/Add.34, para. 15; Tunisia, 10 November 1994, CCPR/C/79/43, para. 14; and Nepal, 10 November 1994, CCPR/C/79/ Add.42, para. 18.

<sup>225</sup> *Judicial Guarantees in States of Emergency* (arts. 27(2), 25 and (8) *American Convention on Human Rights*), *Advisory Opinion OC-9/87 of October 6, 1987*, Series A No. 9, para. 35. See also: *The Word "Laws" in Article 30 of the American Convention on Human Rights*, *Advisory Opinion OC-6/86 of May 9, 1986*, Series A No. 6, paras. 30 and 34; *Habeas corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), *Advisory Opinion OC-8/87 of January 30, 1987*, Series A No. 8, para. 20; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 *American Convention on Human Rights*), *Advisory Opinion OC-5/85 of November 13, 1985*, Series A No. 5, para. 66.

<sup>226</sup> *Habeas corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), *Advisory Opinion OC-8/87, of January 30, 1987*, Series A No. 8, para. 16; and *Judicial Guarantees in States of Emergency* (arts. 27(2), 25 and (8) *American Convention on Human Rights*), *Advisory Opinion OC-9/87 of October 6, 1987*, Series A No. 9, para. 35.

<sup>227</sup> *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106 Doc. 59 rev., June 2, 2000, para. 238.

<sup>228</sup> Resolution No. 55/96 "Promoting and Consolidating Democracy" of 4 December 2000.

<sup>229</sup> See, among others: article 10 of the *Universal Declaration of Human Rights*; article 14 of the *International Covenant on Civil and Political Rights*; article 18 (1) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; article 8 (1) of the *American Convention on Human Rights*; article XXVI of the *American Declaration of the Rights and Duties of Man*; article 7(1) and 26 of the *African Charter on Human and Peoples' Rights*; article 12 of the *Arab Charter on Human Rights*; article 6(1) of the *European Convention on Human Rights*; article 47 of the *Charter of the Fundamental Rights of the European Union*; and the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA*.

<sup>230</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State [...].<sup>231</sup>

Under the principle of separation of powers, it is not acceptable for any branch of government to interfere in the sphere of another.<sup>232</sup> In that context, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN Special Rapporteur on the independence of judges and lawyers have concluded that “[t]he separation of power and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively.”<sup>233</sup>

“[T]he requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law [...]. [T]he underlying concepts of judicial independence and impartiality, [...] are ‘general principles of law recognized by civilized nations’ in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice.” UN Special Rapporteur of the United Nations on the independence of judges and lawyers.<sup>234</sup>

In this regard, the Inter-American Court has stated that “one of the main objectives of the separation of public powers is to guarantee the independence of judges, with the objective of preventing the judicial system and its members from being subjected to undue restrictions in the exercise of their functions by bodies outside the judiciary or even by those judges who exercise review or appeal functions. In addition, the guarantee of judicial independence encompasses guarantees against external pressures, so that the state must refrain from undue interference in the judiciary or its members, for example, relative to individual judges.”<sup>235</sup> The court has also reminded that “impartiality requires that the judge who presides over a particular case should approach the facts of the case without prejudice or subjectivity, and offer sufficient guarantees of objectivity in order to inspire the necessary confidence to the parties in the case, as well as to the citizens in a democratic society. The impartiality of the court implies that its members have no direct interest, position taken, or preference for any of the parties, and that they are not involved in the case.”<sup>236</sup>

The HRC has reminded “that States should take specific measures to guarantee the independence of the judiciary, protect judges from any form of political influence, and establish clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and for disciplinary sanctions against them. A situation where the functions and competencies of the judiciary and the executive branch are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”<sup>237</sup> Similarly, the HRC has stated that “[t]he ‘impartiality’ of the court implies that

<sup>231</sup> *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers - Report of the Special Rapporteur, Mr. Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41, E/CN.4/1995/39, para. 55.*

<sup>232</sup> See *Inter-American Democratic Charter*, adopted by the General Assembly of the OAS on September 11, 2001, articles 3 and 4.

<sup>233</sup> *Situation of human rights in Nigeria - Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre W. N'diaye, and the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1996/79, E/CN.4/1997/62/Add.1, para. 71.*

<sup>234</sup> *Independence and impartiality of the judiciary, [...]* E/CN.4/1995/39, paras. 32 and 34.

<sup>235</sup> Judgment of June 22, 2015, *Case of Granier et al (Radio Caracas Television) v. Venezuela*, Series C No. 293, para. 303 (Free translation). In the same vein, see the judgments: June 30, 2009, *Case of Reverón Trujillo v. Venezuela*, Series C No. 197, para. 146; February 24, 2012, *Case of Atala Riffo and Daughters v. Chile*, Series C No. 239, para. 186; January 31, 2001, *Case of the Constitutional Court v. Peru*, Series C No. 71, para. 75; and November 20, 2014, *Case of Argüelles et al. v. Argentina*, Series C No. 288, para. 147.

<sup>236</sup> *Ibid.*, para. 334 (free translation). See also the judgments: of November 22, 2005, *Case of Palamara Iribarne v. Chile*, Series C No. 135, para. 146; November 20, 2009, *Case of Usón Ramírez v. Venezuela*, Series C No. 207, para. 117; July 2, 2004, *Case of Herrera Ulloa v. Costa Rica*, Series C No. 107, para. 171; November 20, 2014, *Case of Argüelles et al. v. Argentina*, Series C No. 288, para. 168.

<sup>237</sup> Views of 29 October 2012, Communication No. 1940/2010, *Eligio Cedeño v. Bolivarian Republic of Venezuela*, para. 7.3. See, also, *General Comment No. 32. Article 14. Right to Equality before Courts and Tribunals and to Fair Trial*, CCPR/C/GC/32 of 23 August 2007, para. 19.

judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."<sup>238</sup>

The principle of independence and impartiality of the courts is not intended to enable judges to confer benefits personally; its justification is to protect individuals against abuse of power and to ensure the proper administration of justice. Consequently, judges may not arbitrarily decide cases in accordance with their personal preferences or partisan affiliations, but must apply the law to the facts. In this context, the UN Special Rapporteur on the independence of judges and lawyers has concluded that a kind of "corruption within the judiciary" exists when there are "form[s] of biased participation in trials and judgements as a result of the politicization of the judiciary, the party loyalties of judges or all types of judicial patronage."<sup>239</sup> The Special Rapporteur on the independence of judges and lawyers,<sup>240</sup> the IACHR,<sup>241</sup> associations of magistrates and judges,<sup>242</sup> and bar associations<sup>243</sup> have identified factors that promote "corruption within the judiciary," such as judges' subjugation to ideologies or politics, as well as systems or procedures for joining the judiciary and being promoted that are based on discretion and not on objective aspects such as professional capacity, integrity, and experience.

### 3. Political Pluralism, Democracy and Freedoms

Political pluralism is an intrinsic and fundamental element of democracy and is closely related to the effective exercise of political rights and the freedoms of opinion, expression, assembly and association. The IACHR has emphasized this with reference to the Argentine military regime (1973-1980), stating that "[t]he existence, and of course the survival, of the representative democratic system of government, is not possible without effective and unrestricted recognition of the right of citizens to set up political groups and to join those groups whose political ideas and programs are best suited to their conscious or subconscious ideals of government; and the rights of such groups to exist and to carry on without undue restrictions on their propagandizing and proselytizing activities; to take part in the political life of the nation by publishing their views on matters of state when they deem it appropriate to do so; and to nominate candidates individually or jointly with other groups for election to public office."<sup>244</sup>

The IACHR has also noted that the essence of political rights is to strengthen democracy and political pluralism<sup>245</sup> and that this is "a fundamental principle for all democratic societies."<sup>246</sup>

The Inter-American Court has concluded that "[p]olitical rights are human rights of fundamental importance within the inter-American system and they are closely related to other rights embodied in the American Convention, such as freedom of expression, and

<sup>238</sup> Views of 23 October 1992, Communication No. 387/1989, *Arvo. O Karttunen v. Finland*, para. 7.2.

<sup>239</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, E/CN.4/2004/60 of 31 December 2003, para. 39.

<sup>240</sup> See, among others, *Reports of the Special Rapporteur on the independence of judges and lawyers*: E/CN.4/2001/65 of 1 February 2001; E/CN.4/2002/72 of 11 February 2002; E/CN.4/2003/65 of 10 January 2003; E/CN.4/2004/60 of 31 December 2003; E/CN.4/2005/60 of 20 January 2005; A/HRC/4/25 of 18 January 2007; A/HRC/8/4 of 13 May 2008; A/HRC/11/41 of 24 March 2009; A/65/274, of 10 August 2010; A/HRC/20/19 of 7 June 2012; and A/HRC/26/32 of 28 April 2014.

<sup>241</sup> See, among others, *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*, OEA/Ser.L/V/II. Doc. 44, 2013.

<sup>242</sup> See, for example, the *Report of the 1st Study Commission of the International Association of Judges on measures to promote integrity and fight corruption within the judiciary*, 2016; Recommendation concerning "Corruption in Justice," adopted by the African Regional Group of the International Association of Judges in Lomé (Togo) on 20 February 2001; Recommendation on corruption adopted by the Central Council of the International Association of Judges, in Madrid (Spain), on 27 September 2001; Resolution "Judges in the fight against corruption and impunity," adopted by the Conference of the International Association of Judges, in Niamey (Niger) on 5 June 2014; the *Caracas Declaration*, adopted by the Ibero-American Summit of Presidents of Supreme Courts and Tribunals of Justice in March 1998; and the *Declaración de Copán-San Salvador*, adopted by the Fourth Ibero-American Judicial Councils and VIII Iberoamerican Summit of Presidents of Supreme Courts and Tribunals of Justice (Copán-San Salvador, 2004).

<sup>243</sup> See, among others, Judicial Integrity Initiative of the International Bar Association (IBA), *Judicial Systems and Corruption*, May 2016.

<sup>244</sup> *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/V/ II.49 Doc. 19 of April 11, 1980, Chapter IX, "Political Rights," para. 1.

<sup>245</sup> *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 of December 30, 2009, chapter II, para. 18.

<sup>246</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, "Venezuela," para. 76.

freedom of association and assembly; together, they make democracy possible. [...] The political rights embodied in the American Convention, as well as in diverse international instruments,<sup>247</sup> promote the strengthening of democracy and political pluralism [...] [T]he effective exercise of political rights constitutes an end in itself and also a fundamental means that democratic societies [...].<sup>248</sup>

"Opposition voices are imperative for a democratic society; without them it is impossible to reach agreements that take into account the range of viewpoints that prevail in a society. That is why States must guarantee the effective participation of individuals, groups, organizations, and opposition political parties in a democratic society, through proper rules and practices that enable them to have real and effective access on equal terms to the various deliberative forums, and also through the adoption of measures to ensure that this participation can be fully exercised." Inter-American Commission on Human Rights.<sup>249</sup>

For its part, the HRC has stated that "[w]hatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. [...] Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association. [...] Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected."<sup>250</sup> The HRC has also stated that "[f]reedom of opinion and freedom of expression are [...] essential for any society. They constitute the foundation stone for every free and democratic society [...] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint."<sup>251</sup>

Thus, criminalization, deprivation of liberty, or other forms of persecution of the legitimate exercise of freedom of expression, assembly and association, or political rights are incompatible with the general obligation of the state to guarantee the effective enjoyment of these rights and fundamental liberties. On this, the HRC has stated "the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights."<sup>252</sup> The HRC has also indicated that "[t]he penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression."<sup>253</sup> Thus, the HRC has concluded that "[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), freedom of association (art. 22) [...]."<sup>254</sup> In the same vein, the Working Group on Arbitrary Detention has described arbitrary detention as the deprivation of liberty resulting from the exercise of the freedoms of thought, expression, assembly and association, and political rights.<sup>255</sup>

<sup>247</sup> Some of these international instruments are: the *Inter-American Democratic Charter* (articles 2, 3 and 6); *American Convention on Human Rights* (article 23); *American Declaration on the Rights and Duties of Man* (article XX); *Universal Declaration of Human Rights* (article 21); *1993 International Covenant on Civil and Political Rights* (article 25); *Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (article 3); and *African Charter on Human and Peoples' Rights "Banjul Charter"* (article 13).

<sup>248</sup> Judgment of August 6, 2008, *Case of Castañeda Gutman v. Mexico*, Series C No. 184, paras. 140, 141 and 143. (Spanish only.)

<sup>249</sup> Press Release No. 015/15, "IACHR Expresses Deep Concern over the Situation regarding the Rule of Law in Venezuela," February 24, 2015.

<sup>250</sup> *General Comment No. 25, CCPR/C/21/Rev. 1/Add.7 of 27 August 1996*, paras. 1, 8 and 12.

<sup>251</sup> *General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 of 12 September 2011*, paras. 2 and 20.

<sup>252</sup> Views of 10 August 1994, Communication No. 458/1991, *Case of Albert Womah Mukong v. Cameroon*, paragraph 9.7, CCPR/C/51/D/458/1991.

<sup>253</sup> *General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 of 12 September 2011*, para. 42.

<sup>254</sup> *General Comment No. 35, Article 9 (Liberty and security), CCPR/C/GC/35 of 16 December 2014*, para. 17.

<sup>255</sup> Paragraph 8 (b) of *Methods of work of the Working Group on Arbitrary Detention, A/HRC/30/69 of August 4, 2015*.



#### 4. International Recommendations to the Venezuelan State

For several years, international human rights organizations have expressed their concerns about the vertiginous deterioration of human rights and fundamental freedoms, the situation of the judiciary and, in general, the rule of law in Venezuela.

Thus, in 2015, the HRC expressed its concerns, among other things, about:

- “the situation of the judiciary in the State party, in particular with regard to its autonomy, independence and impartiality”;<sup>256</sup>
- “excessive and disproportionate use of force, torture and ill-treatment, arbitrary detention and failure to uphold fundamental legal safeguards”<sup>257</sup> during demonstrations;
- “journalists, human rights defenders and lawyers have been subjected to intimidation, disparagement, threats and/or attacks [...] [and] the arrest of political opposition members”;<sup>258</sup>
- “provisions and practices which could discourage the expression of critical positions or critical media and social media reporting on matters of public interest and which could adversely affect the exercise of freedom of expression, including provisions that make defamation and offending or failing to show respect to the President and other senior officials criminal offences, and reports regarding the extensive monitoring of media content by the National Telecommunications Commission”;<sup>259</sup> and,
- “the existence of a number of rules, including some of those set out in the National Security Act, which could adversely affect the exercise, in practice, of the right to freedom of peaceful assembly.”<sup>260</sup>

In this context, the HRC has recommended that the Venezuelan State:

- “take immediate steps to ensure and uphold the full autonomy, independence and impartiality of judges and prosecutors and guarantee that they are free to operate without pressure or interference of any kind”;<sup>261</sup>
- “[e]nsure that no public official takes measures or performs acts that may constitute intimidation, persecution, disparagement or undue interference in the work of journalists, human rights defenders, social activists, lawyers or members of the political opposition or in the exercise of their rights under the Covenant”;<sup>262</sup>
- “take all necessary steps to guarantee the full and effective exercise of the right to freedom of expression and freedom of the press [...] Consider the possibility of decriminalizing defamation and repealing provisions that establish criminal penalties for persons who offend or fail to show respect for the President or other senior officials and any other similar provisions, and, in any event, restrict the application of criminal law to the most serious cases, bearing in mind that imprisonment is never an appropriate punishment in such cases”;<sup>263</sup> and,
- “take the necessary measures to ensure that all individuals under its jurisdiction are able to fully enjoy their rights to freedom of peaceful assembly and freedom of association.”<sup>264</sup>

In 2014, the Committee against Torture expressed concerns about, among others:

- “the judiciary’s lack of independence from the executive branch” and retaliation against judges for having made rulings unfavorable to the government;<sup>265</sup>

<sup>256</sup> *Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela, CCPR/C/VEN/CO/4* of 14 August 2015, para. 15.

<sup>257</sup> *Ibid.*, para. 14.

<sup>258</sup> *Ibid.*, para. 17.

<sup>259</sup> *Ibid.*, para. 19.

<sup>260</sup> *Ibid.*, para. 20.

<sup>261</sup> *Ibid.*, para. 15.

<sup>262</sup> *Ibid.*, para. 17.

<sup>263</sup> *Ibid.*, para. 19.

<sup>264</sup> *Ibid.*, para. 20.

- “that many of [the] detentions were arbitrary, inasmuch as no arrest warrants were issued and no one was apprehended in *flagrante delicto*, as in the detentions in residential areas near the protest sites [, and] the prolonged and arbitrary detention of opposition members and demonstrators”<sup>266</sup>
- “unwarranted use of firearms and riot control equipment against protesters and in residential areas [... and that] military units such as the Bolivarian National Guard were involved in controlling the demonstrations”<sup>267</sup>
- the “attacks, threats and cases of intimidation and harassment of journalists [...] the great number of attacks and cases of intimidation of human rights defenders [...] and] public denigration of human rights defenders by high-level Government officials”,<sup>268</sup> and,
- prolonged solitary confinement and mistreatment of arrested political opponents.<sup>269</sup>

Thus, the Committee against Torture has recommended that the Venezuelan State:

- “Take steps, as a matter of urgency, to ensure the full independence and non-removability of judges in conformity with applicable international standards. Specifically, the State party should, as soon as possible, organize independently administered public competitive examinations for entry into the judiciary, put an end to the appointment of temporary judges and ensure the security of tenure and independence of current temporary judges.”<sup>270</sup>
- “secure the immediate release of Leopoldo López and Daniel Ceballos and all those who have been arbitrarily detained for having exercised their right to self-expression and peaceful protest;”<sup>271</sup>
- “[e]nsure that the institutions entrusted with maintaining public safety are civilian in nature, as stipulated in article 332 of the State Party’s Constitution”;<sup>272</sup>
- “refrain from discrediting the work of human rights defenders and to publicly acknowledge the essential watchdog role that they and journalists play as regards the fulfilment of obligations under the Convention, [...] and] to ensure the effective protection of human rights defenders and journalists against threats and attacks to which they may be exposed on account of their activities”,<sup>273</sup> and,
- “[e]nsure that alleged acts in breach of the Convention committed against its political opponents during their detention are duly investigated and the perpetrators punished.”<sup>274</sup>

The Committee on the Rights of the Child expressed concern in 2014 about the arrest of minors during demonstrations, and it recommended that the Venezuelan Government “undertake all necessary measures to protect children from harassment and arbitrary detention and ensure the right of children to participate in demonstrations, in accordance with article 13 of the Convention.”<sup>275</sup>

In the same vein, in 2014, the Committee on the Elimination of Discrimination against Women expressed concern about the “threats and intimidation against civil society members, including women, who are exposed to a climate of fear [...] and] some women and girls were detained arbitrarily and/or harassed during the demonstrations that took place early in 2014.”<sup>276</sup> Thus, the Committee has urged the Venezuelan Government “to ensure their right to participate in demonstrations as well as their right to express their opinions, in

<sup>265</sup> *Concluding observations on the combined third and fourth periodic reports of the Bolivarian Republic of Venezuela*, CAT/C/VEN/CO/3-4, 14 December 2014, para. 16.

<sup>266</sup> *Ibid.*, para. 9.

<sup>267</sup> *Ibid.*, para. 12.

<sup>268</sup> *Ibid.*, para. 14.

<sup>269</sup> *Ibid.*, para. 18.

<sup>270</sup> *Ibid.*, para. 16.

<sup>271</sup> *Ibid.*, para. 9.

<sup>272</sup> *Ibid.*, para. 12.

<sup>273</sup> *Ibid.*, para. 14.

<sup>274</sup> *Ibid.*, para. 18.

<sup>275</sup> *Concluding observations on the combined third to fifth periodic reports of the Bolivarian Republic of Venezuela*, CRC/C/VEN/CO/3-5 of 13 October 2014, para. 39.

<sup>276</sup> *Concluding observations on the combined seventh and eighth periodic reports of the Bolivarian Republic of Venezuela*, CEDAW/C/VEN/CO/7-8 of 14 November 2014, para. 24.

accordance with international standards, and to take all measures necessary to protect women and girls from arbitrary detention and harassment."<sup>277</sup>

For its part, the Special Rapporteur on the independence of judges and lawyers has reiterated concerns about the high number of temporary judges and prosecutors, considering that they would be "subject to different political interference mechanisms that affect their independence," in particular taking into account that their removal is "completely discretionary: without cause, procedure, nor effective judicial remedy."<sup>278</sup> Given the serious situation of lack of independence of the judiciary, the UN Special Rapporteur reminded in 2010 that "the United Nations Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct, the Council of Europe recommendation on the independence of the judiciary, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, the Beijing principles, the Latimer House Guidelines, and the Statute of the Ibero-American Judge, oblige the Venezuelan State to respect and guarantee the independence and autonomy of the Venezuelan judiciary."<sup>279</sup> In 2014, the UN Special Rapporteur expressed concern about "interference of the government in the judiciary and the increase in incidents that violate the human rights of Venezuelan judges and prosecutors."<sup>280</sup>

In the Inter-American system, the IACHR has been monitoring the situation in Venezuelan since 2002.<sup>281</sup> In its 2014 report, the IACHR noted that "[i]n its previous reports on Venezuela, the Commission has also repeatedly pointed how the lack of independence and autonomy of the judiciary from political power is one of the weakest points of democracy in Venezuela. In the same vein, it has noted that this lack of independence has allowed the use of punitive power of the State to criminalize human rights defenders, penalize peaceful protest and prosecute political dissidents."<sup>282</sup>

In its 2016 report, the Inter-American Court noted with great concern, the following, among other issues:

- "a significant deterioration in Venezuela's institutionality; the separation, independence, and balance of state powers; respect for political rights; and democratic institutions";<sup>283</sup>
- the adoption, under the pretext of the declaration of a state of economic emergency<sup>284</sup> and a state of exception,<sup>285</sup> measures that "compromise respect for the rule of law and separation of State powers [...] [in that they] granted the Executive Branch discretionary powers";<sup>286</sup>

<sup>277</sup> *Ibid.*, para. 25.

<sup>278</sup> OHCHR, "Preocupante la situación de la justicia en Venezuela, advierte experto de la ONU." Press release. 30 July 2009. (Free translation.)

<sup>279</sup> *Report of the Special Rapporteur on independence of judges and lawyers, Gabriela Carina Knaul de Albuquerque e Silva Addendum Communications to and from Governments*, A/HRC/14/26/Add.1 of 18 June 2010, para. 1206. (Free translation.)

<sup>280</sup> Cited in *Annual Report of the Inter-American Commission on Human Rights - 2014*, OEA/Ser.L/V/II. Doc. 13 of March 9, 2015, para. 539.

<sup>281</sup> See "Venezuela" in Chapter IV of the *Annual Reports of the Inter-American Commission on Human Rights*, for the years 2002 (OEA/Ser.L/V/II.117 Doc. 1 rev. 1 of March 7, 2003), 2003 (OEA/Ser.V/II.118 Doc. 70 rev. 2 of December 29, 2003), 2004 (OEA/Ser.V/II.122 Doc. 5 rev. 1 of February 23, 2005), 2005 (OEA/Ser.L/V/II.124 Doc. 7 of February 27, 2006), 2006 (OEA/Ser.L/V/II.127 Doc. 4 rev. 1 of March 3, 2007), 2007 (OEA/Ser.L/V/II.130 Doc. 22 rev. 1 of December 29, 2007), 2008 (OEA/Ser.L/V/II.134 Doc. 5 rev. 1 of February 25, 2009), 2009 (OEA/Ser.L/V/II. Doc. 51 corr. 1 of December 30, 2009), 2010 (OEA/Ser.L/V/II. Doc. 5 Corr. 1 of March 7, 2011), 2011 (OEA/Ser.L/V/II. Doc. 69 of December 30, 2011), 2012 (OEA/Ser.L/V/II.147 Doc. 1 of March 5, 2013), 2013 (OEA/Ser.L/V/II. Doc. 50 Corr.1 of December 31, 2013), 2014 (OEA/Ser.L/V/II. Doc. 13 of March 9, 2015), 2015 (OEA/Ser.L/V/II. Doc. 48/15 of December 31, 2015) and 2016. See, also, the report *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc 54 of December 30, 2009; and *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118 Doc. 4 rev. 1 of October 24, 2003.

<sup>282</sup> *Annual Report of the Inter-American Commission on Human Rights, 2014*, Chapter IV, para. 328.

<sup>283</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, "Venezuela," para. 53.

<sup>284</sup> Decree No. 2184, published in *Official Gazette*, Extraordinary No. 6214 of 14 January 2016, which declared a nationwide state of economic emergency.

<sup>285</sup> Decree No. 2323, declaring a state of emergency and of economic emergency due to extraordinary social, economic, political, natural, and ecological circumstances gravely affecting the national economy. Published in *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6227, 13 May 2016.

<sup>286</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, "Venezuela," para. 56.

- “the fragile status of judicial independence, it has observed in the past that a large number of judges in Venezuela have provisional appointments and can be removed without a disciplinary proceeding,”<sup>287</sup> situation which was still in effect in 2016;
- “the temporary status of a high number of prosecutors in public prosecutor offices at the national, state, and municipal levels, as well as of prosecutors before the Plenary Chamber and the cassation, constitutional, political administrative, and electoral chambers of the SCJ, and before the adversarial administrative courts”;<sup>288</sup>
- the annulment of laws passed by the opposition majority National Assembly (NA), by “the Constitutional Chamber of the SCJ under President Maduro’s requirement that it review the constitutionality of these laws before they go into effect”;<sup>289</sup>
- “the SCJ has issued judgments with the initial effect of limiting the powers of the National Assembly [...], it declared the actions of the National Assembly manifestly unconstitutional and ‘absolutely null and lacking all validity and legal effect,’ [...] this violates the principle of the separation of powers that is necessary for democratic society”;<sup>290</sup>
- Criminalization, detention, political persecution, acts of aggression—even murder—and reprisals against opposition politicians<sup>291</sup> and “attacks and acts of violence against demonstrators during protests”;<sup>292</sup>
- “deterioration in the right to freedom of expression and access to information, the exercise of which authorities have blocked by both applying and skirting the law. The actions it has been monitoring include arbitrary detention and imprisonment of opposition figures and individuals who publicly express their disagreement with the government or express themselves through the media; repression of and undue restrictions on the right to protest; firing of public employees or threatening them with losing their jobs should they express political opinions against the government; campaigns to stigmatize and harass journalists, opposition politicians, and citizens; the use of criminal law and other State controls to punish or inhibit the work of a critical media; impediments to the right to access to information; and the use of a variety of indirect methods to improperly restrict the right to freedom of expression through media or over the internet”;<sup>293</sup>
- “[a]ttacks and acts of intimidation against journalists and media take place in a context of stigmatization by government officials, including President Maduro and legislator and first vice president of the United Socialist Party of Venezuela Diosdado Cabello, who accuse them of being part of an attempted ‘coup d’état’ supported by foreign governments and including the participation of media outlets that are critical of the government”;<sup>294</sup>
- “the use of criminal proceedings to punish and inhibit expression that is critical of the actions of State authorities or on issues in the public interest, particularly through charges of criminal defamation”;<sup>295</sup>
- “that where they express dissent and criticism of the government, these demonstrations and protests were subject to a series of restrictions—including refusal to grant prior authorization to protests in front of public institutions, automatic dispersal of protests considered illegal, abusive use of force by security forces, mass arrest of demonstrators, and stigmatization and criminalization of organizers—that are not compatible with the right to freedom of expression and assembly”;<sup>296</sup> and,
- “[b]oth abusive use of force through the use of firearms and the participation of the military in controlling and managing public demonstrations.”<sup>297</sup>

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<sup>287</sup> *Ibid.*, para. 57.

<sup>288</sup> *Ibid.*, para. 63.

<sup>289</sup> *Ibid.*, para. 70.

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*, paras. 88 and 90.

<sup>292</sup> *Ibid.*, para. 89.

<sup>293</sup> *Ibid.*, para. 126.

<sup>294</sup> *Ibid.*, para. 136.

<sup>295</sup> *Ibid.*, para. 152.

<sup>296</sup> *Ibid.*, para. 157.

<sup>297</sup> *Ibid.*, para. 161.

Thus, in terms of the rule of law and democracy, the IACHR has recommended that the Venezuelan State:

- “Effectively guarantee the separation, independence and balance of public powers, and specifically, take urgent measures to ensure the independence of the judiciary, strengthening procedures for appointing and removing judges and prosecutors, ensuring the stability of their positions, and eliminating the provisional nature of the posts of the large majority of judges and prosecutors; also, improve the institutional capacity of the judiciary to combat impunity and human rights violation;
- “Guarantee the full exercise of political rights for all people regardless of their political stance, and take the measures necessary to promote tolerance and pluralism in the exercise of political rights; and
- “Refrain from retaliation or using the punitive power of the State to intimidate or punish people based on their political opinions, and guarantee the pluralism of spaces for the exercise of democracy, including electoral processes; and respect demonstrations and protests carried out in the exercise of the right to peaceful assembly and demonstration.”<sup>298</sup>

“In 2016, the persistent structural situations that affect the human rights of Venezuelans have worsened and led to a severe political, social, and economic crisis. These situations include the worsening citizen security situation; the state of emergency in place in Venezuela during the whole year; the lack of effective separation, independence, and balance of State power; and the violation of freedom of expression, political rights, and the right of all social actors to participate in public life, as well as the persistent lack of effective access to independent and impartial justice; and other violations of rights of particularly vulnerable groups. It has also been observed that Venezuela is facing a severe crisis that directly affects access to ESCRs. All of this, added to the political conflict and institutional weakness, have a negative effect on the rule of law in Venezuela.” Inter-American Commission on Human Rights.<sup>299</sup>

The Inter-American Court has issued several judgments on cases related to the administration of justice in Venezuela.<sup>300</sup> The Inter-American Court has stressed that the permanent restructuring of the judiciary, which has been going on for more than a decade, has undermined the independence of the judiciary.<sup>301</sup> Thus, the Inter-American Court has concluded that the internal regulations and practices, as well as the case law handed down by the Supreme Court, which considers that provisional judges do not have any guarantee of permanence, do not adequately guarantee judicial independence.<sup>302</sup>

In its judgments, the Inter-American Court has ordered the Venezuelan State, as measures of reparation, to:

- “The State must adapt, within a reasonable period of time, its domestic legislation to the American Convention by amending the norms and practices that consider that provisional judges can be removed freely,”<sup>303</sup>
- “The State must adopt the measures required to pass the Venezuelan Code of Judicial Ethics, within the term of one year as from notice thereof,”<sup>304</sup> and “the State must ensure both the impartiality of the disciplinary organ, permitting, *inter alia*, that the members of the CORJS [Commission for Operating and Restructuring the Judicial

<sup>298</sup> *Ibid.*, para. 240.

<sup>299</sup> *Annual Report of the Inter-American Commission on Human Rights, 2016*, Chapter IV-B, “Venezuela,” para. 239.

<sup>300</sup> Judgment of June 30, 2009, *Case of Reverón Trujillo v. Venezuela*, Series C No. 197; Judgment of July 1, 2011, *Case of Chocrón - Chocrón v. Venezuela*, Series C No. 227; Judgment of August 5, 2008, *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Series C No. 182; and Judgment of November 20, 2009, *Case of Usón Ramírez v. Venezuela*, Series C No. 207.

<sup>301</sup> Judgment of July 1, 2011, *Case of Chocrón - Chocrón v. Venezuela*, Series C No. 227, para. 141 and 142.

<sup>302</sup> Judgment of June 30, 2009, *Case of Reverón Trujillo v. Venezuela*, Series C No. 197, para. 192.

<sup>303</sup> Judgment of July 1, 2011, *Case of Chocrón - Chocrón v. Venezuela*, Series C No. 227, para. 205 (8).

<sup>304</sup> Judgment of August 5, 2008, *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Series C No. 182, para. 267 (19).

System] be challenged, and its independence, providing for an appropriate selection and appointment process and secured tenure of office.”<sup>305</sup>

- “The State must establish, in a reasonable time and through its legislation, limits on the competence of military tribunals, in such a way that the military jurisdiction will be used only with respect to those crimes relating to military functions, and under no circumstances will a civilian or a military official who is retired be subjected to the jurisdiction of the military tribunals.”<sup>306</sup>

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<sup>305</sup> *Ibid.*, para. 253. See also: Judgment of June 30, 2009, *Case of Reverón Trujillo v. Venezuela*, Series C No. 197, para. 209 (9).

<sup>306</sup> Judgment of November 20, 2009, *Case of Usón Ramírez v. Venezuela*, Series C No. 207, para. 199 (8).

## CONCLUSIONS

Upon review and analysis of the judgments issued by the SCJ outlined in this report, one can observe the following:

- a. It is clear that the various government measures and Supreme Court decisions have undermined the rule of law and democracy in Venezuela, violated the principle of separation of powers, and violated the constitutional functions and the autonomy of the legislature. The State's institutional crisis has seriously affected all of the public powers, eroding their credibility.
- b. The judiciary, as the result of judgments that advanced the political interests of the executive branch, has lost its essential and characteristic attributes, such as autonomy, independence, and legitimacy.
- c. The executive branch has blatantly used the judiciary, through the Supreme Court, to suppress the NA and the Attorney General's Office (Fiscalía General de la Nación) by means of a clear power struggle between these branches of the state.
- d. The Supreme Court has been co-opted by the ruling party, becoming an appendage of the executive branch, and has ceased to exercise its constitutional function as the guarantor of the rule of law, human rights, and fundamental freedoms.
- e. The Supreme Court has taken on the task of giving the appearance of legal legitimacy to the arbitrary political actions of the executive branch. This has been made evident through, among others, declarations of constitutionality of the decrees that declared a State of Economic Emergency and their subsequent extensions. Furthermore, in these cases the Supreme Court gave a political defense of the executive branch's decisions, fully upholding the grounds for the declarations of economic emergency, annulling and disregarding the oversight function that the Constitution assigns to the NA.
- f. By proffering arbitrary interpretations of the Constitution, failing to analyze constitutional provisions, giving precedence to lower level laws over the Constitution and sidestepping due process and the legal appeals system, the Supreme Court has stripped and annulled the National Assembly of its constitutional functions to legislate, to exercise oversight, and for internal regulation and administration, in order to favor the government politically.
- g. From the point of view of the protection of human rights—function that is inherent to the judiciary—the Supreme Court's actions have meant profound regression and a lack of protection for people, opting instead to uphold a political defense of the government. Thus, the independence and autonomy of the judiciary have been seriously undermined, affecting the right of victims to obtain impartial justice and reparation for actions by agents of the State, and in the process further dismantling the rule of law in Venezuela.
- h. The vigor shown by the Supreme Court to resolve, promptly and without delay, the requirements of the government, those of civil organizations sympathetic to the government, and deputies of the government's party, is not the same as it has demonstrated in cases in which the human rights of victims or simply the rights of those who dissent, have been violated by actions of agents of the state. The double standard, when addressing the two kinds of cases, has been obvious.
- i. It is notable that the Supreme Court, in the case of Judgment No. 260 of 2015, ruled based on a rumor that was circulating in the media, validating the rumor and assigning it the value of full proof, with no examination whatsoever, and considering this enough to overturn the sovereign will of the voters of Amazonas State and the southern indigenous region, and, in the process, give rise to greater institutional breakdown. The court's decision, couched in legal terms, had clear political intent that was subsequently consolidated with successive cases presented on the same subject: inventing the excuse of "contempt" to invalidate all of the current legislative acts of the NA and those that the new NA would pass in the future.





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ISBN 978-92-9037-254-7



**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00  
**f** +41 22 979 38 01  
[www.icj.org](http://www.icj.org)