

# **Judges on the Tightrope**

Report on the Independence and  
Impartiality of the Judiciary in Venezuela

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Venezuela

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This Report was originally drafted in Spanish and translated into English. Where quotes cited were originally in English the original was retained for the translation. All other text is a free translation from the Spanish original.

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## **Executive Summary**

This report of the International Commission of Jurists (ICJ) documents how the political control exercised by the executive authorities of the ruling party (United Socialist Party of Venezuela) over the Supreme Court of Justice (SCJ) has contributed to the undermining of the rule of law, judicial independence, and lack of accountability for serious human rights violations in Venezuela.

Although the national legal system enshrines guarantees of judicial impartiality and independence in accordance with the rule of law, there are numerous deficiencies in the law below the Constitutional level. In practice, the operation of judicial independence in the country is abysmal. There is evidence in a number of ways.

First, the judiciary lacks independence from political control or influence and, in the midst of continuing authoritarianism, judges remain subject to severe external pressures.

Second, the Supreme Court of Justice (SCJ), in the exercise of some of its jurisdictional, governance and judicial management functions, has undermined the independence of judges. For example, the SCJ has allowed political actors to ignore constitutional procedures and requirements in the process of appointing judges to the SCJ. In addition, it has allowed political actors to effectively control or improperly influence the Supreme Court, and consequently the general judiciary.

Third, the repeated practice of the Supreme Court of Justice of suspending competitive examinations to appoint judges, as well as the effect this has on the high number of provisional judges, has led to a majority of judges being appointed without complying with constitutional procedures and an increase in the discretionary power of appointments by the Supreme Court of Justice, through its Judicial Commission. The Judicial Commission has broad powers to appoint and remove provisional judges and to create, modify and abolish courts. Furthermore, the SCJ has established in its jurisprudence that the removal of provisional judges does not require a disciplinary procedure which violates the principle of guarantee of security of tenure under international standards. In addition, judges have been dismissed immediately after adopting judicial decisions that the SCJ magistrates do not agree with.

Fourth, there are control mechanisms, both formal and informal, that condition and pressure the work of judges, such as the use of directives and instructions by head judges, coordinators, and presiding judges. These mechanisms seek to pressure judges to make certain decisions in their judgements.

Fifth, there are weaknesses in the judicial disciplinary procedures, such as a lack of implementation in accordance with the Constitution and the problems arising from the direct appointment of disciplinary judges by the SCJ. This is accompanied by a failure to operationalize the judicial electoral colleges and the existence of regulations that allow the majority participation of the Communal Councils - civic organizations with clear political affiliation to the United Socialist Party of Venezuela - in the selection of disciplinary judges.

Sixth, the deterioration of judicial independence has an impact on accountability of public officials and the fight against impunity in cases of serious human rights violations, which itself violates the rights of victims. Furthermore, given the control exercised by members of the current government over the judiciary, the latter is not just incapable of protecting victims of politically motivated repression and human rights violations, but in many cases the judiciary has also been used as a tool of

repression and persecution against dissidents. Rampant corruption has also been identified in the judiciary, consisting, for example, in undue "charges" demanded by judicial officials to carry out procedures, as well as judges linked to state contractors.

The ICJ considers it is essential to reestablish and guarantee the independence of the judiciary in Venezuela, which also means restoring the rule of law in the country. This report makes a series of recommendations to contribute to overcoming the institutional crisis and restoring the rule of law.

The main recommendations are aimed at urgently depoliticizing the judiciary in general, and specifically the Supreme Court of Justice, as well as advancing with appointment processes for senior positions in the judiciary and the Supreme Court of Justice in accordance with constitutional provisions. In addition, the ICJ recommends that independent and autonomous mechanisms are established within the judiciary for the selection of judges and for the exercising of disciplinary functions, and that transparency and accountability in the justice system are strengthened.

The ICJ suggests that part of the country's legislation is revised to bring it into line with international standards, especially that which formally regulates the selection and competitive examination processes for judges. There is also an urgent need to put an end to the use of military justice against civilians and to reinforce the constitutional prohibition of its use against civilians.

Finally, the authorities must comply with the international decisions and recommendations that different bodies in the United Nations and Inter-American human rights system have made, and allow access to the country for international human rights procedures and mechanisms that will contribute to accountability and the restoration of the rule of law. It is also recommended that the international community fortifies its efforts to restore the rule of law and judicial independence in Venezuela.



## I. Introduction

The International Commission of Jurists (ICJ) has documented the deteriorating human rights situation and the weakening of the rule of law and judicial independence in the country over the past decade. *Judges on the Tightrope in Venezuela* is the seventh report produced by the ICJ on Venezuela since 2014.<sup>1</sup>

In its 2014 report, the ICJ had already observed that the high percentage of judges and prosecutors who had been appointed to their positions on a provisional basis "ma[d]e [the] system of justice vulnerable to improper influence and manipulation." This was because "[w]hen a judicial system lacks independence, individual judges become fearful of applying the law justly and impartially, because they fear reprisals or professional consequences."<sup>2</sup> In its 2015 report, the ICJ concluded that "[t]he judiciary ha[d] been co-opted and ha[d] permitted governmental interference".<sup>3</sup> Authorities from the political branches of government had exercised "(...) undue pressure on the Judiciary, especially the SCJ and the Public Prosecutor's Office. This coercion is reflected in the instructions emanating from the government through diverse means, including television. The Government does not respect the separation of powers and even less so the independence and autonomy of the State branches. For the Government the Judiciary is a subordinated appendix of its revolutionary mandate."<sup>4</sup>

This new report documents how political control or undue influence by authorities of the executive branch of government and the current ruling party over the Supreme Court of Justice (SCJ) has contributed to the undermining of the rule of law, judicial independence and lack of accountability for serious human rights violations in relation to the SCJ's role in exercising the functions of governance and administration of the judiciary. This situation has recently worsened, in light of the widespread human rights crisis in the country that has been characterized by some observers as a "complex humanitarian emergency", in which corruption plays a key role.<sup>5</sup>

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<sup>1</sup> "Strengthening the Rule of Law in Venezuela" (2014) available at <https://www.icj.org/wp-content/uploads/2014/11/Venezuela-Strengthening-the-RoL-Publications-Reports-2014-Eng.pdf>; "Venezuela: The Sunset of the Rule of Law" (2015) available at <https://www.icj.org/wp-content/uploads/2015/10/Venezuela-Sunset-of-Rule-of-Law-Publications-Reports-2015-ENG.pdf>; "Achieving Justice for Gross Human Rights Violations in Venezuela" (2017) available at <https://www.icj.org/wp-content/uploads/2017/08/Venezuela-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>; "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch" (2017) available at <https://www.icj.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf> ; "The Trial of Civilians by Military Courts in Venezuela" (2018). Available only in Spanish at <https://www.icj.org/wp-content/uploads/2018/04/Venezuela-Civiles-Tribunales-Militares-Publications-Reports-Thematic-Reports-2018-SPA.pdf>; and "No Room for Debate-The National Constituent Assembly and the Crumbling of the Rule of Law in Venezuela" (2019). Available at <https://www.icj.org/wp-content/uploads/2019/07/Venezuela-No-room-for-debate-Publications-Reports-Fact-finding-mission-reports-2019-ENG.pdf>

<sup>2</sup> International Commission of Jurists "Strengthening the Rule of Law".

<sup>3</sup> International Commission of Jurists "Venezuela: The Sunset of the Rule of Law".

<sup>4</sup> International Commission of Jurists "Venezuela: The Sunset of the Rule of Law".

<sup>5</sup> Washington Office on Latin America (WOLA): "Venezuela's Complex Humanitarian Crisis: Humanitarian Response, Challenges for Civil Society" (2020). Available in Spanish at <https://www.wola.org/wp-content/uploads/2020/11/Informe-de-Vanessa-Cartaya-1.pdf>; Human Rights Watch (HRW) "Venezuela's Humanitarian Emergency" (2019). Available at <https://www.hrw.org/report/2019/04/04/venezuelas-humanitarian-emergency/large->

Venezuela's domestic legal framework<sup>6</sup> enshrines the principle guarantees of judicial independence, including security of tenure, according to which the judiciary must, in administering the judicial functions inherent to it under the system of separation of powers, act independently and impartially and in accordance with international human rights law.<sup>7</sup> This requirement may be characterized as *de jure* independence. The situation of the judicial independence is very different in practice (*de facto* independence). The lack of judicial independence has been repeatedly underscored by leading international human rights authorities, including the UN Human Rights Committee,<sup>8</sup> the UN Committee on Economic, Social and Cultural Rights,<sup>9</sup> the UN Committee Against Torture,<sup>10</sup> the UN Human Rights Council in the process of conducting Universal Periodic Review of Venezuela,<sup>11</sup> the Inter-American Commission on Human Rights (IACHR)<sup>12</sup> and the Inter-American Court of Human Rights (IACtHR).<sup>13</sup> In 2019, the Independent International Fact-Finding Mission on the

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[scale-un-response-needed-address-health](#); AVESA/CEPAZ/FREYA/Mujeres en línea: "Women on the Edge" (2019) Available at [https://cepaz.org/wp-content/uploads/2019/09/WOMAN\\_LIMITE\\_web\\_compressed.pdf](https://cepaz.org/wp-content/uploads/2019/09/WOMAN_LIMITE_web_compressed.pdf); International Commission of Jurists "Achieving Justice for Gross Human Rights Violations in Venezuela" (2017).

<sup>6</sup> Venezuelan Constitution Art. 254 y 255.

<sup>7</sup> See, among others: Universal Declaration of Human Rights (Article 10); International Covenant on Civil and Political Rights (Article 14.1); International Convention on the Elimination of All Forms of Racial Discrimination (Article 5.a); International Convention on the Rights of the Child (Articles 37.d and 40.2); American Convention on Human Rights (Article 8.1), Basic Principles on the Independence of the Judiciary; Guidelines on the Role of Prosecutors and Basic Principles on the Role of Lawyers.

<sup>8</sup> United Nations. Human Rights Committee. Concluding Observations on the fourth periodic report of the Bolivarian Republic of Venezuela. CCPR/C/VEN/CO/4 dated 14 August 2015 available at <https://undocs.org/en/CCPR/C/VEN/CO/4>; Consideration of reports submitted by States Parties under article 40 of the covenant. CCPR/CO/71/VEN dated 26 April 2001 available at <https://undocs.org/en/CCPR/CO/71/VEN>.

<sup>9</sup> United Nations. Economic and Social Council. Committee on Economic, Social and Cultural Rights. Concluding observations on the third periodic report of the Bolivarian Republic of Venezuela E/C.12/VEN/CO/3 dated 7 July 2015. Available at <https://undocs.org/en/E/C.12/VEN/CO/3>

<sup>10</sup> United Nations. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Concluding observations on the combined third and fourth periodic report of the Bolivarian Republic of Venezuela. CAT/C/VEN/CO/3-4 dated 12 December 2014. (Paragraph 16) available at <https://undocs.org/en/CAT/C/VEN/CO/3-4>.

<sup>11</sup> United Nations. Human Rights Council. Report of the Working Group on the Human Rights Council. Universal Periodic Review (2017) A/HRC/34/6 Available at <https://undocs.org/en/A/HRC/34/6> and (2011) A/HRC/19/12 available at <https://undocs.org/en/A/HRC/19/12>.

<sup>12</sup> Among others, Inter-American Commission on Human Rights. Country Reports on Venezuela "Report on the Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and human rights in Venezuela" OEA/Ser.L/V/II. Doc. 209 dated 31 December 2017 available at <https://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf>; Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54 dated 30 December 2009 available at <http://www.cidh.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm>; Report on the Situation of Human Rights in Venezuela, OEA/Ser.L/V/II.118 Doc. 4 rev. 1 dated 24 October 2003 available at <http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm>.

<sup>13</sup> Inter-American Court of Human Rights. Case of Apitz Barbera et al ("First Contentious Administrative Court") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_182\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_182_esp.pdf); Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Available in Spanish at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_197\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_197_esp.pdf); Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of

Bolivarian Republic of Venezuela (FFM) established by the United Nations Human Rights Council declared that "[o]ne of the elements that contributes to the violations and crimes determined by the Mission is the lack of independence of the judiciary".<sup>14</sup>

In the midst of growing authoritarianism, individual judges have been subjected not just to external pressures, but also to internal pressures coming from the highest levels of the judiciary. There are formal mechanisms of repression and control by the Supreme Court contrived to prevent any independent action that could be understood as a deviation from the ruling party's policies or as disloyalty. Judges have also sometimes been effectively complicit, by action or omission, with the arbitrary actions of the government in the face of serious human rights violations. The judiciary has at times become instrumentalized in abuses against human rights and rule of law, as a tool for the executive branch under the longtime control of the ruling party (United Socialist Party of Venezuela), in a manner that has facilitated repression and human rights abuses, in distortion of its role in safeguarding the rule of law.

In addition, the security of tenure of judges, a core tenet of the independence of the judiciary, has not been respected, as many judges have only been "provisionally" appointed to their positions, and the provisional nature of these positions is incompatible with judicial independence. In addition, there are no transparent public selection processes for suitably qualified jurists to access positions in the judiciary. The ICJ has also observed rampant corruption in the justice system related to the adjudicating of the cases or the imposition of unjustifiable fees requested by judiciary officials to perform their duties. Recently, judges have been appointed primarily for their loyalty to those who appoint them, rather than for their competency, experience or legal knowledge.

Members of the judiciary are subjected to various formal and informal control mechanisms, some of them not formally established by law, that weaken their independence and impartiality. These include, among others, abusive issuance of "instructions" on how specific cases must be adjudicated and oversight mechanisms imposed by the Supreme Court; mandatory interpretations of the Constitution made by the Constitutional Chamber of the Supreme Court that favor the actions of the government; and the concentration of power by the Supreme Court of its control functions. These control mechanisms also cause the violation of rights and the real risk of falling victim to widespread acts of persecution due to political reasons.

The lack of security of tenure of the majority of the Venezuelan judiciary, the arbitrary use of mechanisms of governance and control by the Supreme Court of Justice, and internal and external pressures and threats made against judges create a situation of fear and a chilling effect that dissuades judges from properly carrying out their judicial functions and so undermines the independence and impartiality of the judiciary. These factors also create barriers that limit access to justice and accountability for the perpetrators of serious human rights violations.

Following a substantial assessment of the situation, this report presents recommendations for strengthening judicial independence in the country. The text is

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July 1, 2011. Available in Spanish at [http://corteidh.or.cr/docs/casos/articulos/seriec\\_227\\_esp.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_227_esp.pdf).

<sup>14</sup> United Nations. Human Rights Council: Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela. A/HRC/45/CRP.11 Dated 15 September 2020. Paragraph 148 Available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A\\_HRC\\_45\\_CRP.11.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP.11.pdf).

The FFM also declared that it had "reasonable grounds to believe that crimes against humanity were committed in Venezuela" (paragraph 2086).

divided into eight parts: (i) the first is this introductory section; (ii) the second section explains the research methodology for this report; (iii) the third explains the structure of the Venezuelan justice system; (iv) the fourth section presents findings about the deterioration of the independence of courts and tribunals in the country in light with international standards, with emphasis in the decisions of the Supreme Court of Justice, and problems with judicial appointments, including the provisional appointment of judges, regularization of the tenure of provisional judges and the control mechanisms used in administrative management; (v) the fifth section reviews the problematic provisions for disciplinary measures; (vi) the sixth section details the effects of the improper use of controls over judges in terms of impunity, corruption and their role in repression and facilitating human rights violations; (vii) the seventh section presents conclusions; and (viii) the eight presents the recommendations.

It is important to mention that the problems affecting the Venezuelan justice system involve other actors in the administration of justice, such as the Public Prosecutor's Office, police forces, lawyers, the Public Defender's Office and specialized jurisdictions, which, while important subjects in their own right, are beyond the scope of the present report.

## **II. Methodology**

The methodology for this report consists in two parts. First, the ICJ conducted research into published primary and secondary sources on the state of the rule of law and judicial independence and human rights in Venezuela, as well as international standards on human rights, judicial independence and judicial accountability. The purpose of this was to identify and analyze the different challenges to guaranteeing judicial independence in the country. The ICJ also looked at official documents, including those containing the laws of the National Assembly and the resolutions, rulings and agreements issued by the Supreme Court of Justice. This research was undertaken to identify the applicable national legal framework and evaluate it against international law and standards and current practices.

Secondly, the ICJ conducted confidential and remotely interviews with former public officials from the justice system, researchers, academics, lawyers and members of civil society organizations. The interviews inquired as to their experiences regarding the processes of selection, control and removal of judges, as well as the problems caused by the lack of judicial independence in relation to the fulfillment of human rights in the country. Interviews were also requested with the current judiciary authorities.<sup>15</sup> However, these requests did not receive a response.

A total of 80 interviews were conducted, 55 percent of which were with women. Some 50 percent of the interviews were conducted with people whose judicial activity is based in Caracas, while the remaining 50 percent were distributed equally among people located in the states of Lara, Táchira, Bolívar, Mérida and Zulia. These states were selected because they are representative of Venezuela's different regions (Andes, Central, West and East), and because they are the site of specific experiences in the context of the "complex humanitarian emergency". These include the weakness of the State, migratory mobility, presence of indigenous communities, interference by extractive industries, environmental impact and organized crime activities.

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<sup>15</sup> Communication dated 20 October 2020 addressed to the Chief Justice and Chairman of the Judicial Commission. Communication dated 20 October 2020 addressed to the Inspector General of Courts.

In general, the ICJ attempted to achieve a wide-ranging overview of the country in order to verify the extent to which the identified trends in Caracas correspond to the entire justice system. The report aimed to cover a range of themes. Thirty-five percent of interviews focused on the criminal jurisdiction, 20 percent on the civil and commercial jurisdiction, 15 percent on the labor jurisdiction, 15 percent on the administrative jurisdiction and 15 percent on children's jurisdiction.

Finally, the ICJ conducted three consultative meetings with a total of 28 experts from Venezuela and other countries to discuss the findings of the research. Their observations and comments informed the content of this report.

### **III. The Venezuelan justice system**

According to the Constitution, the judiciary is independent<sup>16</sup> and the function of administration of the country's judiciary is centralized at the national level.<sup>17</sup> The Supreme Court of Justice (SCJ) is the overall governing body of the judiciary,<sup>18</sup> as well as the highest and final jurisdictional body.<sup>19</sup> It maintains different chambers, some with specialized competencies.<sup>20</sup> No appeals are allowed against its decisions.<sup>21</sup> Its jurisdictional functions, among others, include judicial review of on questions of law (cassation), prosecution of crimes committed by high-ranking State officials, constitutional interpretation, control of the constitutionality of international treaties, potential nullity of laws and regulatory acts, and control of states of emergency.<sup>22</sup>

The national judiciary is composed of municipal courts and Courts of First Instance (civil and criminal matters) and Courts of Second Instance (Courts of Appeals, Contentious Administrative Courts and Superior Courts),<sup>23</sup> which may sit as a single judge<sup>24</sup> or as a collegiate panel. A Court of Appeal may consist of several chambers with three judges each chamber. The number of additional chambers is freely determined by the SCJ in accordance with the needs of the administration of justice.

The courts that have common subject matter are located in the same state as one another are organized into circuits, in which administrative functions are shared. The Supreme Court of Justice is responsible for the determination of the number of courts and the organization of these circuits, though the parameters in which they do so are regulated by statutory laws, including, among others, the Organic Code of Criminal Procedure.<sup>25</sup> Through resolutions, the SCJ may create new courts for certain matters,

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<sup>16</sup> Venezuelan Constitution Art. 254. In addition, the Constitution decrees a fixed minimum percentage in the State budget (Art. 254).

<sup>17</sup> Organic Law of the Judiciary Art. 61.

<sup>18</sup> Venezuelan Constitution Art. 267.

<sup>19</sup> Organic Law of the Supreme Court of Justice Art. 3.

<sup>20</sup> Venezuelan Constitution Art. 262 The Supreme Court of Justice functions in Chambers: Constitutional, Electoral, Political-Administrative, Social Cassation, Criminal Cassation, Civil Cassation and Plenary Chambers (meeting of all justices).

<sup>21</sup> Organic Law of the Supreme Court of Justice Art. 3.

<sup>22</sup> Venezuelan Constitution Art. 266 and Organic Law of the Supreme Court of Justice Art. 24 to 35.

<sup>23</sup> Organic Law of the Judiciary, Art. 62.

<sup>24</sup> Organic Law of the Judiciary Art. 65, 67 and 70.

<sup>25</sup> Organic Code of Criminal Procedure (2009) Art. 504 "The Supreme Court of Justice may create more than one Criminal Judicial Circuit in a Judicial District, when necessary for reasons of service. Its organization, composition and operation shall be governed by the provisions established in this Code and in the corresponding organic laws, resolutions and regulations issued by the Supreme Court of Justice for such purposes."

as it has done with the courts for terrorism.<sup>26</sup> The SCJ also may abolish or transfer existing courts and modify or eliminate certain of their competencies.<sup>27</sup>

According to the Constitution, the SCJ is functionally, administratively and financially autonomous. It oversees the functions of governance, administration, budget execution, inspection, discipline and oversight of the other courts and the public defense system.<sup>28</sup> However, the disciplinary function is the responsibility of specialized courts with jurisdiction over judicial discipline,<sup>29</sup> but also these specialized courts are under the administrative and jurisdictional authority of the SCJ.

In addition, the Constitution provides for the creation of an Executive Directorate of the Judiciary as an auxiliary body, whose are delegated authority by the SCJ regarding the direction, government and administration of the judiciary.<sup>30</sup> There are other SCJ auxiliary bodies<sup>31</sup> which exercise functions related to the training, inspection and oversight of the judiciary, such as the General Inspectorate of Courts and the National School of the Judiciary. Their incumbents are unilaterally appointed and removal by the SCJ.

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<sup>26</sup> See United Nations. Human Rights Council. Independence of the justice system and access to justice in the Bolivarian Republic of Venezuela, including for violations of economic and social rights, and the situation of human rights in the Arco Minero del Orinoco region. Report of the United Nations High Commissioner for Human Rights. A/HRC/44/54 15 July 2020, para. 14. Available at <https://undocs.org/en/A/HRC/44/54>.

<sup>27</sup> See among others: Resolution No. 2020-0033 dated December 09, 2020, which modifies the structure of the Agrarian competence of the Superior Agrarian Court. Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003796.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003796.html)

Resolution No. 2020-0018 dated November 04, 2020, which creates the jurisdictional organs with competence in the special matter of the criminal section for adolescents. Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003782.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003782.html);

Resolution No. 2020-0020 dated November 04, 2020, which attributes exclusive competence to Chamber No. 1 of the Court of Appeals of the Judicial Circuit (...) to hear and decide matters and cases whose charges involve the commission of economic crimes (...). Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003784.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003784.html)

Resolution No. 2020-0021 dated November 04, 2020, which attributes exclusive competence to Chamber No. 1 of the Court of Appeals of the Judicial Circuit (...). Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003784.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003784.html).

2020-0021 dated 04 November 2020, which creates the Court of Appeals with Jurisdiction over Crimes of Violence against Women. Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003785.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003785.html);

Resolution No. 2020-0022 dated 04 November 2020, which increases the number of Courts of First Instance. Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003786.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003786.html);

Resolution No. 2019-0025 dated 27 November 2019, which constitutes the Special Courts of First Instance and the Special Chamber of the Superior Court, all which are part of the Adolescent Criminal Responsibility System. Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003761.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003761.html);

Resolution No. 2019-0025 dated 16 October 2019, which creates the Chambers of the Court of Appeals. Available in Spanish at

[http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003756.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003756.html)

<sup>28</sup> Organic Law of the Supreme Court of Justice, Art. 2 and 36; Constitution, Art. 267.

<sup>29</sup> Venezuelan Constitution Art. 255 and 267.

<sup>30</sup> Venezuelan Constitution, Art. 267; Organic Law of the Supreme Court of Justice, Art. 75; Regulations on the Direction, Government, and Administration of the Judicial Branch, Official Gazette No. 37.014 of August 15, 2000. Art. 1.

<sup>31</sup> Organic Law of the Supreme Court of Justice, Art. 80.

In accordance with the Constitution, the SCJ is responsible for the appointment and swearing in of judges,<sup>32</sup> who are named to a judicial position following a public selection process. The SCJ in practice has assumed the function of appointing and removing presidents under the criminal jurisdiction, rectors under the civil jurisdiction and coordinators of judicial circuits,<sup>33</sup> despite the fact that the Organic Law of the Judiciary establishes that these officials should be elected annually from among the members of the Courts.<sup>34</sup>

Finally, although the functions of judicial governance and administration are entrusted to the Plenary of the Supreme Court,<sup>35</sup> the SCJ itself established a permanent Judicial Commission,<sup>36</sup> consisting of six judges (one representative from each Chamber), which has the *"purpose of coordinating the policies, activities and performance of the Executive Directorate of the Judiciary, the National Judiciary School, the General Inspectorate of Courts and the Public Defender's Office"*.<sup>37</sup> In practice, this Commission has assumed a number of additional functions,<sup>38</sup> specifically those related to the appointment and removal of judges and public officials of these bodies, even though there is no constitutional or legal reference that provides for even the existence of this Judicial Commission.

#### **IV. The deterioration of judicial independence of courts and tribunals: the role of the Supreme Court of Justice**

As detailed above, the SCJ is the highest judicial body, supervising the governance and administration of the judiciary.<sup>39</sup> It has control over the judiciary, both in terms of its judicial review function and administrative matters, which also concerns matter of budget and disciplinary controls. The Constitution provides that the Judges of the

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<sup>32</sup> Venezuelan Constitution Art. 255; Organic Law of the Supreme Court of Justice Art. 36.6.

<sup>33</sup>See among others: Resolution No. 2018-0001 dated April 08, 2018. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003734.htm](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003734.htm); Resolution No. 2018-0007 dated October 09, 2018. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003740.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003740.html); Resolution No. 2018-0004 dated July 10, 2018. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003738.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003738.html); Resolution No. 2016-0446 dated October 19, 2016. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003589.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003589.html); Resolution No. 2016-0386 dated August 17, 2016. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003521.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003521.html); Resolution No. 2015-0398 dated December 16, 2015. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003112.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003112.html); Resolution No. 2015-0377 dated November 24, 2015. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003091.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003091.html); Resolution No. 2014-0297 dated December 05, 2014. Available at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0002661.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0002661.html); Resolution No. 2014-0293 dated December 02, 2014. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0002657.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0002657.html).

<sup>34</sup> Organic Law of the Judiciary, Art. 62.

<sup>35</sup> The Venezuelan Constitution Art. 262. The Supreme Court of Justice functions in Chambers: Constitutional, Electoral, Political-Administrative, Social Cassation, Criminal Cassation and Civil Cassation and Plenary Chambers (meeting of all the justices).

<sup>36</sup> Originally established in 2000 by the Regulations on the Direction, Government and Administration of the Judicial Branch (Art. 2) "to exercise by delegation the functions of control and supervision of the Executive Directorate of the Judiciary and others provided for in these Regulations". It was modified by the Internal Regulations of the Supreme Court of Justice (2006).

<sup>37</sup> Internal Regulations of the Supreme Court of Justice Art. 73.

<sup>38</sup> Internal Regulations of the Supreme Court of Justice Art. 74.

<sup>39</sup> Organic Law of the Supreme Court of Justice Art. 2 and 36.

SCJ, like any judges, must meet the highest ethical and professional standards required by the Constitution and international principles and must be independent and impartial at all times. In addition, the SCJ must conduct itself with maximum transparency and be accountable to the public.

### **A. General overview of international standards on judicial independence**

Judicial independence and accountability are essential elements for a judiciary operating under the rule of law and fairly administering justice.<sup>40</sup>

In addition to the Constitution and statutes of Venezuela, the question of the independence and accountability of the judiciary is addressed by international law and standards, which Venezuela is bound to respect. International human rights law establishes the right of everyone to be tried by an independent, impartial and competent tribunal established by law and the guarantees for a fair trial.<sup>41</sup> That right is protected under article 14 of the International Covenant on Civil and Political Rights and article 8 of the American Convention on Human Rights. Other universal instruments also provide for the requirement that courts be independent and impartial.<sup>42</sup>

The overarching universal standards on the independence of the judiciary are contained in the UN Basic Principles on the Independent of the Judiciary, which were endorsed by the UN General Assembly,<sup>43</sup> and article 14 of the ICCPR as interpreted by the Human Rights Committee.<sup>44</sup> Leading standards of the Inter-American system are contained in several jurisprudence of the Inter-American Court of Human Rights<sup>45</sup> and in the Inter-American Commission on Human Rights' report "*Guarantees for the Independence of Justice Operators*".<sup>46</sup> Under these and other standards, the judiciary must be structurally institutionally independent, a guarantee which must be ensure by law and by the prescription that "[i]t is the duty of all governmental and other

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<sup>40</sup> United Nations. Report of the Special Rapporteur on the independence of judges and lawyers. A/HRC/26/32 (28 April 2014) Available at <https://undocs.org/en/A/HRC/26/32>.

<sup>41</sup> United Nations. Human Rights Committee, General Comment 32 on the right to equality before courts and tribunals and to a fair trial, UN document CCPR/C/GC/32 (Aug. 23, 2007) available at <https://undocs.org/en/CCPR/C/GC/32>. See also, International Commission of Jurists. A manual on trial observation – Practitioners' Guide N°5 (2009), available at <https://www.icj.org/wp-content/uploads/2009/07/trial-observation-manual-Human-Rights-Rule-of-Law-series-2009-eng.pdf>.

<sup>42</sup> See, for example, Universal Declaration of Human Rights (article 10); International Covenant on Civil and Political Rights (article 14.1); International Convention on the Elimination of All Forms of Racial Discrimination (article 5.a); Convention on the Rights of the Child (articles 37.d and 40.2); Basic Principles on the Independence of the Judiciary; Guidelines on the Role of Prosecutors and Basic Principles on the Role of Lawyers.

<sup>43</sup> United Nations. Basic Principle on the Independence of the Judiciary, Un General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>44</sup> United Nations. Human Rights Committee, General Comment 32 on the right to equality before courts and tribunals and to a fair trial, UN document CCPR/C/GC/32 (Aug. 23, 2007) available at <https://undocs.org/en/CCPR/C/GC/32>.

<sup>45</sup> Inter-American Court of Human Rights and GIZ, "Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos N° 12: Debido Proceso", Costa Rica, 2017, available in spanish at <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo12.pdf>

<sup>46</sup> Inter-American Commission on Human Rights, "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." (2013) Available at <https://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>.



*institutions to respect and observe the independence of the judiciary.”<sup>47</sup> In addition, the decisions of the judiciary must be taken “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>48</sup> Thus, the judiciary must not only be institutionally independent, but independence of each individual judge must be secured. This is achieved by setting very strict controls and procedures for appointment, removals, conditions of tenure, and procedures for discipline if they arise.<sup>49</sup> It also is ensured by making sure that judges are able to enjoy human rights such as freedom of association and expression.<sup>50</sup>*

While judges do enjoy these rights, guarantees of the independence and impartiality of the courts are not intended to establish privileges or personal benefits for judges, but to ensure the fair and equal administration of justice under the rule of law. This also concerns particular responsibilities in the protection of human rights.<sup>51</sup> For this reason, there must also be mechanisms for accountability in relation to judicial misconduct, including judicial corruption or complicity in human rights violations.<sup>52</sup>

These international standards regarding the independence of the judiciary, including as matters of Constitutional law, have been violated, some in a systematic manner in recent years in Venezuela. This can be seen particularly in the manner of the functioning of the SCJ, including in their judicial review, governance and administrative capacities. As will be shown below, this has served to undermine the overall independence of the courts and tribunals in Venezuela.

## **B. Jurisdictional decisions by the Supreme Court of Justice**

The SCJ, far from acting as an impartial arbiter of justice, has played a demonstrative role in supporting and favoring the interests of certain political powers in several decisions. As ICJ previously reported, “*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.*”<sup>53</sup>

The SCJ has showed signs of lack of impartiality in a number of its decisions. During 2019-20 the SCJ authorized the criminal prosecution of 28 member of political opposition parties elected as deputies to the National Assembly in 2015<sup>54</sup> by requiring that their parliamentary immunity be unconstitutionally stripped by the Constituent

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<sup>47</sup> United Nations. Basic Principle on the Independence of the Judiciary, principle 1.

<sup>48</sup> United Nations. Basic Principle on the Independence of the Judiciary, principle 2.

<sup>49</sup> United Nations. Basic Principles on the Independence of the Judiciary, Principles 11-20. See also Inter-American Court of Human Rights Case of Urrutia Laubreaux v. Chile, paras. 96-98; Case of the Constitutional Tribunal v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001, para. 75.

<sup>50</sup> United Nations. Basic Principle on the Independence of the Judiciary, principle 8 and 9.

<sup>51</sup> ICJ Declaration and Plan of Action on Upholding the rule of law and the role of judges and lawyers in times of crisis (2008) available at <https://www.icj.org/wp-content/uploads/2012/04/ICJ-Declaration-and-Plan-of-Action-Position-papers-2008.pdf>.

<sup>52</sup> See International Commission of Jurists. Judicial Accountability: ICJ Practitioners’ Guide no. 13 (2016), available at <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

<sup>53</sup> International Commission of Jurists, “The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch”.

<sup>54</sup> Voluntad Popular, Acción Democrática, Primero Justicia, Un Nuevo Tiempo, Causa R, Avanzada Progresista.

Assembly.<sup>55</sup> Under article 200 of the Constitution, only Parliament has such authority. In addition, the SCJ has continued to strip the National Assembly of the authority to perform its constitutional functions. Thus, in 2020 the SCJ unilaterally appointed the authorities of the National Electoral Council, usurping again the constitutional powers of the National Assembly.<sup>56</sup> Additionally, the SCJ has shown a special interest in and given priority to solving promptly and without delay, cases of interest for the government, such as the intervention of several opposition political parties<sup>57</sup> that had decided not to participate in the 2020 parliamentary elections due to lack of guarantees to ensure the expression of popular sovereignty.<sup>58</sup> The SCJ removed their boards of directors and appointed new ones with the instruction to participate in the 2020 parliamentary elections.

Under the Constitution and domestic law, the Constitutional Chamber of the SCJ has the power to control and review of the constitutionality of the rulings of other courts, including the other Chambers of the Supreme Court of Justice,<sup>59</sup> if requested by one of the parties when those decisions:

- Disregard any precedent of the Constitutional Chamber;
- Produce a serious error in their interpretation or fail to apply constitutional principles or norms in their decisions;<sup>60</sup>

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<sup>55</sup> CEPAZ: "La Fórmula Perfecta Para Apuntalar La Dictadura: Asedio a la Asamblea Nacional de Venezuela". January 2020. Available in Spanish at <https://cepaz.org/wp-content/uploads/2020/01/La-fo%CC%81rmula-perfecta-para-apuntalar-la-dictadura-2.pdf>. In addition, Human Rights Council. Forty-first session. Report of the United Nations High Commissioner for Human Rights. A/HRC/41/18 dated 9 October 2019. Paragraph 37 Available at <https://undocs.org/en/A/HRC/41/18>.

<sup>56</sup> Supreme Court of Justice. Constitutional Chamber. Judgments No. 00068 dated June 05, 2020. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/junio/309870-0068-5620-2020-20-0215.HTML> No. 2341 dated August 25, 2003. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/agosto/PODER%20ELECTORAL.HTM>; No. 1865 dated December 26, 2014. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/173497-1865-261214-2014-14-1343.HTML> and No. 1086 dated December 13, 2016. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/193866-1086-131216-2016-16-1191.HTML>.

<sup>57</sup> Supreme Court of Justice. Constitutional Chamber. Judgments No. 71 dated June 15, 2020 ("Acción Democrática" case). Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/junio/309873-0071-15620-2020-18-0458.HTML>; No. 72 dated June 16, 2020 ("Primero Justicia" case). Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/junio/309874-0072-16620-2020-20-0026.HTML> No. 77 dated July 7, 2020 ("Voluntad Popular" case). Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/julio/309922-0077-7720-2020-20-0053.HTML>; No.81 dated July 22, 2020 (Case "Tendencias Unificadas Para Alcanzar Movimiento de Acción Revolucionarias Organizada (Tupamaro)". Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/julio/309932-0081-22720-2020-20-0250.HTML>; Judgment No. 122 dated August 21, 2020 ("Patria Para Todos" case). Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/agosto/310061-0122-21820-2020-20-0278.HTML>.

<sup>58</sup> "The publication of these Special Rules prompted a national uproar in view of the obvious violation of Constitutional provisions and the body of laws in general." Cf. IDEA-UCAB Study Mission on the conditions of the 2020 parliamentary electoral process in Venezuela, dated November 6, 2020. Available at <https://politikaucab.files.wordpress.com/2020/11/informe-idea-inglecc81s-version-final-11102020-eng-portada.pdf>; Also: Organization of American States, Permanent Council. Resolution of June 26, 2020 CP/RES. 1156 (2291/20) available at [http://scm.oas.org/doc\\_public/english/hist\\_20/cp42624e03.docx](http://scm.oas.org/doc_public/english/hist_20/cp42624e03.docx) Bachelet, Michelle "La posibilidad de procesos electorales democráticos en Venezuela disminuye". Available in Spanish at <https://news.un.org/es/story/2020/07/1476902>.

<sup>59</sup> Organic Law of the Supreme Court of Justice Art. 25.11.

<sup>60</sup> Organic Law of the Supreme Court of Justice Art. 25.10.

- Use the diffuse control of the constitutionality of laws or other legal norms issued by the other Chambers of the Supreme Court and other courts of the Republic has been exercised.<sup>61</sup>

These powers of the Constitutional Chamber constitute an element of control over the other courts,<sup>62</sup> and even over the other judges of the SCJ,<sup>63</sup> when deviation from the jurisprudential lines constitutes an "*inexcusable error due to ignorance of the Constitution of the Republic, of the law or of the legal system, as declared by one of the Chambers of the Supreme Court of Justice hearing the case*".<sup>64</sup> This conduct is punishable by removal from office for both judges and magistrates of the SCJ itself.<sup>65</sup> As will be shown in section **V** below about disciplinary jurisdiction, the application of this provision gives rise to violations of guarantees of judicial independence.

The ICJ considers that some jurisdictional decisions adopted by the SCJ show that the Court has interpreted the Constitution in a way that has effectively limited rather than strengthened the principle of separation of powers. The SCJ has also used the grounds of "inexcusable error" as an ambiguous concept to punish judges who do not follow its jurisprudence, which has undermined the individual independence of the targeted judge.

### **C. Selection and appointment of judges to the Supreme Court of Justice**

The UN Basic Principle 10 establishes that:

*"[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."*

The IAHRRC affirms that:

*"access to positions as justice operators, a common feature of the processes whereby judges, prosecutors and public defenders are selected and appointed is that there shall be no discrimination and the selection processes must be conducted under general conditions of equality."*<sup>66</sup>

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<sup>61</sup> Organic Law of the Supreme Court of Justice Art. 25.12.

<sup>62</sup> Supreme Court of Justice. Electoral Chamber, Judgment No. 24, March 15, 2004. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/selec/marzo/24-150304-X00006.HTM>.

<sup>63</sup> International Commission of Jurists: "Venezuela - Attacks on Justice" (2005).

<sup>64</sup> Code of Ethics of the Venezuelan Judge. Extraordinary Official Gazette of December 28, 2015. Art. 29.21.

<sup>65</sup> Organic Law of the Supreme Court of Justice Art. 62.14.

<sup>66</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 60.

The IAHR has further stated that:

*"[t]he goal of any selection and appointment process must be to appoint applicants based on their merit and professional qualifications, and also to ensure equality of opportunity. Accordingly, States must ensure that persons who have the qualifications are able to compete as equals, even in the case of persons temporarily occupying the positions; a person temporarily in a position, he or she cannot be treated with privileges and advantages or disadvantages."*<sup>67</sup>

As to the duration of appointment, the IAHR has found that "[a]n established and sufficiently lengthy term gives the justice operator the sense of job stability needed to perform his or her functions with a sense of independence and autonomy, without succumbing to pressure or having to fear that the appointment still has to be confirmed or ratified."<sup>68</sup> It stressed that "(...) a short term for judges weakens the judiciary and affects their independence and professional development. Tenured appointments, especially for judges and justices on the high courts, the Prosecutor General and the Public Defender General, do much to strengthen their job stability and, as a result, their independence, as they do not have to concern themselves with re-election."<sup>69</sup>

The IACHR has concluded that provisional appointments and for "indefinite periods of time, without any guarantees of stability for the justice operator, the latter may well make decisions for the sole purpose of pleasing the authority that determines whether to renew his or her appointment or make the justice operator permanent in his or her post. The free removal of justice operators creates objective doubts about whether they can participate in proceedings independently, without fear of reprisals."<sup>70</sup>

Under the Venezuelan Constitution, Article 146 establishes that, in principle, appointment of any public officials must be the result of public competition. Regarding the judiciary, article 255 states that: "[a]ppointment to a judicial position and the promotion of judges shall be carried out by means of public competitions to ensure the capability and excellence of the participants, with selection by the juries of the judicial circuits, in such manner and on such terms as may be established by law." The Venezuelan authorities have acknowledged that judicial operators:

*"whose appointments are provisional are at a disadvantage; their provisional status exposes them to the influence of pressure groups, which would undermine the constitutionality and legality of the justice system. Provisional status in the exercise of public office is contrary to Article 146 of the Constitution of the Bolivarian Republic of Venezuela,*

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<sup>67</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 62.

<sup>68</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 83.

<sup>69</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 84.

<sup>70</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 90.

*which provides that positions in government are career service posts and are won by public competition.”<sup>71</sup>*

In 1999 the Constituent Assembly provisionally appointed the judges for the newly created Supreme Court of Justice, and then failed to conduct the proper process for selection and appointment of SCJ justices under the Constitution. The appointments have been guided by opportunism and carried out through political negotiation. This trend has been documented by the ICJ and by a number of civil society organizations.<sup>72</sup>

First, in relation to the initial members of the Supreme Court of Justice, it is important to note that the National Constituent Assembly of 1999 decreed a "Transitional Regime of Public Power"<sup>73</sup> through which it declared the then existing Supreme Court of Justice extinct and appointed the judges of the new Supreme Tribunal without observing the procedure provided for in the new Constitution.

Magistrates were then appointed on a transitional basis until the new legislative National Assembly made definitive appointments in accordance with the Constitution.<sup>74</sup> However, on November 14, 2000, the National Assembly approved a "Special Law of ratification or designation"<sup>75</sup> that failed to observe the provisions established in the 1999 Constitution.<sup>76</sup> This Law was strongly criticized at the time by members of civil society<sup>77</sup> and by the Inter-American Commission on Human Rights<sup>78</sup>. Later in 2000 the Constitutional Chamber of the SCJ<sup>79</sup> relaxed the requirements for

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<sup>71</sup> Ortega Díaz, Luisa (Former Venezuela's Attorney General) Quoted by the Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 91.

<sup>72</sup> International Commission of Jurists. "Venezuela - Attacks on Justice 2000" available at [https://www.icj.org/wp-content/uploads/2001/08/venezuela\\_attacks\\_justice\\_2000.pdf](https://www.icj.org/wp-content/uploads/2001/08/venezuela_attacks_justice_2000.pdf); "Venezuela - Attacks on Justice 2002" available at [https://www.icj.org/wp-content/uploads/2002/08/venezuela\\_attacks\\_justice\\_27\\_08\\_2002.pdf](https://www.icj.org/wp-content/uploads/2002/08/venezuela_attacks_justice_27_08_2002.pdf); "Venezuela - Attacks on Justice 2005" available at <https://www.icj.org/wp-content/uploads/2012/04/Venezuela-Attacks-on-Justice-2005-Publication-2008.pdf>; "Strengthening the Rule of Law", "Achieving justice for grave human rights violations in Venezuela" and "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch". In addition, see: Human Rights Watch "Rigging the Rule of Law (2004)" available at <https://www.hrw.org/report/2004/06/16/rigging-rule-law/judicial-independence-under-siege-venezuela> and "Venezuela: Concentration and Abuse of Power Under Chávez" (2012). Available <https://www.hrw.org/news/2012/07/17/venezuela-concentration-and-abuse-power-under-chavez>.

<sup>73</sup> Decree on the Transition Regime of Public Power. Dated December 22, 1999, it was originally published on January 28, 2000 and republished on March 28, 2000 in Official Gazette No. 36,920.

<sup>74</sup> Decree on the Transitional Regime of Public Power Art. 21.

<sup>75</sup> Special Law for the Ratification or Appointment of Officials of the Public Power and Magistrates of the Supreme Court of Justice for their First Constitutional Period, published in Official Gazette No. 37.077 dated November 14, 2000.

<sup>76</sup> International Commission of Jurists "Venezuela - Attacks on Justice 2002".

<sup>77</sup> Programa Venezolano Educación Acción en Derechos Humanos (PROVEA) Annual Report. October 2000 - September 2001 (Justice). Available in Spanish at [https://provea.org/wp-content/uploads/008\\_derecho\\_a\\_la\\_justicia-3.pdf](https://provea.org/wp-content/uploads/008_derecho_a_la_justicia-3.pdf).

<sup>78</sup> Inter-American Commission on Human Rights Report on the Situation of Human Rights in Venezuela 2003. Paragraph 178.

<sup>79</sup> Supreme Court of Justice. Constitutional Chamber. Judgment No. 1562 of December 12, 2000. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/1562-121200-00-3035%20.HTM>.

the appointment process and included performance evaluation of the current judges as a criterion to determine whether those were "*worthy of ratification*".<sup>80</sup>

In 2004, the National Assembly reformed the Organic Law of the Supreme Court of Justice (adopted in 1976), on the grounds that there was a need to adapt it to the Constitution of 1999 and the attributes of the new Supreme Court of Justice. This reform was problematic because: (i) it was approved without observing the constitutional and regulatory procedures for enacting laws;<sup>81</sup> (ii) it unjustifiably increased the number of members of the SCJ Justices from 20 to 32 and established the possibility of appointing them with a simple majority of the National Assembly instead of the two-thirds majority required by the Constitution; (iii) established a procedure to annul previous appointments and suspend magistrates, despite the fact that this procedure is not provided for in the Constitution;<sup>82</sup> and (iv) established a regime of "alternate justices".<sup>83</sup>

Once the new law had been passed, several justices were removed by a summary dismissal<sup>84</sup> or were pressured to retire.<sup>85</sup> The ruling party, using a simple majority in the National Assembly, replaced those judges and appointed the 12 new additional and all the alternate justices.<sup>86</sup> Most of those new justices failed to meet the requirements established under the Venezuelan Constitution.

These situations in practice allowed the executive branch to consolidate political control or influence over the SCJ.<sup>87</sup> The Inter-American Commission observed in this respect that "(...) *the rules for the appointment, removal and suspension of justices lack adequate provisions to prevent other branches of government from affecting the independence of the court, or that slim circumstantial majorities decide its composition [sic] without prior consultation with society through a broad and transparent debate.*"<sup>88</sup>

In 2010 the government, faced with a possible change in political alignment arising from the parliamentary elections,<sup>89</sup> used its majority in Parliament to reform the SCJ

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<sup>80</sup> Supreme Court of Justice. Constitutional Chamber. Judgment No. 1562 of December 12, 2000. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/1562-121200-00-3035%20.HTM>.

<sup>81</sup> The Venezuelan Constitution Art. 203.

<sup>82</sup> Regarding the political events that conditioned this reform, see HRW " Rigging the Rule of Law"; International Commission of Jurists "Venezuela - Attacks on Justice 2005".

<sup>83</sup> International Commission of Jurists. "The sunset...", P. 10; "Achieving Justice", P. 26; "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch", P. 4.

<sup>84</sup> National Assembly. "Agreement in compliance with Numeral 4, Article 23 of the Organic Law of the Supreme Court of Justice of the Bolivarian Republic of Venezuela, the act by which this National Assembly appointed Judge Franklin Arrieché Gutiérrez is annulled. Official Gazette No. 37.961 of June 16, 2004.

<sup>85</sup> Justices Alberto Martini Urdaneta, Rafael Hernández, and Orlando Gravina were requested to quit or retire.

<sup>86</sup> Parliamentary Act for the appointment of magistrates. Published in Official Gazette No. 38.086 of December 14, 2004.

<sup>87</sup> Human Rights Watch " Rigging the Rule of Law "; International Commission of Jurists "Venezuela - Attacks on Justice 2005". International Commission of Jurists. "The Sunset..." p. 10; "Achieving justice" p. 26; "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch" p. 4.

<sup>88</sup> Inter-American Commission on Human Rights. Report 2004. Paragraph 174. Available at <http://www.cidh.org/annualrep/2004eng/chap.5b.htm>.

<sup>89</sup> Acceso a la Justicia "El SCJ: La joya que pocos han podido retener" (2017). Available in Spanish at <https://accesoalajusticia.org/el-SCJ-la-joya-que-pocos-han-podido-retener/>

Organic Law<sup>90</sup> and carried out an accelerated process of partial renewal of the SCJ that were vacant at that time.<sup>91</sup> This included nine principal and thirty-two alternate justices. Regarding this process, the ICJ observed at the time that "[t]he appointments were made to ensure that judges sympathetic to the ruling party were elected while the necessary votes were available in the legislature."<sup>92</sup>

In 2014, the ruling party used its majority in the National Assembly, to appoint nine new justices<sup>93</sup> and three alternate justices,<sup>94</sup> and in 2015 again appointed 13 justices and 21 alternate justices. Several appointed justices failed meet the conditions and requirements established in the constitution or the law.<sup>95</sup>

In addition, the International Commission of Jurists noted that:

*"[o]n December 6, 2015, the opposition gained two thirds of the deputies of the N[ational] A[ssembly] to be established in January of the following year. Despite the required favourable vote of two thirds of the deputies of the N[ational] A[ssembly] for the election of the judges, the ruling party in the N[ational] A[ssembly] 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."<sup>96</sup>*

According to a 2016 report from the National Assembly, in this appointment process:

*"constitutional, legal and regulatory norms were violated with a view to altering the process of selecting and appointing principal and alternate justices. In addition, actions were carried out that were aimed at creating vacancies in the Supreme Court of Justice with the purpose of naming people who have links to the ruling party to the positions of Principal and Alternate Justices. This enabled the highest jurisdictional body of the country to issue favorable pronouncements in relation to the actions of the Executive Branch of government."<sup>97</sup>*

The ICJ considers that the appointment of magistrates to the SCJ carried out by the National Assembly have involved irregularities which in sum constitute a violation of

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<sup>90</sup> Amendment to the Organic Law of the Supreme Court of Justice. Published in Official Gazette No. 39.522 of October 1, 2010.

<sup>91</sup> Official Gazette No. 39.569 dated December 8, 2010.

<sup>92</sup> International Commission of Jurists: "Achieving justice for grave human rights violations in Venezuela". P. 26.

<sup>93</sup> Supreme Court of Justice. Constitutional Chamber Ruling No. 1701 dated December 06, 2012. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/1701-61212-2012-12-1259.HTML> and No. 1702 dated December 11, 2012. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/1702-111212-2012-12-1259.HTML>.

<sup>94</sup> Extraordinary Official Gazette No. 6,165 dated December 28, 2014.

<sup>95</sup> Acceso a la Justicia "Los magistrados de la revolución." Available at <https://www.accesoalajusticia.org/wp-content/uploads/2017/03/Los-magistrados-de-la-revoluci%C3%B3n.pdf>.

<sup>96</sup> International Commission of Jurists. "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch" Page 4.

<sup>97</sup> National Assembly. Final Report of the "Special Commission for the study and analysis of the selection process for principal and alternate justices of the Supreme Court of Justice". Available in Spanish at [https://supremainjusticia.org/wp-content/uploads/2016/03/INFORME\\_DEFINITIVO-COMISION-ESPECIAL-ESTUDIAR-DESIGNACION-DE-MAGISTRADOS.pdf](https://supremainjusticia.org/wp-content/uploads/2016/03/INFORME_DEFINITIVO-COMISION-ESPECIAL-ESTUDIAR-DESIGNACION-DE-MAGISTRADOS.pdf).

principles governing the independence of the judiciary, including, among others: increasing the number of justices who sit on the SCJ without justification; the modification in the majority required for their election; and the undue pressure placed on several magistrates to retire. The government has effectively co-opted the SCJ through the election of its members. As a result, the composition of the Court has not provided guarantees of independence and impartiality in relation to political power.

#### **D. Appointment of judges: the assessing of judicial qualifications**

The Inter-American Commission on Human Rights has stated that:

*"[c]ompetitive, merit-based competitions can be a suitable means to appoint justice operators on the basis of merit and professional qualifications. Such competitions can consider such aspects as professional instruction and years of experience required for the post, the results of examinations when the anonymity of the examinations is maintained thereby ensuring that justice operators are not selected on the basis of discretionary appointments and that persons who are interested in applying and who meet the requirements are able to do so.*

*(...) To be certain that selection and appointment processes will properly assess both personal merit and professional qualifications under general conditions of equality, objective criteria should be established for an accurate determination. Those criteria should also be embodied in State regulations, so as to ensure that they are observed and are mandatory.*

*(...) To ensure equal access to the posts of justice operators, the IACHR believes it is imperative that an open and equal opportunity be given through widely publicized announcements that are clear and transparent as regards the eligibility requirements for the post in question. Thus, States must publish in advance the vacancy announcements and procedures for applying, the qualifications required, the criteria and the deadlines, so that any person who believes he or she meets the requirements can apply for a post as a prosecutor, a judge or a public defender.*

*(...) In addition to publishing the requirements and procedures, another transparency-related factor is that the selection procedures be open to public scrutiny, which will significantly reduce the degree of discretion exercised by the authorities in charge of the selection and appointment process and the possibility of interference from other quarters."<sup>98</sup>*

The system for the appointment of judges established in the 1999 Venezuelan Constitution under the provisions of article 255, under which appointment to a judicial position must be through a public selection process carried out by juries of special

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<sup>98</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 76 – 80.



circuits. The Constitution also establishes that the SCJ appoints and swears of judges previously selected by the juries.

There is no specific provision in the Venezuelan Constitution as to on how the selection juries should be composed. Before the Constitution came into force, the National Constituent Assembly issued a Decree ordering the Reorganization of the Judiciary,<sup>99</sup> designed a national plan for the evaluation and selection of judges and to organize a public selection process involving competitive examinations<sup>100</sup> for all courts.<sup>101</sup> This Decree had a limited duration, particularly until the new Constitution was approved.<sup>102</sup>

Once the Constitution came into force at the end of 1999 the powers to the Reorganization of the Judiciary were assigned to a new entity: The Commission for the Functioning and Restructuring of the Judicial System<sup>103</sup> (CRFSJ). This body would be in force until the SCJ's Executive Directorate of the Judiciary was fully operational, and the judicial disciplinary jurisdiction (authority) and the Public Defense system.

Under the mandate on Reorganization of the Judiciary all judicial positions were to be subject to public competitive selection processes in accordance with the Constitution<sup>104</sup> through a Coordinating Commission for Evaluation and Competitive Examinations for Entry and Tenure in the Judiciary (ECEC), which was to be supervised by the Commission for the Functioning and Restructuring of the Judicial System (CRFSJ) and the SCJ.

By 2001, the CRFSJ issued the "Norms for Evaluation and Competitive Examinations for Entry and Tenure in the Judicial Branch,"<sup>105</sup> which included oral, written, practical and psycho-technical evaluations, along with public oversight of the evaluation and competition process through a system of "evaluation juries" composed by five members external actors, including university professors and practicing attorneys.<sup>106</sup>

This process of evaluation and competitive examinations was considered satisfactory by various sectors in the civil society such as NGO's, Bar Associations and Universities,<sup>107</sup> even though there were several observations made by civil society organizations who took part in the process regarding the low quality of candidates or concern that selection could be successful with people with low scores. Some experts interviewed during the investigation for this report expressed the view that the juries selected the "least worst" candidates as the best ones were not available.

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<sup>99</sup> Official Gazette No. 36,772 dated August 25, 1999, subsequently reprinted in Official Gazette No. 36,782 dated September 8, 1999 (reprinted due to "material error by the issuing entity").

<sup>100</sup> Decree of Reorganization of the Judiciary Art. 3.

<sup>101</sup> Inter-American Commission on Human Rights. Venezuela Country Report 2003. Paragraph 164. Available at <http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm>.

<sup>102</sup> Decree of Reorganization of the Judiciary Art. 32.

<sup>103</sup> Transition Regime of the Public Power. Art. 27.

<sup>104</sup> Transition Regime of the Public Power Art. 26.

<sup>105</sup> Rules for Evaluation and Competitive Examinations for Entry and Tenure in the Judiciary. Originally published in Official Gazette No. 36.899 of February 24, 2000; and later modified in Official Gazette No. 36.910 of March 14, 2000.

<sup>106</sup> International Commission of Jurists "Strengthening the Rule of Law" (2014) p. 14.

<sup>107</sup> Programa Venezolano Educación Acción en Derechos Humanos (PROVEA) Annual Report 2002-03. Pp. 378-383. (Justice). Available in Spanish at [https://provea.org/wp-content/uploads/008\\_derecho\\_a\\_la\\_justicia-1.pdf](https://provea.org/wp-content/uploads/008_derecho_a_la_justicia-1.pdf).

In 2003 the SCJ ordered the suspension of the competitive examinations<sup>108</sup> due to high costs and logistical complexities and "*the need to increase the number of people who sit on the juries for this process*".<sup>109</sup> However, by this time the Full Chamber of the SCJ had begun to intervene in the selection process through its discretionary annulment power, under the "Norms for Evaluation and Competitive Examinations for Entry and Tenure in the Judicial Branch",<sup>110</sup> despite the fact that it had previously resolved appeals from candidates and had even ordered some of the competitive examinations to be repeated.<sup>111</sup> Experts interviewed by the ICJ for this report indicated that these decisions were related to cases in which there were conflicts of interest between justices, the jurors responsible for making the selections and unsuccessful applicants.<sup>112</sup>

Certain experts interviewed for this report also pointed out irregularities with the competitive examinations process, such as changes to the lists of candidates or the tribunals selected to decide on the selection of justices and magistrates. This led to legal action being brought against the ECEC as the process and the impartiality of jurors was questioned by former participants who were not selected. As a result, several lawyers and academics who served as jurors resigned from the evaluation process.<sup>113</sup>

In addition, the annulled competitive examinations that candidates had to retake took place at the headquarters of the SCJ and not at the headquarters of the Executive Directorate of the Judiciary. Experts interviewed for this report said that even though the examinations were public, there were Justices present during specific examinations. This was interpreted by former evaluation juries and observers as reflecting the interest of the SCJ Justices in the appointing of specific candidates.

The suspension of the competitions had the effect of reducing the number of tenured judges who were appointed. As PROVEA noted, the "*[i]nformation provided by the Evaluation and Competitive Examination Commission for April 2003 indicated that of 3,638 applicants, only 320 had been selected as tenured judges, or just 8.7%*".<sup>114</sup>

The ICJ considers that the suspension of the competitive examinations to join the Judiciary contravenes article 255 of the Constitution. It has also had the practical effect of driving the prevalence of the naming of provisional judges, which is contrary to international standards that promote the security of tenure of judges.

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<sup>108</sup> Inter-American Commission on Human Rights. Venezuela Country Report 2003. Paragraph 162 and also PROVEA Annual Report 2002-03.

<sup>109</sup> Inter-American Commission on Human Rights. Venezuela Country Report 2003. Paragraph 162.

<sup>110</sup> See for example decisions dated 31 July 2003. Available in Spanish at [http://historico.tsj.gob.ve/decisiones/tplen/julio/AA10-L-2003-000114%20SOLICITUD%20\(CONCURSOS%20DE%20OPOSICI%20OPOSICI%20C3%93N\)%20PLENA.HTM](http://historico.tsj.gob.ve/decisiones/tplen/julio/AA10-L-2003-000114%20SOLICITUD%20(CONCURSOS%20DE%20OPOSICI%20OPOSICI%20C3%93N)%20PLENA.HTM).

<sup>111</sup> See for example decisions dated 07 May 2002. Available in Spanish at and <http://historico.tsj.gob.ve/decisiones/tplen/mayo/NULIDAD%20CONCURSO%20BARINAS%20ETC.HTM>.

<sup>112</sup> International Commission of Jurists. "Strengthening the Rule of Law" (2014) p. 16.

<sup>113</sup> PROVEA, Annual Report 2002-2003 and also Red de Veedores, "Evaluación y Concursos Balance ante la Suspensión" April 2003.

<sup>114</sup> PROVEA Annual Report 2002-03.

## **E. Regularization of the tenure of provisional judges behind the back of the Constitution**

In 2004, the reformed Organic Law of the Supreme Court of Justice assigned the responsibility of organizing and administering competitive examinations for entry into the judicial career and promotion of judges to the National School of the Judiciary (a body under the supervision of the SCJ). In 2005, the SCJ modified the rules on evaluation and competitive examinations to regulate "*the entry, promotion and permanence in the judicial career, through public competitive examinations and performance evaluations*".<sup>115</sup> This reserved to the SCJ the powers to regulate the instruments for the evaluation and training of the other employees of the Judiciary. This process coincided with the so-called Plan for Structural Reform and Modernization of the Judiciary (PREMIUS)<sup>116</sup> and the new composition of the Board of Directors of the Supreme Court of Justice, which publicly assumed leadership of the process.<sup>117</sup> The Board of Directors is elected by the SCJ from among its members. The SCJ Board is responsible for the governance of the SCJ and has several responsibilities related to working procedures of the Plenary Chamber. This Board publicly expresses political partiality during the opening of judicial activities in 2006,<sup>118</sup> when the SCJ encouraged the attendees to chant slogans in favor of the then-President Chavez.

The reformed Norms for Evaluation and Competitive Examinations established that the public competitive examinations should include the pre-approval of candidates through an "Initial Training Program".<sup>119</sup> Thus, applicants to the judiciary have been required to complete a training program offered by the National School of the Judiciary before participating in the public competitive examinations.

The reform also included a "Special Program for the Regularization of Tenure (PET)" consisting of an academic training program, a medical and psychological evaluation, a performance evaluation and the corresponding exam to test the knowledge of candidates. The purpose of this program was to allow provisional or temporary judges who had spent at least three months exercising their judicial functions to participate in the process of obtaining tenure. In practice, this process constituted a closed competition for those who had been provisionally named to the Judiciary, limiting the possibility for any external candidate to participate in the process. This practice squarely contravenes the general provisions of Article 255 of the Constitution and the prescriptions of the IACHR, which establish that the selection process to enter the judiciary must be public.

These changes also expanded the direct intervention of Supreme Court justices in the selection process, both as coordinators of evaluation juries<sup>120</sup> and through their role in the naming of the jury.

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<sup>115</sup> Regulations on the Direction, Government and Administration of the Judicial Branch Art. 17.

<sup>116</sup> Inter-American Commission on Human Rights. Annual Report 2005. Paragraph 287 Available at <http://www.cidh.oas.org/annualrep/2005eng/chap.4d.htm>.

<sup>117</sup> Transparencia Venezuela. *Suprema Injusticia* "Maduro quiere otra reforma en el Poder Judicial, la quinta en 20 años" (2020). Available in Spanish at <https://supremainjusticia.org/2020/03/03/maduro-quiere-otra-reforma-en-el-poder-judicial-la-quinta-en-20-anos/>. See also: PROVEA Annual Report 2004-2005. Available in Spanish at <https://provea.org/wp-content/uploads/justicia-1.pdf> and 2005-06. Available in Spanish at <https://provea.org/wp-content/uploads/126Justicia-1.pdf>.

<sup>118</sup> See Armando.info "El Chavismo enroca a sus militantes en los tribunales penales". Available in Spanish at <https://armando.info/historias/7503=el-chavismo-enroca-sus-militantes-en-los-tribunales-penales>.

<sup>119</sup> Evaluation and Competitive Examinations Rules (2005) Art. 4.

<sup>120</sup> Evaluation and Competitive Examinations Rules (2005) Art. 28.

This process of establishing tenure for judges resulted in an official reduction of the rate of judges with provisional status, in particular by providing tenure to at least 1,140 judges selected in the new competitive examination process, i.e. about 60 percent of the judiciary.<sup>121</sup> As a result, these judges have been able to obtain security of tenure and the guarantee that they could only be removed for legitimate cause through disciplinary proceedings. At the same time, the Judicial Commission continued to arbitrarily remove judges, with no information made available as to the cause of the removal. According to estimates, approximately 600 judges were removed during this restructuring process.<sup>122</sup>

In relation to this process of "tenuring" the provisional judges, the Inter-American Commission on Human Rights concluded in 2006 that:

*"the processes to regularize the status of, or grant tenure to, provisional judges and the competitive examinations that have led to the appointment of new titular judges lack transparency and have not been carried out strictly in accordance with Article 255 of the Constitution and the Rules on Evaluation and Competitive Examinations for Entry to and Promotion in the Judiciary."*<sup>123</sup>

Among these deficiencies, the IACHR highlighted a "supposed lack of reasoned grounds not to grant tenure to certain judges and an alleged breach of statutory rules that require the public announcement of competitions in notices published in two widely distributed national or regional newspapers as well as on the website of the Supreme Court of Justice."<sup>124</sup>

The ICJ highlights the importance of the objective of the process of securing tenure for these provisional judges, in line with the requirement under international standards that judges should have security of tenure as an essential element for the guarantee of judicial independence. The ICJ is concerned, however, that in practice, the process was implemented using a closed selection mechanism in contravention of constitutional provisions and with a clear influence exercise by the SCJ justices involved in this process.

## **F. The 2016 reform of the rules for the evaluation**

In 2016, the SCJ again amended the rules on evaluation and competitive examinations processes, issuing the "Rules on Evaluation and Competitive Examinations for Entry and Promotion to the Judiciary".<sup>125</sup> This reform established that the responsibility for public selection processes lay with the Plenary Chamber of the SCJ and the Judicial Commission, even though the SCJ's internal regulations had been modified to grant the plenary of the SCJ this responsibility.<sup>126</sup>

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<sup>121</sup> Inter-American Commission on Human Rights. Annual Report 2005. Paragraph 287.

<sup>122</sup>Transparencia Venezuela. Suprema Injusticia. Available in Spanish at <https://supremainjusticia.org/2020/03/03/maduro-quiere-otra-reforma-en-el-poder-judicial-la-quinta-en-20-anos/>.

<sup>123</sup> Inter-American Commission on Human Rights. Annual Report 2006. Paragraph 162.

<sup>124</sup> Inter-American Commission on Human Rights. Annual Report 2006. Paragraph 162.

<sup>125</sup> Rules for Evaluation and Competitive Examinations for Admission and Promotion to the Judiciary. Official Gazette No. 40.972 of August 23, 2016.

<sup>126</sup> Internal Regulations of the Supreme Court of Justice. Official Gazette No. 38.496 of August 9, 2006.

The Rules clarify that the Judicial Commission is the body responsible for issuing guidelines, directives and instruments that regulate the entry, leave, promotion, transfer, substitution, suspension and retirement of judicial public servants.<sup>127</sup> Also, the Commission has asserted its authority in the administration of competitive examinations by setting the terms and content of the evaluation<sup>128</sup> and resolving matters not provided for in the Rules and also the requirements and number of phases for the candidates' knowledge evaluation.<sup>129</sup>

In addition, the reform only included the participation of official training bodies and only one kind of civil society organizations, pro-government groups called "people's power organizations" (*organizaciones del poder popular*)<sup>130</sup> in the selection processes. This design is problematic because gives a disproportionate power to politically tendentious non-judicial and to non-legal profession entities in the selection process and enshrines a high risk of politically motivated appointing of judges. This is contrary to the UN Basic Principles on the Independence of the Judiciary, which provide that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives", and that in the process of the selection of judges there shall be no discrimination against a person on the grounds of political or other opinion.<sup>131</sup>

Also, under the new rules, the Supreme Court of Justice published a call for a competitive examination of the admission of non-tenured judges in order to "progressively regularize their tenure in the respective vacancies in the criminal, social, and contentious-administrative jurisdictional areas."<sup>132</sup> As of the writing of this report, there was no information that this process had taken place. In practice, the appointment of provisional judges has not ceased. In 2020, some 881 provisional judges were appointed and 91 were removed by the Judicial Commission.<sup>133</sup>

Local NGO Acceso a la Justicia consider these new rules were alleged:

*"violate constitutional principles such as citizen participation and fundamental rights such as equality before the law, in addition to enshrining serious assumptions of discrimination and bias that prevent the purpose of public selection processes, i.e., the appointment of independent and impartial jurors, from being achieved. These selection processes lack minimum guarantees of objectivity and impartiality that should govern these types of procedures."*<sup>134</sup>

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<sup>127</sup> Rules for Evaluation and Competitive Examinations for Admission and Promotion to the Judiciary (2016) Art. 3.

<sup>128</sup> Rules for Evaluation and Competitive Examinations for Admission and Promotion to the Judiciary (2016) Art. 23 and 24.

<sup>129</sup> Rules for Evaluation and Competitive Examinations for Admission and Promotion to the Judiciary (2016) Art. 26.

<sup>130</sup> Organic Law of the People's Power Official Gazette No. 6.011 Extraordinary dated December 21, 2010.

<sup>131</sup> UN Basic Principles on the Independence of the Judiciary. Principle 10.

<sup>132</sup> Supreme Court of Justice. Resolution No. 2016-0468 Official Gazette No. 41.048 dated December 8, 2016.

<sup>133</sup> Supreme Court of Justice. Maikel Moreno President of the SCJ. Opening Remarks on the occasion of the Opening of the Judicial Year 2021, January 21, 2021. Available in Spanish at

<http://www.tsj.gob.ve/documents/10184/297131/Palabras+de+Apertura+de+Mag.+Maikel+Moreno+2021/bc7c6484-a79b-4b65-b8e7-c65abad98c7a>.

<sup>134</sup> Acceso a la Justicia, "Análisis de las normas de evaluación y concurso para el ingreso y ascenso a la función judicial" (2016). Available in Spanish at <https://accesoalajusticia.org/consideraciones-sobre-las-normas-de-evaluacion-y-concurso-de-oposicion-para-el-ingreso-y-ascenso-a-la-funcion-judicial/>.

The ICJ considers this reform to be problematic because it is contrary to Constitutional prescription setting of the nature of the public competitive examination, limits public participation contrary to constitutional norms guaranteeing general participation and increases the power of SCJ magistrates in the selection and appointment of judges, including a high risk of politically motivated appointing of judges.

### **G. The current high level of provisional appointments in the Judiciary**

As outlined above, the system for the appointment of judges established in the Constitution<sup>135</sup> was designed to ensure that entry into the judicial career is through public competitive examinations. However, the SCJ has altered the content of the Constitutional mandate and has failed to comply with it, so allowing for the maintenance of a system of appointing provisional or temporary judges that is at odds with international standards.<sup>136</sup> It is important to note that the Court defends the legality and constitutionality of its competence to appoint and remove provisional judges in Articles 255 and 267 of the Constitution, citing "(...) *the urgency of filling vacancies in the different courts of the nation in order to avoid the paralysis of judicial proceedings and after examining the credentials of the applicants (...)*".<sup>137</sup> However, the truth is that no public competitive examinations have been held and this has allowed the SCJ to use these provisions, which are meant to be exercised only exceptionally, as a basis to appoint judges whose security of tenure is not guaranteed, in clear contravention of international standards. The exceptional has therefore now become the ordinary.

Despite the lack of officially disclosed information on the number of provisional judges in Venezuela, some civil society organizations estimated in 2018 that there were 2,184 judges and that only 534 were tenured (24.37%), while the rest were provisional (75.63%).<sup>138</sup> In 2019, it was estimated that just 14.7% of judges were tenured.<sup>139</sup> In 2020, 881 provisional judges were appointed and 91 were removed by the Judicial Commission.<sup>140</sup> The ICJ has no reliable statistics for 2020-21, but it is understood that this trend in respect of provisional appointments is continuing.

In addition, the lack of public competitive examinations has provided an excuse for the SCJ to dismiss judges or issue resolutions that render the appointments made null and void for individual judges. The continuing practice in Venezuelan judiciary since

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<sup>135</sup> Venezuelan Constitution Art. 255.

<sup>136</sup> Inter-American Court of Human Rights. *Chocrón Chocrón v. Venezuela*.

<sup>137</sup> Among others see: Resolution No. 2016-0312 dated July 12, 2016. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003447.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003447.html); Resolution No. 2016-0467 dated November 02, 2016. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003610.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003610.html); Resolution No. 2016-0503 dated December 13, 2016. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ\\_0003646.html](http://historico.tsj.gob.ve/informacion/resoluciones/cj/resolucionCJ_0003646.html).

<sup>138</sup> Bloque Constitucional Venezolano "Venezuela clama por Justicia Report 2018." P. 7. Available in Spanish at <https://bloqueconstitucional.com/wp-content/uploads/2019/05/FINAL-INFORME-2018-de-de-abril-de-2019-.pdf>.

<sup>139</sup> Armando.info "La Ley del Poder Judicial: Mientras más pobre la provincia más chavistas son los jueces" (2019). Available in Spanish at <https://armando.info/Reportajes/Details/2581>

<sup>140</sup> Supreme Court of Justice. Maikel Moreno President of the SCJ. Opening Remarks on the occasion of the Opening of the Judicial Year 2021, January 21, 2021. Available in Spanish at <http://www.tsj.gob.ve/documents/10184/297131/Palabras+de+Apertura+de+Mag.+Maikel+Moreno+2021/bc7c6484-a79b-4b65-b8e7-c65abad98c7a>.

2000 of these resolutions of dismissal produced *"almost immediately after [the judges] adopt[ed] judicial decisions in cases with a major political impact"*<sup>141</sup> which represents form of issuing covert sanctions for adopting judicial decisions that are not to the liking of the SCJ.

Also, the SJC in its jurisprudence has established that the removal of provisional judges does not require any legal procedure that would provide the judges with due process, and therefore an administrative removal order is sufficient.<sup>142</sup> According to this jurisprudence, the Judicial Commission of the Supreme Court of Justice has the full discretionary power to annul the appointment of provisional judges. The Court reasoned in a 2007 judgement that provisional judges *"lack stability in their respective positions and, therefore, their appointments may be reviewed and annulled at any time, without the requirement to submit them to a prior administrative procedure or the obligation to give reasons for the specific and legal reasons that led to their removal"*.<sup>143</sup>

Judicial appeals against the dismissal of provisional judges are governed by general regulations on administrative appeals. In most of the cases<sup>144</sup> in which the dismissals ordered by the Judicial Commission of the Supreme Court of Justice have been challenged, the challenge to dismissal has been declared inadmissible.<sup>145</sup> The sole exception appears to be in cases where maternity or paternity status has been alleged, as judges may not be removed due to being on maternity or paternity leave. In such cases, the reinstatement of the judge was not recognized by the SCJ, though their legal right to employment stability was recognized and the Executive Directorate of the Judiciary was ordered to make the corresponding payments for the months during which the judge was protected by this special condition.<sup>146</sup>

The Inter-American Commission on Human Rights has indicated that:

*"the goal of any justice operator selection and appointment process must be to choose candidates based on their merits, abilities, suitability, and honesty, and in keeping with international human rights standards in this field, so as to ensure their independence(...) States need to establish safeguards to preclude discretionary biases on the part of those taking part in the selection and so as to ensure that the selection is not*

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<sup>141</sup> Inter-American Commission on Human Rights. Annual Report 2009. Paragraphs 483. Available at <http://www.cidh.org/annualrep/2009eng/Chap.IV.f.eng.htm>.

<sup>142</sup> Supreme Court of Justice. Constitutional Chamber. Judgment No. 2.414 of December 20, 2007. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/2414-201207-07-1417.HTM>.

<sup>143</sup> Supreme Court of Justice. Constitutional Chamber. Judgment No. 2.414 of December 20, 2007. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/diciembre/2414-201207-07-1417.HTM>.

<sup>144</sup> A.C. Reforma Judicial. "Estudio sobre el control judicial en destituciones de jueces provisorios 2011-2021". Available in Spanish at [www.reformajudicial.org](http://www.reformajudicial.org)

<sup>145</sup> See: Supreme Court of Justice. Political Administrative Chamber, Judgment No. 478 dated May 10, 2018. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/spa/mayo/211040-00478-10518-2018-2014-1253.HTML>. Judgment No. 150 dated November 19, 2020. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/spa/noviembre/310705-00150-191120-2020-2019-0167.HTML>.

<sup>146</sup> See: Supreme Court of Justice. Political Administrative Chamber Judgment No. 177 dated December 10, 2020. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/spa/diciembre/310918-00177-101220-2020-2018-0258.HTML>; Judgment No. 1007 dated August 9, 2017. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/spa/agosto/202350-01007-9817-2017-2014-1492.HTML>.

*based on private and/or party interests, which would mean that the person selected is not necessarily the most qualified and capable (...) every selection process must abide by the principles of openness and transparency and be open to social sector scrutiny and participation.*"<sup>147</sup>

The jurisprudence of the Inter-American Court of Human Rights has established that:

*"States are bound to ensure that provisional judges be independent and therefore must grant them some sort of stability and permanence in office, for to be provisional is not equivalent to being discretionally removable from office. (...) the Court considers that the fact that appointments are provisional should not modify in any manner the safeguards instituted to guarantee the good performance of the judges and to ultimately benefit the parties to a case. (...) On the other hand, since appointments of provisional judges should be subject to such conditions of service as ensure independent exercise of their office, the rules on the promotion, transfer, distribution of cases, suspension, and removal from office of judges having a permanent tenure must apply fully to those judges lacking such tenure.*"<sup>148</sup>

Moreover, the Inter-American Commission has reiterated that *"[t]he practice of appointing temporary judges contracted for three months does not provide for the stability necessary to safeguard judicial personnel against possible interference or pressure in the conduct of their duties."*<sup>149</sup>

In addition, international standards impose the obligation for States to provide effective judicial remedies, which must be substantiated in accordance with the rules of due process of law. The Inter-American Court of Human Rights has stated that States Parties are obliged to provide effective judicial remedies to victims of human rights violations, which must be substantiated in accordance with the rules of due legal process, all within the general obligation to guarantee the free and full exercise of the rights recognized by the Convention to all persons under its jurisdiction.<sup>150</sup>

For this reason, the ICJ considers that the very high level of provisionally appointed judges is a clear indicator the large deficit of judicial independence in Venezuela. Provisional judges are appointed through discretionary mechanisms by the SCJ, without transparency or public selection processes, they have no guarantees of security of tenure and non-removability and there are no removal processes that guarantee due process. Where the maintenance of judge's position is dependent the whims and decisions of external authorities, whether judicial or administrative, this necessarily affects their functioning as independent decision makers.

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<sup>147</sup> Inter-American Commission on Human Rights (IACHR) Report: Corruption and Human Rights, paragraph 300 Available at <http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf>.

<sup>148</sup> Inter-American Court of Human Rights. Case of Apitz Barbera et al. ("First Administrative Contentious Court") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_182\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_182_ing.pdf). Paragraphs 43 and 45

<sup>149</sup> Inter-American Commission on Human Rights. Annual Report 2005. Paragraphs 191. Available at <http://www.cidh.org/annualrep/2004eng/chap.5b.htm>.

<sup>150</sup> See: Inter-American Court of Human Rights. Case of Mota Abarullo et al. v. Venezuela. Merits, Reparations and Costs. Judgment of November 18, 2020. Series C No. 417. Paragraph 120. Available in Spanish at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_417\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_417_esp.pdf).



## H. Management of control mechanisms used to undermine the independence of judges

The Supreme Court of Justice is responsible for the inspection and oversight of the courts.<sup>151</sup> The "Inspectorate General of Courts" has been established<sup>152</sup> to ensure the adequacy of this inspection and oversight and to verify the judicial management of the courts, *"in accordance with the applicable legal provisions, within the principles of economy and efficiency, due process and effective judicial protection"*.<sup>153</sup> This regulation makes no explicit reference to the protection of the independence of judges.

The Inspectorate General of Courts is considered under the SJC regulations to be an autonomous unit.<sup>154</sup> However, the Organic Law of the Supreme Court of Justice establishes it under the supervision of the Judicial Commission, which must *"coordinate [its] policies, activities and performance"*.<sup>155</sup> The Inspectorate is headed by a General Inspector elected by the plenary chamber of the SCJ among its members and the Inspectors are appointed by the Judicial Commission.

The oversight carried out by the Inspectorate:

*"includes objective, systematic, professional, continuous and permanent examination that allows it to assess the effectiveness, efficiency and quality of the administration of the courts and the organs or administrative units that make up the Judicial Circuit or Judicial District, as well as the performance of judges, taking into account the provisions of the Constitution of the Bolivarian Republic of Venezuela, other laws, regulations, orders, circulars and instructions issued by the Supreme Court of Justice, the Judicial Commission, the Executive Directorate of the Judiciary and the Inspectorate General of Courts"*.<sup>156</sup>

This oversight is carried out through different inspection modalities that include:

1. An **Ordinary Inspection**<sup>157</sup> which is carried out on a *"permanent and rotating basis"* in the various judicial districts, and *"includes the review and examination of the judicial management of the Court and each of the judges during the period under inspection. Its character is didactic and corrective."*
2. An **Oversight Inspection**<sup>158</sup> which *"verifies compliance with the guidelines established by the Supreme Court of Justice, as well as the duties of judges in the performance of their functions and their conduct in accordance with the provisions of the legal system."*

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<sup>151</sup> Venezuelan Constitution Art. 267.

<sup>152</sup> Supreme Court of Justice. Full Chamber. Resolution No. 2016-0022, whereby the Operating Regulations of the General Inspectorate of Courts are issued. Published in Official Gazette No. 41.092 dated February 09, 2017.

<sup>153</sup> Supreme Court of Justice. Full Chamber. Resolution N° 2016-0022.

<sup>154</sup> Supreme Court of Justice. Regulations on the Direction, Government and Administration of the Judicial Branch, Official Gazette No. 37.014 of August 15, 2000. Art. 22.

<sup>155</sup> Supreme Court of Justice. Internal Regulations of the Supreme Court of Justice. Published in Official Gazette No. 38.496 of August 9, 2006.

<sup>156</sup> Rules of Procedure of the Inspectorate General of Courts Art. 9.

<sup>157</sup> Rules of Procedure of the Inspectorate General of Courts Art. 11.

<sup>158</sup> Rules of Procedure of the Inspectorate General of Courts Art. 12.

3. The **Judicial Management Evaluation Inspectorate**<sup>159</sup> which collects elements for the evaluation of judges *"that are required by the competent body in charge of their evaluation for their entry into the Judicial Branch, with the purpose of acquiring tenure or, failing that, to determine their permanence in the Judicial Branch"*.
4. **Special or Extraordinary Inspection**<sup>160</sup> which is defined as an inspection *"of a disciplinary nature"* that is carried out ex officio or by means of admitted complaints against a judge *"formulated by individuals, or by any organ of the People's Power"*.
5. A **Comprehensive Inspection**<sup>161</sup> which *"includes the review and examination of the judicial management and disciplinary oversight of the Judge, as well as any other relevant aspect that may be required according to the guidelines of the Inspector General of Courts. It consists of an exhaustive review, without any restrictions, of the records and controls of the Court and of the judicial files, and if warranted, of the Office of the Rector of the Judicial District of the Presidency of the Judicial Circuit or of its support units for jurisdictional activity in order to verify the commission of a disciplinary offense or the abnormal functioning of the Court"*.

Investigations and disciplinary actions against judges may be initiated:<sup>162</sup>

1. Ex officio, on the basis of the complaints received, as a result of previous investigation or inspection, a disciplinary administrative file, or the referral of a decision of any court or administrative authority (rector, president or judicial coordinator).
2. By complaint of the aggrieved or interested person or by their legal representatives.
3. At the request of any organ of the State.

With regard to non-tenured judges, it is important to mention that the Regulations of the Inspectorate established a Transitional Regime arising from a series of measures adopted by the Constitutional Chamber of the Supreme Court of Justice.<sup>163</sup> According to this Regime, the inspection procedure carried out with regard to provisional judges is largely similar but culminates in a report sent to the Judicial Commission of the SCJ instead of the disciplinary process under the Code of Ethics. This means that the judge concerned has no opportunity to exercise their right to defense.<sup>164</sup>

During 2019, and according to information from the Supreme Court of Justice, the Inspectorate conducted a total of 316,056 inspections.<sup>165</sup> Given that the total number of judges at that time has been credibly estimated to be 2,184 or close to that number,<sup>166</sup> it can be inferred that there was an approximate rate of 144.7 inspections

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<sup>159</sup> Rules of Procedure of the Inspectorate General of Courts Art. 13.

<sup>160</sup> Rules of Procedure of the Inspectorate General of Courts Art. 14.

<sup>161</sup> Rules of Procedure of the Inspectorate General of Courts Art. 15.

<sup>162</sup> Rules of Procedure of the Inspectorate General of Courts Art. 20.

<sup>163</sup> Ruling No. 516 dated May 7, 2013, No. 983 dated July 16, 2013 and No. 1388 dated October 17, 2013; No. 1082, dated August 11, 2015; No. 6 dated February 4, 2016; No. 235 dated March 29, 2016; No. 479 dated June 16, 2016 and No. 484 dated June 21, 2016.

<sup>164</sup> Rules of Procedure of the Inspectorate General of Courts. Art. 51.

<sup>165</sup> Supreme Court of Justice. Maikel Moreno President of the SCJ. Opening remarks at the opening of the 2021 Judicial Year. January 21, 2020. Available in Spanish at <http://www.tsj.gob.ve/documents/10184/297082/Palabras+de+Apertura+de+Mag.+Maikel+Moreno/d4e17b9f-2b0b-427d-97ab-7987c4df6db7>.

<sup>166</sup> Bloque Constitucional Venezolano "Venezuela clama Justicia". Report 2018.

per court. This evidence a particularly intense pattern of supervision, especially considering that there were two national blackouts<sup>167</sup> during that year that suspended activities in several courts for at least two weeks. In 2020, which was a year when court activities were suspended for a number of months due<sup>168</sup> to the COVID-19 pandemic, the Inspectorate conducted 76,964<sup>169</sup> inspections, representing a rate of approximately 35 inspections per court.

As noted above, the presiding judges, coordinators and circuit presidents exercise administrative functions in relation to the work and management of the courts. Those the judges would receive guidelines or instructions<sup>170</sup> on how certain cases or certain case profiles should be decided.<sup>171</sup>

The Independent International Fact-Finding Mission on Venezuela (IFFM) reported the case of Judge Ralenys Tovar, the Sixteenth Court of Control Judge who issued the arrest warrant in the case against Leopoldo López a member of the opposition political party Voluntad Popular. Judge Tovar *“reported receiving a call from then Supreme Court President Gladys Gutiérrez on 11 February 2014, telling her to approve a number of arrest warrants that awaited her in the tribunal.”*<sup>172</sup> The UN Working Group on arbitrary detention requested the Government to release Leopoldo López given the arbitrary nature of his detention.<sup>173</sup> Also in the case of Steyci Escalona another member of Voluntad Popular political party, who was prosecuted for rebellion, the IFFM found that judge Luz Mariela Santafe Acevedo ordered her continued pre-trial detention of and suspended the hearing after making a phone call to someone she referred to as *“my boss”*.<sup>174</sup>

In addition, in the case against Leonardo Marrero, also a member of Voluntad Popular political party and chief of staff for the president of the National Assembly, the IFFM reported that *“[a]ccording to Mr. Marrero’s lawyers, the judge [Yixis Gutiérrez] was removed because she was acting independently”*; the Fact-Finding Mission concluded the dismissal of Judge Gutiérrez *“did not follow constitutional procedures for the removal of judges.”*<sup>175</sup>

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<sup>167</sup> Decree 3.822 Published in the Extraordinary Official Gazette No. 6.448 dated April 13, 2019.

<sup>168</sup> Supreme Court of Justice. Plenary Chamber Resolution No. 2020-0001 dated March 20, 2020. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003762.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003762.html).

Ratified until October 2020 by Resolution No. 2020-0008 dated October 1, 2020. Available in Spanish at [http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP\\_0003770.html](http://historico.tsj.gob.ve/informacion/resoluciones/sp/resolucionSP_0003770.html).

<sup>169</sup> Supreme Court of Justice. Maikel Moreno President of the SCJ. Opening remarks at the opening of the 2021 Judicial Year. January 21, 2021. Available in Spanish at <http://www.tsj.gob.ve/documents/10184/297131/Palabras+de+Apertura+de+Mag.+Maikel+Moreno+2021/bc7c6484-a79b-4b65-b8e7-c65abad98c7a>.

<sup>170</sup> International Commission of Jurists. "The Sunset of the Rule of Law" (2015) p. 11.

<sup>171</sup> See Armando.Info "La semana que los juristas del horror se ensañaron con los menores de edad". Available in Spanish at <https://armando.info/Reportajes/Details/2529>.

<sup>172</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 381

<sup>173</sup> UN Working Group on arbitrary detention. Opinion 26/2014 Available at <https://undocs.org/A/HRC/WGAD/2014/26>.

<sup>174</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela.

<sup>175</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 688.

The FFM also reported that one former judge said that:

*"[t]he pressure was tremendous during those days [2014] and so was the fear of reprisals". He said that the executive authorities ordered judges to grant arrest and search warrants against certain people, and that "the anguish for me was tremendous, every 10 days, when I was on duty and I did not know if they were going to send me a political case". The former judge said the president of the judicial circuit visited him more than once and asked why he had released protesters "when the order was to leave them in detention."*<sup>176</sup>

The FFM noticed the case of Judge of Juvenile Control Court No. 1 of First Instance of the Yaracuy state, Ediluh Guédez Ochoa, who:

*"published a video, available on YouTube, in which she claimed that her decision to keep the adolescents in pre-trial detention had been made under coercion (...) she had reviewed the information and intended to release the adolescents but the President of the Criminal Judicial Circuit of Yaracuy pressured her to make a different decision."*<sup>177</sup>

The FFM concluded that there was "high-level political pressure over the judiciary" and found:

*"reasonable grounds to believe that high-level political actors exerted significant pressure over certain members of the judiciary to influence the outcome of cases. Political influence over the judiciary increased both de jure and de facto during the period under review, including through the process of selection and removal of judges."*<sup>178</sup>

The UN Office of the High Commissioner for Human Rights also:

*"identified several factors that considerably undermine the independence of the judiciary, including insecurity of tenure for judges, the absence of transparent process for their designation, political pressure (including threats of dismissal), precarious working conditions, and restrictions to their freedom of association. These elements weaken the ability of the judiciary to check the exercise of power by other institutions and to safeguard human rights."*<sup>179</sup>

In view of these developments, the ICJ is concerned that the control over the management of the courts by the Inspectorates of Courts, an entity that directly reports to the Supreme Court, which also appoints provisional judges, is being used as a mechanism to undermine the independence of judges. Also, the use of directives and instructions by rector judges, coordinators and presidents for judges of instances

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<sup>176</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 1579.

<sup>177</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 1916-1917

<sup>178</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 2011-2012

<sup>179</sup> United Nations. Human Rights Council. Independence of the justice system and access to justice in the Bolivarian Republic of Venezuela, including for violations of economic and social rights, and the situation of human rights in the Arco Minero del Orinoco region. Report of the United Nations High Commissioner for Human Rights. A/HRC/44/54 15 July 2020. Paragraph 7. Available at <https://undocs.org/en/A/HRC/44/54>.

(particularly criminal), violates international standards on judicial independence and impartiality, which establish that judges must decide cases without undue pressure or interference.

## **V. Disciplinary Jurisdiction**

### **A. International standards**

The UN Basic Principles on the Independence of the Judiciary establish that:

*“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.*

*18. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.*

*19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.*

*20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings”.*

In addition, the IACHR and the IACtHR had addressed the arbitrary separation of judges in office in light of Article 8.1 of the American Convention on Human Rights in conjunction with Article 23.1.c of the Convention. The Inter-American Court of Human Rights, as cited by the IACHR, had concluded:

*“i) respect for judicial guarantees implies respect for the independence of the judiciary), ii) the dimensions of judicial independence results in the individual right of the judge that his removal from office obeys solely to the grounds permitted, either through a process that meets fair trial or because the term or period of appointment has been fulfilled, and iii) when the tenure of judges in office is arbitrarily affected, the right to judicial independence enshrined in Article 8.1 of the American Convention is also affected, in conjunction with the right to enter and remain on general terms of equality in public office, established in Article 23.1 of the American Convention.”<sup>180</sup>*

Also, the IACHR has established:

*“The Court has written that the guarantee that judges enjoy that they shall not be subject to discretionary removal, means that disciplinary proceedings involving judges must observe the guarantees of due process and offer judges undergoing a disciplinary process an effective recourse. The guarantees of due process are a corollary of the States’ obligations with respect to the independence of the judiciary, and follow*

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<sup>180</sup> Inter-American Commission on Human Rights “Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas.” Paragraph 187.

*from the effect that disciplinary action can have on a judge's independence. Therefore, those guarantees "apply regardless of the name given to the domestic proceedings whereby judges are relieved of duties, be it termination, dismissal, or removal." A number of international instruments and regional associations have made specific reference to the guarantees that judges enjoy in disciplinary proceedings.*<sup>181</sup>

The UN Human Rights Committee has noted that to ensure the independence of the judiciary, States should consider establishing an independent body that is responsible for the appointment and promotion of judges, as well as the application of disciplinary rules.<sup>182</sup> The Committee has also emphasized the need to secure the independence of the judiciary through oversight and judicial discipline within the judiciary rather than through parliamentary channels.<sup>183</sup>

For disciplinary matters, States must take appropriate measures to ensure that these processes are not used in an abusive or arbitrary manner.<sup>184</sup> While internal judicial accountability mechanisms may be appropriate to monitor judicial independence, competence and objectivity,<sup>185</sup> they must be prevented from being used as a retaliatory or internal pressure mechanism. A judge has the right to be heard by an independent and impartial body against any accusation or complaint made about their judicial and professional performance.<sup>186</sup> In accordance with international legal obligations, including under article 14 of the ICCPR, the conduct that has attracted disciplinary proceedings, as well as the applicable procedure and the corresponding sanctions, must be previously established by law and the decision must be handed down with guarantees of due process.<sup>187</sup>

Under international law and standards, including the Basic Principles on the Independence of the Judiciary, judges may only be suspended or removed from office for incapacity or for conduct that disqualifies them from continuing to perform their functions.<sup>188</sup> The Inter American Court on Human Rights has affirmed that the administrative removal of public officials, including judges, is punitive in nature, and therefore the process must respect due process so that it is not arbitrary.<sup>189</sup> In the case of Venezuela, the UN Human Rights Committee has stressed that judicial

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<sup>181</sup> Inter-American Commission on Human Rights "Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas." Paragraph 188.

<sup>182</sup> United Nations. Human Rights Committee. Concluding Observations (Armenia) CCPR/C/ARM/CO/2, para. 21. Available at <https://undocs.org/en/CCPR/C/ARM/CO/2>.

<sup>183</sup> United Nations. Human Rights Committee. Concluding Observations (Sri Lanka) CCPR/CO/79/LKA, para. 16 Available at <https://undocs.org/en/CCPR/CO/79/LKA>.

<sup>184</sup> See Inter-American Court of Human Rights. Case of Urrutia Laubreaux v. Chile, para. 106; Case of Reverón Trujillo v. Venezuela, para. 108; United Nations. Human Rights Committee General Comment No. 32, para. 19.

<sup>185</sup> United Nations. Report of the Special Rapporteur on the independence of judges and lawyers. A/HRC/26/32 (28 April 2014). Paragraph 72. Available at <https://undocs.org/en/A/HRC/26/32>

<sup>186</sup> United Nations. United Nations Basic Principles on the Independence of the Judiciary. Principle 17.

<sup>187</sup> United Nations. Report of the Special Rapporteur on the independence of judges and lawyers. A/75/172 (July 17, 2020). Available at <https://undocs.org/en/A/75/172>

<sup>188</sup> United Nations. United Nations Basic Principles on the Independence of the Judiciary. Principle 18.

<sup>189</sup> See Inter-American Court of Human Rights. Case of Maldonado Ordóñez v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 3, 2016. Series C No. 311, para. 79. Available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_311\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_311_esp.pdf).

accountability procedures<sup>190</sup> must have objective criteria for the suspension and removal of judges and for the imposition of sanctions.

Finally, judges must be protected from direct or indirect sanctions that serve seek to harass or interfere with the exercising of their judicial functions. The UN Special Rapporteur on the independence of judges and lawyers has emphasized that:

*"[u]nlike the penalties imposed at the outcome of disciplinary, civil or criminal proceedings, disguised sanctions are not imposed in the situations provided for by the law and/or in accordance with a fair, transparent and objective procedure. Their aim is to induce a judge to dismiss the consideration of a case or adjudicate it in a particular way, or to punish the judge for a decision taken in the exercise of the judicial function. Judges dealing with politically sensitive cases are particularly exposed to these sanctions."*<sup>191</sup>

## **B. Problematic disciplinary provisions**

Under article 267 of the Venezuelan Constitution, the judicial disciplinary function is enforced by a specialized tribunal according by the Code of Ethics of the Venezuelan Judge. Although this Code was enacted in 2009, the Constitutional Chamber of the Supreme Court of Justice suspended several of its provisions with a precautionary decision due to an alleged incompatibility of some of the rules with the Constitution.

Among the suspended provisions is Article 2, which provided for the application of the code and its disciplinary procedures to all judges, regardless of the manner in which they were appointed. In this regard, the Constitutional Chamber considered that the code was "*applicable to all judges - regardless of their status - as an ethical parameter of the judicial function*", but that the disciplinary process, as a guarantee for the secure of tenure, should not be extended to judges who had not been appointed through a public and competitive selection process (provisional judges).<sup>192</sup> As of the writing of this report, this precautionary measure - ratified in 2016<sup>193</sup> by the Constitutional Chamber of the SCJ - was still in force. Consequently, this disciplinary jurisdiction reportedly only covers some 15-25 percent of the whole judiciary, i.e. only those who are tenured.<sup>194</sup>

The Code of Ethics has a provision that allows for the dismissal of a judge for a serious inexcusable error due to ignorance of the Constitution, the law or the legal system when declared by a Chamber of the SCJ.<sup>195</sup> This provision is clearly in violation of

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<sup>190</sup> United Nations. Human Rights Committee. Communication 1940/2010 Cedeño v. Bolivarian Republic of Venezuela. Available at <https://undocs.org/en/CCPR/C/106/D/1940/2010>

<sup>191</sup> United Nations. Report of the Special Rapporteur on the independence of judges and lawyers. A/75/172 (17 July 2020). Available at <https://undocs.org/en/A/75/172> Paragraph 85.

<sup>192</sup> Supreme Court of Justice. Constitutional Chamber Ruling No. 516 dated May 07, 2013. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/mayo/516-7513-2013-09-1038.HTML>; Extended by Ruling 006 dated February 4, 2016. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/febrero/184735-06-4216-2016-09-1038.HTML>.

<sup>193</sup> International Commission of Jurists. "Strengthening the Rule of Law" (2014) p. 18.

<sup>194</sup> Bloque Constitucional Venezolano. "Venezuela Clama Justicia" Report 2018. Pg. 7.

<sup>195</sup> Code of Ethics of the Venezuelan Judge. Art. 29 numeral 21

international standards on the independence of the judiciary, as it is far too overbroad to rise to the level of behavior rendering them unfit to discharge their duties.

It is important to mention that a similar provision was the basis for the dismissal of the judges of the First Contentious-Administrative Court of Venezuela.<sup>196</sup> Commenting on this issue, the Inter-American Court stated that *"even if there is a declaration of inexcusable judicial error by a reviewing body, it is still necessary to analyze how serious the conduct is and whether the penalty is proportionate [and that] [t]his sort of review requires an autonomous reason warranting a finding that a disciplinary offense has been committed."*<sup>197</sup> The Inter-American Court held that the statement of reasons is a guarantee that must make it possible to *"allow a reasonable difference in legal interpretations to be distinguished from an "inexcusable judicial error" that compromises the judge's suitability to hold such office, so that judges will not be penalized for taking legal positions that are duly supported but do not correspond to those put forward by the reviewing organs."*<sup>198</sup>

In this sense, the grounds set out for dismissal are overbroad because they do not clearly distinguish disciplinary responsibility for an alleged error of this type and there are deficiencies regarding the reasoning of the decision and lack of proportionality of the sanction.

The Code of Ethics establishes that any intervening party or the disciplinary investigative body may request the Judicial Disciplinary Tribunal to provisionally suspend a judge from holding office "if appropriate".<sup>199</sup> In this regard, the Inter-American Commission observed that: *"the possibility of removing a judge temporarily under the Tribunal's consideration could raise questions about possible abuse of discretion and engender legal insecurity."*<sup>200</sup> This deeply problematic rule is maintained in the 2015 reformed version of the Code.

Additionally, the Inter-American Commission noted that the Code has rules that *"due to their broadness or vagueness, allow for ample discretion by the disciplinary organs that judge the conduct of judges."*<sup>201</sup>

The ICJ considers that the disciplinary rules described above are a threat to judicial independence, as the process that are followed for a "serious inexcusable error" do not distinguish the consequences of a reversal of a judicial decision from those of a disciplinary process, which must have an independent motivation and a sanction proportionate to the fault committed. In addition, the suspension of judges for reasons of "convenience" is a general and ambiguous clause, and in any event outside the scope of a legitimate grounds for disciplinary measures. Disciplinary proceedings against judges must be subject to due process and guarantee the principle of strict legality of misconduct, due motivation and proportionality of sanctions.

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<sup>196</sup> Inter-American Court of Human Rights. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Paragraph 82.

<sup>197</sup> Inter-American Court of Human Rights. Case of Apitz Barbera et al. ("First Contentious Administrative Courts") v. Venezuela. Paragraph 86.

<sup>198</sup> Inter-American Court of Human Rights. Case of Apitz Barbera et al. ("First Contentious Administrative Courts") v. Venezuela. Paragraph 90.

<sup>199</sup> Code of Ethics of the Venezuelan Judge. Art. 73.

<sup>200</sup> Inter-American Commission on Human Rights. Annual Report 2010, Paragraph 626. Available at <http://www.cidh.org/annualrep/2010eng/Chap.IV.VENEZUELA.doc>.

<sup>201</sup> Inter-American Commission on Human Rights. Country Report. Venezuela 2009. Paragraph 244. Available at <http://www.cidh.org/countryrep/Venezuela2009eng/VE09CHAPIIIENG.htm#A>.



### **C. Selection and appointment of the Disciplinary Tribunal and Disciplinary Court**

The bodies that are responsible for disciplinary procedures against judges are the Disciplinary Tribunal and the Disciplinary Court, each of which consists of three judges and three alternates. This competency is established by the Constitution in article 267 and was developed by the Code of Ethics for Venezuelan judges. The process of selecting disciplinary judges is regulated in the Code of Ethics which provides that each election is to be carried out by the respective judicial electoral college, which should exist in each state, in accordance with article 270 of the Constitution. Under the Code, the colleges should be integrated by fourteen persons: one representative of the Judiciary; one representative of the Prosecutor's Office; one representative of the Public Defense; one representative from among the authorized lawyers; and ten delegates of the Communal Councils legally organized in each state.

However, the selection process for judges in the disciplinary jurisdiction is problematic in several respects, both on its face and in practice. First, the Judicial Nominations Committee, the body established by the Constitution for the selection of judges to the SCJ, pre-selects candidates who meet the requirements for the disciplinary jurisdiction and draws up the final list of pre-selected persons. This procedure does not appear to be in accordance with the Constitution, which establishes that the Judicial Nominations Committee should advise the judicial electoral colleges regarding the selection of disciplinary authorities,<sup>202</sup> instead of carrying out a pre-selection process,<sup>203</sup> as provided for in the Code of Ethics.

Second, the members of Communal Councils in the judicial electoral colleges is highly problematic, as the Council's members generally carry affinity with the government.<sup>204</sup> Even leaving the aside the question of real or perceived political allegiances, this requirement is problematic since there is no requirement that these Council members be judges, lawyers or members of the legal profession.

Third, the process for appointing the judicial electoral colleges is so complex, that is very difficult to get them implemented. The disciplinary bodies (Tribunal and Court) are national in their nature and each consist of three members. It is unclear why 24 distinct judicial electoral colleges are required to elect six people. In the original draft submitted by the SCJ in 2001,<sup>205</sup> and in the version approved by parliament in 2003, it was envisaged that there would be several disciplinary courts<sup>206</sup> with jurisdiction over several states and one judicial electoral college in each of the regions.<sup>207</sup>

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<sup>202</sup> Venezuelan Constitution Art. 270.

<sup>203</sup> Pinto Peña, Raúl. Comité de Postulaciones: participación y control social en la preselección de candidatos a ocupar cargos de los poderes públicos nacionales Judicial, Ciudadano y Electoral (2003) Page. 36. ILDIS/FES. Available in Spanish at <http://library.fes.de/pdf-files/bueros/caracas/03843.pdf>.

<sup>204</sup> Organic Law of Communal Councils Art. 2.

<sup>205</sup> Supreme Court of Justice "Draft Code of Ethics for Venezuelan Judges" (2001) Articles 31 and 33.

<sup>206</sup> National Assembly "Bill on the Code of Ethics for Venezuelan Judges" (2003) Article 44. Quoted in Stefanie Ricarda Roos and Jan Woischnik "Códigos de ética judicial: Un estudio de derecho comparado con recomendaciones para los países latinoamericanos" (2005) Konrad Adenauer Stiftung - Rule of Law for South America Program.

<sup>207</sup> National Assembly "Bill on the Code of Ethics for Venezuelan Judges" (2003) Article 103. Quoted in Stefanie Ricarda Roos and Jan Woischnik "Códigos de ética judicial: Un estudio de derecho comparado con recomendaciones para los países latinoamericanos" (2005) Konrad Adenauer Stiftung - Rule of Law for South America Program.

Fourth, the judicial electoral colleges have not yet been established, much less been made operational. In 2010, when enacting the legislation on disciplinary matters, the National Assembly directly appointed the members of the Judicial Disciplinary Tribunal and the Judicial Disciplinary Court due to the fact that the judicial electoral colleges had not been established. In 2016, and in view of the continuing failure to establish the judicial electoral colleges, the Constitutional Chamber took direct control of the appointment of judges to the disciplinary jurisdiction by means of a precautionary measure<sup>208</sup> that maintained the initial appointments.<sup>209</sup> These appointments were criticized because the independence of the appointees was contested, as held political positions, for instance as deputies linked to the ruling political party.<sup>210</sup>

Some experts consulted for this report expressed the view that there was at present little interest from the Supreme Court of Justice in making the disciplinary jurisdiction fully operational, as this would reduce its scope of direct and indirect control over judges. This is especially plausible given that approximately 85 percent of the judiciary consists of provisional judges who are subject to the direct control of the SCJ Judicial Commission, while the remaining 15 percent are subject to the courts and the judicial disciplinary court whose incumbents have been appointed by the Supreme Court of Justice.

The ICJ therefore considers that the structures and procedures for disciplinary processes are problematic in a number of respects. First, the Constitutional provisions establishing these bodies have failed to be implemented, giving rise to a breach in the rule of law. Second, disciplinary judges are now in practice directly appointed by the SCJ due to the lack of implementation of the judicial electoral colleges. This has increased the de facto influence and control exerted by the SCJ over the judges of lower courts. Finally, the regulations that allow members of the Communal Councils – who have political affiliation to the governing party – to participate in the selection of disciplinary judges, while not yet implemented, are inherently inconsistent with the independence of the judiciary.

## **VI. Effects of the deterioration of the judicial independence of courts and tribunals**

Deficiencies in the processes for the appointment of tenured judges, the substantial number of provisional judges, the improper use of administrative control mechanisms, the lack of an independent disciplinary jurisdiction and the concentration of power of the Supreme Court of Justice in the appointment and control of judges generate a context of lack of independence of the courts and tribunals in Venezuela. There is also a pervasive exercise of control or undue influence by actors from the political branches of government power over the SCJ, which is evident in jurisdictional decisions and the appointment processes of the SCJ magistrates. This implies that the judiciary has serious deficits of independence and impartiality. An independent judiciary is not just an important rule of law requirement in its own right but is a prerequisite for the wider fair and effective administration of justice and protection of human rights. In this connection, this section will analyze the effects that the deterioration of judicial

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<sup>208</sup> Supreme Court of Justice. Constitutional Chamber. Judgment No. 484 of June 21, 2016. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scon/junio/188434-484-21616-2016-09-1038.HTML>.

<sup>209</sup> Legislative Acts of June 9, 2011 published in Official Gazette No. 39,693 of June 10, 2011.

<sup>210</sup> International Commission of Jurists. "Strengthening the Rule of Law" (2014) p. 19.

independence has had on accountability, including in respect of impunity and judicial corruption and guarantees of human rights.

#### **A. Impunity and victims' rights**

Judicial independence and impartiality are essential in a State governed by the rule of law if judicial processes are to guarantee the rights of victims of human rights violations and abuses, including effective remedies and reparation, and to ensure accountability and prevent impunity<sup>211</sup> by bringing to justice those responsible for human rights violations.

The Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela was established by the UN Human Rights Council in September 2019 to investigate "*extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims.*"<sup>212</sup> In its September 2020 report to the Human Rights Council, the FFM identified cases where judges had effectively abdicated their human rights protection functions. Specifically, it documented "*cases in which members of the judiciary were involved, either by act or omission, in the perpetration of serious human rights violations*".<sup>213</sup>

In addition, the FFM stated that judges in charge of cases involving serious human rights violations had allowed delays in judicial proceedings and that there was a "*verified systematic in compliance with the timeframes established by law for the various procedural steps*".<sup>214</sup> Examples of these failures include hindering the work of private defense counsel<sup>215</sup> and failing to respond to *habeas corpus* requests in cases of detention in which the whereabouts of the victim were unknown.<sup>216</sup> The FFM found "*no indication[s] that judicial authorities conducted reviews of the legality of these detentions*"<sup>217</sup> for cases of alleged arbitrary detention. The FFM also documented the refusal of courts to investigate allegations of torture "*despite victims either appearing in court with clear marks of mistreatment or expressly stating during hearings that they had been tortured or requested a medical examination.*"<sup>218</sup> The FFM concluded

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<sup>211</sup> Impunity refers to "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." Report of the independent expert to update the Set of Principles to combat impunity, E/CN.4/2005/102/Add.1 (8 February 2005). Available at <https://undocs.org/en/E/CN.4/2005/102/Add.1>.

<sup>212</sup> United Nations. Human Rights Council, Resolution 42/25, adopted on 27 September 2019. Available at <https://undocs.org/A/HRC/RES/42/25>.

<sup>213</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 165. Available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A\\_HRC\\_45\\_CRP.11.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP.11.pdf).

<sup>214</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 354.

<sup>215</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 358.

<sup>216</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 356.

<sup>217</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 349.

<sup>218</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 371.

that the judiciary "*ha[d] failed to act as a check on the other State actors, perpetuating impunity for crimes committed.*"<sup>219</sup>

In the interviews conducted for the preparation of this report, participants asserted that in cases that had a high political profile, judges were put under pressure to act so as to ensure outcomes favorable to political interests. This pressure might come from non-State agents effectively acting under the protection of the authorities, or the pressure may come from these authorities themselves.<sup>220</sup>

On other occasions, judges are told how to manage cases that have a certain political profile or are required to receive instructions from their superiors about their actions.<sup>221</sup> This is a practice that has increased over the years. For example, in 2017 the then-judge Yonathan Mustiola stated that he had received calls from the president of the judicial circuit regarding cases related to protests and was dismissed after deciding to release a group of protesters.<sup>222</sup>

The appointment and removal of judges has led to a revolving door of public officials who change roles in the justice system, which causes conflicts of interest. For example, in the judicial process related to the alleged extrajudicial execution of Wuilderman Paredes involving police officers, the defense attorney of one of the accused had apparently been removed from the position of provisional judge in 2018 and was then appointed as a prosecutor in the same jurisdiction while serving as a defense attorney.<sup>223</sup>

Several of those interviewed during the preparation of this report mentioned that there had been cases of judges who had been removed without any information given about deficiencies with their profiles or *curricula vitae*, or the reasons for removal, who then go into private practice and are subsequently appointed to other positions in the justice system. This can lead to conflicts of interest and non-compliance with the requirements for the entry or removal of a person serving in the judiciary.

Situations were identified in which judges had apparently not exercised their functions with independence and impartiality for fear of reprisals, or because they had conflicts of interest, links with political actors or for following directives from other members of the judiciary when making decisions in legal proceedings.

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<sup>219</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 2010.

<sup>220</sup> See Organization of American States (OAS) "Report of the General Secretariat of the Organization of American States and of the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela". Page 66. Available at <http://www.oas.org/documents/eng/press/Informe-Panel-Independiente-Venezuela-EN.pdf>.

<sup>221</sup> Human Rights Council. Report of the United Nations High Commissioner for Human Rights "Results of the investigation into allegations of possible violations of the human rights to life, liberty and physical and moral integrity in the Bolivarian Republic of Venezuela" A/HRC/44/20 dated July 2, 2020. (Unofficial translation) Paragraph 9. Available at <https://undocs.org/sp/A/HRC/44/20>.

<sup>222</sup> Contrapunto.com: "Exjuez Yonathan Mustiola: Todos los cuerpos de seguridad del Estado deben ser intervenidos" (2020). Available in Spanish at <https://contrapunto.com/especiales/entrevistas-ctp/exjuez-yonathan-mustiola-todos-los-cuerpos-de-seguridad-del-estado-deben-ser-intervenidos/>.

<sup>223</sup> Observatorio de Derechos Humanos de la Universidad de los Andes. Available in Spanish at <https://www.uladdhh.org.ve/index.php/2020/06/08/el-asesinato-de-wuilderman-paredes-cumple-un-ano-y-sigue-impune/>

Venezuela has generally failed to meet the obligation to combat impunity and guarantee the right to truth, justice, reparation and effective remedies.<sup>224</sup> The responsibility to do so binds all organs of the State, including the judiciary. As the United Nations Human Rights Committee has stated:

*"The obligations of the [International] Covenant [on civil and Political Rights] in general ...are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party."*<sup>225</sup>

The different obstacles faced by victims of serious human rights violations and those who require access to the judicial system require a fully independent judiciary.

## **B. Role of the Judiciary in violations of human rights and fundamental freedoms**

The judiciary has played contributing a role in the widespread and systematic human rights violations that have occurred in Venezuela in recent years. The FFM, in this regard, concluded that

*"the judiciary has itself become an instrument of repression, creating an accountability imbalance at variance with the principle of equality of arms. The Mission documented cases in which members of the judiciary were involved, either by act or omission, in the perpetration of serious human rights violations. This is especially true in the case of the criminal prosecution of political opponents (...)"*.<sup>226</sup>

The ICJ<sup>227</sup> and intergovernmental bodies institutions such as the Inter-American Commission on Human Rights<sup>228</sup> and the Inter-American Court of Human Rights<sup>229</sup> have highlighted how that military justice has been abused as a mechanism of to violate civil and political rights. The freedoms of expression, association and assembly and the right to participation have been undermined, with political dissidents serving as target for such attacks. It has been noted that military tribunals and specialized

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<sup>224</sup> International Commission of Jurists. "The right to a remedy and reparation for gross human rights violations Practitioners' Guide No 2 " (Revised edition, 2018) Available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> and "International Law and the Fight Against Impunity: ICJ Practitioners Guide No 7" (2015). Available at <https://www.icj.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf>.

<sup>225</sup> United Nations. Human Rights Committee. General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. Available at <https://undocs.org/en/CCPR/C/21/Rev.1/Add.%2013>.

<sup>226</sup> United Nations. Human Rights Council. Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela. Paragraph 165.

<sup>227</sup> International Jurists Commission, "The judgement of civilians by military courts in Venezuela" Page. 8.

<sup>228</sup> Inter-American Commission on Human Rights. Venezuela Country Report, 2017 - Situation of Human Rights in Venezuela - "Democratic Institutions, Rule of Law and Human Rights in Venezuela". Paragraph 25.

<sup>229</sup> Inter-American Court of Human Rights. Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207. Available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_207\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf).

anti-terrorism tribunals<sup>230</sup> have been used to silence political activists, human rights defenders and members of civil society for political reasons. For example, in January 2021 leaders of the Azul Positivo organization<sup>231</sup> were arbitrarily deprived of their liberty in military facilities and subjected to criminal proceedings. In December 2020, staff from the CONVITE humanitarian assistance organization<sup>232</sup> were subjected to an investigative procedure conducted by an anti-terrorism court in Caracas in connection with their activities involving the delivery of humanitarian assistance and medicines.

According to the interviews conducted for the preparation of this report, there have been numerous obstacles to exercising the right to defense before the anti-terrorism courts, including denial of access to the relevant case files or allowing sufficient time for preparation of the defense. Several UN human rights experts declared that "[t]he arrests and criminal charges [were] part of a pattern of increasing criminalisation of civil society organisations in Venezuela, which already operate under a repressive set of laws and regulations including the 2017 'Law Against Hate' that restricts the exercise of their right to freedom of peaceful assembly, association and expression, among others."<sup>233</sup>

The SCJ has appointed judges who are active members of the ruling party. In 2019, it was estimated that some 56.6% of judges were activists in the party.<sup>234</sup> These judges tend to act in proceedings related to political issues. For example, when Ricardo Prieto and Carlos Varón<sup>235</sup> were prosecuted for violations established under the 'Law Against Hate'<sup>236</sup> after disseminating a satirical video of Venezuelan President Maduro on social networks, the judge publicly stated his political militancy to the ruling political party. International standards such as the Basic Principles on the Independence of the Judiciary establish that the judges "shall always conduct themselves in such a manner

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<sup>230</sup> See United Nations. Human Rights Council. Independence of the justice system and access to justice, including violations of economic and social rights in the Bolivarian Republic of Venezuela, and the human rights situation in the Orinoco Mining Arc region. Report of the United Nations High Commissioner for Human Rights. A/HRC/44/54.

<sup>231</sup> Efecto Cocuyo. "Lo que debe saber sobre la detención de los activistas humanitarios en Venezuela", January 30, 2021. Available in Spanish at <https://efectococuyo.com/la-humanidad/lo-que-debe-saber-sobre-la-detencion-de-los-activistas-humanitarios-en-venezuela/>.

<sup>232</sup> Crónica Uno. "Funcionarios policiales allanaron la sede de Convite y las FAES se llevaron durante dos horas a miembros del equipo", December 15, 2020. Available in Spanish at <https://cronica.uno/funcionarios-policiales-allanaron-la-sede-de-convite-y-las-faes-se-llevaron-durante-dos-horas-a-miembros-del-equipo/>.

<sup>233</sup> "Venezuela: Human rights defenders released but charges remain; criminalisation of civil society must stop" Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26757&LangID=E>

<sup>234</sup> Armando.info "La Ley del Poder Judicial".

<sup>235</sup> See also: Observatorio de Derechos Humanos de la Universidad de Los Andes September 21, 2018, "Juez que imputa a bomberos de Mérida se define como comunista y hace apología de la violencia". Available in Spanish at <https://www.uladdhh.org.ve/index.php/2018/09/21/juez-que-imputa-a-bomberos-de-merida-se-define-comunista-y-hace-apologia-de-la-violencia/> and Espacio Público, "Bomberos de Mérida son imputados por "incitación al odio", 17 September 2018. Available in Spanish at <http://espaciopublico.org/bomberos-de-merida-son-imputados-por-incitacion-al-odio/>

<sup>236</sup> "Constitutional Law against hate and for the Peaceful Coexistence and Tolerance" About this law see International Commission of Jurists. "No Room for Deliberation: The National Constituent Assembly and the Collapse of the Rule of Law in Venezuela" (2019) P. 26. See also: Inter-American Commission on Human Rights. Annual Report 2018 Ch. IV.B, par. 66. Available at <https://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap.4B.NI-en.pdf>

*as to preserve the dignity of their office and the impartiality and independence of the judiciary.*"<sup>237</sup>

Those consulted for this report expressed a variety of opinions regarding the academic qualifications of the appointed judges. Some mentioned that there had been a process of "militarization" of the judiciary, partly due to the appointment of officials coming from the military, which tends to subordinate judges and to demand obedience even on their rulings. For some observers, this phenomenon was seen as generalized across all areas of the judiciary, while for others it is more common in certain jurisdictions, such as the criminal courts. Others interviewed stated that judges were afraid of the executive authorities of government,<sup>238</sup> to the point that in the few cases where decisions have been made to guarantee the rights of victims, it had not been possible to ensure enforcement of the judgements. They pointed out that some security forces often did not accept communications or orders issued by the judiciary, which rendered such orders ineffective.<sup>239</sup>

In this context, several people consulted for this report highlighted the persistent threat of persecution against judges who deviate from the explicit or implicit instructions given by the authorities, or their perceived wishes. As the FFM reported, these instructions could adopt the form of a phone call, a visit or a message effectively directing a judge how to rule in a specific case. This situation also impels judges to self-police their decisions out of fear especially in high profile cases, especially those related to political issues.

Several experts refer to the reissuing of the so-called "Afiuni Effect".<sup>240</sup> This relates to the emblematic case of judge María de Lourdes Afiuni who was targeted by the late President Hugo Chavez who expressly demanded her detention on national television. She was arrested in her office by the police and subjected to an arbitrary criminal procedure that ended with the arbitrary deprivation of her liberty. Judge Afiuni was prosecuted under charges of "spiritual" corruption (corruption without receiving any money in return)<sup>241</sup> for ordering that a pre-trial detainee be released on bail, citing a determination issued by the UN Working Group on Arbitrary Detention.<sup>242</sup> During the time of her imprisonment, she was a victim of inhuman and cruel treatment. Recently, the Criminal Cassation Chamber of the Supreme Court of Justice dismissed the appeal

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<sup>237</sup> Basic Principles on the Independence of the Judiciary. Principle 8.

<sup>238</sup> Acceso a la Justicia "El Gobierno instrumentalizó el derecho y la justicia para perpetuarse en el poder" (2019). Available in Spanish at <https://accesoalajusticia.org/gobierno-instrumentalizo-derecho-justicia-perpetuarse-poder/>.

<sup>239</sup> Foro Penal Venezolano, "Foro Penal: Familiares de presos políticos en Venezuela piden liberaciones antes de la Navidad". Available in Spanish at <https://foropenal.com/foro-penal-familiares-de-presos-politicos-en-venezuela-piden-liberaciones-antes-de-la-navidad/>.

<sup>240</sup> International Commission of Jurists. "Strengthening the Rule of Law in Venezuela", p. 31; "Venezuela: The Sunset of the Rule of Law - Mission Report 2015". P. 7; "Achieving justice for grave human rights violations in Venezuela", p. 26. P. 26. See also, Human Rights Council: Detailed findings of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela A/HRC/45/CRP.11 dated 15 September 2020, para. 363. Report of the United Nations High Commissioner for Human Rights "Results of the investigation into allegations of possible violations of the human rights to life, liberty and physical and moral integrity in the Bolivarian Republic of Venezuela" A/HRC/44/20 dated 2 July 2020. (Unofficial translation) Paragraph 9.

<sup>241</sup> Acceso a la Justicia. "TSJ no vio irregularidades en el juicio contra la juez Afiuni" (2020). Available in Spanish at <https://accesoalajusticia.org/SCJ-no-vio-irregularidades-en-el-juicio-contr-la-juez-afiuni/>.

<sup>242</sup> See United Nations. Working Group on Arbitrary Detention. Opinion N°10/2009 adopted by the Working Group on Arbitrary Detention on September 1<sup>st</sup> 2009 A/HRC/13/30/Add.1 Available at <https://undocs.org/en/A/HRC/13/30/Add.1>.

filed by the defense against the sentencing of Judge Afiuni to five years in prison.<sup>243</sup> Thus, the implicit messages sent by Afiuni case is the so-called "Afiuni Effect", whereby the rest of the judiciary are wary of ruling against the government for fear of similar reprisals.

### C. Judicial corruption and the weakening of democratic institutions

A necessary corollary to judicial independence is the need for judicial accountability. A judiciary that is not accountable and free of corruption or complicity in human rights violations cannot be independent.<sup>244</sup>

Official corruption is endemic in Venezuela. The country ranks last out of 128 countries in the World Justice Project's Rule of Law Index<sup>245</sup> and 176<sup>th</sup> out of 180 countries in Transparency International's Global Corruption Perceptions Index.<sup>246</sup>

The Inter-American Commission on Human Rights has described corruption in the judiciary as a "*distortion of judicial functions by the judicial authority or other justice operator in order to obtain a material or other benefit for oneself or for third parties.*"<sup>247</sup> The IACHR has also observed that "*Corruption induces judicial authorities to violate the principles of "equality of arms" and the right to adversarial proceedings, which should be the hallmark of judicial proceedings*",<sup>248</sup> which affects the right to an effective remedy for individuals.

In the consultations conducted, it was stated that even though the Venezuelan Constitution expressly provides for free access to justice<sup>249</sup> and prohibits charging for the administration of justice,<sup>250</sup> a series of informal "charges" or fees must be made to people accessing the justice system, without which the simplest procedures are not carried out. This situation is reflected in all jurisdictions and has been worsening as the severe generalized human rights crisis has intensified.

The high rate of provisional appointments, labor instability for judges and the low salary they receive (some 30 US dollars per month)<sup>251</sup> are among the factors

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<sup>243</sup> Supreme Court of Justice. Criminal Cassation Chamber. Judgment No. 114 of November 04, 2020. Available in Spanish at <http://historico.tsj.gob.ve/decisiones/scp/noviembre/310474-114-41120-2020-C20-3.HTML>.

<sup>244</sup> See See International Commission of Jurists. Judicial Accountability: ICJ Practitioners' Guide no. 13 (2016), available at <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

<sup>245</sup> World Justice Project. Global Rule of Law Index (2020). Available at [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf)

<sup>246</sup> Transparency International. Corruption Perceptions Index (2020). Available at <https://www.transparency.org/en/cpi>.

<sup>247</sup> Inter-American Commission on Human Rights. Corruption and Human Rights: Inter-American Standards. OEA/Ser.L/V/II. Doc. 236 dated 6 December 2019. Available at <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>. Paragraph 294.

<sup>248</sup> Inter-American Commission on Human Rights. Corruption and Human Rights Report, Paragraph 288.

<sup>249</sup> Venezuelan Constitution Art. 26.

<sup>250</sup> Venezuelan Constitution Art. 254.

<sup>251</sup> "According to information received by OHCHR, the monthly salary of a judge is around US \$30 per month, which increases the risk of corruption in all areas and at all levels of the administration of justice". Human Rights Council. Report of the United Nations High



apparently driving judicial corruption. Cases have been identified in which judicial officials have allocated time and resources from the administration of justice for their own benefit and there have been cases of judges who were both judges and contractors of the State.<sup>252</sup> In 2019, at least 106 judges who were militants of the governing party were linked to companies that were State contractors,<sup>253</sup> despite the existence of constitutional prohibitions aimed at reducing corruption.<sup>254</sup> Those the ICJ interviewed during the preparation of this report, identified that a primary motivation for becoming a judge in present day in Venezuela may be to have closer access to power and the possibility of personal gain through corruption.

In addition, there is rampant judicial cronyism reflected in the appointment of judges because of their political beliefs, activism or formal or informal membership of the governing party. This cronyism may be used as a pressure mechanism to obtain favorable judicial decisions. The Inter-American Commission on Human Rights has observed that:

*"[t]reating people differently based on their political views is a form of discrimination. Thus, when access to public services is made to depend on affinity with a particular political, religious, or other sector, such differentiation violates international human rights obligations, given that public goods are being used to secure a private (political, religious, or other) benefit".*<sup>255</sup>

Corruption in the judicial system affects judicial impartiality, as well as judicial independence in its institutional and individual dimensions.<sup>256</sup> This is because judges decide cases without impartiality, favoring the interests of one of the parties for their own benefit, or make decisions according to the instructions of their superiors. The Inter-American Commission on Human Rights has stated that the *"the administration of justice may itself become corrupted, whereby its necessary independence and impartiality are impaired, along with the justice it is supposed to administer to the citizens who turn to it"*.<sup>257</sup>

## **VII. Conclusions**

The Venezuelan Constitution enshrines the guarantees of independence of the judiciary and contains various provisions to guarantee it, meaning that there exists a basic degree of *de jure* judicial independence, at least in constitutional terms. However, there are major deficiencies in the law below the Constitutional level, and the situation in practice is abysmal.

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Commissioner for Human Rights 44th session A/HRC/44/54 dated 15 July 2020. Available at <https://undocs.org/en/A/HRC/44/54>.

<sup>252</sup> Armando.info " Los jueces de Venezuela asfaltan calles y firman sentencias" (2019). Available in Spanish at <https://armando.info/Reportajes/Details/2531>.

<sup>253</sup> Armando.info " Los jueces de Venezuela asfaltan calles y firman sentencias" (2019)

<sup>254</sup> Venezuelan Constitution Art. 145.

<sup>255</sup>Inter-American Commission on Human Rights. Corruption and Human Rights: Inter-American Standards. OEA/Ser.L/V/II. Doc. 236 dated 6 December 2019. Available at <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>. Paragraph 162.

<sup>256</sup>Inter-American Commission on Human Rights. Corruption and Human Rights, Paragraph 303.

<sup>257</sup>Inter-American Commission on Human Rights. Corruption and Human Rights, Paragraph 286.

The exercise of certain judicial and administrative functions by the Supreme Court of Justice (SCJ), as well as shortcomings in the legislative provisions that give effect to the Constitutional guarantees, reveal a grim picture when it comes to the situation of independence of judges in the country.

The concentration of functions in the SCJ has facilitated the political branches of government, particularly the executive authorities, in their efforts to exercise effective control or undue influence of the judiciary since 1999. This pattern has been evidenced in various ways, including through the appointment processes of the members of the SCJ.

The SCJ, and specifically its Constitutional Chamber, has abdicated its role as guardian of the Constitution and protector of human rights by tolerating that political actors ignore the constitutional procedures and requirements established in the processes for the appointment of judges to the Court. The constitutional mechanisms for the appointment of Justices of the SCJ have not been properly operationalized. The eligibility requirements have been altered to facilitate the access of candidates who have not meet the constitutionally established criteria for their positions, but who have been typically politically linked to the governing party. This has adversely affected the judicial independence of the SCJ and has left judges vulnerable to pressure and threats of disciplinary measures, including dismissal. It has also allowed for effective political control of the Supreme Court and its decisions, consequently, the judiciary as a whole.

The serious weaknesses identified in the selection process for members of the SCJ appear to have been reproduced in the selection of judges.

First, the repeated practice by the SCJ of suspending and not holding public competitive examinations to appoint candidates clearly violates the Constitutional prescription for selecting judges designed to promote transparent, broadly accessible, and merit-based admission to the judiciary. It is important to note that severe irregularities have been identified in the competitive examinations held prior to the suspension, such as changes to the lists of candidates and questions as to the bias of the juries.

Second, the various and frequent modifications to the Evaluation and Competition Rules have resulted in the SCJ having an excessive concentration of power in the process of appointing judges, accompanied by the lack of a formal law regulating the matter and the lack of transparency and accountability of the SCJ itself. Several improper practices were identified: the intervention or presence of Supreme Court justices in the selection process and on the juries; the discretionary relaxation of the requirements and examinations to enter the judiciary; the use of the training courses offered by the School of the Judiciary as a closed competition mechanism; limitations on the participation of universities outside the judiciary in the competitive examinations; and the reduction of advertisements and broad and diverse participation of civil society in the competitive examinations process. These regulatory modifications coincided with the appointment of new justices to the Supreme Court of Justice in 2000, 2005, and 2016 who were named in non-transparent processes.

There is a very high number of provisional judges in Venezuela due to a deliberate policy that has prevented the performance of competitive examinations. The appointment of provisional judges has led to an increased concentration of power in the SCJ, as the Judicial Commission is the body responsible for appointing provisional judges and reports to the Supreme Court. In addition, the Commission has broad powers to appoint and remove provisional judges, as well as to create, modify and abolish courts. The jurisprudence of the SCJ has established that the removal of these officials does not require a disciplinary procedure and judges have been removed from

office immediately after they have made judicial decisions that have not been to the satisfaction of the leaders of the Supreme Court.

Formal and informal control mechanisms were identified that condition and pressure the work of judges, such as the use of directives and instructions by presiding judges, coordinators and presidents to apply pressure to achieve pre-determined outcomes in judicial decisions, especially in criminal cases. Judges lack institutional mechanisms to protect them from these directives and from the threats they may receive in cases with a high public profile or involving political interests.

The violations of judicial independence and the institutional weaknesses described in this report have contributed to promoting impunity for human rights violations and abuses in the country. The judiciary has also acted as an instrument participating in or facilitating serious human rights violations, as documented by the International Independent Fact-Finding Mission (IFFM). In addition, the judiciary has been implicated in corrupt practices, such as undue "charges" by judicial officials to carry out procedures and judges who are linked to companies that are contractors of the State.

These findings support previous conclusions by the International Commission of Jurists, especially that the Judiciary *"has lost its essential and characteristic attributes, such as autonomy, independence, and legitimacy."*<sup>258</sup> Moreover, the Supreme Court of Justice 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"*.<sup>259</sup>

## **VIII. Recommendations**

The International Commission of Jurists considers that it is essential to reestablish and guarantee the independence of the judiciary in Venezuela, which also entails reestablishing the operation of the rule of law in the country.

The concentration of judicial governance and management functions in the SJC and the manner in which it has in practice exercised these functions have undermined the independence of judges. The ICJ therefore calls for concrete measures to be taken to restore the SJC as a fully independent judicial authority fit and poised to carry out its critical work in the fair and effective administration of justice in the country.

The ICJ calls for compliance with the constitutional design of the judiciary, bolstered by adherence to universal principles of judicial independence and the rule of law. This requires reinforcement the separation between the function of appointing and selecting judges and the functions of sanctioning and dismissing judges. In this sense, it is necessary to entrench an autonomous, impartial and independent body within the judiciary that has the competency and mandate of evaluating, organizing and holding competitive examinations for the selection of judges that comply with the criteria of maximum transparency, publicity and accountability. This body must have specific guarantees of judicial independence from political sectors.

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<sup>258</sup> International Commission of Jurists. "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch". P. 50.

<sup>259</sup> International Commission of Jurists. "The Supreme Court of Justice of Venezuela: an instrument of the Executive Branch". P. 50.

Specifically, the ICJ makes the following recommendations for the adoption of policies and practices to guarantee judicial independence, and also generally reiterates the recommendations it has made in previous reports (see Annex).

### **1) To the Supreme Court of Justice and others administering justice**

- Guarantee and respect the institutional independence by law and in practice and throughout the country and refrain from actions of pressure or undue influence on individual judges or other interference in the work of the judiciary.
- Take immediate steps to ensure that the appointment of judges is carried out through appropriate public competitive examinations in accordance with constitutional provisions, and that these guarantee the principles of participation, publicity, impartiality and transparency. This implies modifying the internal rules on evaluation and competitive examinations to ensure that these processes are conducted with publicity, transparency, impartiality, equality, and broad participation.
- Cease the practice of appointing provisional judges as a general rule and strengthen the appointment of tenured judges in compliance with constitutional provisions and international standards that guarantee the security of tenure of judicial officials.
- End or substantially limit the practice of appointing provisional judges and adopt practices of transparency and compliance with the general requirements for entry into the judiciary. In addition, guarantee that provisional judges enjoy security of tenure during their employment and have due process guarantees against their removal from office. Guarantee that provisional judges can participate in public competitive examinations to fill tenured positions on equal terms with other participants in the competitions.
- Appoint the highest authorities of the Executive Directorate of the Judiciary and the auxiliary bodies of the Supreme Court of Justice (General Inspectorate of Courts, Public Defender's Office and National School of the Judiciary) through public and open competitive selection processes and ensure that these appointments have a reasonable period of service so that officials can exercise their functions with autonomy.
- Lift the precautionary measure imposed on the Code of Ethics for Venezuelan judges, so that all judges, regardless of whether they are provisional or tenured, are guaranteed the application of the disciplinary procedure when it is necessary.
- Appoint judges to the judicial disciplinary mechanisms in accordance with the applicable constitutional and legal provisions and ensure their independence. Desist from appointing former members of the legislative branch as part of the judiciary especially in the disciplinary functions.
- Cease the current appointments of presiding judges, rectors and coordinators and order that their appointments are carried out in a transparent manner in accordance with the provisions established in the Organic Law of the Judiciary, limiting their functions to administrative duties without supervisory authority over the rest of the judges of the respective judicial circuit.
- Design an evaluation and competitive examination plan that provides for the evaluation of all provisional tribunals and implement it without delay.
- Provide for training and continuing education of judges on the effective investigation and prosecution of serious human rights violations and on due diligence when prosecuting these serious violations.
- Cooperate with universities, civil society organizations and international agencies to implement training activities for judicial officials.

- Publish the annual management report of the judiciary and include accessible and disaggregated information in compliance with maximum transparency and accountability standards.
- Provide that the criminal jurisdiction for the military courts is circumscribed in accordance with constitutional principles to guarantee due process, and limit military jurisdiction to only crimes of a military nature that are applicable only to military officials on active duty or active status. These should exclude cases related to human rights violations, war crimes and crimes against humanity. In addition, ensure that both the appointment of judges and officials from the military criminal jurisdiction and its disciplinary regime are governed by the same constitutional principles applicable to the rest of the judiciary.

## **2) To the executive authorities**

- Refrain from any actions or measures of threats, persecution, pressure, or exercise of undue influence affecting the individual independence of judges and the judiciary in general and respect judicial independence and the central principle of separation of powers inherent in a State governed by the rule of law.
- Fully cooperate with the UN Human Rights Council's International Independent Fact-Finding Mission for Venezuela, including by allowing it to visit the country and ensure that it can exercise its functions without interference or threats. Guarantee the protection, including from reprisals, of those cooperating with the Mission, including victims of rights violations and human rights defenders.
- Comply with the all judgments of the Inter-American Court of Human Rights, including specifically the cases *Apitz Barbera et al*; *Reverón Trujillo*; and *Chocrón Chocrón*. Extend an invitation to the Inter-American Commission on Human Rights to conduct an on-site visit.
- Respond positively to the requests the visits requested by the United Nations Human Rights Council mandate holders who have requested and invitation to visit Venezuela.

## **3) To the legislature**

- Refrain from any actions or measures of threats, persecution, pressure, or exercise of undue influence affecting the individual independence of judges and the judiciary in general and respect judicial independence and the central principle of separation of powers inherent in a State governed by the rule of law.
- Conduct the process of appointing Supreme Court justices in strict compliance with the constitutional principles that guarantee the independence of the judiciary and the separation of powers and in accordance with the procedure established in the Constitution.
- Adopt legislation that regulates the evaluation processes and public competitive examinations for the appointment of judges in accordance with constitutional provisions and international standards. This legislation should regulate conditions and requirements for the selection of judges, establish an independent body responsible for organizing public competitive examinations, limit the conditions and cases in which provisional judges may be appointed and ensure this process is in compliance with constitutional provisions.
- Amend the Organic Law of the Supreme Court of Justice to ensure an appointment process through the Judicial Nominations Committee that has broad transparency and the participation of civil society without any discrimination. Establish the autonomy and independence of subordinate bodies: General Inspectorate of Courts, School of the Judiciary, Public Defense and Executive Directorate of the Judiciary.

- Reform the Code of Ethics for Venezuelan judges to establish due process and fair hearing guarantees in all disciplinary proceedings against judges, regardless of whether they are provisional or tenured. These regulations should require clear reasons for sanctioning judges, and provide that judges be removed only for incapacity of behavior that renders them unfit to carry out their functions which is narrowly defined; repeals the existing grounds of "serious and inexcusable error"; and place limitations on sanctioning judges for their conduct in accordance with the guarantees of judicial independence. It should also establish proportional and necessary conditions for suspending judges who are subject to disciplinary proceedings. In addition, the selection process for magistrates and judges in the disciplinary jurisdiction should be modified so that any element of discrimination or political motivation in the composition of the judicial electoral colleges is excluded.
- Regulate conflicts of interest that may be incurred by judiciary staff, as well as the procedures for processing them, applicable sanctions and the obligations of public servants in relation to these sanctions.
- Regulate the payment of adequate salaries to the judiciary, as well as measures to promote transparency and accountability in the budgetary execution for the judiciary.
- Reform the Organic Code of Military Justice and other legislation that has unconstitutionally expanded the use of military justice, bringing it into line with international fair trial standards. This should exclusively attribute jurisdiction over strictly military crimes committed by military personnel in service or active duty to the military justice system and incorporate a strict prohibition of the trial of civilians by military tribunals.
- Repeal the Justice System Law and amend the Organic Law of the Judiciary to distinguish jurisdictional functions from those of governance and judicial administration.
- Reform the Organic Code of Criminal Procedure in accordance with the constitutional and international provisions for the due process of law, the right to a fair trial and other human rights the exercising of public interest actions and the representation of victims of human rights violations by non-governmental organizations.

#### **4) To international organizations and actors**

- Publicly call on the responsible Venezuelan authorities to comply with their commitments to upholding international human rights and rule of law, including the duty to guarantee the individual independence of judges and the general judiciary.
- In respect of the UN Human Rights Council, maintain a mechanism to address proper accountability for gross human rights violations, until the prosecutors and the domestic courts and tribunals are capable of effectively investigating and prosecuting with independence and impartiality those violations.
- Offer international cooperation and assistance on the administrations of justice, in particular cooperation with the judiciary to train judges and other justice system officials in order to strengthen judicial independence in the country.
- Support the work of organized civil society with the promotion and protection of judicial independence and the rule of law, as well as supporting the actions necessary to overcome the complex humanitarian emergency that the country is experiencing.

- Implement projects and areas of cooperation that focus on strengthening the rule of law, judicial independence and accountability for serious human rights violations.

## **Annex**

### **Recommendations of previous ICJ reports**

The International Commission of Jurists considers that, on the basis of the findings presented in this new report, a number of recommendations made in previous reports remain valid. The ICJ therefore reiterates the following:

- "To carry out public competitions for judicial appointments, as provided for in the Rules of Evaluation and Competitive Examinations for the Admission and Permanence in the Judiciary, which should be administered by independent authorities and incorporate a substantive role for judges.
- To ensure that competitions for permanent titular judicial offices are equally open to all lawyers who comply with the requirements indicated in the Rules of Evaluation and Competitive Examinations for the Admission and Permanence in the Judiciary.
- To cease the practice of systematically appointing provisional, temporary, casual, accidental or any other types of posts that depart from the ordinarily prescribed judicial recruitment process through resolutions of the Judicial Commission of the Supreme Tribunal of Justice; practice that undermines the independence of the Judiciary and international law standards.
- To guarantee the security of tenure and independence of provisional judges (including temporary, occasional, accidental, or any other type of posts different from the judge of career), including by lifting the suspensory effect of the 7 May 2013 judgment of the Constitutional Chamber of the Supreme Tribunal of Justice on 7 May 2013 on the code of ethics. In consequence, affirm that the provisions of the Code of Ethics of the Venezuelan Judge apply to all judges and justices operating within the jurisdiction of Venezuela, and not only to the titular judges; and not to recognize a discretionary and arbitrary power of the Judicial Commission of the Supreme Tribunal of Justice to appoint and remove judges without reasons.
- To cease the abusive practice of the Judicial Commission of the Supreme Tribunal of Justice whereby the Commission has suspend without remuneration titular judges without previous proceedings, and without any allegation of the possible commission of disciplinary offenses, in violation of essential guarantees of the due process of law.
- To ensure that the suspension for precautionary reasons of a judge shall be decided, and then only if the circumstances justify it, by the exclusively competent Disciplinary Tribunal or Court, and only when a disciplinary investigation is underway, and only for so long as the disciplinary process takes to conclude.
- To ensure that the appointment of members of the Tribunal and Court that constitute the judicial discipline mechanism is exclusively based on the criteria of competence, experience and integrity, in a non-partisan manner without regard to political affiliation.
- To undertake a constitutional reform or issue a constitutionally binding interpretation that recognizes the right of freedom of association for lawful purposes of judges and justices, in accordance with existing international standards, and to facilitate the creation of associations of judges.
- To adopt the necessary legislation to complete the legal framework regulating the functioning of the judiciary, in particular legislation regarding the judicial career and the Organic Law of the Judicial Power.
- To ensure, with regard to the rules and principles of the Inter-American System, that Venezuela fulfils and implements interim and final decisions



adopted by the Inter- American Commission of Human Rights and the precautionary measures and judgements of the Inter-American Court.

- To ensure, with regard to the rules and principles of the international human rights system, that Venezuela respects international human rights and complies with the recommendations contained in the decisions of treaty bodies and reports by United Nations special procedures.
- Venezuela must contribute to the transparency of public information and provide data and background for requests.
- Venezuela must carry out an ongoing training program for judges and public prosecutors in order to improve skills.
- While the open competitive bid process is carried out for the appointment of judges and public prosecutors, temporary appointments must also be carried out in an open, competitive and transparent manner to guarantee suitability and independence of candidates.
- The Judiciary must guarantee the stability of all judges including provisional judges, while permanent positions are established by means of an open competitive bid process. In this regard, dismissals can only be carried out fulfilling predetermined legal causes, due process and the right to an effective judicial review.
- The Judiciary must begin the open competitive bid process, in agreement with the Constitution of the Republic, to fill judge appointments that are currently provisional.
- The Judiciary must implement the regulations on judicial independence contained in Art. XVIII of the American Declaration of the Rights and Duties of Man, Art. 10 of the Universal Declaration of Human Rights and in Art. 14 of International Covenant on Civil and Political Rights. In addition, it must bear in mind the standards contained in the Basic Principles of the Independence of the Judiciary, in the jurisprudence of the Inter-American Court and in the recommendations of the Inter-American Commission.
- The Judiciary must guarantee independence and impartiality in its decisions, in addition to adopting measures to effectively fight the corruption affecting the institution.
- The Judiciary and Public Prosecutor's Office must maintain and strengthen their autonomy in relation to other State branches, to reestablish the trust of judicial operators and the population in general.
- The Judiciary must carry out internal actions to guarantee the efficiency and effectiveness of the justice administration, to provide a suitable response to demands for a quick, expeditious and effective justice system as required by the Venezuelan society”.



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March 2021 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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