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**Limitations and Restrictions
on Access to Justice in Venezuela
with Particular Reference
to the Andean Region**

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This report on the restrictions on access to justice in Venezuela takes into consideration two main aspects: a) the legal framework established by the National Constitution of Venezuela and International Treaties that ensures access to justice; b) the actual reality, marked by the dismantling of the Rule of Law on the part of the national executive power, with the support of a subservient Supreme Tribunal of Justice (TSJ) that has arrogated to itself the functions of the National Assembly (AN) and other government branches. In consequence, the current situation of the Venezuelan people is characterized by the lack of legal certainty, mainly for those who are critical of the government and have suffered from discrimination and other attacks against their rights and guarantees.

Access to justice is a fundamental human right—included within civil and political rights because it is required for the existence of all other human rights. Rights enshrined by the National Constitution and Human Rights International Instruments would be of no use if people were devoid of the certainty to resort to relevant public authorities in asserting their rights or demanding redress or if their right to access to justice is violated directly or indirectly.

For a real and effective exercise of the right to access to justice by the citizenry is required the existence of the Rule of Law, which is only ensured in democratic states where the separation, autonomy, and independence of public powers are authentic, effective, and real.

1. Legal framework on the right to access to justice

Access to justice in Venezuela is a right previously envisaged in the 1961 National Constitution, as well as all other democratic constitutions. The National Constitution, in force since 1999, provides access to justice in Title III, denominated “Duties, Human Rights, and Guarantees. Among other provisions granted by this constitution is important to underline the following:

1.1 Constitutional provisions embodying the principle of equality before the law and the prohibition form of discrimination:

Article 21. All persons are equal before the law and consequently: No discrimination based on race, sex, creed or social standing shall be permitted, nor, in general, any discrimination with the intent or effect of nullifying or encroaching upon the recognition, enjoyment or exercise, on equal terms, of the rights and liberties of every individual. The law shall guarantee legal and administrative conditions such as to make equality before the law real and effective manner; it shall adopt affirmative measures for the benefit of any group that is discriminated against, marginalized or vulnerable; it shall protect in particular those persons who, because of any of the aforementioned circumstances, are in a manifestly weak position; and it shall punish those who abuse or mistreat such persons.

- 1.2 The right to access to justice that implies the principles of impartiality, independence, autonomy, and celerity.

Article 26. Everyone has the right to access the organs comprising the justice system for the purpose of enforcing his or her rights and interests, including those of a collective or diffuse nature to the effective protection of the aforementioned and to obtain the corresponding prompt decision.

The State guarantees justice that is free of charge, accessible, impartial, suitable, transparent, autonomous, independent, responsible, equitable and expeditious, without undue delays, superfluous formalities or useless reinstating.

- 1.3 The right of petition, which entails the right to receive a timely response to any claim submitted to an authority.

Article 51. Everyone has the right to petition or make representations before any authority or public official* concerning matters within their competence and to obtain a timely and adequate response. Whoever violates this right shall be punished in accordance with law, including the possibility of dismissal from office.

These constitutional articles are directly associated with the following International Treaties signed by the Republic of Venezuela. in such a way, they are laws within the domestic legal order of Venezuela.

Universal Declaration of Human Rights

It enshrines in Articles 1 and 2 the principle of equality and the right to non-discrimination, while Article 8 guarantees the access to justice and the right to protection against acts that violate fundamental rights enshrined by the constitution or by law.

American Convention on Human Rights

It establishes equality before law in Article 24. Article 8 declares the right to access to justice, which is defined as the right of every person to have “a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal.” It also states in Article 25 the right to protection against acts that violate a person’s fundamental rights, even if such violation “may have been committed by persons acting in the course of their official duties.”

International Covenant on Civil and Political Rights

It establishes in Article 2 paragraph 3 the right to claim a judicial remedy “notwithstanding that the violation has been committed by persons acting in an official capacity”; Article 14 declares all persons are equal before law, as well as the right of everyone to a fair and public hearing by a **competent, independent and impartial tribunal**.

2. Structure of the Judiciary in Venezuela

Article 136 of the National Constitution of Venezuela establishes the separation and autonomy of the different public powers of the Republic, establishing only collaborative relationships with one another, in order to achieve the purposes of the State.

The justice system is exercised by the **Judicial Power**, which operates at the “national” level. It is not distributed at municipal or state levels, in contrast with the executive and legislative powers. Judicial Power, in accordance with Article 253 of the National Constitution, consists of the Supreme Tribunal of Justice (TSJ), such other tribunals as may be determined by law, the Ministry of Public Prosecutions, the Public Defender's Office, criminal investigation bodies, such as the Scientific, Criminal and Forensic Investigation Corps (CICPC), whose role is to carry out criminal investigations and to provide forensic scientific analysis of crimes.

In accordance with Article 267 of the Constitution, the TSJ is in charge of the direction, governance and administration of the Judicial Power as well as of the inspection and vigilance of the courts of the Republic and the public defenders' offices.

Article 255 of the Constitution of Venezuela establishes **civil service entrance examination** as the method for the appointment and promotion of judges, “to ensure the capability and excellence of the participants [...]; likewise, it states that judges “shall be removed or suspended from office only through the procedures expressly provided for by law.”

3. Subordination of the Judiciary to the Executive Power and Politicization of the Judicial System.

It is a well-known, widely documented fact that the judicial system of Venezuela is under control of the executive power, which is to say, obedient and submissive to its mandates. The President of the TSJ, the General Prosecutor of Venezuela, and the Chief Public Defender are all known militants of the governing party, as well as most of the magistrates of the TSJ, which constitutes a transgression of Article 256 of the National Constitution.

This situation, however, is not completely novel, since it has been occurring since August 1999, when the Constituent National Assembly (ANC) intervened the judicial branch through a decree that declared a “judicial emergency” and created the “committee of judicial restructuring”. On the basis of this decree, judges and prosecutors were dismissed or obliged to resign and were replaced by people aligned with the *chavista* regime, who—on account of the alleged “judicial emergency”—entered the judicature on a provisional basis, without the proper credentials nor the due civil service entrance examination, as established by Article 255 of the National Constitution.

In 2003, the Inter-American Court of Human Rights (IACHR), published a follow-up report to its “2003 Report on Venezuela” expressing its concern “over factors affecting the independence and impartiality of the judiciary, in particular the elevated percentages of judges and prosecutors with provisional tenure and the failure to observe certain procedures set by law and by the Constitution for their appointment and removal.”

In 2004, since the *chavista* government lack of qualified majority in the National Assembly (AN), the Organic Law of the Supreme Tribunal of Justice was passed by a simple majority constituted by the government party legislators, in contravention of Article 203 of the National Constitution, which requires a qualified majority to enact an organic law. With the evident intention of shifting the correlation of forces within the TSJ, this law increased the number of magistrates from 20 to 32. Likewise, such simple majority in the legislative proceeded to appoint 17 new magistrates and 32 deputy magistrates, given that one magistrate retired and other four resigned.

By 2006, the TSJ was amply formed by judges supportive of the government, to the extent that on February 26 2006, during the opening of the legal year of Venezuela, the magistrates of the TSJ, acting under their investment as judicial authorities in the venue of the high tribunal, stood up and ingratiated with the president of the republic while blithely chanting the 2002 slogan: “*Uh, ah, Chávez no se va*” (Uh, ah, Chávez won’t go). Since the death of president Chávez is commonplace to see in the venues of justice bodies, as well as other public administration offices, the following warning: “*Aquí no se habla mal de Chávez*” (We don’t speak ill of Chávez here).

In 2009, the arbitrary criminal process against Judge María Lourdes Afiuni, and the torture inflicted on her, caused panic among other judges across the country. Some of them resigned while some others became subordinated to the political guidelines made by the executive power, the Ministry of Public Prosecutions and the Supreme Tribunal of Justice. As it is known, Judge Afiuni granted Eligio Cedeño conditional release in a preliminary hearing on 10/12/2009. Mr. Cedeño had been deprived of liberty for two years and his detention had been already declared arbitrary by the Working Group on Arbitrary Detention in September 2009 based on the violations of the right to due process. The day after Mr. Cedeño was released, on December 11, during a speech on compulsory radio and television transmission, president Chávez called judge Afiuni a “bandit” among other degrading epithets. He also instructed the Prosecutor General and the President of the TSJ to punish the judge with the maximum penalty in Venezuela, which is 30 years’ imprisonment. The next day, in an expedited act of obedience to Chávez, Luisa Ortega Díaz, General Prosecutor of the Republic, indicted the judge with the crimes of corruption by a public official, abuse of authority, criminal conspiracy, and aiding and abetting a felon to escape.

In paragraph 200 of Chapter III of the report by the IACHR dated December 30th, 2009, the court addressed the lack of independence and autonomy of the Judicial Power in Venezuela: “The changes made within the judiciary have sought the protection or support of a specific political project, not the consolidation of a transparent and independent judicial system to afford justice and due process to the Venezuelan population in general, without discrimination on social or political grounds.” In paragraph 300 of the same report, the IACHR referred to the case of Judge Afiuni: “In relation to these facts, on December 17, 2009, the IACHR sent a request for information to the State. For their part, three United Nations Rapporteurs expressed their profound concern over the arrest of Judge Afiuni, which they described as “a blow by President Hugo Chávez to the independence of judges and lawyers in the country. The UN Rapporteurs expressed their concern about the fact that President Chávez had publicly instructed the Prosecutor General and the President of the Supreme Tribunal of Justice to castigate Judge Afiuni with the maximum penalty. In this sense, they stated that “the reprisals for exercising constitutionally-guaranteed functions and the creation of a climate of fear in the judiciary and in the attorneys serves no other purpose than to undermine the rule of law and to obstruct justice.”

In the 2015 legislative elections, the Venezuelan opposition won the qualified majority of the National Assembly, that is, two thirds of the seats in the legislative body. In view of this event, the outgoing *chavistas* deputies in an evidently deliberated, unconstitutional, and swift process, proceeded to appoint 13 new magistrates for the different chambers conforming the tribunal. In addition to the unlawful designation process, such new magistrates do not meet the

requirements established by Article 263 paragraph 3 of the National Constitution to hold office.

3.1 Dismantlement of the Legislative Power by the Executive Power and the Constitutional Chamber of the TSJ

As of December 2015, the Constitutional Chamber of the TSJ is formed by seven people who are publicly-known supporters of the Chavist ideology. Calixto Ortega, for instance, was vice-minister, diplomat and deputy to the AN from the United Socialist Party of Venezuela (PSUV) for ten years and he was then appointed TSJ magistrate. In addition, none of them is expert on constitutional law. Three of them, at the time of writing this report, have not posted their curriculum on the TSJ website yet.

The Supreme Tribunal of Justice (TSJ), mainly through the Constitutional Chamber, has become the executive arm for the totalitarian purposes of the government of Nicolás Maduro. To this end, he has undermined the powers of the National Assembly, which is an opposition-controlled legislature. According to a 2017 report by *Acceso a la Justicia*: “All sentences related to claims filed against government policies have been declared inadmissible or unfounded. Likewise, 100 percent of lawsuits filed by the Executive to avoid control, to weak institutions, and to concentrate powers have won favorable judgments.”

Some of the unconstitutional proceedings undertaken by the TSJ to favor the government pretensions are:

- a) To cancel the qualified majority of the opposition in the AN, the TSJ deemed the election of three deputies of the state of Amazonas invalid. Up to now, this state does not have legislative representation since the tribunal has not carried out a trial nor has issued a judgment.
- b) The TSJ also found the AN “in contempt”. For this reason, all laws passed by the legislative body have not been promulgated as the Constitutional Chamber considers they are “unconstitutional”.
- c) Restriction on regulatory functions of the AN. The TSJ took away the Law on National Budget from parliamentary control and the submission of annual reports and accounts by the President and Ministers to the National Assembly.

3.2 Provisional Status of Judges and Access to Judiciary Positions without Civil Service Entrance Examinations

In Venezuela, there is not official information on the number of judges and prosecutors who have entered the judicial system with provisional status and without taking the civil service entrance examination. There is not either access to this information by officials who are in charge of handling it. information released by human rights organizations—such as the Office of the United Nations High Commissioner for Human Rights, Amnesty International, and *Acceso a la Justicia*—show that between 80 and 90 percent of judges are temporary or substitute; hence, because they lack of the independence and stability provided by the judiciary service, they had been subjected to pressure, reprisal, and dismissal by the TSJ. In August 2017, the International Commission of Jurists (ICJ) expressed concern on the lack of independence of judges in Venezuela. In October 2017, the World Economic Forum (WEF) stated that Venezuela ranks lowest among 137 countries with respect to judicial independence.

In August 2017, fifteen prosecutors in the state of Mérida were removed from office. Although they were provisional prosecutors they had served between 15 and 30 years. These dismissals were without foundations, but they occurred as Luisa Ortega Díaz was replaced by Tarek William Saab as Prosecutor General of Venezuela, after the former criticized in the breakdown of the constitutional order in Venezuela.

It is important to note that the Constitution of the Bolivarian Republic of Venezuela, the Organic Law on the Office of Public Prosecutions, and the Law of Civil Service Regulations are consistent with each another, by establishing the requirements of admission to civil service. For instance, Article 144 of the Constitution of the Bolivarian Republic of Venezuela states: “Statutes governing public functions shall be enacted by law, with rules concerning admission, promotion, transfer, suspension and removal of employees of the Public Administration...” While Article 94 of the Organic Law of the Public Prosecutor’s Office requires the approval of a civil service entrance examination to enter this body. **The Prosecutor General of the Republic, by order, shall establish the conditions and requirements of the civil service entrance examination, in accordance with this law.**

It is responsibility of the Prosecutor General to convene the civil service entrance examinations to the Public Prosecutor’s Office. The dismissed prosecutors had provisionary and substitute status, which means they performed their job in replacement of another person; hence, in order for this position to exist, there needs to be a regular prosecutor. There should be also an employment contract with respective start and end dates, considering the nature of the position is temporal—and lawfully—substitute the holder of office. In this case, the prosecutors were temporary workers—some of them had more than 25 years of service—, but there were not regular prosecutors. Such situation negatively affects the independence of the judiciary, since Paragraph 2 of Article 285 of the National Constitution establishes, among other functions of the Ministry of Public Prosecutions, “to guarantee the speedy trail of the judicial process, the right to previous trial and a due process.”

3.3 Due Process and Judicial Delays

Judicial delay, along with violations of due process, is a general practice among the tribunals of the republic and other governmental entities, principally when the people involved are dissidents.

This is the case of Rafael Avendaño—a victim of discrimination on political grounds—, ¹who filed²a motion to vacate with precautionary measure was granted eight months later after it was filed, although the law provides that this kind of complaint must be agreed or denied within three working days. There is a delay of five months in respect to the substantive decision related to the invalidity of the act, when the law provides a period of 30 days for the tribunal to make a definitive judgment.

Regarding the delay on Ministry of Public Prosecutions proceedings among the different offices of public prosecution in the state of Mérida, 20 complaints filed by the Observatory of Human Rights of the University of Los Andes between August 2nd, 2017 and February 20th,

¹See the report “Mérida: Asalto a los derechos humanos 2017” (in Spanish) at <http://www.uladdhh.org.ve/index.php/informes-2>

²The case is tracked by the ODH–ULA while it is pending in the Superior Contentious–Administrative Tribunal of the State of Mérida.

2018 are pending. At the time of writing this report, no response has been provided for any of these complaints; thus, violating the right to access to prompt justice.

Although they are not judiciary bodies, public utilities—which are providers of public services such as electricity and water necessary to fully enjoy human rights—commit the same dilatory practices. On April 6 and 18, 2018 the ODH–ULA assisted a group of citizens to file complaints with CORPOELEC³ and AGUAMERCA with regard to the dire failures in the supply of electricity and water respectively. At the moment of writing this report, none of these utilities has responded; thus, violating Article 5 of the Organic Law on Administrative Procedures that establishes a lapse of 20 days to provide an answer.

The violations of due process directly affect the access to justice. In November 2017, the fraudulent ANC passed the so-called “Law Against Hate for Peaceful Existence and Tolerance” meant to criminalize the dissidence. Between March 5, 2018 and June 23, 2018, eight (8) people were arbitrarily detained, without a court’s order nor in flagrante delicto.

In the city of Mérida, the students Johan Adolfo Lobo and Michal Labrador were illegally detained after they made statements in the *Televisora Andina de Mérida* (TAM), a local tv station, on March 5, 2018. In their statements, they criticized the regional government for its politics on student transportation system. These detentions were carried out under alleged charges contained in the aforementioned anti-hate law. The students were released with precautionary measures three months after they were detained, on June 11, 2018.

In the state of Trujillo, Hugo Bastidas, a town councilman of the municipality of Rafael Rangel, was detained for crimes mentioned in the same law.

In the state of Táchira, Orlando González and Oscar Alfredo Ríos, lawyers of *Foro Penal*, were detained on May 16, 2018, following a report they made to the press alleging operations of money laundering. They were accused of resisting authority and released on the next day with precautionary measures. In May 21, 2018, Mr. Álvaro Casadiego and Mr. Ángel Caballero Villamizar were detained for being in the vicinity of a protest against the results of the fraudulent presidential election on May 20, 2018, although they did not commit any crime. In June 23, 2018, Ariana Granadillo, a medicine student, was detained and accused of military rebellion. Although she is a civilian, she is a relative of National Guard General Oswaldo García Palomo, who stands accusation of terrorism by the government. It is important to underline that she had been already detained along with her parents a month earlier and they were released on May 31.

4. Judiciary System vs. University of Los Andes: An Emblematic Case of Violation of Due Process

The University of Los Andes, an institution that has remained critical of the national and local governments, has suffered from the lack of judicial independence as it is shown below:

The Superior Court of the State of Mérida for Contentious–Administrative Matters, a tribunal with jurisdiction over the university, has completely acted in a biased manner against the University of Los Andes. Until January 2018, the court was presided by provisional Judge Moralba Herrera, known for her statements and declarations in favor of the government, a

³ National Electric Power Corporation

flagrant violation of Article 256 of the National Constitution, as well as of her duties enshrined by the Organic Law on the Judiciary and the Code of Ethics of Venezuelan Judges.⁴

- In 2016, this tribunal ordered to maintain the validity of a university degree that was annulled by the ULA, although it was obtained through illegal means.⁵
- In 2017, the tribunal ordered to reinstate two postgraduate medicine students of the ULA who failed the course; thus, violating academic freedom and the natural hierarchy of the university.⁶
- In a 2017 ruling, the same tribunal ordered to reinstate three postgraduate programs coordinators on Commercial Law, Agricultural Development, and Political Science at the Faculty of Law and Political Science – ULA. The decision represents a violation of internal rules of the university, which stipulate the procedures for the appointment, permanence, and removal of directors of postgraduate studies.⁷
- In 2017 case, a decision by the same tribunal declared that the dean of the Faculty of Law and Political Science at the University of Los Andes (ULA) committed **“usurpation of authority”**. The tribunal also ordered the faculty to abstain from producing any administrative measure, including making calls for public competitive exams of professors, and managing the budget. The decision infringes the right of students and aspiring professors of this faculty.
- In a 2017 judgment, the tribunal accepted a document that contained claims violating national legislation. In detail, the claim argued that the University of Los Andes must be subordinated to the fraudulent Constituent National Assembly. It also asked for the political disqualifications of the rector of the university, a sanction that no applies to university authorities.⁸
- In a 2017 case, the same tribunal ordered the entry of two professors whose competitive examination jury was impugned. The university council, which is the body concerned, found the claim admissible, but the administrative procedure was never exhausted.
- In January 2018, provisional Judge Rotsen Diego García assumed the presidency of the tribunal. He is also known by his support to the late president Hugo Chávez.⁹ Out of 18 decisions taken by this tribunal regarding the University of Los Andes between 2016 and 2018, 16 were ruled against the university, which violated the internal rules of the university.
- In 2018 case, the tribunal ordered the university to enroll in the School of Medicine – Mérida all those applicants who failed the aptitude test, an admission test required by the university to medical degrees; thus, violating the enrollment policy and regulations of the university.

The current provisional judge of the Superior Court of the State of Mérida for Contentious–Administrative Matters, Rotsen Diego García, has publicly shown a biased stand against traditional autonomous universities. In his view, according to an article published in the

⁴ See the report “Mérida: Asalto a los derechos humanos 2017” (In Spanish)

⁵ See case file LP41-G-2016-0000-37

⁶ See case files LP41-G-2017-0000-68 and LP41-G-2017-0000-25

⁷ See case files LP41-G-2017-000006/000007/000009

⁸ See case files LE41-X-2017-000006 and LP41-O-2018-000002

⁹ See his article at <https://www.aporrea.org/oposicion/a157790.html>

website Aporrea in January 2013, university autonomy is a privilege: “The university **was built** in a place for privileged people to found privileges **upon the basis of** other privileges already established such as the so-called university autonomy.” He continues his article by saying that the *Plan Socialista de la Nación* (Socialist Plan of the Nation) must govern over national universities. He also criticizes those graduates from traditional universities, since, in his opinion, they are completely devoid of class consciousness. In this manner, he shows a political bias, which calls into question his objectivity and independence.¹⁰

5. Recommendations

- The Venezuela State must guarantee to all citizens the access to an impartial, competent, autonomous, and independent justice without distinctions based on politics, economic, religious or any other ground.
- The State must immediately hold public competitive exams so as to access judicial services as established by the Constitution of the Bolivarian Republic of Venezuela, in order for judges and public prosecutors to be given tenure, as a step further to secure impartial, independent justice.
- The State must restrain from the biased implementation of justice based on political grounds.
- The State must restrain from the implementation of justice as a means of criminalizing and penalizing the dissidence.
- The State must sanction judges and other judiciary officials who are engaged in political activism in violation of Article 256 of the National Constitution.

¹⁰ See the entire/whole text at <https://www.aporrea.org/educacion/a157692.html>



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