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Human Rights Watch
Questions and Answers about Venezuela's Court-Packing Law

Venezuela has begun implementing a new law that allows President Chávez's governing coalition to both pack and purge the country's Supreme Court. This memo explains how this Organic Law of the Supreme Court (*Ley Orgánica del Tribunal Supremo de Justicia*) violates basic principles of international human rights law, as well as the Venezuelan Constitution. It also addresses questions and misconceptions that have arisen in response to the report that we recently issued on this subject.

What does international law say about judicial independence?

The existence of an independent judiciary is essential for democracy and the protection of human rights. Venezuela is party to several human rights treaties that require it to safeguard the independence of its judiciary—including the International Covenant on Civil and Political Rights and the American Convention on Human Rights.[i] The United Nations General Assembly endorsed Basic Principles on the Independence of the Judiciary in 1985, which, while non-binding, reflect a high degree of international consensus on how states should guarantee the independence of their judiciaries. These include establishing security of tenure for judges, as well as methods of judicial selection that "safeguard against judicial appointments for improper motives."[ii]

The principle of judicial independence is also a central feature of the Inter-American Democratic Charter, which the foreign ministers of Venezuela, the United States, and thirty-two other members of the Organization of American States adopted in 2001. The Charter defines the "[e]ssential elements of representative democracy" to include "access to and the exercise of power in accordance with the rule of law" and "the separation of powers and independence of the branches of government."[iii]

What does the Venezuelan Constitution say about judicial independence?

The Venezuelan Constitution guarantees the independence of the Judicial Branch and the autonomy of the Supreme Court (article 254). The Constitution specifically seeks to guarantee the independence of Supreme Court justices by granting them a single twelve-

year term (article 264) and establishing an impeachment process (article 265) according to which justices may only be removed for "serious offenses" by a 2/3 majority vote by the National Assembly.[iv]

What is wrong with the court-packing provisions of the new law?

The new law expands the Supreme Court from twenty to thirty-two justices and allows the new justices to be designated with a simple majority vote of the National Assembly. (A nominee who fails to receive a 2/3 majority in the first three votes can be designated by a simple majority on the fourth vote.) The new law thus allows the governing coalition to use its slim majority in the legislature to obtain an overwhelming majority of seats on the Supreme Court.

By allowing a political takeover of the Supreme Court by a majority in the National Assembly, the new law poses a major threat to the principle of judicial independence established in international law instruments and the Venezuelan Constitution—as well as the more specific provision of the Constitution that establishes the autonomy of the Supreme Court.

What is wrong with the court-purging provisions of the new law?

The new law also creates two new mechanisms for removing justices. One entails suspending justices pending an impeachment vote, the other entails nullifying their appointments. Both contravene the general principle of judicial independence established in international law standards and the Venezuelan Constitution—and both blatantly violate the constitutional provision (article 265) that requires a 2/3 majority vote to remove justices from the Supreme Court.

The first mechanism is found in a new provision which establishes that, when the "citizen branch" (consisting of the attorney general, the ombudsman, and the comptroller) determines that a justice has committed a "serious offense," and unanimously recommends the justice's dismissal, then the justice will be automatically suspended pending an impeachment vote by the National Assembly. If the president of the assembly chooses not to bring the issue to a vote, the justice could remain suspended indefinitely.[v]

The National Assembly has also bestowed upon itself the power to nullify justices' appointments by a simple majority vote in one of three circumstances: the justice provided false information at the time of his or her selection to the court; the justice's

"public attitude . . . undermines the majesty or prestige of the Supreme Court" or of any of its members; or the justice "undermines the functioning" of the judiciary.[vi]

This provision is a clear ploy to circumvent the constitutional requirement that justices can be removed with a 2/3 majority vote of the National Assembly. Calling this action the "nullification of appointment" cannot disguise the fact that it entails firing the justice. What makes the provision particularly dangerous is the fact that two of the three criteria for "nullification" are entirely subjective and will, therefore, allow the assembly's majority to target justices identified with the political opposition.

Isn't the selection of new justices through a simple majority of legislators consistent with the Venezuelan Constitution?

It may be (Venezuelan jurists are divided on this issue), but that is besides the point. The problem here is not how individual justices are selected. The problem is, rather, that a slim political majority within the legislature is selecting *twelve* new justices in one fell swoop.

Is the governing coalition merely "un-packing" a court that was packed by previous governments?

No. Only two of the current members of the Supreme Court previously held seats on the Court prior to the presidency of President Chávez. All twenty were selected in 1999 by a National Constituent Assembly that was convoked by President Chávez and that contained a majority of his supporters. They were then confirmed in their positions in 2000 by the National Assembly that also contained a majority of Chávez supporters. The twenty magistrates were selected via a 2/3 supermajority vote in both instances, suggesting that they had broad political support at the time of their selection.

Is this law any different from the laws regulating the Supreme Court in the United States?

Yes. Under U.S. law, justices can be removed from office after being impeached by the House of Representatives and convicted by the Senate via a 2/3 majority vote. The standard for impeachment is very high, requiring a finding that the justices have committed "Treason, Bribery, or other high Crimes and Misdemeanors." In contrast, Venezuela's new law allows the National Assembly to remove justices from the Supreme Court with a simple majority vote if they merely "undermine" the "majesty or prestige of the Supreme Court" or the "functioning" of the judiciary.

Efforts to pack the Supreme Court are not explicitly prohibited under U.S. law. However, as in Venezuela, such a maneuver would seriously undermine the principle of judicial independence. Moreover, it would almost certainly be repudiated by the legal community and the general public. (Imagine, for example, if today President George W. Bush and the Republican majority in Congress attempted to increase the size of the Supreme Court by five new justices.)

The last time such a maneuver was attempted in the United States was in 1937. Frustrated by court rulings that had struck down progressive social legislation, President Franklin D. Roosevelt proposed a bill that would have allowed him to name six new justices to the Court. His effort was widely repudiated, even by his supporters. The Senate Judiciary Committee, controlled by his own party, rejected the bill. Its reasoning at that time is still relevant today:

> We are told that a reactionary oligarchy defies the will of the majority, that this is a bill to "unpack" the Court, and give effect to the desires of the majority; that is to say a bill to increase the number of Justices for the express purpose of neutralizing the views of some of the present members. . . .
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> This is the first time in the history of our country that a proposal to alter the decisions of the Court by enlarging its personnel has been so boldly made. Let us meet it. Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.
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> Even if every charge brought against the so-called "reactionary" members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands.[vii]

Is this court-packing effort in Venezuela any different from what has taken place elsewhere in Latin America?

Other governments in the region have engaged in similar efforts, and the results have been disastrous. During the 1990s, democratically-elected presidents in several Latin American countries pursued policies that undermined the separation of powers and rule of law, and thereby degraded their own democracies. In Argentina, President Carlos Menem pushed a court-backing law through congress in 1990, expanding the Supreme Court from five to nine members, and managed to get the new openings filled by his allies. The move assured him an "automatic majority"—as it came to be known in Argentina—that ruled regularly in his favor, often using highly dubious legal reasoning.

In Peru, President Alberto Fujimori undercut the independence of the country's judges through mass firings and the denial of tenure, as well as the passage of laws that circumvented constitutional provisions aimed at guaranteeing judicial autonomy and restricting executive power. Fujimori justified these policies as efforts to combat corruption and inefficiency. But what he succeeded in doing—to an even greater extent than Menem—was to ensure his own influence over the courts. The resulting climate of lawlessness in both countries facilitated the forms of corruption for which both former presidents face criminal charges today.

Venezuela is currently pursuing both a court-packing scheme, similar to that of Menem, and an assault on judicial independence, similar in spirit (if not in scope) to that of Fujimori. As the experiences of Argentina and Peru demonstrate, these efforts do not bode well for Venezuela's democracy.

Are there are any remedies to the current problem?

Yes. The National Assembly could suspend implementation of the new court-packing law immediately and promote legislation that would modify those provisions that undermine the independence of the judiciary. Human Rights Watch is calling on President Chávez to urge his supporters in the legislature to do so.

The Supreme Court could also strike down, on constitutional grounds, the provisions of the court-packing law that subject the court to the political agenda of the governing coalition.

Why is the Inter-American Democratic Charter relevant to this problem?

The Democratic Charter authorizes the OAS to respond actively to threats to democracy in the region, ranging from coup d'états to government policies that undermine the democratic process.[viii] It identifies judicial independence as an essential component of a democratic system.

Article 18 of the Charter establishes that "[w]hen situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power," the secretary general and the Permanent Council of the OAS may take steps to investigate and respond to the situation, "with prior consent of the government concerned."[ix]

During Venezuela's 2002 coup, the Charter was crucial in mobilizing member states to join the chorus of condemnation that helped restore President Chávez to office. Human Rights Watch believes that the Charter could again provide the basis for the OAS to engage with Venezuela, under the terms outlined in article 18, to address the current threat to the country's democratic order.

Is Venezuela today a democracy?

Yes. However, by undermining the autonomy of the Supreme Court and the independence of the judiciary, the new Supreme Court law represents a serious threat to the country's democracy.

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[i] The American Convention on Human Rights (provides that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, **by a competent, independent, and impartial tribunal**, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of (...) any other nature." (Emphasis added.) The International Covenant on Civil and Political Rights (art. 14, para. 1) also indicates the importance of the independence of the judiciary by establishing that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law**. …" (Emphasis added.)

[ii] Basic Principles on the Independence of the Judiciary, endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[iii] Art. 3, Inter-American Democratic Charter.

[iv] Article 265 states: "Supreme Court Justices will be subject to removal by the National Assembly by a super-majority of two-thirds of its members, after a hearing is granted the affected party, in cases of serious offenses found by the Citizen Branch, in accordance with the law."

[v] The law establishes that, after the "citizen branch" recommends a justice's dismissal, the president of the National Assembly must call for a hearing and an impeachment vote within ten days. However, such deadlines are habitually disregarded by the assembly, and there is no effective mechanism for enforcing them.

[vi] Art. 23, Number 4, Ley Orgánica del Tribunal Supremo de Justicia.

[vii] U.S. Congress. Senate. Committee on the Judiciary, "Reorganization of the Federal Judiciary," May 18, 1937.

[viii] Preamble, Inter-American Democratic Charter. The Charter recognizes that "one of the purposes of the OAS is to promote and consolidate representative democracy," and reasserts the proposition (originally articulated in the Declaration of Managua for the Promotion of Democracy and Development) that the organization's mission:

> is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government.

[ix] Art. 18, Inter-American Democratic Charter. "When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the secretary general or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The secretary general will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening."

The Inter-American Charter also authorizes the OAS to act without obtaining prior consent of the member state "[i]n the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order" of that state (art. 20). Under such circumstances the secretary general or any other member state "may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate."