Regime Transition and the Judicialization of Politics in Latin America

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Abstract:

At what point can we discern when a regime has transitioned from one that suffers from predictable pathologies of hyper-presidentialism, to one that is increasingly authoritarian? Democratic politics and regime crisis have often been analyzed through lenses of populism (which employ anti-liberal forms of governance) and presidentialism (which create institutional pathologies from within). Nevertheless, both have undermined the role of the court in shaping regime transition. The judicial decisions explored in this paper will reveal that the high court is the final indicator of a regime shift from hyper-presidentialism to a more authoritarian system. To substantiate this claim, this paper will apply a historical institutional approach and will examine rulings of the court in the Bolivarian Republic of Venezuela under the different mandates of Presidents Chávez (1999-2013) and Maduro (2013-present). These will reveal how the court has used its power to limit crucial spaces of political contestation in the legislative and electoral arenas. Overall the change over time of the court will reveal the impact that judicialization and judicial empowerment have on regime change.
REGIME TRANSITION AND THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA

A THESIS

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Master of Arts in Law and Governance

By
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1. Introduction

1.1. Popular and Presidential Politics in Latin America

After the election of Hugo Chávez's in 1998, a participatory but illiberal form of democracy burgeoned in Venezuela, and later in most of South America. And yet, with the emergence of this style of governance came an erosion of the institutions that often acted as the intermediaries between the electorate and the state. From legislation promising the potential financial support to manage their own local governments, to the authority to rewrite and replace their constitutions, citizenries were empowered in Venezuela. What surfaced was an almost unmediated relationship between the populace and President Chávez.

Nevertheless, the regime still attacked for crucial institutions tailored to ensure a balance and separation of power. As such, scholars of democratic politics have been disturbed by the undeniable erosion of liberalism and weakening of institutions that resulted from this populist form of governance (Conaghan 2016; Corrales 2015; Corrales and Penfold 2011; De la Torre 2010 and 2015; Sabatini 2014; Weyland 2013; Zakaria 1997). Although particularly inclusive to those historically alienated from politics, the trend of populism and participatory democracy complicated the assessment of Venezuela.

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1 In the liberal tradition citizenship is different. Peled (1992, 433) describes the liberal citizen in the liberal tradition as the “passive bearer of a status (a mere bundle of rights).” Participatory politics however require the citizen to be active. Spanakos (2008 and 2016) suggest this form of citizenship in Venezuela has an extended degree of “decisionary power” to engage in politics (in local politics through Communal Councils). This is also evidenced for instance through the rewriting of a constitution via constituent assemblies.
(and others) as democratic or authoritarian systems. O'Donnell (1994) classified such style of governance as a “delegative democracy.” Meanwhile, Levitsky and Way (2002 and 2010) described them as “competitive authoritarian systems.” The latter further emphasized these governments’ attack on civil and political liberties (See Corrales 2015). Nevertheless, scholars of presidentialism considered them all to be hyper-presidential systems (Desierto, Rose-Ackerman, and Volosin 2011). For comparativists certain perils or pathologies are inherent in governments irrespective of their participatory or liberal nature (see Linz and Valenzuela 1994; Mainwaring and Shugart 1997; Stepan and Skach 1994). Through a strictly institutional approach, they explain why democratic breakdown occurs. Emphasis on these institutional variables has been helpful, particularly in countries enduring crisis and no longer under the leadership of popular presidents. This is particularly important because, although populist leaders may be less present, hyper-presidentialism is not. However, in order to understand why this is so, it is first important to explain what is meant by the term “hyper-presidential.”

Hyper-Presidentialism

Hyper-presidential systems grant heightened powers to the executive and produce conflict from within. Desierto, Rose-Ackerman and Volosin (2011, 247) have posited that the essence of Presidentialism is the separation of powers, but the overlapping notion of checks and balances is equally important. However, in a hyper-presidential system, presidents who are challenged use the rhetoric of separation of powers to defend their actions, and argue against the imposition of
checks and balances by the other branches and institutions.

When resorting to these means, presidents hope to “entrench their position of political dominance” and to “expand their scope for policy making” (Desierto, Rose-Ackerman and Volosin 2011, 247). Although institutional rules such as constitutions set out rules and constraints, these still “invite the search for loopholes” (Desierto, Rose-Ackerman and Volosin 2011, 329). This has not been a critique made of the Bolivarian Republic of Venezuela, but of most presidential systems that also followed this style of governance in Latin America. These include Ecuador, Argentina, Bolivia, Nicaragua, and Honduras.² As such, it is crucial to inquire on how we can discern when a regime has transitioned from one that suffers from predictable pathologies of presidentialism, to one that is outright authoritarian?

In the case of Venezuela, critics emphasized that the control of the National Assembly (given the congressional delegation of power to the President via enabling laws) and the Judiciary (given the state’s *de jure* attack over its independence) evidenced a diminished amount of democracy (See Brewer-Carias 2014). With such a concentration and centralization of power, critics called the regime out for being undemocratic. They suggested there were shrinking spaces for contestation (Corrales 2015; Levitsky and Way 2010). And yet, on December 6, 2015, the opposite was true. For the first time in 16 years, the Democratic Unity Table (the coalitional opposition) won a supermajority in the legislative elections (Pons 2016). Herein lies the watershed moment for the Bolivarian

² This paper will examine Venezuela (See discussion below on case selection).
Republic of Venezuela when it comes to regime classification.

1.2 The Watershed Moment: Attenuating Uncertainty and Securing Regime Longevity

With a super-majority, the National Assembly held the power to drastically change the political order. They sought to reform laws that limited judicial independence and also kept in line with campaign promises to issue a Recall Referendum that (if supported by the populace) would remove sitting President Maduro from office. Seemingly, the centralization of power that had prevailed since 1999 would cease to continue in December of 2015. But the answer was not so simple.

Upon losing supremacy over a crucial branch of government, the outgoing National Assembly under the mandate of President Maduro appointed thirteen new magistrates (justices) to the Supreme Tribunal of Justice for a term lasting from 2015-2027.3 Ironically, these ex ante appointments of new justices would inevitably ensure that the new and sole mechanism of institutional support for the regime was to be a deliberately anti-democratic institution, the court. This was particularly troubling, because the judiciary would inevitably be utilized to trump the en masse demand for political change.

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3The Supreme Tribunal of Justice is equivalent to the Supreme Court. Nevertheless, as per the 1999 Constitution it has six different chambers (the constitutional, administrative, social, electoral, civil, and criminal).
1.3 Argument

This paper will argue that the court is the final indicator of a regime shift. That is, a transition from a hyper-presidential system towards a competitive authoritarian regime and finally, a more consolidated authoritarian regime. It will do so by examining how the court has shaped the arenas of contestation which Levitsky and Way (2002) emphasize are crucial to differentiate between competitive authoritarian systems and full-blown authoritarian systems. These are the electoral, legislative, and judicial arenas of the state. In order to substantiate this claim, this paper will examine the mandates of President Chávez (1999-2013) and President Maduro (2013-present) in the Bolivarian Republic of Venezuela.

Although the discussion of presidentialism has been helpful in emphasizing the institutional tensions between executive-legislative relations that may bring about democratic breakdown, it has overlooked the role the court play in shaping regime shifts. But even so, the question that follows is why study the judiciary in systems where it is well understood that the court is merely a tool for the regime? Both Gandhi and Przeworski (2007, 1292) have acknowledged that “students of authoritarianism often claim [that institutions] are but “window-dressing.” Nevertheless, they also ask “but why would some autocrats care to dress their windows?”

For scholars of democratic theory, “democracy institutionalizes uncertainty as elected leaders do not know ex ante the outcome of a dispute whereas dictators do” (Przeworski 1991; Schor 2009). This is similar to what occurred on December 6, 2015.
Nevertheless, the *ex ante* appointment of new and loyal justices reveals insights that scholars of judicial politics have previously emphasized. Uncertainty can be attenuated with courts in authoritarian regimes (Ginsburg and Moustafa 2008). This has become important as regimes, often with democratic qualities (namely, electoral) as in Venezuela, have emerged while simultaneously eroding institutions critical for horizontal accountability. For example, Urribarri-Sanchez (2011) writes that instead of reducing constitutional powers, the regime manages the court through appointments and purges to control it. Levitsky and Way (2010) have called these competitive authoritarian regimes, a subtype of hybrid regimes. Although in such regimes there is an attack on institutions, leaders do not enjoy the advantage of certainty that autocrats do. Instead, it is a regime in which incumbents are “forced to sweat” (Levitsky and Way 2002). Nevertheless, the following developments will reveal how courts have limited this democratic quality of “uncertainty” in particular arenas of contestation. This examination will show how the regime has utilized the rational-legal appeal of judicial review to secure legitimacy and attenuate electoral uncertainty (See Moustafa 2014). In so doing, this paper will also tackle the assumption that courts in regimes with hyper-presidential traditions are “weak.”

By dismissing the court as a “kangaroo court,” scholars have missed out on questions of the “political.” In other words, on how the judiciary can interact with other branches, what newer forms of inter-branch conflict emerge, and what this has meant for
governability. The assumption of the court as a powerless or even mere mechanism of procedure (i.e. legal institution) has previously deterred scholars of democratic politics from examining the court as a potential policymaker shaping governance (see Dahl 1957; Rosenberg 2001; Burton 2007; Sunstein 1996). In fact, the power of the court has already been seen in military bureaucratic systems and dictatorships. Although it could be argued that the court is merely a proxy for the executive, the lesson is that modern authoritarianism must rely on new structure (in this case the judiciary) to secure their tenures and regime longevity (Svolik 2012; Przeworski and Gandhi 2007), to assert legitimacy through a rhetorical promotion of rule of law (Rajah 2012), and to shape policy making with the court as an instrument of governance (see Moustafa 2007 and 2014). As such, a “new institutionalism” is underway (Schedler 2009).

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4 In 1957, Dahl wrote a seminal essay on the Supreme Court of the United States as a “national policymaker” examining this institution as both a legal and political one. Other prominent U.S. legal scholars such as Gerard Rosenberg laud Dahl for defying Legal Realism and instead analyzing the court with a social science perspective. Dahl (1957) concluded that the court is a ‘political’ institution because the nature of appointments and judicial decision-making are political. Years later, legal scholars would acknowledge that law was not merely a process but an opportunity for judges to be subjective Steven Burton (2007) characterized this as the judge’s power to make a “judgment of importance” when deciding on which facts and which exceptions matter most in a case. This judgment is something that even law cannot pre-determine.

5 See for instance Magaloni (2008) and Hilbink (2008). The former discusses how the Mexican regime resorted to granting its courts more jurisdiction - albeit limited - in order to ensure political order once it saw it was steadily losing its political clout as a one-party system. The latter discusses the overthrow of the democratically elected government in Chile during the military coup in 1973. The author emphasizes the independence of the Chilean courts under the regime and inquires on why the judiciary did not challenge the regime in spite of remaining independent and being the only branch left untouched by the military during and after the coup d’etat.

6 Moustafa (2007) makes this clear with his examination of the judiciary in Egypt. He claims that the authoritarian regime of Mubarak gave the court limited spheres of
1.4 On Regime Legitimacy and New Institutionalism

Perlmutter (1981) argues that modern authoritarianism has relies on multiple structures (the party, the state, or parallel/auxiliary structures) and elite support to continue onward. He recounts how the Bolshevik’s principal political instrument in the USSR was the party, the Nazi model in Germany relied on the police and propaganda, and the Corporate-Praetorian authoritarian systems in Latin America relied on state bureaucracy and the military (Perlmutter 1981, 9). Similarly, Schedler (2009, 324) contends that “studies of authoritarianism have shifted their focus to those institutions of representation and power divisions that we tend to associate with liberal-democratic regimes.” This includes legislatures and constitutional courts, and multiparty systems. New Institutionalism is different from the Old Institutionalism that Perlmutter (1981) studies in which violence, coercion, and repression were usually the strategy of those who governed. This paper builds on these contributions and agrees that as the political climate changes, political leaders will shift their strategies in order to secure their power (Perlmutter 1981), and increase the likeliness of regime longevity (Svolik 2012; Przeworski and Gandhi 2015). This is necessary as Perlmutter (1981, 10) notes, “it is imperative that a student of comparative politics identify the types of political support and the methods of securing [such] support and legitimacy in different systems.” Hence, independence in order to give investors confidence that rule of law operated well in Egypt.

7 The subsequent section will explain in further detail on the use of courts in nondemocratic regimes.
this argument is built on the assumption that “institutions matter” (Schedler 2009).

However, this paper posits that this new structure which regimes will rely on are courts. The lens of “judicialization” can help scholars identify this change in strategy (Vallinder 1995). As such, it will indicate when a regime shift has occurred. Scholars have taken for granted how the court (although also one of the arenas of contestation) can be empowered enough to colonize or further wipe out other arenas of contestation that it exists alongside with. These are the legislative and electoral arenas. This can be evidenced through judicialization as a lens. Consequently, this lens will reveal how the court has changed the multiple arenas of contestation which Levitsky and Way (2002 and 2010) suggest are indicators of authoritarianism. These arenas are important since they also shape economic governance, political change, and policy making.

Methodology: Case Selection and Approach to Understand Regime Transition

1.5 Case Selection and Structure

The approach applied to this paper will require a conceptual, legal and historical-institutionalist analysis of empirical cases. The empirical cases illustrative of judicialization and regime politics will be evident through the analysis of Venezuela’s judiciary, primarily its Supreme Tribunal of Justice. The use of a concept (Such as judicialization of politics) as lens can allow for a clearer understanding of political phenomena (see Panizza and Spanakos 2015).

The examination of important rulings during the presidential mandates of
President Chávez's and President Maduro in Venezuela will evidence the court’s transformation to one of “judicial omission” (Brewer-Carias 2014) strategy to a heightened amount of judicialization to consolidate power. Scholars of hyper-presidentialism highlight that as presidents start to lose policy making power (such as the one incumbent had prior to the parliamentary elections) they have incentives to issue declarations of states of exception and to then utilize other organs to sanction these declarations (Disierto, Rose-Ackerman, and Volosin 2011, 329). In effect, the case of judicialization the Bolivarian Republic of Venezuela will reveal both the regime’s change in legitimation strategy and its deepened authoritarian qualities. Therefore, Venezuela can be extremely useful to scholars as both an extreme and a pathway case. The discussion below will address pathway cases (Hartlyn 1998).

1.6 Extreme Cases

As per Seawright and Gerring (2008, 301), an extreme case is when “an extreme value is understood here as an observation that lies far away from the mean of a given distribution; that is to say, it is unusual” and “it is the rareness of the value that makes a case valuable.” Amongst all of the regimes (Bolivia, Brazil, Venezuela, Nicaragua, and Ecuador) considered to be hyper-presidentialist in Latin America, Venezuela's extreme reliance of judicialization is both new and extreme. To better understand the qualities and potential impact of certain political phenomena other scholars have relied on extreme cases. For instance, Spanakos (2008, 543) explores extreme case of populism and presidentialism in Venezuela in order to explain what “populism is and is not.” As such,
selecting cases of an extreme nature can enable us to identify things we might not otherwise discern in other hyper-presidential regimes in which scholars often disagree on whether to describe as “delegative democracies” or as “competitive authoritarian regimes” (O’Donnell 1994; Levitsky and Way 2002; Corrales and Penfold 2011). In the case of Venezuela, what we see is the a “division of sovereignty” with the court through its “empowerment.” The extreme case of Venezuela will reveal how President Maduro has managed to survive the worst economic crises in the history of Venezuela, his significant loss in the 2015 National Assembly elections, and the call for his removal through a Recall Referendum.

The following sections will review the literature on presidentialism and how it relates to regime classification (whether it is a delegative democracy or a competitive authoritarian regime). It will also review the emerging role of judicial politics. The latter has challenged and contributed to scholarly debate on regime crisis and transition. Next, this paper will discuss theories that directly link the emergence of judicialization to presidential system (Ferejohn 2002). It is only during times of political fragmentation of power that judicialization and judicial empowerment emerges. The fragmentation of power theory accounts for the interests of presidents to politicize the court and to delegate power to the institution. In so doing, this theory also explains why courts are unable to gain independence in spite of seeing their power hike.

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8 See Solomon (2008) for an account of how judicial empowerment (jurisdiction) is granted to courts in Russia to secure political order and legitimacy in certain arenas. Solomon (2008) author contends that there are moments where sovereignty is divided between the executive and the judiciary.
1.7 Pathway Cases

Since institutional crises are not new, certainly not in Venezuela (or in Latin America), scholars such as Hartlyn (1998) underscore the importance of studying the arrangement of power in order to explain transitions and regime types. He submits that it is important to do so using the approach of "historical-institutionalism." This framework places an emphasis on the study of the independent impact of institutions. These include both formal and informal processes. This approach emphasizes that transitions occur following a path-dependency.

Nevertheless, as Hartlyn (1998) acknowledges, this method of change is not always able to pre-determine future outcomes, namely because it can be interrupted by what Collier and Collier (1991) have described as critical junctures or what Krasner (1988) described as punctuated equilibrium. To make a trenchant argument about the role of formal rules in regime types Hartlyn (1998, 9) develops "middle-level arguments about transitions." He insists that changes in regime cannot be explained without attention to the long-term effects of past events. At the same time, key turning point or critical junctures are moments that provide potential opportunities to break with past patterns and establish new ones as well as moments that continue or establish new structural constraints.

Therefore, this approach sees political change as a process that can be triggered by
moments of crisis, but which must also acknowledges that such a change is largely fomented by prior institutional design. In order to discern regime shifts, this paper explores the organization of power of formal (the court) and informal (politicization and judicialization) institutions and processes in Venezuela.

1.8 Counterfactual?

A potential counterfactual that may arise as a result of the posed argument and approach is whether the regime would have shifted anyway under the mandate of a more popular Hugo Chávez's. In 2012, Hugo Chávez's (a year before his death) held a 57% approval rating. This is notable given that he governed since 1999 (Gallup 2013). Meanwhile, current president Nicolas Maduro suffers from a 22% approval rating (Pons 2016). Nevertheless, it is also important to note that under President Chávez's’s mandate, the price of commodities (a main source of revenue for the regime) saw a boom from 2003-2013 (Corrales 2016). However, after the boom came to an end, subsequent leader President Maduro faced economic constraints very different from his predecessors. This is perhaps not a comparison between mandates as it is an explanation for the way institutions can be gradually subverted in order to secure regime longevity. The historical-institutional approach will reveal that the regime would have shifted anyway. This is because hyper-presidentialism inherently incites political conflict and the de jure and de facto control of the court was well underway prior to Maduro (Taylor 2014).
Chapter 2: Literature Review: Understanding Regime Crisis, Democratic Breakdown, and the Emergence of Judicial Power

Institutions: Presidentialism and the Global Expansion of Judicial Power in Democracies

2.1 Presidentialism and Democratic Breakdown

In his seminal essay “Presidential or Parliamentary Democracy: Does it Make a Difference?” Juan Linz argued that presidential systems organized power in a way that enabled pathologies which enabled regime crisis. These pathologies emanated from two basic components of the presidential system, its “rigidity” and its conflict of “dual legitimacy” (Linz 1994, 6). The following paragraphs will discuss the following elements that foment regime crisis.

First, the “rigidity” of the system, Linz argued, surfaced given that “both the president and congress are elected for a fixed term, the president's tenure in office is independent of the legislature, and the survival of the legislature is independent of the president.” (Linz 1994, 6). In hyper-presidential systems presidents are encouraged to engage in unilateral decisionmaking (Rose-Ackerman, Desierto, and Volosin 2011, 249). This is troubling when there is a decline in popularity. Linz (1994, 10) writes, “the president who loses confidence and control cannot be replaced with someone who is more able to compromise with the opposition.” Therefore, this rigidity enables winner-takes all tendencies, gridlock, polarization, and a diminished amount of executive
accountability.

Second, since the citizenry elects both the president and the legislature; Linz held that it was also impossible to discern who had the more legitimate say in the event of inevitable conflict. The problem of dual legitimacy not only made the regime more "conflict prone" (Valenzuela 2004, 17), but it made resolution of such conflict difficult. In a third somewhat interrelated point, comparativists also note that presidential systems enable the election of outsiders. Outsiders come to power when the party-systems are weak and they launch campaigns based on hostility to parties and politicians. Hence, they perpetuate polarization from within (Linz 1994, 26). In effect, rules and institutional design often shape conditions for political conflict.

Although Linz’s co-edited collection with Arturo Valenzuela intended to “understand the relationship between regime type and democratic stability in varying political contexts” (Linz and Valenzuela 1994, xi), it largely centered its argument on the conflicts between the executive and legislative branches. In spite of being useful analysis, it downplayed the court’s role as an institution that could influence the democratic stability of a regime. In fact, Linz referred to it as an “undemocratic” institution that occasionally moderates this executive-legislative inter-branch conflict (Linz 1990, 65). Even Mainwaring and Shugart (1997, 283), write that the “judiciary is generally inferior in terms of power to executive and legislative branches.” These consider the court a moderator at best, but never as a potential sovereign having the final word in every political conflict.
2.2 Describing Democracy: Delegative Democracy and Horizontal Accountability

Other scholars trying to make sense hyper-presidential regimes submit that the regime is still democratic. However, it lacks of horizontal accountability. This makes it a “delegative democracy” (O’Donnell 1994). Horizontal accountability is the check from other branches of government on each other. Therefore, horizontal accountability acts as a check on the executive that keeps a democracy from becoming “delegative,” where the ruler governs as “he or she sees fit” (O’Donnell 1994, 59).

The value in this form of accountability matters since it allows for a “republican dimension of democracy [which creates] a careful distinction between the spheres of public and private interests of office holders” (O’Donnell 1994, 61). This enables a universal implementation of rule of law. The value of such an application is that no one is above the law, not even presidents. In spite of the diminished amount of horizontal accountability in such regimes, scholars still suggest that this adjective is more helpful in describing them. Although the president has significant clout, spaces of contestation are not eliminated completely.
2.3: Describing Diminished Authoritarianism: Competitive Authoritarianism

2.3.1: Standard Criteria for Democracy

The classification of the regime must change when political contestation erodes significantly and the lack of formal horizontal accountability heightens substantially. Levitsky and Way (2002; 2010) have set forth a concept in order to classify regimes that limit not just checks but which also constrain contestation within the political arena, these are “Competitive Authoritarian” regimes. For Levitsky and Way (2002, 53) competitive authoritarian regimes violate certain criteria of modern democracies. These criteria are related to the arenas of political contestation. They require the following:

1) Executives and legislatures are chosen through elections that are open, free, and fair; 2) virtually all adults possess the right to vote; 3) political rights and civil liberties, including freedom of the press, freedom of association, and freedom to criticize the government without reprisal, are broadly protected; and 4) elected authorities possess real authority to govern, in that they are not subject to the tutelary control of military or clerical leaders.

Although these scholars acknowledge that even modern democracies violate these criteria from time to time, democracies are distinguishable from competitive authoritarian regimes because “such violations are not broad or systematic enough to seriously impede democratic challenges to incumbent governments.”

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9 In other words, “they do not fundamentally alter the playing field between government and opposition” (Levitsky and Way 2002, 53).
2.3.2: Arenas of political contestation

This form of control over contestation is evidenced in the electoral, legislative, judicial, and media arenas (Levitsky and Way 2002). In these arenas, the authors distinguish between consolidated authoritarian regimes and competitive authoritarian regimes. The former they suggest, is a place in which elections, legislatures, judiciaries, and the media are co-opted, subdued, or simply do not exist (Levitsky and Way 2002, 55). In competitive authoritarian regimes, however there is a degree of opportunity for actors in the opposition (be they politicians, judges, journalists, or institutions) to contest and challenge the regime. The authors cite Peru, Ukraine, Russia, Slovakia to evidence how governments have utilized these arenas to limit contestation. In spite of this, the authors take for granted the way the court, can indicate a regime change when empowered (through judicialization) to wipe out contestation in the other arenas (legislative, electoral, and media).

Conceptual Lens for Regime Classification

2.4 Judicialization

The lack of dialogue between the scholarship on presidentialism and judicialization is unfortunate since most institutionalists studying presidentialism in the late 20th century were writing in response to previous “breakdown of democratic regimes” (Linz and Stepan 1978) and the post-authoritarian transition that followed (Valenzuela 1990; Shugart and Carey 1992; Stepan and Skach 1994; Linz and Valenzuela 1994, Mainwaring and Shugart 1997).
Similarly, in 1994, the same year of Linz's seminal publication, comparativist Torbjörn Vallinder was working on an entire issue on the "judicialization of politics" in the *International Political Science Review*. In it, he noted the "worldwide emergence" of judicial power (Vallinder 1994).

Vallinder (1994, 13) argued that, "judicialization essentially involved turning something into a form of judicial process." As such, he conceptualized judicialization as the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decisionmaking rights from the legislature, the cabinet, or the civil service to the courts, or, at least, the spread of judicial decision-making methods outside the judicial province proper (Vallinder 1995,13).10

By 1995, Torbjörn Vallinder along with Neal C. Tate co-edited and published the essays of the issue in a book they titled, *The Global Expansion of Judicial Power*. Both works argued that judicial power surfaced for various reasons. The following section will explain these reasons and will also use Vallinder 's conceptualization of judicialization.

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10 It is important to note however that in his subsequent co-edited book he used "judicialization of politics" and "judicial power" synonymously (Vallinder 1994; Vallinder and Tate 1995). This paper will distinguish judicialization from judicial power. The former is the process while the latter is related to power to engage in such a process and the legitimacy that stems from it.
2.5 Varieties of Judicialization

The first reason judicialization emerges is for a rights-based purpose. This was because there was a concern with the inability of courts to stop crimes against humanity by the Nazi government. Muller (1991) explores why justices in the Third Reich sanctioned Hitler's infamous Fire Decree. Muller (1991, 39) writes, “although their actions in the twelve years of the Third Reich may have been frequently prompted by opportunism, ambition cannot have been a motive. Their [judicial] career had been made before.” As such scholars like Vallinder (1995) saw this rights-based approach as a justification for judicialization. He notes that the other opposite of judicialization was “total majoritarianism” (Vallinder 1994, 98). This was troubling given the genocide occurring in World War II. Shapiro (1994) follows this notion and suggests that judicialization surfaces to assuage a pathology present in the democracy. For Shapiro (1994) judicialization is useful to democracy when such a pathology (sometimes inherent in a presidential system) is not self-correcting. As such, judicialization protects pluralism, and enhance rights. Shapiro (1994, 104) even cites Dworkin (1977), and notes that a “judge is portrayed not as exercising policy discretion but simply as enforcing pre existing legal rights.”

Separate from political reasons, judicialization surfaced as a result of newer contributions in legal theory. Legal scholars such as Ronald Dworkin (1977) and John Rawls promoted theories in defense of liberalism and equality. Lastly, there was the rise

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\(^{11}\) See Browning (1992)
of international institutions and law. This includes the European Court. Similar patterns are visible in Latin America with the rise of the Inter-American System of Human Rights. Both of these organs contained a Commission and a Court which hear cases on behalf of people wronged by the state.

Therefore, judicialization can occur “from above” “from below” and even “from abroad” (Sieder, Schjolden, Angell 2005, 5; Perez Perdomo 2005). Each of these at some point has emerged in Venezuela. Be they by intervention of courts from multilateral sanctions, or domestic courts. Judicialization emerged with the presumption that it would protect human rights. For instance, in the case of judicialization from “abroad,” a good example would be the Inter-American Court of Human Rights (IAC hereafter). The IAC has been responsible for issuing precautionary measures in the event of human rights violations. Nevertheless, as Sabatini (2014) argues, this form of check on member states has been compromised by the rise of newer institutions (UNASUR and CELAC). These new institutions are unwilling to hold states accountable for violations of human rights (such as the imprisonment of Leopoldo López a prominent opposition leader in Venezuela). Consequently, a “meaningless multilateralism” has emerged (Sabatini 2014).

In spite of the utility of these ideas, even judicial scholars were not conversing with the literature on presidentialism. In fact, the International Political Science Association issue published by Vallinder in 1994 did not even have one case examining courts in Latin America. And yet, it claimed a “worldwide emergence” of judicial power (Vallinder 1994).
Conversation between the literature on presidentialism and judicialization could have enabled scholars to integrate insights on institutional qualities that influence democratic stability, while also exposing faulty assumptions implicit in the literature regarding the political role of courts in regime change. For instance, the literature on judicialization has presumed such a process is usually rights-enhancing. However, the polarization evident in presidential systems shows how courts often operate without judicial independence. As such, this weakens the democratic potentiality of judicialization.

**Presidentialism and Judicialization: Theory Fragmentation of Power**

2.6 Judicialization and Politicization

One of the few scholars to develop hypotheses linking presidentialism to judicialization is Ferejohn (2002). He suggests that judicialization surfaces for two reasons. The first is the ever-present rights-based approach. Nevertheless, Ferejohn (2002) submits a second hypothesis, and points to the “fragmentation of power.” This is often the case in presidential systems which endura gridlock and polarization because of the way power is organized in the presidential system (Linz and Valenzuela 1994). This hypothesis holds that in such instances “courts have more freedom of action when the political branches are too fragmented to make decisions effectively” (Ferejohn 2002, 59).

Similarly Chávez's, Ferejohn, and Weingast (2011) write about an interbranch theory. This theory suggests that judicial independence could be established in a post-electoral
scenario when the majorities split and a space for judicial decision-making emerges. The problem with this is that along with judicialization comes a “politicization of the court.” Contrasting politicization to judicialization, Ferejohn (2002, 63-64) writes,

> When courts can make politically consequential and more-or-less final decisions, anyone with an interest in those decisions has reason to try to frame those interests in the form of persuasive legal arguments. And those interested in judicial decisions have reason to seek to influence and, if possible, to control appointments to the courts and other legal institutions.

Once politicization has occurred in a place where independence was already missing it is very difficult to expect impartial decisions. In fact, politicization often deepens the de facto (informal) limits of judicial independence. As per Urribarri-Sanchez (2010) a degree of loyalty links are strengthened from within. This makes it highly unlikely that the court could rule against the regime. Politicization deepens these loyalty links and prevents defection (Urribarri-Sanchez 2010). This is perhaps a point in which judicialization may be less helpful to the liberal principles of democracy. In spite of being empowered then (given jurisdiction or space to make an issue a judicial process), the court is seldom there to constrain actors who politicize it. Instead, they give an illusion of constraint.  

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12 Vallinder (1994, 98) ends his often cited paper by discussing the of “prospects” of judicialization noting that they “differ from country to country, depending on the constitutional traditions and the political situation...in the end a new equilibrium will perhaps be established in many countries between the rights of citizens and the rights and obligations of the (legislative) majority.” He reveals that this process must find a balance within the legal culture, constitutional politics, and organization of power within the
2.7 Empowering the Judiciary: Courts as Mechanisms of Governance, and Tools for Regime Durability

Borrowing insights from Gandhi and Przeworski (2007), "autocrats face two types of threats to their rule: those that emerge from within the ruling elite and those that come from outsiders within society" (2007, 1280). In effect, rulers in control sometimes empower and co-opt democratic institutions to prolong their rule and ensure their survival. Their aim is to keep an eye on the potential defector from within. This is also the case with the court in Venezuela. In response, these scholars examine the longevity of authoritarian rulers in power during the 1946-1996. This study is helpful since it explains why even in autocratic settings (not merely hybrid), democratic institutions are empowered even in the face of intense revolt and opposition.

Svolik (2012) also supports this theory on institutional empowerment. However, Svolik (2012, 124) suggests that a dictator's mandate lasts longer when he or she engages in "power-sharing" with democratic institutions (parties or legislatures). He writes that this may occasionally breed a hazard for the leader because the same resources that enable the regime's helpers can empower them to act against the regime itself (Svolik 2012, 124). Nevertheless, this is prevented because the regime grants these indispensable actors an "institutional autonomy" that "fulfills their interest" (Svolik 2012, 127). Similarly, in this case courts may be empowered institutions. However, what are the state. That is, if it is to be an agent for freedom. In effect for these scholars the court's engagement in judicialization is legitimated by its ability to resolve a conflict, but also to ensure the public interest through the protection of individual rights.
limits of such institutional empowerment?

Examining the judiciary in Egypt, Moustafa (2007) contends that with incentives to increase investor confidence, the authoritarian regime under Mubarak empowered the court. But this empowerment has its limits because it operated under a sort of "insulated liberalism." It was only able to render independent decisions in cases regarding property. As a result, Moustafa (2014, 283) suggests that the court is an "instrument for governance" for the regime and that authoritarian regimes usually "deploy" law and resort to courts to

(a) exercise state power vis-à-vis opposition, (b) advance administrative discipline within state institutions, (c) maintain cohesion among various factions within the ruling coalition, (d) facilitate market transitions, (e) contain majoritarian institutions through authoritarian enclaves, (f) delegate controversial reforms, and (g) bolster regime legitimacy.

Moustafa (2014, 287) contends that authoritarian legitimacy in post-populist regimes often "fill [in] the ideological vacuum." As a result, regimes resort to a "rule-of-law rhetoric to build a new legitimizing ideology and to distance themselves from the spectacular excesses and failures of their predecessors." Thus, transitioning from a more charismatic source of legitimacy to one that is rational-legal.

In particular, Moustafa (2007) makes note of Nasser of Egypt who obtained legitimacy by his revolutionary principles and redistributive policies just like the leftist leaders in Latin America have (See Ecuador's Rafael Correa promote a Citizen's
Revolutions and Venezuela’s Hugo Chávez a Bolivarian Revolution). However, the legitimacy of his successor was established through *siyadat al-qanun* (the rule of law) discourse. Similarly Moustafa (2014) points to the shift from Mao Zedong’s blatant disregard for the judiciary in the founding of the People’s Republic of China and the current regimes now use of rule-of-law-rhetoric (See Peerenboom 2002; Lubman 1999). Rajah (2012)’s examination of the legal regime in Singapore reveals a similar insight. Singaporean rulers establish order and use the promotion of law to secure interests without resorting to brute force (Rajah 2012, xiv; see Moustafa 2014).

Of course, this seemingly fair application of the rule (given its universality) has already been pre-designed to cap the ability of the court to rule against the regime. This style prevents defection and ensures longevity and legitimacy. The forthcoming case of the Venezuelan judiciary will reveal how the regime has utilized the court’s legitimacy to take and consolidate a heightened amount of power which Levitsky and Way (2010) would agree limits contestation.
Chapter 3: Empirical Cases on Presidentialism and the Judiciary in Venezuela

Presidentialism in Venezuela: A Delegative Democracy or Competitive Authoritarian Regime?

Given the structure of presidential democracy, Linz (1994) foresaw certain “perils” to democracy, amongst these was the institutional opening for the rise of populist leaders (Linz 1994, 26). This peril within the presidential system is especially important in Latin America. Latin America has experienced classical and radical populism in the twentieth and twenty-first centuries (De la Torre 2010). Populism has been understood to be one of the most prominent “mobilizing forces” in Latin America (Spanakos 2015).

Newly elected leaders of the left have been characterized as radical for their denouncement of neoliberalism (See Silva 2009; Panizza 2009 and 2015) and for their governing style. This has been characterized as “the pink tide. (ie. Hugo Chávez’s in 1999 for Venezuela, Néstor Kirchner in 2003 for Argentina, Cristina Fernández de Kirchner in 2007 for Argentina; Evo Morales in 2006 for Bolivia; Rafael Correa in 2007 for Ecuador, Manuel Zelaya in 2006 for Honduras; Daniel Ortega in 2007 for Nicaragua). The latter has enabled an unmediated relationship between the president and populace. This has been evident in leaders’ use of referendums to approve and Constituent Assemblies to rewrite and replace constitutions previously perceived as non-inclusive (Colon-Ríos 2011).
3.1: A Delegative Democracy?

3.1.1: *The Outsider, The Outsider*

Venezuela was one of the few countries to remain democratic during the era of bureaucratic-authoritarianism in South America in the late 20th century (Perez-Perdomo 2005). However, the consolidation of such a democracy was questionable since political power was centralized. After the establishment of democracy in 1958, a two-party system governed Venezuela for more than 40 years.\(^{13}\) Here, the judiciary was elite controlled (Perez-Perdomo 2005; Urribarri-Sánchez 2011). It was only after the coup in 1992, (led by then Colonel Hugo Chávez's) that the regime decided to reform the clientelistic court and appoint less compromised judges (Perez-Perdomo 2005). However, this reform led to highly inefficient court which was unable to manage large caseloads. Still, the court gradually became more involved in political matters such as in the impeachment of President Carlos Andres Perez in 1993 (Perez-Perdomo 2005).

Given the inefficiency of courts, the attempted coup, and the inevitable fall of the two-party control of Venezuela, new political spaces opened. By 1998, Colonel Hugo Chávez's ran for office as an outsider. He campaigned in line with anti-status quo appeal that the citizenry was in demand of and was elected with 56% of the vote (Consejo Nacional Electoral n.d.). This reflects one of the most relevant pathologies that Linz

\(^{13}\) The two parties were Acción Democrática (AD) and Partido Social Cristiano (COPEI). The pact was signed between elite parties in order to avoid future political conflict. In order to preserve democracy, the parties worked in unison and acknowledged electoral results (Smilde and Hellinger 2011).
identifies in presidential governments: the rise of outsider. Linz defines political outsiders as “candidates not identified with or supported by any political party, sometimes without any governmental or even political experience” (Linz 1994, 26). Some attribute Chávez’s’s electoral success to his position as an outsider.

However, the political momentum facilitated by the edge as an outsider is not always enough to ensure the longevity of candidates like President Chávez's. As Linz (1994, 26), mentions, “such leaders have no support in the congress and no permanent institutionalized continuity.” It is here when the leader strengthens his outsider advantage with populist means such as the changing of a political order (De la Torre 2010). This is done through constituent assemblies and new constitutions.

These institutional changes came about in 1998, immediately after Chávez's was elected. He quickly called for a constituent assembly to rewrite a new constitution. However, this call put the legislative branch and the executive branch at odds with each other because the president had no constitutional authority to make such a demand. This then evidenced the second pathology Linz identified in presidential systems: the dual legitimacy problem. The following discussion will reveal the role the court played in such a political conflict.
3.1.2: The Dual Legitimacy Crisis and the Court: The Convening of a Constituent Assembly in 1999 and Opinion 17

Immediately after being elected, President Hugo Chávez's issued a decree to convene a Constituent Assembly. The Constituent Assembly would rewrite and replace the Constitution of 1961. However, there was one problem. The "constitutionally appointed agent" to call for a Constituent Assembly was not the President (See Brewer-Carias 2014; Colon-Rios 2011; Spanakos 2015). As per Article 245 of the Constitution of 1961, the legislature had this authority. As a result, the constitutionality of the referendum was taken to Supreme Court of Justice (Ibáñez 2014).

The court held that the call for the Constituent Assembly by the president was constitutional because it did so in the name of popular sovereignty. They held that "constituent power" is "previous and superior to an established juridical order" (Supreme Court of Justice of Venezuela 1999, Opinion No. 17, 9-10). For Spanakos (2015, 117) the court's ruling established that the "invocation of the will of the sovereign people empowered the president to take on procedures constitutionally reserved for the Congress." This also "[allowed] for [a] constitutional ruling which was [also] contra to the constitutional Article 250 whose subheading proclaimed 'the inviolability of the Constitution.'" Hence, the court became an instrument of interpretation, which formalized "constituent power" as a force that is "supra-constitutional" (Ibáñez 2014, para. 7). Therefore, it placed the referendum set forth by the President Chávez's and the popular will above the established legal order (Spanakos 2015, 117).
Due to the enhancement of constituent power under President Chávez's, some scholars have noted that the Bolivarian Republic of Venezuela has expanded citizenship even if it has also eroded horizontal accountability (Spanakos 2008; Angosto-Ferrandez 2015). Ciccariello-Maher (2013) has argued that "constituent power" preceded and enabled the Bolivarian Revolution. Others have outright contended that "the people" are "the State" in Venezuela (Valencia 2015). Such arguments were particularly supported in 1999 with the aforementioned call for a Constituent Assembly.

Despite this extreme case in which constituent power was granted legitimacy (and in which the dual legitimacy crisis was resolved in favor the president), both the president and the populace still relied on this third party (i.e., the court) as an interpreter to enable their will to rewrite the constitution (Spanakos 2015). This shows that although "the people" may hold the power, they do not always hold the political authority. This discussion of Venezuela at an "extreme moment," is helpful in that it shows the relationship between presidentialism, constituent power, and the judiciary. Even during this extreme moment where constituent power and presidentialism triumphed with the Constituent Assembly, the Supreme Court was still a necessary institution in politics. It was institution, which through procedure and interpretation, stamped the sovereignty and will of the people (and the populist) with a formal seal of approval. Thus, research on judicial empowerment is crucial.
Ultimately, although populism and presidentialism have enabled the state to respond to the citizenry’s demands for inclusion and political change (such as it did through a Constituent Assembly), it has been criticized for its subsequent volatility in policymaking and its brushing aside of institutions (Conaghan 1994; Conaghan and De La Torre 2008; De La Torre 2010). The government however, has warranted most of its actions through its participatory model of democracy (See Hellinger 2011; Hellinger and Smilde 2011). This has led critics to contend instead that Venezuela initially could be what O’Donnell (1994, 59) classified as a “delegative democracy.” Therefore, the constituency delegates power to allow the ruler to govern as “he sees fit” (i.e. to unilaterally issue a decree to convene a constituent assembly). Here, a direct form of vertical accountability (constituent power) is deepened while the horizontal accountability is compromised. The section below will describe how the Chávez’s Regime made use of the court during the rest of his mandate, and how this triggered some experts to instead classify it as a “competitive authoritarian” system (Levitsky and Way 2002).

**A Competitive Authoritarian Regime?**

Levitsky and Way (2002) suggest that leaders in competitive authoritarian diminish checks and balances and limit the contestation of political power. Arenas have limited spaces for contestation, but still allow for an opposition to win. Corrales (2016, para. 4) notes, “Venezuela under Chávez’s never became a new Cuba – as in, a full dictatorship – because it always preserved one minimal standard of democratic life not present on the
island: elections.” These elections were spaces in which the opposition could campaign and win. The two-thirds majority success of the the Movement for Democratic Unity of December 2015 make this evident. The following section will discuss how the electoral and legislative arenas under President Chávez were attacked but not entirely shut down.

3.2: Liberalism in Decline: The attack on judicial independence

3.2.1: The 2002 Coup Decision

In 2002, however after a coup that temporarily deposed President Hugo Chávez's from office, the Supreme Tribunal of Justice ruled in favor of the accused high brass military officers that temporarily displaced President Chávez's during the coup. On August 14, 2002, the court absolved the military officers of any guilt and held that the temporary deposition of President Chávez's constituted a “power vacuum” as opposed to a “coup” (Tribunal Supremo de Justicia 2002). The court was defiant and showed signs of autonomy from the executive. This outcome evidences that the court was assertiveness and independent. In light of these decisions, it was clear that the Constitution of 1999 still enabled the court to render autonomous opinions. This made President Chávez's’s lack of control over it obvious (Perez-Perdomo 2005).

3.2.2: Ley Orgánica del Tribunal Supremo de Justicia (LOTSJ)

However in 2004, in light of this lack of control, the Chavista-controlled National Assembly passed the Ley Orgánica del Tribunal Supremo de Justicia (LOTSJ) in 2004. This newly established de jure roadblock allowed the government to pack the court with
supporters, and purge it of its opponents (Human Rights Watch 2008.) After the passing of the LOTSJ, judicial independence diminished significantly (Perez-Perdomo 2005; Human Rights Watch 2008; Urribarri-Sanchez 2011; Taylor 2014). According to Article 3 and 4 of the LOSTJ "magistrates can be ousted by a simple majority when the "administrative act of their appointment" is revoked" (See Brewer-Carias 2014, 291). The constitution on the other hand suggests that a “supermajority can remove judges, following a prior qualification by the Citizens Power.” (Bolivarian Republic of Venezuela 1999, Article 265; Brewer-Carias 2014, 291). This crippled horizontal accountability in Venezuela. As Urribarri-Sanchez (2011) tells, the degree of dissents within the court's constitutional chamber declined after the passage of the LOTSJ.

Urribarri-Sanchez (2011, 874) suggests that after the LOSTJ, there was not just a decline in dissents, but a “breakage between pro government and pro-opposition factions in the Court.” In addition, there was also a “a visible decay in the judiciary’s willingness to support petitioners in constitutional review cases, precisely after the institutional structure and the composition of the Constitutional Chamber.” Hence, the court decided to avoid ruling against the government. Although this non-action strengthened the position of the government, it was not necessarily an active tool by which the government could assert legal legitimacy of its policies with. Thus, it is evident that a form of legal strategy to limit contestation emerged under President Chávez's.

In the 2015 edition of “Authoritarian Resurgence,” published by the Journal of Democracy, Javier Corrales writes that under President Chávez's there was an
implementation of “autocratic legalism.”\textsuperscript{14} Although Venezuelan expert Corrales (2015, 44) criticizes the Chávez’s regime for establishing such autocratic legalism, he says that Maduro “inherited Chávez's’s semi-authoritarian legacy.” Here, Corrales (2015) characterizes the Chávez's regime as “semi-authoritarian” in spite of acknowledging President Chávez's was the creator of “autocratic legalism.” In other words, although autocratic legalism “account[s] for the mechanics of Venezuela’s shift toward greater authoritarianism,” the shift into a greater authoritarianism in Venezuela under Maduro are a “combination of path dependence and declining electoral competitiveness” (Corrales 2015, 45). In short, the legalism that was employed was not sufficient to characterize the regime as a fully consolidated system. After all, elections were held and the institutional space for contestation was not yet obliterated.

3.3: Electoral Arena: Recall Referendum in 2002 and Inter-Chamber debates

In terms of cases on elections during the Mandate for Chávez's, the Supreme Tribunal of Justice often found itself debating back and forth. When a Recall Referendum against President Chávez's was called, the court again revealed its (albeit limited) independence. Before discussing the court’s role, I will discuss the role of a Recall Referendum. A Recall Referendums is the constitutional “escape valve for democracy” to remove unpopular or ineffective presidents from office in Venezuela (Polga-Hecimovich 2016).\textsuperscript{15} They require a collection of signatures from the populace.

\textsuperscript{14} Autocratic legalism is the strategic use, abuse, and nonuse of the law to reward loyalists, punish opponents, and to concentrate power (Corrales 2015).
\textsuperscript{15} Seemingly, this is the solution to the presidential peril of term rigidity that Linz (1994)
Once these signatures are obtained, and the National Electoral Council (CNE onward) must validate them in order to sanction the referendum. If and when these signatures are validated, the populace votes in favor or against the leader’s mandate.

In 2004, the Venezuelan opposition mounted a Recall Referendum against President Chávez’s. Once signatures were gathered, however, the CNE invalidated the signatures to invoke a Recall Referendum by August of 2004. As such, NGOs took the case to the Supreme Tribunal of Justice. The case was heard in the Electoral Chamber. The Electoral Chamber deemed the signatures valid once again. However, soon enough, the Constitutional Chamber overturned the Electoral Chamber’s ruling. The last say was to be held by the Constitutional Chamber. (Human Rights Watch 2008; Brewer-Carias 2004). In response, the opposition found itself obliged to once again go out into the streets and collect signatures. The did so successfully and the referendum was held. Once again, Hugo Chávez’s garnered popular support and defeated the Recall Referendum in which 58% of the citizenry decided against removing him from office.

The role of the TSJ in this critical moment of electoral contestation is notable because it revealed not just the opposition’s perception of the judiciary, but that of civil society’s (this was because NGO’s filed the suit, not political leaders). Constituent power was once again in action. Next, the inter-chamber tensions revealed that by 2004 (five years after entering office) President Chávez’s had not yet instituted loyalists that would blindly rule in favor of him. This was after the passing of the LOSTJ, thereby denounces in presidential systems.
showing that its implementation had not yet intimidated judges in every chamber into acquiescing to the government's interests (Brewer-Carias 2004). The outcome of the call for a Recall Referendum is different today (see discussion below).

3.4 Legislative Arena: Judicial Omission, the Communal State, and the National Assembly

After defeating his opposition in 2004, President Chávez and the National Assembly passed a series of laws to institutionalize a shift towards a deepened participatory democracy. This shift was clear in laws such as the Law of Communal Councils in 2006. This law granted local citizenry the power to go beyond deliberation and partake in decision-making on local matters in their communities. As such, they develop what Spanakos (2016) calls "decisionary power." Of course, the creation of this law brings about a multitude of "constitutional questions of supremacy" (Spanakos 2016, 6).

For legal scholar Brewer-Carias (2004 and 2014) the creation of these councils is an example of the dismantling of representative democracy. As a result, Brewer-Carias (2014) argues that the passing of many of these participatory policies gives rise to what he calls a "communal state" as opposed to a "constitutional state." He emphasizes that these decrees were often challenged on their constitutionality, but that almost all of them

\[16\] In these Communal Councils, "spokespersons (voceros) [are elected and they] form committees on a diverse range of subjects" (Spanakos 2016, 6).
were ignored by the court. He cites a myriad of additional decrees on food sovereignty, popular economy, amongst other to assert that a “deconstitutionalization of the constitutional state” ensued in Venezuela (Brewer-Carias 2014, 772).

Nevertheless, although the passage of these policies were passed via decree, Brewer-Carias notes that the courts consistently and deliberately avoiding ruling on them, thereby allowing for a form of “judicial omission” to ensue (in spite of the many requests issued). Once again, the petition of the opposition to challenge the constitutionality of these decrees reveals the perception of the opposition of the court. It was an institution where contestation could perhaps still exist. However, most of all, the decision the regime to not seek legal legitimacy of its decrees (which eroded representative democracy) is telling of the leader’s confidence in his legitimacy strategy. Given the support he enjoyed from the populace he found these decrees to be legitimate enough to curb judicial sanction.

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17 Decree Law, n 6,130, June 3, 2008: “enacted the Popular Economy Promotion and Development Law, establishing a “socio-productive communal model” with different socio-productive organizations following the “socialist model” (See Gaceta Oficial N. 5890, Extra, July 31, 2008 in Brewer Carias 2014, 769)

Decree Law, N 6,092 “enacted] the Access to Goods and Services Persons Defence Law which derogated the previous consumer and users protection law” (Brewer Carias 2014, 769 citing Gaceta Oficial N 5.889 Extra of July 31, 2008)

Decree Law n 6.239 reformed the Organic Law of the National Bolivarian Armed Forces (See Brewer-Carias 2014, 772 in Gaceta Oficial N 5.933, Extra, Oct 21, 2009)

18 Venezuelan legal scholar Brewer Carias (2014, 772) writes, “Almost all these laws and decree laws have been challenged on the grounds of unconstitutionality before the Constitutional Chamber of the Supreme Tribunal which has never decided on the matter. [The court’s] Omission has been without a doubt the main source of decosnstitutionalization of the Constitutional State.” These were rejected by the populace in the 2007 referendum but modified and passed by decree regardless.”
Therefore, judicial activation was not sought after by the President (to legitimize his unilateral decision-making) but by opposition. As such, the strategy for legitimation of policies that diminished horizontal forms of accountability were different under President Chávez's, who did not utilize judicialization to support his decrees. Eventually, many of these popular policies were passed by the National Assembly. This revealed President Chávez's's use of democratic institutions to permanently install popular laws.

3.5 Different Strategies

Under President Chávez's "autocratic" and "discriminatory legalism" was well underway (Corrales 2015; Weyland 2009). As Corrales (2015) writes, a number of attacks were issued on the opposition and institutions that were supposed to keep a check on the executive. However, before the LOTSJ was passed and then fully enforced (1999-2004), the court had an opportunity to rule against and contest some of the regime's actions (Human Rights Watch 2008; Helmke and Rios-Figueroa 2011; Taylor 2014) as it did in its ruling on the 2002 ruling of the coup and during the Recall Referendum of 2004 (Brewer-Carias 2004). Nevertheless, once the LOTSJ was fully implemented, President Chávez was in control of the court both in the de jure and defacto contexts. And yet, he seldom utilized the judiciary to legitimate his controversial decrees. Nevertheless, the subsequent empirical cases of Venezuela under Maduro will

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19 Laws on the Popular Power; the Communes; the Communal Economic System; the Public and Communal Planning; and the Social Comptrollership...in the same framework of organizing the Communal State based on the Popular power the Organic Laws of Municipal Public Power, of the Public Policy Planning and Coordination of State Councils pf of the Local Council Public Planning Laws were reformed" ((Brewer Carias 2014, 773)
show how the judicialization of politics became more prevalent under P namely because conditions to his power tenure were threatened.

As the hyper-presidential regime has endured a drop in commodity prices, a main source to finance most of its socialist policies (including funding for Communal Councils), it has lost a significant amount of electoral support. In the face of such a loss in the “electoral stream” (term utilized by Angosto-Ferrandez 2015), the regime must find a way to secure its durability. It has done so through an institution that enjoys normative support, but which is essentially supra-electoral and unaccountable to the populace, the court. The regime has shifted its source of legitimacy from constituent power and popular sovereignty which it once promoted under President Chávez (Supreme Court of Justice of Venezuela 1999, Opinion No. 17, 9-10), to one of legality and procedure. In so doing, it has contradicted itself, and implemented a counter-majoritarian judicialization of politics.
Chapter 4: Heightened Judicialization and Regime Transition

4. Limiting Spaces of Contestation: The Electoral Arena

4.1.1: Decision 260: Suspending Amazonas

On December 6, 2015, the opposition to the incumbent government won the legislative elections by a supermajority. This was an electoral defeat that had not been seen in sixteen years (Pons 2016). Nevertheless, by December 23, 2015, thirteen new justices were appointed to the TSJ in multiple chambers (Cruz 2015). Therefore, both the outvoted National Assembly and President Maduro anticipated the strategic role of court for the preservation of the regime. By December 30, 2015, the newly appointed justices in the electoral chamber of the TSJ suspended three of the newly elected legislators (deputies) from the Southern State of Amazonas. In so doing, they put in abeyance the super-majority that had been obtained during the legislative elections on December 6, 2015. The TSJ issued a precautionary measure barring the leaders for reasons of election fraud. However, the justices did not present any evidence nor did they state when the deputies could be reinstituted (Tribunal Supremo de Justicia 2016, Opinión 260).

In response, the newly elected deputies of the opposition launched a report to “Rescue the Institutionality” of the judiciary (Comisión Especial 2016). On March 1, 2016, the TSJ ruled that the National Assembly’s Commission was not legitimate because it breached the separation of power. They stated that Article 245 of the Constitution of 1999 establishes that both a 2/3 majority of the National Assembly must
request it, as well as the Attorney general, the National Ombudsman, and the Comptroller (TSJ Decision 9). Given that outvoted legislators instituted the new court in advance, this ruling is the result of a “ politicization” of the court.

In regard to Decision 260, which dealt with the barring the three deputies, what we see is a judicialization of politics from “above,” which is one of the varieties of judicialization as per Sieder, Schjolden, Angell (2005, 5) and Perez Perdomo (2005). This is because it is “driven by elite actors or typically constitutional court judges who challenge the conditionality of certain laws or governmental practices, or by politicians who may resort to judicial review to try to block or change certain policies” (Sieder, Schjolden, Angell 2005). Decision 260 of the TSJ is important for two reasons. The first is that it bars elected leaders from utilizing their legislative power, granted to them via the constitution. It also bars the additional power that comes when they are a super-majority. Amongst these powers is the authority to remove judges as stated by Article 265 of the 1999 Constitution.

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20 The original text reads: “Que la Asamblea Nacional no está legitimada para revisar, anular, revocar o de cualquier forma dejar sin efecto el proceso interinstitucional de designación de los magistrados y magistradas del Tribunal Supremo de Justicia, principales y suplentes, en el que también participan el Poder Ciudadano y el Poder Judicial (este último a través del comité de postulaciones judiciales que debe designar –art. 270 Constitucional-), pues además de no estar previsto en la Constitución y atentar contra el equilibrio entre Poderes, ello sería tanto como remover a los magistrados y magistradas sin tener la mayoría calificada de las dos terceras partes de sus integrantes, sin audiencia concedida al interesado o interesada, y en casos de -supuestas- faltas –graves- no calificadas por el Poder Ciudadano, al margen de la ley y de la Constitución (ver art. 265 Constitucional).” (Tribunal Supremo de Justicia, Decisión 9)
Separate from limiting legislative power, this ruling also disenfranchises the voters of Amazonas. When indefinitely barring the leaders, the court does away with the representation of the state of Amazonas in the National Assembly. This effectively disables the deputies from meeting one of the crucial criteria that Levitsky and Way (2002) suggest is necessary in a democracy. This criteria holds that elected authorities must possess real authority to carry out their mandate and to govern. The taking of this power is not only indefinite but the court also made it systematic. The following case will make this evident.

4.1.2: Decision 108: Nullifying Legislative Power

Given the refusal of the court to make a final decision on the precautionary measure, the opposition swore in the Amazonas Deputies during late July of 2016. They defied the judicial ruling. The institutional battle did not end there. On August 1 (Tribunal Supremo de Justicia 2016, Decision 108) and 11th (Tribunal Supremo de Justicia 2016, Decision 126), the court reiterated that their initial ruling barring the deputies was still in full effect (Tribunal Supremo de Justicia 2016, Decision 260). As such, any procedures by the National Assembly would be suspended until the barred deputies were removed. Revealing a Marbury v. Madison tone the court asserted its “constitutional supremacy” (Tribunal Supremo de Justicia 2016, Decision 108, para. 47), and its right to review the case and defend the constitution by nullifying the acts of congress aggressively (Tribunal Supremo de Justicia 2016, Decision 108, para. 49). The
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judiciary condemned the swearing in of the deputies and stated,

Unquestionable is the in flagrante delicto and contumacy with which the majority of the National Assembly deputies have acted when challenging the authority of the Supreme Court of the Republic; standing thus completely outside the current constitutional order, in pursuit of a state of anarchy” (Tribunal Supremo de Justicia 2016, Decision 108, para. 11)

The court's claim that the National Assembly’s noncompliance is in “pursuit of a state of anarchy” was indicative of the positioning of the court as above the voice of the constituents that elected the leaders into office. In response, to the swearing in of the deputies, the court also reiterated its intention to nullify any acts that the opposition sets forth with the votes of the Amazonas deputies. In Decision 808 the court deemed a law unconstitutional without even reviewing its content on the grounds that it was passed by a National Assembly acting in contempt of its previous decisions (Decision 260). As such, the court was effectively usurping all authority from the elected legislative branch when nullifying all of its acts. The heightened judicial power stemming from this adjudication is made evident not just by courts power to be the final arbiter at the request of President Maduro, but also by the position taken by the opposition to acquiesce and comply.

Recently, and in light of the refusal of the court to take any of the legislative acts of the National Assembly into account, the Amazonas deputies requested to be de-instituted, thereby complying with the court’s ruling. In spite of its position against the ruling, the opposition has acknowledged the court’s power, though not necessarily its
legitimacy by referring to it in an open letter to multiple international leaders (OAS Secretary General Luis Almagro, UNASUR Secretary General Ernesto Samper and acting UN Secretary General Ban-Ki-Moon). In the letter, they characterized the recent developments as a judicial coup (Unidad Venezuela 2015). Although some scholars contend that the court lacks power and can never be the “aggressor” (Helmke 2014) during inter-branch conflict, the asymmetrical power between both branches during this time of crisis in Venezuela suggests otherwise.

4.1.3: Indefinite Suspension of Elections: The Recall Referendum and Gubernatorial Elections

Part of the reason as to why the regime had interests in ensuring its support from the judiciary came from the fact that opposition members had campaigned on the grounds of bringing about another Recall Referendum (as it did in 2004 against President Chávez) to depose President Maduro. While Deputies in the National Assembly were being barred, the opposition sought signatures from the citizenry to initiate the call for a referendum. However, by October of 2016, judges of criminal tribunals (without jurisdiction over elections) issued precautionary measures once again claiming a fraud for the collection of signatures on Recall Referendum (Haro 2016).

Consequently, the CNE extended the effect of these measures nationally and indefinitely suspended not just the Recall (a constitutional right). The CNE said that it was complying “with the measures ordered by the courts and [that it] has issued instructions to postpone the collection process until further judicial instruction” (Consejo
Nacional Electoral 2016). In addition to suspending the Recall, the CNE also canceled the gubernatorial elections that were issued for December of 2016 (Haro 2016). Hence, it is evident that the electoral arena has not been deterred by the President, but rather by the decisions initiated by the judiciary (in this case the criminal tribunals) and then implemented and enforced by the CNE.

As such we see first instance how the court has activated its own power to limit contestation in the electoral arena and to become the final arbiter. This is usually something scholars suggest does not occur given that the petitioner or respondent must petition a wrong and thereby show standing in order for judicial activation (Helmke 2014). However, the case in question reveals the opposite in which - without jurisdiction - the judiciary issued decisions and enjoyed the compliance of an electoral organ in order suspend elections indefinitely. This defies the inherent pro-tempore nature of democracy (Linz 1994).

4.2 Spaces of Contestation: The Legislative Arena

4.2.1: Decision 4 & 113: On the State of Exception and Economic Emergency

On January 14, 2016, President Nicolas Maduro issued a State of Economic Emergency through Decree 2.184. The court sanctioned its constitutionality on January 20th (Tribunal Supremo de Justicia 2016, Decision 4). In response, the deputies of the National Assembly moved to block the decree, but the TSJ reestablished its constitutionality on February 11 (Tribunal Supremo de Justicia 2016, Decision 7). The ruling noted that the deputies had missed the forty-eight hour deadline to challenge the
decree. The court justified its opinion using the *Organic Law on States of Exception* (Article 27). The ruling of the court was notable in that it emphasized procedure (the enforcement of a deadline in order to prevent the National Assembly from contesting the decree). By May of 2016, the *Estado de Excepción y de la Emergencia Económica* (or Decree 2.323) was issued again and on July 12 via Decree 2.371 was extended for another 60 days. The latest decree on July was found constitutional on July 19 (*Tribunal Supremo de Justicia* 2016, Decision 615)

In short, the decrees allowed the President Maduro to control the economic crisis, an original purview of the legislative branch. Irrespective of this, the decree ultimately allowed Maduro to decide on issues of the budget, currency, and the private sector. The court sanctioned its decree when it accepted constitutionality of the decree the first time it was issued and every time it was extended. The latest extension was of Decree 2.742. It was later deemed constitutional on March 20, 2017 (TSJ 2017, Decision 113). On July 11 2016, President Maduro also decreed into Action “*Gran Misión Abastecimiento*” (via Decree 2.367) and then (Decree 2.667). The latter held that all of his ministers are subordinate to the Minister of Defense Padrino Lopez (Decree 2.667) to administrate national food allocation (given that the country has been suffering from food shortage). Therefore, the legislative power that had been judicialized (1999 Constitution, Article 187, section 6), and then extended to the president, had now been delegated to military high brass officers. Corrales and Franz Von Bergen (2016) have argued therefore that the

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21 Stating that the National Assembly has the authority to “discuss and approve the national budget and any bill relating to taxation and public credit.”
state has undergone a *coup nouvelle*.\(^{22}\) Although this point of view is largely debatable, it sheds light on the extent to which judicialization is an indicator of regime shift. The court has judicialized critical powers of the newly elected branch that briefly enjoyed a two-thirds majority, and then sanctioned the delegation of this usurped power to the military.

Such an outcome was mostly possible given the reasoning the court relied on with the *Organic Law on States of Exception*. The law, pre-establishes along that in a time of crisis, the executive can issue a State of Exception. However, it seems that the final decision is in the hands of the Supreme Tribunal of Justice (TSJ) (See Organic Law on States of Exception, Article 31). The court however has ignored Articles 27 and 33. These articles hold that the National Assembly has the power to review the decree and request changes. However, in this case the approval of the National Assembly was not considered. Although the National Assembly has contested these decrees and disapproved of them, the TSJ has fought back saying its acts are still nullified for disobeying the judicial power (TSJ 2017, Decision 113). In this same opinion, the Supreme Tribunal of Justice recognized that it has issued seven legal opinions reiterating that the legislative power has been “vitiated” (TSJ 2017, Decision 113). In this latest decision, the TSJ characterized all the acts of the National Assembly (which disapproved

\(^{22}\) The authors write, “maybe the military has now decided to tell Maduro to relinquish his autonomy and governing authority to the military. If so, we might have just witnessed a new type of coup in Latin America, one in which the president is not displaced, but effectively handcuffed. We could call it a cohabitational palace coup.” (Corrales and Von Bergen 2016).
of the decree during their ordinary sessions) as “null, non existent, and ineffective”
(*nullo, inexistente e ineficaz*). In this same decision, the constitutional chamber also
reiterates that its rulings have a “binding nature and *erga omnes* effect on all public
powers” (TSJ 2017, Decision 113, V. Para. 6).

4.2.2: Decisions 808 and 810: Usurping Budgetary Authority

On October 11, 2016, the TSJ then followed up on the ruling which approved the
constitutionality of the decree on States of Exception and Economic Emergency (Decree
No 2.452; and allowed President Maduro to handle the budget for the Fiscal Year of
2017 (TSJ 2016, Decision 810). As such, the court has allowed the president to present a
budget that will have to be passed via a decree instead of the legislative process. The
court’s reasoning relied on its previous ruling (TSJ 2016, Decision 808), which held that
all the laws of the National Assembly were null and void (since they instituted three
deputies, that were previously barred by the court). In its ruling, the TSJ emphasized that
so long as the National Assembly is,

in contempt of court, [and] its acts will remain null and void. It additionally
followed this narrative and rhetoric of abiding by constitutional doctrine norms on
separation of power. Noting that the approval of the president’s request (TSJ
2016, Decision 808).

In particular the court made clear the taking of power when it mentioned “the National
Assembly may not alter at any time budget items or pretend to obstruct or affect the
integrity of the provisions laid down in the relevant decree of the national budget” (TSJ
Therefore, this evidences a taking of constitutional authority of the legislative branch on budgetary powers (1999 Constitution, Article 187, section 6). The president must therefore draft the budget decree within five days and the TSJ will overlook it. The court justified this decision making by citing Article 336 sections 3 and 4 of the 1999 Constitution. Ironically, the court's reasoning was aligned with the liberal constitutional doctrine on separation of powers. The decision states,

to the pressing necessity to complete a stage in the legal drafting of the national budget, with a duty to honour separation and balance of the powers comprising the Public Power, and in order to preserve the State's operations, the guarantee of fundamental rights and the constitutional order. (TSJ 2016, Decision 814).

The court's ruling reveals the heightened power it enjoys. In spite of the decision

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23 The original text reads: “La Asamblea Nacional no podrá alterar en ningún momento las partidas presupuestarias ni pretender obstruir ni incidir en la integridad de las disposiciones establecidas en el correspondiente decreto de presupuesto nacional.” (TSJ 2016, Constitutional Chamber Decision 814, October 11)

24 Stating that the National Assembly has the authority to “discuss and approve the national budget and any bill relating to taxation and public credit.”

25 The powers of the Constitutional Chamber of the Supreme Court: (3): To declare the total or partial annulment of acts with force of law issued by the National Executive that conflict with this Constitution.(4): To declare the total or partial annulment of acts of direct and immediate implementation of the Constitution, dictated by any other government organ exercising Public Power when collide with it.

26 The original text reads: “Frente a la imperiosa necesidad de cumplir una fase del proceso de formación jurídica del presupuesto nacional, ante el deber de honrar los postulados de separación y equilibrio entre los poderes que conforman el Poder Público y con el propósito de mantener el funcionamiento del Estado, la garantía de los derechos fundamentales y el orden constitucional, el Tribunal Supremo de Justicia (TSJ) declaró que el presupuesto nacional deberá ser presentado por el Presidente de la República ante la Sala Constitucional, bajo la forma normativa de Decreto que tendrá Rango y Fuerza de Ley” (TSJ 2016, Decisión 814, October 11)
capacity to override legislative powers, and concentrate some for its own, the regime relied and requested a ruling in order to validate its usurpation of the powers of the legislative branch. The regime, as Venezuela scholar Urribarri-Sanchez (2011) suggests, manages the court. It manages it in order to soften the unfettered tone of executive overreach, namely because it is done through legal opinion claiming a defense for separation of power. The court is an instrument for governance that Moustafa (2014) suggests, allows the president to continue to shape economic policy through unilateral decision-making.

4.3: Judicialization as a Check on Power?

In the aggregate, these cases counter Shapiro (1994)'s point regarding what makes judicialization useful to democracy. According to Shapiro (1994, 11) one of the strongest arguments in favor of judicialization is based in its capability to ensure “redundancy.” He writes that it is not really true that governing power can be divided between three great branches, one of which legislates and legislates only, one of which administers and administers only, and one of which judges and judges only. Segments of government can only check and balance one another if they share the same powers, not if they wield different ones (Shapiro 1994, 111)

For Shapiro (1994, 111) judicialization is therefore an opportunity for a policy to more stable because “three heads are better than two. High levels of redundancy are a standard and sensible design response for systems that must handle high-risk, [and]
high-uncertainty.” The cases in point are what many can agree involve high stakes. As such, a check on the executive allows for other branches to practice a similar role of the branch they are checking.

Since the inception of the political and economic crisis in Venezuela, TSJ was the final arbiter on all matters. As such, there was a “division of sovereignty” since the executive delegated to the court the power to be the final decision-maker (See Solomon 2008). This may give the impression of constraint on the executive on the surface. However, as this paper has argued, this strategy has merely enabled the president to secure his power. The decisions of the court in the cases of economic emergency allowed the president to exercise what Mainwaring and Shugart (1997) call a “proactive power,” that is, the use of decrees to change the status quo (Mainwaring and Shugart 1997). In this case, the status quo was his loss of control over the National Assembly after the 2015 legislative elections.
Chapter 5: Conclusion

5. Limiting Spaces of Contention
5.1 Reflections on Regime Change in Venezuela

When discussing the perils of presidential systems, scholar Juan Linz asked “who on the basis of democratic principles is better legitimated to speak in the name of the people: the president, or the congressional majority that opposes policies?” (Linz 1994, 7). In light of the inability of “democratic principle” to resolve this question, Linz suggested that the incumbent president uses his political clout to mobilize the constituency to make an argument for his “true democratic legitimacy” over the legislature (Linz 1990, 63). Nevertheless, the dual legitimacy conflict that Linz (1990; 1994) says can cause regime crisis or breakdown becomes more pronounced and difficult to resolve when it arises under the mandate of a highly unpopular president, a hyper polarized society, and a divided government. Such is the case in contemporary Venezuela, a nation governed by Nicolas Maduro, a leader with an approval rating of twenty-two percent, a lost majority in the National Assembly, and an attempted call for his removal through a Recall Referendum (Pons 2016).

From 1999-2012, Hugo Chávez’s Bolivarian Revolution won fifteen elections (Burbach, Fox and Fuentes 2013). Some of these were local, gubernatorial, presidential, or on matters of constitutional amendment and replacement. One of the most notable instances of political change through elections came after his election when President Chávez made a call for a Constituent Assembly to change the old 1961 Constitution.
Through his substantial popular support, he was able to justify his administration's brushing aside of institutions. As Corrales and Penfold (2011, 18) note, the court was reluctant to counter an action (the call for a Constituent Assembly) of the President which enjoyed an 87% approval from the populace. Of course, this was not the case every time. In many times, President Chávez saw his popularity wane, and also saw his tenure threatened. In both 2002 and 2004 there were attempts to remove him. Yet, each time this occurred, he resorted to a populist methods and his populist appeal to once again secure his tenure (see his use of referendums in 1999 and 2009 to make constitutional the end of term limits). Separate from relying on constituent support, he often enjoyed a majority in the National Assembly and the power to issue decrees (after the passing of enabling laws). During the Chávez era, there was a fairly inactive court, often inactive and engaging in a deliberate form of judicial omission (Brewer-Carias 2014).

Under the President Maduro, the strategy has shifted. Not only does he utilize the autocratic legalism established by Chávez, but he also compounds this advantage with what Corrales (2016) has labeled, a “judicial shield.” Most of the decisions after the 2015 legislative elections involve a deep judicialization of politics, whereby democratic processes reserved for the National Assembly are judicialized. As the regime has entered a time of severe instability, the role and powers of the branches of governments has shifted, and paying closer attention to the judiciary as a force that empowers the regime instead of the democratically elected branches is important. The lens of judicialization has enabled us to discern this. The judicialization of politics has become a crucial tool for
the regime. It has allowed it to diminish competition within the state. This was most
evident in the court’s decisions disabling the opposition in the electoral and legislative
arenas. This has given us an insight to discern “political trajectory” (Hartlyn 1998, 10) of
regimes tending towards authoritarianism. More broadly, the lens of judicialization
revealed not merely a shift in regime in the Bolivarian Republic of Venezuela, but also
the limits of participatory democracy. The inability of such a hybrid government to take
and consolidate power without utilizing liberal means is telling of such a limit. The
Maduro government has been aware of the normative value of judicial review (that is, it
submits itself to a judicial process instead of issuing decrees unilaterally). Since it has
lost most of its electoral support, President Maduro has kept, taken and deepened his
power in a different way. The regime has abandoned the strategy used in the Chávez era
in which it relied on the Schmittian source of legitimacy: constituent power (See
Colon-Rios 2011; Negretto 2000; Spanakos 2015). Being aware of a shift in legitimation
strategy (and what conditions shape this shift) may be useful to scholars studying and
assessing other hyper-presidential states in the region. These include Ecuador, Nicaragua,
and Bolivia. These states have also been characterized as delegative democracies and
competitive authoritarian systems (see Conaghan 2016; Luna and Vergara 2016).
Understanding the relationship between judicialization and the regime type has also been
advantageous as it has given us an indication of which way this phenomenon tends. Is the
phenomenon of judicialization an agent for the protection of rights, or an agent for
authority? This is important as it also contributes to the debate in which some scholars
aim to discern if judicialization - and by extension, the court - are illegitimate (Bickel 1962) or democracy-enhancing guardians of the constitution (see Dahl 1971; Schmitter 2012; Kelsen 1931; Schmitt 1931; Dworkin 1977).

Ultimately, exploring the regime shift through a lens of judicialization has thus revealed what Levitsky and Way (2002) insist has occurred in the post-Cold war era. Although they submit that a Western liberal hegemony has subsisted, a trend of nondemocratic regimes has also prevailed. The cases here have show how the court has had the final say in political conflict, and how it has utilized means (even of liberal argumentation) to ensure regime survival, and to limit political contestation (in the electoral and legislative arenas). To some scholars of authoritarian politics, this may be an example of a “division of sovereignty” (Solomon 2008). As such, a new institutionalism has followed (Schedler 2009). Judicialization has evidenced a clear a regime shift. No longer is the court merely one of the arenas weakened by the regime, as Levitsky and Way (2002; 2010) would agree. Instead, it is an empowered institution that enables the weakening of the electoral and legislative arenas. The court is therefore more than a victim of populist deinstitutionalization, and hyper-presidential abuse. It is an indispensable institution that can be the enabler of the rise and consolidation of an authoritarian system.
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