



Coordinadora Internacional Venezolana

P.O. Box 7655,
Arlington, Virginia 22207-0655
USA

Tel: (703) 256-0350/ Fax: (703) 535-7998

E-Mail: washington@civw.org

The Road to the Referendum

White Paper: Background information on legal issues concerning the Recall Referendum

Understanding the roles and relationships between the Electoral Chamber, the Constitutional Chamber and the Full Chamber of the Venezuelan Supreme Court

Executive Summary

WASHINGTON D.C. – APRIL 4, 2004 -This White paper is being issued by the Coordinadora Internacional Venezolana as a primer to better understand the complexities of the legal issues behind the controversy of the Venezuelan Supreme Court.

It provides an overview over the inherent conflict between the Constitutional and Electoral Chambers of the Supreme Court and the legal rationale that provide evidence about the dangerous manipulation of the Rule of Law by the Constitutional Chamber of the Supreme Court. They are responding to the government's interest of avoiding the democratic, electoral and pacific solution to the current crisis.

Venezuela is at an impasse between rulings by the Electoral Chamber and the Constitutional Chamber of the Supreme Court. On the one hand the Electoral Chamber has exerted its independence jurisdiction over electoral matters by ruling that the 870,000 signatures that are on the "Planillas Planas" should be included in the list of valid signatures, which would allow for the recall referendum to move forward. The Electoral Chamber has several legal claims to its independent jurisdiction over electoral matters: Article 297 of the Constitution which specifically states that the Electoral Chamber has jurisdiction over electoral matters, and previous decisions and rulings by the Constitutional Chamber that have established precedent that no other Chamber can intervene in decisions of the Electoral Chamber precisely because all chambers of the Supreme Court are of the same rank, thus rulings of one Chamber cannot be overruled by another Chamber (in this case the Constitutional Chamber).

The Coordinadora Internacional Venezolana (CIV) is a 501 (c) 3 non-profit dedicated towards pro-democracy initiatives for Venezuela. It provides educational information for key policy makers and the international community concerning developments in Venezuela, especially actions or situations that may undermine democratic institutions or processes. The CIV is not associated with the Coordinadora Democrática or other "opposition groups."

On the other hand, by attempting to over-rule the Electoral Chamber, the Constitutional Chamber is following the government's line to obstruct the recall referendum and undermining the independence of the judicial system, by generating an institutional crisis in the Supreme Court.

Pro-government factions claim that the Constitutional Chamber is 'superior' to the Electoral Chamber based on Articles 335 and 336 of the Constitution. This narrow interpretation is misleading because it ignores Article 297, which confers jurisdiction on electoral matters in the Electoral Chamber.

On March 29, the Electoral Chamber restates its jurisdiction over the referendum issue by responding to the unconstitutional exercise of power by the Constitutional Court. The Electoral Chamber claims that the Constitutional Chamber cannot over-rule its decision because both chambers are at the same level and rank. This conflict of functions needs to be resolved by the full 20 member Supreme Court.

It is expected that the debate and decision in the full court will be intense and polarized. In addition, it is likely that there will be reclusive actions by both sides and that alternate judges will replace judges that have taken part in the decisions of both chambers in dispute. These factors make it difficult too predict the final outcome of the full court decision.

Irrespective of what may happen legally, the Recall Referendum is in a race against the clock. The decision on the signatures should be made before May 19 in order for the National Electoral Council - NEC to organize the recall referendum, within the 97 days established in the regulations, before August 19.

It is important to highlight that should the recall referendum take place after August 19, 2004, the Vice-President would complete the presidential term until the elections of 2006. Therefore, the window of opportunity for the recall referendum that would allow for the calling of another presidential election if the recall referendum were successful is extremely short.

If nothing else the crises to date only demonstrates the lack of credibility in the judicial system as well as all public powers as further evidence of the deterioration of the Rule of Law and democracy in Venezuela.

Analysis:

Summary of facts as of April 4, 2004:

- On February 24, 2004 the National Electoral Council -NEC reformed regulation on the recall referendum creating the similar handwriting concept, an item not mentioned in any previous regulation as of that date. That new regulation affects the verification process since it retroactively tries to apply a requirement that was never contemplated under the NEC norms and procedures of November 20, 2003. The issue is what happens to signatures where another person (an agent) fills in personal data such as name, date of birth, and identification

The Coordinadora Internacional Venezolana (CIV) is a 501 (c) 3 non-profit dedicated towards pro-democracy initiatives for Venezuela. It provides educational information for key policy makers and the international community concerning developments in Venezuela, especially actions or situations that may undermine democratic institutions or processes. The CIV is not associated with the Coordinadora Democratica or other "opposition groups."

number (cédula), but the persona identified signs the form, along with putting their thumbprint next to the signature line.

- On March 2nd, the NEC issued its first decision on the verification process of the signatures requesting the recall referendum to the President, establishing that the opposition only collected around 1,8 million valid signatures (short of the 2,4 required by the Constitution). The most salient issue of that decision was that more than 870,000 signatures were considered to be of similar handwriting and considered invalid unless that universe of signature holders prove otherwise. (The opposition handed in around 3.4 million signatures to the CNE to recall the president on December 19, 2003).
- On March 8th, opposition representatives filed an Electoral Judicial Recourse with a Provisional Injunction measure, with the Electoral Chamber of the Supreme Court.
- On March 14 the President of the Constitutional Chamber (and of the Supreme Court), ordered, through an informal letter (oficio), that the Electoral Chamber stop reviewing the matter of electoral recourse and injunction on the referendum matter and requested the Electoral Chamber to send the respective files to the Constitutional Chamber for their review.
- On March 15 the Electoral Chamber decided on the Provisional Injunction Request indicating that the NEC could be violating the constitution with its February 24th instructions and March 2nd decision. Moreover, the decision ordered the NEC to recognize as valid the more than 870,000 signatures with similar handwriting and to continue with the rectification process as stated in the NEC regulations. The Electoral Chamber responded to the Constitutional Chamber confirming its jurisdiction over the matter and highlighting the illegality of the act used by the President of the Constitutional Court on March 14th to communicate its decision.
- From March 15 to March 22, about 5 different recourses were attempted by pro-government factions, including the NEC's President.
- From March 16 to March 22 several recusations against both, members of the Constitutional Chamber and Electoral Chambers have been tried. Moreover, an investigation to review personal responsibilities of the Judges of the Electoral Chamber has been ordered by pro-government factions with the objective of having them removed from their positions.
- On March 23 the Constitutional Chamber nullified the Electoral Chamber decision.
- On March 29th the Electoral Chamber again reiterated its position that they had jurisdiction over the similar handwriting case since it is an electoral matter and both chambers of the Supreme Court are of similar rank. That decision triggered a conflict of functions that needs to be reviewed by the full 20 member Supreme Court.

The organization of Supreme Court of Justice and key issues to understand the current impasse between the Constitutional and Electoral Chambers

How it is organized?

- The 1999 Constitution changed the organization of the Supreme Court adding two new chambers. The 20 judges of the Full Court are divided into six smaller chambers which are: the Constitutional Chamber, Political-Administrative Chamber, Electoral Chamber, Social Chamber, Civil Chamber and Criminal Chamber.
- With the exception of the Constitutional Chamber, all chambers are composed of 3 judges. The Constitutional Chamber has 5 judges.

The Coordinadora Internacional Venezolana (CIV) is a 501 (c) 3 non-profit dedicated towards pro-democracy initiatives for Venezuela. It provides educational information for key policy makers and the international community concerning developments in Venezuela, especially actions or situations that may undermine democratic institutions or processes. The CIV is not associated with the Coordinadora Democrática or other "opposition groups."

- Both the new 1999 Constitution and the 1978 Organic Law of the Supreme Court of Justice – OLSCJ (valid till a new law is passed) define the organization of the Supreme Court.

How do the Chambers generate justice? What are the formalities of their decisions.

- In accordance with the OLSCJ, decisions by any Chamber of the Supreme Court have to follow all of the following requirements, which are:
 - Decisions from the Supreme Court related to legal trials are called “autos” or “sentencias”. In non-trial related matters rulings are defined as matters, agreements and resolutions (asuntos, acuerdos y resoluciones) (Article 56).
 - Any decision issued by the Supreme Court requires a minimum quorum of 4/5 of the judges that are part of that chamber (Article 54). For a decision to be valid it needs to comply with the following:
 - i. A minimum quorum to discuss the decision of 4/5 of the judges that are part of the chamber (Article 54)¹
 - ii. A simple majority agreeing with the decision (Article 55);
 - iii. The decision has to be published;
 - iv. That publication requires the signature of the 4/5 members of the Chamber that should include: the minimum majority in favor and those who disagree with the decision (Article 59 and 60).

The March 14 communication from the President of the Supreme Court to the Electoral Chamber requesting the suspension of any decision from that Chamber, was issued as an informal communication without following the formalities established in the law because it did not comply with the minimum quorum to discuss the decision, it was not published by the time triggered to conflict, and it did not have the signature of the fourth judge ².

What is the competence of the Constitutional and Electoral Chamber over electoral matters?

Key issues to consider in reviewing the issues:

- Is the NEC’s March 2, 2004 decision an electoral matter that gives the Electoral Chamber jurisdiction?
- Which judicial chamber has jurisdiction over electoral matters?
- Can the Constitutional Chamber over-rule legal/constitutional matters of the Electoral Chamber?
- What was the nature of the Electoral Chamber decision?

¹ For the Constitutional Chamber a quorum requires 4 of the 5 judges and for the Electoral Chamber it is 2 of the 3 judges.

² Judge Ivan Rincón, President of the Supreme Court and of the Constitutional Chamber issue a public communication on March 16 trying to clarify that judge Antonio García García was indeed present during the allegedly Constitutional Chamber session he claims took place on March 14. (<http://www.tsj.gov.ve/informacin/comunicados/ComunicadoDrRincon.htm>). Judge Antonio García García responded that he never formed part of any formal session. To date, neither Judge Ivan Rincón nor any other member of the Constitutional Chamber have been able to demonstrate through a formal act evidence that the session of the Constitutional Chamber actually occurred as is the common practice of the Supreme Court.

NEC's decisions are electoral matters and the Electoral Chamber has the jurisdiction to review those decisions. The legal grounds are the following:

- In accordance with the Organic Suffrage Law (OSL), any legal or constitutional issue related to referendums is an **electoral matter** (Article 192) and decisions emanating from the NEC can be reviewed by the Supreme Court (Article 240, #2) through an Electoral Judicial Recourse -*Recurso Contencioso Electoral* (Article 235 and 236).
- The Supreme Court Chamber with jurisdiction over Electoral Judicial matters (judicial complaints from the NEC) is the Electoral Chamber as it is clearly established by Article 297 of the Constitution.
- The Democratic Coordinator legal recourse challenging NEC's decision of the use of similar handwriting on the referendum signature forms is an Electoral Judicial Recourse (consistent with the OSL) that incorporates a Constitutional Protection Provisional Injunction measure -*Amparo Constitucional Cautelar*- to prevent the violation of the right of more than 3 million signature holders to exercise the recall referendum, which is a constitutional right.
- Past case law of the Constitutional Chamber has established precedent that the confirmed that the Electoral Chamber has jurisdiction over electoral matters. The Constitutional Chamber decision of January 22, 2003 (Interpretation Recourse by Gutierrez and Alvarez) established “. ...this Chamber (Constitutional) will be exercising an undue intromission in an electoral matter that correspond to the Electoral Chamber of this supreme court, entity with the electoral jurisdiction ... that is currently reviewing Electoral Judicial Recourses against the mentioned consultative referendum request...” (see decision in www.tsj.gov.ve)

The Constitutional communication by the Constitutional Chamber to suspend any decision on the Electoral Judicial Recourse and the March 23 decision to nullify the Electoral Chamber decision is unconstitutional. The legal grounds are as follows:

- The Constitutional and the Electoral Chambers are of the same rank and level, therefore the former cannot order the latter to stop reviewing any cause nor can it over-rule its jurisdiction over any matter. The same Constitutional Chamber has consistently created jurisprudence precedent confirming the same level or rank of all Supreme Court Chambers implying that it cannot over-rule the jurisdiction of its homonymous Chambers. Decisions April 4, 2003 (Pizani incorporation to the NEC and the Consultative Referendum case³); April 24, 2002 (Sitracemento case); January 25, 2001 (Ismael Amaya and others case).
- The Constitutional Chamber has indeed jurisdiction to clarify confusion over constitutional related issues and its interpretation over those matters are mandatory to any other Chamber on those specific issues. However, such jurisdiction does not apply to the NEC's decision nor to the Electoral Chamber jurisdiction over these causes for the following reasons:

³ The decision established: since the present judicial claim requests the overruling by the Constitutional Chamber over two judicial claims submitted to the Electoral Chamber, both Chambers of the Supreme Court of Justice, and since **both Chambers are of the same rank**, being both (Constitutional and Electoral) the **top of the Constitutional and Electoral jurisdiction**, decides that the present judicial overruling request is not valid in accordance to the law and thereby declare it.

- (i) It is clearly an Electoral matter;
- (ii) The same Constitutional Chamber has established precedent of the electoral content and jurisdiction of the Electoral chamber over electoral matters (see above) and;
- (iii) There is no confusion regarding the application of the constitution because the matter refers to the application of sub-legal regulations and not constitutional articles,⁴

The Electoral Chamber decision is not about the Electoral Judicial Recourse per se but on the Constitutional Provision Injunction Request (*medida cautelar de amparo constitucional*) that is an accessory to the Recourse.

- The Organic Law of Constitutional Protection OLCP (Ley Orgánica de Amparo Constitucional) establishes the possibility of a provisional injunction measure to protect the exercise of constitutional rights, accessory to a principal recourse (Article 5 of the OLCP). The provision injunction provision is to protect the constitutional rights under threats by any administrative order, that otherwise will be severely damaged with no possibility of recuperation.
- The OLCP expressly mandates that provisional injunction measures cannot be appealed. Only definitive decisions can be appealed. That is to avoid delays that may impede the violation of a constitutional right.
- The Constitutional Chamber decision of March 23, 2004, revised the provisional injunction provision dictated by the Electoral Chamber, alleging that since the Electoral Chamber is the last resource to review the injunction provision, that decision is definitive, therefore, the Constitutional Chamber can review and decided to nullify it. That decision is a new interpretation of law that contradicts hundreds of years of Venezuela law and jurisprudence.

The situation as of April 4, 2004 and its implications:

- As the battle takes place at the Supreme Court level, the three pro-government board members of the NEC have stated that they do not recognize the Electoral Chamber decision. They have only recognized decisions by the Constitutional Chamber.
- The legal battle between the two Chambers of the Supreme Court is having a severe impact over the sensitive timeframe of the Recall Referendum. The Electoral Chamber expects more delays because of the Constitutional Chamber decision of March 23 and the restatement on March 29 that they, in fact, have jurisdiction over the matter. According to the Electoral Chamber this creates a functional conflict that needs to be resolved by the Full Chamber of 20 members. The outcome of that conflict is unknown as it is the time it will take to resolve it.
- Pro-governments factions outside and inside the Supreme Court are targeting the Judges of the Electoral Chamber to open an investigation in order to revoke their tenure. The

⁴ On March 16 the Embassy of Venezuela in Washington issued a statement providing a rationale against the Electoral Chamber's decision. That rational is misleading since it focuses only on articles 335 and 336 of the Constitution that refers to different matters. The statement intentionally did not mention Article 297 of the Constitution that assigns jurisdiction on electoral matters to the Electoral Chamber.

The Coordinadora Internacional Venezolana (CIV) is a 501 (c) 3 non-profit dedicated towards pro-democracy initiatives for Venezuela. It provides educational information for key policy makers and the international community concerning developments in Venezuela, especially actions or situations that may undermine democratic institutions or processes. The CIV is not associated with the Coordinadora Democrática or other "opposition groups."

objective will be to assure an absolute control of the Supreme Court in order for pro-government decision to prevail regardless of the rule of law.

- There have been moves in the National Assembly to try and “pack the court” with more pro-government judges thereby tilting the court more to their favor.
- Recent declarations by the NEC’s President challenges the observations made in the signature verification process by the OAS and Carter Center representatives in Venezuela. Should the matter return to the NEC for implementation of the rectification process (*reparos*), the three pro-government board members of the NEC will try to discredit international observers and rule freely.

The Coordinadora Internacional Venezolana (CIV) is a 501 (c) 3 non-profit dedicated towards pro-democracy initiatives for Venezuela. It provides educational information for key policy makers and the international community concerning developments in Venezuela, especially actions or situations that may undermine democratic institutions or processes. The CIV is not associated with the Coordinadora Democrática or other “opposition groups.”