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Wolves in Sheep's Clothing: A Critical Appraisal to Abusive Exercise of Constitutional Powers in Venezuela, Argentina, and Peru

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Abstract: The constitutionalism movement aims to organize a society under the rule of law to protect the human person. For that purpose, constitutions usually establish several mechanisms of checks and balances. However, contemporary authoritarian tendencies refrain from resorting to disruptive institutional changes. Latin American autocrats, in general, no longer seek to implement a constitutional design that aligns with their agenda or aspirations to remain in power. Instead, they aim to use the institutional forms of liberal constitutionalism to undermine the core of democracy. Those autocratic tendencies perform their powers as wolves in sheep's clothing. This kind of manoeuvre has come to be known as "abusive constitutionalism" and is probably one of the greatest threats to the democratic consolidation of the region. In this article, we will examine three cases of abusive constitutionalism — Argentina, Venezuela, and Peru — where some of the three branches of

government respected institutional procedures but undermined one of the core foundations of constitutional democracy: judicial independence.

Keywords: authoritarianism; rule of law; judicial independence; constitutional amendments

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I. Introduction: How to Undermine Constitutional Democracy from Within

Constitutional changes, in the case of highly flexible constitutions, can be carried out through their formal channels, i.e., the reform or amendment mechanisms established by the Constitution. However, it is only sometimes possible to direct the changes through the formally established channels. The impossibility of following such channels may be due to significant political fragmentation or because we are faced with rigid constitutions. In both cases, constitutional changes are usually implemented through rulings of higher courts or, in general, through precedents of the highest interpreters of basic rights (Laise, 2019, p. 230).

Nevertheless, another instance has a particular theoretical and practical relevance in the current times. We are referring to abusive constitutionalism, i.e., a gradual decline of constitutionalism through informal or formal channels established by the Constitution (Dixon and Landau, 2021a, p. 52). More specifically, abusive constitutionalism undermines the fundamental core of democracy, namely, free and competitive elections, political freedoms, and basic institutional systems of checks and balances, such as, for example, judicial independence (Dixon and Landau, 2022, p. 428). In other words, abusive constitutionalism is an effort to implode the separation of powers and the limitation of public power through a manipulative instantiation of constitutional powers.

At first glance, the term “abusive constitutionalism” appears to be an oxymoron (González-Jácome, 2017, p. 450). If constitutionalism aims to limit government to safeguard the dignity and freedom of the

human person (Badeni, 2006, p. 42), how is it possible to use this same tool against its own ends? As will be discussed in subsequent sections, the answer to this question depends on what we understand by abuse of rights.

Thus, the claim we will defend in this paper is that the civil doctrine of the abuse of law can illuminate the increasing interference of political branches — executive and legislative — in the Judiciary. In particular, the parallelism with the abuse of law could shed light on weakening democratic systems. Moreover, it could also explain the authoritarian drift of governments that began under the protection of democratic institutions and a person-centred constitution but ended up in autocratic or hybrid regimes.

This is because, as observed in the doctrine of abuse of rights in the civil law tradition (Cuentas Ormachea, 1997, p. 466), the exercise of ostensibly legitimate powers by the political branches may gradually undermine judicial independence. Finally, if the doctrine of the abuse of rights highlights that property rights are not to be exercised in an antisocial manner, the development of constitutional institutions to undermine the socio-political framework of a State is even more reprehensible (Carranza, 1970, p. 466).

To hold the claim of the paper, we propose the following roadmap: (1) We will unfold the meaning of the concept of abuse of rights in the field of civil law tradition; (2) We will elucidate what the abusive exercise of constitutional powers consists of; (3) We will examine the Venezuelan, Argentinean and Peruvian cases regarding the abusive exercise of constitutional powers tending to undermine the independence of the Judiciary; (4) We will elaborate on a critical balance in which we will defend how to harmonize the form and substance to ensure constitutional democracy.

II. From the Concept of Abuse of Rights to the Abusive Exercise of Personal Rights

The current notion of abuse of rights entails a social function of the law. Thus, we can only exercise rights for lawful and moral purposes. However, was this always the case? There are multiple historical pre-

decessors of the abuse of law in Rome. Still, these concepts are just an antecedent or, rather, prefiguration, as the study and practice of ancient law focused not on what the community owed to the individual but on what the individual owed to other individuals or the whole community (Strauss, 1953, p. 182).

In any case, Rome is usually considered the first historical antecedent for an intriguing reason: in Roman law, the unrestricted exercise of legal powers was forbidden. For example, the Romans were quite severe with those who filed a reckless lawsuit, i.e., a claim without merit. Whoever suffered a reckless lawsuit could bring an action for slander, *contrarium judicial*, oath, or *restipulatio* (López, 1966, p. 83). Whoever intervened in a lawsuit recklessly was subject to monetary sanctions, and, in some cases, that could even lead to a sentence for infamy.

On the other hand, some authors identify the origin of the abuse of rights in the medieval institution of acts of emulation. These consisted of actions by which the control of the thing is exercised without the intent of benefiting its property owner but to harm the owner of a neighbouring estate (Rutherford, 2013, p. 636). However, this approach presents certain difficulties. On the one hand, medieval texts are often characterized by inaccuracies or misunderstandings; on the other hand, many medieval jurists developed the doctrine of acts of emulation based on, or under the authority of, the writings of Paulus or Ulpianus (Rutherford, 2013, p. 643). Whatever its origin, this idea persisted in medieval law: no one shall exercise her rights to harm other community members.

The French Revolution marked a Copernican turn in these matters. Then, the very idea of absolute rights began to proliferate (López, 1966, p. 82). The nineteenth-century liberal ideology required absolute subjective rights. The paradigmatic example was the property right. Following the line of The Napoleonic Code, and beyond some nuances introduced in each country, the first civil codifications in Latin America recognized a robust or thick right to property (Parise, 2022, pp. 73–75). Only the law could limit the conditions for exercising that right.

Even so, this idea gradually gave way to alternative theories. The modern content of rights limits the exercise of our freedoms to enable

the development of community life. Why did this change occur? It was the result of what has been described as *a solidarity turn*. This understanding holds that there was a decline in the individualistic liberalism that nourished the first civil codes of the Western legal tradition, especially in its French version. Then, as a reaction, solidarity emerged as the supreme value of social life (Fernández Sessarego, 1992, p. 134). In this way, the exercise of the rights of an individual cannot overlap the rights and legitimate interests of the rest of the community members (Hess et al., 2010, p. 3).

However, what criteria are employed to identify instances of abuse of rights? The Civil doctrine has been debating this issue for decades. In any case, for the purposes of this study, it is helpful to categorize such criteria as subjective, objective, or mixed.

The subjective approach reduces the abuse of rights to intended or negligent manoeuvres aimed at exercising a right to harm another person. At first, many resorted to subjective criteria to recognize cases of abuse of rights in French jurisprudence (Hess et al., 2010, p. 4). According to this view, some voluntary action to harm another person is a necessary and sufficient element of the abuse of rights, whether intentional or negligent. Nevertheless, the agent need not be motivated by an interest in acting as he does (Fernández Sessarego, 1992, p. 125).

Alternatively, the objective criterion does not emphasize the intent to harm someone by exercising your right. This position emerged as a reaction to the heavy evidentiary burdens implied by the subjective theory of abuse of rights (Fernández Sessarego, 1992, p. 125). Moreover, this doctrine would be primarily neutralised if it were required to prove intent or negligence when abusing rights. Indeed, the abuse of rights consists of deploying a subjective right that harms third parties without the need for voluntary action.

By contrast, under the objective criterion, the central issue is the transgression of the limits established by the function of each right. (Fernández Sessarego, 1992, p. 129). But what is this function? Some authors, for example, associate it with good faith and generally accepted morality (Spota, 1957, p. 304). However, some views assume a less intense connection with morality. Borda, for example, argues that the

abuse of rights depends on the economic and social purposes of the law under which a subjective right is protected (Borda, 1990, p. 14).

The eclectic theory resorts to a blend of objective and subjective criteria. However, that theory suggests that we are in a false dilemma fallacy. Although the subjective and objective criteria pose an exclusive disjunction, they are complementary. Thus, within the framework of practical applications, it may be necessary to emphasize the subjective aspect over the objective aspect. Everything will depend on the peculiarities of the specific case (Fernández Sessarego, 1992, pp. 132–133).

Nevertheless, the most significant topic highlighted by the discussion on the abuse of rights is the role of private law in regulating private relations. That is particularly problematic in the absence of a prohibitive legal provision. However, in many cases, if such a prohibition existed, the situation would not constitute an abuse of rights but rather a conflict of rights (Mere, 1992, p. 37). For instance, consider the case of a debtor who has become insolvent but must pay his debt to the bank. That person, at the same time, is forbidden to dispose of his assets in a way that harms the basic sustenance of his children but, at the same time, must fulfil his family obligations.

The abuse of rights involves the exercise of a subjective right that injures an interest not specified by any other legal provision. For example, John decides to exercise his right of ownership over his land and plants some trees on his property with a leafy canopy. Still, he chose some trees and a spot to block the sun's rays from falling on his neighbour's (Peter) swimming pool. Peter did not have a subjective right to have his pool full of sun, even though he was interested in optimally enjoying his property. John significantly truncated that interest since the city's dry climate, which is not so hot in summer, requires as much sunshine as possible to enjoy the pool.

The abuse of rights tests the thickness of the bridges between private and public law. These issues may be synthesized in the following question: Is private law a mechanism for regulating private relations in pursuit of socially beneficial ends, or is it a legal order that ensures compliance through strong protection of the principle of freedom? (Barros Bourie, 1999, p. 15). The discussion of private law is a topic

that exceeds the scope of this study. Nonetheless, public law emphasis of this research is to be enhanced by a conception of private law as an area where the general interest determines the limits of relationships between private individuals.

The final issue addressed in this section is as follows: What are the effects of abuse of rights that hold particular significance for public law?

— Whoever abuses a right cannot invoke it as a justification for her actions (Barros Bourie, 1999, p. 35).

— If the abuse is related to the exercise of an action, the holder is deprived of the respective claim (Barros Bourie, 1999, p. 35).

— If the abuse has relapsed in exercising a personal right, that is, in a competence attributed to creating, modifying or extinguishing legal relations, the effect will be the ineffectiveness of the act (Barros Bourie, 1999, p. 36).

III. The Abuse of Rights in Abusive Constitutionalism: When Forms Separate from Substance

In the name of rights or the rule of law, the rhetorical appeal to abuse is commonplace, as some attempt to cover up the harm of goods of institutional significance. After all, the idea of abuse unfolds a game of double standards. On the one hand, we instantiate the right of persons. On the other, we undermine the legal system by a manipulative exercise of the social interest protected by that right (Palombella, 2006, p. 35). Indeed, the expression “abuse of the right” emphasizes the perpetrator of the act and not so much the one who suffers it. Thus, we could use a more precise articulation: the abusive exercise of rights (Cuentas Ormachea, 1997, p. 465).

Similarly, “abusive constitutionalism” is intended to underline a dual intention. On the one hand, it simulates a formal commitment to the Constitution. On the other hand, it undermines the very heart of constitutionalism, namely the minimum core of democracy and the rule of law. It is, therefore, a matter of weakening the techniques aimed at limiting the exercise of power through institutions concerned with the defence of basic rights (Badeni, 2006, p. 42).

Dixon and Landau consider abusive constitutionalism as one of the most pressing challenges of liberal constitutional democracies. Indeed, we may even be entering the era of abusive constitutionalism (Dixon and Landau, 2022, p. 427). More importantly, most of the legal system adopts constitutional provisions containing the basic foundations of the rule of law. However, nowadays, tyrants and their collaborators channel their aspirations using the constitution to further their agenda (Dixon and Landau, 2021b, p. 11).

We shall illustrate the latter with the example of Nicolás Maduro. The Venezuelan autocrat delivers his scathing speeches to undermine the separation of powers almost always with the constitutional text in hand. However, he always masks his further intentions behind some constitutional power. Even more, there is no lack of allusions to constitutional provisions to proclaim some measure tending to further violate the basic legal guarantees of Venezuelans. Indeed, legal provisions are not enough to shield a State from abusive exercises of constitutional powers. Some autocrats used those provisions to entrench their autocratic regime, as we shall see in the upcoming sections of this paper.

Thus, abusive constitutionalism highlights precisely this trend of undermining the Constitution from within, that is, by using institutions provided by the Constitution itself. In its most extreme forms, as some authors have noted, we face examples of stealth authoritarianism (Varol, 2015, p. 1684). That is because most autocrats intend to camouflage authoritarian practices by resorting to the typical institutions of constitutional democracies.

To make things worse, most of the manoeuvres of abusive constitutionalism are often carried out in multiple acts. For example, in India, the Modi government has pursued a series of legal and constitutional reforms or amendments that have profoundly damaged the core of constitutionalism. Nevertheless, this was not the result of a single event. Those undermining acts underwent a gradual succession of constitutional acts, legal reforms, and, at times, mild constitutional amendments. In short, we could say that constitutional democracy was assassinated by a thousand stab wounds (Khaitan, 2020, pp. 49–50).

Thus, authoritarian regimes often cannot be clearly distinguished from consolidated democracies by their institutional design. Both systems have a robust constitutional review, thick recognition of fundamental rights, constitutional amendments, extra-power bodies in charge of overseeing elections, and a clear separation between those who initiate the criminal action — the Public Prosecutor's Office — and those who judge the cases, to mention just a few examples.

In the end, the autocrats of the current times do not usually want to exhibit extravagant institutional designs, nor do they try to seize the main public offices by sheer force (Skąpska, 2019, p. 422). Moreover, tyrants are no longer inclined to organize coups d'état or to formally establish constitutions that are not person-centered; that is, fundamental legal orders that reduce the individual to a mere instrument for the pursuit of a dominant political idea, whatever that may be (Badeni, 2006, p. 25). That is no longer the season's latest trend (Dixon and Landau, 2021b, p. 14).

The latest fashion among autocrats is to go under the radar or, better yet, to use the guise of democratic leaders. Some African politicians, for example, have become masters in the art of abusing constitutional powers. Such politicians have even enlisted members of Congress as critical players in constitutional coups (Basheka and Auriacombe, 2019, p. 109). These recruitment processes aimed to obtain acolytes to promote and carry out constitutional amendments. The goal was to satisfy the aspirations of power of some autocratic leaders. When that was impossible, they redirected their objective to co-opting the final interpretation of constitutional provisions. Thus, if a constitutional amendment or reform process was not feasible, the goal turned to get those in charge of the constitutional review of the most relevant governmental actions (Basheka and Auriacombe, 2019, p. 110).

Why is there a tendency to disguise an authoritarian drift under the appearance of liberal democracy? One possible answer is that authoritarian governments, or those aspiring to become such, may be able to conceal their real intentions and manoeuvres more effectively. A keen observer might notice what is happening, but the average citizen may need a better sense of what is actually going on. Given the current

levels of political disaffection in Latin America, this seems entirely possible (Monsiváis Carrillo, 2017, pp. 5–6).

This problem of disaffection in the face of examples of abusive constitutionalism turns worse as those who resort to such practices hide behind a discourse of enhancing democracy. See, for example, the Mexican constitutional reform that instituted the popular election of all judges of the Nation. The effort to defend and legitimize these changes in the organization of constitutional government was accompanied by frequent references to “democratizing” the judiciary. These measures were not presented as an attack on the separation of powers. Instead, the advocates of such reforms saw themselves as champions of boosting the popular bases to find a robust and actual democracy.

A second argument, although interrelated with the previous one, is that the abusive exercise of constitutional institutions makes it difficult for international agencies or bodies to intervene (Law and Versteeg, 2013, p. 919). If, for example, an autocrat decided to change the composition of a country’s Supreme Court or Constitutional Court by sheer force of arms, this would cause alarm and a strong reaction from the international community. Take, as a recent example, the coup d’état in Myanmar (2021). That news had a global reach, and significant international leaders were eager to speak their minds against the overthrow of the President, Aung San Suu Kyi.

Meanwhile, the case of the gradual co-optation of the Supreme Court of Justice of the Nation of Venezuela never had a significant worldwide impact. They carried out everything through the formal channels established in the constitution. It is worth noting that the Venezuelan legislative body does not allow the participation of the opposition parties in the national elections. That, in turn, was not done solely through the exercise of raw power. The *Chavista* regime proscribed the opposition with the consent or active intervention of the Judiciary and the governing body in electoral matters, but always under the unceasing façade of subordination to a higher law. Has this led to a decisive intervention at the international level? Has the OAS Democratic Charter been invoked in response to this? The answer is in the negative.

Thus, abusive constitutionalism undermines the rule of law by dissociating the form and the substance. Those who resort to these practices comply fully with the Constitution. Still, such compliance separates the forms from its substance or, more clearly, its inherent purpose (Dixon and Landau, 2021b, p. 19). In other words, they respect the forms but with an anti-democratic aim. For example, the control of the functioning of the judicial power or the court packing usually involves a complex interaction between the Legislative and Executive Branches of the Nation. However, this serves a specific purpose: to prevent the judiciary from becoming wholly subject to the fluctuations of partisan politics.

Thus, it constitutes an example of abusive constitutionalism when the political branches seek to control the judiciary with the aim of undermining judicial independence, even if such actions formally comply with the letter of the Constitution.

Is this decoupling between the form and the substance merely intentional? Must we contemplate its necessary consequences? The first alternative can be highly complex to prove. Reconstructing the motives that drive constitutional actors is not a path with an accessible gateway. Moreover, mixed or eclectic intentions are frequent in collective bodies of a political nature (Petrov, 2024, p. 2). In this way, various factional interests might conflict, including allegation of impunity, ideological commitments, and the fear of falling out of favour with the autocrats in office.

In contrast, a more effective way to detect abusive exercises of constitutional powers is to emphasize the historical interrelationship between the means chosen and their consequent outcomes (Petrov, 2024, p. 2). This seems quite sensitive, as constitutional practices are necessarily instrumental. Then, what results do these abusive practices aim to achieve? The answer is simple: the intention is to circumvent accountability.

As Petrov (2024, p. 15) suggested, this would be the critical analysis factor. However, the possibility of eliminating the accountability requirement depends on the gradual erosion of checks and balances. After

all, how can an institution be exempted from being accountable for its actions without the approval of those in charge of its control or supervision? For this reason, undermining the minimum cores of democracy begins with the co-optation by the political branches of the Judiciary and, above all, constitutional justice (Roznai et al., 2023, p. 294).

IV. Abusive Constitutionalism in Venezuela, Argentina and Peru: The Case of Interference in the Judiciary

The cases in this Section will focus on intrusions into the judicial independence. That is not the only example of an abusive exercise of constitutional powers, but it is undoubtedly among the most serious. One of the most fundamental elements of constitutionalism lies in organizing a society under the rule of law; in this way, the Judiciary exercises its jurisdictional powers to entrench the subordination of the political branches to the law (Skąpska, 2019, p. 423).

Thus, we will examine three examples where the political branches of the government acted by constitutional provisions to achieve an outcome that undermines liberal democracy. Autocrats, or those who aspire to be autocrats, when they cannot use the formal mechanisms of constitutional change, resort to informal abusive constitutional or judicial review exercises. The courts, especially the courts exercising constitutional jurisdiction, stand as the last defence against the emergence of authoritarian outbreaks or autocratic leaders (Juhász, 2022, p. 578). Because of that, when autocratic leaders cannot reform or amend the constitutional system to unfold their agenda, they focus on holding some control over the final interpreters of the Constitution.

Despite the varying degrees of difficulty that different constitutional systems encounter when implementing amendments or reforms, each of the three cases examined attempted to use constitutional mechanisms to subject the judiciary to partisan political dynamics, as will be discussed in the following pages.

IV.1. The Venezuelan Case: The Subordination of the Constitutional Justice System to the Will of the Presidency

IV.1.1. The Context of the Case: the Coronation of Constitutional Justice at the Top of the State but Subordinated to the National Executive Power

Since Venezuela's Declaration of Independence (1819), several authoritarian governments have shaped the Venezuelan constitutional system (Berríos Ortigoza and Sánchez-Urribarri, 2024, p. 341). This fact is essential to understanding what has happened in the last twenty-five years. Historians refer to this period as the "Chavista era" (López Maya, 2016, p. 160), with Hugo Chávez leading its initial phase from 1999 to 2013.¹

After Chávez's death, Nicolás Maduro took over the position and held it until now. Maduro had served as a substitute during the illness that led to Chávez's death. Both figures belong to the same political faction, the United Socialist Party of Venezuela. The party's political platform displayed several contradictions. On the one hand, Chávez refused to be labelled a Marxist, yet, at the same time; he implemented a notably class-based social policy. Moreover, Chávez often championed class struggles, the role of the working class, anti-imperialism, and anti-capitalism (Rodríguez Rojas, 2010, p. 207).

One of the tools used to undermine constitutional democracy from within was the co-optation of justice and, most significantly, of constitutional justice (Brewer Carías, 2016, p. 9). When the implementation of the Constituent Assembly of 2015, no lack of defenders of the regime went so far as to say that the Venezuelan system of government is neither parliamentary nor presidential, but rather "semi-presidential because, in our regime, all power resides in the constitutional chamber" (Rodríguez, 2016).

From a strictly factual perspective, and with reference to the provisions of the Venezuelan Constitution itself, Rodríguez's comment

¹ This work assumes a critical appraisal to the *Chavista* Regime. Nevertheless, some authors hold a positive view, particularly regarding to the first period (1999–2013). For instance, Vidal Molina et al., (2018); Borón (2014), and Hellinger (2011).

grasps a grain of truth. Because since the dawn of the *Chavista* era, gradually, the Constitutional Chamber of the *Tribunal Supremo de Justicia* (hereinafter TSJ) has been acquiring the sum of public power, although under the subordination to the Executive Power (Brewer Carías, 2016, p. 10). In other words, the Executive Branch became the preeminent branch of government over all others, but this subordination was carried out through the Constitutional Chamber of the TSJ.

In 2015, the TSJ reached its highest peak regarding its power accumulation. At that time, the opposition to the *Chavista* regime won the legislative elections. However, the Constitutional Chamber of the TSJ abusively exercised its powers to prevent the new representatives of the people from taking office, as we will see in the following section. This led some authors to describe the Venezuelan regime as a “judicial dictatorship” (Brewer Carías, 2016, p. 15).

How did the *Chavista* regime get a constitutional justice system addicted to its will? The regime went down that road with patience and determination. As the saying goes, “Rome wasn’t built in a day”. However, the starting point of that road, the beginning of *Chavismo*’s authoritarian drift, could be traced to Chávez’s presidential re-election in 2006 with 63.4 % of the votes.

López Maya holds that Chávez interpreted the electoral results as a massive support to his socialist model (López Maya, 2016, p. 167). Then, Chávez doubled the bet and tried establishing a socialist state model of a “communal” type. Such a model intended to channel its goals through a constitutional reform, but a referendum rejected that in December 2007. After such events, the concentration of power in Chávez peaked, and the checks and balances over the Executive Power began to crack. Thus, Chávez, in his second government, was able to achieve *de facto* control over the Legislative Power, the Judicial Power, the mechanisms of citizen control and, last but not least, he managed to subordinate the National Electoral Council (López Maya, 2016, p. 167).

The facts described above show that, as it was impossible to channel profound changes in the constitutional structure through formal means, those in power have co-opted the mechanisms of checks and balances

over the National Executive Branch. The case of the judicial branch, which is the main subject of this paper, is particularly significant.

The *Chavista* regime introduced its first innovation to the constitutional justice system with the 1999 Constitution. At that time, they established the TSJ, which was designed to have different functions and a distinct structure from the previous Supreme Court. In terms of judicial governance, they abolished the Council of the Judiciary and transferred judicial management and government functions to the new TSJ. Additionally, they created a Constitutional Chamber within that Court, granting it broad powers to serve as the guardian of the Constitution (Pérez Perdomo, 2007, p. 16).

The Constitutional Chamber possesses powers comparable to those of other constitutional courts. However, the legal provisions allocated the Constitutional Chamber within the Judicial Branch to avoid conflicts. Such constitutional design aimed to circumvent potential difficulties arising from conflicts between ordinary and constitutional justice. This way, the Constitution avoided divergences between the Constitutional Chamber's decisions and other TSJ chambers during plenary sessions (Pérez Perdomo, 2007, p. 16).

IV.1.2. The Alliance between the TSJ and the National Executive Power: Chronicle of a Self-Serving Affair

The control and oversight of the judicial function by the TSJ has meant that it holds the authority to appoint, sanction, or remove all judges in the country. In practice, the TSJ established a so-called Judicial Commission, composed of its own justices, which exercises control over judicial appointments, as well as decisions regarding the retention or removal of judges from office (Pérez Perdomo, 2007, p. 18). In short, the TSJ is the lord and master of the destiny of the Judiciary or those who aspire to become judges. Therefore, if the national executive branch controls the TSJ, this not only implies holding a grip of the final interpreter of the Constitution but also subordinating the entire judicial system to the will of the President in office.

Furthermore, the TSJ does not have to provide any justification for revoking appointments. They perform that function at their sheer discretion. In practice, the TSJ established a so-called Judicial Commission, composed of its own justices, which exercises control over judicial appointments, as well as decisions regarding the retention or removal of judges from office. If a judge decides to file a claim regarding those procedures against her, the TSJ will be responsible for that claim. Even more, the TSJ deals with the judges' claims when removed from office. This impeachment procedure lacks essential impartiality (Pérez Perdomo, 2007, p. 18).

Nevertheless, how did the Constitutional Chamber of the TSJ become an ally of the Executive Branch? The first answer to this question lies in the need for judicial independence. Since ratifying the Constitution of the Bolivarian Republic of Venezuela in 1999, no justice has completed their 12-year term in office (Berríos Ortigoza and Sánchez-Urribarri, 2024, p. 348). Additionally, partisan interests have manipulated the process of appointing these justices.

The appointment of justices initially resulted from a transactional agreement between the ruling party and the opposition coalition. However, this arrangement was short-lived. In 2004, after a failed referendum against Hugo Chavez, the National Assembly approved several regulations on the TSJ. That led to a court-packing round designation in December 2004. Then, the total number of justices increased to 32. The Constitutional Chamber was composed of seven justices, five of whom maintained close affiliations with the *Chavista* regime (Berríos Ortigoza and Sánchez-Urribarri, 2024, pp. 349–350).

Although court packing is not necessarily connected with democratic erosion, the four court-packing incidents under Chavez's regime harmed the court's willingness to hold the government to account (Garcia Holgado and Sánchez-Urribarri, 2023, p. 351). Partisan and militant judges replaced the vacancies produced by the retirements of judges without ties to the ruling party. Thus, finally, the Constitutional Chamber was co-opted by the *Chavista* regime.

In fact, the TSJ has contributed to stabilizing the autocratic regime by several strategies. For example, it confirms manipulations of the

electoral regime, approves the violent repression of demonstrators opposed to the *Chavista* government, and, last but not least, validates the political persecution of those who try to exercise an oppositional role in the National Assembly (Berríos Ortigoza and Sánchez-Urribarri, 2024, p. 346).

To sum up, the Constitutional Chamber ultimately served to validate the authority of the National Executive. Still, it undertakes supremacy over the other two branches of the State: the Executive and the Judiciary. This judicial body, therefore, functions as an instance of constitutional control that seems to be addicted to the presidential will whatever its content might be. Simultaneously, the TSJ behaves in an activist manner concerning the other branches of government. Then, the TSJ attributes itself competence beyond the scope of the legal provisions to restrict the powers of the legislative and the judicial power (Laise, 2020).

IV.1.3. Some Examples of Abusive Constitutionalism in the TSJ Aimed at Undermining Constitutional Democracy

a) The case of “las morochas” (2005)

This case refers to a ruling of the TSJ that involved an electoral tactic used in parliamentary elections (2015). *Morochas* refers to a strategy used by the ruling party and its allies. Its objective was to maximize its representation in the National Assembly. In this sense, the Venezuelan electoral system allowed voting for nominal candidates (individuals) and party lists in the parliamentary elections.

According to electoral law, seats in the National Assembly are to be allocated proportionally using a mixed formula that combines both nominal candidates and party lists.

The strategy of the *morochas* consisted of the ruling party presenting two separate lists: one with the nominal candidates and the other with the list of candidates. While the concept promoted unity, it effectively restricted voters' choices. Voters could not express their preferences for individual candidates; instead, they had to vote for the whole

list. The critics perceived this arrangement as a strategic move elaborated by the Chávez administration to accumulate power, as it diminished the chances for opposition candidates to gain seats.

The TSJ validated this strategy and considered it legal under the current legal framework (2005).² However, several sectors of the opposition considered that the *morochas* distorted the principle of proportional and equitable representation provided for in the Venezuelan Constitution. Thus, the TSJ allowed the use of the *morochas* in the 2005 elections, which permitted the ruling party and its allies to obtain an even more significant majority in the National Assembly. Since that moment, the *Chavista* regime has had almost unlimited power.

b) *The case of the opposition assembly members (2015)*

The TSJ of Venezuela addressed the case of the opposition assembly members in 2016, linking it to that year's legislative elections. The opposition, grouped in the *Mesa de la Unidad Democrática* (MUD), secured victory by a substantial margin. Nevertheless, the electoral results were subjected to judicial review shortly thereafter, with the case specifically concerning the outcomes in the state of Amazona. That alleged incident was intensely controversial and profoundly impacted Venezuelan politics.

However, how did the events that led to such a judicial decision occur? In December 2015, legislative elections took place in Venezuela. The opposition to the *Chavista* regime won the majority in the National Assembly for the first time in more than a decade. The MUD secured 112 seats, granting it a two-thirds qualified majority — a supermajority. That was crucial to pass organic laws and profoundly change the country's institutions. In a word, the National Assembly could strictly limit the power of Nicolás Maduro's government.

The *Chavista* regime was not going to accept defeat passively. On 30 December 2015, the TSJ received many claims related to the electoral results in some states, including Amazonas. The ruling party, through the United Socialist Party of Venezuela (PSUV), held that *electoral*

² Venezuela (2005). Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Sala Constitucional, Sentencia 2996/2005, Expediente 2005-001786, 13 de octubre de 2005.

fraud and vote buying had occurred in that state, which, according to them, affected the outcome.

On 30 December 2015, the TSJ issued a *precautionary measure* in its Electoral Chamber, which suspended the proclamation and the effects of the results of four representatives elected in Amazonas: three opposition representatives and one pro-government deputy. The suspended opposition deputies were vital for the opposition to reach the two-thirds qualified majority. Thus, the TSJ prescribed that the three opposition deputies from Amazonas — Julio Ygarza, Nirma Guarulla, and Romel Guzamana — were not formally incorporated into the National Assembly under the accusation of irregularities in the electoral process (2016).³

Nevertheless, despite the TSJ's measure, the opposition incorporated the challenged deputies in January 2016. The National Assembly argued that the Court was acting unconstitutionally and biased in favour of the government. In response, the TSJ declared the National Assembly in *contempt* for having sworn in such deputies. For all practical purposes, this meant that, from that moment onward, the Court deemed all decisions and actions of the National Assembly to be null and void, without legal effect. That left the National Assembly without adequate power *vis-à-vis* the government of Nicolás Maduro, even though the opposition had won the elections. Thus began a prolonged institutional breakdown between Venezuela's legislative and judicial branches.

c) The case of the National Constituent Assembly (2017)

After those attacks, the National Constituent Assembly (NCA) was deeply weakened and delegitimized. Maduro established a National Constituent Assembly (2017) to face such a situation. Thus, the *Chavista* regime further consolidated the control of the Executive over the Legislative Branch. Because of that, the Constituent Assembly did not limit itself to drafting a new constitution but assumed legislative powers. In other words, the National Constituent Assembly acted as the

³ Venezuela (2016a). Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Sala Electoral, Expediente No. AA70-E-2015-000146, 7 de enero de 2016.

original constituent power and, simultaneously, the constituted power in charge of the ordinary legislative functions.

The election of NCA members in July 2017 was highly controversial, and the opposition boycotted it. The NCA ended up composed exclusively of members who supported *Chavismo*. Thus, its legitimacy was intensely questioned both within Venezuela and abroad. That occurred because the NCA assumed ordinary legislative functions, such as approving or modifying existing laws, approving the national budget, and reforming organic laws. In short, everything that corresponded to the National Assembly ended up in the hands of the ANC.

In this context, the role of the TSJ was to function as an instance of government policy validation. The installation of the NCA, and especially its assumption of legislative functions, was a matter that the TSJ approved (2017). The final interpreter of the Venezuelan Constitution held that since the NCA was an “original power”, its decisions were superior to those of any other State body, including the National Assembly. Thus, the TSJ recognized the NCA as Venezuela’s *de facto* legislative body. As mentioned above, this consolidated the Court’s control over the legislative branch.⁴

The subjugation of the Legislative Branch and the abusive exercise of the TSJ’s jurisdiction annihilated the executive branch’s control instances. The *Chavista* strategy was to wage a battle of trenches to gradually take control over the Venezuelan justice system within the institutional framework. Once the regimen achieved that goal, the only remaining instance of governmental control was the Legislative Power. Then, with the help of the TSJ judges, the *Chavista* regime eradicated the last remnants of institutionalism that kept on standing.

In a few words, the ruling party was patient and tenacious in taking over the government bodies in charge of its control. Without appealing to direct violence and always under the appearance of constitutional forms, Maduro and Chávez took over the sum of public power, little by little.

⁴ Venezuela (2017). Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, Sala Constitucional, Expediente No. 2017-0610, 12 de junio de 2017.

IV.2. The Argentinean Case: Federal Judges under the Scrutiny of Officials Selected by the Popular Vote

IV.2.1. The Context of the Case: The “Democratization” of Justice

The latest constitutional amendment (1994) incorporated a novel institution into the Argentine legal system: the Council of the Magistracy. This body is entrusted with the authority to regulate and administer the procedures for appointing, sanctioning, and removing judge. This body is entrusted with the authority to regulate and administer the procedures for appointing, sanctioning, and removing judges. It is also in charge of administering the budget of the Judicial Power of the Nation.

Section 114 of the Constitution of the Argentine Nation provides that “The Council of the Magistracy, ruled by a special law enacted by the absolute majority of all the members of each House, shall be in charge of the selection of the judges and the administration of the Judicial Power”. This paragraph introduces a relevant institutional matter: an aggravated majority is required to regulate the competence of the Council of the Magistracy of the Nation.

That regulation had significant consequences. The vote calculation is not based on the number of members who enable a legislative session but on the total number of members in the Chamber of Senators and the Chamber of Deputies, respectively. Specifically, the process requires obtaining at least 37 senators out of 72 and 129 deputies out of 257 (Urristi, 2023, p. 136).

However, the most controversial aspect of the constitutional amendment lies in the second paragraph that states, “The Council shall be periodically constituted to achieve the balance among the representation of the political bodies arising from popular election, the judges of all instances, and the lawyers with federal registration. Likewise, it shall be composed of other scholars and scientists as indicated by law in number and form”. Subsequently, the law enunciates each attribute of the Council of the Magistracy, which is irrelevant to this work.

On the other hand, as we will discuss, what is essential is the regularity and, more importantly, the balanced composition of that constitutional body. Thus, according to the latest act regulating the matter, the Council of the Magistracy of the Nation must be composed of 1) three members representing the Judicial Power; 2) three members representing the Chamber of Senators — two for the majority, and one for the runner-up; 3) three members representing the Chamber of Deputies — two for the majority, and one for the runner-up; 4) three lawyers of the Bar Association — one for the lawyers of the interior of Argentina; 5) one member for the National Executive Branch; 6) and six members for the regular professors of law — four for the majority, and two for the minority.⁵

IV.2.2. The Abusive Nature of the Council of the Magistracy Law: The Pretext of “Democratization”

Nonetheless, one of the most controversial aspects of the law governing the Council of the Magistracy is the system used for electing its members. Specifically, Section 4 of the law mentioned above provides that “to elect the members of the Council of the Magistracy representing the academic and scientific sphere, judges and lawyers of the federal registry, the elections shall be held jointly and simultaneously with the national elections in which the president is elected.”⁶ Additionally, individuals seeking membership on the Council were required to run on nationally scoped party lists, with their parties having a presence in at least eighteen of the twenty-four jurisdictions (Delamata, 2024, p. 191).

It should be clarified that this reform was not intended to bring judges of ordinary matters closer to the people. In a federal system such as Argentina’s, — which, in this regard, closely follows the U.S. constitutional model — jurisdiction over ordinary crimes generally resides with the provinces.⁷ Therefore, the purpose of this judicial

⁵ Argentina, Act No. 26.855/13, Section 2.

⁶ Argentina, Act No. 26.855/13.

⁷ The exception to this general rule is when there is an actual concurrence between ordinary and federal crimes, but only when there is a legitimate federal interest. Then, the federal jurisdiction operates as a “jurisdiction of attraction” (Argentina (2014)

reform was not to prevent residents of the country's cities and towns from choosing who would administer justice. In other words, the idea was not to implement a system of popular election of ordinary judges in the U.S. style.

Instead, the purpose of this reform aimed at the election of federal judges, i.e., those involved in crimes such as drug trafficking, human trafficking, smuggling, counterfeiting of national currency and, last but not least, crimes against the National Public Administration. All these matters are limited in scope and must be interpreted restrictively. Federal jurisdiction constitutes an exception to the general rule: the provinces retain all authority over the administration of justice, except for those powers that have been expressly delegated to the federal government (Badeni, 2006, p. 1757).

Nevertheless, there is also an issue of great relevance. Federal judges are also in charge of the electoral competence of national authorities: deputies, senators, president, and vice president. Moreover, federal judges act as the authority for applying all electoral regulations. They do not only intervene in contentious controversies. Specifically, federal judges are also in charge of controlling political parties' existence, activity and financing. In addition, they also exercise electoral administration functions, i.e., they form, correct, and print the provisional lists and the definitive voter rolls. The federal justice is the one that designates the places where the polling stations will operate and the authorities in charge of them. Finally, the federal judges control the deployment and folding of the ballot boxes, a task that is carried out by the national postal service (Argentina, Centro de Información Judicial).

Given these legal reforms, the Supreme Court of Justice of the Nation (hereinafter the SCJN) established that the election by popular vote could not extend to cases not expressly provided by the constitutional text. However, this differs from the case of lawyers and jurists referred to in the second paragraph of Section 114 of the Constitution of the Argentine Nation. Moreover, if the creation of the Council of the

Cámara Federal de Casación Penal, Causa No. 992/2013 — Sala III — “Murray, Juan, P. (fiscal) s/recurso de casación”, Registro No.1159/14). For example, if an aggravated homicide occurred in the context of a case of large-scale commercialization of narcotics.

Magistracy intended to attenuate the weight of political branches in the appointment of judges, it was not appropriate to subordinate lawyers and law professors to the exact appointment mechanism established for politicians.⁸

Likewise, the SCJN determined that the number of members representing lawyers and legal scholars was excessive. They would be overrepresented in a body striving for balanced integration. Still, the overrepresentation would stem from the selection mechanism rather than the number of members. Lawyers and jurists would be under the same political-factional dynamics as those who aspire to exercise Executive Power or integrate Legislative Power.⁹

In *Colegios of Abogados case*, the SCJN addressed an additional issue it had not dealt with in other decisions related to these matters.¹⁰ In this case, the Court discussed the quorum required for the Council to deliver a decision. Specifically, the SCJN maintained that the political establishment has hegemony to lead the Council. Seven members were required to deliberate and to decide in a valid session. The political branches have precisely that number: three members of the Senate, three members of the Chamber of Deputies, and one member of the Executive Branch. However, according to the SCJN, this provision directly contradicts the principle of balanced composition of the Council.

To deal with that problem, the SCJN had to choose between three alternatives. One option was to declare the composition of the Council of the Magistracy unconstitutional without further discussion, that is, without specifying how its composition should be structured. A second alternative was to outline the criteria or standards for the Council to be integrated and balanced while delegating and urging those matters to the political branches. Finally, there was the path that the SCJN

⁸ Argentina (2013). Corte Suprema de Justicia de la Nación. “Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c/ Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. No. 3034/13), Cons. 33.

⁹ Argentina (2013). Corte Suprema de Justicia de la Nación. “Rizzo, Jorge Gabriel (apoderado Lista 3 Gente de Derecho) s/ acción de amparo c/ Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. No. 3034/13), Cons. 10.

¹⁰ Argentina (2021). Corte Suprema de Justicia de la Nación. “Colegio de Abogados de la Ciudad de Buenos Aires y otro c/ EN — ley 26.080 — dto. 816/99 y otros s/ proceso de conocimiento.

chose: to rule that a repealed law, Act No. 24.937/97 (as amended by Act No. 24.939) should be put back into force. That act initially regulated the composition of the Council before its unconstitutional drifts (Puga and Ardoy, 2023, pp. 226–227).

IV.2.3. Critical Appraisal: the Abusive Exercise of Constitutional Powers to Undermine Judicial Independence

The Legislative Power is competent in regulating the composition of the Council of the Magistracy while upholding constitutional democracy. Thus, attempting to subject the body in charge of selecting, sanctioning and removing judges entirely to fluctuations of partisan politics is an abusive exercise of constitutional powers. The composition of the Council should achieve a sensible balance between members of the political powers — Executive and Legislative Power — and judges, lawyers and law professors. The intention of subjecting all persons seeking to be members of the Council of the Magistracy to the dynamics of agonal politics, especially in the case of judges, undermines judicial independence.

In fact, judges, lawyers, and professors aspiring to become members of the Council of the Magistracy would have to adapt to the dynamics of partisan politics and compete for a spot on a political party's electoral ballot. It is essential to clarify that individuals in Argentina cannot participate in popular elections as independent candidates. Therefore, this legal reform subordinated the non-political classes to the discipline of the political parties.

Only the judges with the support of a specific party would be eligible to be candidates to become members of the Council of the Magistracy. Can the independence of judges appointed with the backing of a political party truly be guaranteed? Would a judge serving as a council member be able to impartially assign responsibility to a peer, or would party discipline — by which he attained his position — exert a strong influence on his actions? The answers to these questions are in the negative.

Indeed, some articulated these legal reforms as efforts to “democratize” justice. Moreover, the pretension of democratizing every aspect

of social life can often be contrary to the very substance of democratic life (Ortega y Gasset, 1983, pp. 43–44). In any case, this tendency to equate democratization with the idea of subjecting institutions to the scrutiny of the popular vote is an abusive exercise of constitutional powers. But why is this the case?

Because the so-called “democratization or justice” is nothing more than a plain attempt to disguise the intentions of undermining judicial independence under the mask of increasing democracy. This is nothing more than a tactic to concentrate more power. The so-called “democratization of justice” means emancipating the political branches from the proper control exercised by the judicial power. In other words, by putting judges, lawyers and jurists to compete in the game of professional politicians, all the players would end up tied to the interests of partisan politics.

In what sense, then, could this reform of the Council of the Magistracy be understood as an attempt to reduce the level of accountability for government actions? Well, this reform is just one more move within a larger strategy. The levels of transparency and accountability demonstrated by then-President Cristina Fernández de Kirchner (2007–2015 as President, 2019–2023 as Vice President) (hereafter CFK) were at a notably low point. Corruption cases were beginning to increase in the federal courts. In fact, by the middle of her term as Vice President in 2021, CFK was facing at least ten corruption cases either under trial or in preliminary investigation (Gindin, 2021, p. 63).

Furthermore, the Council of the Magistracy reform was part of a confrontation between the then President, Cristina Fernández de Kirchner, and the federal Judiciary members. The controversy escalated to the extent that she began referring to the Judiciary by the nickname “Judicial Party”. (Gindin, 2021, p. 62). The cases brought against CFK reveal one of the factors that boosted this reform in the Council of the Magistracy. The institutional redesign of the body in charge of appointing, sanctioning and removing federal judges looks like a strategic move that would be a means for political actors to intervene in a retributive way on judicial independence (Delamata, 2024, p. 193).

IV.3. The Peruvian Case: the Dismissal of the Members of the National Board of Justice (2024)

IV.3.1. The Context of the Case: An Interpretative Dispute?

The Peruvian case addressed in this section concerns the dismissal of two members of the National Justice Board (Junta Nacional de Justicia, hereafter JNJ): Inés Tello and Aldo Vásquez (2024). As will be demonstrated, this case exemplifies the abusive exercise of constitutional powers. However, before proceeding, it is necessary to provide some contextual background for our argument.

The JNJ is a constitutionally autonomous and independent body subject to the Constitution, its organic law and other acts on the matter. Its mission is to appoint, evaluate, ratify and sanction judges or prosecutors. Besides, the JNJ appoints the national authorities of the Public Prosecutor's Office and the Judicial Power. The JNJ also selects the heads of the National Office of Electoral Processes (hereinafter ONPE) and the National Registry of Identification and Civil Status (hereinafter RENIEC).

However, the National Congress controls the JNJ, as it can remove JNJ members for serious misconduct. In this case, Congress must adopt a resolution with the affirmative vote of two-thirds of its legally constituted members.¹¹ Therefore, if the Legislative Branch intended to change or modify the composition of the JNJ and, at the same time, to keep in the institutional channels, it had to charge its members with some cause of disciplinary responsibility of the utmost importance.

Thus, what was the "serious misconduct" attributed to the denounced members? None of them respected the constitutional age limit required for the members of the JNJ.¹² The facts that motivated the sanction under study could be summarized quite simply: allegedly, they exceeded in the exercise of their interpretative powers. Specifically, the JNJ issued Resolution 224-2020-JNJ that interpreted that the maximum age established in Para. 3 of Section 156 of the Political

¹¹ Perú, Political Constitution, Section 157.

¹² Perú. Legislative Resolution No. 009-2023-2024-CRC.

Constitution (75 years) was only a limit to access the position and not to remain in it.

Congress rejected the harmonizing interpretation elaborated by the JNJ. This constitutional body faced tension between two constitutional provisions of equal rank. On the one hand, the constitutional provision established an age limit for the members of the JNJ. On the other hand, a constitutional precept establishes that these same members have a term of five years.¹³ Thus, the JNJ concluded that a conciliatory interpretation is possible: the 75-year age limit applies only at the time of assuming office. Therefore, it does not entail an obligation to vacate the position upon reaching that age.

According to the Congress of the Republic, this interpretation contradicts an explicit constitutional provision that does not make such a distinction. Furthermore, the Congress asserts that the JNJ does not have the authority “to impose a binding interpretation of the Constitution”. According to the legislative body, this interpretation was adopted specifically to benefit Inés Tello, one of the dismissed members, who was under 75 years of age when she assumed her position but reached the age of 75 during her term (Peru. Legislative Resolution No. 009-2023-2024-CRC). The Congress charged Inés Tello with the same wrongs as Aldo Vásquez, but added that she remained in office after reaching 75.¹⁴

What is the outcome of such disciplinary proceedings? The Congress of the Republic dismissed two JNJ members and prevented them from holding any public office for ten years.¹⁵

IV.3.2. The Abusive Nature of the Legislative Resolution

What is the disconnection between the form and substance that we shall identify in the present case? We are dealing with an effort directly aimed at influencing the composition of the JNJ. The

¹³ Peru, Political Constitution, Section 155.

¹⁴ Peru. Legislative Resolution No. 008-2023-2024-CRC.

¹⁵ Perú. Legislative Resolution No. 008-2023-2024-CRC; Peru. Legislative Resolution No. 009-2023-2024.

disciplinary sanctions went through the formal channels established by the regulations of Congress and the relevant constitutional provisions, notwithstanding some controversial issues surrounding the legislative procedures applied. In principle, the legislative branch respected the forms as the Constitution provides for serious misconduct as the reason to blame Vásquez and Tello. Ultimately, everything revolved around a controversial interpretation of Section 156, Para. 3 of the Political Constitution of Peru, made by the JNJ.

Nevertheless, the legislative resolutions suggest the issue is more indeterminate. After all, the constitutional text only states “being a member”, which does not univocally refer to the age as a condition to apply for the position, as the JNJ interpreted it. Neither does “being a member” refer only to “remaining in office”, as the Congress of the Republic suggested. Consequently, while the law was unambiguous, the charges could not be considered implausible.

Thus, Congress exercised its discretionary powers to interpret what “serious misconduct” means in the disciplinary proceedings filed against members of the JNJ. Strictly speaking, this is something that formally appears to be under the attributions of the National Congress. The legal interpretation defended by Congress is undoubtedly problematic but not implausible. In the end, the legislative body has the power to remove the members of the JNJ, even though there is a discussion about the parliamentary procedure applied to obtain the votes for the session in Congress.

However, one detail powerfully reveals the abusive nature of this disciplinary process. We are referring to the fact that in the resolution made by the Plenary of the Congress, a congressional representative, José Luna, also a member of the Permanent Commission of the Congress of the Republic, cast his vote. Section 100 of the Political Constitution of Peru prohibits such intervention. This provision establishes that “It is the responsibility of Congress, without the involvement of the Permanent Commission, to decide whether to suspend the accused official, disqualify him or her from holding public office for up to ten years, or remove the individual from office, without prejudice to any other liabilities”.

It should be clarified that the non-intervention of the Permanent Commission is justified by Section 99 of the Political Constitution of Peru establishing that this body is responsible for accusing the members of the JNJ before Congress. In this way, Congress intends to respect the principle of impartiality; that is, the one who judges the responsibility is not the same one who has intervened in the prosecution phase. In other words, the separation of functions respects the accusatory principle of any sanctioning process. Ordinarily, one group is responsible for formulating the accusation, while a separate group determines liability. However, this separation was not observed in this case.

The Congress stated that members of the Permanent Commission could vote in the Plenary only if they abstained from voting when the prosecution issued its final report. That was the case for Congressman Luna. His vote was a crucial topic since the vote outcome was extremely close. Therefore, Luna's vote allowed Congress to reach the necessary 67 votes to sanction the members of the JNJ. In other words, Congress could dismiss the members of the JNJ, but only with the essential vote of someone who participated in the prosecution phase.

What is curious in this case is that Congress claims to have the power to deviate from the letter of the constitutional text but denies that the JNJ has similar powers. Following such a line of reasoning, the JNJ cannot reconcile the age limit with the temporary limits of its term, as they did. However, the Peruvian Congress understands that it can expand its interpretive toolbox. Therefore, Congress has many techniques available, not only the literal method. In short, without providing substantial justification for such a distinction, the Legislature claims for itself powers that it denies to the constitutional bodies over which it exercises disciplinary authority.

Moreover, Congress may unfold interpretive creativity to fulfil its functions, sometimes making controversial interpretations about the principle of impartiality. Conversely, that is not the case for the JNJ. Its members must strictly abide by the literal wording of the Constitution unless they are willing to suffer the consequences of a disciplinary procedure. It is necessary to underline that the disqualification for 10 (ten) years is the most severe sanction provided by the Constitution

of the Republic of Peru for high public officials such as the President of the Republic, congressmen, Ministers of State, members of the Constitutional Tribunal, members of the Supreme Court, supreme prosecutors, the Ombudsman, the Comptroller General and, of course, the members of the JNJ.¹⁶

Thus, Congress uses the powers attributed by the Constitution to remove the JNJ, but it does so to undermine judicial independence. The legislative body intervened in exercising the interpretative powers of the constitutional body in charge of appointing, evaluating, sanctioning, or removing judges and prosecutors throughout the country. The indeterminacy of the legal provisions and their contentious relationship with other norms served merely as a pretext for asserting control over the composition of this constitutional body.

Even more surprising is that the case was against only two of the members of the JNJ. The charges against Inés Tello are easy to understand because, after all, she was the person favoured by the interpretation formulated by the JNJ. But what is not understandable is why only Aldo Vásquez was held responsible. The legislative resolution states that accusations were made against all the members of the JNJ. However, the rest of the constitutional accusations were dismissed. Congress did not provide any justification for exempting from responsibility the other four members who voted in favor of the contested JNJ resolution.

The legislative resolution against the JNJ members seems to suggest that Vasquez deserved more intense blame because he chaired the JNJ at those times. That is a striking conclusion because we are dealing with a collective decision. Vasquez could not decide on his own what he was dismissed for. He necessarily needed the approval of the other members to decide as they did. Nevertheless, he received the most severe disciplinary sanction possible: dismissal and disqualification for ten years.

However, the other members of the JNJ who supported the decision for which Vásquez and Tello were held responsible were absolved of any liability. They did not even receive a warning or a reprimand. In short, it is inexplicable why Congress only blamed the former President of the

¹⁶ Peru, Political Constitution, Section 99.

JNJ for a decision that was adopted jointly, because if we are dealing with some (allegedly) manifestly unconstitutional action, all those who voted in such a collective decision should be also held liable.

IV.4. Recap: When Congress is Unchained

Congress's exercise of constitutional powers in this disciplinary proceeding did not aim to sanction the members of the JNJ for not subordinating to the Constitution. Thus, some members of the JNJ were punished with the utmost severity, while others departed without any blemish on their records. If the true issue at stake had been the JNJ's commitment to the rule of law, then, following Congress's own reasoning, a different course of action would have been appropriate. All members of the JNJ should have been removed and disqualified. That was not the case.

Selective application of the law is intended to undermine and interfere with the autonomy of the body in charge of selecting, appointing, sanctioning, evaluating, and sanctioning judges and prosecutors in the country. For what purpose? It is difficult to conjecture a synthetic and global explanation. One thing is known for sure. Congress capable of imposing responsibilities on some and exempting others without further explanations cannot avoid giving a worrying political message to the rest of the branches of government: "We apply our control powers over the constitutional organs to whomever we please".

To sum up, Congress communicates that the separation of powers, checks and balances, and judicial independence are at its mercy. In other words, the Peruvian Congress affirms with these decisions that it is above all other branches and powers of the government.

V. Concluding Balance: The Necessary Harmonization of the Form and Substance to Ensure Constitutional Democracy

There is an iconic phrase in Argentine cinematography spoken by the protagonist played by Isabel Sarli as she attempts to resist the dubious intentions of her aggressor. With a haughty look and a

challenging tone, she pronounces her famous phrase: “You scoundrel, what do you want from me?” Although that scene was nothing more than a popular myth, it leaves a profound message for this work.

Liberal constitutionalism, when not actively defended, becomes vulnerable and subject to the whims of unscrupulous actors. These actors are not shy. They exercise constitutional powers to camouflage their aspirations to perpetuate themselves in the office. In less extreme cases, they make efforts to undermine the mechanisms that ensure oversight of governmental actions. In short, without instances of institutional defence, the autocratic pretensions have no retaining wall and, therefore, they can batter their victim — liberal constitutionalism — with sheer impunity.

The phenomenon of abusive constitutionalism, as examined in this paper, reveals a fundamental paradox: while constitutional mechanisms intend to protect democracy, some actors could manipulate those institutions to subvert it from within. The cases of Venezuela, Argentina, and Peru illustrate how political actors — from the executive, legislative, or judicial branches — have used formally legal means to erode judicial independence and weaken democratic institutions.

The cases we have summarized in this paper underline a topic of central relevance for studying abusive constitutionalism. It is only sometimes a matter of manoeuvres undertaken by the executive branch. The Peruvian case reveals how one branch of government, i.e., the Legislative Branch, seeks to set itself up as the power above the other branches. Consequently, not only holders of the National Executive Power or aspiring dictators seek to abuse institutions to undermine the Rule of Law. Plural and collective bodies such as the Congress of the Republic also undertake abusive manoeuvres.

The Venezuelan case demonstrates how constitutional justice was co-opted to consolidate executive power, turning the Judiciary into an instrument of authoritarian rule. Argentina’s attempt to “democratize” judicial appointments reveals the risks of subjecting judicial independence to partisan politics, effectively placing the Judiciary under the influence of the political actors it is supposed to control. The Peruvian Congress’ selective removal of National Justice Board members highlight how

legislative control over judicial oversight bodies can become a tool for political interference rather than accountability.

Indeed, co-opting justice, and especially the final interpreters of the Constitution, was a necessary means to exercise power without actual instances of control. That collusion between the Executive branch and the Judicial Power occurred in the Venezuelan presidential elections in 2024. The judicial system appointed Nicolás Maduro as the elected President despite multiple evidence of fraud. It was of no use that the opposition candidate presented more than 80 % of the electoral records supporting a different outcome; that is, the Venezuelan people elected Edmundo Gonzalez as their President. The courts disregarded the fact that the opposition was not allowed to enter the premises of the National Electoral Council to control the vote-counting process, contrary to the provisions of the electoral law itself. However, none of that mattered for the judicial system.

The TSJ of the Bolivarian Republic of Venezuela consecrated Nicolás Maduro as the elected President. Nonetheless, the most surprising aspect of such a decision is its unsound reasons and foundations. It alleges a cybernetic attack on the electoral authority in charge of counting the votes, but without specifying how and when such a cyber-attack occurred. Even more curious, the TSJ did not refute the validity of the records presented by the opposition. In a few words, thanks to the TSJ, Maduro was re-elected once again.

The Argentine case, in turn, reveals how Cristina Fernández de Kirchner sought to subordinate the federal judges to the national electoral dynamics. That implied not only that the candidates to be members of the Council of the Magistracy had to be elected by popular vote. The most significant issue was that candidates were required to participate in partisan politics, as only those affiliated with parties present in at least 18 of the 24 electoral jurisdictions could appear on the ballot and run for election.

Furthermore, the Council of the Magistracy can select, remove and sanction the federal judges. Since those judges have the power to implement the electoral law and to resolve the controversies that this would raise, they would have indirect control of some decisive electoral issues. In short, Cristina Fernández de Kirchner intended to influence

the appointment of the judges who would be the ones to control the application of the electoral law on political parties. Thus, the electoral processes would be in the hands of judges who reached their positions by the one they would then have to control.

A critical insight from these cases is that threats to constitutional democracy are not always direct or overt. Currently, autocratic aspirations no longer employ violent *coups d'état*. They usually do not seize constitutional institutions by sheer force. Instead, they weaken the Rule of Law while pretending to enhance it. The latest trend among autocratic or hybrid regimes is to use institutional forms to undermine constitutional democracy. Therefore, legal scholars, political scientists, and institutional actors must remain vigilant against disconnection between the constitutional form and democratic substance. The mere existence of constitutional institutions is not enough to safeguard democracy, as their ability to function independently and uphold democratic principles ultimately determines their legitimacy. Aligning the formal aspects of constitutionalism with its substantive goals is essential to ensuring that constitutional democracy remains resilient against internal subversion.

To sum up, we should pay close attention if political powers attempt to undermine judicial independence under the guise of improving or democratizing the Judiciary. Without independent judges, we would have eradicated one of the primary instances of limiting political actors. The constitutional equivalent of the saying "It's a wolf in sheep's clothing" would be "That is an autocrat in institutional clothing". Such closing is no more than a disguise, but only if we know that just wearing a habit does not make you a monk. More importantly, without institutions capable of upholding such claims, constitutional democracy can never be truly secure.

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