Machado vs. the Goliath Chavista

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On October 27, María Corina Machado was declared the winner of the presidential primary elections organized by the National Commission, a civil society association. With more than 92% of the votes, she has become the new face of the Venezuelan opposition. Despite having popular support, her ability to run for the presidency in 2024 is in doubt. Since June 2023, the political ban she was once subject to in 2015 has been extended for fifteen years, which the Venezuelan Supreme Tribunal of Justice (STJ) confirmed on October 30 following an electoral administrative appeal by the pro-government parliamentarian Brito Rodríguez. This blog details the constitutional and procedural problems that plague Machado's politicial ban and explains why it should be seen as Maduro's latest attempt to obstruct the holding of free and fair elections in 2024.

The Current Institutional Crisis in a Nutshell

Since the first presidential election of Chávez in 1998, Venezuela has been ruled by a Chavist regime. In his moribund condition, Chávez appointed Nicolás Maduro Moros as his successor and enjoined his followers to vote for him. Following Chávez's death on March 5th, 2013, Maduro won the presidential elections in 2013 against Capriles Radonski and has governed the country ever since. His rule is widely known for its large-scale-human-rights violations and a humanitarian crisis that has caused more than 7 million Venezuelans, a quarter of the country's population, to flee the country.

Venezuela's current institutional crisis can be traced back to 2015 when the opposition won two-thirds of parliamentary seats, their first electoral success since the electoral defeat of Chavez in 2007. In retaliation, the pro- Chavist STJ declared the parliament in contempt and Maduro decreed the creation of a Constituent Assembly, which instead of drafting a new Constitution acted as a parallel parliament. Just before the start of the new parliament's term, the incumbent National Assembly illegally selected new government-friendly magisters for the STJ; an appointment that subsequently would be nullified in 2016 by the new National Assembly. Despite the government's refusal to recognize the annulment, the IV. National Assembly elected new magisters that would later be persecuted and forced into exile, leading thus to the creation of a parallel STJ operating from exile.

In 2019, after holding fraudulent elections in December of 2018, in which Nicolas Maduro was proclaimed the winner, the institutional crisis reached its climax: Juan Guaidó, then president of the National Assembly, declared himself the interim president, a decision supported by Machado. He did so on the basis of Article 233 of the Venezuelan Constitution which regulates the cases of absolute absence (*faltas absolutas*), or permanent unavailability to serve, of the President, *inter alia,* due to popular revocation of his mandate. If the absence occurs *before* the chosen President assumes office, the President of the National Assembly shall take on the presidency until the new President is elected.

This political move made Guaidó, who until then had been a largely unknown lawmaker, the leader of the opposition. However, because Guaidó couldn't keep his political promise to overthrow the government of Maduro, the opposition lost faith in him and the National Assembly voted to dissolve his interim presidency in 2022. The unfulfilled political promises and the termination of Guaidó's interim presidency led to a lack of leadership among the opposition. This changed on October 27, when María Corina Machado was declared the winner of the presidential primary elections organized by the national Commission, a civil society organization.

Machado's Political Trajectory

Machado made her first steps into politics in 2002 when she co-founded the NGO *Súmate* – an organization dedicated to the defense of electoral rights. Among other projects, it helped to recollect millions of signatures to hold a referendum against Chávez in 2004. In 2005, Machado was welcomed in the White House by the former president of the U.S., George W. Bush, which infuriated the government. In 2010, after resigning from her post in *Súmate*, Machado ran for parliament and won her first and only office. Due to her appearance at the Permanent Council of the OAS in 2014, however, in which she denounced the serious situation in Venezuela, making usage of an alternative accreditation of Panama, Machado was stripped of this mandate by Diosdado Cabello (then president of the National Assembly). In 2012, the opposition organized – for the first time – presidential primaries, in which Machado participated with her liberal party "*Vente Venezuela*". Among other opposition figures, Machado was subsequently charged with planning the murder of Maduro in 2014; an accusation that was repeated in 2018. Neither resulted in a conviction.

Instead, Machado was banned from holding public office for 12 months in 2015 pursuant to Article 39 of the Decreto con Rango, Valor y Fuerza de Ley Contra la Corrupción, which lists concealment, falsification or non-compliance with regards to asset disclosure obligations as relevant legal grounds. Notably, the official document does not specify the ground for Machado's ban. Even though those 12 months have already passed years ago, a public servant of the Comptroller General's Office confirmed in June 2023 that the political ban placed on Machado has been extended based on Article 105(2) of the Ley Orgánica de la Contraloría General de la República y del sistema nacional de control fiscal (LOCGRSNCF) for fifteen years, likely until 2030. On August 14, the STJ rejected two legal actions against Machado's political disqualification (Judgement Nr. 1.243, File Nr. 23-0706 and Judgement Nr. 1.244, File Nr. 23-0722). The first claim was rejected due to the applicant's lack of legitimacy, while the other was dismissed due to having an unsuitable subject matter for a constitutional complaint. Curiously enough, both decisions were only recently published on October 16, some days after the fifth evaluation of the state of political and civil rights in Venezuela by the United Nations Human Rights Committee has started.

Constitutional Issues with the Ban

From a constitutional law and human rights perspective, Article 105(2) LOCGRSNCF is highly problematic. In particular, it empowers the Comptroller of the Republic – who is not a judge –to ban officials that have committed an administrative – not a criminal offence – from the exercise of public functions. This appears to violate Article 42(2) of the Venezuelan Constitution which establishes that only a final *judicial* decision might suspend the exercise of political rights. Furthermore, Article 65 of the Venezuelan Constitution specifies that only criminal acts committed during the performance of public functions can justify the suspension of political rights. Hence, the commission of an administrative offence is inadequate to suspend political rights.

For similar reasons, Article 105(2) LOCGRSNCF is also incompatible with the ACHR. Article 23(2) ACHR stipulates that the law may only regulate the exercise of the right to participate in government on the basis of, inter alia, sentencing by a competent court in criminal proceedings. Despite its denunciation by the government in September 2012, the ACHR arguably still forms part of the Venezuelan block of constitutionality. Both because the denunciation was unconstitutional from the beginning, as it infringed the constitutional supremacy of the ACHR (Article 23 of the Venezuelan Constitution), the right to address petitions or complaints to an international body for the protection of human rights (Article 31(1) of the Venezuelan Constitution) and the principle of progressiveness of human rights (Article 19 of the Venezuelan Constitution), and because Guaidó ratified the ACHR with retroactive effect in July 2019.

Procedural Irregularities

There were also significant procedural irregularities with the ban's extension. In June 2023, upon a request by the pro-government parliamentarian Brito Rodríguez, a public servant of the Comptroller General's Office notified him about the decision of the Comptroller to "*continue*" its assets investigations against Machado. According to the document, it was "*found*" that Machado is banned from holding public office for 15 years. Formally speaking, the notification amounts to a mere relationship certification, since it reports the testimony of an official on facts of their knowledge regarding the content of a case. However, Article 173 Ley Orgánica de la Administración Pública prohibits the public issuance of such a document.

At the same time, the certification was not issued by the current Comptroller of the Republic, Félix Antonio Santana García, but by Antonio José Meneses Rodríguez, a Director-General for special procedures of the Comptroller's office. Yet, pursuant Article 105(2) LOCGRSNCF, the right to ban someone from holding public office is "exclusively and exhaustively" vested in the Comptroller. Moreover, the addressee of the letter was not Machado, but the parliamentarian Brito. This is contravention of Article 79 and Article 77 LOCGRSNCF which declare such kind of investigations to be "reserved". Hence, only directly involved parties shall be informed.

At the same time, Machado is arguably no longer a norm addressee of Article 105(2). Thus, Article 9 LOCGRSNCF stipulates, *inter alia,* that only those working in bodies or entities of public power are subject to it. Machado, however, has not held any official public office since her removal from parliament in 2014.

Finally, the suggested grounds for the extension suffer from vagueness and generalizations. They include unspecified errors and omissions in Machado's sworn declarations of assets; her participation in the "corruption scheme" of Juan Guaidó which, inter alia, led to the "criminal" blocking of Venezuela as well as the "shameless dispossession" of companies and wealth (located abroad) of the Venezuelan people; her "request" to blockade Venezuela economically which ended up causing "great harm to the public health system" and the "external displacement of the population;" and her acceptance of the accreditation as an alternative representative of the delegation of Panama at the OAS "since" 2014. It is questionable whether the sanctions imposed on Venezuela have something to do with a "request" coming from Machado or that the "great harm to the public health" and the external displacement of the population were caused by her. It also remains unclear exactly how Machado "participated" in the "corruption scheme" of Guaidó, given that she has not held public office since 2014. Finally, Machado only appeared once as an alternative representative of Panama at the OAS in 2014, and not "since" then.

In light of these difficulties, this "ban extension" is unlikely to pass legal muster. To add injury to insult, it might also infringe Machado's human rights (her right to due process (Article 49 of the Venezuelan Constitution), to judicial protection (Article 25 ACHR) and her right to participate in government (Article 62(1) of the Venezuelan Constitution, Article 23 ACHR, Article 25 ICCPR)).

A State of Uncertainty

After the collapse of Guaidó's interim presidency, the Venezuelan opposition lacked leadership. This changed when more than 2 million Venezuelans voted for María Corina Machado in the presidential primary elections organized by the National Commission in October 2023. Her political ban is arguably further evidence of undemocratic and arbitrary essence of Maduro's regime which tries to hold onto power through legal and political manipulation. Machado's disqualification affects not only the strength of the opposition, who is being left with a leader for whom they cannot vote in the upcoming presidential elections, but also the democratic future of the country. In this regard, it should be clear that a presidential election without Machado's candidature can neither be fair nor free. And yet, in spite of the pressure exerted by the U.S., it does not seem that the narco–kleptocratic-state of Maduro will lift the ban on Machado any time

soon. Under these circumstances, there is a high chance that the opposition will have no choice but to choose another candidate who – for reasons of time – probably will not be selected in a primary election.

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