



Distrust in Justice:

The Afiuni case and the independence of the judiciary in Venezuela

Executive Summary
April 2011

A report of the visit by the International Bar Association Human Rights Institute
to the Bolivarian Republic of Venezuela between 8 to 11 February 2011

Supported by the Foundation Open Society Institute

Material contained in this report may be freely quoted or reprinted,
provided credit is given to the International Bar Association



International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868
Fax: +44 (0)20 7691 6544
Website: www.ibanet.org

Executive Summary

This is the executive summary of a report of a fact-finding visit to the Bolivarian Republic of Venezuela ('Venezuela') carried out by a high-level International Bar Association Human Rights (IBAHRI) delegation between 8 and 11 February 2011, to examine the independence of the judiciary and the situation of the legal profession. During the visit, the delegation met with members and former members of the judiciary, lawyers, non-governmental organisations and representatives of the diplomatic community. The delegation requested official meetings with Government authorities, to which it received no response, apart from the State Representative for Human Rights before the Organization of American States (OAS) and the United Nations, for whose cooperation the delegation is grateful.

The delegation comprised Belisário dos Santos Junior, former Secretary to the Ministry of Justice for São Paulo State and member of the International Commission of Jurists; Professor Carlos Tiffer, former Prosecutor and Judge of the Supreme Court of Costa Rica; and Alex Wilks, Senior Programme Lawyer of the IBAHRI.

The terms of reference of the mission were:

- (i) To examine the current status of judges and lawyers in Venezuela and their ability to carry out their professional duties freely;
- (ii) To investigate impediments, either in law or in practice, to the effective administration of justice;
- (iii) To examine the legal guarantees for the effective functioning of the justice system, including the independence of the judiciary and whether these guarantees are respected in practice; and
- (iv) To make recommendations with respect to the above.

Summary of conclusions

(i) The administration of justice in Venezuela

The effective administration of justice in Venezuela is challenged by the lack of independence of the judiciary, which has been a theme of recurrent concern in the international community, in particular the OAS and the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The delegation concludes that, in general, the situation of the independence of the judiciary has deteriorated significantly since the last visit of the IBAHRI in 2007. The delegation is concerned that the separation of powers, a fundamental principle of the rule of law, is under threat in Venezuela as the result of several factors.

The delegation highlights as examples of this lack of independence: (i) constitutional problems regarding the election of judges of the Supreme Justice Tribunal (*Tribunal Supremo de Justicia* – TSJ) by an outgoing National Assembly; (ii) the lack of implementation of the Judicial Code of Ethics ('the Code') and inadequate parameters regarding the appointment and removal of judges; (iii) the regime of 'provisional judges' and the lack of guarantees for independence and security of

tenure for these judges; and (iv) statements and actions by state authorities – starting with the President of the Republic – that seriously compromise the independence of the judiciary.

These factors raise serious concerns regarding the existence of a mechanism of checks and balances between the different branches of government, which are eroding the already-low credibility of the judiciary and are deepening the grave political and social polarisation that exists in Venezuela. The IBAHRI concludes that the clear delineation of the separation of powers in Venezuela – an essential principle of the rule of law – is fading significantly.

The IBAHRI was concerned to hear that the election of judges of the TSJ took place unconstitutionally and after the elections of members of the National Assembly in September 2009, so that judges aligned to the ruling party would be selected. This is because in January 2010 a new National Assembly would assume its functions, in which the ruling party does not have the required two thirds majority to make these nominations. The IBAHRI concludes that these appointments compromise the perceived independence and impartiality of the judiciary, for apparently having been based on political considerations.

The lack of implementation of the Code, in particular the non-constitution of disciplinary tribunals as is required by the Code and ordered by Inter-American Court of Human Rights in the case of *Reverón Trujillo v Venezuela*, undermines the independence of the judiciary. The Code provides that the members of disciplinary tribunals should be elected by communal councils. The IBAHRI is concerned that the appointment of these judges is instead subject to direct political influence and that consequently, effective guarantees for security of tenure do not exist.

The high number of provisional judges (over 50 per cent) combined with the lack of the implementation of competitive judicial service entrance exams (*concursos*), as established by the Constitution of the Bolivarian Republic of Venezuela ('the Constitution'), and the removal of judges without due process, creates a climate of instability amongst judges, which makes them vulnerable to external pressures from other branches of government, in particular the executive.

Finally, the IBAHRI is concerned by the comments at the official opening of the 2011 judicial calendar by the master of ceremonies, Judge Fernando Ramón Vegas Torrealba of the Electoral Chamber of the TSJ, that the Constitution should be interpreted in accordance with the ideology of the Bolivarian Revolution. As mentioned in the 2007 IBAHRI report regarding the official opening of the 2006 judicial calendar and the declarations of President Chávez on the impossibility of judges acting contrary to the Bolivarian Revolution, such comments threaten judicial autonomy and exemplify the political pressures exerted on the judiciary. The IBAHRI is also concerned at the public statements of the President of the Republic, which are considered in this executive summary and examined in further detail in the report.

RECOMMENDATIONS

- The IBAHRI calls upon the Government to guarantee the separation of powers in order to strengthen the rule of law and the independence of the judiciary. In particular, the IBAHRI recommends that the Government adopts necessary measures to ensure that the appointment and removal of members of the judiciary are realised in accordance with national and international standards regarding the independence of the judiciary.
- The IBAHRI calls upon the Government to adopt necessary measures to eliminate the regime of provisional judges in Venezuela and to implement competitive judicial service entrance exams as provided for in the Constitution. The IBAHRI also recommends that internal legislation and practices which allow for the free removal of provisional judges should be modified to guarantee security of tenure until the competitive judicial service entrance exams are implemented.
- The IBAHRI calls upon public officials and members of the judiciary not to make public statements that exert political pressure on the judiciary and undermine the separation of powers.

(ii) Laws that threaten the separation of powers

The IBAHRI is concerned at laws approved by the outgoing National Assembly that undermine the separation of powers and especially the independence of the judiciary. In particular, the ‘Enabling Law’ (*Ley Habilitante*) allows the President of the Republic to issue decrees that have the same rank and status of law, including constitutionally mandated legislation (*ley orgánica*) in areas that affect human rights. The IBAHRI is also concerned at the provision to the President of sweeping powers to legislate for a period of 18 months in a range of imprecisely-defined areas, without allowing the participation of Venezuelan society as represented in the National Assembly.

Further, the IBAHRI considers the Law of the Defence of Political Sovereignty and National Self-Determination, which, inter alia, limits national non-governmental organisations from receiving support from international donors, may restrict civil society from fulfilling its vital role in the promotion of human rights.

RECOMMENDATION

- The IBAHRI recommends to the Government that laws are promoted that are compatible with the the rule of law and separation of powers; and that the above-mentioned laws, amongst other laws recently passed by the National Assembly, are reviewed and modified to ensure their compatibility with the Constitution and international human rights standards.

(iii) Relationship between Venezuela and international organisations

As mentioned in the IBAHRI 2007 report, the IBAHRI expresses its disappointment at the deterioration of relations between international organisations and Venezuela, especially within the Inter-American system. The IBA considers the constant public statements by high-ranking officials that discredit the organs for the protection of human rights in the Inter-American system a risk to respect for human rights and the rule of law in Venezuela. Further, the IBA is seriously concerned at the judgment of the Constitutional Court of the Venezuelan Supreme Court ('the Constitutional Court') of 18 December 2008, which not only refused to implement a judgment of the Inter-American Court of Human Rights but also requested the executive to withdraw from the Inter-American Convention on Human Rights.

The delegation is also concerned by statements made to it by the State Representative for Human Rights before the OAS that the Government do not intend to implement any decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in the future.

RECOMMENDATIONS

- The IBAHRI calls upon the Government to demonstrate its commitment for the guarantee of human rights, its respect for the recommendations and decisions of international tribunals and to refrain from making declarations that threaten compliance with these decisions.
- The IBAHRI respectfully recommends to the Constitutional Court to modify its jurisprudence with respect to non-compliance with the decisions and recommendations of the organs of the Inter-American system for the protection of human rights. The IBAHRI respectfully reminds the Constitutional Court of the good faith obligation on the State to implement international treaties that it has ratified, or *pacta sunt servanda*, and that internal laws may not be invoked to avoid compliance with international human rights obligations.

(iv) The case of Judge María Lourdes Afiuni

In its 2007 report, the IBAHRI expressed concern at serious impact of external interference, especially by the executive power, on the independence of the judiciary. The 2011 delegation found this concern to be especially apparent in the case of Judge María Lourdes Afiuni, which clearly demonstrates the lack of independence of the judiciary and the external pressures to which they are subject.

The case of Afiuni is considered in detail in Chapter 3 of this report. María Lourdes Afiuni is a titular judge who has been detained since 2009 and has been subject to disciplinary proceedings since she released on bail an individual who had been held in pre-trial detention for two years, applying provisions of the Venezuelan penal code and taking into account a decision of the UN Working Group on Arbitrary Detention that considered that the individual was being held unlawfully. She was detained in a prison where she suffered death threats, attacks and developed serious health complications. Immediately after her detention, President Chávez stated on national television that she is a bandit (*bandida*); that a new law should be made for her, as someone who sets a criminal free is more of a threat to the Republic than an assassin; and that her case should be an example to other judges. At the time of the delegation's visit, she had been transferred to house arrest following a court order to allow her to recover from a major operation.

Her case has generated considerable international concern and given that the President of the Republic has publicly stated that her case should be an example to other judges, is considered by the IBAHRI to be a paradigmatic case for the situation of the independence of the judiciary in Venezuela.

The IBAHRI concludes that there are various elements in the case that represent a serious threat to the independence of the judiciary.

Due process violations

The IBAHRI is concerned at multiple violations of due process and judicial guarantees in the case against Judge Afiuni, including the violation of her right to personal liberty; inadequate information regarding the criminal charge against her; her right to defence and presumption of innocence; and the lack of due process in her suspension.

The IBAHRI considers that Judge Afiuni was deprived of her right to personal liberty without the appropriate due process guarantees, given that in such cases, in principle, restriction of liberty should be administrative and not judicial. Further, the IBAHRI considers that she has not been adequately informed of the charge against her, nor for the reason for her detention; which is in contravention of Venezuelan domestic law and international treaties, and that therefore, her detention is arbitrary.

The IBAHRI also considers that her right to defence has not been guaranteed. For example, her multiple applications for recusal of the judge in charge of her case have either not been answered or have been declared inadmissible by the same judge whose recusal was being requested, and as a result her lawyers have been denied access to the case file. Due to various due process violations which are considered in more detail in this report, Judge Afiuni has refused to submit herself to what she considers to be an illegal process against her.

The violation of the presumption of innocence is also a matter of concern to the delegation. Several high-ranking public officials have made statements regarding her alleged guilt, including President Chávez the day after her detention. The IBAHRI considers this to be a serious and direct interference in the administration of justice that undermines the separation of powers and the rule of law.

Finally, since 11 December 2009, Judge Afiuni has been suspended from her post and her salary has been withdrawn without any disciplinary process. The IBAHRI considers that any state action that restricts the rights of its citizens must respect minimum due process guarantees. In this respect, Judge Afiuni has not been able to defend herself as the disciplinary proceedings have been non-existent, although she has nevertheless received a disciplinary punishment.

RECOMMENDATION

- The IBAHRI calls upon the Government to adopt necessary measures to ensure that Judge Afiuni is subject to minimum judicial guarantees, as established in the Constitution and international treaties. Further, the IBAHRI urges the Government to refrain from limiting her right to visits from her family, friends and lawyers.

Conditions of Detention

The IBAHRI considers that Judge Afiuni was detained arbitrarily in the National Institute of Feminine Orientation in conditions that were not compliant with the UN Basic Principles for the Treatment of Prisoners, and was disturbed to hear that due to the lack of access to a civilian doctor and constant impediments to the entry of doctors to visit her in the prison were so bad that her health deteriorated to the point that she had to have a laparotomy and hysterectomy.

On 2 March 2011, subsequent to the IBAHRI's visit, the Inter-American Court of Human Rights withdrew its order for provisional measures regarding the Judge Afiuni's conditions of detention, as the Judge had been transferred from prison to house arrest following the operation, and therefore the most serious elements necessary for this type of order are no longer applicable. Nevertheless, although the conditions of detention may have changed, the IBAHRI considers that Judge Afiuni is being arbitrarily detained.

RECOMMENDATION

- The IBAHRI urges the Government to implement the recommendation of the UN Working Group on Arbitrary Detention in the case to allow the Judge her personal liberty during the criminal proceedings. Nevertheless, whilst the Judge is deprived of her liberty, the delegation calls upon the Government to adopt the necessary measures for the Judge to be allowed to remain in her home due to her medical condition and not to return her to the prison.

(v) Situation of prisons in Venezuela

Having examined the circumstances of Judge Afiuni and her conditions of detention, the general situation of prisons in Venezuela appeared to the IBAHRI to be particularly serious and therefore required some consideration in this report. In its 2007 report, the IBAHRI noted that the situation of Venezuelan prisons was extremely serious and concluded that it was vital to implement measures to prevent inhumane conditions for those deprived of their liberty. The IBAHRI reiterates this conclusion given that, in spite of several provisional measures regarding Venezuelan prisons given by the Inter-American Court of Human Rights, violence has in fact risen in the past few years and that Venezuelan prisons are currently considered the most violent in Latin America.

RECOMMENDATIONS

- The IBAHRI calls upon the Government to implement the provisional measures ordered by the Inter-American Court of Human Rights in order to avoid more violations.
- The IBAHRI recommends the creation of a comprehensive action plan to protect those deprived of their liberty and in compliance with the UN Basic Principles for the Treatment of Prisoners and the orders of the Inter-American Court of Human Rights.

(vi) The effect of the Afiuni case on the judiciary

The IBAHRI considers the consequences of the proceedings against Judge Afiuni to be extremely dangerous for the independence of the judiciary where a climate of fear exists. Before the Afiuni case, judges were fearful of the threat of disciplinary proceedings or removals; however, the IBAHRI is extremely concerned that now members of the judiciary are fearful of being deprived of their liberty if they make a decision that is not aligned with the will of the executive. The delegation heard on several occasions ‘Nobody wants to be the next Afiuni’. This not only represents a serious threat to the independence of the judiciary, it crucially undermines public confidence in the administration of justice and deprives Venezuelan citizens of the legitimate expectation to live in a democratic society under the rule of law, as enshrined in the Venezuelan Constitution and the international agreements to which Venezuela is party.

RECOMMENDATIONS

- The IBAHRI urges the Government to refrain all practices of intimidation against members of the judiciary, so that they are able to decide cases in accordance with the law, justice and equity, without political interference or external pressure.
- The IBAHRI urges public officials, including the President of the Republic, to refrain from making statements that undermine the independence of the judiciary and from directly interfering in its functioning.

(vii) Responses to the Afiuni case

The Afiuni case has generated widespread concern nationally and internationally amongst bar associations, judges’ associations and international human rights organisations. This report details many of their responses to the case and their concerns regarding the independence of the judiciary in Venezuela.

The IBAHRI considers it important to highlight that there exists a measure of control and interference by the Government over bar associations in Venezuela. For example, a decision by the Constitutional Court annulled the elections of the Caracas Bar Association and has prevented it from renewing its leadership council. In relation to judges’ associations, the IBAHRI considers that the constitutional prohibition on judges to form associations prevents them from exercising their right to freedom of association and restricts their ability to act independently and promote their independence, as is the case with other professions.

RECOMMENDATIONS

- The IBAHRI urges the Government to guarantee the right for lawyers and judges to freely form associations to fulfil their legitimate objectives, such as the defence of their rights and independence, in accordance with the UN Basic Principles on the Role of Lawyers and the UN Basic Principles on the Independence of the Judiciary.
- The IBAHRI urges the Government to modify laws that specifically prohibit the association of judges.

International organisations emphatically condemned the detention of Judge Afiuni and the violation of her judicial guarantees. Firstly, the OAS expressed concern at the gravity of the Judge's detention and found multiple violations of her personal integrity, and the Inter-American Commission on Human Rights ordered precautionary protective measures that were then converted into provisional measures issued by the Inter-American Court. Further, the UN has pronounced on various occasions on the impact the Judge's case may have on the judiciary, and the UN Working Group on Arbitrary Detention found that the Judge was being held arbitrarily and requested to the Government her immediate release.

The IBAHRI is concerned that none of these decisions have been implemented by the Government. Not only does this undermine the rights of petitioners, but risks undermining the international systems for the protection of human rights as a whole.

RECOMMENDATION

- The delegation urges the Government to comply, *pacta sunt servanda*, with the obligations contained in the international human rights treaties that the State has signed.



International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868
Fax: +44 (0)20 7691 6544
Website: www.ibanet.org