THE COLLAPSE OF THE RULE OF LAW AND THE STRUGGLE FOR DEMOCRACY IN VENEZUELA

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THE COLLAPSE OF THE RULE OF LAW AND THE STRUGGLE FOR DEMOCRACY IN VENEZUELA

Lectures and Essays (2015-2020)

Foreword: Asdrúbal Aguiar

Cátedra Mezerhane sobre
Democracia, Estado de Derecho y
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To Beatriz,
with all my thanks for her permanent support
and all her love over the past sixty years.

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AUTHOR'S NOTE

The process of subverting and demolishing the democratic institutions in Venezuela, which began in 1999 after the election of the late Hugo Chávez Frías as President of the Republic, has continued without interruption during the past two decades. The process started with his assault of power through a constitutional-making process developed through a Constituent Assembly that was convened without having any support in the then in force 1961, imposing the people's sovereignty over the principle of constitutional supremacy. The result was the intervention and takeover of all branches of government by the elected Constituent Assembly, which eventually imposed in the country the authoritarian, centralistic and militaristic government that has developed over the past twenty years.

For such purpose, the first action taken by the Constituent Assembly and continued by the government was the takeover of the Judiciary, which was stripped of its autonomy and independence, transforming the Supreme Tribunal and its Constitutional Chamber in the most ominous instrument of authoritarianism. The Chamber, in effect, completely controlled by the government, has molded and accepted as legitimate all the constitutional violations that have occurred, particularly affecting the decentralized form of government, the principle of separation of powers, the independence of the judiciary and the representative democratic government; changing in many cases, the sense and meaning of constitutional provision and even mutating their content. The result, from the democratic point of view, has been the complete lack of its essential elements, namely the access to power and its exercise subject to the rule of law; the performing of periodic, free and fair elections based on universal, direct and secret vote as an expression of the

sovereignty of the people; the plural regime of political parties and organizations; the separation and independence of all branches of government, and the respect for human rights and fundamental freedoms.

Since 2005, when I established my residence in the United States beginning my teaching at the Columbia Law School in the City of New York, I have continued following and studying all the decisions and facts that within the authoritarian government have eroded the democratic system, the result of which were the following two books: Dismantling Democracy. The Chávez Authoritarian Experiment, *published in 2010 by Cambridge University Press; and my book:* Authoritarian Government v. The Rule of Law. Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, published in 2014, by Fundación de Derecho Público, Editorial Jurídica Venezolana.*

Since the last publication, the situation in the country has worsened, and we have witness the definitive collapse of the rule of law, on the one hand, and in the other, the struggle to restore democracy lead by the National Assembly elected in December 2015, the only legitimate elected institution in the country, after an unconstitutional convening of another fraudulent Constituent Assembly in 2017, violating the provisions of the Constitution, and after the unconstitutional call by it of an anticipated and unconstitutional presidential election in order to reelect Nicolas Maduro as President of Venezuela in 2018; reelection considered as a "farce" by the National Assembly which declared it as "nonexistent." The result was, in January 2019, facing the lack of a President legitimately elected that could take his oath for the presidential term 2019-2025, the assumption by the National Assembly of a constitutional transition process to restore democracy and the enforcement of the Constitution.

In that context, this book is a collection of all the essays I have written in English during the past six years, analyzing the most important decisions issued by the authoritarian government and its Supreme Tribunal against the rule of the Constitution, as well as of the National Assembly in order to restore democracy and the rule of law. I have basically preserved the original text of the essays as a sort of testimony expressed at the time when they were written, on the course of the different events.

I have organized all the Essays in an Introduction and Fifteen Chapters, within Six Parts.

The *INTRODUCTION, on The Collapse of the Rule of Law, contains the t*ext I wrote for the Presentations I delivered on "The collapse of the Rule of Law in Venezuela," at *The 25th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium*, on *Shifting Tides: Recent Developments in Latin American Rule of Law*, presented by the *NYU Journal of International Law and Politics*, New York University, New York, October 10th, 2019.

PART ONE on The Endless Process of Destruction of the Democratic State, *contains the text of following* Essays:

Chapter I, on *17 Years Disregarding the Constitution. What to Expect: 1999-2017, is the text essay written for the* Presentation I delivered at the event: "Venezuela: 17 Years Disregarding the Constitution. What to Expect? *Venezuelan American Association of the U.S.*, New York, May 31, 2017.

Chapter II on Transition from Democracy to Tyranny through the Fraudulent Use of Democratic, *is the text of the* Presentation I delivered at the *Clough Center for the Study of Constitutional Democracy,* Boston College, Boston, September 25, 2018.

PART TWO on Some Steps on The Dismantling of the Democratic State, contains *the text of the following Essays:*

Chapter III is the text of the Essay on Dismantling of the Judiciary: The Tragic Institutional Situation of the Judiciary, which I presented as the Venezuelan National Report, at the International Congress of Comparative Law organized by the International Academy of Comparative Law in Vienna in 2014.

Chapter IV is the text of a paper written commenting The December 2014 Coup d'état: The Unconstitutional Indirect Election of Senior Public Officials of the Branches of Government, in reference to the unconstitutional appointment of High Officials of the State made in December 2014 by the National Assembly without complying with the provisions of the Constitution.

Chapter V is an essay on The Communal State and the Dismantling of the Federal State. Unconstitutional

Developments, written in 2015 *to be published in the book honoring my friend professor Giuseppe de Vergottini, of Italy.*

Chapter VI is the text of an essay written in 2018, analyzing the State of Emergency and its Constitutional Implications, referring to the permanent State of emergency decreed by the President of the Republic since 2016.

PART THREE contains the text of following essays devoted to study The Constituent Assembly Unconstitutionally Convened and Elected in 2017:

Chapter VII is the text of the essay: Fraud Against the Venezuelan Constitution and the Will of its People: The Unconstitutional Decree Calling a Constituent Assembly to Approve the Constitutional Reform that was Rejected by Popular Vote in 2007, written in 2017.

Chapter VIII is the text of the essay explaining The Great Lie: The National Constituent Assembly is Neither Sovereign nor is it a Depository of the Original Constituent Power, and has not been Globally Recognized, written in 2017.

PART FOUR on Human Rights Abandoned, contains the text of following essays;

Chapter IX on Human Rights in Latin America: Are We Serious in Protecting Them? is the text of the Presentation I delivered at the Conference on: *Human Rights in the Americas: Are we Serious? James Madison Program in American Ideals and Institutions*, Princeton University, Princeton, May 6, 2016.

Chapter X is the text of the essay on The Judges of Horrors in Action: The *Conviction of Leopoldo López to Prison for the "Crime" of Expressing his Opinion, written in 2015.*

Chapter XI on The Bachelet Report: An Eviction Notice to the Regime, is the text of the essay I wrote commenting the Report of the United Nations High Commissioner for Human Rights on the situation of Human Rights in the Bolivarian Republic of Venezuela" of July 4th, 2019.

Chapter XII on The September 2020 Report of the United Nations Independent International Fact-Finding Mission on Human Rights in Venezuela and its effects with regards to the

Rule of Law and Elections, based on the text written for the Presentation on the UN Report, organized by the Venezuelan Academy of Political and Social Sciences, October 1st, 2020.

PART FIVE on The Process of Transition Towards Democracy Decreed by the National Assembly, since January 2019, contains the text of the text of the essays I have written on the matter, conforming the following Chapters:

*Chapter XIII on The Definitive Collapse of the Rule of Law and the Reaction of the National Assembly in January and February 2019, based on the text written for the Presentation I delivered at the Event on "Perspectives on Venezuela: Present and Future Challenges," organized for the launching of the New York Chapter of the Inter-*American *Bar Association, New York, 17 July 2019.*

Chapter XIV on The Role of the National Assembly Interpreting the Constitution in the Absence of a Legitimately Elected President that Could take Oath in January 2019, based on the Presentation I delivered in an Event organized by SOS Venezuela, in Fordham University at Lincoln Center, Law School Costantino, RM 2-02, New York, NY, February 2. 2019.

Chapter XV on The Democratic Transition Process Established by the National Assembly and its International Recognition, *based on the Presentation I made in the Event: "Ask a Venezuelan: On the Current Constitucional Situation of the Country, March 2019," at the Northwestern Pritzker School of Law, Northwestern University, Chicago, March 8th, 2019.*

PART SIX on The Last Blow against the efforts to Restore Democracy, containing

Chapter XVI, on the "Electoral Circus" organized by the Constitutional Chamber of the Supreme Tribunal colling for an unconstitutional Parliamentary Elections for December 2020, based on the text written for the Presentation at the event "Parliamentary Elections: Unconstitutionality and Illegitimacy," organized by the Venezuelan Academy of Political and Social Sciences, Caracas September 17, 2020.

Chapter XVII, on the Last Blow to the Rule of Law: The "Anti-blockade" "Constitutional Law "to top off and distribute the

Remains of the Nationalized Economy, within a framework of Secrecy and Legal Uncertainty (2020), based on the text written for the Presentation made at the event "The de facto Impact of the unconstitutional Anti-blockade Law in Venezuela," organized by Analitica, Caracas October 22, 2020

All these essays were written in New York, where I have continued to reside due to the political persecution I have suffered from the Venezuelan Government. And as I said referring to those published in the aforementioned book of 2014, they all also follow the same line of thoughts that have oriented my analysis of the authoritarian government developed by the late Hugo Chávez since his election as President of the Republic in 1998, after having failed in his 1992 military coup d'État attempt, promoted against the democratic government; and that has continued to be developed by the government of Nicolás Maduro.

Under these governments the rule of law has completely collapsed, separation of powers and check and balances have disappeared ant the democratic principles have been erased with the consequence that no effective guarantee exists regarding the right to life, humane dignity and security, as well as political rights, the right to assembly, the rights of freedom of association and the freedom of expression, which have been denied.

All this situation has been the object of analysis in the "Report of the United Nations High Commissioner for Human Rights on the situation of Human rights in the Bolivarian Republic of Venezuela" (Bachelet Report) of July 4th, 2019, which I comment in this book, in which by giving an "overview of the human rights situation" it concludes by describing "patterns of violations directly and indirectly affecting all human rights – civil, political, economic, social and cultural" in other words, every right of all Venezuelans, also affecting all the population.

That Report was completed by the Report issued on September 16 2020 by the UN Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela appointed by the United Nations Human Rights Council through Resolution No. 42/25 27 of September 2019, documenting all the horrors that have occur in the country since 2014, qualified as crimes against humanity.

Finally, I what to thaks Professor Asdrúbal Aguiar for accepting writing the Foreword to this book, and his suggestion for t tu by published in the Collection Anales, of the Chair Mezerhane on Democracy and the Rule of Law and Human Rights, Miami Dade College.

New York, October 2020

FOREWORD

THE CONSTITUTIONAL DISMANTLING OF THE VENEZUELAN NATION AND STATE (1999-2020)

Prof. Dr. Asdrúbal Aguiar

Minister of Internal Affairs
and Acting President of Venezuela (1998)
Secretary General of the Democratic Initiative of Spain and the Americas (IDEA)
Member of the Royal Hispanic-American Academy of Sciences, Arts and Letters of Spain

Professor Allan R. Brewer Carías, an emblem of Hispanic-American public law and head of one of its schools, honors me once again by requesting an introductory letter for his new contribution, from a juridical standpoint, about what not few -including Venezuelans themselves as kidnapped victims- view as a gimmick: The unbelievable, sustained and recurring social and institutional crisis that Venezuela has suffered over the first two decades of this century.

His book titled *The Collapse of the rule of law and the struggle for democracy in Venezuela* will be part of the collection of studies of the Mezerhane Chair on Democracy, Rule of Law and Human Rights that I currently direct at the Miami Dade College. It contains

his essays written on this matter over the last five years to highlight what he characterizes as the contempt for the Constitution, an issue that I summarily address in this introduction as a tribute to its author and also as a new reading and update of the lecture that I delivered at the National Academy of Law and Social Sciences of Buenos Aires on July 18, 2013,[1] when presenting my book *Historia Inconstitucional de Venezuela* (EJV, Caracas, 2012).

Professor Brewer analyzes the most important decisions made by the authoritarian government and its Supreme Court against the supremacy of the Constitution, as well as the decisions of the current National Assembly, issued in order to restore democracy and the rule of law. In his opening comments, he describes the full content of his work and defines what has been his line of reasoning in this regard throughout the regimes of Hugo Chávez Frías and his successor, Nicolás Maduro Moros, both of whom have systematically violated the freedoms and human rights of Venezuelans and, totally eroded their guaranties.

He further denounces, squarely, that during that time, not only the international community, but also the United States, had a benign view of the tragedy of Venezuela, to the extent of having branded its critics as dinosaurs in the field of political and constitutional thought. It was necessary for that constitutional and democratic simulation to reach a point of a constitutional dismantling of biblical proportions in order for that perception to change, at least in part.

The author understands the reason for this and illustrates it by noting that the continued coup d'état in Venezuela has been carried out through the purification of unconstitutionalities by the justices, making possible the emergence of an atypical despotic regime in Latin America not caused by an "insurgency in the barracks." Hence, the significance of delving into this sinuous and gradual process of "dismantling" and consequential re-creation of a schizophrenic

[1] "La historia inconstitucional de Venezuela," conference offered at the National Academy of Law and Social Sciences of Buenos Aires, on July 18, 2013, vid. La Ley (Año LXXVII, nro. 153), Suplemento Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires, August 20, 2013; Revista de Derecho Público 133, Caracas, Editorial Jurídica Venezolana, 2013. Also in summarized text, "El chavismo y su herencia: Despotismo iletrado y economía del narcotráfico", www.urru.org, January 17, 2014.

environment of "simulation" of the Rule of Law, more perverse than the worst tyrannies suffered by the region in the two preceding centuries. This is why Brewer Carías, while honing his concepts, speaks of a true totalitarian state that in our view has even ceased to be after the nation and the republic have literally disappeared, becoming a puzzle.

The work, of true importance as an analytical and critical chronicle of an ominous historical period for Western democracies from the Venezuelan legal perspective, is ultimately based on a premise that democrats themselves still underestimate and is cited by the author to whom we dedicate these paragraphs. It is about what is clearly indigestible from a rational standpoint, "the process of demolition of one of the most envied constitutional democracies in Latin America during the second half of the last century, the Venezuelan democracy that functioned between 1958 and 1998."

I

However, we wish to label the institutional circumstances of Venezuela, and apart from the rich debate that the theory of the coup d'état stirs up when defining it, a common and historical thread characterizes it, regardless of its motives, as an action carried out by organs of the same State.

Contrary to common belief, the coup d'état is not merely a simple action by the military against the center of constituted power, nor an uprising or insurrection that proved to be ineffective, as the events of February 4 and November 27, 1992.

The military presence in coups and in the practice thereof is common. Nevertheless, it not only is there when the military stratum participates in a coup, but also when it assumes neutrality or becomes an accomplice by omission or indifference to the coup actions carried out by a ruler, parliament, or Supreme Court justices themselves.

The indisputable legitimacy of origin of the Venezuelan National Assembly is recognized today by the international community of States, pursuant to the Agreement of October 23, 2016, that declared the existence of a "rupture of the constitutional order and the existence of a continued coup" perpetrated by whom, -according to said Assembly and the Organization of American States (OAS)-, is usurping power, Nicolás Maduro Moros.

The works of Gabriel Naudé (*Considérations politiques sur les coups d'État*, 1639), Curzio Malaparte (*Technique du Coup d'État*, 1931), or the most current, by Edward Luttwak, with the same title as the former (1969), are emblematic with regard to this factual political phenomenon, and also juridically, because, as recalled by the teacher of legal dogma, Hans Kelsen, the coup occurs when the legality of the existing order is violated and the mutation thereof takes place with a clear purpose: the reinforcement of power by whoever exercises it. He explains it as follows:

> "A revolution, in the broad sense of the word, which also includes the coup d'état, is any non-legitimate modification of the Constitution –in other words, not carried out in accordance with the constitutional provisions–, or its replacement by a new one. Seen from a legal standpoint, it is indifferent that this modification of the legal situation be carried out by means of an act of force directed against the legitimate government, or by members of the same government; that it be a popular mass movement or carried out by a small group of individuals. What is decisive is that the valid Constitution be modified in some way, or entirely replaced by a new Constitution that is not prescribed in the Constitution until then in force."(See Pure Theory of Law, 1960).

The preceding consideration is relevant because of the attempted coups against our constitutionality – that is, against our rights and freedoms, and their organic guaranties - driven from the Miraflores Palace by its temporary tenant from 1999, the military Hugo Rafael Chávez Frías, and later by his successors, starting with Maduro himself, throughout the first and second decades of this century;[2]

[2] See in this regard our successive books, which together with those quoted in the text, contain a general chronicle of the twenty years to which we refer here: *Memoria de la Venezuela Enferma: 2013-2014*, Caracas, Editorial Jurídica Venezolana, Colección Estudios Políticos N°9, 2014 (256 pp.); *El problema de Venezuela: 1998-2016*, Caracas, Editorial Jurídica Venezolana, Colección Estudios Políticos N°10, 2016 (837 pp.); *Civilización y barbarie: Venezuela 2015-2018*, Caracas, Editorial Jurídica Venezolana, Colección Estudios Políticos N°16, 2018 (417 pp.); *Crónicas de Facundo (Bajo el régimen de Hugo Chávez)*, Caracas, Editorial Jurídica Venezolana

supported, without reservations, either by accompaniment or silence, by different parliaments -until the emergence of the last one, elected in 2015-, and also by the Public Prosecutor's Office, the Ombudsman's Office, the Office of the Comptroller of the Republic, the Electoral Power, and the Judicial Power, totally controlled and without nuances by the gendarme president, under the active and pleased gaze of the Armed Forces.

Such coups d'état or serious ruptures, when reviewed as a whole, have no other purpose than to reinforce the personal power of the president and, currently, since 2013, for the benefit of the various power factions that are built, atomized and reciprocally cooperate at the expense of democracy and constitutional dismantling. They ignore the dictates of the Constitution and promote the systematic violation thereof; causing constitutional mutations through the manipulation or ignorance, either of the forms of Law, or of the legitimate popular will expressed in elections or acts of constitutionally protected political participation.

In fact, those are the typical and novel traits of the Venezuelan "coup" experience in the midst of its specificities, before, between 1999 and 2012, and afterwards, between 2013 and 2020. The aforementioned forms of law were used or subverted to consummate successive and continuous "coups of State," stripping the law of its ethical and finalist content: apparently legitimate means with a view to illegitimate ends and allegedly legitimate purposes through clearly illegitimate means whereby democratic ethics are disrupted. In the past, during the first half of the twentieth century, when dictatorships were installed and their so-called "necessary gendarmes" were present, at least they had a sense of shame in that they modified the constitutional order previously to adjust it to their needs and thereafter affirm that they abide by it unquestioningly.

Internacional, Colección Estudios Políticos N°21, 2019 (1.194 pp.); *Crónicas de Facundo (Bajo la usurpación de Nicolás Maduro)*, Panamá, Editorial Jurídica Venezolana International, Colección Estudios Políticos N°22, 2020 (663 pp.); and *De la pequeña Venecia a la disolución de las certezas*, Panamá, Editorial Jurídica Venezolana International, Colección Estudios Políticos N°23, 2020 (411 pp.)

In his attempt to reinforce his personal political power, with primitive audacity, at the price of the liberties of Venezuelans and republican institutions, the formerly called Commander President and successively labeled the Eternal Commander by those who succeeded him and after his death, after he wickedly struck the 1961 Constitution by swearing not to recognize it –referring to it as the "dying flame" at the time of taking his oath on it in 1999, hence inviting the people to disown it despite having been elected under its canons-, he forced a moratorium on the Constitution that succeeded it, -and that was authored by him-, in order for that induced constitutional void to favor the total dismantling of the constituted public powers.

II

One must remember the background.

Upon his inauguration, since he got into power counting on the majority of the votes of Venezuelans, but further, with the Cuban assistance of Fidel Castro and the arrangements made with the latter's help with Libya and Iraq, Chávez issued a decree in December 1998 - without waiting for the elected Congress to decree it alongside him, - calling for a popular referendum. He hoped that the people would grant him the authority to set the organizational bases of an electoral process that would lead to a constituent process for the purpose of "transforming the State and creating a new legal order," without complying with the prior requirement of a constitutional reform regarding the then in force 1961 Constitution, which did not provide for such a process.

When the time came to elect the constituents, 53.7 percent of the registered voters abstained and Chávez, given the electoral model established for the circumstance, having obtained 65% of the votes actually cast, managed to control 98% of the seats in the new Assembly: 125 official pro-government constituents and 6 opposition constituents. The proportional representation of minorities, an essential trait for democracy, died in an instant.

The truth is that this Constituent Assembly - without being empowered by the people to do so - maintained that, as it was the depository of the original popular sovereignty, was not bound by the Constitution still in force. To this end, it ordered to paralyze the

functioning of the Congress of the Republic and, what at that time mattered most to those who from there on were in control of the rails of power, it ordered the intervention of the Judicial Power and all the judges of the Republic were dismissed without a trial. They were replaced by provisional judges subject to free appointment and removal by the forces of the emerging "*Chavismo*," arguing that they should be re-legitimized through contests that were never carried out in a systematic manner.

In any event, it can be said that the nascent constitution was theoretically affirmed on the ideology of the democratic Caesar or necessary gendarme, which Simón Bolívar, the Liberator, defended so much, thereby prostrating the liberal, democratic and republican constitutional work of our Founding Fathers – who wore frock coats and were members of our first illustration.

Bear in mind that after the fall of the First Republic after having betrayed our forefather Francisco de Miranda, his hierarchical superior, and handed him over to the Spanish authorities and subsequently accepting from them a passport that allowed him to travel to Cartagena, where he stated that "philosophers as bosses, philanthropy as legislation, dialectics as tactics, and sophists as soldiers," was a characteristic of the germinal work of the former, mostly graduates from our first university, the Royal and Pontifical University of Santa Rosa de Lima and Tomás de Aquino.[3]

Not by chance, the 1999 Constitution, changing the changeable, in its contemporary language, is not at all different from the creed of Bolívar, who thought that Venezuelans "were not prepared for so much good," that of the democratic republic; in lieu of which he proposed, in 1819, from Angostura, the forging of a hereditary senate made up by the military, to whom the homeland forever owed all -according to him-, and asked for a president for life in the manner of the British monarch. Afterwards, when signing the Constitution of Chuquisaca in 1826, this proposal was reiterated by providing for the designation of a life-long and irresponsible president with the power to appoint the vice-president as his successor. After the death of the author of our current constitution, he was succeeded by his vice-

[3] A. Bello, *Calendario manual y guía universal del forastero*, Caracas, Gallager & Lamb, 1810

president -imposed *in articulo mortis*- for the illegitimate exercise of the government of Venezuela, as it actually happened.

The Constitution *in comento,* therefore, provides in its Article 3 that it is the responsibility of the State, as an essential function, to develop the personality of Venezuelans; educate them to adapt their life projects to the new values installed, as stated in Article 103, which are, as organizing principles of the constitutional scaffolding, none other than those extracted, as dictated by Article 1, from the doctrine and ideas of Bolivar. As if that were not enough, this Constitution, in order to be ensured as a model for the gendarme or "dictator of the 21st century"[4] with the responsibility of forging the "new man",[5] allowed delegating, without limits or emergency justification, the legislative functions to the President; and it made national security - whose backbone is an Armed Force that votes and deliberates, and assumes the responsibility of militarizing civilians - the articulating element of the Constitution, as can be seen from reading Title VII.

The foregoing, however, did not suffice nor was enough for Chávez; hence, the aforementioned delay in the official publication of the brand new Bolivarian text approved by the National Constituent Assembly. Affirming, now, that the 1961 Constitution had finally died, and advising that the 1999 Constitution will forthwith become effective upon its publication in the official gazette, which happened after a month or so. Meanwhile, the Assembly declared to be the provisional depository of all the constitutional powers of the Republic and, without waiting, ordered the closure of the powers constituted or reconstituted after the 1998 elections, in which Chávez himself was elected.

Immediately thereafter, the incumbents in those positions - justices elected for the term, the attorney general, the comptroller - were replaced by other handpicked provisional ones, while also closing down state legislatures. At the same time, a Legislative

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4 This expression belongs to Osvaldo Hurtado, vid. su libro *Dictaduras del siglo XXI*, Paradiso Editores, 2012

5 This is what Hugo Chávez expressly set forth in *La Nueva Etapa, El Nuevo Mapa Estratégico de la Revolución Bolivariana*, Caracas, 12 y 13 de noviembre de 2004.

Commission or "*congresillo*" was organized, made up by deputies of their choice who would assume the duties of the Congress of the Republic, also closed down, until the constitutional order approved by the people came into effect.

Ominous consequences were to be expected.

As the time came for the Bolivarian Constitution of Venezuela to come into force as it was devised: four different texts thereof having been drawn up, three of which not known by the constituents, but by the government amenders, in the middle of the year 2000, the provisional Ombudsman reminded the Assembly of its duty to re-legitimize the provisional public powers and to comply with the nascent form of participatory democracy now installed; in short, to allow the citizens' committees to freely nominate those who would later discharge the various functions within the State. In the meantime, the chairman of the constituent assembly, Luis Miquilena, replied that the matter must be consulted before the Constitutional Chamber made up of the provisional justices appointed by said assembly; and these, in turn, resolved by means of a decision that the approved constitutional rules only applied to those who, in the future, aspired to be part of the public powers, but not to those who were already in office. So, with one blow, the total and totalitarian power was enthroned in Venezuela since then.

The constitutional degeneration until its total dematerialization with the subsequent loss of the rule of law, afterwards denounced, is just the prolongation of the previous original sin. Chávez, in practice, under the cover of the forms of law and the consent of his peers in the Continent, became a dictator. From the academy, along with those who later repeated their experience in Latin America, he was nuanced as leading a regime of mere competitive authoritarianism. Hence, he exercised total power with the dominant cooperation of the Armed Forces. Its officers and non-commissioned officers at the time were appointed to most of the positions within the central and decentralized public administration, and to this day, to the point that today they lead a narco-criminal network disguised as a progressive political militancy, that has given rise to the so-called "Cartel de los Soles."

The unsettled disagreement between the Venezuelan State and the Inter-American Commission on Human Rights was born against

such a backdrop, which would lead the government of Venezuela to denounce on various occasions the Pact of San José or the American Convention on Human Rights in 2009 and 2010, later consummated in 2012:

> "The constitutional articulation [in force since 1999] does not foresee, in important cases, mechanisms of checks and balances as a way to control the exercise of public power and guarantee the validity of human rights. The main legislative powers were diverted under an enabling regime to the Executive Power without defining limits for the exercising thereof," opined the said Commission in 2002.

Until that date, and after that date, the purpose of the concentration of the ruler's personal power did not yield and there occurred some *tours de force* with the modern sectors of Venezuelan society until subjecting them to Cuban colonial control and copying the model that would finally replace the first constitutional cover of Bolivarian lineage: 21st Century Socialism. The steps that led toward it are emblematic.

III

It is pertinent to look back, even for a moment, to remember that in the perspective of the experience of civil democracy that Venezuela knows, the then Venezuelan president Rómulo Betancourt warned the Congress of the Republic, in 1964, about what would come true 35 years later. To that effect, he stated:

> "It is easy to explain and understand why Venezuela has been chosen as a primary target by the rulers in Havana for the experimentation of their crime exporting policy. Venezuela is the main supplier to the non-communist West of the essential raw material for modern industrialized countries, in times of peace and in times of war: oil. Venezuela is also perhaps the country in Latin America where there has been carried out, with the most willful decision, jointly with a policy of public liberties, another one of social changes, with the sympathy and support of the urban and rural industrious sectors. This can thus explain how the Havana regime considered, among its expansion plans to Latin America, that its first and most precious loot was Venezuela, in order to establish there another communist bridgehead in the world's leading oil-exporting country."

After two generations has elapsed since his seizure of power in Cuba on July 26, 1989, Fidel Castro preached what was elementary for him, namely that "if tomorrow or any day we wake up with the news that the USSR has been disintegrated, which we hope will never happen, even under those circumstances, Cuba and the Cuban revolution will continue to fight and to resist!"

Without losing its essence, far from the formal Marxist preaching that he inaugurated 30 years ago, it was conveniently renewed to flow during the 30 years that followed the world's contemporary entry to the Age of Artificial Intelligence in 1989. Cuba and its executors declare themselves to be "21st century socialists." Castro himself later unveiled again and again that reality turned into a franchise -that of 21st Century Socialism- as "communism, ... which Marx himself defined as communist"; but that is useful in order to continue hiding the truth behind the curtain and which Betancourt himself confessed from his place of retirement:

> "It arises from a "group of gunmen" that began not by reading books on Marxist theory, not by engaging in political proselytizing or organizing parties, but rather as a gang of kidnappers from the universities."

Justo Rigores, the character from the novel by Rómulo Gallegos about Cuba, *"Una brizna de paja en el viento"* (1952), who at that time and according to the former Venezuelan president was Castro himself, realizes after the fall of the Berlin Wall, that he must "use capitalist methods, and slow down the ideology" in order to keep control of the masses without whom socialism – "his" socialism - would have no future.[6]

The founding documents of the Sao Paulo Forum - which he promoted together with the Brazilian leader of the Workers' Party, Luiz Inãcio Lula da Silva-, reveals as its first strategic idea "the full recovery of our cultural and historical identity" (Declaration of July 4, 1990). Martí in Cuba, Sandino in Nicaragua, Bolívar in Venezuela, would thus replace, as a tactical element, the Marxist Communist Manifesto. And in the Declaration of June 15, 1991, while already celebrating "the conquest of local and regional governments," by way

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[6] Fernando Martínez Heredia, "Rectificación y profundización del socialismo en Cuba", *Pensar en tiempo de revolución*, CLACSO, 2018

of votes and on a line of clear "socialist" pragmatism, dismissing as useless "the simple criticism of the capitalist system," set forth what matters from the constitutional and democratic point of view, namely, coming into power in order to preserve it without alternation. Soon, without waiting for two decades to elapse, the world would know of an experience that opened and showed downstream, with rude harshness, the symbiosis between political power and structured transnational criminality.

After criticizing what they described as "restricted democracy," in its Mexico document, the Forum declared its clear willingness to fight against the "political structures in which those who are elected have their capacity for mandate curtailed due to the overlapping of non-elected institutions that limit their range of action in order to modify the prevailing neoliberal policies and transform those realities."

Aside from the necessary digression, before the end of 1999, Chávez formally pacts with the Colombian narco-guerrilla and with the Revolutionary Armed Forces of Colombia, turning the Venezuelan territory into the spillway and bridge of their international crimes. Captain Ramón Rodríguez, his head of intelligence, then Minister of the Interior and Governor of the State of Guárico, served as his "ambassador for this folly." The issue has been officially documented and will go down in history.

In the year 2000, the Constituent Assembly had not yet closed its activities, despite of having exhausted its mission. Rather, it advanced -under the allegation of not being subject to any order higher than its own- with the aforementioned process of re-legitimation of the public powers, for which it enacted an Electoral Statute that allowed going back to the nominal system and re-establishing the closed party voting lists, but punished the representation of minorities and its *Congresillo* - made up by handpicked deputies – who took charge of forming the new Electoral Power with allies. In the match for re-legitimation, Chávez competed against his partner in the coup plot, Lieutenant Colonel Francisco Arias Cárdenas, the then "*Chavista*" governor of the State of Zulia, and upon his foreseeable victory, the original constitutional term of 5 years resulting from the 1998 elections was changed in practice into an 8-year term. Having increased the constitutional period to a six-

year term, the Supreme Court declared that the first two years of the presidential term did not count for this purpose. On December 6, date scheduled for the re-legitimation of the local regional and municipal powers, 78% of Venezuelans decided to abstain from voting.

The purpose of revolutionary control appears to be total, except for the incident in December, when the government, under its new Constitution, forced the workers' unions to hold elections under the supervision of its official Electoral Power and loses them.

Be that as it may, the year did not end without the Government signing its first Comprehensive Cooperation Agreement with the Republic of Cuba, which would imply financial and oil generosity in its favor, in return for which and since then it has supplied Venezuela with a legion of doctors and teachers. There are approximately 40,000 missionaries, to which, according to information from the responsible Cuban official, there were later added 30,000 members of the Committees for the Defense of the Revolution, who since then serve as commissars in the military dependencies, control the public registry services, intelligence, identification and immigration, and are in charge of managing the first rings of presidential security and the transportation of the president on board Cubana de Aviación aircraft. Meanwhile, it was confirmed that the Peruvian arms dealer and intelligence chief Ramiro Montesinos supplied 10,000 rifles to the FARC, financed with bonds issued by the official Venezuelan Central Bank.

Venezuela, in short, has been peacefully colonized under the authoritarian decision of a Venezuelan military, by the person who during the 1960s –Castro– had tried to achieve this by means of armed invasions and was defeated.

IV

In 2001, Chávez affirmed that he was doing what was possible, “we are making a superhuman effort to make a peaceful revolution, something difficult, but not impossible. But if this fails, there will come a revolution with weapons, because that is the only way out for Venezuelans.” This is the moment when he made public his understanding of the constitutional order that he promoted in 1999. “I am the law; I am the State,” he categorically stated like a sort of medieval prince before the International Congress of Agrarian Law.

Thereafter, as the supreme lawmaker that he now became, he sanctioned by decree 49 laws, among which, the conflictive Land Law, under which he decided to confiscate without a trial formula, judicial mediation or prior compensation, the land needed for national agricultural development. He ordered the administrative authority to proceed, without further ado, to disown the incorporation of companies, the closing of contracts and, in general, to adopt the legal forms and procedures whereby, at his discretion, they could circumvent the purposes of the law.

During the 3rd Summit of the Americas, where the drafting of the Inter-American Democratic Charter was agreed upon, Chávez decided to stop pretending. He separated from his peers and protested against democracy. He then declared himself "the second Latin American Castro" and from Russia, he affirmed that "he believes in democracy, but not in the forms of democracy that are imposed on us."

The Military High Command – absent the Commander of the Army - publicly declared its adherence to the revolutionary project and Chávez announced the formation of a popular militia, with one million armed civilians. Since then, the Bolivarian Circles were born, trained by the Libyan embassy in Caracas. And Norberto Ceresole, his Argentine adviser, affirmed the legitimacy of the pronouncement of the "military party."

Later on, before the national strike of December 10, which brought together the workers' unions sector with the business sector, the Catholic Church and the parties that remained from the old democratic experience and the civil society, the Constitutional Chamber adopted a crucial measure: It established by statute, through Decision #1,013, the set of rules that will later be gathered in the Law of Social Responsibility for Radio and Television or the "Gag Law," which allowed the State to control the informative content of the press and advance toward the establishment of a public communicational hegemony.

In January 2002, before the Miraflores Massacre and the one-act farce of the microphones, as was strictly called the coup d'état of April 11, I set forth in writing in my analysis and opinion columns that in Venezuela there were unveiling "objective conditions," both external and internal, sociological and political, that determined the

acceleration of an inexcusable process of constitutional breakdown. The same, as I noted back then, was oriented toward the final and necessary definition of roles between the old gendarme State and the already mature Venezuelan civil society: the former, under the leadership of Lieutenant Colonel (Army) Hugo Chávez Frías, President of the Republic, who moved to recover the privileges lost by the military as a result of the events occurred in January 23, 1958; the latter, upon waking up and discovering itself on its own - under the same historical crisis and the drift of social disorganization that accompanied it since the beginning of the 21st century - with no parties or civil leaders to protect it until recently. Thus, it reacted firmly, but instinctively, in order to thwart the purposes that sought to destroy its freedoms or neutralize it as a citizen expression.

The truth is that the military advanced their game; the members of the "military party" forged since 1999 around Chávez, and those who did not fully agree with the proposed subjection or displacement of Venezuela toward a model of Cuban and Marxist inspiration, within the framework of a colonization that had become manifest and caused irritation within the barracks. The "international brigade of the Cuban revolution" had already been installed, its missionaries added up to 7,000 and, coincidentally, the Cuban embassy requested safe-conduct letters for them during the critical hours of the aforementioned April 11, 2002.

The Church mediated, however, to avoid the worst. It even provided the basis for a national democratic agreement that was signed on March 6. But, Chávez, coming from a pre-conventional culture, a soldier who despised dialogue and understood it as a defeat under his very Bolivarian idea of the fatal opposition between friends and enemies, was prepared for the circumstance that he knew to be unavoidable. Better yet, he propitiated and accelerated it and had an exceptional witness, his former vice president and later ambassador in Rome, at that time Head of the Public Prosecutor's Office or Public Ministry, Julián Isaías Rodríguez. On April 16, 2012, he confessed having been called by the president in the days leading up to April 11 to inform him, in the presence of military personnel loyal to his cause, of what would happen and to ask him if he had the courage to assume the fatal circumstances that would ensue. In the end, both decided not to reduce or make the known risk disappear on time, resorting to

timely legal or high police measures. They preferred that the maelstrom take shape and end up with 20 dead and a hundred gunshot wounded in the face of the urgency of paving the floor for the drug state they were forming and now was in disgraceful evidence.

Then there would come, in concert with the president of the Criminal Chamber of the Supreme Court of Justice, colonel and justice Eladio Aponte, the pardons received by the gunmen of Puente Llaguno, militants of the revolution who aimed their bullets against an exemplary civil demonstration, full of songs and flags, that was approaching the center of the city, and the unjust sentence of 30 years in prison that was imposed for the events - to cover them up - against a group of police commissioners, among which Iván Simonovis A., as the aforementioned "judge of horror" tardily admitted in public after the arbitrary arm of the regime it had served sought to put him aside.

The military, in the end, as they say in Venezuelan slang, "payed each other but also got the change." When the time came, divided by the situation, a group of them declared to be in disobedience through the media, via the microphones, and all deposed their weapons and force. Chávez, strangely, surrendered voluntarily and ended up in prison, as the offer to allow him to travel abroad with his family was not met. However, after a few hours, he returned to power at the hands of the same military. The Supreme Court, also divided, considered by a narrow majority that there was no evidence of violent military action to judge the insurgents. Immediately thereafter, the president and his followers dismissed the disloyal judges and cleaned the military landscape, but they did not harass the military. There was a merciless persecution against the civilians who at the ninth hour had believed -from military sources - that the time had come to dispatch the Cubans back to their country.

President Jimmy Carter and César Gaviria, secretary of the OAS, mediated in this regard. The Inter-American Commission on Human Rights, for its part, invited Venezuelans to a serious task of reflection on the grave crisis that afflicted their democracy and the rule of law in Venezuela. Next, it cautioned the State bodies about their unavoidable responsibilities in this regard, while pointing out two circumstances that, in the immediate future, could upset the social peace if not addressed urgently: One, related to the investigation and

prevention of the acts of violence attributed to the Bolivarian Circles or popular militias, given that "it is essential that the monopoly of force be maintained exclusively by public security forces, [ensuring] the most complete disarmament of any group of civilians." And, also to "they fully comply with the decisions and recommendations adopted by the organs of the Inter-American system, in their decisions on individual cases, in their judgments and, in particular, in the requests for precautionary measures issued to protect the people in situations of serious risk ... "; not failing to recall at first that a Truth Commission, "made up of people with high credibility and experience in human rights ... with full access to scientific expertise and other pieces of criminal investigation ..., with reasonable time to exhaust all lines of research; [and based] on a serious political commitment to accept its conclusions..." on the truth of the Miraflores Massacre and its responsibilities "can make a very important contribution to Venezuelan democracy."

Despite the aforementioned international mediation, President Chávez, as expected, opposed the creation of the proposed Commission. His judges, without further ado and according to what has been said, determined the responsible parties at their own convenience and he only agreed, after harsh confrontations, especially with the secretary of the OAS, to hold a recall referendum, but first making sure to create the conditions in order to have his way.

He ordered the military commanders not to abide by any judicial order that could contradict his provisions as Commander-in-Chief, and in December, his followers caused another massacre at Plaza Altamira, with a balance of 3 dead and 20 gunshot wounded. At the same time, he decided to suspend the constitutional guaranties - with the endorsement of the Constitutional Chamber of the Supreme Court - without complying with the formal requirements demanded by the Constitution in order to prevent an oil strike that was underway.

Hence, early in 2003, without any judicial or administrative proceeding and through a television program, he dismissed, personally naming the main leaders, 20,000 members on the oil industry workers' payroll for complaining about the misuse of its resources for proselytism purposes and exporting the revolution. Meanwhile, the first agreements were signed with the terrorist

government of Iran, offering them the use of our territory for their "economic" and financial operations.

The Constitutional Chamber set a safe ground for the revolution and decided, alleging the legislative omission in this regard, to appoint the electoral authorities that would be in charge of the proposed recall referendum, while at the same time mutating the constitutional norms to transform said referendum into a plebiscite. Even if the democratic opposition could reach the quorum required by the Constitution for the repeal of the presidential mandate, which until then and according to the precise text of the Constitution required one more vote than the number of votes obtained by the president in his previous election – hereinafter, according to the Supreme Court, it sufficed that the ruler cast one more vote in his favor during the referendum for his mandate not to be revoked. Chávez had been elected by 3,757,774 votes and the opposition obtained 3,989,008 votes in the referendum held on August 20, 2004, but they were not enough because of the change described above.

Chávez imposed an electronic voting system that used bidirectional gaming machines bought from Olivetti by the Smartmatic company. Then he confessed with unprecedented transparency the reason of what happened: "Had we not completed the identification process, my God! I believe that even the recall referendum would have been lost - the President admitted - because these people got 4 million votes ... That's when we started working with the missions; we designed the first one ("La Misión Identidad") here and I started to ask Fidel for support. I told him: "Look, I have this idea, to attack from below with all my strength, and he told me: if I there is something I know, it's that, you have my full support." Meanwhile, without even being heard by the US authorities, the Colombian Foreign Minister, Carolina Barco, denounced that 500,000 Venezuelan identity cards were handed over to the FARC so that Colombian guerrillas could vote in the referendum.

The observers, Carter and the OAS, paradoxically validated what happened. At the same time, with inexcusable cynicism, they declared in their reports, among other things, the following: (1) The "significant asymmetry of resources" between the government and the opposition for their campaigns is true; (2) The "number of voters - registered in the Electoral Registry - grew disproportionately and

too fast," apart from the involuntary migration of voters to distant voting centers; (3) The CNE removed all the members of the Electoral Boards, appointing "Chavista" militants in their place; (4) The audit agreed upon for the day of the election was not made; (5) Voting records were not printed prior to the electronic transmission, making it possible for central computers to give instructions to the machines; (6) The Armed Forces participated in the administration of the process outside and within the signature collection centers and electoral centers and "in some cases, this active role intimidates the voters"; (7) Finally, there is a "lack of transparency in the decision-making" of the Electoral Power.

Thus, having reinforced the structures of Chavista power, to make this history of unconstitutionalities brief, at the end of the year Chávez enacted the Gag Law and launched what he called The New Stage: The New Strategic Map of the Revolution,[7] adopted in November. In short, it decided the full subjection of Venezuela to the Cuban political and constitutional model and thus began the formal visits to Fidel Castro of the graduates of the Command and General Staff Courses of the Armed Forces. Deaths by homicide, per year, had already increased from 5,968 victims in 1999 to 16,366 victims.

V

Through a fast track, President Chávez thereafter assumed in 2005, by his own will, the military rank of Commander in Chief with the right to insignia and the immediate exercise of the operational control of the military apparatus from the Presidential Palace, endowing himself with an immediate General Staff. He also unified the command, which was previously a joint command of the Armed Forces, under a Strategic Operational Command, for the purpose of establishing a territorial defensive system, in other words, subjecting to the a National Security all the activities deployed on the spaces of the nation. The civil government fully ceased. The regime acquired its true profile. It formally created popular militias: the people in arms and, in defiance of the decisions of the UN Security Council, it gave its public and formal support to Iran's nuclear program.

A fraction of the people who rejected the advance toward a totalitarian regime and, in the midst of a political and institutional

7 Cit. supra

crisis that the May Accords[8] do not resolve, opted to resist. They abstained from the parliamentary elections at the end of the year and the European Union denounced the lack of democratic guaranties and independence of the electoral body. Meanwhile, Peter McLaren, a foreign Marxist educator, was working on the design of our educational reform.

The voice of the Catholic Church, in a milestone that will mark the ironclad position of the Venezuelan Episcopal Conference (CVE) until 2020, made itself felt strongly at the beginning of 2016 through the homily of Cardinal Rosalio Castillo Lara, emeritus and once Governor of the Vatican City State. In a prayer addressed to the "Divina Pastora" during the celebration honoring her in Barquisimeto, he implored for the fate of Venezuelans: we ask you not to abandon us at this time! Give us the joy of regained freedom!

The Constitutional Chamber of the Supreme Court of Justice, in a ruling issued on May 16, reiterated that "in the automated process, the scrutiny is carried out by the voting machines, so the manual counting of votes is not required," leaving the people's sovereignty in the hands of the digital aristocracy of the regime. In turn, as a first step toward what was coming, the National Assembly, over the constitutional scaffolding of the Republic created a State of Communes, dictated the Organic Law of the Communal Councils, putting an end to our municipal historical and geopolitical organization. Moreover, seeking to affirm his regional projection, Chávez decided to finance 12 military bases in Bolivia, alleging the protection of Evo Morales.

This is how the 2007 socialist constitutional reform arrived, before which Chávez had ordered the closure of Radio Caracas Televisión, the oldest television and radio broadcasting station in the country that was in the hands of defenders of the democracy. Once again, a legitimate and democratic means -the referendum vote- was used to put an end to democracy. An attempt was made to carry out another institutional coup that barely frustrated the quick and forceful response of the citizens who voted against, given the unexpected

[8] Signed between the government and the democratic opposition through mediation of the OAS and the Carter Center, in order to attain, among others objectives, the recall referendum of 2004.

division in the ranks of the “Chavista” militants, including the military.

They unanimously accepted that the "necessary gendarme" could think and make decisions on their behalf, but not to the point of making them losing the liberalities of current state capitalism and private property. The seizing, and especially the expropriations, grew exponentially before the aforementioned referendum. So, on December 2, even the president's ex-wife, Marisabel Rodríguez, and his defense minister, Raúl Isaías Baduel, a trusted man close to the revolution, “switched teams.” The latter, today a political prisoner, urged him to accept his defeat and the National Electoral Council, however, to ease the burden, chose to silence the total results.

In 2008, Chavez dictated 26 laws by decree outside the period of his new enabling as legislator and affirmed that the purpose thereof was "to deepen the socialist plan." He set, by means of extra-constitutional norms, the bases to strengthen the military control over civil life, named the various components of the Armed Forces as “Bolivarian,” by law, and created the militia: as the people in arms, superimposed regional authorities chosen by his own free will over the elected state and municipal authorities and, in addition, ordered the expropriation of the entire economic chain related to food.

Subsequently, in collusion with the president of the National Assembly, Cilia Flores, the chairman of the Supreme Court of Justice, Luisa Estella Morales, and the president of the National Electoral Council, Tibisay Lucena, redressing the posture, but not the content - even mocking the constitutional prohibition governing the matter -prompted a specific amendment, disguised as a real reason during the frustrated reform, to stay in power without time limits. In other words, he sought to strengthen it over the Constitution, using a legitimate means - again the vote - for an illegitimate end, ensuring his re-election *sine die* and thus ending the principle of democratic alternation, as proposed by the São Paulo Forum. Thus, at the beginning of 2009, another coup d'état to the constitutionality was consummated yet again.

However, since the coups do no exhaust in their objectives in a single blow nor on themselves, they can acquire a systematic character, as we have seen, to the same extent that their creator continues to violate the rule of law in order to reinforce his designated

power. It is not by chance that Hans Kelsen[9] remembers well that within dictatorships "elections and plebiscites have the sole objective of hiding the fact of the dictatorship." Consequently, elections are not enough to sustain democratic preaching. Nor is the formal State of Law sufficient without independent powers that make it a reality and without holders outside the teachings of Machiavelli and Guicciardini, for whom –in the 16th century– power cannot be exercised according to the dictates of conscience.

As a testimony of the constitutional degeneration that takes place in Venezuela over the years that have elapsed up to now, and as a living example of the denounced modern deviation: in addition to the advance toward dictatorship through democratic means and the establishment of communism through the resources of capitalism, there were also the enforcement actions to void the competences or superimpose authorities over the governors and mayors of the opposition. In particular, the REDI and ZODI, military regions and zones for alleged integral defense were created as authorities that, in practice, overlapped the elected state and municipal civil authorities, disfiguring their constitutional powers. These authorities, governors and mayors, in the midst of institutional anomie and lacking guaranties, nevertheless managed to subdue the coup power with the overwhelming vote of the people's will at the end of 2009.

It was the year, coincidentally, in which Chávez recognized the belligerence status of the Colombian guerrilla (FARC and ELN), and by September, his protector, Fidel Castro, admitted being the negotiator of medical equipment for Venezuela with the Dutch company Philips. The debt with China -committing crude oil futures– increased to 8,000 million dollars. Muamar Al Gaddafi was given a replica of Bolívar's sword, while the government concealed the initiatives of the Cooperative Republic of Guyana to strip away Venezuela's claimed Essequibo territory and its territorial sea.

As Chávez himself weighed the decline of significant spaces over which he deployed his populist action through the exercise of his personal and centralizing power, once his candidates lost the States of Táchira, Zulia, Carabobo and Miranda, and the Mayor's Offices of Maracaibo and of the Greater Caracas in the elections:

9 H.Kelsen, *Teoría General del Derecho y del Estado*, México, UNAM, 1995.

jointly adding up to half the electorate, he ordered the National Assembly to immediately provide for the enactment of a Law to reconcentrate in his hands, as Head of State, the powers held by the former. The case of the Office of the Mayor of Caracas is the most ominous, because when Antonio Ledezma achieved an unobjectionable and brutal victory over the electoral opportunism and corruption, the president immediately asked the Assembly -contrary to the Constitution- to create the office of Head of Government of the Capital District, which voided the constitutional powers of the Metropolitan Mayor's Office and reserved for Chávez the appointment or free election of the new ruler of the capital.

The prior disqualification of opposition candidates for said elections -which gave rise to the actions by the Inter-American System-, and the judicial persecution such as the dismantling of the powers of the elected local authorities to further strengthen their already all-embracing and abusive power, thus allowed consummating an effective coup against the Constitution; or, as referred to by French doctrine, "a deliberate violation of constitutional forms by a government, by an assembly, or by a group of people who hold authority" in order to rise above the Common Good and the democratic society.

Not being satisfied with his perpetrations, relying on the "judges of horror" who recreated the experience of judges and prosecutors who gave a legal framework to the most shameful dictatorship of the twentieth century, that of Adolf Hitler, in 2010, Chávez closed the circle of his advanced coup plotted in stages and simulating forms of democracy, without bothering to hide his pretenses.

VI

At the beginning of February, the president intensified his authoritarianism. From the Plaza Bolívar in Caracas, he announced impulsive public expropriations on television, and walked by decreeing them orally at the pace of his fertile imagination: *Exprópiese!* he shouted in front of each neighboring building or construction, regardless of the constitutional requirements for justifying them upon evidencing the public utility and social interest of the respective property, calling for a judicial decision and previously having set aside the fiscal resources for compensating the expropriation to the owners, as provided in Article 115 of the

Constitution. He then swore in 35,000 members of his so-called popular armed guerrilla. His official party, the United Socialist Party of Venezuela (PSUV), officially declared to be Marxist. Its textual motivation was decisive: "It is only possible to advance in the elimination of capitalism if the social relations of production based on the exploitation of the labor of others are eliminated and, consequently, if the processes of private accumulation of capital based on profit are eliminated." A true Jurassic Park was then born.

The Spanish Courts warned of the government's cooperation in forging relations between the ETA and the FARC; Iran Air flights from Caracas with stopovers in Beirut and Damascus were allegedly transporting Venezuelan uranium, carrying Iranian agents and Hezbollah intelligence personnel as passengers. Cuban commander Ramiro Valdés, a well-known repressor, was involved by Chávez and his followers in the public management, arguing that he would solve our electricity crisis, after which Colombia sued the Venezuelan regime at the OAS for protecting FARC and ELN camps in its territory.

The Constitutional Chamber of the Supreme Court of Justice once again admitted its militant role. It was devoted to constitutionalizing the unconstitutional, assuming to be the depository of the original popular sovereignty. To this end, over the provisions of Article 297 of the Constitution, which entrusts the contentious electoral jurisdiction to a specialized Electoral Chamber of the same Supreme Court, the former disposed of it by means of its Decision 182, arguing that there was no law that regulated the operation thereof and, consequently, for the future, stated that the Electoral Chamber could not receive or process the appeals for constitutional protection that individuals filed against the decisions adopted by the National Electoral Council (CNE), its subordinate bodies or any other instance in charge of organizing elections in the country, the same Constitutional Chamber reserving said power for itself. The government, apparently, was not willing to take risks within the electoral court.

Chávez had already put a significant number of dissidents in jail, some were politicians and other capitalists, while he forced the rest to exile. Thus, in view of the foregoing, once he clearly lost the majority of the electorate during the parliamentary elections of

December 2010, since the opposition obtained 52% of the votes, he managed to assign them fewer deputies than for the government. Next, it demanded that the Assembly that was ending its mandate enable him to legislate by decree; and his deputies carried out in a disciplined manner before leaving the seats they had lost, deciding beyond the term of their constitutional mandate and taking away part of the constitutional time that, by popular decision, lawfully pertained to the new elected parliamentary body.

A deluge of pending socialist laws (land ownership, popular power, social comptroller, communes, telecommunications, parties, information content, university education, transfer of powers from the governorships and mayors to the emerging popular power, etc.) was sanctioned by Chávez as a constitutional dictator, turning his back on the Constitution.

It must be noted that José Miguel Insulza, from the moment he took office as Secretary General of the OAS had been consistently endorsing the way in which the Venezuelan demo-autocrat and his followers were using the same forms of law and democracy to put an end the freedom of their fellow citizens and their institutional guaranties.

His sleazy attitude and his many silences were covered by invoking the principle of non-intervention. He conveniently forgot or ignored that this principle originated from the Monroe Doctrine, precisely for the protection of republican ideals and the model of government that our nations have given themselves after the Independence. When failing to declare its strong defense and support -the reason for which it was created in 1948- the OAS itself lost its vocation and meaning.

By admitting *in extremis* that the castration of the nascent National Assembly of Venezuela by its predecessor, transforming the tenant of Miraflores into supreme legislator, violated the spirit of the Inter-American Democratic Charter, Insulza hastily clarified that he did so by mere opinion, and nothing more. He did not take into account that the aforementioned Charter, whose text is something more than mere "spirit" and authentically interprets the democratic obligations of the States according to the statutes of the aforementioned hemispheric organization and the American Convention on Human Rights, clearly states in its Article 20 that any

member state or the Secretary General may request -without requiring the authorization of the affected country- the convening of the Permanent Council to assess and decide on "a serious alteration of the constitutional order" that seriously affects the democratic order.

But, unfortunately, the times we live in are different.

VII

After this occurred, what followed was only sacramental and justifying the unjustifiable at the hands of the judicial notaries of the regime, in a time and a ninth hour in which -as never before- the phrase attributed to Don José Gil Fortoul, distinguished author of the *Historia Constitucional de Venezuela* (1907), became true: "The Constitution is a yellow book that is reformed every year and violated every day."

Thus, at the opening of the judicial year of 2011, and spoken through one of the justices who previously proclaimed his loyalty to the Commander President, the Supreme Court affirmed that criminal, civil and administrative judges must prosecute and punish the dissidents of the Cuban-style socialism that was in the process of affirmation. And the reasoning did not reach them immediately, because, from the pointed vertex of Justice it was argued that the same thing happened in the past when there were punished -at that time partly by the same co-authors of the current absurdity in progress– those who went against the rule of law and liberal democratic institutions since 1960, through guerrilla violence.

At the beginning of 2012, under similar circumstances, another supreme justice, on behalf of his peers, advocated for the total State, relying on the thesis of the legal architect of Nazism, Carl Schmitt. What is more serious and disgraceful, thereafter the Moral Power and the National Assembly -in the midst of the internal brawl that occurred within the State and the government, caused by the sudden illness of the President and the uncertainty about his eventual political succession- they dismissed the hitherto Chairman of the Criminal Chamber of the Supreme Court of Justice, Colonel Eladio Aponte-Aponte, head and comptroller of the Venezuelan criminal justice. The latter, revealing with unspeakable cynicism the moral collapse suffered by the Republic toward the month of April,

confessed -assuming that he would live unfortunate moments- to having used the judges under his command to persecute the government's adversaries, convict innocents through false witnesses, and forgive drug traffickers linked to the highest official and military spheres. He also disclosed the weekly and sustained collusion between the heads of the Supreme Court and the Public Ministry with the Vice President's Office, to order the administration of justice according to the presidential whims and the political circumstances.

In short, the moral death of the Republic occurred in Venezuela.

As if that were not enough, by the year 2011, Chávez already governed us from Havana; the patrimonial damage suffered by the republic is exposed -estimated at 18,430 million dollars- when the debt with the Chinese Fund arose to 28 billion dollars, guaranteed by the delivery of oil for 10 years at a cost of USD$ 40 per barrel. Moreover, Cuba assumed full control of the identity of Venezuelans and all data related thereto. After this, the portrait of the late Argentine president Néstor Kirchner began to preside from there on the Chamber of the Venezuelan Council of Ministers.

It should not be surprising that, in his long agony of 2012 also cited above, the Commander President, first commander and then ruler, transmuting himself, signed decrees in Cuba and named ministers, which decrees later appeared to be issued in the Miraflores Palace. Furthermore, supporting ALBA's strategy, he ordered Venezuela's withdrawal from the Inter-American Human Rights system, violating the right to international protection of the rights that the Constitution recognizes for Venezuelans.

The presence of the Cuban commissars within the Armed Forces began to cause irritation among their ranks. From Cuba, precisely, attending to the testamentary will of the now deceased president, his succession was organized, debated and shared by his allies in Latin America. In the best style of the Bolívar of Chuquisaca, Chávez designated as his heir Nicolás Maduro Moros, a citizen of Colombian origin, who had been trained during his youth at the School of Political Training in Havana and whom the Castros' Cuba knew long before the second Latin-American Castro.

It is therefore irrelevant that he submitted to electoral scrutiny during the elections of April 14, 2013, which elections were

questioned by the Institute of Higher European Studies, the International Network of Universities for Peace, and even by the Carter Center; or, that the international companion of the revolutionary lodge installed in UNASUR affirmed the neatness of the elections in which the designated successor barely managed to separate himself from his contender, the young leader of the democratic opposition and governor of the State of Miranda, Henrique Capriles, by a difference of only 1%.

What should be kept in mind is that the illegitimacy of the new Venezuelan ruler comes from the last two blows inflicted on the 1999 Constitution by the Supreme Court of Justice. In effect, on January 10, 2013, President Chávez –dying, according to some, died in Havana at the end of the year, according to others– did not attend his swearing in ceremony for another constitutional term. The Constitutional Chamber, in a ruling the day before, was in charge of saying that he did not need to be sworn in and that he could do so whenever he decided to do so. It further stated that the government whose mandate expired that day was in line with the principle of administrative continuity and his vice-president, Maduro Moros, continued to be such and in such capacity, he could act as Acting President of the Republic. Gone is, once again, the constitutional and democratic principle under which the mandates die fatally in the republic and in the face of a probable empty seat, and in order to prevent this, another body of popular sovereignty should provisionally assume, in this case, the chairman of the National Assembly, Lieutenant Diosdado Cabello.

The Supreme Court, moreover, closed the constitutional alternative that obliges it to appoint a competent medical board to determine -before the end of the term- the absolute absence or not of the incumbent president, or later, that of the president-elect. The judges, in short, bluntly enforced the political will of a dying man, whose executors were the Castro brothers.

Then, under an illegitimate extension of his term as vice-president, in violation of republican principles, Maduro, as acting president, ran as a candidate in the elections. Here again, the servile justices dictated another ruling upon request, declaring that Maduro was now Acting President and no longer vice-president, wherefore the constitutional rule of Article 229 that forbids the incumbent vice-

president from being a presidential candidate if he continued in office on the day of his nomination would not be applicable. Maduro, at this point, thanks to that other sentence of indignity dictated by the Constitutional Chamber, on March 12 and adopted for this purpose in the constitutional text as a *prêt-à-porter* dress, has been since then and not only now, in view of his doubtful election, deemed to be an unconstitutional ruler, clearly illegitimate and since then, the usurper of the powers of the State.

In my aforementioned book *Historia Inconstitucional de Venezuela*, I fully describe the typical constitutional coups d'état (278 in total) that took place between 1999 and 2012, to which we should add the last two described above. Indeed, in another following book that I coordinated and presented, *El Golpe de Enero en Venezuela* (Editorial Jurídica Venezolana, 2013), I gather the studies of different constitutionalists who address the blow that inaugurated the current and continued exercise of the *de facto* power of Maduro Moros, who now is actively in charge of totally dissolving the Venezuelan nation and State. He does it in open and carefree collusion with transnational narco-terrorism and corruption, under Cuban guidance. Its consummation point occurs 30 years, two political generations, after the milestone that marked the exhaustion of the Soviet experience of real socialism and the moment when the Socialism of the 21st Century is again baptized at the hands of the Forum of São Paulo to change the franchise and thereafter calls itself "progressivism" or globalism.

VIII

The first year of the government of Nicolás Maduro is marked not only by the aforementioned usurpation of constitutional power, but by two actions that foreshadow the looming model of destruction of the bases of nationality and the affirmation of the dismantling of the republic under the rules of espionage and terror.

On October 7, by means of a Decree, he created the CESPPA, the so-called Strategic Center for Security and Protection of the Homeland -a sort of Chilean DINA ascribed to the presidential office- conceived as the governing body of the entire intelligence and counterintelligence system that had previously been conveniently distributed among the various government offices, henceforth under the leadership of the Army Major General, who in turn acted as Minister of the Presidency. Subsequently, subjecting the other

"Chavismo" leaders who could counterbalance his still weakened regime under his orders as Commander-in-Chief, he returned them to the military activity and promoted to a higher military rank: Ramón Rodríguez Chacín, Hugo Chávez's link with the Colombian narco-guerrilla, Francisco Arias Cárdenas, leader of 4F movement, and Diosdado Cabello, head of the National Assembly. However, this did not stop there. He successively cannibalized the nation's territory and distributed it, for a management more akin to his outspoken nature of mere "Cuban commissar," among military that he trusts, whom he places in command of the regions (REDI) and zones (ZODI) of comprehensive defense. They are superimposed over the pyramid of state and municipal civil authorities, ensuring the territorial control of a parcelled state that becomes a bounty, therefore ceasing to be such. In an instant, Venezuela returns to the 19th century, to the puzzle of the militaristic *caudillismos*.

After squandering 1.5 billion dollars from black gold and castrating the national productive apparatus in the course of the preceding 15 years, affecting more than a thousand commercial and industrial establishments, the 1999 pact with the FARC begins to leave its fruits in alliance with the territorial distribution made among members of the Armed Forces. Venezuela enters, without hesitation, the economy of drug trafficking. Its inflation of 56% becomes the highest in the world. According to reports in the international press, 40,000 million dollars have been stolen by shell companies linked to the regime. And the dollars for the purchase of supplies are beginning to become scarce, with the deficit of food and medicine at 24%. The year 2013 also closed with 24,763 homicides.

Andrés Oppenheimer, in his press columns, leaves Zimbabwe out of any attempt to compare it with the tragic reality that emerges in the north of South America, in Venezuela. The civil-military lodge that is enthroned and subject to the tenant of the Miraflores Palace, in collusion with the Cuban regime, will exacerbate internal violence as a habit and proof that it has given away more than formal democracy, but also the Rule of Law.

Sensibly, within this context, the Massacre of 14F is explained - 22 young people murdered, 318 wounded and tortured and 1,103 detained– directed by the same government from the Ministry of the Interior on the occasion of the peaceful opposition protest known as

La Salida, headed by leaders María Corina Machado, Antonio Ledezma and Leopoldo López. Maduro himself appeared before the country and at that same moment, disrespecting the mournful atmosphere by celebrating the Carnival festivities, dancing euphorically, and at the end, he offered in return the call for a Peace Conference supported by the Vatican and the Permanent Council of the OAS. At that time, Machado was prevented from speaking at this conference from the chair offered by the government of Panama, with which Maduro broke up diplomatic relations.

The reaction of the Ombudsman caused astonishment: "It is impossible that an illegality be committed with the presence of all the public power," it argued, while Professor Allan R. Brewer Carías, exiled in New York City, replied to the Ombudsman: "As simple as that. This means that if the totalitarian State -which is the one that controls all the powers and lives of citizens- violates human rights, does this with the participation of all public powers, even if it is contrary to the Constitution, then it is legal."

That tragic year would not end without the paroxysm of amorality - the absence, as Max Weber would say, of substantive rationality in leaving its path of shared social morality - when Army Major General Hugo Carvajal was arrested in Aruba, accused of being a drug trafficker. The United States requested his extradition. Maduro replied: "I got his back" and the truth is that the Dutch authorities decided to return the detainee to Caracas, a Consul General who had not yet been granted an exequatur, and the First Lady and the Venezuelan Foreign Minister welcomed him back with honors. Since then, the usurping president would take part, after a stopover in San Pedro Alejandrino, in the peace negotiations between the FARC narco-guerrilla and Colombian President Juan Manuel Santos.

The value judgment on that moment, despite its narco-criminal plot, alien to all political rationality, was shared instantly, around 2014, by the now former presidential candidate Henrique Capriles Radonsky and the Venezuelan Jesuit who is currently the world head of the Order of the Jesuits, Arturo Sosa: There is an illegitimate system of domination, but a negative opposition, there is an absence of an opposition alternative, they say. They place victims and perpetrators on the same ethical level.

As 2015 arrived, Antonio Ledezma, Metropolitan Mayor of Caracas in office, re-elected with 51% of the votes, was sent by Maduro to a military prison -Ramo Verde-, which already lodged his partner Leopoldo López. He accused him of conspiracy. He was kidnapped by faceless officials and violently dragged from his office. Maduro argued that the sin of having signed, together with López and María Corina Machado, a public statement demanding that he amend or resign, was unacceptable. The devaluation of the bolivar reached 2,600%, inflation exceeded 100%, national income fell by 35,000 million dollars and the public debt broke the ceiling of 147,000 million dollars.

In view of all this, 26 former heads of state and governments met in Panama, in what will later be known as the Democratic Initiative of Spain and the Americas (IDEA), alerted the international community gathered at the 7th Summit of the Americas. They denounced the prevailing communicational hegemony in Venezuela, the serious alteration suffered by its constitutionality and democracy, revealing as the most concerning, the information from international financial entities regarding acts of corruption and the laundering of illicit money that was superimposed over the social and economic misery that impacts all Venezuelans. The ex-presidents bet on putting pressure on the Maduro regime to respect the electoral conditions during the parliamentary elections scheduled for the end of the year.

IX

The context posed by the ongoing humanitarian crisis, the unitary awareness of the political actors of the democratic resistance as well as the arrogance of the regime, for which it suffices to have the support of former presidents José Luis Rodríguez Zapatero of Spain, Ernesto Samper of Colombia, Martín Torrijos of Panama and Leonel Fernández of the Dominican Republic, caused the country's unitary opposition reaction to achieve a victory in the parliamentary elections of December 5, ensuring the qualified majority of 112 deputies in the National Assembly.

However, the constitutional and democratic simulation from the standpoint of the regime, which accepted the opposition’s victories in different regions and municipalities of the country, hardly allowed it to accept one that invaded the exclusive premises of the central power in a fully presidential republic. Hence, regardless of the

constitutional provisions, the powerless Assembly, still led by the now Captain Cabello, before the end of 2015, assaulted and subjected the Supreme Court of Justice and its Constitutional Chamber to their absolute control. It compelled the current justices to resign their positions either by accelerating their retirements or directly ordering them to resign. It transformed deputies from the ruling party who had been defeated in the electoral fight into Supreme Court justices. The road for the definitive constitutional dismantling of Venezuela was thus paved and made solid.

The elected National Assembly that took office on January 5, 2016, through successive acts tried to resolve, through constitutional channels, the dilemma that arose as a result of the Executive Power, the Supreme Court of Justice and even the National Electoral Council's ignorance about the competences and attributions vested therein.

On May 10, 2016, on the occasion of the presidential contempt for a motion of censure adopted against one of the regime's ministers, the suspension by the Supreme Court of deputies that had been elected and already proclaimed, thus affecting their immunities, and the disavowing of the powers of the National Assembly to issue laws, by means of a majority agreement, the latter (i) denounced "the breakdown of the constitutional and democratic order" in Venezuela; (ii) urged the President of the Republic to remove the obstacles that impede the institutional dialogue and stop its use of propaganda; and (iii) gave notice of these events to the international community, in particular, the OAS.

Twenty days later, by resolution of the Permanent Council - CP / DEC. 63 (2076/16) - the hemispheric organization preferred to support, to that effect, another national dialogue initiative promoted for this purpose by the aforementioned former presidents José Luis Rodríguez Zapatero, Leonel Fernández and Martín Torrijos, thus preventing the application of the Inter-American Democratic Charter to the Maduro regime.

On October 13, 2016, the same National Assembly stated "That there is no democracy without the effective force of a constitutional text," wherefore it agreed "To ignore, in accordance with the provisions of Articles 7 and 333 of the Constitution, the authority and validity of the acts of the Executive Power and of the decisions of the

Supreme Court of Justice that are contrary to the democratic values, principles and guaranties and infringe fundamental rights."

At the same time, it entrusted its board of directors to lead a process and to issue the pertinent orders for the Electoral Power to carry out a recall referendum against Maduro's mandate, upon complying with the constitutional provisions therefor. Notwithstanding the above, the Permanent Council of the OAS, in another resolution of November 16 - CP / DEC. 66 (2095/16) - reiterated its support to the national dialogue promoted by the aforementioned former presidents, who were openly close to the Maduro government.

After the Electoral Power decided to confiscate the sovereignty of the people and prevent them from exercising their constitutional right to revoke the mandate of President Maduro by means of a referendum, after more than half of his term has elapsed, the National Assembly declared on October 23, 2016, "the rupture of the constitutional order and the existence of a continued coup d'état... "It requested "the international community to activate all the necessary mechanisms to guarantee the rights of the people of Venezuela, especially their right to democracy," and invoked the application of Article 333 of the Constitution after popular consultation in order to achieve the restitution of the fractured constitutional order.

Given the seriousness of the events, particularly after the fact that as of January 14, 2016, President Maduro decided to govern by decree and, thanks to an existing state of emergency that he extended in overt violation of the Constitution, without the National Assembly's approval, the latter declared on December 13, 2016 "the political responsibility of the President of the Republic for the serious rupture of the constitutional and democratic order, the violation of human rights and the devastation of the economic and social bases of the Nation that he has carried out." Consequently, it decided to study the hypothesis of the neglect of duties by the Head of State.

On January 9, 2017, in accordance with Articles 232 and 233 of the Constitution, the National Assembly declared "Nicolás Maduro has neglected his duties, abandoning the principle of constitutional supremacy" and, to that effect, decided to "call the holding of free and plural elections." Moreover, it ratified its invocation of Article 333 of the Constitution because the breakdown of the constitutional

order "occurs not only through an act of force," but also when the Presidency of the Republic "uses its civil and military authority to undermine the Constitution."

On April 5, 2017, when the Supreme Court of Justice in Constitutional Chamber decided to ignore the parliamentary immunity and the constitutional powers of the parliament to approve international instruments -Decisions 155 and 156- the National Assembly condemned what happened as a "widespread and systematic violation of the constitutional and democratic order in Venezuela" and again as a "coup d'état." The Permanent Council of the OAS, now invoking the Inter-American Democratic Charter, declared "the violation of the constitutional order" in Venezuela, asked the government to guarantee the separation of powers, and agreed to deploy "diplomatic efforts" through resolution CP / RES. 1078 (2108/17).

On May 30, 2017, it ratified before the international community -by means of an Agreement- the demands agreed upon in the public session at Parque Miranda, Caracas, on the previous April 27, demanding (i) early presidential elections and elections for governors and mayors before the end of the year; (ii) humanitarian aid for Venezuelans; (iii) the release of political prisoners; and (iv) the demobilization of paramilitary forces, among others.

In this regard, on July 5, 2017, the National Assembly agreed to convene the people for a popular consultation based on Articles 5, 62, 70 and 187, paragraph 4, of the Constitution of the Bolivarian Republic, to pave the way toward invoking Article 333 and proceeding to adopt decisions "for the democratic reconstruction of the Nation within the framework of the supremacy of the Constitution." Said consultation, which took place on the following July 16, under the supervision of the IDEA Group[10] and in which there participated 7,676,894 Venezuelans registered in the Permanent Electoral Registry, responded affirmatively to the following questions:

[10] www.idea-democratica.org.

1. Do you reject and disavow the designation of a constituent assembly proposed by Nicolás Maduro without the prior approval of the people of Venezuela?

2. Do you demand that the National Armed Force and all public officials obey and defend the 1999 Constitution and support the decisions of the National Assembly?

3. Do you approve the renewal of the Public Powers in accordance with the provisions of the Constitution and the holding of free and transparent elections, as well as the formation of a Government of National Unity to restore the constitutional order?

The invocation of constitutional Article 333 was reiterated by the National Assembly, first, in its Agreement of July 18, 2017, according to which and as a result of the consultation carried out, it announced that it will "adopt the constitutional measures necessary for the effective reestablishment of the validity of the Constitution, as ordered in its Article 333. To this end, the Public Powers shall be renewed in accordance with the provisions of the Constitution, creating the conditions that allow for free and transparent elections to be held, and promoting the formation of a Government of National Unity to restore constitutional order." None of this, however, was done by the Assembly.

Subsequently, after the installation inside the legitimate Assembly's headquarters of the void unconstitutional National Constituent Assembly formed by the Maduro regime without the prior approval of the people for its convocation, thus usurping the original constituent power of the people and violating the principle of universal, direct vote and secrecy, as denounced in the agreement of August 9, 2017, the legitimate National Assembly, by means of an agreement of August 7, reaffirmed "the mandate contained in Article 333 of the Constitution." Hence, expressing its rejection and disavowing any decisions adopted by the aforementioned Constituent.

X

At a meeting of the 17 foreign ministers of the Americas, eleven of them adopted the Declaration of Lima on August 8, in which they recognized:

(i) the breakdown of the constitutional and democratic order in Venezuela;

(ii) that the spurious National Constituent Assembly installed by the Maduro regime is part of it;

(iii) that they will only accept internationally the acts of government that pertain and are approved by the National Assembly elected in 2015;

(iv) not to approve any international candidacy presented by the Maduro regime;

(v) and, among others, to move forward toward the application of the Inter-American Democratic Charter and form a Contact Group that promotes a dialogue to build "options for solutions of the Venezuelan crisis." The National Assembly adhered to these declarations in its Agreement the following day.

On October 24, 2017, the Assembly ratified that the election of a Constituent Assembly was a fraud and asked the governors chosen in elections called by it not to subordinate themselves to its authority. At the same time, it condemned the rejection of Juan Pablo Guanipa as the elected governor of the State of Zulia by not accepting that he be sworn in before it. At the same time, in a purpose that does not comply with the aforementioned, it decided "to ratify the mandate of the Popular Consultation of July 16, 2017.

Through an agreement dated November 28, 2017, the National Assembly agreed to participate and give its support to the negotiation process to be carried out in the Dominican Republic on December 1 and 2, mediated by the host government and facilitated by former president José Luis Rodríguez Zapatero. The effort was frustrated, as always, when it was found again that the Maduro regime used the mechanism for nothing more than the democratic demobilization.

Upon the Maduro government having called a premature election for president of the republic, without guaranties or time for the Venezuelan people to freely express their opinion, the Permanent Council of the OAS, pursuant to its resolution of February 23, 2018, based on the reports of the Inter-American Commission on Human Rights and considering that a "free and fair electoral process" is the way for Venezuela to return to democracy and the validity of the rule of law, stated that such announcement "makes it impossible to hold democratic, transparent and credible elections according to

international standards, and contradicts democratic principles and good faith."

Given the "illegitimate origin" of the presidential election called upon, the National Assembly declared it an "electoral mockery" on February 27, 2018. It announced the organization, a National Broad Front to reject and denounce it before the international community, and fight for "free and competitive elections" during the course of that year. Thereafter, supported by said agreement and the others adopted on March 27 and May 15, on May 22 it declared "as non-existent the farce carried out on May 20, 2018, for having been carried out entirely outside the provisions of the Treaties on Human Rights, the Constitution and the Laws of the Republic. "

To that effect, it agreed:

> "To disavow any illegal and invalid acts of proclamation and swearing in by virtue of which it is intended to constitutionally invest citizen Nicolás Maduro Moros as the alleged president of the Bolivarian Republic of Venezuela for the 2019-2025 term."

The General Assembly of the OAS, at the time based on the Inter-American Democratic Charter and by resolution of June 5 - AG / RES. 2929 (XLVIII-O / 18) - conclusively decided as follows on the invalid election:

> "That the electoral process carried out in Venezuela on May 20, 2018, lacks legitimacy because it did not have the participation of all the political actors of Venezuela, did not comply with international standards and was carried out without the necessary guaranties for a free, fair, transparent and democratic process."

On August 21, 2018, the National Assembly ratified its decision declaring the neglect of duties by Nicolás Maduro Moros and expressed its "political support" to the decision adopted by the appointed justices of the Supreme Court of Justice [in exile] and sworn in before it, in which they declared "the criminal liability [of Maduro himself] for acts of corruption linked to the Odebrecht company; which decision in the case, requested to investigate former presidential candidate Henrique Capriles R. Thus, the Assembly announced the existence of a "power vacuum" that they hoped to resolve in accordance with Articles 333 and 350 of the Constitution.

On November 13, it acknowledged the need to "appeal to the international community" to make effective the pressure on the Maduro regime to be able to build "an orderly and immediate democratic transition" without which "none of the problems that Venezuela suffers will have solution"; and invoked "a political solution" that leads to such an orderly transition. What was fundamental, the National Assembly undertook "to create the regulatory framework that ensures political change and a return to democratic life," "without revenge or persecution," "thus promoting national reconciliation"; but from the onset declared "as unconstitutional the claim of Nicolás Maduro Moros to continue usurping the presidential powers as of January 10, 2019," given that since 2018, the Assembly had declared his neglect of duties, which resulted in "the absolute failure to discharge said position" in accordance with the cited agreement of August 21.

Upon the opening of a new session of the National Assembly on January 5, 2019 and after appointing Juan Guaidó Márquez as chairman of the parliamentary body, the Permanent Council of the OAS, through its resolution CP / RES. 1117 (2200/19) of 10 January decided:

> "To not recognize the legitimacy of the term of the Nicolás Maduro regime as of January 10, 2019."

At this time, as can be noted, and *mutatis mutandi*, there was repeated the hypothesis of January 10, 2013, when president-elect Hugo Chávez Frías, having passed away, could not appear at the swearing-in ceremony before the parliament and Nicolás Maduro Moros assumed power in contravention of the Constitution. Now, however, leveraged by a previous decision of the Inter-American System - which gave Maduro the benefit of legitimacy as ruler only until January 10, which the National Assembly had denied him since the previous November 13, when he already considers him to be "usurping the presidential powers" - the Assembly agreed, on January 15, the following:

FIRST: To formally declare the usurpation of the Presidency of the Republic by Nicolás Maduro Moros and, therefore, consider the *de facto* situation of Nicolás Maduro to be legally ineffective and to deem null and void all the alleged acts emanating from the Executive Power, in accordance with Article 138 of the Constitution.

SECOND: To adopt, within the framework of the application of Article 233, the measures that allow to re-establish the conditions of electoral integrity in order to, once the usurpation has ceased and a Transitional Government is effectively formed, call and hold free and transparent elections within the shortest time possible, in accordance with the provisions of the Constitution and other laws of the Republic and applicable treaties.

THIRD: To approve the legislative framework for the political and economic transition, setting forth the legal conditions that allow the initiation of a gradual and temporary process of transfer of powers from the Executive Branch to the Legislative Branch, with special attention to those that allow adopting the necessary measures to re-establish constitutional order and address the complex humanitarian emergency, including the refugee and migrant crisis. The chairman of the National Assembly will be in charge of ensuring compliance with the approved legal regulations until the democratic order and the rule of law are restored in the country.

In short, it led to the establishment, since then, of a *sine die* constitutional transition, not limited in time. They even grant the thirty (30) days stipulated in Article 233 of the Constitution so that elections be called due to the lack of an elected president. The usurpation and constitutional dismantling prevent it, and the exceptionality prevails from now on limited to the achievement of the objective: Return to the Constitution and hold elections once the objective conditions are attained.

XI

In short, upon the complete loss of all constitutional materiality in the country; the destruction of social bonds by the diaspora; the cannibalization of republican institutions; the subjection of the daily life of Venezuelans to the rules of force between local criminal groups and foreign forces established within the territory co-opting the nominally subsisting public powers: 172,266 homicides occurred in Venezuela since the start of Maduro's mandate; the National Assembly elected in December 2015 -as the last body of the powers that achieved democratic legitimacy of origin and performance- adopted on February 5, 2019 a provisional constitutional statute: the Statute that governs the transition toward democracy to re-establish the force of the Constitution of the Bolivarian Republic of Venezuela.

This was based on the aforementioned Article 333 of the Constitution, which has lost its material reality, in which, "every citizen whether or not vested ... with authority, shall have the duty to collaborate in the reestablishment of the effective validity thereof." The results were immediate, namely, in the provisional or transitional period, until the gradual force of the factually repealed Constitution is re-established, there shall prevail the norms that "govern the transition."

Whatever the value judgment or political relevance that it may deserve, the evolution of the realities and the necessary actions that must be taken for the process of constitutional reconstruction in Venezuela should be understood and read in light of the provisions of the text having constitutional rank that may be called temporary or the Statute for Transition. It is even more binding upon those who, as current deputies and members of the National Assembly, enacted it upon confirming the factual collapse of the constitutional and democratic order and as allowed by Law, setting forth their desideratum in the Preamble of the statute:

> "Its purpose is to return to the Constitution from the Constitution itself so as to offer an orderly and rational channel for the unprecedented and imminent process of political change that has begun in the country. This is a regulatory initiative by the National Assembly that aspires to preserve the 1999 Constitution as a pact of coexistence for the civic life of Venezuelans and as the foundation of the democratic transition."

The *ipso iure* assumption of the leadership by Juan Guaidó as Acting Head of State, in charge of the Executive branch of the government until the return to the constitutional order from the Constitution itself, as provided in Article 333 of the Constitution, finds its foundation and teleology against the previous backdrop of severe constitutional incidents.

Thus, after the Permanent Council of the OAS, in response to the obligation of governments to promote and defend the "right to democracy" according to the Inter-American Democratic Charter, did not recognize the legitimacy of Maduro, followed by several member states of the OAS and members of the so-called Lima Group, through their governments, namely those of Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras,

Panama, Paraguay and Peru, formally stated on the following January 23, that:

1. They acknowledge and express their full support to the president of the National Assembly, Juan Guaidó, who has assumed on this date as acting president of the Bolivarian Republic of Venezuela, in accordance with constitutional norms and given the illegitimacy of the Nicolás Maduro regime.

2. They support the beginning of the democratic transition process in Venezuela within the framework of its Constitution, in order to hold new elections within the shortest term, with the participation of all political actors and with the international guaranties and standards required for a democratic process.

The preceding matter is not trivial; it is of serious constitutional significance and because of its unprecedented and innovative effects for international law, moreover admitting that the social and institutional degeneration of Venezuela can hardly be reversed without the assistance of the community of States.

In 1930, in opposition to Tobar's thesis -consisting of the exhortation made in 1907 by the Foreign Minister of Ecuador, Carlos R. Tobar, with regard to defending the democratic legitimacy of governments and not recognizing de facto governments -and in the line of democratic indifference renewed by Mexico in the 21st century under the Andrés Manuel López Obrador-, the Mexican Secretary of Foreign Affairs, Genaro Estrada, giving rise to the other thesis bearing his own name, the Estrada Doctrine , affirmed that:

> "Mexico does not pronounce on the matter of recognition, because this would be an offensive practice that, in addition to undermining the sovereignty of other nations, makes their internal affairs the object of appraisals in one sense or another by other governments".

Due to this, the State would have to limit itself to maintaining or breaking its diplomatic relations without implying the approval or rejection of the government concerned.

Much later, when the well-known civil and democratic republic of parties was inaugurated in Venezuela in 1959, President Betancourt, then elected by popular and direct vote, called upon the

OAS with respect to its historical approach of 1948, in the following terms included in his inaugural address:

> "We will request the cooperation of other democratic governments of America to ask, united, that the Organization of American States exclude dictatorial governments therefrom, not only because they affront the dignity of America, but also because Article 1 of the Bogota Charter, the constitutive act of the OAS, establishes that only Governments of respectable origin born of popular expression, through the only legitimate source of power, namely, freely held elections, can be part of this organization. Regimes that do not respect human rights, violate the freedoms of their citizens and tyrannize them with the support of totalitarian policies, must be subjected to a rigorous sanitary cordon and eradicated through the collective peaceful action of the international legal community."

Thus, beyond the recognized absence of immediate and effective hemispheric mechanisms for the defense of democracy and except in the aforementioned case of aggression that made possible to exercise inter-American actions in the Dominican Republic (1959) and Peru (1962), it was declared in Santiago de Chile that "the existence of antidemocratic regimes violates the Charter [of the OAS] in its principles."

However, in 1969, the thesis of democratic pluralism took shape under the names of Presidents Díaz Ordaz, of Mexico, and Rafael Caldera, of Venezuela. The governments they represented would maintain relations with other governments of different political lines or orientation, thinking more about the negative effects that a break of relations could have on the peoples, and not as support or to the detriment of recognized governments.

At present, after the adoption in 2001 of the Inter-American Democratic Charter, based on the hypothesis that arose in Venezuela after the 2018 presidential elections that were declared fraudulent and invalid, and lacking a legitimately elected president, the international community –in the end, some 60 countries- withdrew their recognition of Maduro and granted it to the Chairman of the National Assembly and Head of the Executive Branch, in accordance with the provisions of the Constitution.

Consequently, until democratic and internationally observed elections are held, the act of recognition is not delayed or postponed as proposed by Tobar, nor is the government of Venezuela excluded from the OAS according to the dictates of the Betancourt Doctrine, but rather, henceforth maintains a duality or temporary parallelism that must be resolved on the basis of exemplariness and its expected consequences: an unrecognized *de facto* government that unlawfully holds the material control of power and arms, and a legitimate one, residing in a democratically-elected parliament, with no real powers other than those of the representation of the State in international settings where it has been recognized. And with a sole statutory purpose for this, namely, to achieve a transition that makes possible the conditions for holding free and competitive general elections.

In its agreement of February 5, 2019, for this purpose, the National Assembly established the preliminary bases of the aforementioned process and gives an account of its international recognition, which implies (i) the internal and international recognition of the constitutional and temporary exercise of power by Guaidó - avoiding a vacuum, according to Article 233 of the Constitution-, and (ii) until "the exit of the dictatorial regime of Maduro is achieved, putting an end to the usurpation of power, allowing for the calling of elections and the restoration of democracy in Venezuela."

This explains why the constitutional periods and terms have been paralyzed given the material impossibility of sustaining them, due to the constitutional breakdown that occurred. Consequently, it can only be understood that upon the occurrence of the “complete absence” in the exercise of the presidency of the republic and upon the president of the National Assembly assuming as Head of State on an interim basis while proceeding to a new election, there has been left aside the term of thirty (30) consecutive days mandated by the Constitution for the implementation thereof and the termination of the temporary exercise of the presidency of the republic by the Acting President. So much is this so that the person in charge of the presidency, Guaidó, still remains in the exercise of his status as of this date, after nineteen (19) months, sustained by the international recognition he has been awarded.

XII

In line with the foregoing, the National Assembly declared in its aforementioned agreement of February 5, 2019 that:

> "Any attempt of dialogue or contact with the usurping regime must be subject to a single objective: the guaranties and conditions for achieving the cessation of the usurpation, a transitional government and free elections" [understanding that the constitutional terms are paralyzed and with a view to a dialogue that only allows] "as the sole objective to offer and agree with the usurping regime, the guaranties and conditions for it to hand over power in accordance with the Constitution, and to initiate a Transition process in which the full force of the Magna Carta is restored."

The Statute for the Transition adopted that same day as a provisional constitutional charter or, if you like, as a sort of "transitional constitutional provisions" that ensued the constitutional breakdown, therefore sanctions the gradual realization of the constitutional order, until its full completion. This explains what the National Assembly later declared and agreed on September 17, 2019, based on the attributions granted by Article 333 of the Constitution in relation to the Statute for Transition, namely:

> "To adopt, within the framework of the application of Article 233, the measures that allow restoring the conditions of electoral integrity in order to, once the usurpation has ceased and a Transitional Government is effectively formed, proceed to calling and holding free and transparent elections within the shortest possible time."
>
> "To ratify the full force of all the powers of the National Assembly of Venezuela, the mandate of the democratically-elected deputies, and the sovereign will of the Venezuelan people, as well as the legal itinerary outlined by the Statute that Governs the Transition to Democracy for the Reestablishment of the Constitution of the Bolivarian Republic of Venezuela, giving unrestricted political support to the leadership of Juan Guaidó Márquez as Chairman of the National Assembly, and as President (A) of the Bolivarian Republic of Venezuela, until the cessation of the usurpation."

The foregoing predicate is normatively clear. The Assembly and its chairman, while concurrently in charge of the Executive Branch of the Government, remain, based on the Statute for the Transition and on their authentic interpretations contained in its agreements, as a legitimate and internationally recognized parliamentary body, until democratic elections are held in Venezuela. For this it is necessary, as the aforementioned Agreement says with regard to the Statute:

> "A new legitimate Electoral Power, appointed by the National Assembly in exercising its constitutional powers and the establishment of a Transitional Government that will lead the country to that process [a free, fair and transparent presidential electoral process, with serious international observation and the free participation of all Venezuelans]".

Upon the occurrence of the "constitutional dismantling" described in the preceding pages and which is the subject matter considered by the National Assembly in its agreement of February 19, 2019, the essence of the Statute acquires force and points to what can be constructed or reconstituted as it has collapsed, namely, the organic and protective structure of the Constitution; given which, according to the terms of the same agreement, "the holding of free and transparent elections, ... has among its objectives the re-institutionalization of the organs of the National Public Power and the rescue of electoral sovereignty."

It would be a contradiction to point out that the fractured and suspended organic constitutional regularity simply continues to operate or that the National Assembly installed since January 5, 2016, can operate without being suspended only with regard to the legitimate power of the responsibility it has to achieve and carry out the transition. Hence, what is referred by the same Assembly in said Agreement of February 5, and which we understand to be an authentic interpretation of the Statute that was adopted on the same day, regarding the validity of its powers and the mandate of its deputies "until the cessation of the usurpation."

Upon suppressing all the constitutional periods and terms to which it must return, the Statute, therefore, provides that the transition means: "the itinerary for democratization and deinstitutionalization" until reaching "the full restoration of constitutional order, the rescue of popular sovereignty through free

elections" (Articles 2 and 3). For this, as the Statute also provides that, "it is up to the National Assembly to determine the opportunity to carry out all or part of the necessary formalities that, within the framework of Article 333 of the Constitution, allow modifying periods and legal requirements in order to recover the legitimacy of the Public Powers." And these provisions, which leave it to the Assembly to reorder the temporary terms of the State bodies, according to the same Statute, have the category of "a normative act in direct and immediate execution of Article 333 of the Constitution" (Article 4).

In view of the foregoing, by mandate of the Statute, the National Assembly "in order to achieve the process of reestablishing constitutional order" must have as its defined purpose "the formation of a Government of national unity that fills in the absence of an elected president until free and transparent elections are held within the shortest time possible"(Article 6). Wherefore the limit of the competence of the chairman of the National Assembly as "in charge of the Executive Branch of government" - given the constitutional transitory nature - finds that its term is no longer the 30 days provided by Article 233 of the "dismantled" Constitution, but "until a provisional government of national unity is formed," by the Assembly itself.

The idea of "progressiveness" with regard to the restoration of full force of the constitution –by nature alien to preclusive terms or periods, without impairment to what is set forth in the paragraph- is subject, however, to the completion of three successive stages:

(i) the "cessation of de facto powers",
(ii) the "formation of a provisional government",
(iii) the "holding free elections".

However, the same Statute, since its onset, warns that these are not watertight compartments that must be exhausted without a solution of continuity in order for one stage to go on to the next. So much so that "the cessation of the usurped authority" and "the formation of a provisional government of national unity" are considered by the provision of Article 12 as "concurrent elements" - meaning, according to the Dictionary of the Royal Spanish Academy of Language (DRAE), "to gather in the same place or time"- that allow, for the purpose of weakening the usurpation itself and

operating as communicating vessels, the exercise of the acting president, legitimized by Article 233 of the Constitution in relation to Article 14 of the Statute, or, as Article 26 *ejusdem* points out, the establishment by the latter of a government of national unity.

It should be noted that the above principles -progressiveness, concurrence, modification of terms, primacy of the purpose of the transition- overlap in the interpretation or reinterpretation of other key rules of the Statute that, when read separately, could lead to the false belief that the National Assembly reaches its final term or "shall exercise its constitutional functions within the framework of this Legislature until January 4, 2021," as provided in Article 13 of the Statute; or that the cessation of the usurpation is needed in order to restore the full force of Article 233 of the Constitution that supports the Acting President, Juan Guaidó.

Pursuant to Article 25 *ejusdem*, in the abovementioned circumstance, "he will hold office for thirty (30) consecutive days as acting president of the Republic for the purpose of conducting the process that leads to the formation of a provisional Government of national unity and the adoption of measures that are necessary for the holding of free and competitive presidential elections."

Summarizing the foregoing, it is may be concluded that having yielded the constitutional architecture and scaffolding in Venezuela, namely, those that support the dogmatic part -values, principles, human rights and the guaranty of democracy- of the 1999 Constitution, and as the organs of public power called to be constituted again have ceased to exist materially due to the impossibility of holding free and competitive elections, the constitutional periods or terms lose all significance; they are elements of the organic part of the aforementioned framework and that are suspended until they become viable through the full restoration of constitutionality. Not by chance, the resolution of the Permanent Council of the OAS - CP / RES. 1124 (2217/19) of April 9, 2019, states in two of its paragraphs with regard to the accreditation of the representative of the Acting President, the following:

> "[It highlights] the constitutional authority of the National Assembly of Venezuela, democratically elected, and resolved not to recognize the legitimacy of the new mandate of Nicolás Maduro."

> "To accept the appointment of Mr. Gustavo Tarre as Permanent Representative, designated by the National Assembly, until new elections are held and the appointment of a democratically elected government."

In any event, in view of the doubt regarding the effects of the constitutional transition toward democracy posed as an absurdity, whereby the usurper regime intends to violate it by now using the terms of the Constitution that it dismantled in order to rid itself of the only democratic instance that it does not control, the National Assembly, it could finally be stated that, constitutionally, there is no doubt about the continuity of the mandates of the current deputies elected to the National Assembly that began its activities on January 5, 2016, and the temporary exercise by its president of the Executive Power as of January 10, 2019. This is confirmed by the Statute for the Transition cited in connection with the Parliamentary Decision approved on September 17, 2019, also referred to herein.

Furthermore, one must bear in mind that, according to Article 33 of the Statute, the latter provides for its provisional constitutional supremacy and cannot cease to be observed by the Assembly, which is its implementing body, until its purposes are achieved, in the following terms:

> "The National Assembly will adopt all the decisions, agreements and laws necessary for the implementation of this Statute, in order to allow the effective restoration of the Constitution and the cessation of the usurpation of the Presidency of the Republic. Until these objectives are met, the provisions of this Statute and the other decisions adopted within the framework of Articles 233 and 333 of the Constitution shall apply on a preferential basis."

Moreover, according to the Residual Clause of the Statute, if there is any doubt or obstacle during the transition process that allows "the full restoration of constitutional order, the rescue of popular sovereignty through free elections," as stated in the abovementioned Article 3 *ejusdem*:

> "In order to guarantee the democratic transition, everything not foreseen in this Statute will be resolved by the National Assembly applying Article 333 of the Constitution".

XIII

Whatever it may be, by way of conclusion, at the height of the year 2020, Venezuela, as well as the region, is trapped by the severe pandemic that adds to the seriousness of its humanitarian ills, there is noted, for the time being and in the face of the destruction of the foundations of the nation and the republic, a sort of constitutional schizophrenia, which I can summarize in the same terms that I have set forth in one of my recent opinions for the hemispheric press. This, despite the fact that in a statement of August 14, 28 countries, including the United States, Israel and South Korea, members of the OAS, the Lima Group, and the International Contact Group created by Europe, agreed to support the constitutional transition and the holding of free presidential elections in Venezuela.

Nearing another "electoral farce" –as cautioned by the Secretary of the OAS, Luis Almagro- that could replicate in the parliamentary sphere and with a view to the coming December, the previous self-election of Nicolás Maduro in 2018, there remains to resolve the great obstacle the prevents the breaking of the vicious circle of evils that have lasted twenty years in Venezuela.

This is all about the constitutional mendacity, the trap of nominalism, intellectual flight or autism in the face of events that are considered to be fatal.

In his lucid chronicle on fascism as a regime of lies cited *supra [Il fascismo come regime della menzogna*, 2014] Piero Calamandrei (1889-1956) recalls that "we must do everything so that the viscous intoxication does not trap us: we need to keep our eyes on it, learn to recognize it in all its shams."

He found it necessary, -and this became demanding for his compatriots after twenty years such as the ones we have gone through-, once they had achieved freedom, to see themselves every day in the mirror of a reality that trapped their minds. They understood that the most important task was still pending, "the war for liberation in the depth of their conscience."

What remains and still prevents Cubans and the other victims of their narco-satrapy, Venezuelans, Nicaraguans, Ecuadorians and Bolivians, from escaping the misfortunes that keep us politically immobilized and spinning in circles, is precisely that diffuse

sensation of feeling ourselves exiled within our own homelands and at the same time living as slaves in a form of domination worse than the well-known colonization that our histories of independence describe. It is about "moral duality."

What do I mean by this?

Once the Venezuelan constitutional order expired, especially its simulation during the years of Hugo Chávez's government (1999-2012), after his successors definitively threw him overboard so that Nicolás Maduro could assume power unconstitutionally and by Cuban orders (2013-2020), the same regime today dusts it off at times; it wields it at convenience and confronts the Venezuelan people and its political actors only to inhibit them from their fights for freedom, tying them to their nominal democratic atavisms.

As a majority within the National Assembly, the group of deputies that opposes the ruling cartel in Venezuela has declared the death of the rule of law and democracy, as described in the preceding pages. They invoked Article 333 of the Constitution, obtained the support of the OAS and more than 60 governments, and gave birth to a provisional constitutional statute in order to gradually reconstitute the republic, with a view to goal and the flexibility of periods that cannot be attained immediately.

Inexplicably or explaining it within the context of the commented "regime of lies," as two sides of the same coin, this and those decided to revolve around the provoked "electoral circus" -how it is called by the author of this book, Allan Brewer Carías, who has honored me by requesting this introduction-, reissuing the provisions of a Constitution that is pending to be re-established, that of 1999. Some to spuriously elect deputies who would have completed their term and thus remain in the unlimited exercise of constitutional usurpation. Others, perhaps to ask the people for the umpteenth time, in the meantime, whether or not they want it to disappear at some point.

The Italian author to whom I refer describes this phenomenon of schizophrenic duality, alluding to "the existence of an order that is specified in laws, and another informal one that is specified in legalized illegal practices," creating a kind of reciprocal "vicariousness." It is the world of "constitutional fiction," typical of

those perverse regimes that, while stimulating the creation of feigned "consensuses" around deceptive realities: "insidious tricks to tame resistance," do nothing more than impede the formation of consciences and a critical awareness within a population trapped by "lies."

The lie becomes the physiology of power and is more damaging, as the distinguished Italian jurist points out, than "traditional dictatorships, which without vague terms or masks at least have the merit of sincerity."

Italy is saved from its "Chinese storm," it is true. It will take many more decades of rebuilding, however, to fully shed. Even today, it looks in the mirror of what it suffered and observes that at the end it managed to find a way out, but only when it decided to go find the truth, ward off mendacity and heal from the established intellectual mortgage schemes.

Only those who lived under "quarantine" managed to contain the schizophrenia: suffering workers, priests, university students, intellectuals, journalists who forged narratives to fracture autism and lift minds from their inertia, such as the political prisoners; all are immune from the contagion of fraud that exploits and superimposes over the material needs of those who suffer, the cult of selfishness and the suffocation of enlightened or practical reason through propaganda and surveys.

> "The political lie -says Calamandrei, in summing up- that can be expressed in the corruption and degeneration within those systems" that prey on human dignity, "is the normal and physiological instrument" of power that only sees itself in power. Its totalitarianism resides, exactly, in that nobody can escape its effects, as in Venezuela, in Cuba, in Nicaragua, and as far as it can go. "It is something murkier than illegality" – thus, the fiction and perhaps the offense of calling the people to express themselves at the time they are dying- because it is about the "simulation of legality," the "legally organized deceit of legality." It is the "adulterated legality," the "legalized illegality," the totalizing "constitutional fraud."

In the case that concerns us and the book that I honorably introduce, since it refers to Venezuela, something more will be

needed for its actors to resolve that which serves as a constant support to the constitutional building in democracy, the reality and the reconstruction of what supports every nation before becoming a republic: its higher values. This was described in a masterly way by President Betancourt, whom we have mentioned several times in a compelling way.[11]

> "The Third Republic of 1830 was erected in a country with much land and few people," argues Rómulo, noting that "after Bolívar, Sucre, Urdaneta and other leading figures of high military rank were dead, most of their comrades in arms revealed themselves to be inferior to their glories and they divided the country into parochial fiefdoms and covered it with blood in internal fights with no motivation other than the appetite for personal and absolute power."

He then notes how our "people, who had not derived social benefits from the Independence and still lived within the Republic under the yoke of economic and even legal slavery, rushed after whoever read out a demagogic proclamation and summoned them to the armed adventure."

Against that, he says, the artisans of our civil and party democracy had to fight when they took charge facing other and expressing their reservations, jointly and not separately and without preconceived agendas, of drawing up a unitary pact –not of unity– that respected their differences without demonizing them, harmonizing them as much as possible and under the common denominator, the common danger: yesterday it was militarism, today it is political criminality. Thus, was born the Pact of Puntofijo, not accepted by the communists, who salute its ideals, precisely because it distanced itself from the "unanimity" that is so pleasant for despots.

> "There is no lack of opinions –Betancourt added– in the sense that it would be more comfortable and expeditious for me as Head of State to choose my collaborators without taking the agreement into account. The "I will destroy the Goths even as a social nucleus," from the well-known phrase of the autocrat, that showed off an external liberal attire, is an expression that typifies

[11] Asdrúbal Aguiar y otros, *De la revolución restauradora a la revolución bolivariana*, Caracas, UCAB/Diario El Universal, 2009

that "Cainite fury" that has shaped the inter-party struggles in Venezuela. "The coalition has meant and means the elimination of this traditional cannibalism in our country in the struggles between the parties, carried out in the limited democratic interludes, fleeting parentheses between long stages in which the authoritarian empire of dictators and despots prevailed," he concludes.

Scripta manent, verba volant

Broward County, September 3, 2020

INTRODUCTION

THE COLLAPSE OF THE RULE OF LAW (2019)*

The Collapse of the rule of law in Venezuela is not the result of a casual event, or of a sudden *coup d'État* given by a few outlaws against the Constitution, or of a single wrong governmental action; it is the result of the deliberate process developed since 1998, under the guidance of Hugo Chávez, for the implementation of a previously designed plan in order to allow him and a few former military officers to assault power; a plan that was designed after having failed, seven years before, in 1992, in a military and bloody *coup d'État* attempt against a democratic government. The plan allowed them to perform

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the same assault of power, but this time with an electoral veil.[12] To such effect, Chavez, after being imprisoned for his failed attempt of military coup in 1992, and after being pardoned, facing weak political parties candidates, won the presidential elections of 1998, and in 1999, completed his assault on power by unconstitutionally convening a Constitutional Assembly that changed the Constitution to favor his plans.[13]

By assaulting power, they subsequently proceed, giving a *coup d'État*,[14] from within the democratic institutions, to directly destroy the democratic system, demolishing all its essential elements, beginning with the principle of separation of power, eliminating all sort of control or check and balance between the branches of government. In particular, for such purpose, they began capturing the Judiciary, subduing the Supreme Court, proceeding to destroy all the basis of representative democracy with the excuse of establishing a

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12 See Allan R. Brewer-Carías, *Proyectos constitucionales del chavismo para desmantelar la democracia y establecer un Estado socialista en Venezuela (Del principio al fin),* Editorial Temis, Editorial Jurídica Venezolana, Bogotá, Caracas 2019. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/08/9789583512223-txt-PROYECTOS-DEL-CHAVISMO-PAGINA-WEB.pdf

13 See Allan R. Brewer-Carías, Brewer-Carías, *Asamblea Constituyente y ordenamiento constitucional*, Academia de Ciencias Políticas y Sociales, Caracas 1999. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2089.%20ASAMBLEA%20CONSTITUYENTE%20Y%20ORDENAMIENTO%20CONSTITUCIONAL.pdf; *Poder constituyente originario y Asamblea Nacional Constituyente (Comentarios sobre la interpretación jurisprudencial relativa a la naturaleza, la misión y los límites de la Asamblea Nacional Constituyente),* Editorial Jurídica Venezolana, Caracas 1999. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2088.%20PODER%20Constituyente%20originario%20y%20ANC.~1.pdf

14 See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/II-1-98.-GOLPE-DE-ESTADO-Y-PROCESO-CONSTITITUYENTE-EN-VENEZUELA-_MEXICO_-VERSION-FINAL.pdf.

participatory democracy, which eventually resulted in a monumental fraud.[15]

The consequence of all this process is that after two decades of "*chavismo*," the once democratic Venezuelan State that still existed in 1999, has been transformed into a Totalitarian State that not only has perverted and controls almost all branches of government, but using them all, has progressively suffocated all private initiatives, destroying institutions, crushing the productive framework, dismantling from within the foundations of democracy, controlling the life of all citizens and carrying on a brutal repression by the military and paramilitary forces, not only against dissidents, but in general against the people.[16]

Without doubt, we are now seeing the final act of the Tragedy that resulted in the progressive and systematic destruction of democracy and all the economic and social institutions of the country, which although having been done with all the fanfare imaginable, has still not been sufficiently examined by the democratic world, particularly by academic field. [17]

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15 See Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente,* Tomo I, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas,1999. Available at: http://allanbrewer carias.net/ Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/ II,% 201,%2087.%20APORTES%20AL%20DEBATE%20CONSTITUYENTE %20TOMO%20I.pdf.

16 See Allan R. Brewer-Carías, *La ruina de la democracia*. *Algunas consecuencias. Venezuela 2015*, Editorial Jurídica Venezolana, Caracas / New York 2015. Available at: http://allanbrewercarias.com/wp-content/ uploads/2015/11/Brewer.-pdf-del-libro-LA-RUINA-DE-LA-DEMOCRACIA-2015.-ISBN-9789803653255.pdf

17 See Allan R. Brewer-Carías, *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Ediciones El Nacional Caracas 2002. Available at: http://allanbrewercarias.net /Content/ 449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2097.%20LA %20CRISIS%20DE%20LA%20DEMOCRACIA%20VENEZOLANA%20. ..%20_EL%20NACIONAL_.pdf. *Crónica constitucional de una Venezuela en las tinieblas 2018-2019,* Biblioteca de Derecho Público, Ediciones Olejnik, Buenos Aires, Santiago de Chile, Madrid 2019; *Sobre la democracia. Estudios,* Instituto de Derecho Público, Universidad Central de Venezuela,

The fact is that after all that destructive process, from a social and economic point of view, in Venezuela there occurred an extraordinary miracle – as all miracles are – of having converted, in barely two decades, what used to be the wealthiest country in Latin America, into a factory of poor people. As stated in the title of an article published a few years ago by the Washington Post: "There has never been a country that should have been so rich but ended up this poor,"[18] describing with precision the terrible situation of the country after more than fifteen years of an allegedly "pretty revolution" led by Hugo Chávez, which purported to implant in Venezuela what he called the "Twenty-First Century Socialism," which has turned the country – as has been qualified - into the current "Failed-State," "Narco-State," "Mafia State," "Gangster State," or "Putrid State;" that is, bringing it to situation in which it is no longer possible to hide behind the official propaganda and the supporting Lobbies paid by the "*chavista*" government abroad.

The "miracle" that the Venezuelan authoritarian regime has achieved, is a man-made disaster resulting from the destructive government policy expressly designed and deployed for that purpose by the late President Chavez, and continued by the man who currently is usurping the Presidency, Nicolas Maduro.

That process of destruction also produced the miracle of demolishing what in the 90's still was one of the most envied constitutional democracies of Latin America, the Venezuelan democracy that functioned from 1958 to 1998.

In fact, a democratic system began to be implemented in Venezuela in 1958, on the basis of an agreement reached between the then main political parties of the country, -the so-called *Pacto de Punto Fijo*- a Pact that must be considered - despite the acid criticism

Editorial Jurídica Venezolana, Caracas 2019. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/04/188.-CRONICA-CONSTITUCIONAL-VZLA-EN-TINIEBLAS-Car%C3%A1tula-e-%C3%ADndice.pdf

[18] See Matt.O'Brein, "There has never been a country that should have been so rich but ended up this poor," *The Washington Post*, Washington, May 19, 2016; available at: https://www.washingtonpost.com/news/wonk /wp/2016/05/19/there-has-never-been-a-country-that-should-have-been-so-rich-but-ended-up-this-poor/

spread by Chavez's followers – an outstanding and exceptional political Pact in which the parties set aside their main differences and achieved the goal of consolidating a constitutional democracy in a country that, until 1958, had been one of the countries with less democratic tradition in all of Latin America.[19]

It was precisely that stable democratic system that functioned during forty years up to 1999, what began to be methodically destroyed by the authoritarian regime that assaulted power in 1999.

Since then, and during the past twenty years, I have denounced what has been happening in the country, publishing many articles, Papers and books on the matter; among others, the 2009 book: *Dismantling Democracy: The Chavez's Authoritarian Experiment,*[20] at a time – not so long ago - when many academic and writers on these matters in the United States, were still admiring and applauding the former paratrooper commander that, after failing in his assault on power by military force in 1992, and being released from prison, was elected President of the Republic in 1998. The world then "discovered" that somebody in the country began – as the populist propaganda said – "to take care of the poor," as if nobody before Chávez had done nothing on matters of social justice in the country.

That astonishing and simplistic approach was enough for Chávez to gain admiration from so many people in the United States, to the point that anyone who dared denounce the great farce that was being carried out, disguised with a democratic veil, was immediately labeled as a sort of "dinosaur" in the academic archeology.

It is well known that since the Second World War, North Americans and Europeans have fortunately gotten used to democracy, refusing in general to admit the idea of the possibility that a democratic regime be transformed into a tyranny by using its own democratic resources. And that is, precisely, one of the reasons

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[19] See Allan R. Brewer-Carías, *Cambio Político y reforma del Estado en Venezuela*. Contribución al estudio del Estado democrático y social de derecho, Editorial Tecnos, Madrid 1978. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II.1.19.pdf

[20] See Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez's Authoritarian Experiment*, Cambridge University Press, New York 2009.

that explains why it has been so difficult for the North American and European people, in the academic world and in the government, to understand what has exactly happened during the past two decades in Venezuela, where the democratic institutions have been unmercifully destroyed and removed, following the doctrines of a so-called "new constitutionalism," based on a fallacious "participatory" or populist democracy, in order to construct a Socialist State in the twenty-first century.

The truth is that the relatively stable democratic system that we had in Venezuela for 40 years, from 1958 until 1999, was gradually transformed into a tyranny, using and misusing the electoral tools provided by Democracy itself.

Chávez, in fact, began his assault against the State institutions – in the presence of the then already cornered and naïve political parties- , taking over all the branches of government, doing away with the principle of separation of powers and eliminating the territorial distribution of State powers, eventually beginning the process of establishing a centralized, militaristic and authoritarian government in the country.

It all began in 1999, as aforementioned, through an unconstitutional process for adopting a new constitution that Chávez promoted by convening and electing a Constituent Assembly that was not contemplated nor regulated in the Constitution. The Assembly was entirely dominated and directed by the same group of former militaries that had accompanied Chávez in his 1992 attempt of *coup d'état*, and who still are abusing power. That Constituent Assembly, encouraged by the promoters of the "new Latin American constitutionalism" ideas,[21] was the main tool for Chávez to accomplish his assault on power, and eventually the militarization of the political institutions, and the dissolution of the constituted powers.

For this purpose, the Constituent Assembly supplanted and usurped the sovereignty of the people, assumed full and unlimited

[21] See Allan R. Brewer-Carías, *"El "nuevo constitucionalismo* latinoamericano*" y la destrucción del Estado democrático por el Juez Constitucional. El caso de Venezuela*, Colección Biblioteca de Derecho Constitucional, Ediciones Olejnik, Santiago, Madrid, Buenos Aires 2018.

powers to allegedly transform the institutional framework of the State, imposing Chávez's authoritarian ideas, and intervening all the constituted powers – with my isolated opposition, as I was one of the four elected member of the Assembly that were "the opposition," among its 131 members.[22]

In 2000, the Assembly removed and limited the authorities of all the branches of government; replaced all the Justices of the Supreme Court; dissolved the elected Congress, assuming the legislative functions; intervened the provincial and municipal powers; suspended the municipal elections; removed the members of the Electoral Council and the Comptroller General of the State, and in general, intervened the Judiciary, dismissing almost all the judges and the members of the Public Prosecutor's Office.[23]

And it was since that constituent process of 1999, that the collapse of the rule of law and the process of transition from democracy to tyranny gradually began to take shape, while the world, in general, and the North American and European countries, in particular, viewed the former Lieutenant Colonel with some sort of sympathy, due in part to his illusionist promises, ignoring his fraudulent use of the democratic institutions.

In that context, we must also remember how so many countries profited from his performance as a typical and extravagant Caribbean *nouveau riche,* when he dilapidated the country's wealth, using public money to finance politicians all over the world. We must not forget, for instance, that he even financed the supply of heating oil for homes in allegedly poor neighborhoods in Boston and in the South Bronx, in New York, supported by many important local

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22 See Allan R. Brewer-Carías, *Asamblea Constituyente y proceso constituyente 1999,* Colección Tratado de Derecho Constitucional, Tomo VI, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2013. Available at: http://allanbrewercarias.com/wp-content/uploads/2014/07/BREWER-TRATADO-DE-DC-TOMO-VI-9789803652432-txt.pdf

23 See Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente,* Tomo I, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas,1999. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2087.%20APORTES%20AL%20DEBATE%20CONSTITUYENTE%20TOMO%20I.pdf.

politicians, and got to the point of subsidizing public transportation in London, supported by the Mayor of the City, all delighted and captivated by the sympathetic, but erratic, military who acted as a sort of a twenty-first century Robin Hood.

In a simple way, he was considered as somebody that being elected by the people, began to sell himself as someone that promised to take care of the poor – falsely pretending that that had never happened before in the then richest State of Latin America –, illegally encouraging corruption in the country and financing political parties in many countries in Latin America and Europe with Venezuelan oil resources.

With all his charisma, and misusing the immense wealth that the country had due to the boom in oil prices, after twenty years of authoritarian government, to which I referred in my book: *Authoritarian Government v. The Rule of Law*, *Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution,*[24] he and his appointed successor Nicolás Maduro, managed to transform this democratic country into a dictatorship or tyranny.

Of course, during all this process, elections took place now and then, always controlled by a partialized electoral authority within a centralized power and a militarized Public Administration; using the tools of democracy only to destroy its very essence.

As stated above, the first task assumed by the 1999 Constituent Assembly, besides giving deliberative political rights and participation to the military, was to assault the Judiciary – a fact ignored by so many democrats in the world -, dismissing almost all of the country's judges and replacing them all by provisional and temporary judges, thus ending the autonomy and independence of the

[24] See Allan R. Brewer-Carías, *Authoritarian Government v. The Rule of Law*, *Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, Editorial Jurídica Venezolana, Caracas / New York 2014. Available at: http://allanbrewercarias.com/wp-content/uploads/2014/03/9789803652272-txt.pdf.

Judiciary.[25] A democracy cannot subsist without judicial independence; but this was ignored up to nowadays when the violations of human rights became so evident that it could no longer be covered.

Within that framework, beginning in 2000, and afterwards, in 2004, 2010 and 2015, the Supreme Tribunal was transformed into the most ominous instrument for consolidating authoritarianism in the country, having been completely packed with government supporters, even with former representatives of the official party in the National Assembly. This explains why the Constitutional Chamber of the Supreme Tribunal, instead of being the guardian of the Constitution, has been the main tool of the authoritarian government for the illegitimate mutation of the Constitution, for the demolition of the rule of law, [26] and even for the persecution and illegitimate prosecution of members of the new National Assembly elected in 2015, which, not being controlled by the Government, has been systematically attacked and its powers diminished. Nonetheless, that National Assembly is today the only hope Venezuelans have for the restoration of democracy in the country.

In any case, regarding the other branches of government, it can be said that the assault on power was completed after 2005, when due

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[25] See Allan R. Brewer-Carías, "The Government of Judges and Democracy. The Tragic Situation of the Venezuelan Judiciary," in Sophie Turenne (Editor.), *Fair Reflection of Society in Judicial Systems. A Comparative St*udy, Ius Comparatum. Global Studies in Comparative Law, Vol 7, Springer 2015, pp. 205-231; also published in the book: *Venezuela. Some Current Legal Issues 2014, Venezuelan National Reports to the 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, 20-26 July 2014*, Academia de Ciencias Políticas y Sociales, Caracas 2014, pp. 13-42. Also available at: http://allanbrewercarias.com/wp-content/uploads/2015/08/837.-II.4.832-government-judges.pdf

[26] See Allan R. Brewer-Carías, *Crónica sobre la "in" justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público / Universidad Central de Venezuela Caracas 2007. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/09/113.-CRONICA-SOBRE-LA-IN-JUSTICIA-07-07-2017-2.pdf; *Práctica y distorsión de la Justicia Constitucional en Venezuela (2008-2012***),** Acceso a la Justicia, Academia de Ciencias Políticas y Sociales, Universidad Metropolitana, Editorial Jurídica Venezolana, Caracas 2012.

to the decision adopted by the opposition to not to participate in the parliamentary elections of December that year, the government took complete control of the National Assembly –a control that endured for 10 years, up to 2016 -, completing the process of packing all the branches of government with government loyalists, including the Electoral Authority, the Public Prosecutor's Office and the Comptroller General's Office.

The following year, in 2006, after President Chávez was re-elected, he declared to be a Marxist-Leninist, and the Official State Party he managed to create adopted Marxism as its official ideology, proposing then to definitively change the Democratic Rule of Law State, converting it into a Popular or Communal State.

For this purpose, new laws were approved, such as the Communal Council Law (2006), and in 2007, the President took the initiative of proposing a Constitutional Reform in order to create a "State of Popular Power," in parallel with the Constitutional State, based on a communist economic system, eliminating private property and substituting it by social or communal properties. Although those reforms could only be introduced through a "constitutional reform" procedure carried out by duly convened Constituent Assembly, the Supreme Tribunal, already coopted by the Executive Branch, refused to even receive the complaints for judicial review that were filed.[27]

Fortunately, the people rejected the proposed constitutional through a referendum held in December 2007, this being the most important political defeat suffered by Chávez during his tenure.

Unfortunately, that defeat had a disastrous response: the aggressive reaction of Chavez against the will of the people, which led him to breach the Constitution, impose the rejected constitutional reform by means of ordinary legislation and decree laws that were enacted between 2008 and 2011, to create the framework of a Cuban-

[27] See Allan R. Brewer-Carías, *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007),* Colección Textos Legislativos, No.43, Editorial Jurídica Venezolana, Caracas 2007. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%20117.%20LA%20REFORMA%20CONSTITUCIONAL%20DE%202007%20VERSION%20DEFINITIVA.pdf

style a "State of Popular Power," or "Communal State." In this case, the claims for judicial review against such laws, also ended up in the dead files of the Supreme Tribunal, who never processed the requests, wherefore such unconstitutional laws were implemented by the government in total impunity, without any sort of control or judicial review.[28]

In any case, by 2015, the political, economic and social destruction of the country was already completed, provoking a sort of "popular rebellion," which was expressed by the vote in the parliamentary election held in December 2015; an election whose results surprised everybody, including the controlled Electoral body, which could not manage to manipulate the results.

With this election, the government lost control of the majority in held in the National Assembly, and the opposition obtained a qualified majority of representatives, this being, without doubt, the second most important political setback of the authoritarian regime since 1999, after the defeat of the 2007 constitutional reform.[29]

However, the regime was already used to exercising absolute power without any sort of control or checks or balances, and therefore, an autonomous National Assembly could not be tolerated. The Government then, soon after such election, began to systematically obstruct the opposition from carrying on its legislative agenda, and gradually began to strip the Legislative body of all its powers and functions – yes, all of them - ; and all that, thanks to an all evil and depraved collusion between the Executive Branch and the Supreme Tribunal of Justice.

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[28] See Allan R. Brewer-Carías, *Estado Totalitario y desprecio a la Ley*. La *desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela*, Editorial Jurídica Venezolana, Caracas / New York, 2014/2015. Available at: http://allanbrewercarias.net/Content /449725d9-f1cb-474b-8ab2-41efb849fea5/Content/9789803652722-txt%20 (pagina%20web%20arbc).pdf.

[29] See Allan R. Brewer-Carías, Allan R., 2015, *La mentira como política de Estado. Crónica de una crisis política permanente. Venezuela 1999-2015,* Editorial Jurídica Venezolana, Caracas / New York 2015; Available at: http://allanbrewercarias.com/wp-content/uploads/2015/08/9789803653187-txt.pdf.

That happened even before the newly elected National Assembly could hold its first session on January 5, 2016, when the former National Assembly enacted in just two days (December 29th and 30th) more than 30 statutes striping off all legal powers from the new Assembly; and appointing Supreme Tribunal justices, packing it then entirely with members of the governing party.

Once the Tribunal was completely controlled, it immediately began to prevent the Assembly from exercising its functions, issuing, during 2016 and 2017, more than 100 rulings that transformed the political system into what I have called, a "Judicial Dictatorship or Judicial Tyranny," characterized by the fact that the Executive used, at his will, the subdued Supreme Tribunal as its main instrument to neutralize the National Assembly, absolutely eliminating all its functions in order to consolidate authoritarianism.

The result was that the Constitutional Chamber of the Supreme Tribunal, acting as constitutional judge, declared the unconstitutionality of practically all – yes, all – the laws or statutes that have been sanctioned by the National Assembly elected in December 2015; and furthermore, has reformed the *interna corporis* of the Assembly in order to subject the exercise of its legislative functions to the prior approval by the Executive Branch, something never seen in any democratic State; has eliminated the Assembly's political power to control the government and the Public Administration; has imposed the prior approval by the Executive Vice-President for a Minister to be questioned by the Assembly; has eliminated the possibility for the Assembly to oppose and disapprove the states of emergency that the Executive has successively decreed; has eliminated the possibility for the National Assembly to approve votes of non-confidence against the Ministers; has canceled the constitutional obligation of the President to submit its Annual Address on the State of the Nation before the National Assembly, deciding instead to waive it before the same Supreme Tribunal; has eliminated the legislative approval of the national budget law, transforming the Budget Law into a mere executive decree to be approved by the Tribunal; has eliminated the Assembly's power to review its own decisions and repeal them, as was the case regarding the unconstitutional appointment of the justices of the Supreme Tribunal made in December 2015; has eliminated the power of the

National Assembly even to express its political opinion as a result of its debates, having annulled all the major political Bills, Resolutions and Declarations that the Assembly has adopted.

Finally, in a few decisions issued in 2017, based on an alleged but absurd "contempt of court" regarding a ruling by the Electoral Chamber of the same Supreme Tribunal, the Constitutional Chamber has systematically – up to this date - declared null and void all – yes all – " present and future decisions" of the National Assembly, even in some occasions, threatening to revoke the popular mandate of its members and to imprison them.

However, this did not end here. In one of the most notorious and shameful decisions of the Constitutional Chamber issued in March 2017 (No. 155 of March 27, 2017, and No. 156 of March 29, 2017), it simply decreed in an unconstitutional way a state of emergency; eliminated the parliamentary immunity of the representatives; arbitrarily assumed all – yes, all - the parliamentary powers of the National Assembly; and even the Tribunal dared "delegate" legislative powers upon the President of the Republic, ordering him to reform laws and Codes at his own discretion, among them, the Criminal Code and the Organic Code of Criminal Procedure. [30]

All these decisions can only be considered or qualified as a permanent and continued *coup d'état*, which gave birth to a new model of authoritarian government that did not have its origin in a

[30] See Allan R. Brewer-Carías, *El golpe a la democracia dado por la Sala Constitucional,* Editorial Jurídica Venezolana, Caracas,2014/ 2015. Available at: http://allanbrewercarias.com/wp-content/uploads/2014/07/154.-9789803652531-txt-P%C3%81GINA-WEB-ARBC.pdf. *Dictadura judicial y perversión del Estado de derecho. La Sala Constitucional y la destrucción de la democracia en Venezuela*, Editorial Jurídica Venezolana International, Caracas / Madrid 2016 / 2017. Available at: http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf; *La consolidación de la tiranía judicial. El Juez Constitucional controlado por el Poder Ejecutivo asumiendo el* Poder *Absoluto*, Editorial Jurídica Venezolana International, Caracas / New York 2017. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/06/ALLAN-BREWER-CARIAS-LA-CONSOLIDACI%C3%93N-DE-LA-TIRAN%C3%8DA-JUDICIAL-EN-VZLA-JUNIO-2017-FINAL.pdf.

military coup, as was the tradition in Latin America, but through the manipulation of popular elections, the degradation of judicial review processes, and the abuse of all democratic tools, in order to eventually give the factual control of the country to the military; and all this, for the purpose of destroying the rule of law and the democratic principles, using a very convenient camouflage of "constitutional" and "elective" masks.

After all these facts, if we have to make a general balance today of the 1999 Venezuelan Constitution it can be considered as one of the most vivid examples in contemporary constitutionalism, of a Constitution that has been violated and infringed since even before it was published. This is the only explanation in order to understand why the Federal State has been transformed into a centralized system of power; the separation between five - not three - five branches of government has been erased and replaced by a political system of total concentration of power; the principle of representativeness has been neglected; the political participation has been denied and ignored; and the economic liberty has been engulfed by an extreme "statization" of all activities and a State capitalism through indiscriminate expropriations and confiscations. [31]

One of the last acts or stages of all this institutional Tragedy that is currently affecting the county began in 2017, with the unconstitutional convening and functioning of a new Constituent Assembly with unlimited powers and duration, installed in July 2017 by President Nicolás Maduro in breach of the provisions of the Constitution because only the people by means of a referendum can convene such Assembly.[32]

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[31] See for instance in relation to the Oil Industry: Allan R. Brewer-Carías, *Crónica de una destrucción.* Concesión*, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y Degradación de la Industria Petrolera,* Colección Centro de Estudios de Regulación Económica-Universidad Monteávila, N° 3, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas 2018 Available at: http://allanbrewercarias.com/wp-content/uploads/2018/06/9789803654276-txt-Cr%C3%B3nica-destrucci%C3%B3n-ARBC-PAGINA-WEB.pdf

[32] See Allan R. Brewer-Carías, *La inconstitucional convocatoria de una Asamblea Nacional Constituyente en fraude a la voluntad popular*, Editorial

The purpose of the Assembly, again, is supposedly to transform the State in order to try again to insert in it the Socialist, Popular or Communal State framework; that is, the same constitutional framework that was rejected by the people in 2007; and the same that has been unconstitutionally implemented through ordinary legislation since 2010.[33]

The fact is that, violating the Constitution, the Constituent Assembly, composed by more than 500 members, was elected through an *ad hoc* electoral system contrary to the universal and direct suffrage guaranteed in the Constitution, based on a territorial (municipal) and corporate or fascist vote exercised by chosen sectors of the society, thus institutionalizing discrimination and exclusions.

Although the unconstitutional convening of this fraudulent Constituent Assembly was again challenged before the Constitutional Chamber of the Supreme Tribunal, eventually, the response was, making fun of the Constitution, that a referendum is indeed needed in order to change a "comma," or a word or one phrase in an article of the Constitution, but to change the entire Constitution, as it was intended, it was not necessary to ask for the people's approval. As simple as that: eight individuals (the President of the Republic and seven Justices of the Tribunal) imposed their will upon the people without limits.

Based on this unconstitutional decision, the members of the Constituent Assembly were finally elected on July 2017, all of them being affiliated to the official party, which explains why all its decisions are only adopted by unanimous vote. The Assembly

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Jurídica Venezolana International, Caracas / New York 2017. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/06/BREWER-CARIAS-LA-INCONSTITUCIONAL-CONVOCATORIA-AN-CONSTITUYENTE -JUNIO-2017-FINAL.pdf.

33 See Allan R. Brewer-Carías *et al*., *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal (Los consejos comunales, las comunas, la sociedad socialista y el sistema económico comunal*) Colección Textos Legislativos Nº 50, Editorial Jurídica Venezolana, Caracas 2011. Available at: http://allanbrewercarias.com/biblioteca-virtual/introduccion-general-al-regimen-del-poder-popular-y-del-estado-comunal-o-de-como-en-el-siglo-xxi-en-venezuela-se-decreta-al-margen-de-la-constitucion-un-estado-de-comunas-y-de-consejos-comunales/

assumed an original constituent power, substituting the people's will and sovereignty, acting with alleged supra-constitutional powers, imposing its will on all constituted powers, including the Supreme Tribunal, whose Justices appeared before the Assembly prostrating themselves before it. That is why in another book published in 2017, *Usurpación Constituyente*, [34] I explain how the "Judicial Tyranny" was in part transformed into a "Constituent Tyranny," when the Supreme Tribunal began to be relatively useless.

Additionally, since 2017, the Constituent Assembly has acted as a sort of Caribbean reincarnation of the 1792 *Comité de Salut Public* of the Terror Regime in revolutionary France, established in order to persecute any dissidence, declaring, for instance, that elected members of the National Assembly who refused to prostrate themselves before it, were traitors to the motherland, particularly after they met, for instance, with public officials and representatives in foreign countries in order to explain the situation of the country. This persecution against members of the National Assembly in August 2018, got to an extreme situation when the Supreme Tribunal, in collusion with the Constituent Assembly, ordered the incarceration and apprehension of two representatives, unjustly indicting them of magnicide and other grave crimes against the State.

All the above is not science fiction.

All has happened and is currently happening in Venezuela. Nevertheless, the most important factor in all this process today is the fact that nobody can allege to be deceived. That is to say, finally, and tragically, the truth has surfaced regarding all the abuses committed by the Venezuelan government against its own people, and of course, not only by the current Maduro regime but beginning with the Chávez hypocrite regime, both using the democratic veil in order to transform the former Venezuelan democracy into tyranny.

Furthermore, that truth has surfaced even clearer with the last unconstitutional actions taken by the regime, since 2017, beginning

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[34] See Allan R. Brewer-Carías, *Usurpación constituyente 1999, 2017. La* historia *se repite, unas veces como comedia y otras como tragedia*, Editorial Jurídica Venezolana, Caracas/ New York 2017. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/02/14-2-2018-USURPACI% C3 %93N-CONSTITUYENTE-1.pdf

with the decision adopted by the fraudulent and unconstitutional National Constituent Assembly installed in 2017, to illegitimately convene (supplanting the National Electoral Council), an advanced presidential election in order to "re-elect" Nicolas Maduro for a new term (2019-2025), which was due to begin in January 2019.

That so-called "re-election" of Nicolas Maduro was held on May 20, 2018, through an election process that did not meet the national and international standards set for democratic, free, fair and transparent election processes. Consequently, the National Assembly, as a political and legislative body that represents the sovereign will of the people, legitimately elected in December 2015, and as the primary interpreter of the Constitution, approved on May 22, 2018, a very important Resolution denouncing the "farce" of said elections process of May 20, 2018, stating that it:

> "violated all the electoral guaranties recognized in Human Rights Treaties and Agreements, and in the Constitution of the Bolivarian Republic of Venezuela and the Organic Law of Electoral Processes, considering the effective absence of the Rule of Law; the partiality of the electoral arbiter; the violation of the effective guaranties for exercising the right to vote and the right to be elected to office by popular vote; the lack of effective controls against acts of electoral corruption perpetrated by the government; the systematic breach of the freedom of expression, together with the partiality of mass media controlled by the government, the absence of effective and transparent mechanisms of electoral oversight." [35]

The National Assembly also construed that if the majority of the "people of Venezuela" refrained from participating in said illegitimate elections process (in which 82% of the Registered electors abstained), it was the people who:

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[35] Text of the Resolution of May 22, 2018 available at http://www.asamblea nacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. Similarly, in the review "National Assembly does not accept the results of 20M and declares Maduro a 'usurper,'" in *NTN24*, May 22, 2018, available at http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas

> "defending our Constitution and invoking Articles 333 and 350 sanctioned by the Constitution, decided to reject, disavow and not validate the farce called for May 20, in spite of the government's pressure through the social control media."

By virtue of the foregoing, the National Assembly, on the same date May 22, 2018, resolved "to declare as "non-existent" the farce that took place on May 20, 2018;" "to disavow the alleged outcome announced by the National Electoral Council, especially, the alleged election of Nicolas Maduro Moros as President of the Republic, who must heretofore be deemed a usurper of said office;" and to " disavow any null and illegitimate acts of proclamation and swearing in" of Nicolas Maduro for the 2019-2025 term."

This was ratified by the same National Assembly a few months later, on November 13, 2018, by issuing a Resolution "to promote a political solution for the national crisis" declaring that "as of January 10, 2019, Nicolas Maduro continues to usurp the office of President of the Republic, in spite of not being the president-elect," deeming "all the decisions of the National Executive Branch ineffective as of that date, pursuant to the terms of Article 138 of the Constitution." [36]

This Resolution cannot be perceived in any other way than as a manifestation of civil disobedience and of resistance against illegitimacy, ignoring an election deemed fraudulent, declaring it as non-existent, and ignoring the proclamation of the allegedly elected official. [37]

The Resolution specifically mentioned a Declaration of the "*Grupo de Lima*" issued on May 21, 2018, which was followed by declarations with the same international value expressed by more than 44 governments of America and Europe, rejecting the legitimacy of the election. The "*Grupo de Lima*," gathering representatives of the governments of Argentina, Brazil, Canada, Chile, Colombia,

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[36] Available at http://www.asambleanacional.gob.ve/documentos_archivos/acuerdo-con-el-objeto-de-impulsar-una-solucion-politica-a-la-crisis-nacional-260.pdf

[37] See Allan R. Brewer-Carías, *El derecho constitucional a la desobediencia civil. Estudios. Aplicación e interpretación del artículo 350 de la Constitución de Venezuela de 1999*, Biblioteca de Derecho Público, Ediciones Olejnik, Buenos Aires, Santiago de Chile, Madrid 2018.

Costa Rica, Guatemala, Guyana, Honduras, México, Panamá, Paraguay, Peru and St. Lucia, agreed to contribute to "preserve the attributions of the National Assembly," expressing that those States:

> "Do not recognize the legitimacy of the electoral process that took place in Venezuela and that ended on May 20, 2019, for failure to meet the international standards of a democratic, free, just and transparent electoral process."

The same day, Mike Pompeo, Secretary of State of the United States, said in a very simple way that:

> "The United States condemn the fraudulent election that took place in Venezuela on May 20. Such so-called "election" is an attack to the constitutional order and an affront to the democratic tradition of Venezuela." [38]

We should also mention the reaction of the *G7 Group*, that gathers the leaders of Germany, Canada, the United States, France, Italy, Japan and the United Kingdom, which on May 23 denounced the presidential election because it "did not meet the international standards" and did not safeguard the "basic guaranties," concluding by rejecting the "Venezuelan presidential elections and its results for not representing the democratic will of the citizens of Venezuela."[39]

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[38] See Mike Pompeo's statement: "The United States condemns the fraudulent election that took place in Venezuela on May 20. This so-called 'election' is an attack on constitutional order and an affront to Venezuela's tradition of democracy," in "An Unfair, Unfree Vote in Venezuela," Press Statement, *Secretary of State*, Washington, DC., May 21, 2018, en https://www.state.gov /secretary/remarks/-2018/05/282303.htm .

[39] See "G7 Leaders' Statement on Venezuela," on the official website of Canada's Prime Minister Justin Trudeau, May 23, 2018, in https:// pm.gc.ca/eng/news/2018/05/23/g7-leaders-statement-venezuela. See also, in the review "The G7 denounced the elections in Venezuela for 'not meeting international standards' or ensuring 'basic guarantees,' in *Infobae*, May 23, 2018, in https://www.infobae.com/america/venezuela/2018/05/23/el-g7-denuncio-las-elecciones-en-venezuela-por-no-cumplir-los-estandares-internacionales-ni-asegurar-garantias-basicas/ . See also the information in "G7 and European Union unite to reject recent election in Venezuela," *north shore news,* The Canadian Press, May 23, 2018, in http://www.nsnews. com/news/national/g7-and-european-union-unite-to-reject-recent-election-in-venezuela-1.23310884 .

The consequence of all this process of rejection of the supposedly presidential re-election of Nicolás Maduro was that when that day of January 10, 2019 arrived (day on which the new constitutional term was to begin and the new President was to be sworn in), the situation had already been clearly announced since May 2018. That is why, for instance, on January 4th, 2019, the National *Academy of Political and Social Sciences,* the highest consultative entity of the country on institutional matters, issued a proclamation highlighting that due "to the non-existence of the necessary conditions in order to hold free and fair elections," the illegitimate presidential "re-election" of May 2019, placed the country in an "unprecedented situation" (which was the one that Venezuelans faced in January 2019), due to the fact -said he Academy- that

> "on next January 10th 2019, date on which, as established in article 231 of the Constitution, the president for the constitutional term 2019-2025 has to be sworn, the country lacks of a president legitimately elected by means of free and just election." [40]

Consequently, the Academy, facing the grave situation confirmed by those "proceed "to comply with the citizens' duty establish in article 333 of the Constitution," demanded that "the different Branches of Government respect the Constitution," and "proceed to the full reestablishment of the constitutional and democratic order of the country;" a message that, in fact, was addressed to the National Assembly, recognized as the only State organ with democratic legitimacy in the country due to the fact that

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[40] See the Declaration of the *Academia de Ciencias Políticas y Sociales*: "Ante el 10 de enero de 2019: fecha en la que ha de juramentarse al presidente de la República conforme a la Constitución," January 4, 2019; available at: http://www.acienpol.org.ve/cmacienpol/Resources/Pronunciamientos/PRONUNCIAMIENTO%20DE%20LA%20ACADEMIA%20DE%20CIENCIAS%20POLITICAS%20Y%20SOCIALES%20SOBRE%20EL%20RECHAZO%20A%20LA%20DEMANDA%20DE%20GUYANA%20CONTRA%20VENEZUELA%20def..pdf. . See the reference in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitutcionalización democática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, caracas 2019, pp. 332 ff. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf

all the other branches of government were totally subdued to the National Executive, in particular the Supreme Tribunal of Justice, the National Electoral Council, and the organs of the Citizens' power, led by the General Prosecutor of the Republic.

At that moment and in that situation, the National Assembly, as the people's representative and as primary interpreter of the Constitution, had no other choice but to interpret the Constitution in order to start to resolve the political crisis that arose from the unprecedented political event in the country's history, that on January 10, 2019, there was no legitimately elect president that could be sworn in and, pursuant to Article 231 of the Constitution, take the office of President of the Republic for the 2019-2025 term. For that purpose, the Assembly applied by analogy Article 233 of the Constitution referring to cases of "absolute lack of the president prior to taking office," for which the relevant section of this article that governs similar situations provides the following:

> "When an elected President is permanently unavailable to serve prior to his inauguration, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending the election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic."

Interpreting the Constitution and applying this rule by analogy, the National Assembly decided that in the situation that occurred on January 10, 2019, since there was no legitimately elected president that could be constitutionally sworn in to said office for the constitutional presidential term of 2019-2025, and as the same National Assembly had decided since May 2018, it should consider, pursuant to Article 233 of the Constitution, in view of the absolute lack of a president-elect, that the president of the National Assembly had the duty to take charge of the Presidency of the Republic, this being precisely one of the functions inherent in his duties in the cases of absolute lack of a president of the Republic, which he had to accomplish by full operation of law, without the need for any additional swearing in before the Assembly, for he had already done

this when accepting the position as President of the Assembly on January 5, 2019.[41]

The interpretation of the Constitution made by the National Assembly started with a Bill or Resolution issued by the Assembly on the same January 10, 2019, when it decreed the "emergency due to the total disruption of constitutional continuity," setting the path for the "ceasing of the usurpation." As the president of the National Assembly stated on that same day, the situation was that: "Today there is no Chief of State, today there is no commander in chief of the Armed Forces, today there is a National Assembly that represents the people of Venezuela."

A few days later, the National Assembly completed the interpretation of the Constitution by issuing another Resolution, on January 15, 2019, reaffirming "the declaration of usurpation of the Presidency of the Republic by Nicolas Maduro Moros and the reinstatement of the Constitution," adopting a set of "decisions to proceed to restore the force of the constitutional order, on the basis of Articles 5, 187, 233, 333 and 350 of the Constitution."[42]

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41 See Allan R., Brewer-Carías, *Transición hacia la democracia en* Venezuela. *Bases constitucionales y obstáculos usurpadores*, (Con Prólogo de Asdrúbal Aguiar; y Epílogo de Román José Duque Corredor), Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana, Miami 2019. Available at: http://allanbrewercarias.com/wp-content/uploads /2019 /06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf; "Some Constitutional and Legal Challenges posed by the Process of Transition Towards Democracy Decreed by the National Assembly of Venezuela, Since January 2019," ((Text of the Presentation made at the Event on "Perspectives on Venezuela: Present and Future Challenges," organized for the Launching of the New York Chapter of the Inter-American Bar Association (*Federación Interamericana de Abogados*), New York, 17 July 2019, published in the Inter-American Bar Association, website, at http://www.iaba.org/some-constitutional-and-legal-challenges-posed-by-the-process-of-transition-towards-democracy-decreed-by-the-national-assembly-of-venezuela-since-january-2019%EF%80%AAallan-r-brewer-carias-emeritus/

42 Available at: http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-dela-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion.

The National Assembly specifically decided to "apply by analogy Article 233 of the Constitution in order to fill in the absence of a president-elect, while concurrently acting to restore the constitutional order based on Articles 333 and 350 of the Constitution**,** and cause the ceasing of the usurpation by effectively forming a Transition Government and proceeding to organize free and transparent elections."

In the same Resolution, the Assembly decided "to formally declare the usurpation of the Presidency of the Republic by Nicolas Maduro Moros and, consequently, consider the de facto status of Nicolas Maduro as legally ineffective, and declare all the alleged actions of the Executive Branch to be null and void, pursuant to Article 138 of the Constitution," and also decided:

> "to adopt, within the frame of the application of Article 233, the measures that allow restoring the conditions of electoral integrity so that, once the usurpation ceases and a Transition Government is formed and installed, it will call and hold free and transparent elections within the shortest term possible, as provided in the Constitution and other Laws of the Republic and applicable treaties."

For this transition process, the National Assembly also enacted on February 5, 2019, a Law called as the "Statute that governs the transition to democracy in order to reinstate the Constitution," which confirmed, in its Article 14, that "the president of the National Assembly is the legitimate acting president of the Bolivarian Republic of Venezuela in accordance with Article 233 of the Constitution." [43]

Consequently, after the constitutional interpretation made by the National Assembly in the aforementioned Resolution of January 15, 2019, and in the Statute for the Transition, to apply by analogy

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[43] The text of the *Statute for Transition* is available at http://www.asamblea nacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf.

Article 233 of the Constitution due to the absence of a legitimate president-elect that could be sworn in as president of the Republic for the 2019-2025 term, this implied that as of January 10, 2019, representative Juan Guaidó, in his capacity as president of the National Assembly, by mandate of the Constitution and without losing his capacity as such president of the Assembly, became by law the interim President of the Republic or President in charge, which, among other public statements, was expressed by Juan Guaidó himself in a public rally held on January 23, 2019.

By assuming the interim presidency of the Republic in his capacity as President of the National Assembly, Guaidó merely fulfilled a duty imposed by the Constitution, so there was no "self-proclamation" as has been erroneously affirmed, but the assuming of one of the functions that has been constitutionally vested on him as president of the National Assembly. Therefore, the "oath" expressed by Guaidó at a rally on January 23, 2019, although it was a very important political formality, did not replace the formal oath that he did swear as president of the National Assembly on January 5, 2019, to fulfill, among others, the duty of precisely taking charge of the Presidency of the Republic, which is constitutionally according to law under the Constitution, as of January 10, 2019.

This was understood by the country, represented by the majority of its citizens in rallies and demonstrations; this was understood by the international community, acknowledging him as the legitimate acting president of the Republic, and also, without doubt, was recognized by the European Parliament by Resolution of January 31, 2019, when it decided to "acknowledge Juan Guaidó ("the legitimate and democratically elected president of the National Assembly") as the legitimate interim president of the Bolivarian Republic of Venezuela, in accordance with the Venezuelan Constitution, pursuant to the provisions of its Article 233, and to fully support his road map." [44]

[44] See the text of the Resolution on the situation in Venezuela (2019/2543(RSP), in *Parlamento Europeo, 2014-2019*, Textos Aprobados, P8_TA-PROV (2019)0061 Situación en Venezuela, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0061+0+DOC+PDF+V0//ES

But, in spite of all this political situation and turmoil, the fact is that the de facto government controlled by Nicolás Maduro is acting within a Totalitarian State that has continued all its abuses with the participation of all the branches of government – except the Legislative branch that from 2016 has been controlled by the opposition -, purporting to give to its actions an alleged veil of "legality" through decisions of the Constitutional Chamber against the National Assembly. This has happened, for instance, when mass media are closed; people are murdered indiscriminately with impunity; electoral fraud is committed; the economy and the productive apparatus are destroyed; opponents are deprived of their liberty; students are repressed; demonstrators are brutalized and tortured; all unchecked and uncontrolled, but all supposedly "legal" because it supported by the branches of government – excluding the National Assembly - , and, in particular, by the Judiciary. As was all recently been documented by the High Commissioner on Human Rights of the UN (*Bachelet Report*, July 2019). [45]

Obviously, all these actions are contrary to the Constitution, and evidences that the Venezuelan State under the usurped government of Nicolás Maduro is not a rule of law State nor a democracy, which is much more than having elections. Democracy is basically a system where the separation of powers is guaranteed, because without separation of powers there can be no protection of human rights, free elections, pluralism or rule of law.

Facing this situation, a permanent question that has to be raised is: How did we, Venezuelans, arrive at this unfortunate situation? Especially if we bear in mind, as already mentioned, that throughout the second half of last century, Venezuela had the most envied democracy in Latin America due to its continuity and stability, with alternation in the exercise of power, separation of powers, free elections, strong political parties, civil liberties, freedom of speech,

[45] See the comments on Bachelet Report, in "El Informe Bachelet: desahucio al régimen," en *Informes sobre violaciones graves a los derechos humanos en Venezuela* (Editores: Allan R. Brewer-Carías, Asdrúbal Aguiar), Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana International**,** Miami 2019, pp. 12-46. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/10/9789803654702-txt-30-Septiembre-2019-1.pdf

and open discussion of ideologies. What happened? How did we get here?

Nothing comes from nothing, and in the case of Venezuela, authoritarianism - as in many other cases in history – was the result of the crisis of the democratic party system in the last years of last century; this allowed and facilitated the assault on power perpetrated in 1998 by Chávez and his companions.

As mentioned, in 1998, the assault they accomplished was through elections, although without proposing any specific political project, except the vague idea of seeking a "change," by convening a National Constituent Assembly. After its election, and after having intervened all the branches of government, destroying their autonomy and independence, the final product was the drafting of a Constitution. As I publicly denounced in 1999, as an independent member of the Constituent Assembly, that draft had:

> "an institutional framework designed for authoritarianism, which derived from the combination of state centralism, exacerbated presidential power, party power and militarism, for the organization of State." [46]

Time proved me right, although twenty years ago, nobody wanted to listen, and the result is that all branches of government are now at the service of authoritarianism (except from 2016, in the case of the National Assembly, although it has been drowned), with the consequence that, in particular, the Judiciary, has been completely controlled by the Executive and made up by temporary or provisional judges, completely dependent on the government; the Comptroller General does not control anything, being responsible for the klepto-State that has been established; the People's Defender does not protect or defend, anybody, being responsible for the Depredator-state that has been established; a General Prosecutor has become the controlled arm for persecuting the opposition, ensuring the total

[46] See Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea nacional Constituyente),* Tomo III, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2085.%20APORTES%20AL%20DEBATE%20CONSTITUYENTE%20TOMO%20III.pdf

impunity of military and paramilitary murders, also leaving thousands of street murders in impunity; and an Electoral Branch that has been the key instrument for perpetrating all electoral frauds, appearing to be no more than a political agent for supporting the candidates of the government.

Only this explains, for instance, the horrors that have been denounced in the Report issued in July 2019, by the U.N.'s High Commissioner on Human Rights, Michelle Bachelet, among which, the tortures to detainees and the assassination of political prisoners by the police in their detention centers, without any sort of remorse by the government, and with total impunity.

In any case, in this situation, the leaders of the Totalitarian State - who are responsible for all this institutional violence -, are now realizing that they are running out of time, and also that their time is near the end. That is why, in a recurrent way, they have made appeals to establish some sort of alleged Dialogues with opposition leaders, which of course have failed.

For such Dialogues to produce some results, above all it is the Government that has to change democratically, that is to say, to change and concede, and to accept the full application of the Constitution, the democratic principles and the guaranty of human rights, that is, to accept democratic rules and pluralism.

Otherwise, without doubt, we will continue to witness higher popular rebellion, because the civil society, including the student movement and the political opposition, which is much more than half of the country, will not continue to accept being ruled by a Government that has reduced its actions to attempting to crush by force, persecution, intimidation, threats and criminalization, all those who think and act against what the Government wants to impose, which is none other than the old and abandoned communist doctrine, which was already rejected by the people in the 2007 referendum.

The country has already spoken on this matter, even by fleeing the country in the greatest exodus in the History of the Western World. The will of the people cannot be ignored forever, and eventually the government that has turned his back on the people, sooner or later, will inevitably disappear.

New York, October 2019

PART ONE

THE ENDLESS PROCESS OF DESTRUCTION OF THE DEMOCRATIC STATE

Chapter I

17 YEARS DISREGARDING THE CONSTITUTION. WHAT TO EXPECT: 1999-2017 (2017)*

Since its enactment in 1999, the Venezuelan Constitution has been openly violated in all of its three components, the Political, the Social and the Economic one, which have not been really enforced.

I have been asked to talk about these 17 years of disregard for the Constitution, but, of course, I will not be able to refer this evening to all its three components (Political, Social and Economic Constitution). Rather, I will refer only to the breaches against the Political Constitution, purported to create the "Democratic and social Federal Rule of Law and justice State," (*Estado democrático y social de derecho y de justicia, Federal y descentralizado*) – as the Constitution says - which, contrary to this wording, has not been structured in the country

Regarding the breach of the Social and Economic Constitutions, I think it is for now enough in order to realize the situation, to only remember the headlines of a story published last year by *The*

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* Presentation: "Venezuela: 17 Years Disregarding the Constitution. What to Expect? in *Venezuelan American Association of the U.S.*, New York, May 31, 2017

Washington Post under the suggestive title "There has never been a country that should have been so rich but ended up this poor." [47]

The article reported on the terrible situation of the country after more than fifteen years of the allegedly "pretty revolution" that intended to implant in Venezuela the so-called "Twenty-First Century Socialism," which eventually turned the country into the current "failed-State", "narco-State" or "gangster-State," that ended up in the hands of a group of military and civilians blindly following orders from a foreign government, namely, Cuba.

From the economic and social standpoint, the truth is that nowadays it is no longer possible to continue hiding the terrible situation of the country behind the official propaganda and its supporting lobbies, the country being globally ranked – as it is - "with the world's worst economic growth and worst inflation rates," [48] the highest currency devaluation, and holding the world record of first place in misery. [49]

This has been the "miracle" that the Venezuelan authoritarian regime has achieved[50] converting in just a few years the wealthiest

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47 See Matt.O'Brein, "There has never been a country that should have been so rich but ended up this poor," in *The Washington Post*, Washington, May 19, 2016, in https://www.washingtonpost.com/news/wonk/wp/2016/05/19/there-has-never-been-a-country-that-should-have-been-so-rich-but-ended-up-this-poor/

48 See the information inn http://www.infobae.com/2014/04/24/1559615-en-un-ano-la-inflacion-oficial-venezuela-llego-al-60-ciento

49 Venezuela has the "ignominious" first place in the World's Misery Index. See the Report of Steve H. Hanke, "Measuring Misery around the World," published in May 2104, in *Global Asia*, en http://www.cato.org/publications/commentary/measuring-misery-around-world See also *Índice Mundial de Miseria*, 2014, in http://www.razon.com.mx/spip.php?ar-ticle215150; y in http://vallartaopina.net/2014/05/23/en-indice-mundial-de-miseria-venezuela-ocupa-primer-lugar/

50 Pedro Carmona Estanga summarized the regime's economic feat by explaining that: "To the country's misfortune, during these 16 years there have been squandered more than US$ 1.5 billion that will not return, and there is only left the destruction of the production infrastructure, the deterioration of the standard of living and of the institutions, and macro-economic and attitudinal distortions in the people, to such a depth that it will cost the future

country in Latin America into a "factory of poor people," [51] led – as stated in the article - by an "inept State, kidnapped by a governing elite of corrupt bureaucracy that denies all constitutional social and economic rights, and manipulates the ignorance and poverty of the less favored social classes."[52] The article of *The Washington Post* ended by noting how the country with "the world's largest oil reserves" is now in "total economic and social collapse," noting that in order to understand it, there is no need to seek for any mysterious explanation or to blame any Empire for that. It has been a "man-

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generations sweat and blood to overcome. That was the historical feat achieved and so much bragged about by the regime." See Pedro Carmona Estanga, "La destrucción de Venezuela: hazaña histórica," 19 de octubre de 2014, en http://pcarmonae.blogspot.com/2014/10/la-destruccion-de-venezuela -hazana.html

[51] In this regard, Brian Fincheltub noted that "The missions became factories of dependent people, with no stability, who entrusted their subsistence solely to the State. There was never interest in taking people out of poverty because, as minister Héctor Rodríguez himself admitted, "they would become our opponents (*escuálidos)*." That is, they would become independent, and that is extremely dangerous for a system whose main strategy is to control." See Brian Fincheltub, "Fabrica de pobres," in *El Nacional*, Caracas, June 5, 2014, in http://www.el-nacional.com/opinion/Fabrica-pobres_0_421757946.html

[52] For this reason, it has been rightly said, "If Venezuela were a Social State, there would be no dead newborns due to the infectious conditions in public hospitals. If Venezuela were a Social State, all persons would have a sure job or would be fully exercising freedom of enterprise and trade. If Venezuela were a Social State, we would not display in shame the world's highest murder rate. If Venezuela were a Social State, steel bars and cement would not have disappeared and the cement factories that were intervened by the State would be producing at their maximum installed capacity. If Venezuela were a Social State, all the shelves in grocery and staples stores would be full of products. If Venezuela were a Social State, schools would not have roofs full of leaks, but supplied with sufficient materials for teaching, and teachers and professors would be the best-paid employees in the country. If Venezuela were a Social State, there would be no discrimination due to political and ideological reasons in order to have access to any public service, benefits or aid, or first necessity items. If Venezuela were a Social State, the permanent garbage problem in the large cities would be already solved by the most modern and up-to-date methods for environmental protection. See Isaac Villamizar, "Cuál Estado Social?," in *La Nación*, San Cristóbal, October 7, 2014, in http://www.lanacion.com.ve/columnas/opinion/cual-estado-social/

made disaster," the consequence of "a destructive government policy," expressly designed and deployed for this purpose by the late President Hugo Chavez, and by who currently is in charge of the presidency, Nicolas Maduro. [53]

That situation was summarized last week by Luis Almagro Secretary General of the Organization of the American States, in the Oslo Freedom Forum, where he expressed with regret that today – I quote -:

> "[Venezuela] suffers under the worst government in its history. It has destroyed the country's institutions, destroyed the economy and taken away the rights of the people.
>
> A humanitarian tragedy is taking place before our very eyes. There is no food in the stores and the government watches as its citizens starve.
>
> The country's public health care system has collapsed. There are no medicines and patients have to bring whatever supplies they might need with them for treatment – if they can even find or afford them on the black market.
>
> The GDP is in a free fall. Inflation is predicted to reach 1600% next year. The currency is worthless and more than three quarters of Venezuelans are living in poverty.
>
> Violent crime has skyrocketed, as Venezuela now has one of the highest homicide rates in the world. Its leaders are engaged in international drug trafficking and steal billions of dollars from state accounts instead of buying food to feed the starving population."
>
> Finally, he added:
>
> "As we are talking in comfort and safety [like now], people are dying. Venezuelans -men, women, children, even infants- are starving, they are dying without medical care – they are being killed in the streets by security forces." [54]

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[53] See Matt.O'Brein, "There has never been a country that should have been so rich but ended up this poor," *The Washington Post*, Washington, May 19, 2016, in https://www.washingtonpost.com/news/wonk/wp/2016/05/19/there-has-never-been-a-country-that-should-have-been-so-rich-but-ended-up-this-poor/

[54] Oslo, Norway, May 24, 2017, in https://www.youtube.com/watch?v=PiZ5744FEco

But, as I mentioned, my purpose this evening is to refer to the systematic disregarding of the Political Constitution since its approval 17 years ago, the consequence of which has been the total collapse of all the institutions, due to the destruction of the foundations of the rule of law and a state of justice, in particular, the demolition of the system of separation of powers and of mutual control among them that was to be the main support of the rule of law State.

These principles were expressly included in the 1999 Constitution,[55] which I must remind, was enacted by an ill-formed and worse structured National Constituent Assembly,[56] this being the remote origin of all the subsequent collapse of the State and of the disregarding of the Constitution.

I was part of such Constituent Assembly as an independent elected member, forming with other three members the very meagre opposition in an Assembly of 131 members that was entirely controlled by the followers of then President Hugo Chavez. So, I know, first hand, what was included in the Constitution, and I also know what are the promises it contained that have been ignored, disregarding the Constitution.

The fact is that the general balance today, in my opinion, is that the 1999 Constitution can be considered as one of the most vivid examples in contemporary constitutionalism, of a Constitution that has been violated and infringed since even before it was published. This is the only explanation in order to understand why the Federal State has been transformed into a centralized system of power; the separation between five - not three – five branches of government has been erased and substituted by a political system of total concentration of power; the principle of representativeness has been neglected; the political participation has been denied and ignored;

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55 See Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional venezolano*, 2 volumes, Caracas 2004.

56 See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002.

and the economic liberty has been engulfed by an extreme statization of all activities and a State capitalism. [57]

In fact, the only aspects of the Constitution that have been enforced have been the authoritarian ones, which were inserted within the flowery text of its articles. Those authoritarian elements were precisely the ones that led me in December 1999 to promote the "NO Vote" in the referendum for the approval of the Constitution, expressing at that time – 17 years ago -, that "the *political Constitution* inserted in the draft of the proposed Constitution":

> "reveals an institutional scheme for authoritarianism that results from a combination of State centralism, exacerbated presidentialism, partocracy and militarism, which are the central elements designed in order to organize the Power of the State."[58]

Those authoritarian grafts began to be applied even before the Constitution was officially published, one week after its popular approval, when it began to be outrageously disregarded by the Chávez regime, the same Constituent Assembly being the instrument for such purposes, even though its mandate was already over. That Assembly, in fact, enacted a decree containing a "Transitory Constitutional Regime" that was not approved by the people, through which it gave rise to another "parallel" constitution that was in force for more than fifteen years.[59] Contrary to what was promised in the text approved by the people, this parallel transitory constitution assured that the one approved would never be completely enforced.

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[57] See Allan R. Brewer-Carías, "La Constitución como promesa incumplida: el caso de Venezuela," Conferencia, *Real Academia de Jurisprudencia y Legislación,* Madrid, 23 de mayo 2016.

[58] See Allan R. Brewer-Carías, "Razones del voto NO en el referendo aprobatorio de la Constitución," in *Debate Constituyente (Labor en la Asamblea Nacional Constituyente),* Tomo III, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2000.

[59] The Constitution was approved by the people in the referendum of December 15, 1999. The Transitory Constitutional Decree was issued by the National Constituent Assembly on December 22, 1999, without the people's approval; and the Constitution altogether with such Decree were published in Official Gazette on December 30, 1999. See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002.

That is why I then – in 2000 - characterized such acts as ones configuring a "constituent coup d'état."[60]

In any case, that was the origin of a constitutional regime that ultimately was established in order to not be observed, institutionally configured as a great lie, particularly regarding the establishment of a representative and participative democratic political system, which never occurred; the establishment of a democratic rule of law and state of justice, which never took place; and the consolidation of a federal decentralized State, which, to the contrary, was abandoned. The same occurred with the establishment of a social State, which did not go beyond a vain illusion for propaganda purposes, eventually acquiring the distorted image of a populist State, to finally impoverish and make all the people dependent upon a giant and inefficient bureaucracy conducted by a corrupt oligarchy that has only ensured that the entire population, not only those with fewer resources, bear the same scarcity and dearth. [61]

Therefore, from a political standpoint, the wording of the Constitution was only a mask for establishing a Totalitarian State of total concentration and centralization of power, disguised behind the slogan of being a "participatory protagonist democracy," ensuring that none of the essential components and core elements of democracy would be enforced. [62]

The first and foremost pillar expressed in the Constitution that was disdained from the outset, was the basic principle of the

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60 There were also added various "modifications" or "reforms" to the text, which were made on the occasion of the "style corrections" prior to its publication on November 30, 1999. See Allan R. Brewer-Carías, "Comentarios sobre la ilegítima "Exposición de Motivos" de la Constitución de 1999 relativa al sistema de justicia constitucional", in *Revista de Derecho Constitucional*, Nº 2, enero-junio 2000, Caracas 2000, pp. 47-59

61 See Allan R. Brewer-Carías, *La mentira como política de Estado. Crónica de una crisis política permanente. Venezuela 1999-2015* (Prólogo de Manuel Rachadell)**,** Colección Estudios Políticos, No. 10, Editorial Jurídica Venezolana, Caracas 2015.

62 See Allan R. Brewer-Carías, *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela,* Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014.

separation and independence of the public branches of government, without which no rule of law or democracy are possible, nor any possible control upon the exercise of power, in particular the one that only can be in the hands of an autonomous and independent judiciary.[63]

In Venezuela, contrary to the promises contained in the Constitution, the State that was established is one in which all power has been concentrated in the hands of the Executive branch of government and to which all other branches are subjected, particularly, the Supreme Tribunal of Justice and the Electoral Authority, and until January 2016, also the National Assembly.

The regime became so used to exercising absolute control of power, that after a new National Assembly was elected in December 2015, in which the opposition controlled the vast majority of votes, the authoritarian government began to gradually strip the people's representatives of all their competences and functions, thanks to an all evil collusion between the Executive Branch and the Supreme Tribunal of Justice.

This process began a few days after the parliamentary election of December 2015, when the former National Assembly that was ending its mandate, enacted in only two days more than 30 statutes directed to taking away competences from the new Assembly that a few days later was to begin its functions. The same old Assembly, against the provisions of the Constitution, also proceeded to appoint new Supreme Tribunal justices packing it entirely with members of the governing party.

With this new structure, that Supreme Tribunal, usually at the request of the same Executive Branch or of the governing party, began to take away all the powers and functions of the National

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63 See Gustavo Tarre Briceño, *Solo el poder detiene al poder, La teoría de la separación de los poderes y su aplicación en Venezuela*, Colección Estudios Jurídicos Nº 102, Editorial Jurídica Venezolana, Caracas 2014; and Jesús María Alvarado Andrade, "División del Poder y Principio de Subsidiariedad. El Ideal Político del Estado de Derecho como base para la Libertad y prosperidad material" in Luis Alfonso Herrera Orellana (Coord.), *Enfoques Actuales sobre Derecho y Libertad en Venezuela*, Academia de Ciencias Políticas y Sociales, Caracas, 2013, pp. 131-185.

Assembly, having issued more that forty decisions for such purpose since January 2016.[64]

The result has been that the Constitutional Chamber of the Supreme Tribunal, acting as constitutional judge, has dismantled the Legislative branch of government, for which purpose it successively has declared the unconstitutionality of practically all – yes, all – the statutes that have been enacted by the National Assembly. The Tribunal has even reformed, although not being the Legislator, the internal Rules of Procedure and Debates of the Assembly in order to subject the exercise of its legislative functions to the prior approval of the Executive Branch. The Supreme Tribunal has also eliminated the Assembly's political power of controlling the government and the Public Administration, and has imposed, for instance, the prior approval by the Executive Vice-President in order for a Minister to be questioned by the Assembly, only being allowed to pose questions in writing. Additionally, the Tribunal has eliminated the possibility for the Assembly to disapprove the states of emergency that may be decreed, an extraordinary situation in which the country has been for the past year and a-half, during which the President has authorized himself to restrict constitutional guaranties without parliamentary control.

The Tribunal has also eliminated the possibility for the National Assembly to approve votes of non-confidence against Ministers, and has even resolved that the President should submit its Annual Address on the State of the Nation, not before the National Assembly, as provided in the Constitution, but before the Constitutional Chamber of the Supreme Tribunal itself. That Chamber has even eliminated the legislative participation in the approval of the national budget, thus turning the Budget Law into a mere and unconstitutional

[64] It all began some days before the inauguration of the newly elected National Assembly, by means of a judicial decision issued in the last day of December 2015 by the Electoral Chamber of the Supreme Tribunal, granting a temporary precautionary measure of suspension of the proclamation of four representatives elected in the Amazonas State, so as to curtail the qualified majority that had been obtained by the opposition. See Allan R. Brewer-Carías, "El desconocimiento judicial de la elección popular de diputados," in *Revista de Derecho Público***,** No. 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 285- 318.

executive decree to be submitted by the President of the Republic not before the National Assembly, but before the same Constitutional Chamber of the Supreme Tribunal.

The same Chamber of the Tribunal has further eliminated the National Assembly's power as a decision-making body to express any sort of political opinion as a result of its debates, having annulled all the major political Resolutions and Declarations that it has adopted. The Chamber has also eliminated the Assembly's power to review its own decisions and repeal them, as was the case regarding the unconstitutional appointment of the justices of the Supreme Tribunal made in December 2015. Finally, the Constitutional Chamber has completely eliminated the Assembly's power to legislate within the frame of the already mentioned unconstitutional and permanent state of emergency that has been renewed every three months with no parliamentary control, and only by the approval of the Constitutional Chamber. [65]

That is, the Legislative Branch represented by the National Assembly that gained autonomy after the December 2015 parliamentary elections, has been totally neutralized and stripped of its powers and functions, to the extent that a recent decision of January this year, based on an alleged defiance of a decision of the Electoral Chamber of the same Tribunal (issued a few days before for the precautionary suspension of the proclamation of four representatives who had been already proclaimed), it decreed the definitive *de facto* suspension of the National Assembly in the exercising of its constitutional functions as the body of representatives elected by the people. For this purpose, the same Constitutional Chamber (through Decision No. 2 of January 11, 2017),[66] annulled the act of installation of the Assembly for its second annual term, resolving that:

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[65] See on these decisions Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de Derecho*, Segunda Edición, (Presentaciones de Asdrúbal Aguiar, José Ignacio Hernández y Jesús María Alvarado), Nº 13, Editorial Jurídica Venezolana International, 2016; edición española: Editorial IUSTEL, Madrid 2017.

[66] See in http://historico.tsj.gob.ve/decisiones/scon/enero/194891-02-11117-2017-17-0001.HTML

> "Any action by the National Assembly and any other body or individual against this decision will be null and void, without impairment to the liabilities that may arise therefrom."

This decision was confirmed through other decisions of the Constitutional Chamber, also of January 2017 (No. 3 of January 11, 2017, [67] and No. 7 of January 26, 2017), in one of which it definitively deprived the people of its most essential right in a Rule of Law State, which is the right to exercise its sovereignty through its representatives. For such purpose, the Chamber simply declared all past and future actions of the National Assembly to be absolutely null and void, even leaving open the possibility for the eventual prosecution of the representatives for contempt, adding to it the threat of revoking their popular mandate and imprison them. [68]

If we analyze retrospectively all these decisions against the National Assembly, one must without doubt conclude that the country has witnessed a continued coup d'état, which had its last expression in March 2017, when the Constitutional Chamber issued two shameful and very publicized decisions, No. 155 of March 27, 2017, [69] and No. 156 of March 29, 2017[70] through which it simply

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67 See in http://historico.tsj.gob.ve/decisiones/scon/enero/194892-03-11117-2017-17-0002.HTML

68 See in historico.tsj.gob.ve/decisiones/scon/enero/195578-07-26117-2017-17-0010.HTML.

69 See decision No. 155 of March 27, 2017, in http://historico.tsj.gob.ve/decisiones/scon/marzo/197285-155-28317-2017-17-0323.HTML. See the comments on such decision in Allan Brewer-Carías: "La consolidación de la dictadura judicial: la Sala Constitucional, en un juicio sin proceso, usurpó todos los poderes del Estado, decretó inconstitucionalmente un estado de excepción y eliminó la inmunidad parlamentaria (sentencia no. 156 de la Sala Constitucional), March 29, 2017, in http://diarioconstitucional.cl/noticias/actualidad-internacional/2017/03/31/opinion-acerca-de-la-usurpacion-de-funciones-por-el-tribunal-supremo-de-venezuela-y-la-consolidacion-de-una-dictadura-judicial/

70 See decision No. 156 of March 29, 2017 in http://historico.tsj.gob.ve/decisiones/scon/marzo/197364-156-29317-2017-17-0325.HTML. See the comments on such decision Allan. Brewer-Carías: "El reparto de despojos: la usurpación definitiva de las funciones de la Asamblea Nacional por la Sala Constitucional del Tribunal Supremo de Justicia al asumir el poder absoluto del

usurped all the powers of the State. In them, the Chamber ordered the President to exercise certain functions related to international relations that are of its exclusive power; decreed in an unconstitutional way a state of emergency; eliminated the parliamentary immunity of the representatives; assumed in an arbitrary way all the parliamentary competences of the National Assembly; and delegated legislative powers that it does not have, without limitation, upon the President of the Republic, even ordering him to reform laws and Codes at his discretion, among which none other than the Criminal Code and the Organic Code of Criminal Procedure.

These infamous decisions that were praised by Mr. Maduro as "historical,"[71] were precisely the ones that began to generate a global condemnation of the Venezuelan regime, not only within the country but internationally.

For instance, the Secretary General of the Organization of American States, Dr. Luis Almagro, stated about these decisions that "stripping the representatives of the National Assembly of their parliamentary immunities and assuming the Legislative Powers in a totally unconstitutional manner are the last blows with which the regime subverts the country's constitutional order and terminates democracy."[72]

In the national sphere, in addition to many other open rejections, I must highlight the important public statement made the following

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Estado (sentencia no. 156 de la Sala Constitucional), 30 de marzo de 2017, in http://diarioconstitucional.cl/noticias/actualidad-internacional/2017/03/31/opinion-acerca-de-la-usurpacion-de-funciones-por-el-tribunal-supremo-de-venezuela-y-la-consolidacion-de-una-dictadura-judicial/

71 See: "Nicolás Maduro: El TSJ ha dictado una sentencia histórica**.** Durante el Consejo de Ministros, el jefe de Estado señaló que además pedirá sugerencias a la Procuraduría General de la República para cumplir con las órdenes dictadas por el máximo órgano judicial," in El Nacional, March 28, 2017, in http://www.el-nacional.com/noticias/gobierno/nicolas-maduro-tsj-dictado-una-sentencia-historica_87784

72 See: "Almagro denuncia auto-golpe de Estado del gobierno contra Asamblea Nacional," El Nacional, March 30, 2017, en http://www.el-nacional.com/noticias/mundo/almagro-denuncia-auto-golpe-estado-del-gobierno-contra-asamblea-nacional_88094

day (on March 31, 2017), by the Prosecutor General of the Republic. In spite of having been during the past ten years the main instrument of the regime for persecuting and criminalizing political dissent, she spoke out and stated that those Constitutional Chamber decisions evidenced "several breaches against the constitutional order and the disavowing of the form of State sanctioned in our Constitution," considering that they constituted a "breaking off with constitutional order." [73]

The astonishing outcome of the Supreme Tribunal's decisions, particularly after the surprising statement of dissent within the regime made by its Prosecutor General, was that the President of the Republic "interpreted" it just as a "impasse" between the Prosecutor General and the Supreme Tribunal that supposedly needed to be "settled," calling for such purpose a meeting of the Nation's Defense Council. This body, of a mere consultative nature and fully controlled by the Executive Branch, immediately decided to "urge" the Supreme Tribunal of Justice to "revise Decisions 155 and 156,"[74] that is, to openly commit an illegal act, contrary to the most elementary principles of due process, that is, that no judge in any part of the world can ever reform or repeal its own decisions.

But, the Constitutional Chamber of the Supreme Tribunal in Venezuela being a court that does not respect the law and has no one to control it, on the next day, April 1, 2017, submissively heeding the Executive Branch's request, reformed and partially revoked its decisions No. 155 and 156 (by means of decisions No. 157[75] and

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73 See the text in "Fiscal General de Venezuela, Luisa Ortega Díaz, dice que sentencias del Tribunal Supremo sobre la Asamblea Nacional violan el orden constitucional," in RedacciónBBC Mundo, *BBC Mundo*, 31 de marzo de 2017, en http://www.bbc.com/mundo/noticias-america-latina-39459905. See video in https://www.youtube.com/watch?v=GohPIrveXFE.

74 See the text in "Consejo de Defensa Nacional exhorta al TSJ a revisar sentencias 155 y 156 // #MonitorProDaVinci, April 1, 2017, in http://prodavinci.com/2017/04/01/actualidad/consejo-de-defensa-nacional-exhorta-al-tsj-a-revisar-sentencias-155-y-156-monitorprodavinci/

75 See in http://historico.tsj.gob.ve/decisiones/scon/abril/197399-157-1417-2017-17-0323.HTML. See the comments on that decision in Allan R. Brewer-Carías, "La nueva farsa del Juez Constitucional controlado: la

158,[76]) breaching, as I said, the most elementary principles of due process.

The current result of all this process is none other than the consolidation of a "judicial dictatorship," - as I have called it in a recent book[77] - in which of the five branches of government that make up the separation of powers in Venezuela (Executive, Legislative, Judicial, Citizen and Electoral), the only one that since January 2016 had some political autonomy vis-à-vis the Executive Branch, the National Assembly, has been completely neutralized.

That is, pursuant to the continued coup d'état staged by the Executive Branch in collusion with the Judicial Branch, the Legislative Branch has been materially paralyzed and its members deprived of their parliamentary immunity, and their mandate on the verge of being revoked due to alleged judicial contempt. For the other Public Branches, whose heads were appointed by the preceding National Assembly in breach of the Constitution, they are now all subordinated to the Executive Branch, having abandoned their controlling powers.

This implies that for the past 17 years in Venezuela, in fact, there has been no Comptroller General of the Republic exercising fiscal

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inconstitucional y falsa "corrección" de la usurpación de funciones legislativas por parte de la Sala Constitucional del Tribunal Supremo (sentencias Nos. 157 y 158 de 1 de abril de 2017), New York, April 4, 2017, in http://allanbrewercarias.net/site/wp-content/uploads/2017/04/151.-doc.-Brewer-Nueva-farsa-del-Juez-Constitucional.-Falsa-correcci%C3%B3n.-Sentencias-Sala-Constit.-157-y-158-.-4-4-2017.pdf:

[76] See in http://Historico.Tsj.Gob.Ve/Decisiones/Scon/Abril/197400-158-1417-2017-17-0325.Html See the comments on that decision in Allan R. Brewer-Carías, "La nueva farsa del Juez Constitucional controlado: la inconstitucional y falsa "corrección" de la usurpación de funciones legislativas por parte de la Sala Constitucional del Tribunal Supremo (sentencias Nos. 157 y 158 de 1 de abril de 2017), New York, April 4, , 2017, in http://allanbrewercarias.net/site/wp-content/uploads/2017/04/151.-doc.-Brewer-Nueva-farsa-del-Juez-Constitucional.-Falsa-correcci%C3%B3n.-Sentencias-Sala-Constit.-157-y-158-.-4-4-2017.pdf:

[77] See the Spanish edition: Allan R. Brewer-Carías, *Dictadura Judicial y perversión del Estado de derecho*, IUSTEL, Madrid 2017:

control, wherefore the country is ranked today as first in the world's corruption index[78]

The People's Defender has never protected human rights and has in truth become the official agency for endorsing the violation of such rights by the State's authorities, evidenced by the brutal repression of the right to protest, which the whole world has been witnessing for some time now (for example, in view of the health crisis denounced by the Venezuelan National Academy of Medicine in August, 2014, claiming that an emergency be declared for the health sector, the People's Defender's reply was simply that there was no such crisis in Venezuela).[79]

The Office of the Prosecutor General of the Republic, as I mentioned, instead of having been a bona fide party to the criminal procedures and upholding the Constitution, has been the main

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78 See the Report of German ONG, *Transparencia Internacional* of 2013, in: "Aseguran que Venezuela es el país más corrupto de Latinoamérica,", in *El Universal*, Caracas 3 de diciembre de 2013, in http://www.eluniversal.com /nacional-y-politica/131203/aseguran-que-venezuela-es-el-pais-mas-corrupto-de-latinoamerica. Also see article in BBC Mundo, "Transparencia Internacional: Venezuela y Haití, los que se ven más corruptos de A. Latina," December 3, 2013, in http://www.bbc.co.uk/mundo/ultimas_noti-cias/2013/12/131203_ultnot_transparencia_corrupcion_lp.shtml. See also, Román José Duque Corredor, "Corrupción y democracia en América Latina. Casos emblemáticos de corrupción en Venezuela," en *Revista Electrónica de Derecho Administrativo*, Universidad Monteávila, 2014)

79 See press article: "Defensora del Pueblo Gabriela Ramírez afirma que en Venezuela no existe ninguna crisis en el sector salud," en *Noticias Venezuela*, August 20, 2014, in http://noticiasvene-zuela.info/2014/08/defensora-del-pueblo-gabriela-ramirez-afirma-que-en-venezuela-no-existe-ninguna-crisis-en-el-sector-salud/ ; and the press report: "Gabriela Ramírez, Defensora del Pueblo: Es desproporcionada petición de emergencia humanitaria en el sector salud," in El Universal, Caracas 20 de agosto de 2014, en http://m. eluniversal.com/nacional-y-politica/140820/es-desproporcionada-peticion-de-emergencia-humanitaria-en-el-sector-sa. Por ello, con razón, el Editorial del diario *El Nacional* del 22 de agosto de 2014, se tituló: "A quien defiende la defensora?" Véase en http://www.el-nacional.com/opinion/editorial/defiende-defensora_19_46874-3123.html.)

instrument for ensuring impunity and political persecution[80] This, notwithstanding, does not prevent me from saluting the fact that she has begun to discover in the last weeks that the decisions of the Constitutional Division implied breaking off with the democratic order, and after years of silence has further discovered that "the due process must be respected even in a state of emergency."[81]

In addition, regarding the Electoral Branch of the government, that is, the National Electoral Council, unfortunately, it has been none other than a sort of electoral agency for the government, made up by members of the official party in overt breach of the Constitution, ceasing to be an independent arbiter in the elections. For this purpose, since 2004, this branch of the government has been entirely seized by the Executive Branch, when its heads were appointed by the Supreme Tribunal of Justice pursuant to the Executive Branch's instructions, usurping the functions that pertain to the National Assembly.[82]

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80 As noted in the report of the International Commission of Jurists entitled *Strengthening the Rule of Law in Venezuela,* released in Geneva, in March 2014, the Office of the Public Prosecutor "has resulted in an institution without independence from other branches of the government and other political actors," so the public prosecutors are "vulnerable to improper interferences from superior authorities and other external pressures…") (See the text in http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf).

81 See in: "Ortega Díaz: Hasta en un estado de excepción debe respetarse el debido proceso" donde además "pidió respeto para quienes piensen distinto," in *El Nacional*, Caracas 26 de abril de 2017), that civilians cannot be processed before military tribunals, and has acknowledged that, in general, no one can "demand lawful and peaceful behaviors from the citizens if the State makes decisions that are contrary to law." (See in Anatoly Kurmanaev y Kejal Vyas, "Venezuela Minister Chides Regime She Serves," in *The Wall Street Journal*, New York, May 4, 2017, p. A9.) More recently, the Prosecutor General has expressed her opposition to the unconstitutional convening of a Constituent Assembly by the President of the Republic

82 See Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004,"in *Boletín Mexicano de* Derecho *Comparado*, Instituto de Investigaciones Jurídicas, Universidad

Within this frame of breaches and disregard for the Constitution, it is evident that the worst for Venezuela has been the tragic dependency of the Judicial Branch on the wishes and policies of the Executive Branch, [83] operating as an instrument at the service of the government and its authoritarian policy.[84] This has caused devastating effects due to the factual absence of control regarding all institutions of the State.

Therefore, it is not a surprise that, in all shame for our country, for instance, recent decisions have been issued by three Supreme

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Nacional Autónoma de México, Nº 112. México, enero–abril 2005 pp. 11–73; *La Sala Constitucional versus el Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Ares, Caracas, 2004, 172 pp.).

83 See Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía en independencia del Poder Judicial en Venezuela (1999-2004)", in *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33-174; y "La justicia sometida al poder [La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)]" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25-57; "La demolición de las instituciones judiciales y la destrucción de la democracia: La experiencia venezolana," in *Instituciones Judiciales y Democracia. Reflexiones con ocasión del Bicentenario de la Independencia y del Centenario del Acto Legislativo 3 de 1910,* Consejo de Estado, Sala de Consulta y Servicio Civil, Bogotá 2012, pp. 230-254..

84 For this reason, the International Commission of Jurists forum in Geneva, in 2014, concluded that: "A judicial system that lacks independence, such as that of Venezuela, has proven to be inefficient to fulfill its duties. In this regard, in Venezuela, […] the administration of justice is prevented by external pressures from fulfilling its duty to protect people from abuses of government power… to the contrary, in many cases it is made to serve as a mechanism for the persecution of political opponents and dissidents and other critics of the political system in the country, including political, peasant and union leaders, human rights defenders and students. See in http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf (Executive summary in English: https://www.icj.org/wp-content/uploads/2014/06/VENEZUELA-Summary-A5-elec.pdf)

Courts, of Costa Rica, Brazil and Chile, reacting against the lack of independence of the Judiciary of Venezuela by denying the State's requests for extradition of persons accused of common crimes, considering that the potentially extradited persons would not have the assurance of a fair trial and due process guaranties in Venezuela. [85]

Due to this absence of a Judiciary capable of controlling the actions of the branches of government, one of the must absolute disregards that this regime has shown for the Constitution, has been the process of de-constitutionalizing of the State that has taken place during the past seven years[86] for the purpose of creating, in parallel to the Constitutional State, a so-called "State of Popular Power" or a "Communal State," which nobody has voted for, and on the contrary, has been rejected by the people.

That was the proposal that the late President Hugo Chavez purported to impose through a constitutional reform in 2007, and was overwhelmingly rejected by the people through a referendum. But, notwithstanding such rejection, in a very unconstitutional way the State of Popular Power was implemented by ordinary legislation in 2010,[87] for the purpose of replacing the representative democracy and

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[85] See Allan R. Brewer-Carías, "Las Cortes Supremas de Costa Rica, Brasil y Chile condenan la falta de garantías judiciales en Venezuela. De cómo, ante la ceguera de los gobiernos de la región y la abstención de la Corte Interamericana de Derechos Humanos, han sido las Cortes Supremas de estos países las que con base en la jurisdicción universal de protección de los derechos humanos, han comenzado a juzgar la falta de autonomía e independencia del Poder Judicial en Venezuela, dictando medidas de protección a favor de ciudadanos venezolanos contra el Estado venezolano," in *Revista de Derecho Público***,** No. 143-144, (julio- diciembre 2015, Editorial Jurídica Venezolana, Caracas 2015, pp. 495-500.

[86] See Allan R. Brewer-Carías, *Estado totalitario y desprecio a la Ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela*, Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014, 532 pp.; segunda edición, (Con prólogo de José Ignacio Hernández), Caracas 2015, 542 pp

[87] See Allan R. Brewer-Carías, "Las leyes del Poder Popular dictadas en Venezuela en diciembre de 2010, para transformar el Estado Democrático y Social de Derecho en un Estado Comunal Socialista, sin reformar la Constitución," in *Cuadernos Manuel Giménez Abad,* Fundación Manuel

the social and democratic rule of law State sanctioned in the Constitution, [88] seeking to definitively eliminate universal suffrage and the federal form of State, and imposing the process of de-municipalization of the nation.[89]

Although it is elementary in Modern Constitutionalism that a Constitution cannot be reformed by ordinary decisions, but only through the procedures set forth in the Constitution, the Constitutional Chamber in Venezuela has refused to judge this massive fraud against the Constitution and against the peoples will expressed in 2007.

In this context, there is no doubt that in Venezuela the Constitution has become a ductile set of laws, whose norms, after having abandoned their rigidity, have had, in practice, the force and scope decided by the Executive Branch and, up to 2015, by the

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Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, No. 1, Madrid, Junio 2011, pp. 127-131; "La Ley Orgánica del Poder Popular y la desconstitucionalización del Estado de derecho en Venezuela," in *Revista de Derecho Público*, No. 124, (octubre-diciembre 2010), Editorial Jurídica Venezolana, Caracas 2010, pp. 81-101; "*Introducción General al Régimen del Poder Popular y del Estado Comunal (O de cómo en el siglo XXI, en Venezuela se decreta, al margen de la Constitución, un Estado de Comunas y de Consejos Comunales, y se establece una sociedad socialista y un sistema económico comunista, por los cuales nadie ha votado)," in Allan R. Brewer-Carías,* Claudia Nikken, Luis A. Herrera Orellana, Jesús María Alvarado Andrade, José Ignacio Hernández y Adriana Vigilanza, *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal (Los consejos comunales, las comunas, la sociedad socialista y el sistema económico comunal*) Colección Textos Legislativos Nº 50, Editorial Jurídica Venezolana, Caracas 2011, pp. 9-182

88 See. Allan R. Brewer-Carías, *La ruina de la democracia. Algunas consecuencias. Venezuela 2015,* Editorial Jurídica Venezolana, Caracas 2015.

89 See Allan R. Brewer-Carías, **"**El inicio de la desmunicipalización en Venezuela: La organización del Poder Popular para eliminar la descentralización, la democracia representativa y la participación a nivel local", in *AIDA, Opera Prima de Derecho Administrativo. Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Facultad de Estudios Superiores de Acatlán, Coordinación de Postgrado, Instituto Internacional de Derecho Administrativo "Agustín Gordillo", Asociación Internacional de Derecho Administrativo, México, 2007, pp. 49 a 67

former National Assembly through unconstitutional ordinary laws or decree-laws that the Constitutional Judge refuses to control. This Judge, adding greater dismay, has actively participated in the disregard for the Constitution, covering-up the violations by tailoring specific constitutional interpretations in order to justify them or by illegitimately mutating the Constitution in order to "guarantee" that said unconstitutional actions would not be controlled.[90]

The most recent example the country has seen of this disregard for the Constitution has been the unconstitutional call made on May 1st 2017, by the President of the Republic, for none other than a new Constituent Assembly for the purpose of transforming the State and approving a new Constitution, in order, precisely, to insert in the Constitution the already rejected State of the People's Power or Communal State, now without the people's participation.

This procedure is absolutely unconstitutional to the point that it has been rejected by the same Prosecutor General of the Republic[91] and even in public statements by two of the Justices of the Supreme Tribunal. [92]

The text of the Constitution, according to the principle of participatory democracy, requires the people vote through a referendum in all three mechanisms for constitutional reform, which are the constitutional amendment, the constitutional reform and the calling of a constituent assembly.

In the first two cases, the Constitution demands the approval of the amendment or reform by the people by means of a referendum

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90 See Allan R. Brewer-Carías, "¿Reforma constitucional o mutación constitucional?: La experiencia venezolana." en *Revista de Derecho Público,* No 137 (Primer Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp.19-65; y "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública*, No. 180, Madrid 2009, pp. 383-418.

91 See Luisa Ortega Díaz, en "Fiscal Ortega Díaz envió carta a Jaua para rechazar la Constituyente," in *El Nacional*, 19 de mayo de 2017.

92 See declaraciones del Magistrado Danilo Mujica, de la Sala de Casación Social, Caracas 23 de mayo de 2017, in https://www.youtube.com/watch?v=axFlSExNcRE

(Arts. 341.3, 344), providing in the third case, that only the people may call a Constituent Assembly, of course, also by means of a referendum (Art. 347).[93] Once the convening of such Assembly has been approved by the people, the election of its members must compulsively be done in order to represent the people as a whole, following the democratic values, principles and guaranties established in the Constitution (Art. 350), among which, the right to representative democracy, in the sense of electing all representatives only by means of universal, direct and secret vote (Art. 63), banning in public bodies all other kinds of group, sectorial, class or just territorial elections or representation.

Therefore, those who may take the initiative to begin a constituent process, according to the Constitution, are the President in Council of Ministers, the National Assembly with qualified vote, the two-thirds of the Municipal Councils, or fifteen percent of the voting citizens (Art. 348); that initiative is only for calling a referendum for the people to vote and to decide whether or not to convene a Constituent Assembly, and does not imply that those with standing to initiate the process could directly convene such Assembly without the people's participation.

Notwithstanding, and contrary to these provisions, the President of the Republic directly convened a Constituent Assembly by Decree No. 2830 issued on May 1st 2017, [94] not only in breach of the Constitution, but also usurping the exclusive power of the people, as holder of sovereignty, to exercise the original constituent power. Furthermore, by means of such Decree, the President has also committed a fraud against the will of the people that was expressed in the referendum of 2007, rejecting the same constitutional reform

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93 See Allan R. Brewer-Carías, *Reforma constitucional y fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009, p. 64-66; and in *La Constitución de 1999 y la Enmienda constitucional No. 1 de 2009*, Editorial Jurídica Venezolana, Caracas 2011, pp. 299-300

94 See *Gaceta Oficial* No. 6295 Extraordinario de 1 de mayo de 2017

proposed by Hugo Chavez, [95] but now trying to approve it, 10 years later, without the people's participation.

It is evident from the text of the Decree, that its main purpose is to "make constitutional" or to constitutionalize the same "Communal State" or the "People's State" [96] already rejected by the people, but this time depriving the people from its right to political participation and to be properly represented.

So, in order to avoid the people, that is, the entire population of electors to be represented, the President has decided himself, violating the principle of universal suffrage system established in the Constitution, that the members of the Assembly he has unconstitutionally convened are going to be elected through sectorial and territorial votes, thus allowing discriminations or exclusions forbidden in the Constitution.

The Constitution only exceptionally admits sectorial elections of representatives for the election of the representatives of the indigenous peoples to the National Assembly, and to no other public body. That is, they are only allowed outside of the scope of the State bodies, for example, for a political party, a social club, a workers' union or a chamber of commerce, where only the members of those organizations are allowed to vote, this being completely inadmissible for the election of a National Constituent Assembly that must represent the universality of the people.

On the other hand, according to the Constitution, the right of the people to vote in the territorial entities is to ensure the representation of all their inhabitants, that is, the whole population that lives in the

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95 See Allan R. Brewer-Carías, "La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario", in *Anuario de Derecho Público 2007,* Año 1, Instituto de Estudios de Derecho Público de la Universidad Monteávila, Caracas 2008, pp. 17-65

96 See Allan R. Brewer-Carías, *Hacia la consolidación de un Estado socialista, centralizado, policial y militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Colección Textos Legislativos, No. 42, Editorial Jurídica Venezolana, Caracas 2007; *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Colección Textos Legislativos, No.43, Editorial Jurídica Venezolana, Caracas 2007.

territory; but not the territories themselves, as intended in the unconstitutional Presidential decree.[97]

Nonetheless, in spite of all the warnings and critiques,[98] last week the President published what he called the "*bases comiciales,*" that is, the electoral bases for the election of the members of the National Assembly, but in a contradictory manner, without submitting them to any sort of election or voting or "*comicios,"* which in this case was to be a referendum. [99] That is, the President decreed some "electoral bases" without submitting them to any sort of popular vote.

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[97] After the Decree convening the Constituent Assembly and in face of the unconstitutional call to elect its members on sectorial grounds, the Constitutional Chamber of the Supreme Tribunal, in lieu of controlling it, in a prompt manner, gave the government the needed assistance, by means of a new decision No. 355 of May 16, 2017, to illegitimately mutate the Constitution in order to allow elections in the country, by-passing the need for universal vote. In such decision, the Constitutional Chamber without reasoning, except for general references to the means for citizens' participation, in a contradictory way ignored the right of the people to participate through the election of its representatives by universal, direct and secret suffrage, as guaranteed in the Constitution (arts. 5,63), and has admitted that it can be eliminated through statutes; in the case at issue, the Organic Law of the Municipal Power. See the reference in "¡La Estocada Final! TSJ eliminó el voto universal," en *NotiCensura,* mayo 23, 2017, en http://www.noticensura.com/2017/05/la-estocada-final-tsj-elimino-el-voto.html

[98] For instance, the Venezuelan Academy of Political and Social Sciences, opposed the proposal. For all, see: "La Convocatoria presidencial a una Asamblea Nacional Constituyente es un fraude a la democracia," May 6, 2017, in http://www.acienpol.org.ve/cmacienpol/Resources/ Pronunciamientos /2017-05-05%20Pronunciamiento%20conjunto%20sobre%20ANC%20-%20final.pdf See also Allan R. Brewer-Carías: "A new fraud against the Venezuelan Constitution and the will of its people: Unconstitutional Decree calling a Constituent Assembly to approve the constitutional reform that was rejected by popular vote in 2007, May 5, 2017. See in http://allanbrewercarias.net/site/wp-content/uploads/2017/05/156.-doc-New-Fraud-against-the-Venezuelan-Constitution-and-the-will-of-its-people.-May-4-2017.pdf

[99] See "Maduro entregó bases comiciales de la Constituyente al CNE, *El Nacional* 23 de mayo de 2017, enhttp://www.el-nacional.com/noticias /gobierno/maduro-entrego-bases-comiciales-constituyente-cne_183853

Such *bases comiciales*, in addition to establishing an indirect election of the members of the Assembly by sectors, which is forbidden in the Constitution,, also contravened the Constitution regarding the proposed territorial election, the principle of which is that the people can convene a Constituent Assembly in order for all the people to be represented as a whole.

On the contrary, what was established in the decree is a territorial representation, consequently giving, for example, fewer representatives to the very populated Capital District of Caracas that has almost two million inhabitants, compared to other small Municipalities with only some hundred inhabitants. This territorial representation violates the right of the people in the sense that the population must be represented according to the number of inhabitants who live in the territories.

In brief, from the electoral point of view, said *bases comiciales* can be considered as the most insulting disdain to the political configuration of the country; only designed for the purpose of trying to allow the government to control the Assembly with less than 20 % of the votes.[100]

In any case, in this continued process of disregarding the Constitution, the oligarchy that governs the country has shown no respect for what the Constitution could establish. Accordingly, today – only a few hours ago -, the Constitutional Chamber of the Supreme Tribunal has issued a new decision (No. 378 of May 31, 2017)[101] simply stating that in order to convene a Constituent Assembly there is no need at all for the people to be heard or participate by means of a referendum. That is, according to this decision, in order to change a comma or a phrase in an article of the Constitution, a referendum must take place, but in order to entirely change the Constitution, reform the whole State and create a wholly new legal order, it is not necessary to request the people's approval. As simple as that: eight

[100] See for instance Héctor Briceño, "Constituyente: reglas manipuladas para ganar con el 20% de los votos," Prodavinci, May 27 2017, in In http:// prodavinci.com/2017/05/27/actualidad/constituyente-reglas-manipuladas-para-ganar-con-el-20-de-los-votos-por-hector-briceno/

[101] See in http://historico.tsj.gob.ve/decisiones/scon/mayo/199490-378-31517-2017-17-0519.HTML.

individuals (the President and seven justices of the Tribunal) can impose their will upon the people, without limits. That is the very definition of an Oligarchy.

In face of so many years of dismantling democracy and the democratic institutions,[102] it is then not surprising to see how, in December 2015, there occurred a popular rebellion against the authoritarian government in defense of the Constitution and democracy. On that occasion, the rebellion materialized by voting in the parliamentary elections, whereby the people demanded a change of the political system, giving the opposition a qualified majority of votes and the control of the National Assembly.

This democratic triumph unfortunately was ignored by the authoritarian regime that not only stripped the newly elected National Assembly, as I have explained, of absolutely all its powers, but also prevented the people from expressing its will through other electoral or voting processes. This occurred through the unjustified and unconstitutional postponement of the regional and municipal elections that, as provided in the Constitution, should have been held last year[103]; and also, by placing uncountable obstacles that eventually led to the final elimination of the presidential recall referendum that is a right of the people. And now, as I have mentioned, we are witnessing the Executive Branch calling a National Constituent Assembly without allowing the participation of the people through a referendum, with the blessing of the Constitutional Judge.

All these successive anti-democratic events have provoked a new sort of rebellion by the people, who have again started to express its will, even if by voting, which the regime insists on denying, but rather, through the massive general protests and demonstrations that

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[102] See Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment,* Cambridge University Press, New York 2010.

[103] The announcement made by the Chairman of the National Electoral Council on May 24, 2017, to call regional elections at the end of 2017, was received with total rejection and scepticism. See in "CNE anuncia elecciones regionales para el próximo 10 de diciembre," in El Nacional, 23 de mayo de 2017, en http://www.el-nacional.com/noticias/politica/cne-anuncia-elecciones -regionales-para-proximo-diciembre_183919

we have been witnessing during the past weeks. These protests have been brutally repressed. The military forces have acted against peaceful and unarmed protesters, many of whom have been murdered in a way never seen in our country. They have acted with rage, as if they were an occupation army, which, in fact, it appears to be, even applying torture to detainees. Venezuelans do not act in such an insensitive way, and much less accompanied by paramilitary criminal gangs protected and armed by the State.

That is why we are compelled to think that perhaps not all those who are participating in such repressive military gangs are Venezuelan.

In any case, of course, after more than 50 assassinations by these repressive forces in the long month that has passed, we are witnessing again a general rebellion against such practices.

Even if it is shocking to say, these tragic events are giving us hope that we may again see democracy flourish in our soil, and that eventually, the representatives that uphold the will of the people will be able to rescue their constitutional role.

Furthermore, in today's globalized world - even though somehow late -, Venezuelans are also beginning to find some support from the international community in favor of the country's democratic process.[104] This is of utmost importance, particularly if we bear in mind the disastrous influence that a foreign country, as is the case of Cuba, exercises upon the current Venezuelan government, having even penetrated key bodies of the State and its military forces. Within this international support that the Venezuelan people has been receiving, we have to acknowledge, in particular, the essential role played by the Secretary General of the Organization of American States, Dr. Luis Almagro,[105] who persistently has moved the friendly

[104] See Michael Pentfold, "La constituyente en el contexto internacional," in Prodavinci, May 30, 2017, in http://prodavinci.com/blogs/la-constituyente-en-el-contexto-internacional-por-michael-penfold/

[105] See *La Crisis de la democracia en Venezuela, la OEA y la Carta Democrática Interamericana. Documentos de Luis Almagro*, Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana International, 2016.

nations to speak, advocating in various ways for the restauration of democracy in Venezuela.

Today's Meeting of Consultations of Ministers of Foreign Affairs of the Organization of American States, whatever its outcome, is another result of his efforts.

Let us then not lose hope. I think maybe we are beginning to see more clearly that the vital signs of the authoritarian regime are now gradually fading, and perhaps entering into a terminal state,[106] as we all want.

In this situation, I just want to conclude quoting what my friend Professor Pedro Nikken,[107] pointed out two weeks ago, when he said:

> "The Government has to rectify because it faces a generalized popular rebellion. It cannot continue to kick the institutions." […]
>
> "If they don't rectify, the power will be taken away from them violently. The Venezuelan people are upraised and with reasons." [108]

New York, May 31, 2017.

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[106] See Allan R. Brewer-Carías, "Venezuela: Historia y Crisis Política," in *Derecho y Sociedad. Revista de Estudiantes de Derecho de la Universidad Monteávila*, Nº 3, Caracas, Abril 2002, pp. 217-244.

[107] Former Dean of the Law Faculty of the Central University of Venezuela, and former President of the International Commission of Jurists and of the Inter American Court of Human Rights.

[108] See Pedro Nikken, "Es suicida para el gobierno seguir el camino de la constituyente," en *El Nacional*, Caracas 22 de mayo 2017, en http://www.el-nacional.com/noticias/politica/suicida-para-gobierno-seguir-camino-constituyente_183517

Chapter II

TRANSITION FROM DEMOCRACY TO TYRANNY THROUGH THE FRAUDULENT USE OF DEMOCRATIC INSTITUTIONS (2018)*

Being it the main goal of the *Clough Center for the Study of Constitutional Democracy* to promote and develop studies in order to reinvigorate and reimagine constitutional democracy in the twenty-first century, I thought it was necessary, and moreover, indispensable, for me to refer to the process of demolition of one of the most envied constitutional democracies of Latin America during the second half of last century, the Venezuelan democracy that functioned between 1958 and 1998.

After one attempt, in 1945, to establish a democratic regime in Venezuela, and after paying the consequences of the lack of compromise between the political parties of the country, democracy began to be implemented based on an agreement eventually reached in 1958, the so-called *Pacto de Punto Fijo.* That outstanding and exceptional political Pact, which set aside their main interparty differences, had the purpose of consolidating a constitutional

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* Text of the Presentation at the *Clough Center for the Study of Constitutional Democracy,* Boston College, Boston, September 25, 2018. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/09/1218.-Brewer.-conf.-Transictiion-Democracy-to-Tyranny.-B.C.-2018.pdf. I followed in this Presentation the one I made a year before, at the Conference on: "Transition to Democracy," organized by the *European Public Law Organization*, Municipality of Fyli, Fyli (Athens), 11 September 2017. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/09/1197.-Conf.-Brewer.-Transition-Democracy-to-Tyranny-11-Sept.-2017.pdf

democracy in the country that, in contrast, in 1958, was the one with less democratic traditions in all Latin America.

That democratic regime, which functioned during forty years, was systematically destroyed by the authoritarian regime that assaulted power in 1999.

Of course, this is not the first time I am referring to this matter. I waived many years ago the "right to be silent" on these matters, and instead, since 1998, I assumed the duty to speak out denouncing what was happening and has happened in my country, having published many articles, Papers and books on the matter. I must mention the book I published in 2010, entitled "*Dismantling Democracy: The Chavez Authoritarian Experiment,*" published by Cambridge University, a time – not so far away - when still many academic and writers on these matters in this country were admiring the former paratrooper commander that after failing in his assault on power by military force violating the Constitution, was later released from prison and eventually elected President of the Republic, beginning, – as the populist propaganda said – "to take care of the poor," as if nobody before him had done nothing on matters of social justice in the country. That astonishing and simplistic approach was enough for Chávez to gain the admiration of so many in this country, so anybody who dared denounce the great farce that was being developed in my country, disguised with a democratic veil, was immediately placed as a sort of "dinosaur" in the academic archeology.

Of course, this has not been the first time that a democratic regime has been destroyed from within using its own democratic tools, it sufficing to remember the processes that occurred in Europe before Second World War, in the cases of the Fascist regimes, when a transition from democracy to tyranny was achieved by using the democratic institutions in a populist and fraudulent way.

Nonetheless, what is true is that, since then, no other experiment of such kind fortunately has taken shape in Europe – although it has begun to flourish in some relatively newcomers to the European Union, like Poland -, wherefore the Democratic Clause included in the old Treaties of the European Union if of the utmost importance. This provision has not only prevented such unwanted sort of transitions, but has imposed upon the countries, as a condition for

being admitted and remaining in the Union, the need for democratization and for having stable democratic institutions.

In any case, seventy years after the Second World War, North Americans and Europeans have fortunately gotten used to democracy, generally rejecting the idea of the possibility for a democratic regime to be transformed into a tyranny through its own democratic means.

And that has being precisely one of the reasons that explains how difficult it has been for the North American and European people and governments to understand what has exactly happened during the past two decades in some Latin American countries, particularly, in Venezuela, where the democratic institutions have been unmercifully destroyed and eliminated, be means of a so-called "new constitutionalism," based on a "participatory" or populist democracy, in order to construct an also so called "twenty-first century socialism."

The fact is that the relatively stable democratic regime that we had in Venezuela for 40 years, from 1958 until 1999, has been gradually transformed into a Tyranny, following a process that was conceived and conducted by Lieutenant Colonel Hugo Chávez, after failing in his military attempt of *coup d'état* in 1992. Seven years later, in 1999, he achieved the same goal of assaulting power, but through an election, starting the process of using democratic tools in order to destroy the constitutional democracy we had. At that time, in 1998, I was the President of the National Academy of Political and Social Sciences, and, as such, I began to denounce and oppose his undemocratic actions.

By using and misusing the electoral tools, Chávez began his assault on the State institutions – before the eyes of the already cornered and naïve political parties – , taking over all the branches of government, erasing the principle of separation of powers and eliminating the territorial distribution of State powers, eventually beginning the process of establishing a centralized and militaristic authoritarian government in the country.

It all began, as I said, in 1999, through the unconstitutional constitution-making process that he promoted, based on the convening and election of a Constituent Assembly that was not

established nor regulated in the Constitution, and which ended up totally dominated and directed by the same group of former military that accompanied Chávez in his *coup d'état* attempt, who are still abusing power. That Constituent Assembly encouraged by the promoters of the "new constitutionalism" ideas, was his main tool for accomplishing his assault on power, and eventually militarize the political institutions, dissolving the constituted powers.

For this purpose, and according to the already mentioned new constitutional gospel called "the new constitutionalism" that began to be spread in Latin America by some Cuban-trained Spanish scholars, many of which later participated in the creation of the *Podemos* party in Spain, - a process that also followed in Ecuador and Bolivia -, that Constituent Assembly, supplanting and usurping the sovereignty of the people, assumed full and unlimited powers to allegedly transform the institutional framework of the State, imposing Chávez's authoritarian ideas.

For this purpose, the Constituent Assembly intervened all the constituted powers – with my isolated opposition (I was elected member of that Assembly and, together with other three, were the only opposition members in an Assembly of 161 members). The Assembly removed and limited their authorities; replaced all the Justices of the Supreme Court; dissolved the elected Congress, and assumed the legislative functions; intervened the provincial and municipal powers; suspended the municipal elections; removed the members of the Electoral Council and the Comptroller General of the State, and in general, intervened the Judiciary, dismissing almost all the judges and the members of the Public Prosecutor's Office.

As I mentioned, I was a direct witness of that process as an independent elected member of that Constituent Assembly, having opposed the authoritarian program that marked its activities, and which since then I have continued to denounce; wherefore I was eventually persecuted for political reasons, and forced to remain in the U.S. since 2005, without any possibility to return to my country.

Since that constituent process of 1999, the transition from democracy to tyranny began to take shape gradually, while the world, in general, and the North American and the European countries, in particular, viewed the former Lieutenant Colonel with some sort of sympathy, due in part to the simple fact that he was elected and to his

illusionist promises that he was going to take care of the people, but ignoring his fraudulent use of the democratic institutions.

The misuse the immense income of the country due to the boom in oil prices, after two decades of authoritarian government, Chávez and his successor Maduro managed to transform what is was a prosperous county into the most miserable one in Latin America, and to transform the once Venezuelan envied democracy into a dictatorship or tyranny.

And the worst of all that process is that it was achieved violating and distorting the Constitution, with elections that took place now and then, but always controlled by a submissive electoral authority within a centralized power, and a militarized Public Administration that used democratic tools only to destroy the very essence of democracy. As was recently explained by Ricardo Haussmann (Professor at the Harvard Kennedy School in his article "The Venality of Evil," 31 July 2018), all done in an evil way, that is, with the intention to do harm, it being impossible to find "other plausible explanations for what has happened in Venezuela."

The first task that was assumed by the 1999 Constituent Assembly, besides giving the military deliberative and participative political rights, was to assault the Judiciary – a fact ignored by so many democrats in the world - , dismissing almost all the country's Judges, replacing them all with provisional and temporary judges, thus, ending the autonomy and independence of the Judiciary.

Within that framework, the Supreme Tribunal was transformed into the most ominous instrument for consolidating authoritarianism in the country, having been completely packed with government supporters. That explains why its Constitutional Chamber, instead of being the guardian of the Constitution, has been the main tool of the authoritarian government for the illegitimate mutation of the Constitution, for the demolition of the rule of law, and even for the persecution and illegitimate prosecution of members of the National Assembly, which has been almost extinguished.

Regarding the other branches of government, the assault was completed after 2005, when due to the decision adopted by the opposition not to participate in the parliamentary election of December that year, the government took complete control of the

National Assembly, completing the process of packing all the branches of government with government loyalists, including the Electoral Authority, the Public Prosecutor's Office and the Comptroller General's Office.

The following year, in 2006, after the re-election of President Chávez took place, he declared himself Marxist-Leninist and the Official State Party he managed to create adopted Marxism as its official ideology, proposing then to definitively change the Democratic Rule of Law State, converting it into a People's or Communal State.

For such purpose, new Laws were approved, such as the Communal Council Law (2006), and in 2007, the President took the initiative of proposing a Constitutional Reform in order to create in parallel to the Constitutional State, a "State of the Popular Power," based on a communist economic system, eliminating private property and substituting it by social or communal properties. Although those reforms could not be introduced through a "constitutional reform" procedure, but only by convening a Constituent Assembly, the Supreme Tribunal already coopted by the Executive Branch, refused to even receive the judicial review complaints that were filed.

Fortunately, the proposed reform was rejected by the people through a referendum, this being the most important political defeat suffered by Chávez.

It was so important that he aggressively reacted against the people's will, overtly violating the Constitution, and proceeded to impose the rejected constitutional reform by means of ordinary legislation and decree-laws enacted between 2008 and 2011, creating the framework of a Cuban-style "State of Popular Power." The claims for judicial review against such laws, also remained in the dead files of the Supreme Tribunal, which never processed the requests; such unconstitutional laws being implemented by the government with total impunity, without any sort of control or judicial review.

In any case, after sixteen years of authoritarian rule and after the failure of the erroneous economic and social policies that were imposed, the destruction of all the productive forces of the country was achieved through indiscriminate confiscations and

expropriations of private lands, industries and property. The consequence was that the political, economic and social destruction of the country had been completed by 2016, provoking a sort of popular rebellion that was expressed by voting in the parliamentary elections held in December 2015. In those elections, the government lost its majority control of the National Assembly, and the opposition obtained a qualified majority of representatives, this being, without doubt, the second most important political setback of the authoritarian regime since 1999, after the failure of the 2007 constitutional reform.

However, the regime was already used to exercising absolute control of power and, therefore, an autonomous Legislature could not be tolerated. The Government then, soon after such election, began to obstruct the opposition from developing its legislative agenda, and gradually stripped the Legislative body of all its powers and functions – yes, all of them - and all that, thanks to an evil and depraved collusion between the Executive Branch and the Supreme Tribunal of Justice.

That happened even before the newly elected National Assembly could hold its first session on January 5th 2016, when the former National Assembly enacted just two days before (December 29th and 30th) more than 30 statutes that stripped off all the legal powers of the new Assembly; then proceeding to appoint new Supreme Tribunal justices, packing it entirely with members of the governing party.

Once the Tribunal was completely controlled, it immediately began to prevent the Assembly from exercising its functions, issuing, during the following years more than 100 rulings that have transformed the political system into what I called, a "Judicial Dictatorship or Judicial Tyranny," characterized by the fact that the Executive has used, at his will, the subdued Supreme Tribunal as its main instrument to neutralize the National Assembly, absolutely eliminating all its functions.

The result has been that the Constitutional Chamber of the Supreme Tribunal, acting as constitutional judge, declared the unconstitutionality of practically all – yes, all – the statutes that up to now have been sanctioned by the National Assembly elected on December 2015; reformed the *interna corporis* of the Assembly in order to subject the exercise of its legislative functions to the prior

approval by the Executive Branch, something never seen in any State; eliminated the Assembly's political power of controlling the government and the Public Administration; imposed the prior approval by the Executive Vice-President for a Minister to be questioned by the Assembly; eliminated the possibility for the Assembly to oppose and disapprove the states of emergency that the Executive has successively decreed; eliminated the possibility for the National Assembly to approve votes of non-confidence against the Ministers; canceled the constitutional obligation of the President to submit its Annual Address on the State of the Nation before the National Assembly, deciding instead that it was to be submitted before the same Supreme Tribunal; eliminated the legislative approval of the national budget law, transforming the Budget Law into a mere executive decree to be approved by the Tribunal; eliminated the Assembly's power to review its own decisions and repeal them, as was the case regarding the unconstitutional appointment of the justices of the Supreme Tribunal made in December 2015; eliminated the power of the National Assembly even to express political opinion as a result of its debates, having annulled all the major political Resolutions and Declarations that it has adopted; and in a few decisions issued last year, based on an alleged contempt of court regarding a ruling by the Electoral Chamber of the same Supreme Tribunal, the Constitutional Chamber declared null and void all – yes, all present and future decisions of the National Assembly, threating to revoke the popular mandate of its members and to imprison them.

But that was not the end. In one of the most notorious and shameful decisions of the Constitutional Chamber issued in March last year (No. 155 of March 27, 2017, and No. 156 of March 29, 2017), it simply decreed in an unconstitutional way a state of emergency; eliminated the parliamentary immunity of the representatives; assumed in an arbitrary way all – yes, all - the parliamentary powers of the National Assembly; and the Tribunal even delegated legislative powers upon the President of the Republic, ordering him to reform laws and Codes at his discretion, among them, the Criminal Code and the Organic Code of Criminal Procedure.

All these decisions cannot be considered or qualified in another way but as a permanent and continued *coup d'état*, which gave birth

to a new model of authoritarian government – resulting from the implementation of the "new constitutionalism" doctrine - , which did not originate itself from a military coup, as was the Latin America tradition, but through the manipulation of popular elections, the degradation of judicial review processes and the abuse of all democratic tools, in order to eventually give to the military the factual control of the country; and all this, with the purpose of destroying the rule of law and the democratic principles, using for such purpose a very convenient camouflage of "constitutional" and "elective" masks.

The next step was taken that same year 2017, with the unconstitutional convening by Nicolás Maduro of a new Constituent Assembly, with unlimited powers and duration, for the purpose, again, of transforming the State in order to try to insert in it the Socialist, Popular or Communal State framework. The Assembly was elected through an electoral system based on a territorial (municipal) and corporate (or fascist) vote established by sectors of the society, institutionalizing discrimination and exclusions.

Once the Constitutional Chamber of the Supreme Tribunal blessed the Constituent Assembly, it was elected with members of the official party, and proceed to assume an original constituent power, acting with alleged supra-constitutional powers, compelling the constituted powers, including the Supreme Tribunal, to recognized it sovereignty.

The Constituent Assembly began to persecute all dissidence and, in particular, the members of the National Assembly. For such purpose, by August 2018, the controlled Supreme Tribunal in collusion with the Constituent Assembly, began to order the incarceration and apprehension of representatives, unjustly indicting them of magnicide and other serious crimes against the State.

What must be set clear is that all what I have explained is not science fiction. All has happened and is currently happening in my country, and I have only referred to the institutional consequences of the actions of an authoritarian regime that for years has being playing a masquerade pretending to be a democracy. As for the economic and social implications, the Venezuelan tragedy is already known all over the world, it not being possible nowadays to hide the magnitude of the failure of the Chávez-Maduro regime.

The fact is that nowadays nobody can allege to be cheated. Finally, and tragically, the truth has surfaced regarding all the abuses perpetrated by the Venezuelan government against its own people, and, of course, not only by the current Maduro regime, but beginning with the Chávez's hypocrite regime, who used the democratic veil in order to transform the former Venezuelan democracy into tyranny. This has allowed the democratic governments of the world to begin to understand the nature of the Chávez-Maduro regime and, in parallel, to understand the democratic and material needs of the Venezuelan people. This is important because in order to overcome the narco-military-dictatorship that has taken over the country, in the future, we Venezuelans not only need a very firm international understanding of the situation, but also a determined multilateral aid.

In that context, it is very important to encourage academic centers like the Clough Center to continue with the promotion and development of studies in order to reinvigorate and reimagine constitutional democracy in the twenty-first century. The example of what has happened in Venezuela could be, in fact, a very useful subject for your studies, in order to precisely prevent that anything similar happens in any other country in the future.

Boston, September 25, 2018

PART TWO

SOME STEPS ON THE DISMANTLING OF THE DEMOCRATIC STATE

Chapter III

DISMANTLING OF THE JUDICIARY: THE TRAGIC INSTITUTIONAL SITUATION OF THE JUDICIARY (2014)*

I. DEMOCRACY AND SEPARATION OF POWERS

The essential components of democracy are much more than the sole popular or circumstantial election of government officials, as it has been formally declared in the Inter-American Democratic Charter *(Carta Democrática Interamericana)* adopted by the

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* *Venezuelan National Report*, International Congress of Comparative Law, International Academy of Comparative Law. Vienna 2014. Publiched in the book: *Venezuela. Some Current Legal Issues 2014, Venezuelan National Reports to the 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, 20-26 July 2014*, Academia de Ciencias Políticas y Sociales, Caracas 2014, pp. 13-42. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2 41efb849fea2/Content/II,%204,%2078-,%20Brewer.THE%20GOVERNMENT%20OF%20JUDGES%20AND%20DEMOCRACY.%20Venezuelan%20National%20Report.%20Vienna%20Congress,%20April.pdf

Organization of American States in 2001,[109] after so many antidemocratic, militarist and authoritarian regimes, disguised as democratic because of their electoral origin, that Latin American countries have suffered.

The Charter, in fact, enumerates among the *essential elements of a representative democracy,* in addition to having periodical, fair and free elections based on the universal and secret vote as expression of the will of the people, the following: respect for human rights and fundamental liberties; access to power and the exercise thereof subject to the Rule of Law; plural regime of the political parties and organizations; and, what is the most important of all, "*separation and independence of public powers*" (Article 3), that is, the possibility to control the different branches of government. The *Inter-American Charter* also defined the following *fundamental components of democracy*: transparency of governmental activities; integrity, responsibility of governments for public management; respect of social rights and freedom of speech and press; constitutional subordination of all institutions of the State to the legally constituted civil authority, and respect for the Rule of Law by all the entities and sectors of society.

The principle of separation and independence of powers is so important as one of the "essential elements of democracy," because it is the one that allows all the other "fundamental components of democracy" to be politically possible. To be precise, democracy, as a political system, can only function in a constitutional Rule of Law system where the control of power exists; that is, checks and balances based on the separation of powers with their independence and autonomy guaranteed, so that power can be stopped by power itself. Consequently, without the separation of powers and the possibility to control power, none the other essential factors of democracy can be guaranteed, because only by controlling power, can free and fair elections and political pluralism exist; only by controlling power, can an effective democratic participation be possible and an effective

[109] See on the Inter-American Democratic Charter, in Allan R. Brewer-Carías, 2002. *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Caracas: Ediciones El Nacional, pp. 137 ff.; Asdrúbal Aguiar, 2008. *El Derecho a la Democracia*, Caracas: Editorial Jurídica Venezolana.

transparency in the exercise of government be assured; only by controlling power can there be a government submitted to the Constitution and the laws, that is, the Rule of Law; only by controlling power can there be an effective access to justice functioning with autonomy and independence; and only by controlling power can there be a true and effective guaranty for the respect of human rights.[110]

The consequence of the aforementioned is that democratic regimes cannot exist without the separation of powers, and in particular, without the possibility of an independent and autonomous Judicial Power with the capacity to control all the other powers of the State. That is why the most important principle governing the functioning of the Judiciary in democratic regimes is the independence and autonomy of judges, so they can apply the rule of law without interference from other State's powers, from institutions, corporations or even from citizens; and only subject to the rule of the Constitution and of law.

II. PROVISIONS OF THE VENEZUELAN CONSTITUTION REGARDING THE JUDICIAL SYSTEM AND ITS GOVERNANCE

For such purpose, in our contemporary world, Constitutions have included express provisions in this respect, the Venezuelan Constitution of 1999 being no exception.[111] In fact, according to Article 253 of the Constitution, the power to render or administer justice emanates from the citizenry and is exercised "in the name of the Republic and by the authority of the law." For such purposes, Article 26 of the Constitution provides that the State must guarantee a "cost-free, accessible, impartial, adequate, transparent,

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110 See Allan R. Brewer-Carías, 2007. Democracia: sus elementos y componentes esenciales y el control del poder. Nuria González Martín (Comp.)**,** 2007. *Grandes temas para un observatorio electoral ciudadano, Vol. I, Democracia: retos y fundamentos,* México. Instituto Electoral del Distrito Federal, pp. 171-220.

111 See on the Venezuelan 1999 Constitution, Allan R. Brewer-Carías, 2004. *La Constitución de 1999. Derecho Constitucional Venezulano*, 2 Vol. Caracas: Editorial Jurídica Venezolana.

autonomous, independent, accountable, equitable, and expeditious justice, without undue or delay, formalism, or unnecessary replication of procedures."[112] Consequently, the Constitution denies the Judiciary the power to establish court costs or fees, or to require payment for services (Article 254).

The system of justice, according to the same Article 253 of the Constitution, consists not only by the bodies of the Judicial Branch (Supreme Tribunal of Justice and all the other courts established by law), but by the offices of the Prosecutor General, the Peoples' Defender, the criminal investigatory organs, the penitentiary system, the alternative means of justice, the citizens who participate in the administration of justice as provided in the law, and the attorneys authorized to practice law.[113]

The principle of the independence of the Judicial Power is expressly set forth in Article 254 of the Constitution, which, in addition, sets forth its financial autonomy,[114] and assigns "functional, financial, and administrative autonomy" to the Supreme Tribunal. For this purpose, the Constitution provides that within the national general annual budget, an appropriation of at least two percent (2%) of the ordinary national budget be established for the judiciary, a percentage amount that cannot be changed without prior approval by the National Assembly.

With the purpose of guaranteeing the impartiality and independence of judges in the exercise of their duties, Article 256 of

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112 See Gustavo Urdaneta Troconis, 2001. El Poder Judicial en la Constitución de 1999. *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Vol. I. Caracas: Imprenta Nacional, pp. 521-564.

113 See the Law on the Judicial System, (2009). *Gaceta Oficial* Nº 39.276 of October 1, 2009, Caracas: Imprenta Nacional. See Román J. Duque Corredor 2008. El sistema de Justicia, in Jesús María Casal, Alfredo Arismendi y Carlos Luis Carrillo Artiles (Coord.), 2008, *Tendencias Actuales del Derecho Constitucional. Homenaje a Jesús María Casal Montbrun,* Vol. II, Caracas: Universidad Central de Venezuela/Universidad Católica Andrés Bello, pp. 87-112.

114 See Juan Rafael Perdomo, 2003. Independencia y competencia del Poder Judicial, *Revista de derecho del Tribunal Supremo de Justicia,* Nº 8, Caracas, pp. 483 a 518.

the Constitution requires that justices, judges and prosecutors of the Public Prosecutor and the Public Defenders' offices , from the time of assuming their respective offices until stepping down, cannot engage in partisan political activity other than voting. This includes political party activism, union, guild and similar activities. Justices, judges and prosecutors are also prohibited from engaging in private or business activities that are incompatible with their judicial functions, either on their own behalf or on the behalf of others, and they cannot undertake any other public functions other than educational activities. In addition, Judges are prohibited from associating with one another (Article 256), which is a limit regarding the constitutional right of association set forth in Article 52 of the Constitution.

According to Article 257 of the Constitution, the fundamental instrument for the realization of justice is the judicial process, regarding which the procedural laws must establish simplified, uniform and effective procedures, and adopt brief, public, and oral proceedings, wherefore in no case justice should be sacrificed based on the omission of non-essential formalities. These provisions are supplemented by Article 26 of the Constitution, which provides that the State must guarantee expeditious justice without undue delay, formalisms, or useless procedural repositions. In addition, the alternative means of justice being part of the judicial system (Article 253), Article 258 of the Constitution imposes on the Legislator the duty to promote arbitration, conciliation, mediation, and other alternative means for conflict resolution.

Finally, under Article 255 of the Constitution, judges are personally responsible for unjustified errors, delays, or omissions, for substantial failures to observe procedural requirements, for abuse of or refusal to apply the law (*denegación*), for bias, for the crime of graft (*cohecho*) and for criminally negligent or intentional injustice (*prevaricación*) effected in the course of performing their judicial functions.

One of the innovations of the 1999 Constitution was to confer upon the Supreme Tribunal of Justice "the Governance and Administration of the Judicial Branch," while eliminating the former Council of the Judiciary (*Consejo de la Judicatura*), which exercised these functions under Article 217 of the Constitution of 1961, as one

of the bodies with functional autonomy separate and independent from all the branches of government, including the former Supreme Court of Justice.

Consequently, since 2000, as provided in Article 267 of the Constitution, the Supreme Tribunal of Justice is charged with the direction, governance and administration of the Judicial Branch, including inspection and oversight of the other courts of the Republic, as well as the offices of the Public Defenders.[115] For such purposes, the Supreme Tribunal is in charge of drafting and putting into effect its own budget and the budget of the Judicial Branch, in general, according to principles set out in Article 254.

In order to perform these functions, the Supreme Tribunal of Justice, in plenary session, has created an Executive Directorate of the Judiciary (*Dirección Ejecutiva de la Magistratura*) with regional offices. Judicial Circuits are to be established and organized by statute, as are the jurisdictions of tribunals and regional courts in order to promote the administrative and jurisdictional decentralization of the Judicial Power (Article 269).

As mentioned, jurisdiction for judicial discipline is to be exercised by disciplinary tribunals, as determined by law (Article 267), which nonetheless was only formally established in 2010-2011 after the sanctioning of the Code of Ethics of the Venezuelan Judge, providing that disciplinary proceedings must be public, oral, and brief, in conformity with due process of law.

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115 See the Organic Law of the Supreme Tribunal of Justice 2010. *Gaceta Oficial* Nº 39.522 of October 1, 2010. See Allan R. Brewer-Carías and Víctor Hernández Mendible, 2010. *Ley Orgánica del Tribunal Supremo de Justicia 2010, Caracas:* Editorial Jurídica Venezolana; Laura Louza, 2002. El Tribunal Supremo de Justicia en la Constitución de la República Bolivariana de Venezuela, *Revista del Tribunal Supremo de Justicia,* Nº 4. Caracas, pp. 379-437; Nélida Peña Colmenares, 2002. El Tribunal Supremo de Justicia como órgano de dirección, gobierno, administración, inspección y vigilancia del Poder Judicial venezolano", *Revista de derecho del Tribunal Supremo de Justicia,* Nº 8, Caracas, pp. 391 a 434; and Olga Dos Santos, 2002. Comisión Judicial del Tribunal Supremo de Justicia, in *Revista de derecho del Tribunal Supremo de Justicia*, Nº 6, Caracas, pp. 373 a 378.

III. THE CONSTITUTIONAL REGULATIONS REGARDING THE STABILITY AND INDEPENDENCE OF JUDGES

The basic constitutional provision in order to guarantee the independence and autonomy of courts and judges is established in Article 255, which provides for a specific mechanism to ensure the independent appointment of judges, and to guarantee their stability.

In this regard, the judicial tenure is considered as a judicial career, in which the admission and promotion of judges within it must be the result of a public competition or examination to ensure the excellence and adequacy of qualifications of the participants, who are to be chosen by panels from the judicial circuits (Article 255). The naming and swearing in of judges are to be done by the Supreme Tribunal of Justice, and the citizens' participation in the selection procedure and designation of judges are to be guaranteed by law. Unfortunately, up to 2011, all these provisions have not been applicable due to a lack of legislation implementing them.

The Constitution also creates a Judicial Nominations Committee (Article 270) as a body that assists the Judicial Branch in selecting not only the Justices for the Supreme Tribunal of Justice (Article 264), but also to assist judicial colleges in selecting judges for the courts including those of the jurisdiction in Judicial Discipline. This Judicial Nominations Committee is to be made up by representatives from different sectors of society, as determined by law. The law is required to promote the professional development of judges, to which end universities are to collaborate with the judiciary by including training in judicial specialization in law school curricula. Nonetheless, none of these provisions has been implemented, and to the contrary, since 1999, the Venezuelan Judiciary has been almost completely made up by temporal and provisional judges,[116] lacking stability and

[116] The Inter-American Commission on Human Rights said: "The Commission has been informed that only 250 judges have been appointed by opposition concurrence according to the constitutional text. From a total of 1.772 positions of judges in Venezuela, the Supreme Court of Justice reports that only 183 are permanent appointed holders, 1331 are provisional and 258 are temporary", 2003. *Informe sobre la Situación de los Derechos Humanos en*

being subject to political manipulation, altering the people's right to an adequate administration of justice.

On the other hand, in order to guarantee the stability of judges according to the express provision of the Constitution, these can only be removed or suspended from office through judicial proceedings or trials expressly established by statutes, led by Judicial Disciplinary Judges (Article 255). Nonetheless, up to 2011, due to the failure to fa implement the Disciplinary Jurisdiction, judges were removed without due process guaranties by a "transitory" Reorganization Commission of the Judicial Power in charge of the disciplinary procedures, only eliminated in June 2011, being replaced by courts whose judges are appointed by the political body of the State, the National Assembly, instead of by the Supreme Tribunal of Justice.

IV. THE CATASTROPHIC DEPENDENCE OF THE JUDICIARY IN THE VENEZUELAN AUTHORITARIAN GOVERNMENT

Now, despite all the provisions included in the text of the 1999 Constitution, since 1999, Venezuela has experienced a process of progressive concentration of powers, implemented by controlling the nomination of the head of the State's bodies. In fact, one of the mechanisms established in the 1999 Constitution in order to ensure the independence of powers was the provision of a system to ensure that their appointment by the National Assembly was to be limited by the necessary participation of special collective bodies called Nominating Committees, which must be made up by representatives of the different sectors of society (Arts. 264, 279, 295). Those Nominating Committees were to be in charge of selecting and nominating the candidates, guaranteeing the political participation of the Citizens in the process.

Venezuela; OAS/Ser.L/V/II.118. d.C. 4rev. 2; December 29, 2003, paragraph 11. The same Commission also said that "an aspect linked to the autonomy and independence of the Judicial Power is that of the provisional nature of the judges in the judicial system of Venezuela. Today, the information provided by the different sources indicates that more than 80% of Venezuelan judges are "provisional". *Idem*, Paragraph 161.

Consequently, the appointment of the Justices of the Supreme Tribunal, and of all other head of the other State's powers can only be made from among the candidates proposed by the corresponding "Nominating Committees," which are the ones in charge of selecting and nominating the candidates before the Assembly. These constitutional provisions were designed in order to limit the discretionary power that the political legislative body traditionally had to appoint those high officials through political party agreements, by ensuring political Citizenship participation. [117] Unfortunately, these exceptional constitutional provisions have not been applied because the National Assembly during the past years, defrauding the Constitution, has deliberately "transformed" the said Committees into mere "parliamentary Commissions," reducing the civil society's right to political participation. The Assembly, in all the statutes enacted regarding such Committees and the appointment process, has established the structure of all the Nominating Committees with a majority of parliamentary representatives (whom by definition cannot be representatives of the "civil society"), although providing, in addition, for the incorporation of some other members chosen by the National Assembly itself from among strategically selected "non-governmental Organizations."[118] The result has been the total political control of the Nominating Committees, and the persistence of the discretionary political and partisan way of appointing the

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[117] See Allan R. Brewer-Carías, 2005. La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas, *Revista Iberoamericana de Derecho Publico y Administrativo,* Año 5, N° 5-2005, San Jose, Costa Rica, pp. 76-95.

[118] See regarding the distortion of the "Judicial Nominating Committee" in Allan R. Brewer-Carías, 2004. *Ley Orgánica del Tribunal Supremo de Justicia*, Caracas: Editorial Jurídica Venezolana; the distortion on the "Citizen Power Nominating Committee" in Allan R. Brewer-Carías *et al.*, 2005. *Ley Orgánica del Poder Ciudadano*, Caracas: Editorial Jurídica Venezolana; and in Sobre el nombramiento irregular por la Asamblea Nacional de los titulares de los órganos del poder ciudadano en 2007, 2008. *Revista de Derecho Público***,** Nº 113, Caracas: Editorial Jurídica Venezolana, pp. 85-88; and the distortion on the Electoral Nominating Committee in Allan R. Brewer-Carías, 2007. *Crónica sobre la "in" justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Caracas: Universidad Central de Venezuela, Nº 2, pp 197-230.

official heads of the non-elected branches of government, which the provisions of the 1999 Constitution intended to limit, by a National Assembly that since 2000 has been completely controlled by the Executive.

That is why, in this context, it was hardly surprising to hear former President Chávez, when referring to the delegate legislation enacted by him, say in August 2008, simply: "*I am the Law…. I am the State* !!;[119] repeating the same phrases he used in 2001, also referring to other series of decree-laws he enacted at that time as delegate legislation.[120] Such phrases, as we all know, were attributed in the seventeenth century to Louis XIV, in France, as a sign of the meaning of an Absolute Monarchy –although in fact he never expressed them–;[121] but to hear a Head of State saying them in our times is enough to understand the tragic institutional situation that Venezuela is currently facing, characterized by a complete absence of separation of powers and, consequently, of a democratic and rule of law government.[122] Consequently, since 1999, a tragic setback has occurred in Venezuela regarding democratic standards, by means of a continuous, persistent, and deliberate process of demolishing the

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119 Hugo Chávez Frías, August 28, 2008. See in Gustavo Coronel, 2008. Las Armas de Coronel, October 15, 2008, available at http://lasarmasdecoronel.blogspot.com/2008/10/yo-soy-la-leyyo-soy-el-estado.html

120 See in *El Universal,* Caracas, December 4, 2001, pp. 1,1 and 2,1. This explains what was said by the Head of State in 2009 considering "representative democracy, separation of Powers and alternate government" as doctrines that "poisons the masses' mind." See Hugo Chávez, 2009. Hugo Chávez seeks to catch them young, *The Economist*, August 22-28, 2009, p. 33.

121 See Yves Guchet, 1990. *Histoire Constitutionnelle Française (1789–1958)*, Paris : Ed. Erasme, p.8.

122 See the summary of this situation in Teodoro Petkoff, 2008. Election and Political Power. Challenges for the Opposition", *ReVista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, pp. 12. See also Allan R. Brewer-Carías, 2005. Los problemas de la gobernabilidad democrática en Venezuela: el autoritarismo constitucional y la concentración y centralización del poder," in Diego Valadés (Coord.), 2005. *Gobernabilidad y constitucionalismo en América Latina*, Mexico: Universidad Nacional Autónoma de México, pp. 73-96.

rule of law institutions[123] and of destroying democracy in a way never before experienced in all the constitutional history of the country.[124]

This has led to the complete control of the Judiciary, which after being initially intervened by the Constituent National Assembly in 1999,[125] with the consent and complicity of the former Supreme

[123] See in *general*, Allan R. Brewer-Carías, 2005. La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004), *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Barquisimeto, Instituto de Estudios Jurídicos del Estado Lara, pp. 33-174; Allan R. Brewer-Carías, 2007. El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial, Allan R. Brewer-Carías, 2007. *Estudios Sobre el Estado Constitucional (2005-2006)*, Caracas: Editorial Jurídica Venezolana, pp. 245-269; and Allan R. Brewer-Carías 2007. La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006), *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Madrid: Marcial Pons, pp. 25-57, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios Nº 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, 2008. *Historia Constitucional de Venezuela*, Vol II. Caracas, Editorial Alfa, pp. 402-454.

[124] See, in general, Allan R. Brewer-Carías, 2007. El autoritarismo establecido en fraude a la Constitución y a la democracia y su formalización en "Venezuela mediante la reforma constitucional. (De cómo en un país democrático se ha utilizado el sistema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional), *Temas constitucionales. Planteamientos ante una Reforma,* Fundación de Estudios de Derecho Administrativo, Caracas FUNEDA, pp. 13-74; and Allan R. Brewer-Carías, 2009. La demolición del Estado de Derecho en Venezuela Reforma Constitucional y fraude a la Constitución (1999-2009), *El Cronista del Estado Social y Democrático de Derecho*, Nº 6, Madrid, Editorial Iustel, pp. 52-61.

[125] See on the national Constituent Assembly of 1999: Allan R. Brewer-Carías, 2008. Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", *Lateinamerika Analysen*, 19, 1/2008, GIGA, German Institute of Global and Area Studies, Hamburg: Institute of Latin American Studies, pp. 119-142. On August 19, 1999, the National

Court of Justice, which endorsed the creation of a Commission of Judicial Emergency[126] that continued to function, although with another name, in violation of the new Constitution, until 2011.[127] In this regard, in the past fifteen years the country has witnessed a permanent and systematic demolition process of the autonomy and independence of the judicial power, aggravated by the fact that according to the 1999 Constitution, as stated above, the Supreme Tribunal, which is totally controlled by the Executive, is in charge of administering all the Venezuelan judicial system, particularly, by appointing and dismissing judges.[128]

Constituent Assembly decided to declare "the Judicial Power in emergency." *Gaceta Oficial* Nº 36.772 of August 25, 1999 reprinted in *Gaceta Oficial* N° 36.782 of September 8, 1999. See in Allan R. Brewer-Carías, 1999. *Debate Constituyente,* vol. I, Fundación de Derecho Público, Caracas: Editorial Jurídica Venezolana, pp. 57-73; and in *Gaceta Constituyente (Diario de Debates), Agosto–Septiembre de 1999,,* Session of August 18, 1999, Nº 10, pp. 17-22. See the text of the decree in *Gaceta Oficial* Nº 36.782 of September 08, 1999

126 "Resolution" of the Supreme Court of Justice of August 23, 1999. See the comments regarding this Resolution in Allan R. Brewer-Carías, 1999. *Debate Constituyente,* vol. I, Fundación de Derecho Público, Caracas: Editorial Jurídica Venezolana, pp. 141 ff. See also the comments of Lolymar Hernández Camargo, 2000. *La Teoría del Poder Constituyente,* San Cristóbal: Universidad Católica del Táchira, pp. 75 ff..

127 See Allan R. Brewer-Carías, 2002. *Golpe de Estado y proceso constituyente en Venezuela*, México: Universidad Nacional Autónoma de México, p. 160.

128 See Rafael J. Chavero Gazdik, 2011. *La Justicia Revolucionaria. Una década de reestructuración (o involución) Judicial en Venezuela*, Caracas: Editorial Aequitas; Laura Louza Scognamiglio, 2011. *La revolución judicial en Venezuela*, Caracas: FUNEDA; Allan R. Brewer-Carías, 2005. La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004), *XXX Jornadas J.M. Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Barquisimeto: Instituto de Estudios Jurídicos del Estado Lara, pp. 33-174; and Allan R. Brewer-Carías, 2007. La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006), *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Madrid: Marcial Pons, pp. 25-57.

The process was begun by the National Constituent Assembly, after eliminating the Supreme Court itself, and dismissing its Justices, with the appointment, in 1999, of new Justices of the new Supreme Tribunal of Justice, without complying with the constitutional conditions, by means of a Constitutional Transitory regime sanctioned after the Constitution was approved by referendum.[129]. That Supreme Tribunal, completely packed with the government supporters, has been precisely the most ominous instrument during the past fifteen years for consolidating authoritarianism in the country. From there on, the process of intervention of the Judiciary continued up to the point that the President of the Republic has politically controlled the Supreme Tribunal of Justice and, through it, the complete Venezuelan judicial system.

For that purpose, the constitutional conditions set for electing Justice of the Supreme Tribunal and the procedures for their nomination with the participation of representatives of the different sectors of civil society, were violated from the onset. First, as stated above, in 1999, by the National Constituent Assembly itself, after it dismissed the previous Justices and appointed new ones without receiving any nominations from any Nominating Committee, and many of them without meeting the conditions set forth in the Constitution for being a Justice. Second, in 2000, by the newly elected National Assembly, by enacting a Special Law in order to appoint the Justices in a transitory manner without complying with the Constitution.[130] This reform, as the Inter-American Commission on Human Rights emphasized in its *2004 Annual Report*, "lacks the

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[129] See in *Gaceta Constituyente (Diario de Debates), Noviembre 1999-Enero 2000*, Session of December 22, 1999, Nº 51, pp. 2 ff. See *Gaceta Oficial* Nº 36.859 of December 29, 1999; and *Gaceta Oficial* Nº 36.860 of December 30, 1999.

[130] For this reason, in its 2003 *Report on Venezuela,* the Inter-American Commission on Human Rights observed that the appointment of Judges of the Supreme Court of Justice did not apply to the Constitution, so that "the constitutional reforms introduced in the form of the election of these authorities established as guaranties of independence and impartiality were not used in this case. See Inter-American Commission of Human Rights, 2003 *Report on Venezuela*; paragraph 186.

safeguards necessary to prevent other branches of government from undermining the Supreme Tribunal's independence and to keep narrow or temporary majorities from determining its composition."[131] Third, in 2004, again by the National Assembly, by enacting the Organic Law of the Supreme Tribunal of Justice, increasing the number of Justices from 20 to 32, and distorting the constitutional conditions for their appointment and dismissal, allowing the government to assume absolute control of the Supreme Tribunal, and in particular, of its Constitutional Chamber.[132] And fourth, in 2010, once more, the National Assembly reformed the Organic Law of the Supreme Tribunal of Justice, first in a regular way,[133] and subsequently, in an irregular manner,[134] in order to pack the Tribunal with new government controlled members.

After this 2004 reform, the process of selection of new Justices has been subjected to the will of the President of the Republic, as was publicly admitted by the President of the parliamentary Commission in charge of selecting the candidates for Justices of the Supreme Tribunal Court of Justice, who was later appointed Minister of the Interior and Justice. On December 2004, he said the following:

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131 See IACHR, *2004 Annual Report* (Follow-Up Report on Compliance by the State of Venezuela with the Recommendations made by the IACHR in its Report on the Situation of Human Rights in Venezuela [2003]), para. 174. Available at http://www.cidh.oas.org/annualrep/2004eng/chap.5b.htm

132 *Gaceta Oficial* Nº 37.942 of May 20, 2004. See the comments in Allan R. Brewer-Carías, 2004. *Ley Orgánica del Tribunal Supremo de Justicia*, Caracas: Editorial Jurídica Venezolana.

133 *Gaceta Oficial* Nº 39.483 of August 9, 2010 and Nº 39.522 of October 1, 2010 . See the comments in Allan R. Brewer-Carías and Víctor Hernández Mendible, 2010. *Ley Orgánica del Tribunal Supremo de Justicia*, Caracas: Editorial Jurídica Venezolana.

134 See the comments Víctor Hernández Mendible, 2010. Sobre la nueva reimpresión por 'supuestos errores' materiales de la Ley Orgánica del Tribunal Supremo, octubre 2010, *Revista de Derecho Público*, No. 124, Caracas Editorial Jurídica Venezolana, pp-110-123; and Antonio Silva Aranguren, 2010. Tras el rastro del engaño, en la web de la Asamblea Nacional," *Revista de Derecho Público*, No. 124, Caracas: Editorial Jurídica Venezolana, pp-112-113.

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score auto-goals. In the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is no one in the group of nominees that could act against us…"[135]

This configuration of the Supreme Tribunal as highly politicized and subjected to the will of the President of the Republic has been reinforced in 2010,[136] eliminating all autonomy of the Judicial Power and even the basic principle of the separation of power, as the cornerstone of the Rule of Law and the foundation of all democratic institutions.

On the other hand, as mentioned above, according to Article 265 of the 1999 Constitution, the Justices can be dismissed by the vote of a qualified majority of the National Assembly when grave faults are committed, following a prior qualification by the Citizen's Power. This qualified two-thirds majority was established to avoid leaving the existence of the heads of the judiciary in the hands of a simple majority of legislators. Unfortunately, this provision was also distorted by the 2004 Organic Law of the Supreme Tribunal of Justice, which established in an unconstitutional manner that the Justices could be dismissed by simple majority when the "administrative act of their appointment" was revoked (Article 23,4). This distortion, contrary to the independence of the Judiciary, although eliminated in the reform of the Law in 2010, also purported to be constitutionalized with the rejected 2007 Constitutional reform,

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135 See in *El Nacional*, Caracas 12-13-2004. That is why the Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS corresponding to 2004 that "these regulations of the Organic Law of the Supreme Court of Justice would have made possible the manipulation, by the Executive Branch, of the election process of judges that took place during 2004". See Inter-American Commission on Human Rights, 2004 *Report on Venezuela*; paragraph 180.

136 See Hildegard Rondón de Sansó, 2010. *Obiter Dicta*. En torno a una elección, *La Voce d'Italia*, Caracas December 14, 2010.

which proposed that the Justices of the Supreme Tribunal could be dismissed in case of grave faults, but just by the vote of the majority of the members of the National Assembly.

The consequence of this political subjection is that all the principles tending to ensure the independence of judges at any level of the Judiciary have been postponed. In particular, the Constitution establishes that all judges must be selected by public competition for the tenure; and that the dismissal of judges can only be made through disciplinary proceedings carried out by disciplinary judges (Articles 254 and 267). Unfortunately, none of these provisions has been implemented, and to the contrary, since 1999, the Venezuelan Judiciary has been composed by temporary and provisional judges,[137] lacking stability and being subjected to political manipulation, altering the people's right to an adequate administration of justice. In addition, regarding the disciplinary jurisdiction of the judges, it was only in 2010[138] when it was established. Until then, with the authorization of the Supreme Tribunal, a "transitory" Reorganization Commission of the Judicial Power created since 1999, continued to function, removing judges without due process.[139]

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137 The Inter-American Commission on Human Rights said: "The Commission has been informed that only 250 judges have been appointed by opposition concurrence according to the constitutional text. From a total of 1772 positions of judges in Venezuela, the Supreme Court of Justice reports that only 183 are duly appointed holders, 1331 are provisional and 258 are temporary", *Informe sobre la Situación de los Derechos Humanos en Venezuela*; OAS/Ser.L/V/II.118. d.C. 4rev. 2; December 29, 2003; paragraph 11. The same Commission also said that "an aspect linked to the autonomy and independence of the Judicial Power is that of the provisional character of the judges in the judicial system of Venezuela. Today, the information provided by the different sources indicates that more than 80% of Venezuelan judges are "provisional". Idem, Paragraph 161.

138 The Law on the Ethics Code of Venezuelan Judges *Gaceta Oficial* Nº 39.494 of August 24, 2010, created the expected Disciplinary Judicial Jurisdiction. In 2011 the corresponding tribunal was appointed.

139 See Allan R. Brewer-Carías, 2007. La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)", *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Año II, Nº 11, Caracas: Universidad Metropolitana, pp. 122-138.

The worst of this irregular situation is that, since 2006, the problem of the provisional status of judges has been "regularized" through a "Special Program for the Regularization of Tenures", addressed to accidental, temporary or provisional judges, bypassing the entry system constitutionally established by means of public competitive exams (Article 255), by consolidating the effects of the provisional appointments and their consequent power dependency.

V. THE JUDICIARY PACKED BY TEMPORARY AND PROVISIONAL JUDGES AND THE USE OF THE JUDICIARY FOR POLITICAL PERSECUTION

Through the Supreme Tribunal, which is in charge of governing and administering the Judiciary, the political control over all judges has been also ensured, reinforced by means of the survival until 2011, the 1999 "provisional" Commission on the Functioning and Restructuring of the Judicial System, which was legitimized by the same Tribunal, making the 1999 constitutional provisions seeking to guarantee the independence and autonomy of judges entirely inapplicable. [140]

In fact, as referred to above, according to the text of the 1999 Constitution, judges can only enter the judicial career by means of

[140] See in general, Allan R. Brewer-Carías, 2005. La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)," *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Barquisimeto: Instituto de Estudios Jurídicos del Estado Lara, pp. 33-174; Allan R. Brewer-Carías, 2007. El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial, in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, 2007. Caracas: Editorial Jurídica Venezolana, pp. 245-269; and Allan R. Brewer-Carías 2007. La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006),"*Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Madrid: Marcial Pons, pp. 25-57, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios Nº 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, 2008. *Historia Constitucional de Venezuela*, vol II. Caracas: Editorial Alfa, pp. 402-454.

public competition that must be organized with the citizens' participation. Nonetheless, this provision has not yet been implemented, the judiciary being almost exclusively made up of temporary and provisional judges, without any stability. Regarding this situation, for instance, since 2003 the Inter-American Commission on Human Rights has repeatedly expressed concern about the fact that provisional judges are susceptible to political manipulation, which alters the people's right of access to justice, reporting cases of dismissals and substitutions of judges in retaliation for decisions contrary to the government's position.[141] In its *2008 Annual Report*, the Commission again verified the provisional character of the judiciary as an "endemic problem" because the appointment of judges was made without applying constitutional provisions on the matter –thus exposing judges to discretionary dismissal–, which highlights the "permanent state of urgency" in which those appointments have been made. [142]

Contrary to these facts, according to the words of the Constitution in order to guarantee the independence of the Judiciary, judges can be dismissed from their tenure only through disciplinary processes, conducted by disciplinary courts and judges of a Disciplinary Judicial Jurisdiction. Nonetheless, as referred to above, that jurisdiction was only created in 2011, that year's disciplinary judicial functions corresponding to the already mentioned transitory Commission, [143] which, as reported by the same Inter-American Commission in its *2009 Annual Report*, "in addition to being a

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[141] See *Informe sobre la Situación de Derechos Humanos en Venezuela*; OAS/Ser.L/V/II.118. doc.4rev.2; December 29, 2003, Paragraphs 161, 174, available at http://www.cidh.oas.org/coun-tryrep/Venezuela2003eng/toc.htm.

[142] See *Annual Report 20*08 (OEA/Ser.L/V/II.134. Doc. 5 rev. 1. 25 febrero 2009), paragraph 39.

[143] The Politico Administrative Chamber of the Supreme Tribunal has decided that the dismiss of temporary judges is a discretionary power of the Commission on the Functioning and Reorganization of the Judiciary, which adopts its decision without following any administrative procedure rules or due process rules. See Decision Nº 00463-2007 of March 20, 2007; Decision Nº 00673-2008 of April 24, 2008 (cited in Decision Nº 1.939 of December 18, 2008, p. 42). The Chamber has adopted the same position in Decision Nº 2414 of December 20, 2007 and Decision Nº 280 of February 23, 2007.

special, temporary entity, does not afford due guaranties for ensuring the independence of its decisions,[144] since its members may also be appointed or removed at the sole discretion of the Constitutional Chamber of the Supreme Tribunal of Justice, without previously establishing either the grounds or the procedure for such formalities."[145]

The Commission had then "cleansed" the Judiciary of judges not in line with the authoritarian regime, removing judges in a discretionary way when they have issued decisions not within the complacency of the government.[146] This led the Inter-American Commission on Human Rights to observe in its *2009 Annual Report* that "in Venezuela, judges and prosecutors do not enjoy the guaranteed tenure necessary to ensure their independence." [147]

One of the leading cases showing this situation took place in 2003, when a High Administrative Contentious Court ruled against the government in a politically charged case regarding the hiring of Cuban physicians for medical social programs. In response to a provisional judicial measure suspending the hiring procedures due to discrimination allegations made by the Council of Physicians of Caracas,[148] the government, after declaring that the decision was not

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144 See Decisión Nº 1.939 of December 18, 2008 (Caso: *Gustavo Álvarez Arias et al*.)

145 Véase *Annual Report 2009*, Par. 481, en http://www.cidh.org/annualrep/2009eng/Chap. IV.f.eng.htm.

146 Decision N° 1.939 (Dec. 18, 2008) (Case: *Abogados Gustavo Álvarez Arias y otros*), in which the Constitutonal Chamber declared the non-enforceability of the decision of the Inter-American Court of Human Rights of August 5, 2008, Case: *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela* Serie C, N° 182.

147 See *Informe Anual de 2009*, paragraph 480, available at http://www.cidh.oas.org/annual-rep/2009eng/Chap.IV.f.eng.htm

148 See Decision of August 21, 2003, in *Revista de Derecho Público*, nº 93-96, Caracas: Editorial Jurídica Venezolana, pp. 445 ff. See the comments in Claudia Nikken, 2003. El caso "Barrio Adentro": La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos," *Revista de Derecho Público*, nº 93-96, Caracas: Editorial Jurídica Venezolana, pp. 5 ff.

going to be accepted [149] seized the Court using secret police officers, and dismissed its judges after being offended by the President of the Republic.[150] The case was brought before the Inter-American Court of Human Rights and after it ruled in 2008, that the dismissal effectively violated the American Convention on Human Rights,[151] the Constitutional Chamber of the Supreme Tribunal's response to the Inter-American Court ruling, at the request of the government, was that the decision of the Inter-American Court could not be enforced in Venezuela.[152] As simple as that, showing the subordination of the Venezuelan judiciary to the policies, wishes, and dictates of the President.

In December 2009, another astonishing case was the detention of a criminal judge (María Lourdes Afiuni Mora) for having ordered, based on a previous recommendation of the UN Working Group on Arbitrary Detention, the release of an individual in order for him to face criminal trial while in release from custody, as guaranteed in the Constitution. The same day of the decision, the president publicly asked that the judge be incarcerated asking that she be sentenced to a 30–year prison term, the maximum punishment in Venezuelan law for horrendous or grave crimes. The fact is that judge has remained to this day in detention without trial. The UN Working Group described these facts as "a blow by President Hugo Chávez to the independence of judges and lawyers in the country," demanding "the immediate release of the judge," concluding that "retaliation for

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149 The President of the Republic said: "*Váyanse con su decisión no sé para donde, la cumplirán ustedes en su casa si quieren ...*" (You can go with your decision, I don't know where; you will enforce it in your house if you want ...."). See *El Universal,* Caracas, August 25, 2003 and *El Universal*, Caracas, August 28, 2003.

150 See in *El Nacional*, Caracas November 5, 2004, p. A2.

151 *See* Inter-American Court of Human Rights, case: *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela,* Decision of August 5, 2008, available at_www.corteidh.or.cr. *See also*, *El Universal,* Caracas, October 16, 2003; and *El Universal*, Caracas, September 22, 2003.

152 Supreme Tribunal of Justice, Constitutional Chamber, Decision Nº 1.939 of December 18, 2008 (Case: *Abogados Gustavo Álvarez Arias et al.*) (Exp. Nº 08-1572), available at http://www.tsj.gov.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html

exercising their constitutionally guaranteed functions and creating a climate of fear among the judiciary and lawyers' profession, serve no purpose except to undermine the rule of law and obstruct justice."[153]

The fact is that in Venezuela, no judge can adopt any decision that might affect the government's policies, or the President's wishes, the state's interest, or the public servants' will, without previous authorization from the government itself. [154] That is why the Inter-American Commission on Human Rights, after describing in its *2009 Annual Report* "how large numbers of judges have been removed, or their appointments voided, without the required administrative proceedings," noted "with concern that in some cases, judges were removed almost immediately after adopting judicial decisions in cases with a major political impact," concluding that "The lack of judicial independence and autonomy vis-à-vis political power is, in the Commission's opinion, one of the weakest points in Venezuelan democracy." [155]

In this context of political subjection, the Constitutional Chamber, since 2000, far from acting as the guardian of the Constitution, has been the main tool of the authoritarian government for the illegitimate mutation of the Constitution, by means of unconstitutional constitutional interpretations,[156] not only regarding its own powers of judicial review, which have been enlarged, but also

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153 See the text of the UN Working Group in http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/93687E8429BD53A1C125768E00529DB6?OpenDocument&cntxt=B35C3&cookielang=fr . In October 14, 2010, the same Working Group asked the venezuelan Government to subject the Judge to a trail ruled by the due process guaranties and in freedom." See *in El Universal*, October 14, 2010, available at http://www.eluniversal.com/2010/10/14/pol_ava_instancia-de-la-onu_14A4608051 .shtml

154 See Antonio Canova González, 2008. *La realidad del contencioso administrativo venezolano (Un llamado de atención frente a las desoladoras estadísticas de la Sala Político Administrativa en 2007 y primer semestre de 2008)*, Caracas: FUNEDA, p. 14.

155 See in ICHR, *Annual Report 2009*, paragraph 483, available at http://www.cidh.oas.org/-annualrep/2009eng/Chap.IV.f.eng.htm .

156 See Allan R. Brewer-Carías, 2008. *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas: Editorial Jurídica Venezolana.

regarding substantive matters. The Supreme Tribunal has distorted the Constitution through illegitimate and fraudulent "constitutional mutations" in the sense of changing the meaning of its provisions without changing its wording. And all this, of course, without any possibility of being controlled,[157] so the eternal question arising from the uncontrolled power, – *Quis custodiet ipsos custodes* –, in Venezuela also remains unanswered.

On the other hand, regarding some fundamental rights essential for a democracy to function, such as freedom of expression, contrary to the principle of progressiveness established in the Constitution, the Supreme Tribunal of Justice has been the State body in charge of limiting its scope. First, in 2000, it was the Political-Administrative Chamber of the Supreme Tribunal that ordered the media not to transmit certain information, eventually admitting limits to be imposed upon the media, regardless of the general prohibition of censorship established in the Constitution.

The following year, in 2001, it was the Constitutional Chamber of the Supreme Tribunal, the one that distorted the Constitution when dismissing an action for constitutional protection or "*amparo"* filed against the President of the Republic by a citizen and a non-governmental organization, asking to exercise their right of reply against the attacks made by the President in his weekly TV program. The Constitutional Chamber reduced the scope of freedom of information, eliminating the right of reply and rectification regarding opinions in the media when they are expressed by the president in a regular televised program. In addition, the tribunal excluded journalists and all those persons that have a regular radio program or a newspaper column, from the right to rectification or response. [158]

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[157] See Allan R. Brewer-Carías, 2005. *Quis Custodiet ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación, *VIII Congreso Nacional de Derecho Constitucional*, Arequipa: Fondo Editorial and Colegio de Abogados de Arequipa, 463-89; and Allan R. Brewer-Carías, 2007. *Crónica de la "In"Justicia constitucional: La Sala constitucional y el autoritarismo en Venezuela*, Caracas: Editorial Jurídica Venezolana, pp. 11-44 and 47-79.

[158] See Allan R. Brewer-Carías, 2001. La libertad de expresión del pensamiento y el derecho a la información y su violación por la Sala Constitucional del

Furthermore, in 2003, the Constitutional Chamber dismissed an action of unconstitutionality filed against a few articles of the Criminal Code that limit the right to formulate criticism against public officials, considering that such provisions could not be deemed as limiting the freedom of expression, contradicting a well-established doctrine to the contrary decreed by the Inter-American Court on Human Rights. The Constitutional Chamber also decided, in contradiction with the constitutional prohibition of censorship, that through a statute it was possible to prevent the diffusion of information when it could be deemed contrary to other provisions of the Constitution. [159]

Other cases in which the Judiciary has been used for political persecution refer to the exercise of freedom of expression, ended up in the shutdown of TV stations that had a line of political opposition regarding the government, and the legal persecution of their major shareholders. One leading case was that of *Radio Caracas Televisión*, referred to a TV station that, in 2007, was the most important television station of the country, critical of the administration of President Hugo Chavez. In that case, as the Supreme Tribunal in 2007, was the State body that materialized the State intervention in order to terminate the authorizations and licenses of the TV station, whose assets were confiscated and its equipment assigned to establish a state-owned TV enterprise through an illegitimate Supreme Tribunal decision. [160] The case is the most vivid example of

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Tribunal Supremo de Justicia, in Allan R. Brewer-Carías et al., 2001. *La libertad de expresión amenazada (Sentencia 1013),* Caracas/San José: Edición Conjunta Instituto Interamericano de Derechos Humanos y Editorial Jurídica Venezolana, pp. 17-57; and Jesús A. Davila Ortega, 2002. El derecho de la información y la libertad de expresión en Venezuela (Un estudio de la sentencia 1.013/2001 de la Sala Constitucional del Tribunal Supremo de Justicia), *Revista de Derecho Constitucional* 5, Caracas: Editorial Sherwood, pp. 305-25.

159 See *Revista de Derecho Público,* 93–94, 2003. Caracas: Editorial Jurídica Venezolana, 136ff. and 164ff. See comments in Alberto Arteaga Sánchez et al., 2004. *Sentencia 1942 vs. Libertad de expresión*, Caracas.

160 See the Constitutional Chamber Decision N° 957 (May 25, 2007), in *Revista de Derecho Público* 110, Editorial Jurídica Venezolana, Caracas 2007, 117ff. See the comments in Allan R. Brewer-Carías, 2007. El juez constitucional en

the illegitimate collusion or confabulation between a politically controlled Judiciary and an authoritarian government in order to reduce freedom of expression, and to confiscate private property. For this purpose, it was the Constitutional Chamber of the Supreme Tribunal of Justice and the Political Administrative Chamber of the same Tribunal that in May 2007, instead of protecting the citizens' right of freedom of expression, conspired as docile instruments controlled by the Executive, in order to kidnap and violate them. In this case, it was the highest level of the Judiciary that covered the governmental arbitrariness with a judicial veil, executing the shutdown of the TV Station, reducing the freedom of expression in the country, and with total impunity, confiscated private property in a way that neither the Executive nor the Legislator could have done, because it was forbidden in the Constitution (art. 115). In this case, it was the Supreme Tribunal who violated the Constitution, with the aggravating circumstance that the conspirators knew that their actions could not be controlled. This case has also been recently submitted before the Inter-American Court on Human Rights.

Other cases of political persecution, also related to freedom of expression are the cases against Guillermo Zuloaga and Nelson Mezerhane, two very distinguished businessman that were the main shareholders of Globovisión, the other independent TV station that, after the takeover of Radio Caracas Television, had remained with a critic line of opinion against the government. They both were harassed by the Public Prosecutor's Office and by the Judiciary; accused of various common crimes that they did not commit; they were detained without any serious grounds; their enterprises were occupied and their property confiscated. They both had to leave the country, without any possibility of obtaining Justice. Their cases have also been submitted before the Inter-American Commission on Human Rights.

The Judiciary, particularly on criminal matters, has also been used as the government's instrument to pervert Justice, distorting the

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Venezuela como instrumento para aniquilar la libertad de expresión plural y para confiscar la propiedad privada: El caso RCTV, *Revista de Derecho Público*", Nº 110, (abril-junio 2007), Caracas: Editorial Jurídica Venezolana, pp. 7-32.

facts in specific cases of political interest, converting innocent people into criminals, and liberating criminals from all suspicion. It was the unfortunate case of the mass killings committed by government agents and supporters as a consequence of the enforcement of the so-called Plan Avila, a military order that encouraged the shooting of people participating in the biggest mass demonstration in Venezuelan history, which, on April 11, 2002, was asking for the resignation of President Chávez. The shooting provoked a general military disobedience by the high commanders, witnessed by all the country on TV, which ended with the military removal of the President, although just for a few hours, until the same military reinstated him in office. Nonetheless, in order to change history, the shooting and mass killing were re-written, and those responsible seen by everybody on live TV, were gratified as heroes for being government supporters, and the Police Officials who were to preserve order in the demonstration, such as Officers Simonovis and Forero, were blamed of crimes that they did not commit, and sentenced for murder with the highest term of 30 years in prison. The former Chief Justice of the Criminal Chamber of the Supreme Tribunal of Justice, general Eladio Aponte Forego, confessed last year 2012 in a TV Program (SolTV) in Miami, when answering if there were "political persons in prison in Venezuela, saying "Yes, there are people regarding which there is an order not to let them free," referring particularly to "the Police Officers," mentioning Officer Simonovis. The same former Justice, answering a question about "*Who gives the order,"* simply said*: "*The order comes from the President's Office downwards," adding that "we must have no doubts, in Venezuela there are action it is not approved by the President." He finally said, answering a question if he "*received the order not to let free Simonovis*" he explained that: "the position of the Criminal Chamber" was "To validate all that arrived already done; that is, in a few words, to accept that these gentlemen could not be freed." [161]

To hear these answers given by one who until recently was the highest Justice in the Venezuelan Criminal System, simple causes indignation, because it was he, as Chief Criminal Justice, who was in

[161] See the text of the statement on, in *El Universal*, Caracas 18-4-2012, available at: http://www.eluniversal.com/nacional-y-politica/120418/historias-secretas-de-un-juez-en-venezuela

charge of manipulating justice, and the way he confessed to have sentenced the Police Officers to 30 years in prison, just because he was obeying orders from the Executive.

VI. THE USE OF THE JUDICIARY TO FACILITATE THE CONCENTRATION OF POWER AND THE DISMANTLING OF DEMOCRACY

On different matters regarding the organization of the State, the same illegitimate constitutional mutation has occurred regarding the federal system of distribution of competences among territorial entities of the State, which in Venezuela is constitutionally organized as a "decentralized federal State;" a distribution that can only be changed by means of a constitutional reform. Specifically, for instance, the Constitution provides that the conservation, administration, and use of roads and national highways, as well as of national ports and airports of commercial use, are among the exclusive powers of the states, which they must exercise in "coordination" with the Federal government.

One of the purposes of the rejected 2007 constitutional reform was precisely to change this competence of the States. But, in spite of the popular rejection of the reform, nonetheless, the Constitutional Chamber, through a decision adopted four months after the referendum (April 15, 2008), was the State body in charge of implementing the reform. The Chamber, in fact, when deciding an autonomous appeal for the abstract interpretation of the Constitution filed by the Attorney General, modified the content of that constitutional provision, considering that the exclusive attribution it contained, was not "exclusive," but a "concurrent" one, to be exercised jointly with the federal government, which could even reassume the attribution or decree its intervention..[162]

[162] See Allan R. Brewer-Carías, 2008. La Sala Constitucional como poder constituyente: la modificación de la forma federal del estado y del sistema constitucional de división territorial del poder público, *Revista de Derecho Público*, Nº 114, (abril-junio 2008), Caracas: Editorial Jurídica Venezolana, pp. 247-262; and Allan R. Brewer-Carías, 2009. La ilegitima mutación de la Constitución y la legitimidad de la jurisdicción constitucional: la "reforma"

With this interpretation, again, the Chamber illegitimately modified the Constitution and usurped popular sovereignty, compelling the National Assembly to enact legislation contrary to the Constitution, which it did in March 2009, by reforming of the Organic Law for Decentralization. [163]

In other cases, the Constitutional Chamber has been the instrument of the government in order to assume direct control of other branches of government, as happened in 2002, with the take-over of the Electoral Power, which since then has been totally controlled by the Executive. This began in 2002, after the Organic Law of the Electoral Power[164] was enacted and the National Assembly was due to appoint the new members of the National Electoral Council. Because the representatives supporting the government did not have the qualified majority to approve these designations by themselves, and did not reach agreements on the matter with the opposition, when the National Assembly failed to appoint the members of the National Electoral Council, that task was assumed, without any constitutional power, by the Constitutional Chamber itself. Deciding an action that was filed against the unconstitutional legislative omission, the Chamber, instead of urging the Assembly to perform its constitutional duty, directly appointed the members of the Electoral Council, usurping the Legislator's functions, without complying with the conditions established in the Constitution for such appointments. [165] With this decision, the

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de la forma federal del Estado en Venezuela mediante interpretación constitucional," *Memoria del X Congreso Iberoamericano de Derecho Constitucional,* Lima: Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de Investigaciones Jurídicas-UNAM y Maestría en Derecho Constitucional-PUCP, IDEMSA, tomo 1, pp. 29-51

163 See *Gaceta Oficial* N° 39 140 of March 17, 2009

164 See *Gaceta Oficial* Nº 37.573 of November 19, 2002

165 See Decision Nº 2073 of August 4, 2003, Case: *Hermánn Escarrá Malaver y oros*), and Decision Nº 2341 of August 25, 2003, Case: *Hemann Escarrá y otros*. See in Allan R. Brewer-Carías, 2003/2004. El secuestro del poder electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004, *Stvdi Vrbinati,*

Chamber ensured the government's complete control of the Council, kidnapping the citizen's rights to political participation, and allowing the official governmental party to manipulate the electoral results.

Consequently, the elections held in Venezuela during the past decade have been organized by a politically dependent branch of government, without any guaranty of independence or impartiality. This is the only explanation, for instance, for the complete lack of official information on the final voting results of the December 2007 referendum rejecting the constitutional reform drafted and proposed by the President. The country, nowadays, still ignores the majority number of votes that effectively rejected the constitutional reform draft that intended to consolidate in the Constitution the basis for a socialist, centralized, militaristic, and police state, as proposed by President Chávez.

The Constitutional Chamber of the Supreme Tribunal has also been the instrument for attacking the democratic principle, limiting the right to be elected, imposing non-elected officials as Head of State, or revoking the popular mandate of elected officials without having competence or jurisdiction.

Between January and March 2013, the Constitutional Chamber of the Supreme Tribunal, openly violated the democratic principle by imposing a non-elected official as Head of State, during the illness of former President Chávez and after his death, in two decisions adopted, without proving anything. The decisions were issued after deciding appeals for interpretations of the Constitution: The first decision, No. 2 of January 9, 2013, was issued to resolve the legal situation of the failure by the President- elect to attend his Inauguration for the presidential term 2013-2019, Constitutional Chamber refusing to consider that the situation was one of absolute absence of the elected President, and instead constructing, without proving anything on the health condition of the elected and ill President, an alleged "administrative continuity" of Chávez, affirming that even been absent from the country (he was said to be in a Hospital in Havana), he allegedly was effectively in charge of

Rivista tgrimestrale di Scienze Giuridiche, Politiche ed Economiche, Año LXXI – 2003/04 Nuova Serie A – N. 55,3, Urbino: Università degli Studi di Urbino, pp.379-436

the Presidency, so his non-elected Vice President (N. Maduro) was to be in charge of the Presidency. [166] The second decision, No. 141, of March 8, 2013, was issued after the announcement of the death of President Chávez, without proving such fact nor when it actually occurred, in order to ensure that the Vice-President (N. Maduro), already imposed as President in charge by the same Supreme Tribunal, was to continue in charge of the Presidency; and additionally, allowing him, in breach of the Constitution, to be candidate for the same position in the subsequent election, without leaving the post.[167]

In other decisions, also contrary to the democratic principle, the Constitutional Chamber of the Supreme Tribunal revoked the mandate of two duly elected mayors, a decision that according to the Constitution only can be adopted by the people that elected the officials by means of a referendum (art. 74). The Supreme Tribunal, ignoring such principle and provision, without having constitutional competence and usurping the jurisdiction of the criminal courts that are the only ones competent to impose criminal penalties against officials for not obeying judicial decisions, issued decision No. 138 of March 17, 2014,[168] condemning the Mayors by deeming that they had committed a crime (not to obey a preliminary injunction), and imprisoning them, without guaranteeing a due process of law. The common trend in this case was that both Mayors were from the opposition to the government

In another case, the Constitutional Chamber of the Supreme Tribunal also revoked the popular mandate of a representative to the National Assembly, which also could only be revoked by the people through a referendum, issuing decision No. 207 of March 31, 2014,[169]

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166 See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/Enero /02-9113-2013-12-1358.html

167 See the text of the decision in http://www.tsj.gov.ve.decisioes/scon/Marzo/ 141-9313-2013-13-0196.html

168 See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/marzo/ 162025-138-17314-2014-14-0205.HTML

169 See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/marzo/ 162546-207-31314-2014-14-0286.HTML. Also in *Gaceta Oficial* No. 40385 April 2, 2014

in a case that the Tribunal had already closed because the action was declared inadmissible, but Tribunal acted *ex officio*, and interpreted an article of the Constitution (Article 93), that prevents representatives from accepting another public position without losing their elected one. The initial petition that was declared inadmissible was a request for the Tribunal to condemn the *de facto* actions of the President of the National Assembly to strip out the elected condition of one representative; but, once the petition was declared to be inadmissible, the Tribunal, *ex officio,* decided to revoke the popular mandate of the representative that it was supposed to be protect. The reason for such decision was that the representative (María Corina Machado), had spoken before the Permanent Council of the Organization of American States, in a session devoted to analyzing the political situation of Venezuela, acting as alternate representative of Panama, at such country's special invitation to do so.

Finally, in another decision, the Supreme Tribunal, also in violation of the democratic principle, accepted that the right of a citizen to be elected, which is a constitutional right, could be limited by an administrative body such as the Comptroller General's Office, when issuing decisions imposing public officials the penalty of disqualifying them from running for elected offices. In Decision Nº 1265 of August 5, 2008,[170] the Supreme Tribunal refused to declare that such disqualification for the exercise of a political right was contrary to the American Convention on Human Rights, that in Venezuela had constitutional rank (Article 23). The lack of justice in Venezuela, led the interested person, a former Mayor, to file a petition before the Inter-American Court of Human Rights, seeking the protection of his political right, the result being a decision by such Court on September 1st, 2011 (case *López Mendoza vs. Venezuela*), sentencing the Venezuelan State for the violation of the Convention. Nonetheless, the State's response was to file before the Supreme Tribunal of Justice, at the initiative of the Attorney General, an action for "judicial review" of the Inter-American Court decision, which was astonishingly admitted by the Constitutional Chamber, and

[170] See the text of the decision in http://www.tsj.gov.ve:80/decisiones/scon/Agosto /1265-050808-05-1853.htm

thereafter through decision No. 1547 of October 17, 2011,[171] it declared the Inter-American Court of Human Rights' decision as "non enforceable" in Venezuela, recommending the Government to denounce the Convention. This eventually happened in 2012.

SOME CONCLUSIONS

The result of all these events is that at the beginning of the twenty-first century, Latin America has witnessed in Venezuela the birth of a new model of authoritarian government that did not immediately originate in a military coup, as had happened in many other occasions during the long decades of last century, but in a constituent *coup d'état* and as a result of popular elections, which despite their final goal of destroying the rule of law and democracy, have provided to it the convenient camouflage of "constitutional" and "electoral" marks, although, of course, lacking the essential components of democracy, which are much more than the sole popular or circumstantial election of governments.

In particular, among all the essential elements and components of democracy, the one regarding the separation and independence of public powers may be the most fundamental pillar of the rule of law, because it is the only one that can allow the other factors of democracy to become a political reality. To be precise, democracy, as a political system based on the rule of law, can only function in a constitutional system where the control of power exists, for without effective checks and balances, no plural political system can be developed; no effective democratic participation can be ensured; no effective transparency in the exercise of government can be guaranteed; no real government accountability can be secure; and no effective access to justice can be guaranteed in order to protect human rights.

All these factors are lacking now in Venezuela, where a new form of constitutional authoritarianism has been developed, based on the concentration and centralization of state powers, preventing any possibility of effective democratic participation, and any possible checks and balances between the branches of government. Today, all

[171] See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/Octubre/1547-171011-2011-11-1130.htmll

the State organs are subjected to the National Assembly, and through it, to the President. This is why the legislative elections are so important, particularly bearing in mind that, according to the Constitution, the presidential system of government was conceived to function only if the government has complete control over the Assembly. A government that does not have such control will find it difficult to govern, that being the reason, for example, why the then President of the Republic declared, just before the 2010 parliamentary elections, that if the opposition won the control of the Assembly, "that would mean war."

The fact is that, after fifteen years of demolishing the rule of law and the democratic institutions by controlling, at the government's will, all the branches of government, it will be very difficult for the government and its official party to admit the democratic need they have to share power in the Assembly.[172] They are not used to democracy, that is to say, they are not used to any sort of compromise and consensus, but only to imposing their decisions; and that is why, when in 2010 they lost the 2/3 majority that they used to have in the Assembly, they announced that they were not going to participate in any sort of dialogue. That is why, even before the newly elected representatives took their seat in the Assembly in January 2011, the old Assembly approved an unconstitutional legislation in order to enforce what the people had rejected in a referendum of December 2007, the so called "Communal State," which is based on the centralized framework of the so-called "Popular Power" to be exercised by "Communes" and by the government controlled "Communal Councils."[173]

Another example of the perversion of the Constitution and of the will of the people expressed in the September 2010 Legislative elections was the move made regarding the appointment of the new

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172 See Allan R. Brewer-Carías, 2009. *Dismantling Democracy. The Chávez's Authoritarian Experiment*, New York: Cambridge University Press; Allan R. Brewer-Carías, 2014. *Authoritarian Government v. The Rule of Law*, Caracas: Editorial Jurídica Venezolana.

173 See the Organic Laws on the Popular Power, in *Gaceta Oficial* Nº 6.011 Extra. December 21, 2010. See on these Laws, Allan R. Brewer-Carías *et al*., 2011. *Leyes Orgánicas del Poder Popular*, Caracas: Editorial Jurídica Venezolana..

Justices of the Supreme Tribunal. What just weeks before was only a threat by the government, once it lost the 2/3 control of the National Assembly, which prevented the government's representatives from appointing such Justices by their faction in 2011; they immediately proceed to appoint the new justices of the Supreme before the newly elected members of the National Assembly were inaugurated in January 2011, avoiding the participation the opposition members of the Assembly in said nominating process. Nonetheless, in order to make such appointments, which required a previous reform the Organic Law of the Supreme Tribunal, which they had no time to approve, they made the "reform," not through the ordinary procedure, but through a totally irregular mechanism of "reprinting" the text of the statute in the *Official Gazette* based on an alleged "material error" in the copying of the text of the statute.[174]

Article 70 of the Organic Law of the Supreme Tribunal, in fact, established that the term for proposing the candidates to be nominated as Justices of the Supreme Tribunal before the Nominating Judicial Committee "must not be *less* than thirty calendar days;" wording that has been changed through a "notice" published by the Secretary of the Assembly in the Official Gazette stating that instead of the word "*less,*" the correct word to be used is the antonym word "*more*" in the sense that the term "must not be more than thirty calendar days." That means that the "reform" of the statute by changing a word (less to more), transformed a minimum term into a maximum term in order to reduce the term to nominate candidates and allow the current national Assembly to proceed to designate the justices before the newly elected National Assembly began its activities in January 2010.[175] This is the "procedure" currently used in order to reform statutes, by means of the

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174 See *Gaceta Oficial* Nº 39.522 of October 1, 2010

175 See the comments in Víctor Hernández Mendible, 2010. Sobre la nueva reimpresión por "supuestos errores" materiales de la LOTSJ en la *Gaceta Oficial* Nº 39.522, de 1 de octubre de 2010. Addendum to Allan R. Brewer-Carías and Víctor Hernández Mendible*, 2010. Ley Orgánica del Tribunal Supremo de Justicia de 2010, Caracas:* Editorial Jurídica Venezolana; and Antonio Silva Aranguren, 2010. Tras el rastro del engaño, en la web de la Asamblea Nacional, Addendum to Allan R. Brewer-Carías and Víctor Hernández Mendible*,* 2010. *Ley Orgánica del Tribunal Supremo de Justicia de 2010,* Caracas: Editorial Jurídica Venezolana.

reprinting of the text in the *Official Gazette*, without any possible judicial review.

With this legal "reform," the National Assembly, made up by representatives who by December 2010, after the Legislative elections, can be said did not represent the majority of the people, proceeded to fill the Supreme Tribunal of Justices who belonged to the governing political party, and even with members of the same Assembly that were finishing their tenure and that did not meet the constitutional conditions for being justices. As the former justice of the Supreme Court of Justice, Hildegard Rondón de Sansó, wrote:

"The biggest risk for the State regarding the improper actions of the National Assembly in the recent nomination of the justices of the Supreme Tribunal of Justice, lies not only in the lack of a of constitutional conditions of majority of the justices appointed, but in having taken to the apex of the Judicial Power the decisive influence of one sector of the legislative Power, due to the fact that five legislators were elected for various Chambers."[176]

Former Justice Sansó also affirmed that "a whole fundamental sector of the power of the State is going to be in the hands of a small group of persons that are not jurists, but politicians by profession, who will be in charge, among other functions, of the control of normative acts," adding that "the most grave is that those appointing, not even for a single moment realized that they were designating the highest judges of the Venezuelan legal system, who, as such, had to be the most competent and of recognized prestige, as the Constitution imposes."[177] She concluded, as stated above, recognizing within the "grave errors" accompanying the nomination:

"The configuration of the Nominating Judicial Committee, which the Constitution created as a neutral body, representing the 'different sectors of society' (Article 271), but the Organic Law of the Supreme Tribunal unconstitutionally converted it, into an appendix of the Legislative Power. The consequence of this grave error was unavoidable: those electing chose their own colleagues, believing that acting in such way was the most natural thing in this

[176] See Hildegard Rondón de Sansó, 2010. *Obiter Dicta*. En torno a una elección, *La Voce d'Italia*, 14-12-2010.

[177] *Id*.

world, and an example of that were the shameful applauses with which each appointment was greeted."[178]

Unfortunately, the political control over the Supreme Tribunal of Justice has permeated to all the judiciary, mainly due to the aforementioned fact that in Venezuela, the Supreme Tribunal is the body in charge of the government and administration of the Judiciary. This has seriously affected the autonomy and independence of judges at all levels of the Judiciary, aggravated by the fact that during the past fifteen years, the Venezuelan Judiciary has been made up primarily by temporary and provisional judges, without a long-standing career or stability, appointed without the public competition process of selection established in the Constitution, and dismissed without due process of law, for political reasons.[179] This reality amounts to political control of the Judiciary, as demonstrated by the dismissal of judges who have adopted decisions contrary to the policies of the governing political authorities.

New York, April 2014

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178 *Id.*

179 See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, doc. 4 rev. 2, December 29, 2003, par. 174, *available at* http://www.cidh.oas.org/countryrep/ Venezuela 2003eng/toc.htm.

Chapter IV

THE DECEMBER 2014 COUP D'ÉTAT: THE UNCONSTITUTIONAL INDIRECT ELECTION OF SENIOR PUBLIC OFFICIALS OF THE BRANCHES OF GOVERNMENT (2015)*

A coup d'état occurs, as noted by Diego Valadés, when "the Constitution is ignored by a constitutionally elected body," adding as an example that "a president elected under the Constitution cannot invoke a vote, even if it is with an overwhelming majority, to later ignore the constitutional order. Doing so would mean that a coup has taken place"[180].

And this is precisely what happened in Venezuela in December 2014, when the President of the National Assembly and a group of

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180 See Diego Valadés, *Constitución y democracia,* Universidad Nacional Autónoma de México, México 2000, p. 35; and Diego Valadés, "La Constitución y el Poder," in Diego Valadés y Miguel Carbonell (Coordinadores), *Constitucionalismo Iberoamericano del siglo XXI*, Cámara de Diputados, Universidad Nacional Autónoma de México, México 2000, p.145

members of the Assembly, who in some cases had been elected by means of a conspiracy with the Justices of the Constitutional Chamber of the Supreme Court, ignored the Constitution and proceeded to elect, violating its provisions, the senior officials of the Branches of government who are not directly elected by the people, that is, those of the Citizen and the Electoral Branches of the government, and the Supreme Court itself, as head of the Judicial Branch.

With this, they have done nothing more than to follow the same unconstitutional line of systematic and continuous coup d'état that has occurred in Venezuela since President Hugo Chávez, when taking office for the first time on February 2 1999, convened a National Constituent Assembly, not foreseen in the Constitution then in force. [181]

What occurred in December 2014, to the same effect, is nothing more than a coup d'état, executed, in this case, by the State authorities themselves, by electing, without legal power to do so and violating the Constitution, a set of senior civil servants. This happened, first with the election of the members of the Citizen's Branch of government (Comptroller General, Attorney General and People's Defender or Ombudsman), by the National Assembly, with the vote of a simple majority of deputies, when the Constitution requires a vote of more than 2/3 of its members; second, with the election of the members of the Electoral Branch of government by the Constitutional Chamber of the Supreme Court, which is not the body required by the Constitution, which provides that it is the National Assembly with a vote of more than 2/3 of its members; and third, with the appointment of Justices of the Supreme Court by the National Assembly, with a vote of a simple majority of deputies, when a vote of more than 2/3 of its members is constitutionally required; and all this, without any citizens' participation and in some cases, by means of a fraudulent citizens' participation.

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[181] See Allan R, Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela,* Universidad Nacional Autónoma de México, México 2002.

I. THE FIVE BRANCHES OF GOVERNMENT AND THE POPULAR ELECTION (DIRECT AND INDIRECT) OF ALL THE SENIOR OFFICIALS OF THE BODIES OF THE BRANCHES OF GOVERNMENT

1. The popular election of senior government officials

One of the most important innovations of the 1999 Venezuelan Constitution undoubtedly was the establishment of a division of public powers into five branches of government, in this regard it being the only constitution in the world in which, in addition to three classic government branches (Legislative, Executive and Judiciary) two additional branches were established, the Citizen's Branch consisting of the Comptroller General, the Attorney General and the People's Defender or Ombudsman, and the Electoral Branch.

All five powers are regulated in the Constitution on an equal basis, with autonomy and independence from each other. To guarantee their independence, a specific form of election of its members was established, consisting in all cases of popular election, directly in some cases, and indirectly in others, that is, through direct or indirect elections; all in order to ensure that no power is dependent on another, and that there may be checks and balances among them.

This democratic structure for choosing the members of the Public Branches derives from the principle established in Article 6 of the Constitution, which states that the government of Venezuela "is and will always be democratic, participatory and elective," requiring precisely that senior officials of all bodies of government be elected by the people in a democratic and participatory manner.

The difference in the popular election is nevertheless in the way it is done, in the sense that in some cases, the popular election is done directly by the people through universal and secret vote, as is the case of the election of the President of the Republic (Art 228.) and the deputies the National Assembly (Art. 186). In other cases, the popular election is indirect, held in the name of the people by their elected representatives, that is, the deputies to the National Assembly, as in the case of the Justices of the Supreme Tribunal, (Arts. 264, 265), the Comptroller General, the Attorney General and

the People's Defender or Ombudsman (Art.279), and members of the National Electoral Council (Art. 296).

This means that in both cases, according to the constitutional provisions, all members of the bodies of Public Branches of government must be elected by the people, either directly or indirectly. Therefore, according to the provisions of the Constitution, anyone who is not elected directly by the people cannot exercise the office of President of the Republic nor be a Member of the National Assembly; and anyone who is not elected indirectly by the people through a qualified majority (2/3) of deputies to the National Assembly, cannot hold a senior position in the Citizen, Electoral and Judicial branches of government.

In the second case of indirect popular election, therefore, only the National Assembly, acting as an electoral body, may appoint the members of the Citizen, Electoral and Judicial Branches, and this exclusively by a qualified majority of 2/3 of the deputies in their capacity as representatives of the people.

2. The representative and participatory democratic logic in the elections

All these constitutional provisions that regulate the popular election of the high public officials of all the branches of government, and guarantee the autonomy and independence of the same, respond to a representative and participatory democratic logic that derives from the aforementioned declaration of Article 6 of the Constitution imposing as a rock-solid principle that "the government is and will always be democratic, participatory, and elective."

With regard to the elective or representative democratic logic, in order to ensure the election, through universal, direct and secret suffrage, of the President of the Republic and the deputies to the National Assembly, and for the purposes of guaranteeing a greater democratic representation in the indirect popular election of justices of the Supreme Court, the Comptroller General, the Attorney General, the People's Defender and members of the National Electoral Council, the Constitution provides that this can only be done with a qualified majority vote of 2/3 of the deputies of the National Assembly. This qualified majority is set explicitly regarding

the election of Comptroller General, the Attorney General and the People's Defender (Art.279), and members of the National Electoral Council (Article 296.); and implicitly, regarding the election of justices of the Supreme Court, and by requiring such qualified vote for their removal (Art. 264, 265).

With this, the Constituent, in lieu of providing for the direct popular election of such senior officials, established the indirect popular election, but ensuring a qualified democratic representation through a qualified vote of the electoral body (2/3).

The consequence of this is that the electoral technique differs depending on whether it is a direct or indirect election. In the case of a direct election by the people, each person votes for the candidate of their choice; but in indirect elections, the second degree electors, in this case consisting of deputies to the National Assembly, must reach an agreement among them in order to carry out the election of the public official whenever a political group does not control the qualified majority of the deputies ,. That is the democratic logic of the electoral process in these cases, even if a political group has a majority of the deputies. In such cases, it must give up hegemonic pretensions and necessarily reach agreements, commitments or consensus with the various political forces represented in the Assembly, so that it can ensure the qualified majority of votes. In a democracy, there is no other way to conduct an indirect election in an electoral body such as an Assembly, and in no case the political force that has the majority, but does not control the qualified majority vote, may seek to impose its will individually, as this would be undemocratic.

What is important to note, in any case, is that in these cases of indirect elections of senior officials of the State by the deputies of the National Assembly, such elected body does not act constitutionally as a regular general or legislative body, but rather as an electoral body, to the point that the responsibilities assigned to it as such are not even included among the general powers of the National Assembly specified in Article 187 of the Constitution. This implies that in exercising the powers as an electoral body, the National Assembly, pursuant to the Constitution, is not and cannot be subject to the simple majority system that applies and governs its general operation as a legislative body, instead being subjected only to the

qualified vote system regulated by Articles 264, 265, 279 and 296 of the Constitution.

Meanwhile, in terms of the participatory democratic logic in cases of indirect popular election, it also implies that, in order to ensure greater democratic participation, the indirect popular election of the Justices of the Supreme Court, of the Comptroller General, of the Attorney General, of the People's Defender, and of the members of the National Electoral Council, cannot be carried out by the mere will of the deputies of the National Assembly, even with the required qualified majority. It must only be done through a process that ensures that before the election is made by such majority, the citizen's participation is assured through various sorts of Nominating Committees: the Judicial Nominations Committee (Articles 264, 270) [182], the Citizen's Branch Nomination and Evaluation Committee (Article 279)[183] and the Electoral Nominations Committee (Article 295) [184], which must be formed exclusively with representatives of various sectors of society; that is, with people from the civil society, which means that in their structure there is no place for public officials. Therefore, the deputies of the National Assembly cannot be part of those committees, and their inclusion therein is unconstitutional. [185]

The logic of representative and participatory democracy in the indirect elections of the members of some Branches of Government in the Constitution[186] is such that, for example, in terms of the

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[182] According to Article 270, The Judicial Nominating Committee "will be made up by representatives from Civil Society."

[183] According to Article 279, Nominations Evaluating Committee of the Citizens Branch, "will be made up by representatives from diverse sectors of society."

[184] According to Article 295, the Electoral Nominating Comittee "will be made up by representatives from diverse sectors of society."

[185] See comments about this in Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas", in *Revista Iberoamericana de Derecho Público y Administrativo*, Año 5, Nº 5-2005, San José, Costa Rica 2005, pp. 76-95

[186] To this it can be added, as indicated by Maria Amparo Grau, the reference to the importance of the functions of these Branches of government, which

election of the members of the bodies of Citizen's Branch of government, Article 279 provides that if the National Assembly fails to elect the respective members to the Citizen's Branch from the list of candidates for each office submitted by the Nominations Evaluation Committee of that Branch, within a term not exceeding thirty calendar days, by the favorable vote of two thirds of its members, then "the Electoral Branch shall submit the shortlist to popular consultation," that is, a consultative referendum.

None of this, however was complied with in December 2014, and the members of the bodies of the Citizen's Branch, i.e. the Comptroller General, the Attorney General and the People's Defender; the members of the National Electoral Council and the Justices of the Supreme Court, were unconstitutionally elected in some cases by a simple majority of the deputies of the National Assembly or, in others, by the Constitutional Chamber of the Supreme Court, in both cases violating the Constitution, in what was a coup d'état. In order to enforce this, the President of the National Assembly and a group of deputies, in one case conspired with the Attorney General, other members of the Moral Republican Council and the justices of the Constitutional Chamber of the Supreme Court, committing a fraud against the Constitution; and in another cases, unlawfully mutating its text.

II. THE UNCONSTITUTIONAL ELECTION OF THE MEMBERS OF THE CITIZEN'S BRANCH AND THE ILLEGITIMATE MUTATION OF ARTICLE 297 OF THE CONSTITUTION

In fact, on December 22, 2014 the National Assembly, by simple majority, acting as a general legislative body, ignoring the status of

require the greatest consensus in their selection. These bodies have attributions of control over the legal and ethical conduct of public officials, controlling the legal and ethical use of money and State property; the protection of human rights, the adequate functioning of the course of justice and the investigation and criminal prosecution. "Its political dependence must be avoided, thereby the necessary consensus to guarantee that this power becomes a containment wall against arbitrariness, corruption and crime." See in Maria Amparo Grau, "**Golpe a la Constitución ¡de nuevo!," in** *El Nacional*, Caracas, 24 de diciembre 2014.

electoral body it had under the Constitution, appointed the Citizen's Branch, i.e. the Comptroller General, the Attorney General, and the People's Defender in clear breach of Article 279 of the Constitution, and against all representative and participatory democratic logic required by Article 6, which is developed in this case in Article 279.

In fact, that provision of Article 279 states that:

> *"Article 279*: The Republican Moral Council shall convene a Citizen's Power Nominations Evaluation Committee, which shall be made up of a group of representatives from various sectors of society, and shall conduct public proceedings resulting in the provision of a shortlist for each body of the Citizen's Branch to be submitted to the consideration of the National Assembly, which, within 30 calendar days shall elect, by a two-thirds vote of its members, the respective member of the Citizen Branch body under consideration in each case. If the National Assembly has not reached an agreement by the end of this period, the Electoral Branch shall submit the shortlist to a public consultative referendum.
>
> If the Citizen's Branch Nominations Evaluation Committee has not been convened, the National Assembly shall proceed, within such time limit as may be determined by law, to designate the member(s) of the pertinent body of the Citizen's Branch.
>
> Members of the Citizen Branch shall be subject to removal by the National Assembly, following a decision by the Supreme Tribunal of Justice, in accordance with the procedure established by law."

For any reader who is slightly informed regarding the election of the members of the Citizen's Branch, the rule essentially says what it expresses in its own text, not needing any interpretation, in the sense that the election of these senior officials is carried out by the National Assembly *"through the favorable vote of two-thirds of its members,"* which is in line with the representative and participatory constitutional logic of the configuration of the National Assembly as an electoral body for an indirect election. This implies, *first*, that in order to guarantee maximum representativeness of the indirect election to office, representing the people, the National Assembly must appoint the members the Citizen's Branch by the affirmative

vote of two-thirds of its members; and *second*, that to guarantee maximum citizen's participation in the election, the National Assembly, for that purpose, cannot merely appoint whoever their deputies choose and decide with a qualified vote of the majority of the deputies of the National Assembly, but only from among the candidates set in a shortlist submitted by the Citizen's Branch Nominations Evaluation Committee, which shall be made up by representatives from various sectors of society.

The only exception to this representative and participatory democratic logic that the Constitution imposes on the National Assembly when acting as an indirect electoral body, does not refer to the representative democratic principle itself, but only to the participatory democratic principle, providing that, if it has not been possible to convene the Citizen's Branch Nominations Evaluation Committee, and therefore, even in the absence of the popular participation mechanism that regulates the Constitution, the National Assembly should proceed as such electoral body, "to appoint the member of the respective body of the Citizen's Branch," only as indicated by the favorable vote of two-thirds of its members, since that representative democratic logic is not subject to any exception.

Therefore, you need not even be curious about laws to read and understand what the rule says.

However, in an evident fraud to the Constitution[187], and mutating its contents, all carried out as part of a conspiracy to violate it and

[187] This has not been uncommon in the conduct of public authorities in the last three decades. See for example, as indicated in Allan R. Brewer-Carías: *Reforma constitucional y fraude a la constitución (1999-2009*), Academia de Ciencias Políticas y Sociales, Caracas 2009; "Reforma Constitucional y fraude a la Constitución: el caso de Venezuela 1999-2009," in Pedro Rubén Torres Estrada y Michael Núñez Torres (Coordinators), *La reforma constitucional. Sus implicaciones jurídicas y políticas en el contexto comparado*, Cátedra Estado de Derecho, Editorial Porrúa, México 2010, pp. 421-533; "La demolición del Estado de Derecho en Venezuela Reforma Constitucional y fraude a la Constitución (1999-2009)," in *El Cronista del Estado Social y Democrático de Derecho*, No. 6, Editorial Iustel, Madrid 2009, pp. 52-61; "El autoritarismo establecido en fraude a la Constitución y a la democracia, y su formalización en Venezuela mediante la reforma constitucional. De cómo en un país democrático se ha utilizado el sistema

change it with institutional violence, in which the President of the National Assembly and a group of deputies, the President of the Republican Moral Council and its other members and the justices of the Constitutional Chamber of the Supreme Court participated, on December 22, 2014, the National Assembly proceeded to appoint the Comptroller General, the Attorney General and the People's Defender without submitting to the rule of the qualified majority with which it could only act as an electoral body, doing so with the vote of a simple majority of the deputies, as if it were acting as a general legislative body, violating the representative democratic principle of popular indirect election of such senior official established by the Constitution.[188]

This constitutional fraud, as mentioned by José Ignacio Hernández, "was committed in six acts"[189], which, in essence, were the following:

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eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional), in the book: *Temas constitucionales. Planteamientos ante una Reforma*, Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74.

188 As observed by Sergio Sáez, as soon as the decision of the National Assembly was adopted: "There remains in the air the bitter taste of complicity among the powers. Some for not meeting their obligations, as evidenced by having had the Comptroller´s Office acephalous for such a long time; other, facing the proximity of the expiration of the term of the remaining members of the Republican Moral Council, and having raised the impossibility of carry out the process under the Constitution to safeguard the election of its members; another, when finding the intricacies of the law to get rid of the responsibility of having to choose members in strict compliance with the Law; and the last one, when exercising its discretionary power, again to mutate the Constitution, instead of interpreting it, in observance of the legitimate canon of Constitutional Law." See Sergio Sáez, "Bochorno y desgracia en la Asamblea Nacional," 23 diciembre de 2014, at http://www.academia.edu/9879823/Venezuela_Bochorno_y_desgracia_en_la_Asamblea._de_Ing._Sergio_Saez and http://www.frentepatriotico.com/inicio/2014/12/24/bochorno-y-desgracia-en-la-asamblea-nacional/

189 See José Ignacio Hernández, "La designación del Poder Ciudadano: fraude a la Constitución en 6 actos;" in *Prodavinci,* 22 de diciembre, 2014, at

First Act: The Republican Moral Council, consisting of the heads of its three bodies of the Citizen's Branch (Comptroller General, Attorney General and Ombudsman), in September 2014, presided over by the Attorney General and according to Article 279 of the Constitution, adopted some *rules for convening and forming the Citizen's Power Nominations Evaluation Committee*, which should be made up by "representatives of various sectors of society", and whose members should have been designated by the Republican Moral Council. To this end, its members declared themselves in permanent session.[190]

Second Act: In late November 2014, the Chair of the Moral Republican Council (Attorney General) publicly reported that no "consensus" had been reached to appoint the members of the Evaluation Committee, without any kind of explanation. Of course, nobody can believe that these senior government officials could not agree to appoint members of that committee, especially when the members of such bodies were all supporters of the government and their party.

Third Act: The National Assembly, without competence to do so, on December 2, 2014, appointed the members of the aforementioned Evaluation Committee. However, notwithstanding that no State body other than the Republican Moral Council had constitutional jurisdiction to appoint such members of the Nominations Committee. The National Assembly, when designating the Committee, violated Article 279 of the Constitution, in spite of the fact that the Assembly recognized that the Republican Moral Council had breached its constitutional obligation to appoint them.

Fourth Act: The President of the National Assembly, on Friday, December 19, 2014, publicly stated that the Assembly would proceed to appoint the members of the bodies of popular power, and proceeded to ask the Constitutional Chamber of the Supreme Court for a "constitutional interpretation" of Article 279 of the Constitution,

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http://prodavinci.com/blogs/la-designacion-del-poder-ciudadano-fraude-a-la-constitucion-en-6-actos-por-jose-i-hernandez/ .

190 See the note: "Consejo Moral activa conformación del Comité que evaluará postulaciones de aspirantes al Poder Ciudadano,"at http://www.cmr.gob.ve/index.php/noticia/84-cmr-aspirante

in order to support the possibility of the election of the members of the bodies of the popular power in the Assembly by the vote of only a simple majority, ignoring its status as an electoral body in such cases, which may only be decided with a qualified 2/3 majority of its members. Meanwhile, the President of the National Assembly to convened a session of the Assembly on Saturday, December 20, 2014. However, as he probably had found out that the Constitutional Court could not have the decision, he had requested to be ready by the next day, he strategically deferred the session scheduled for December 20 for Monday December 22, 2014, so the Constitutional Court would have time to issue the decision during the weekend.

Fifth Act: The Constitutional Chamber then, very diligently and through a joint presentation, drafted the requested decision on Saturday, 20 and Sunday 21, of December 2014, and published it on Monday, December 22, 2014, just before the session of the National Assembly was convened to elect the members of the Citizen's Branch. The Constitutional Chamber in that sentence concluded, in essence, obviously in an unconstitutional manner, that as the second paragraph of Article 279 of the Constitution supposedly did not specify the majority required to appoint the representatives of Citizen's Branch – which, of course, was not necessary because it was already indicated in the first paragraph of the rule - then it should be understood that such appointment could be made with "half plus one of the deputies present at the pertinent parliamentary session," ignoring the indirect electoral body nature of the National Assembly to conduct an election on behalf of the people in such cases.

Sixth Act: The National Assembly appointed the members of the bodies of Citizen's Branch of government, by ratifying the Attorney General, the same who -as President of the Ethics Council- had supposedly failed to reach a consensus to appoint the members of the Nominations Evaluation Committee of Citizen's Branch and had conspired with the other aforementioned officials to unconstitutionally change the Constitution with institutional violence. Her illegitimate appointment was a repeat, as she also had been appointed illegally in 2007.[191] The National Assembly also

[191] See the comment in Allan R. Brewer-Carías, "Sobre el nombramiento irregular por la Asamblea Nacional de los titulares de los órganos del poder

appointed as Comptroller General of the Republic, to control the executive branch, someone who was then the acting General Prosecutor of the Republic, that is, the State's lawyer subject to the instructions of the Executive, which is an incompatible appointment. Moreover, a known militant of the ruling party and former Governor of a State of the Republic was appointed as People's Defender or Ombudsman. [192]

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ciudadano en 2007", in Revista *de Derecho Público***,** No. 113, Editorial Jurídica Venezolana, Caracas 2008, pp. 85-88.

[192] See the Decision of the National Assembly in *Gaceta Oficial* No. **40.567 of December 22 2014.** What occurred in the National Assembly to justify the unconstitutional decision to elect with a simple majority of deputies present, the members of the Citizen Branch, was summed up by journalist Alex Velazquez, as follows: "The 'Chavismo' played their cards. In yesterday's four-hour long special meeting, the ruling block of the National Assembly was assured of the Citizen's Branch control, contrary to what the Constitution states, but with the approval of TSJ (Supreme Tribunal of Justice) [...]. How did they do it? With an awkward explanation, Deputy Pedro Carreno said that the 110 votes mandated by Article 279 of the Constitution are only necessary if the selection is done after the Moral Council has installed the Nominations Committee of the Citizen's Branch. But since that did not happen, the Constitution states that it is up to the Assembly to make the appointments and it "does not mention how many votes are needed" in that case. As it is up to the Assembly, said the deputy, the Rules of Procedure and Debate indicating that the decisions of the Assembly shall be by a majority plus one-half of those present is applied "except where the Constitution or this regulation specify it." If there was any doubt, Parliament President Diosdado Cabello surprised everyone with an announcement: on December 19, he went to the Supreme Tribunal to "urgently" ask the Constitutional Chamber to clarify how many votes were needed. "As I am not a lawyer, and so they do not say that I am dumb, I went to the Supreme Court to explain the selection process of the Citizen's Branch" he said. The answer was published yesterday on the website of the Supreme Tribunal. It reaffirmed Carreño's thesis exactly: that as the opinion rests with the Assembly and the Moral Council did not finalize its process, decisions "are made by an absolute majority, except where the Constitution or the Rules so specify it". Deputy Stalin González (UNT) explained that there are not two separate procedures and that, in both cases, two-thirds of the deputies are needed. He wondered whether the committee was never installed precisely to "commit fraud against the Constitution.". See Alex Vásquez, "Imponen al Poder Ciudadano al margen de la Constitución,"

As was clearly sensed by José Ignacio Hernandez in his analysis of the case, the first act of the conspiracy was conducted by the Attorney General of the Republic, as Chair of the Moral Republican Council, allegedly failing to reach an "agreement" or "consensus" with the other members of the Citizen Branch, to appoint members of the Nominations Evaluation Committee. With that, she allowed the possibility of a constitutional fraud in the appointment of the members of the Citizen's Branch by the National Assembly without the required qualified majority demanded by its condition as an electoral body, resorting in an isolated form to the second paragraph of Article 279 of the Constitution, and thereby proceeding to their election by the simple majority of deputies present. The third act of the conspiracy was led by the President of the National Assembly by postponing the session scheduled for the appointments and requesting the Constitutional Chamber's constitutional interpretation of the rule. The fifth act of conspiracy, was performed this time by the justices of the Constitutional Court, ruling as requested, ignoring the status of the National Assembly in these cases as an electoral body, and making possible a constitutional fraud, allowing the election of the members of the Citizen's Branch by simple majority of the deputies, as if it were another act by the ordinary legislative body.

José Ignacio Hernández concluded in this regard by correctly saying that:

> "With these appointments, the fraud against the Constitution was materialized: a 2/3 majority became a 'simple' or 'absolute majority.' The appointment of representatives of the Citizen's Branch by a simple or absolute majority of the members of the Assembly may be technically qualified as 'fraud against the Constitution' because the violation of the Constitution results in a series of events that are apparently valid, but are rooted on a clear violation of Article 279 of the Constitution, according to which the appointment of representatives of the Citizen's Branch should be done by the majority vote of 2/3 of the members of the

in *El Nacional*, December 22, 2014, at http://www.el-nacional.com/politica/Imponen-Poder-Ciudadano-margen-Constitucion_0_542345921.html The

National Assembly. In fact, Article 279 of the Constitution was modified to endorse the appointment of representatives of the Citizen's Branch by 'simple' or 'absolute' majority." [193]

The architect of this constitutional fraud eventually became the Constitutional Chamber of the Supreme Tribunal, with its ruling No. 1864 of December 22, 2014,[194] in response to the request made by "Major General[195] Diosdado Cabello Rondón in his capacity as President of the National Assembly" about the interpretation of the content and scope of Article 279 of the Constitution, incorrectly and falsely claiming that:

"The Constitution clearly establishes two procedures for the appointment and each one with its methodology. First, when the Assembly receives the shortlist from the Nomination Committee of the Citizen Branch, three conditions are established: a) the period for the appointment (30 days), b) a vote by (2/3) two-thirds of the deputies c) if there is no agreement, the electoral branch submits the shortlist to popular consultation. For the

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193 See José Ignacio Hernández, "La designación del Poder Ciudadano: fraude a la Constitución en 6 actos;" in *Prodavinci,* December 22, 2014, at http://prodavinci.com/blogs/la-designacion-del-poder-ciudadano-fraude-a-la-constitucion-en-6-actos-por-jose-i-hernandez/

194 The decision was published initially on December 22 2014 in http://www.tsj.gob.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML. A few days later it was placed at: http://historico.tsj.gov.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML

195 It appeared this way on the website of the Supreme Court when I personally consulted it the same day December 22 2014 (at http://www.tsj.gob.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML). Later the text of the decision was modified on this website, eliminating the military rank of this person and of course, without letting the reader how to know what other parts of the text of the sentence may have been illegally modified. See in http://historico.tsj.gov.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML See about this, as indicated in the Note: "Constitutional Court forged sentence which authorized the naming of authorities with a simple majority", at https://cloud-1416351791-cache.cdn-cachefront.net/sala-constitucional-forjo-sentencia-que-autoriza-nombrar-autoridades-con-mayoria-simple/#.VJ2Y5U9KGAE.twitter

second procedure, when the Citizen's Branch fails to agree on the Nominations Evaluation Committee of Citizen's Branch, the Constituent imposed the direct responsibility of such designation on the National Assembly, with no other requirement than the *30-day limit. In that sense, it is assumed that as the qualified vote is not expressly established, the appointment procedure is by absolute majority, according to the provisions of Article 89 of the Internal Rules for Debates of the National Assembly."*

The premise from which the aforementioned "Major General" formulated the plea for interpretation is false, as the constitutional provision whose "interpretation" was sought provides only a single method that, acting as an electoral body and with a mechanism for citizen participation, the Assembly elects the members of the said public authorities by a vote of 2/3 of its members, the second part of the article being an exception referred exclusively to the mechanism for citizen participation, that does not affect the voting system. Therefore, in reality, the rule does not generate any "doubt", and the allegation of the President of the Assembly is completely false when stating, first, that "only two-thirds are required when the Evaluation Committee of the Citizen's Branch is convened", and second that if it has not been possible to convene the Evaluation Committee, then the election of the members with the absolute or simple majority may proceed.

With these false premises, and as was argued, the interpretation of Article 279 was "urgently" requested to the Constitutional Chamber of the Supreme Court, as last and highest interpreter of our Constitution,

And indeed, the Constitutional Court, without further reasoning, and without referring to the alleged "reasonable doubt as to the content, scope and applicability of the constitutional provisions regarding the factual situation" in which the military plaintiff was acting also as President of the National Assembly, very diligently and submissively, during a weekend, did what it was asked (ordered?). To do this, the Constitutional Chamber considered that the issue was just a matter of law, eliminating the right of the deputies who had a different opinion on the requested "interpretation" and on their performance in the electoral body, to be heard and to submit allegations, in breach of Article 49 of the Constitution. Subsequently,

the Chamber, proceeded to decide without any formalities, disregarding the values and axiological principles on which Venezuelan constitutional government rests as a democratic state, which requires that members of the Citizen's Branch to be appointed by indirect popular election of the National Assembly, by a vote of 2/3 of the deputies, as provided by the Constitution.

On the contrary, what the Chamber decided was that the electoral body nature of the National Assembly acting with a qualified majority would only exist when the Republican Moral Council "has convened a Nominations Evaluation Citizen's Branch Committee," so presumably, if it is not convened, the Assembly is no longer an electoral body and becomes a general legislative body, being able to elect these high officials by simple majority vote, in accordance with the Internal Rules of Procedure of the National Assembly (Art. 89), considering that the "absolute majority is the one consisting of the affirmative manifestation of half plus one of the deputies present." [196] In other words, not even half plus one of the elected deputies that make up the Assembly, but only of those present at the meeting, which, of course, is contrary to the "axiological values and principles on which the Constitutional State is based," in this case, the

[196] As reported in the newspaper *El Carabobeño* about what was said by Pablo Aure: "The Government uses the Supreme Court to violate the Constitution and to stay in power, said Pablo Aure, Coordinator of the "*Valencia se Respeta* Movement". He cited the collusion of the National Assembly with the Constitutional Chamber of the Supreme Court to 'with gross ploy' interpret Article 279 of the Constitution which provides that, to elect the Citizen Branch, the approval by two thirds of the members of the National Assembly is required. However, the Constitutional Chamber fraudulently interpreted that this percentage is only required in the case that the candidates to conform the Citizen Branch are proposed by the Nomination and Evaluation Committee of Citizen Branch. But since it did not start there, a simple majority was enough, Aure said. That is outrageous, because it is illogical to think that the Constitution is less demanding in naming these officers, in the case that they had previously been shortlisted by the Nomination and Evaluation Committee, since qualifying for such appointments, does not come from the way they are shortlisted but the importance of the positions in the Citizen Branch, explained the university authority." See in Alfredo Fermín, "Aure: El Gobierno utiliza al TSJ para violar la Constitución," in *El Carabobeño,* Valencia, 24 de diciembre de 2014.

democratic principles that derive from the second-degree electoral body nature assigned by the rule to the National Assembly.

As highlighted by María Amparo Grau, the Constitutional Chamber "is not allowed to deliver a judgment that is contrary to the text of the Constitution, which is crystal clear, although the ruling party trusted that the solution of the issue would come from the wise decision of the Tribunal."[197] But, instead of being a wise decision, the interpretation given by the Chamber is so absurd, that from an indirect popular election attributed to an electoral body such as the National Assembly ensuring maximum democratic representation with the vote of 2/3 of the elected deputies, it allowed the election of the senior officials by a simple majority (half plus one) of the members present at that session, which becomes a total distortion of the democratic sense of the regulated second-degree election. Contrary to the decision of the Chamber, since there is no specification in the second paragraph of Article 279 of the Constitution regarding a specific system of majority to use for the election of the members of the Republican Moral Council by the National Assembly, it should be understood that this does not change the system of qualified majority provided for in the rule, having no constitutional foothold to state that the absolute majority of the ordinary operations of the Assembly is to be applied.

Therefore, the decision of the Constitutional Chamber caused a total illegitimate constitutional mutation, because keeping the same text of Article 279 of the Constitution, the Supreme Tribunal has changed its purpose and meaning, distorting the electoral body nature of the National Assembly, which can only act with 2/3 of the vote of the elected deputies, allowing instead that a simple majority of the members present at a meeting the members of the Citizen's Branch be elected; all this to materialize the conspiracy to change the Constitution with institutional violence, carried out by the Attorney General and the other members of the Republican Moral Council, and the President and some members of the National Assembly.

On this, José Román Duque Corredor rightly observed that:

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[197] See in María Amparo Grau, "**Golpe a la Constitución ¡de nuevo!," in *El Nacional***, Caracas, December 24, 2014.

> "The above interpretation is accommodating and forced because, as the ruling party was not being able to obtain the required two-thirds vote within the constitutionally established term, the appointments had to be submitted to a popular consultative referendum. With this decision, popular sovereignty was replaced by a simple majority. Being it that the appointment of the members of the Citizen Branch was under discussion in the National Assembly, in relevant debates, and since the Republican Moral Council had sent the respective shortlists, surreptitiously it informed that it had not complied with the appointment of the Nominations Committee due to lack of agreement between them, so they could then appoint the Citizen's Branch through the National Assembly and not by popular will. In any case, supposing that it could be done by the National Assembly, the intangible principle for the appointment of the Citizen's Branch, as is clear from Article 279 of the Constitution, requires a vote a qualified two-thirds majority and not a simple majority. With this decision, constitutional norms relating to the legitimacy of the members of the Citizen's Branch and respect for popular sovereignty were violated by the erroneous interpretation made by Constitutional Chamber.[198]

Now, regarding the elected officials in a way that is contrary to the letter and spirit of the Constitution, as highlighted by María Amparo Grau, their illegitimacy is of origin, "regardless of their performance, they will be officials by fact but not bylaw," but with the added difficulty that in this case the doctrine regarding "de facto officials" ("*funcionario de hecho*") would not apply, since in this case:

> "There is no good faith in the conduct of an Assembly which flagrantly violates the selection procedure of these authorities in order to impose candidates of their choice without going through the necessary parliamentary agreement with representatives of other political groups and without submitting to the popular will,

[198] See letter from Román Duque Corredor about the appointment of the Ombudsman to the Preident of the Ltin American Institute of the Ombudsman, December 27, 2014, at http://cronicasvenezuela.com/2014/12/27/carta-de-romn-duque-corredor-por-designacin-del-defensor-del-pueblo/

which is the one who ultimately had to decide, in the absence of agreement by those who should have occupied the leading positions of the bodies of the Branch that comprise the Republican Moral Council. A few days after the official celebration of the 15th anniversary of the Constitution, it is shamelessly violated again, but this time bypassing even the power conferred by it to the sovereign itself. The tenures so designated are corrupted by an illegitimacy of origin that makes them de facto officials. We are in a regime characterized by hyper-rulings and discourse, but in which the value of the law, including the Constitution, does not exist." [199]

III. THE UNCONSTITUTIONAL ELECTION OF MEMBERS OF THE NATIONAL ELECTORAL COUNCIL BY THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF JUSTICE.

The same day, December 22, 2014, the parliamentary group of the ruling party, failing to elect on their own, without agreement with the other political groups, the members of the Electoral Branch of government, specifically the National Electoral Council, by lacking the qualified 2/3 votes of the deputies, the President of the National Assembly, Mr. Diosdado Cabello, publicly announced "that the Supreme Court of Justice will be responsible for appointing the principal and alternate members of the National Electoral Council (CNE) because the two thirds needed for the appointment had not been achieved".[200] In other news concerning the decision of the National Assembly, it was reported that:

"The appointment of new members of the National Electoral Council (CNE) was sent by the National Assembly to the Supreme Tribunal of Justice (TSJ) for failing to achieve the majority vote required by the Constitution of the Bolivarian Republic of Venezuela, it therefore corresponding to the

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199 See in María Amparo Grau, "**Golpe a la Constitución ¡de nuevo!,"** in ***El Nacional***, Caracas, December 24, 2014.

200 See "TSJ decidirá cargos de rectores del CNE", Noticias "Globovisión, Caracas, December 22, 2014, in http://globovision.com/tsj-decidira-cargos-de-rectores-del-cne/

Constitutional Chamber of the Supreme Tribunal to appoint the members of the Electoral Branch.**" [201]**

It was also reported in the press that: "Cabello read and signed the communication that was sent" immediately to the highest "institution of justice in the country."**[202]**

This decision of the President of the National Assembly, of course, was essentially unconstitutional, because, as an electoral body conceived to conduct an indirect election, it cannot delegate its constitutional functions to anybody of the State, much less to the Supreme Court of Justice.

Moreover, it is false that when the required majority of votes of deputies for the election of members of the National Electoral Council is not achieved "it corresponds" to the Supreme Tribunal to make such a choice. On the contrary, the Supreme Tribunal lacks competence to make such an election; and much less, competence when there is an allegation that the National Assembly "could not achieve the majority required by the Constitution."

The Constitutional Chamber of the Supreme Tribunal, in fact, cannot, under any circumstances, substitute the National Assembly as an electoral body for an indirect election, and elect these officials, as indeed it did, incurring usurpation of authority that, according to Article 138 of the Constitution "is ineffective and its acts are null".

1. The unconstitutional precedent of 2003 on the occasion of judicial review of a legislative omission

It is very likely that the President of the National Assembly, when making his decision, remembered the unconstitutional actions of the Constitutional Chamber of the Supreme Tribunal in 2003, when it elected the members of the National Electoral Council, exercising Judicial Review of the legislative omission to do so. The

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201 See "Designación de rectores y suplentes del CNE pasa al TSJ," in *Informe21.com*, Caracas, December 22, 2014, in http://informe21.com/cne/designacion-de-rectores-y-suplentes-del-cne-pasa-al-tsj

202 See "TSJ decidirá cargos de rectores del CNE", Caracas Noticias "Globovisión, December 22, 2014 in http://globovision.com/tsj-decidira-cargos-de-rectores-del-cne/

decision was issued at the request of a citizen, the Chamber exercising its competence under Article 336.7 of the Constitution, which provides that the Chamber has the power:

> "To declare the unconstitutionality of municipal, state or national legislative branch omissions when these fails to issue rules or measures essential for ensuring compliance with this Constitution, or issuing them incompletely; and if necessary, set the term, and the guidelines for their correction."

Regarding the competence of the Constitutional Chamber to control the constitutionality of the legislative omission, in terms of this provision, the Chamber cannot replace the legislator and issue the respective law or measure, obviating the deliberative function of popular representation. However, the Constitutional Chamber has forced its role in the matter and although it has acknowledged that because of the complexity of the matter, the Constitutional Court could hardly make up for the omission of the legislator as a whole, noting that "it is constitutionally impossible even for this Chamber, despite its broad constitutional authority, to become a legislator and provide to the community the laws it demands", it has nonetheless considered that it is authorized to provide solutions to specific issues, including the adoption of general rules that temporarily take the place of the absent rules, but not to completely correct the inactivity of the legislator and to make rules as required.[203]

In these cases, the Constitutional Chamber has decided popular actions brought before it to control the legislative omission by the National Assembly to indirectly elect the senior public officials that it should under the Constitution. And that is what happened in 2003, regarding the election of members of the National Electoral Council due to the omission of the Assembly, but with the peculiarity that the Constitutional Chamber not only declared unconstitutional this legislative omission, but also replaced the Assembly in the exercise of such attribution as an indirect electoral body.[204]

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[203] See sentence Nº 1043 de 31–5–2004 (Caso: Consejo Legislativo del Estado Zulia), in *Revista de Derecho Público*, Nº 97–98, Editorial Jurídica Venezolana, Caracas 2004, p. 408.

[204] See Allan R. Brewer-Carías, *La Justicia Constitucional. Procesos y procedimientos constitucionales*, México, 2007, pp. 392 ss.

In fact, in 2003, the Constitutional Chamber through decision No. 2073 of August 4, 2003 (*Case: Hermann Escarra Malaver and others*) [205] delivered a ruling deciding on the omission of the legislature, and provisionally appointed members of such Council. It began, however, by recognizing the reality of the political functioning of the political representative bodies, discarding any unconstitutional situation in the difficulty to make the indirect election, saying:

> "The parliamentary system, in many instances, requires decisions by qualified majorities and not by absolute or simple majority; and when this happens (which may even occur in the case of a simple majority), if the members of the Assembly do not reach the necessary agreement to attain the required majority and the election cannot be made, strictly speaking on matters of principles, it cannot be considered as a legislative omission, since it is the nature of these bodies and their voting procedures, that there may be disagreement among members of national, state or municipal legislative bodies, and the number of necessary votes may not be reached, and those who do not agree cannot be forced to reach an agreement that would go against the conscience of voters. From this point of view, a constitutional omission that involves the responsibility of the bodies referred to in Article 336.7 of the Constitution cannot be deemed to exist."

However, if the lack of a parliamentary agreement was considered by the Constitutional Chamber to be a normal circumstance in representative parliamentary action, in this case, the Chamber considered that the failure to elect the members of the National Electoral Council, even if not illegitimate, could lead it to exercise jurisdiction under Article 336.7 of the Constitution and

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[205] See in http://historico.tsj.gov.ve/decisiones/scon/agosto/2073-040803-03-1254%20Y%201308.HTM. See the comments in Allan R. Brewer-Carías, "El control de la constitucionalidad de la omisión legislativa y la sustitución del Legislador por el Juez Constitucional: el caso del nombramiento de los titulares del Poder Electoral en Venezuela," in *Revista Iberoamericana de Derecho Procesal Constitucional*, No. 10 Julio-Diciembre 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 271-286

declare that the omission was unconstitutional, setting a deadline to correct it and the guidelines for such correction. And that's what happened; so the Constitutional Chamber in its decision only ordered the National Assembly to comply with its obligation within a period of 10 days, adding that if it failed to do it within that period, the Chamber would then proceed to correct it, in the best possible way according to the situation arising from the concrete omission, which in this case was none other than to proceed to hold the elections "within a period of ten (10) calendar days." In its decision, the Chamber in any event made the following reasoning and set the following criteria, establishing the form in which it would operate, which was, ultimately, to kidnap the Electoral Power:[206]

First, that failing to hold the elections, the appointment that the Chamber could make would only be temporary, so they would cease when the competent body, the National Assembly, assumed its competences and held the elections.

Second, the Chamber considered that to make the provisional appointments, it should "adapt to the conditions that the law required for the official", but clarified, however, that "due to the temporary nature and the need for the body to function," the Chamber was not required to "observe, step by step, all the legal formalities required by law from the competent electorate, since the important thing was to fill the institutional void until it formalized a final decision", disassociating the Chamber from the legal requirements that the normal electorate would have meet in order to make the appointments.

Third, the Constitutional Chamber confirmed the existence of an "institutional void," considering that "the failure to designate the members within the legal term constitutes a gap to be filled by this Chamber if the National Assembly does fulfill it", since the Constitutional Chamber itself, in previous decision No. 2816 of

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[206] See, in general, about these decisions, Allan R. Brewer-Carías, La Sala Constitucional vs. El Estado democrático de derecho *(El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política).*Ediciones El Nacional, Caracas 2004.

November 18, 2002 (Case: *Consejo Nacional Electoral*)[207], had materially paralyzed, of course, unconstitutionally, the operation of the initial National Electoral Council that had been appointed by the Constituent Assembly in 1999.

The Constitutional Chamber, after the 10 days it had given the National Assembly to fulfill its obligation, the ruling party having failed to obtain the majority of 2/3 of the members of the Assembly to impose their views and elect the members of the National Electoral Council, then proceeded, in this case, to substitute the National Assembly and decide in accordance with what the ruling party had wanted, which was achieved through decision No. 2341 of August 25, 2003 (case: *Hermann Escarra M. and others*)[208], in which it proceeded to elect the members of the National Electoral Council and their alternates "in accordance with Article 13 of the Organic Law of the Electoral Power," without doubt, usurping a competence that is unique to the National Assembly as electoral body, [209] and therefore "overstepping its duties and unwarranted and unlawfully limiting the

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[207] See in http://historico.tsj.gov.ve/decisiones/scon/noviembre/2816-181102-02-1662.HTM

[208] See in http://historico.tsj.gov.ve/decisiones/scon/agosto/PODER%20ELECTORAL.HTM See the comments in Allan R. Brewer-Carías, "El control de la constitucionalidad de la omisión legislativa y la sustitución del Legislador por el Juez Constitucional: el caso del nombramiento de los titulares del Poder Electoral en Venezuela," in *Revista Iberoamericana de Derecho Procesal Constitucional*, No. 10 Julio-Diciembre 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 271-286.

[209] See Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000–2004", in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero–abril 2005 pp. 11–73; and "La autonomía e independencia del Poder Electoral y de la Jurisdicción Electoral en Venezuela, y su secuestro y sometimiento por la Jurisdicción Constitucional." Paper presented to the *III Congreso Iberoamericano de Derecho Electoral*, Facultad de Estudios Superiores de Aragón de la Universidad Nacional Autónoma de México, Estado de México, 27-29 Septiembre de 2012.

own autonomy of the National Electoral Council as the governing body of that public branch."[210]

However, this was certainly a precedent, although unconstitutional, of election of the members of the Electoral Council by the Constitutional Court, usurping the powers of the National Assembly as indirect electoral body, but that was not even alluded to in the request of the President of the National Assembly, or in the sentencing of the Constitutional Chamber on December 2014.[211]

2. The new usurpation of the functions of the National Assembly, as an electoral body, by the Constitutional Chamber of the Supreme Court

On December 22, 2014, the President of the National Assembly, on his own, because no decision on the matter was adopted by the National Assembly as a collegiate body, mistakenly considering that since the Assembly had failed to obtain the 2/3 qualified majority to elect the members of the National Electoral Council, decided that supposedly automatically, it was up to the Constitutional Chamber to make the election. For such purpose, that same day, December 22, 2014, he addressed the Chamber requesting it to proceed with this usurpation of authority, which the Constitutional Chamber executed, very diligently, by decision No. 1865 of December 26, 2014.[212]

The content of the request of the President of the Assembly was summarized in the Tribunal's decision, which stated that he merely

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210 Véase Allan R. Brewer-Carías, *La Justicia Constitucional. Procesos y procedimientos constitucionales*, México, 2007, p. 392

211 It was only ex post facto, through public statements that the President of the Supreme Court on December 29, 2014, she "remembered" that "the Chamber" had acted in the same way in 2003 and 2005, when it also recorded cases of "legislative omission" See "Gladys Gutierrez: in: "En elección de rectores del CNE se siguió estrictamente el procedimiento,: Caracas December 29, 2014, at http://www.lapatilla.com/site/2014/12/29/gladys-gutierrez-en-eleccion-de-rectores-del-cne-se-siguio-estrictamente-el-procedimiento/

212 I initially consulted the sentence in http://www.tsj.gob.ve/decisiones/scon /diciembre/173497-1865-261214-2014-14-1343.HTML Later it is only available in http://historico.tsj.gov.ve/decisiones/scon/diciembre/173497-1865-261214-2014-14-1343.HTML .

noted that the Assembly "failed to reach the majority of two-thirds of its members required by the Constitution in its Article 296, for the appointment of the Principals and Alternates of the National Electoral Council nominated by the Civil Society", which is why it decided to forward to "this information to the highest court, for its consideration and corresponding purpose, as established in the Constitution of the Bolivarian Republic of Venezuela, in its Article 336, subsection 7." Based on these vague assertions, it was the Constitutional Chamber that "inferred" that this was a request for a declaration of omission, for which purpose it construed its own competence for the cases of filing of an action for unconstitutionality by omission, according to the interpretation of Article 336.7 of the Constitution made in its decision No. 1556 of July 9, 2002.

Nonetheless, that provision, as shown by its own text, only authorizes the Constitutional Chamber to declare that the National Assembly has incurred unconstitutionality, for example, when it has not issued a decision or a law required under the Constitution, or a necessary measure to ensure compliance with the Constitution, ordering the Assembly to dictate a norm or measure, and eventually establish guidelines for the correction; but the Constitutional Chamber can never replace the will of the Assembly, or dictate by itself neither a law nor the measure of latter's specific competence.

However, the Chamber, in this case, when analyzing the standing of the President of the Assembly to make such request, given the popular nature of the action against the omission, falsely expressed that the said official, exercising "the representation of the parliamentary body and in that role declaring the impossibility for the deliberative body to appoint the Governing members of the National Electoral Council," had requested the Chamber "*to fill the alluded omission,*" which was not true. This was not specified by the abovementioned official in his request, as the same Constitutional Chamber summarized it. One thing is controlling the unconstitutionality of the omission, which is what is stated in Article 336.7 of the Constitution, to which without argument the "plaintiff" referred, and another thing is to ask the Chamber "to take the place" of the Assembly, that is, to make the election in substitution of the electoral body, something that was not requested and could not be done because it is unconstitutional. But that was what the

Constitutional Chamber ultimately did in a "process" that, at its own discretion, it considered being just a matter of law, deciding "without opening any proceedings," to deny other interested persons, such as the Members of the National Assembly themselves, who did not agree with the petition, the right to be heard; all, in violation of the right to due process established in Article 49 of the Constitution.

In addition, as observed by José Ignacio Hernández,

> "...in this case, it was precisely the President of the National Assembly who incurred the omission, it being the institution controlled by the action of omission.
>
> By doing this, a paradoxical situation occurred: The National Assembly sued itself. In fact, it was the President of the Assembly who sued for the legislative omission, which according to the lawsuit, the Assembly would have incurred with that omission. A kind of "self-lawsuit," so incoherent, that it reveals the unconstitutionality of the commented judicial decision."[213]

In deciding the case, the Constitutional Chamber, besides narrating commonplaces about the separation of public power into five branches of government, and indicating that all five, including the Electoral Branch, should have had members elected under the terms established in the Constitution, referred to the information given to the Chamber by the President of the National Assembly himself, which it also considered as a "notorious communicational fact," in the sense that they had failed "to obtain the respective majority of the members of that body that is responsible for the appointment of the members of the National Electoral Council," with which the Chamber evidenced "the occurrence of an omission by the national parliamentary body," in addition to finding that the procedures provided for in Article 296 of the Constitution and in Article 30 of the Organic Law of the Electoral Power were exhausted, all of which, in the opinion of the Constitutional Chamber, had been recognized by the President of the National Assembly.

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[213] See José Ignacio Hernández, "La inconstitucional designación de los rectores del CNE," in *Prodavinci*, Caracas December 27, 2014, at http://prodavinci.com/blogs/la-inscostitucional-designacion-de-los-rectores-del-cne-por-jose-ignacio-hernandez/

The Constitutional Chamber specified that "the omission of the appointment is an objective fact that is confirmed by the request made by the President of the National Assembly, arising from the fact that a qualified majority consisting of the favorable vote by two-thirds of its members does not exist in the parliamentary body," as required by Article 296 of the Constitution, from which the Constitutional Chamber then inferred that there was "an omission by the National Assembly to appoint the members of the National Electoral Council in accordance with the nominations made by the civil society."

It only took this simple and unfounded reasoning for the Constitutional Chamber "in response to the mandate established in Articles 296, 335 and 336, paragraph 7, of the Constitution," to resolve not to demand that Assembly perform its functions, setting, for example, a deadline for compliance, as occurred in the judicial precedent of 2003, but to directly elect the following members of the National Electoral Council: "as first principal member, Tibisay Lucena, and her alternates Abdón Rodolfo Hernandez and Ali Ernesto Padrón Paredes; as second principal member, Sandra Oblitas, and her alternates Carlos Enrique Quintero and Pablo Cuevas Jose Duran; as third principal member, Luis Emilio Rondon, and his alternates Octavio Marcos Méndez and Andrés Eloy Brito." Thereafter, the Chamber convened the designated principal and alternate members for their swearing in ceremony, which took place in the Supreme Tribunal on Monday, December 29, 2014.

Moreover, the election of these members to the National Electoral Council by the Constitutional Chamber was made in a definitive way for the relevant constitutional term, abandoning the idea of the "provisional nature" of the designation that had prevailed in the aforementioned judicial precedent of 2003.

All of this, of course, was unconstitutional, because in the National Assembly in December 2014, in fact, there was no unconstitutional omission in the election, to the point that the President of the Assembly himself did not even use the word "omission" in his request. It is false, therefore, the statement made by the Constitutional Chamber in the sense that that "omission designation" has been an "objective fact that is confirmed by the request made by the President of the National Assembly," because he

said nothing in this regard.[214] The only thing that he expressed was that the required qualified 2/3 majority was not reached, so the election of members of the National Electoral Council could not be materialized; and this in itself is not unconstitutional. About this, however the Constitutional Chamber falsely concluded that said qualified majority did not exist ("does not exist in the parliamentary body"), therefore deducting an alleged "existence of the omission by the National Assembly."

In a deliberative body such as the National Assembly, not reaching parliamentary agreements through discussion and consensus on certain occasions does not mean that there is an "omission" and, much less, unconstitutionality. This is what democracy is about, agreements and consensus when a single political force does not control the majority required to decide. In such cases, it must agree with the other political forces. As expressed by the Constitutional Chamber itself in 2003 in the aforementioned judgment No. 2073 of August 4, 2003 (Case: *Hermann Escarra Malaver and others*),[215] when "the members of the Assembly fail to reach the necessary agreement to attain a majority vote, the election cannot be carried out without it, in purity of principle, it being considered a legislative omission, since it is the nature of these bodies and their voting procedures that there may be disagreement among members of legislative bodies, and that the number of votes needed cannot be achieved, it not being possible to force those who dissent to agree in a way that would go against their conscience." In these

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[214] Because of this, José Ignacio Hernández rightly indicated that "a nonexistent omission was declared." See José Ignacio Hernández, "La inconstitucional designación de los rectores del CNE," in *Prodavinci*, Caracas December 27, 2004 at http://prodavinci.com/blogs/la-inscostitucional-designacion-de-los-rectores-del-cne-por-jose-ignacio-hernandez/,

[215] See in http://historico.tsj.gov.ve/decisiones/scon/agosto/2073-040803-03-1254%20Y%201308.HTM. See the comments in Allan R. Brewer-Carías, "El control de la constitucionalidad de la omisión legislativa y la sustitución del Legislador por el Juez Constitucional: el caso del nombramiento de los titulares del Poder Electoral en Venezuela," in *Revista Iberoamericana de Derecho Procesal Constitucional,* No. 10 Julio-Diciembre 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 271-286.

cases, therefore, there is no unconstitutionality at all, but the need for some political forces to reach an agreement, compromising and ceding among them, which is normal in democracy.

As noted by José Román Duque Corredor, the Constitutional Chamber:

> "considered as an unconstitutional omission the lack of political agreement among the members of the National Assembly to reach a majority of 2/3 of the votes necessary to designate the members of the National Electoral Council, when it is not a matter of failing to pass a law or some juridical measure essential for complying with the Constitution, but the lack of consensus in parliamentary discussions to reach political decisions required for the democratic legitimacy of origin of a Branch of government. Political disagreement is not really an inactivity of the National Assembly; which, on the contrary, is what the Constitutional Chamber purports to show."[216]

Therefore, when the Constitutional Chamber decided, *ex officio*, that because a qualified majority was not reached in the National Assembly as the ruling party wanted, since that becomes an "unconstitutional omission," what has been decided is that the parliamentary democracy is unconstitutional in itself, being "constitutional" the situation where one political party imposes its own will without having to reach agreements with the other political groups or parties represented in the Assembly. With this decision, the Constitutional Chamber has legitimized authoritarianism, considering it "constitutional" when the ruling party adopts and imposes decisions without any opposition, and conversely, "unconstitutional", when representative parliamentary democracy comes into play and when in any parliamentary session the ruling party cannot impose its will because it cannot obtain the qualified 2/3

[216] See Román José Duque Corredor, "El logaritmo inconstitucional: 7 Magistrados de la Sala Constitucional son iguales a 2/3 partes de la representación popular de la Asamblea Nacional,: Caracas December 29, 2014, at http://www.frentepatriotico.com/inicio/2014/12/29/logaritmo-inconstitucional/

majority vote of its deputies, having to reach agreement or consensus with other groups.[217]

And amid this absurdity, it is even more absurd that in a very undemocratic manner the Constitutional Chamber not only usurped the electoral body nature of the National Assembly in these cases to elect indirectly the members of a Branch of Government with a qualified majority vote of 2/3 of its members, but considered "constitutional" that its seven judges, who are not elected by direct vote, assuming the condition of electoral body of the Assembly, replaces the will of 2/3 of its members, and appoints the members of the National Electoral Council, without complying with the constitutional requirements.

This entire absurd situation was summed up by José Román Duque Corredor when analyzing what he called the "unconstitutional logarithm," expressing as follows:

> "The Un-Constitutional Chamber or rather the permissive Chamber of the Supreme Tribunal, crookedly manipulates Articles 336.7 and 296 of the Constitution in order to appoint as members of the National Electoral Council, instead of the 2/3 majority of the members of the National Assembly, those

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[217] As highlighted by José Ignacio Hernández "The existence of qualified majorities to appoint certain civil servants as is the case of the two-thirds of the members of the Assembly needed to designate the National Electoral Council, has a clear purpose: to force the consensus between the different political parties, preventing the party that has a simple (or absolute) majority from dictating all decisions. This is so, because if a single political party in the Assembly makes all decisions without having to compromise with other parties, this would be what Alexis de Tocqueville called the "tyranny of the majority". [...] So, it is why the 1999 Constitution does not allow the Constitutional Chamber to assume the appointment of the members of the National Electoral Council, for that designation could only be made by the will of two-thirds of the deputies of the Assembly. That is, a single will is not enough -it shouldn't be enough - to make that designation. The Constitutional Court assumed this in a unilateral way, a designation that should be plural under the Constitution. It additionally did it ignoring those two thirds of the Assembly, which is a distinct entity from who chairs the Assembly,- because not even a previous trial followed," in *Prodavinci*, Caracas December 27, 2014, at http://prodavinci.com/blogs/la-inscostitucional-designacion-de-los-rectores-del-cne-por-jose-ignacio-hernandez/

nominated by the PSUV [ruling party] who did not obtain the consent of the qualified majority. To do this, the Chamber declared unconstitutional that in the parliamentary sessions the deputies had not obtained the majority of 2/3 and deemed that its seven justices, in a new logarithm, were competent to replace that qualified majority. That is, exponentially, seven justices are equivalent to 110 deputies. With this formula, it appointed the members of the National Electoral Council that 99 members of the ruling party could not designate. The basis of this unconstitutional logarithm is the distortion of constitutional provisions that makes such designation to have the democratic legitimacy of a second-degree election [indirect election], which requires consensus or a large majority of the popular representation that voted to elect the National Assembly. What the Constitution intended with this 2/3 majority, was to ensure the authenticity of the popular base of the designation. In other words, the requirement of a qualified majority vote is one way that popular sovereignty indirectly intervenes in shaping the electoral authority, which belongs to the people according to the terms of Article 5 of the Constitution. [...]

Based, therefore, on its crooked interpretation, the Constitutional Chamber, again in its function as the permissive Chamber of the government, and as executor of orders from the barracks, through an unconstitutional logarithm, replaced 2/3 of popular representation in the National Assembly that is, 110 of its members, for its seven justices, which again contributes to the loss of validity and deinstitutionalization of the democratic rule of law in Venezuela."[218]

[218] See Román José Duque Corredor, "El logaritmo inconstitucional: 7 Magistrados de la Sala Constitucional son iguales a 2/3 partes de la representación popular de la Asamblea Nacional,: Caracas, December 29, 2014, at http://www.frentepatriotico.com/inicio/2014/12/29/logaritmo-inconstitucional/

IV. THE UNCONSTITUTIONAL ELECTION OF THE SUPREME TRIBUNAL OF JUSTICE BY THE NATIONAL ASSEMBLY

The last step of the conspiracy for consolidating the total stockpiling and control of the Branches of government by the ruling party, occurred on December 28, 2014, with the election by the National Assembly of 12 justices the Supreme Tribunal of Justice

As established in Articles 264 and 265 of the Constitution, as we have pointed out, the Constitution also provides for the indirect popular election of the judges of the Supreme Tribunal by the National Assembly as an electoral body, and although it is not mentioned, as in the other cases, that the election must be made by a vote of the 2/3 majority of the deputies, it is provided however that their removal can only take place with a 2/3 majority vote thereof, it should be understood within the democratic constitutional logic of the Constitution that the election must also be made by such qualified majority.

This was established as a principle in Article 38 of the Organic Law of the Supreme Court, but with an unfortunate and inconsistent subsidiary provision regulating the election of Judges of the Supreme Tribunal by the National Assembly for a single term of 12 years, according to the following procedure:

> "When the second pre-selection filed by the Citizen's Branch is received, in accordance with Article 264 of the Constitution and this Law, in a plenary session that must be convened by notice made at least three working days in advance, the National Assembly will make the final selection by the affirmative vote of two thirds (2/3) of its members. If the vote of the required qualified majority is not attained, a second plenary meeting will be convened, in accordance with this article, and if the affirmative vote of two thirds (2/3) is not obtained, it will convene a third session, and if it does receive the favorable vote of two thirds (2/3) of the members of the National Assembly, a fourth plenary session will be convened, in which the appointment will be made by the affirmative vote of a simple majority of the members of the National Assembly."

According to the provision of the last part of this Article 38 of the Law, in short, if a qualified majority for the election of the justices cannot be achieved, the deputies members of the Assembly could elect them with a simple majority, which we have deemed "is completely inconsistent" with the majority vote required for their removal under Article 265 of the Constitution.[219]

But, precisely, based on such legal inconsistency, on December 27, 2014, it was reported in the press that the President of the National Assembly, considering that at the meeting that day "there was not a qualified two-thirds majority vote of 110 deputies for the appointment of judges to the Supreme Court, [...]convened a fourth extraordinary session for Sunday, December 28th at 10:00 am" simply announcing that "We will designate them with the favorable vote of a simple majority (99 deputies)."[220]

And, in fact, that was what happened in the session of the National Assembly of December 28, 2014, in which, with a simple majority vote,[221] the ruling party deputies appointed twelve justices to the Supreme Court,[222] without having effectively guaranteed the participation of the various sectors of society in the Judicial Nominations Committee, which, in the Organic Law of the Supreme Tribunal, was configured as an "expanded" parliamentary committee controlled by the National Assembly, in violation of the provisions for citizen's participation established in the Constitution.

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219 See Allan R. Brewer-Carías y Víctor Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia 2010*, Editorial Jurídica Venezolana, Caracas 2010, p. 34p.

220 See in: "AN convoca a cuarta sesión para designar a magistrados del TSJ," in Globovisión.com, Caracas December 27, 2014, at http://globovision.com/an-convoca-a-cuarta-sesion-para-designar-a-magistrados-del-tsj-2/

221 See in: "AN designa a los magistrados del TSJ," en Globovisión.com, December 28, 2014, at http://globovision.com/an-designa-a-los-magistrados-del-tsj/

222 See the National Assembly Resolution with the apointments in ***Gaceta Oficial*** No.40.570, 29 de diciembre de 2014, y N 6.165 Extra., 28 de diciembre de 2014.

V. THE REINSTATEMENT OF THE CONSTITUTION AND THE RIGHT OF RESISTANCE AGAINST UNLAWFUL AUTHORITIES

This way, in just one week and as a result of a conspiracy to change the Constitution with institutional violence, the Chair of the Republican Moral Council and other bodies of the Citizen's Branch of government, the President of the National Assembly and the group of ruling party deputies, and the justices of the Constitutional Chamber of the Supreme Tribunal, executed a coup d'état that unlawfully and unconstitutionally mutated the Constitution to elect the heads of the bodies of Citizen's Branch, the Electoral Branch and the Supreme Tribunal Justice, through a bodies that lack competence to do so: first, regarding the Officers of the Citizen's and Judicial Branches, by the National Assembly acting as an ordinary legislature, and second, in the case of the Electoral Branch of government, by the Constitutional Chamber of the Supreme Court of Justice, when in both cases, this pertains to the National Assembly, acting as an indirect electoral body needing a 2/3 majority vote of its members to approve. In both cases, there has been a usurpation of functions that voids the acts dictated, making the appointments made illegitimate of origin.

The violated Constitution, however, as stated in its Article 333, even if there has been a failure to comply with it because of the aforementioned act of institutional force, remains valid, every citizen being required, whether or not vested with authority, to collaborate with the means at its disposal to reinstate the effective enforcement of the Constitution.

As for the illegitimate authorities designated through the coup d'état of December 2015, under Article 350 of the Constitution, the people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, have the duty to ignore them, for being contrary to the democratic values, principles and guaranties, and for undermining the rights of the citizens to democracy and constitutional supremacy.

This right of resistance to oppression or tyranny, as noted by the Constitutional Chamber's decision No. 24 of January 22, 2003 (Case: *Interpretation of Article 350 of the Constitution*), is precisely what

"is recognized in Article 333 of the Constitution, whose wording is almost identical to Article 250 of the Charter of 1961," the Chamber adding that:

> "This provision is linked to Article 138 of the Constitution, which states that 'all usurped authority is ineffective and its acts are null.' The right to the restoration of democracy (defense of the constitutional system) referred to in Article 333, is a legitimate mechanism of civil disobedience that implies the resistance to a usurper and an unconstitutional regime."[223]

But, nevertheless, the same conspiratorial Constitutional Chamber, when "interpreting" said Article 350, in the same decision No. 24 of January 22, 2003, argued restrictively, that the right of the people to ignore the illegal authorities provided for therein only:

> "can be manifested constitutionally through various mechanisms for citizen participation contained in the Constitution, particularly of a political nature, dictated in Article 70, namely: through 'the election of public officials, a referendum, popular consultation, a revocation of mandate, legislative, constitutional and constituent initiatives, open forums and assembly of citizens."[224]

That is, in general, the Constitutional Chamber, materially reduced the forms of exercising the right to resistance to the mechanisms of suffrage (election or voting), whose exercise is precisely controlled by one of the illegitimate bodies that the people have the right to not recognize, such as the National Electoral Council, whose members were elected by the Constitutional Chamber itself, usurping the role of the National Assembly as an electoral body for their indirect popular election.

This, by making it impossible to exercise this right of resistance against the actions of the usurping National Assembly and of the usurping Constitutional Chamber, or against the illegitimate decisions of the unconstitutionality elected National Electoral

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223 See in *Revista de Derecho Público*, Nº 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 126-127.

224 *Idem*.

Council, must necessarily open other democratic alternatives for its manifestation. [225]

Paris, January,2015.

[225] See Allan R. Brewer-Carías**,** "El derecho a la desobediencia y a la resistencia contra la opresión, a la luz de la *Declaración de Santiago"* in Carlos Villán Durán y Carmelo Faleh Pérez (directores), *El derecho humano a la paz: de la teoría a la práctica***,** CIDEAL/AEDIDH, Madrid 2013, pp. 167-189. See also: "El Juez Constitucional vs. El derecho a la desobediencia civil, y de cómo dicho derecho fue ejercido contra el Juez Constitucional desacatando una decisión ilegítima (El caso de los Cuadernos de Votación de las elecciones primarias de la oposición democrática de febrero de 2012)," in *Revista de Derecho Público*, No 129 (enero-marzo 2012), Editorial Jurídica Venezolana, Caracas 2012, pp. 241-249.

Chapter V

THE COMMUNAL STATE AND THE DISMANTLING Of THE FEDERAL STATE. UNCONSTITUTIONAL DEVELOPMENTS (2015)*

The 1999 Venezuelan Constitution, following the provisions of the previous 1961 Constitution, instituted the country as a *Democratic and Social Rule of Law and Justice State*, "which holds as highest values of its legal system and its performance, life, liberty, justice, equality, solidarity, democracy, social responsibility and, in general, the preeminence of human rights, ethics and political plurality" (Art. 2). For such purposes, it organized the Republic as "a *decentralized federal State*" that "is governed by the principles of geographical integrity, cooperation, solidarity, concurrence and shared responsibility" (Art. 4).

Such is the Constitutional State in Venezuela: a decentralized *Federal Democratic and Social Rule of Law and Justice State*[226],

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* Published in the book: *Studi in onore di Giuseppe de Vergottini* (Luigi Melica, Luca Mazzeti, Valeria Piergigli, Editore,) Cedam , Coordinators), Wolkers Kuwer, Cedam, 2015, Tomo, pp. 755-784. Available at: http://allanbrewercarias.com/wp-content/uploads/2014/08/II-4-782-Brewer-Car%C3%ADas-THE-COMMUNAL-STATE-v-THE-FEDERAL-STATE-in-VENEZUELA-RECENT-UNCONSTITUCIONAL-DEVELOPMENTS-Studi-onore-De-Vergottini-Fi.pdf

226 See the study of the constitution regarding the regulation of this constitutional federal state model, in Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional venezolano*, 2 vols., Caracas 2004; and *La*

based on a vertical distribution of public powers at three territorial levels of government: National level, State level and municipal level (Art. 136), according to which, each level must always have a government of an "elective, decentralized, alternative, responsible, plural, and of revocable mandate" nature, as required by Article 6 of the Constitution.

Constitutionally speaking, therefore, it is not possible to create in Venezuela, by law, political institutions in order to empty the powers of other organizations of the State (at any level: national, states, municipal and other local entities), and, even less, to establish new political organizations without ensuring the elective character of their governments and representatives of the people by means of universal, direct and secret suffrage; nor without assuring their own political autonomy, which is essential to their federal and decentralized nature; and not guaranteeing their plural nature in the sense that they cannot be linked to a particular ideology, such as socialism.

An attempt was made to change this Constitutional model of the Federal State through a draft of constitutional reform that was sanctioned by the National Assembly in 2007, with the objective of establishing a socialist, centralized, militaristic, and police State[227], called the "Popular Power State" or "Communal State,"[228] which,

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Constitución de 1999 y la Enmienda Constitucional de 2009, Editorial Jurídica Venezolana, Caracas 2011.

227 See Allan R. Brewer-Carías, *Hacia la Consolidación de un Estado Socialista, Centralizado, Policial y Militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Colección Textos Legislativos, No. 42, Editorial Jurídica Venezolana, Caracas 2007; and "Estudio sobre la propuesta de Reforma Constitucional para establecer un estado socialista, centralizado y militarista (Análisis del anteproyecto presidencial, Agosto de 2007)," in *Cadernos da Escola de Direito e Relações Internacionais da UniBrasil* 7, Curitiba 2007, pp. 265-308.

228 See Allan R. Brewer-Carías, *Hacia la consolidación de un Estado socialista, centralizado, policial y militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Editorial Jurídica Venezolana, Caracas 2007; *La reforma constitucional de 2007 (Comentarios al Proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007*), Colección Textos Legislativos, No.43, Editorial Jurídica Venezolana, Caracas 2007.

nevertheless, once it was put to popular vote, was rejected by the people in a referendum held on December 7, 2007.[229]

Nevertheless, in disdain of the people's will and defrauding the Constitution, even before the aforementioned referendum was held, the National Assembly in open violation of the Constitution began to dismantle the Constitutional Federal State, seeking to replace it by a Socialist State, by structuring in *parallel* a "Popular Power State" or "Communal State," through the sanctioning of the Communal Councils' Law of 2006[230], later reformed and elevated to the rank of organic law in 2009[231].

Nonetheless, the drive to establish a socialist State in Venezuela was rejected again as a result of the September 26, 2010 parliamentary elections, when the President and the governmental majority of the National Assembly, with a massive campaign for their candidates, posed such elections as a "plebiscite" on the President, his performance and his socialist policies, already previously rejected by the people in 2007; "plebiscite" which the President and his party lost overwhelmingly because the majority of the country voted against them.

As a result of such parliamentary election, the President and his party lost the absolute control they previously had over the National Assembly, preventing them in the future from imposing at will the legislation they wanted. Nonetheless, before the newly elected deputies to the Assembly took office in January 2011, defrauding the

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229 See Allan R. Brewer-Carías, "La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario", in *Anuario de Derecho Público 2007,* Año 1, Instituto de Estudios de Derecho Público de la Universidad Monteávila, Caracas 2008, pp. 17-65

230 See *Official Gazette* N° 5.806 Extra. 04-10-2006. See on this Law: Allan R. Brewer-Carías, "El inicio de la desmunicipalización en Venezuela: La organización del poder popular para eliminar la descentralización, la democracia representativa y la participación a nivel local," in *AIDA, Revista de la Asociación Internacional de Derecho Administrativo,* Universidad Nacional Autónoma de México, Asociación Internacional de Derecho Administrativo, Mexico City 2007, 49-67

231 See *Official Gazette* N° 39.335, of Dec. 28, 2009. See on this Law the comments in Allan R. Brewer-Carías, *Ley Orgánica de Consejos Comunales*, Editorial Jurídica Venezolana, Caracas 2010.

popular will and the Constitution, the already delegitimized previous National Assembly, in December 2010, hastily proceeded to enact a set of organic laws through which they have finished defining, outside of the Constitution, the legislative framework for a new State, parallel to the Constitutional Federal State, which is no more than a socialist, centralized, military and police State called the "Communal State."

The organic laws that were approved in December 2010 are the laws on the *Popular Power; the Communes; the Communal Economic System; the Public and Communal Planning; the Social Comptrollership*.[232] Furthermore, in the same framework of organizing the Communal State, based on the Popular Power, there stand out the reform of the *Organic Law of Municipal Public Power* and *the Public Policy Planning and Coordination of the State Councils*, and of the *Local Council Public Planning Laws*.[233] Finally, in 2012 the Law on the *States and Municipalities Power and Competences Transfer System to Popular Power Organizations* was also approved, but through a decree-law.[234]

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232 See *Official Gazette* Nº 6.011 Extra. of Dec. 21, 2010. See on these Laws the comments in Allan R. Brewer-Carías, Claudia Nikken, Luis A. Herrera Orellana, J. M. Alvarado Andrade, José Ignacio Herández, Adriana Vigilanza, *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal (Los Consejos Comunales, las Comunas, la Sociedad Socialista y el Sistema Económico Comunal),* Editorial Jurídica Venezolana, Caracas 2011.

233 See *Official Gazette* Nº 6.015 Extra. of Dec. 28, 2010. Nevertheless, by December 31st 2010, it had not yet been published.

234 See *Oficial Gazette* No. 39954 of June 28, 2012. See on this Decree Law the comments of José Luis Villegas Moreno, "Hacia la instauración del Estado Comunal en Venezuela: Comentario al Decreto Ley Orgánica de la Gestión Comunitaria de Competencia, Servicios y otras Atribuciones, en el contexto del Primer Plan Socialista-Proyecto Nacional Simón Bolívar 2007-2013, (pp. 1290138); Juan Cristóbal Carmona Borjas, "Decreto con rango, valor y fuerza de Ley Orgánica para la Gestión Comunitaria de Competencias, Servicios y otras Atribuciones, (pp.139-146); Celilia Sosa G,. "El carácter orgánico de un Decreto con fuerza de Ley (no habilitado) para la gestión comunitaria que arrasa lentamente con los Poderes estadales y municipales de la Constitución" (pp. 147-157), José Ignacio Hernández, "Reflexiones sobre el nuevo régimen para la Gestión Comunitaria de Competencias, Servicios y otras

In 2012, the delegitimized National Assembly also passed an enabling Law authorizing the President, through delegated legislation, to enact laws on all imaginable subjects, including laws of an organic nature, emptying the new National Assembly of matters on which to legislate for a period of 18 months until June 2012.

The general defining framework of the Socialist State that is being imposed on Venezuelans, and for which nobody has voted, is supposedly based on the exercise of the "sovereignty of the people" exclusively in a direct manner through the implementation of the Popular Power and the establishment of a Communal State, as provided in the Organic Law for Popular Power (LOPP), whose provisions, according to its Article 6 "are applicable to all organizations, expressions and areas of Popular Power, exercised directly or indirectly by the people, communities, social sectors of society, in general, and situations that affect the collective interest, accepting the principle of legality in the formation, implementation and control of public management."

That is, the provisions of this organic law are all encompassing; apply to everyone and everything, as an essential part of the new "socialist principle of legality" in the creation, implementation and control of public entities, in parallel of the Federal State.

I. THE COMMUNAL STATE, POPULAR POWER AND SOCIALISM

The main purpose of these laws is the organization of the "Communal State," which has the commune as its fundamental unit, unconstitutionally r the municipality as the "primary political unit of the national organization" (Art. 168 of the Constitution). The

Atribuciones," (pp. 157-164), Alfredo Romero Mendoza, "Comentarios sobre el Decreto con rango, valor y fuerza de Ley Orgánica para la Gestión Comunitaria de Competencias, Servicios y otras Atribuciones" (pp. 167-176), and Enrique J. Sánchez falcón, "El Decreto con Rango, Valor y Fuerza de Ley Orgánica para la Gestión Comunitaria de Competencias, Servicios y otras Atribuciones o la negación del federalismo cooperativo y descentralizado," (pp. 177-184), in *Revista de Derecho Público*, No. 130 (Estudios sobre los decretos leyes 2010-2011), Editorial Jurídica Venezolana, Caracas 2012.

people's or Popular Power is exercised through the communes, manifested in the exercising of popular sovereignty only directly by the people, not by representatives. It is therefore a political system in which representative democracy is ignored, openly violating the Constitution.

The Socialist State sought through these laws, called the Communal State, in parallel to the Constitutional Federal State, is based on this simple scheme: as Article 5 of the Constitution provides that "Sovereignty resides untransferable in the people, who exercise it directly as provided in this Constitution and the Law, and indirectly, by suffrage, through the bodies exercising the Public Power," the Constitutional federal State structure being based on the concept of representative democracy, that is, the exercise of sovereignty indirectly through vote; the Communal State is now structured based on the direct exercise of sovereignty, ignoring representation.

This has even been "legitimized" by the Supreme Tribunal's Constitutional Chamber's decisions analyzing the organic nature of the laws, such as the one issued in connection with the Organic Law of Municipalities, which stated that it had been enacted:

> "developing the constitutional principle of participative and decentralized democracy postulated in the constitutional preamble and recognized in Articles 5 and 6 of the Constitution of the Bolivarian Republic of Venezuela, from whose content the principle of sovereignty is extracted, whose holder is the people, who are also empowered to exercise it "directly" and not only "indirectly" through Public Power organizations; as well as in Article 62, which governs the right of the people to freely participate in public affairs; and, especially, in Article 70, which expressly recognizes self-management means as popular and active participation mechanisms in the exercise of its sovereignty."[235]

Based on these principles, Article, 8.8 of the LOPP defines the Communal State as:

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[235] See decision No.1.330, Case: Organic Character of the Law of the Communes 12/17/2010, in http://www.tsj.gov.ve/decisiones/scon/Diciembre/1330-171210-2010-10-1436.html

> "A social and political organization based on the democratic and social State of law and justice established in the Constitution of the Republic, in which power is exercised directly by the people, with an economic model of social property and endogenous sustainable development that allows attaining the supreme social happiness of the Venezuelan people in a *socialist* society. The basic unit forming the Communal State is the Commune.[236]

What is being sought is to establish a Communal State alongside the Constitutional Federal State: the first based on the allegedly direct exercise of sovereignty by the people; and the second, based on the indirect exercise of sovereignty by the people through representatives elected by universal suffrage; in a system in which the former will gradually strangle and empty competences from the second. All of this is unconstitutional, particularly because in the structure of the Communal State that is established, ultimately, the exercise of sovereignty is indirect through "representatives" that are "elected" at Citizens' Assemblies to exercise Popular Power in the name of the people, called "spokespersons," but who are not elected by the people through universal, secret and direct suffrage.

The system that is being structured, in short, controlled by a Ministry of the National Executive Branch of Government, far from being an instrument of decentralization – which concept is indissolubly linked to federalism and political autonomy – is a centralized system of the communities tightly controlled by the central power. That explains the aversion to suffrage. Under this framework, a true participative democracy would be one that guarantees members of the communal councils, the communes and all organizations of the Popular Power to elect their representatives through universal direct and secret suffrage, and not through a show

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[236] The new Organic Law of the Municipal Power, however, defines the Communal State as follows: "Form of sociopolitical organization, based on the democratic and social state of law and justice established in the Constitution of the Republic, whose power is exercised directly by the people through communal self-governments, with an economic model of social property and endogenous and sustainable development that attains the supreme social happiness of the Venezuelan people in a socialist society. Forming the basic unit of the Communal State is the commune" (Art.4.10).

of hands at assemblies controlled by the official party and the executive branch, contrary to the decentralized Democratic and Social Rule of Law and Justice Federal State established in the Constitution.

It is in this context, seeking to establish in parallel with the Constitutional Federal State in which the people exercise public power indirectly through representatives elected by direct universal and secret suffrage, that a Communal State is being imposed upon Venezuelans, in which state the people would allegedly exercise the People's Power directly through spokespersons who are not elected by direct universal and secret suffrage, but at citizen's assemblies. In this regard, Article 2 of the LOPP defines Popular Power as:

> "The full exercise of sovereignty by the people in the political, economic, social, cultural, environmental, international, and in all areas of development of society through its diverse and dissimilar forms of organization that build the Communal State."

All of which is but a fallacy, because, ultimately, this "building" of the Communal State denies people the right to elect, by direct universal and secret suffrage, those who are going to "represent" them in all these areas, including internationally. It is rather a "building" of organizations to prevent people from really exercising their sovereignty and to impose on them, through a tightly centralized control, policies for which they never have a chance to vote.

Moreover, under Article 4 of the LOPP, the purpose of this Popular Power that is exercised by the bodies of the Communal State, is to "guarantee the life and social welfare of the people, through the creation of social and spiritual development mechanisms, ensuring equal conditions for everyone to freely develop their personality, direct their destiny, enjoy human rights and achieve supreme social happiness; without discrimination based on ethnicity, religion, social status, gender, sexual orientation, identity and expression of gender, language, political opinion, national origin, age, economic status, disability or any other personal, legal or social circumstance, which has the effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and constitutional guaranties." Of course, all these principles of equality are broken since the Communal State system, parallel to the Constitutional Federal State, is structured on a

unique concept, which is *socialism*, so that anyone who is not a socialist is automatically discriminated. It is not possible, therefore, under the framework of this law to reconcile the pluralism guaranteed by the Constitution and the principle of non-discrimination on the grounds of "political opinion" referred to in this article, with the remaining provisions of this Law pursuing the opposite, that is, the establishment of a Communal State, whose bodies can only act on the basis of socialism and in which any citizen who has another opinion is excluded.

The result from all these laws, after President Chávez confessed, in January 2010, to be convinced Marxist, has been the resurrection, in the name of an allegedly "Bolivarian revolution," of the historically failed "Marxist revolution," although led by a president who said he has never even read Marx's writings.[237] This public announcement, in any case, led to the adoption in April 2010, by the government's United Socialist Party of Venezuela (presided over by the President), in its First Special Congress, of a "Declaration of Principles" in which the party was officially declared to be a "Marxist," "Anti-imperialist" and "Anti-capitalist" party. According to the same document, the party's actions are based on "scientific socialism" and on the "inputs of Marxism as a philosophy of praxis," in order to replace the "Bourgeois Capitalist State" with a "Socialist State" based on the Popular Power and the socialization of the means of production.[238]

Consequently, through the Organic Law on the Popular Power, there has been established the defining framework of a new model of a Socialist State parallel and different from the Constitutional Federal State, called the Communal State, based exclusively on Socialism as the political doctrine and practice, which is the political organization

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[237] In his annual speech before the National Assembly on Jan. 15, 2010, in which Chávez declared to have "assumed Marxism," he also confessed that he had never read Marx's works. See María Lilibeth Da Corte, "Por primera vez asumo el marxismo," in *El Universal*, Caracas Jan. 16, 2010, http://www.eluniversal.com/2010/01/16/pol_art_por-primera-vez-asu_1726209.shtml.

[238] See "Declaración de Principios, I Congreso Extraordinario del Partido Socialista Unido de Venezuela," Apr. 23, 2010, at http://psuv.org.ve/files/tcdocumentos/Declaracion-de-principios-PSUV.pdf

through which the exercise of Popular Power is produced, which in turn is "the full exercise of sovereignty by the people."

This Popular Power is based, as declared in Article 3 of the LOPP, "on the sovereign principle of progressiveness of rights established in the Constitution, whose exercise and development are determined by the level of political and organizational conscience of the people" (Art.3). With this statement, however, far from the universality, prevalence and progressiveness of human rights guaranteed by the Constitution, what has been established is the total disappearance of the universal concept of human rights, the abandonment of their prevalent nature and the deterioration of the principles *pro homines* and *favor libertatis*, by conditioning their existence, scope and progressiveness "to the level of political and organizational consciousness of the people," that is, by what the organizations of Popular Power that seek to "organize" the people, all subjected to Socialism, stipulate and prescribe. With it, the concept of human rights as areas that are innate to man and immune from power disappears, moving to a concept of human rights dependent on the orders of the central power, which ultimately controls the entire "building" of the Communal State or Socialist State, as a clear demonstration of totalitarianism, which is at the basis of this Law.

In the same regard, Article 5 of the LOPP states that "the people's organization and participation in exercising its sovereignty is based on Simon Bolivar, the Liberator's doctrine, and is based on socialist principles and values,"[239] thus, as has been mentioned, ties the organization of the Communal State in parallel to the Constitutional State, to the socialist political ideology, that is, with *socialism*, defined in Article 8.14 as:

> "a mode of social relations of production, centered on coexistence with solidarity and the satisfaction of material and intangible needs of all of society, which has as fundamental basis, the recovery of the value of work as a producer of goods

[239] The same expression was utilized in the Organic Law of the Communes with respect to their constitution, shaping and functioning (Art.2), in the Communal Council's Law (Art.1) and in the Organic Law of Social Comptrollership (Art. 6)

> and services to meet human needs and achieve supreme social happiness and integral human development. This requires developing the social ownership of the basic and strategic means of production, so that all families, Venezuelan citizens, possess, use and enjoy their patrimony, individual or family property, and exercise the full enjoyment of their economic, social, political and cultural rights."[240]

The first thing that must be observed regarding this provision is the untenable claim of linking "the doctrine of Simon Bolívar" to socialist principles and values. Nothing can be found about socialism in the works of Bolivar and related to his conception of the State.[241] To the contrary, Karl Marx himself would have detected it when he wrote the entry on "Simón Bolívar y Ponte" for the *New American Cyclopedia* published in New York in 1857,[242] eleven years after publishing his book with Fredrick Engels on *The German Ideology*.[243] It was in this 1847 book were they used the word "communism" perhaps for the first time;[244] and the fact is that ten years later, in the 1857 article on Bolívar, Marx made no mention at

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240 The same definition is found in Article 4.14 of the Organic Law of the Communes. Many are the definitions of socialism, but in all, its basic elements can be identified: (i) a system of social and economic organization, (ii) based on collective or State ownership and administration of the means of production, and (iii) State regulation of economic and social activities and distribution of goods, (iv) seeking the gradual disappearance of social classes.

241 See Allan R. Brewer-Carías, "Ideas centrales sobre la organización el Estado en la Obra del Libertador y sus Proyecciones Contemporáneas" in *Boletín de la Academia de Ciencias Políticas y Sociales*, Nº 95-96, January-June 1984, pp. 137-151.

242 See *The New American Cyclopaedia*, Vol. III, 1858, on "Bolivar y Ponte, Simón." Available at http://www.marxists.org/archive/marx/works/1858/01/bolivar.htm

243 The book was written between 1845 and 1846. The Communist Manifest was published in February 1848.

244 See in Karl Marx and Frederich Engels, "The German Ideology," in *Collective Works*, Vol. 5, International Publishers, New York 1976, p. 47. See the pertinent text at http://www.educa.madrid.org/cms_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf

all to any "socialist" ideas of Bolívar, that article being, by the way, one, if not the most, critical work ever written about Bolívar.

Consequently, the name of Bolívar is used only as a pretext to continue to manipulate the Bolivar "cult" to justify authoritarianism, as has occurred so many times before in the history of the country,[245] although in the past, it has been used "at least more or less respecting the basic thought of the Liberator, even when they misrepresented its meaning."[246] The fact is that never before, the adherence to Bolivar had led to changing the republic's name, and to the invention of a new "Bolivarian doctrine" in order to justify the government's policies, as it has happened with the so-called "Bolivarian Revolution" linked to the idea of a "Twenty-First Century Socialism,"[247] as well as to the creation of the Communal State.

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245 It has been the case of Antonio Guzmán Blanco in the nineteenth century and Cipriano Castro, Juan Vicente Gómez, Eleazar López Contreras and Marcos Perez Jimenez in the twentieth century. John Lynch has noted that: "The traditional worship of Bolívar has been used as a convenient ideology by military dictators, culminating with the regimes of Juan Vicente Gómez and Eleazar López Contreras, who at least more or less respected the basic thoughts of the Liberator, even when they distorted their meaning." Lynch concludes by noting that in the case of Venezuela today, to proclaim the Liberator as basis for policies of the authoritarian regime is a distortion of his ideas. See John Lynch, *Simón Bolívar: A Life*, Yale University Press, New Haven 2007, p. 304. .See also, Germán Carrera Damas, *El culto a Bolívar*, esbozo para un estudio de la historia de las ideas en Venezuela, Universidad Central de Venezuela, Caracas 1969; Luis Castro Leiva, *De la patria boba a la teología bolivariana*, Monteávila, Caracas 1987; Elías Pino Iturrieta, *El divino Bolívar. Ensayo sobre una religión republicana*, Alfail, Caracas 2008; Ana Teresa Torres, *La herencia de la tribu. Del mito de la independencia a la Revolución bolivariana*, Editorial Alfa, Caracas 2009. About the history related to these books see Tomás Straka, *La épica del desencanto*, Editorial Alfa, Caracas 2009.

246 See John Lynch, *Simón Bolívar: A Life*, Yale University Press, New Haven, CT, 2007, p. 304.

247 The last attempt to completely appropriate Simón Bolívar for the "Bolivarian Revolution," was the televised exhumation of his remains that took place at the National Pantheon in Caracas on July 26, 2010, conducted by President Chávez himself and other high officials, including the Prosecutor General, among others, for the purpose of determining if Bolivar died of arsenic

On the other hand, the abovementioned provision of Article 8.14 of the LOPP defining socialism openly violates the Constitution's guarantee of the right to property (Art. 115) which does not allow for restrictions to only collective or social property, excluding private ownership of the means of production

Article 5 of the LOPP, moreover, defines the following socialist "principles and values":

> "participatory and active democracy, collective interest, equity, justice, social and gender equality, complementarity, cultural diversity, human rights, shared responsibility, joint management, self-management, cooperation, solidarity, transparency, honesty, effectiveness, efficiency, effectiveness, universality, responsibility, social duty, accountability, social control, free debate of ideas, voluntariness, sustainability, environmental protection and defense, guarantee of the rights of women, children and adolescents and of any vulnerable person, geographical integrity and national sovereignty defense." (Art. 5) [248]

This catalog of "principles", of course, is not necessarily linked to socialism, nor is it an exclusively catalog of "socialist principles and values" as it aims to show, in a misappropriation made by the legislator. What the drafter of the rule did, in fact, was to copy the entire set of principles that are defined throughout the Constitution (Preamble and articles 1, 2, 3, 4, 6, 19, 20, 21, 22, 26, 84, 86, 102, 112, 137, 141, 153, 165, 257, 293, 299, 311, 316, 326, for example), which are the values of the Constitutional Federal State. Only in some cases they have not dared use the classic terminology such as "freedom of expression" and have wanted to replace it with "free discussion of ideas," which, of course, is not the same, especially since that freedom is not tolerated in a socialist State which knows only a single ideology.

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poisoning in Santa Marta in 1830, instead of from tuberculosis. See Simon Romero, "Building a New History By Exhuming Bolívar," *The New York Times,* August 4, 2010, p. A7.

[248] These same principles are listed in relation to the communes in Article 2 of the Organic Law of the Communes, and in relation to social comptrollership in Article 6 of the Organic Law of Social Comptrollership.

The LOPP has been issued for the purpose of developing and strengthening the Popular Power, ignoring the basic constitutional principles and values that all levels of government in Venezuela (for instance that they be "elective, decentralized, alternative, responsible, pluralistic and of revocable mandates" as required by article 6 of the Constitution) , to allegedly generate:

> "Objective conditions through various means of participation and organization established in the Constitution, in the Law and those that may arise from popular initiative so that citizens may exercise their full right to sovereignty, participatory and active democracy, and the establishment of forms of community and communal self-government for the direct exercise of power" (Art. 1)."

According to the Constitution, the "creation of new decentralized organs at the parish, community, 'barrios' and neighborhood levels," is only possible with "a view to guaranteeing the principle of shared responsibility in the public administration of local and state governments, and to develop self-management and joint management processes in the administration and control of states and municipal public services" (Art. 184.6). This means that the mechanisms of participation that can be established under the Constitution are not to empty the Constitutional Federal State structures, that is, the "local and states governments" (like the municipalities), but to strengthen them in governance. Moreover, under the Constitution, there can be none other than an *elective, decentralized and pluralistic* government, yet the LOPP defines a parallel State, which is the Communal State, structured on "governments" or "self-governments" that are neither elected nor decentralized nor pluralistic.

On these, Article 14 of the LOPP merely defines "the communal self-government and aggregation systems that arise among their instances" as "a field of action of Popular Power in the development of its sovereignty, by the direct involvement of organized communities in the formulation, implementation and control of public functions, according to the law regulating the matter."

Moreover, in this context the "community" is defined in the LOPP as a "basic and indivisible spatial core made up of people and families living in a specific geographical area, linked by common

characteristics and interests who share a history, needs and potentialities on cultural, economic, social, geographical and other measures"(Art. 8.4).[249]

II. THE PURPOSE OF POPULAR POWER

Article 7 of the LOPP defines the following purpose of Popular Power, that is, allegedly "the full exercise of sovereignty by the people" through "its various and dissimilar forms of organization that build up the communal state." (Art. 2):

First, "Promote the strengthening of the people's organization, in order to consolidate the revolutionary protagonist democracy and build the bases of a society that is *socialist*, democratic, of law and justice." In relation to what the Constitution provides about the organization of the State, the addition of "socialist" imposed by this provision does away with the principle of pluralism, which is guaranteed by the Constitution, paving the way for political discrimination against any citizen who is not a socialist, who is consequently denied the right to political participation.

Second, "Generate conditions to ensure that the popular initiative, in exercising social management, assumes duties, attributes and competences for administration, delivery of services and execution of works, by transferring from the various political and geographical entities to community and communal self-governments, and aggregation systems that may arise therefrom." Under Article 184.1 of the Constitution, this transfer of competences can only refer to "the transfer of services in the areas of health, education, housing, sports, culture, social programs, the environment, maintenance of industrial areas, maintenance and upkeep of urban areas, neighborhood crime prevention and protection services, public works and provision of public services." To this end, "they shall have the power to enter into agreements, whose content shall be guided by the principles of interdependence, coordination, cooperation and shared responsibility."

Third, "Strengthen the culture of participation in public affairs to ensure the exercise of popular sovereignty."

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[249] The same definition is repeated in the Organic Law of the Communes (Art 4.4) and in the Organic Law of the Communal Councils (Art. 4.1)

Fourth, "Promote values and principles of socialist ethics: solidarity, the common good, honesty, social duty, willfulness, defense and protection of the environment and human rights." Again, these really are not the values of any "socialist ethics", but as mentioned earlier, they are values of democracy and of Western civilization and typical of the Constitutional State.

Fifth, "Contribute with State policies in all instances, in order to work in a coordinate in the implementation of the Economic and Social Development Plan of the Nation and other plans established in each of the territorial-political levels and in the political-administrative levels established by law."

Sixth, "Establish the bases that allow organized communities to exercise social comptrollership to ensure that the investment of public resources is efficiently performed for the collective benefit; and monitor that the activities of the private sector that have social impact are carried out within legal rules that protect users and consumers." For the purpose of this provision, Article 8.6 of the LOPP, defines social comptrollership as the exercise of the prevention, surveillance, supervision, monitoring and control functions, by individual or collective citizens, over the administration of Public Power and of instances of Popular Power and of private activities that affect collective interests (Art. 8.6). However, nothing in the Constitution authorizes the allocation of competences to public entities of the community dependent on the national executive, nor to individuals, in general, to exercise the surveillance, supervision or social comptrollership of private activities. This feature can only be exercised by political authorities of the State in a limited way. As established in these laws on the Popular Power, it is none other than a general system of social espionage and surveillance to be carried out among peoples in order to institutionalize the denunciation and persecution of any deviation from the socialist framework imposed on the citizenship.

Seventh, "Deepening shared responsibility, self-management and joint-management." For the purpose of this rule, the Law defines co-responsibility, as the "shared responsibility among citizens and State institutions in the process of formation, implementation, control and evaluation of social, community and communal management, for the welfare of organized communities" (Art. 8.7). Self-management is defined as the set of actions whereby organized communities

assume direct management of projects, execution of public works and services to improve the quality of life within their geographical area" (Art. 8.2). And joint management, is defined as "the process whereby organized communities coordinate with public authorities at any level or instances, the joint management in the implementation of works and services needed to improve the quality of life within their geographical area" (Art. 8.3).

Moreover, for the purpose of these rules, "organized community" is defined in the LOPP as one "made up of popular organizational expressions, councils of workers, peasants, fishermen and any other social grassroots organization, coordinated with an instance of Popular Power[250] duly recognized by law and registered in the Ministry of Popular Power competent on matters of citizen participation" (Art. 8.5). The Constitution, however, referring to community organizations subject to decentralization, conceived only the following as geographical entities: "parishes, communities and neighborhoods," without any subjection to the National Executive, which are those allowed, under Article 186.6, to assume "joint-responsibility in the governance of local and state governments and develop self and joint management processes in the administration and control of state and municipal public services."

III. THE INSTANCES OF POPULAR POWER

1. The diverse instances of popular power and their legal status

The instances of Popular Power for the "full exercise of sovereignty by the people" made up by the "diverse and dissimilar organization forms that form the communal State" (Art. 2), as specified in Article 8.9 of the LOPP, are "made up of the different systems of communal aggregation and articulations, to expand and strengthen the actions of communal self-government: communal councils, communes, communal cities, communal federations,

[250] The definition of "organized community" is similar in the Organic Law of the Communes: formed by "popular organizational expressions, councils of workers, peasants, fishermen and any other grassroots organization, linked to an instance of Popular Power "(art. 4.5)

communal confederations and, those which, according to the Constitution and the law and regulations governing the matter, arise from popular initiative[251], "being grassroots organizations of Popular Power" those "consisting of citizens for the pursuit of collective welfare" (Article 8.10).

All these Popular Power instances recognized by the LOPP, as provided in Article 32, acquire legal status through their registration with the Executive Branch's Popular Power's Ministry of the Communes, taking into account the procedures that are to be established in the regulations of the Law. Consequently, the decision to register a communal council, a commune, or a communal city, is ultimately in the hands of the Executive Branch, which, of course, strictly applying the letter of the law, wherefore, if it is controlled by "spokespersons" who are not socialists, will not be registered, nor, recognized as a legal entity, even if it is the result of a genuine and popular initiative.

2. The Popular Power instances' spokespersons and their non- representative nature

None of the persons exercising the authority over Popular Power instances, referred to as "spokespersons," is expected to be elected in elections made through direct, universal and secret ballot. They are not even expected to be elected by "indirect" suffrage, as in no case they have roots in a previous and initial direct election.

In fact, the LOPP does not indicate how the spokespersons of Popular Power instances are to be designated. What is stated in the regulations of the laws enacted regarding the instances of Popular Power is a designation by bodies that do not have their origin in direct, secret and universal elections. In particular, for example, the Organic Law of Communal Councils, provides that spokespersons are "elected" by citizen's assemblies (Articles 4.6 and 11), and not by means of a direct, universal and secret ballot, as prescribed by the

[251] The Organic Law of the Communes, however, defines Popular Power instances as those "constituted by an aggregation of different communal systems: communal councils, communes, communal cities, communal federations, communal confederations and others that according to the Constitution and the law may arise from the initiative."(Article 4.12)

Constitution, but by an alleged "popular vote" that is not organized by the National Electoral Council, and is exercised in open assemblies in which there is no guarantee of suffrage or secrecy. The Law, however, does indicate that all levels of Popular Power that are "elected by popular vote", are revocable after the first half of the term for which they were elected, under the conditions established by law (Art. 17).

In fact, it should be said that Citizens Assemblies are at the foundation of these instances of Popular Power, which, although not specifically regulated by the LOPP, nor named in any of its articles, are defined as the "highest instance of participation and decision of organized communities, established in accordance to the law regulating the form of participation for the direct exercise of Popular Power, by the integration of people with legal standing, whose decisions are of a binding nature for the community, for different forms of organization, for the communal government and for the instances of Public Power, according is the provisions of the laws that set forth the creation, organization and operation of community self-governments, and the aggregation systems that may arise" (Art. 8.1).

3. Communal aggregation systems

Article 15.4 of the LOPP defines communal aggregation systems as the instances that may arise from popular initiative, from community councils and among Communes, regarding which Article 50 of the Organic Law of the Communes (LOC) specifies that "the instances of Popular Power may organize communal aggregation systems among them with the purpose of articulating the exercise of "self-government" (although not elected), strengthening the capacity for action on geographical, political, economic, social, cultural, ecological and security and defense of national sovereignty aspects according to the Constitution and the law."

The purpose of communal aggregation systems under Article 59 of the LOC, are to:

A. Expand and strengthen communal "self-government" action.

B. Carry out investment plans in their geographical area, following guidelines and requirements set forth in the respective communal development plans.

C. Assume the competences granted to them by the transfers of administration, execution of public works and provision of public services.

D. Encourage the development of the communal economic system, by means of network articulation of directly or indirectly owned socio-communitarian organizations, per area of production and service.

E. Exercise social comptrollership functions over various plans and projects executed within their geographical area by the instances of Popular Power or Public Power.

The LOC, however, says nothing about the conditions for the creation of communal aggregation systems and their operation, which will be established in the Regulations of the LOC and the guidelines issued by the Popular Power's Ministry of the Communes.

In any event, the LOC lists in Article 60, the various types of communal systems as follows:

A. The Communal Council: an instance for the articulation of the social movements and organizations of a community.

B. The Commune: an instance for the articulation of several communities organized in a specified geographical area.

C. The Communal City: established by popular initiative, through the aggregation of several Communes in a specified geographical area.

D. Communal Federation: an instance for the articulation of two or more cities corresponding to an instance of a Development Engine District.

E. Communal Confederation: articulation instance of communal federations within the scope of a territorial development axis.

F. All others formed by popular initiative

In particular, regarding the Communal City and the Communal *Federation* and Confederation, the conditions for their creation must be provided for in the Regulations of each Law.

Notwithstanding all these instances of Popular Power envisaged for "the exercise of self-government," Article 15 of the LOPP only refers in some detail to the Communal Councils and to the Communes, which have otherwise been regulated by the Organic Law of the Communal Councils and by the Organic Law of the Communes; and to the Communal Cities.

4. The Communal Councils

The communal councils are defined in the Law as the "instance of participation, articulation and integration among citizens, and various community organizations, social and popular movements, that allows organized people to exercise community government and direct management of public policy and projects aimed to meeting the needs, potentials and aspirations of communities, for the construction of the new model of the socialist society of equality, equity and social justice" [252](Art. 15.1)

This legal definition highlights the fact that Community Councils can only and exclusively have as their objective to contribute to "the construction of a new model of **socialist** society," in violation of the principle of pluralism established by Article 6 of the Constitution, so any citizen who does not follow or accept the socialist doctrine has no place in this new parallel State that is sought with this Law.

This instance of Popular Power constituted by the Communal Councils is regulated by the said Law of the Communal Councils[253], whose "spokespersons", also by reforming the Organic Law of Municipal Public Power of December 2010, have been assigned the function of appointing the members of the Parish Councils, which were therefore "degraded" by ceasing to be the "local entities" they were when their governments were elected through universal, direct and secret suffrage; becoming now mere "advisory, evaluating and coordination bodies between the Popular Power and the Municipal entities of Public Power"(Art. 35), whose members are also appointed by the spokespersons of the community councils of the

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[252] The same definition is established in Article 2 of the Organic Law on Communal Councils (art. 2).

[253] See *Official Gazette* N° 39.335 of Dec. 28, 2009.

respective parish (Art. 35), and only from among those supported by the Citizens' Assembly "of the respective municipal council" (Art. 36).

For such purpose, in an evidently unconstitutional manner, the Reformed Law of Municipal Power ordered the "cessation" in their roles of "members and their alternates, and secretaries of the existing parish councils, the Mayor's Office being responsible for the management and future of the staff, as well as the corresponding assets. (Second Repeal Provision)

5. The Communes

The Communes, on the other hand, which are conceived in the LOPP as the "basic unit" of the Communal State, are defined in Article 15.2 as the "*socialist space* that as a local entity is defined by the integration of neighboring communities with a shared historical memory, cultural traits and customs that are recognized in the territory that they occupy and in the productive activities that serve as their support and over which they exercise sovereignty principles and active participation as an expression of popular power, in accordance with a regime of social production and the model of endogenous and sustainable development contemplated in the Economic and Social Development Plan of the Nation."[254] This same definition of the Commune as a *socialist space* is also in Article 5 of the Organic Law of Municipalities; which notion implies that it is forbidden for anyone who is not a socialist or who does not believe in socialism or is in communion with socialism as a political doctrine. The legal concept of the Commune, therefore, is contrary to the democratic pluralism guaranteed by the Constitution, it being openly discriminatory and contrary to equality as guaranteed in Article 21 of the Constitution.

On the other hand, the LOPP defines the commune as a "local entity" and the same description appears in Article 1 of the Organic Law of the Communes, which defines it "as the local entity where citizens, in exercising Popular Power, exercise the full right of sovereignty and develop active participation through forms of self-

[254] The same definition is established in Article 5 of the Organic Law of the Communes

government for the construction of the Communal State within the frame of a Social Democratic State of Law and Justice" (Art. 1). In the December 2010 reform of the Organic Law of Municipal Public Power, the communes were also included in the list of "local territorial authorities," providing, that since they are governed by a different Popular Power legislation, and have to be constituted "among various municipalities," they are exempted from the provisions of the Organic Law of Municipal Public Power.

Now, in characterizing communes as "local entities", the delegitimized legislator of December 2010 forgot that under the 1999 Constitution (Articles 169, 173), this expression of "local entity" can only be applied to political entities of the Constitutional Federal State, which must have "governments" consisting of representatives elected by universal, direct and secret ballot (Articles 63, 169) adhered to the principles laid down in Article 6 of the Constitution, that is, they "shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, with revocable mandates." According to the 1999 Constitution, therefore, there can be no "local entities" with governments that are not democratic in the abovementioned terms, especially if the "representatives" are not directly elected by the people and are appointed by other public bodies.

And this is precisely what happens with the so-called "governments of the communes," which under this legislation on Popular Power and its organizations have an origin not guaranteed through democratic election by universal, direct and secret suffrage, it thus being an unconstitutional conception.

It should also be stressed that, as provided in Article 28 of the LOPP, the government of the communes can transfer its management, administration and services to organizations of Popular Power. To this end, grassroots organizations of Popular Power must make their respective formal requests, meeting the preconditions and requirements established in the laws governing the matter.

This instance of Popular Power made up by the communes has been regulated by the Organic Law of the Communes.[255]

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[255] See *Official Gazette* Nº 6.011 Extra. of Dec. 21, 2010)

6. Communal Cities

Communal cities, according to the Law, "are those created by popular initiative through the aggregation of several communes in a given territory" (Art. 15.3). Being the communes, according to the Law, the "socialist space" and "basic unit" of the Communal State, Communal Cities as aggregations of several communes or several socialist spaces are also designed under the law as "**socialist**" Cities, which as such, do not admit any citizen or neighbor who is not a socialist.

IV. THE ORGANIZATIONS AND ORGANIZATIONAL EXPRESSIONS OF POPULAR POWER

In addition to Popular Power instances, the law establishes some provisions tending to regulate two organizational forms that are specific to Popular Power: the organizations and organizational expressions of Popular Power

1. Organizational Forms of Popular Power

A. The organizations of Popular Power

Under Article 9 of the LOPP, Popular Power organizations "are the various forms of organizing people, constituted from the locality by popular initiative, integrating citizens with common goals and interests, seeking to overcome difficulties and promote common welfare so that the people involved assume their rights and duties and develop higher levels of political awareness. Popular Power organizations will act democratically and will endeavor to obtain popular consensus among its members".

These Popular Power organizations are formed at the initiative of citizens, according to their nature, common interests, needs, potentialities and any other common point of reference set out in the law governing their area of activity (Art. 12).

These Popular Power Organizations, as Popular Power instances under Article 32 of the LOPP, acquire their legal status by registering with the Ministry of Popular Power competent on matters of citizen participation, taking into account the procedures established in the

Regulations of the law. The formal recognition of these organizations is hence dependent on the National Government, so all those who are not socialist, and contrary to the purposes prescribed in the Law (Article 1) would be rejected. Citizens who do not share the socialist ideology would not be accepted in those registered organizations.

B. Organizational expressions of Popular Power

With respect to the "organizational expressions of Popular Power," as provided in Article 10 of the LOPP, they are "the integration of citizens with common goals and interests, organized from the locality, their location or social development area of reference, which temporarily and based on the principles of solidarity and cooperation, seek the collective interest."

These expressions of Popular Power are formed by popular initiative and in response to the needs and potentialities of the communities, in accordance with the Constitution and the law of the Republic. (Art.13)

Under the Third final provision, the exercise of people's participation and the stimulus to the initiative and organization of Popular Power established by Law should apply in indigenous towns and communities, according to their habits, customs and traditions.

2. The purpose of organizations and organizational expressions of Popular Power

These organizations and organizational expressions of popular power, according to Article 11 of the LOPP, have the following purpose:

First, "strengthen participatory and active democracy, according to Popular Power insurgency, as a historical event for the construction of the *socialist*, democratic society of law and justice." As noted above, the addition of "socialist" imposed on society by this provision, breaks the principle of pluralism guaranteed by the Constitution, paving the way for political discrimination against any citizen who is not a socialist, who is denied the political right to participate.

Second, "promote the development and consolidation of the communal economic system by establishing socio-productive organizations for the production of goods and services to satisfy social needs, the exchange of knowledge and expertise and the social reinvestment of the surplus." The LOPP, for these purposes, defines as "communal economic system" a set of social relations of production, distribution, exchange and consumption of goods and services, as well as knowledge and expertise developed by the instances of Popular Power, Public Power, or by agreement among them, through socio-productive organizations under communal forms of social property"(Art. 8.13).

Third, "promote unity, solidarity, primacy of collective interests over *individual* interests and consensus in their areas of influence."

Fourth, "promote research and dissemination of values, historical and *cultural* traditions of the communities."

And fifth, "exercise social comptrollership."

V. AREAS OF POPULAR POWER

The LOPP identifies the following "areas of Popular Power" that are defined in the Organic Law and which in the traditional terminology of public law are nothing more than competences that are assigned to Popular Power: Public Policy Planning, Communal Economy, Social Comptrollership, Organization and Management of the Territory and Communal Justice.

1. Public Policy Planning

Public policy planning in the terms established in the Organic Law of Public and Popular Planning,[256] is defined in Article 17 of the LOPP as "an area for action that guarantees, through shared government action among the public institutions and the instances of Popular Power, the implementation of the strategic guidelines of the Economic and Social Development Plan of the Nation, for the use of public resources in the achievement, coordination and harmonization of the plans, programs and projects for achieving the country's

[256] See *Official Gazette* Nº 6.011 Extra. of Dec. 21, 2010.

transformation, balanced territorial development and fair distribution of wealth."

In this provision, there stands out the distinction between constitutional State bodies that are designated as "public institutions" and Popular *Power* instances, confirming the intent of the law to establish a parallel State, the Communal State, with the purpose of emptying the content and ultimately stifle the Constitutional Federal State.

On the other hand, in connection with this planning competence, in terms of "participatory planning," the LOPP defines it as the "form of citizens' participation in the design, formulation, implementation, *evaluation* and control of public policies" (Art. 8.11), and in terms of "participatory budget," it is defined "as the mechanism through which citizens propose, debate and decide on the formulation, implementation, monitoring and evaluation of public budgets, in order to materialize the projects leading to the development of communities and the general welfare" (Art. 8.12).

All this public policy planning is to be developed within a centralized planning system totally controlled by the Central government. For this purpose, even before the 2007 draft of constitutional reforms were submitted to the National Assembly, in June 2007, Decree-Law No. 5,841 was enacted,[257] containing the Organic Law creating the Central Planning Commission. This was the first formal official act by the state devoted to building the socialist state,[258] so after the 2007 constitutional reform was rejected in a referendum, a few days later, on December 13, 2007, the National Assembly approved the 2007-13 Economic and Social Development National Plan, established in Article 32 of the Decree-

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257 *Gazette* N° 5.841, Extra., of June 22, 2007.

258 See Allan R. Brewer-Carías, "Comentarios sobre la inconstitucional creación de la Comisión Central de Planificación, centralizada y obligatoria," in *Revista de Derecho Público* 110, Editorial Jurídica Venezolana, Caracas 2007, pp. 79-89; Luis A. Herrera Orellana**, "**Los Decretos-Leyes de 30 de julio de 2008 y la Comisión Central de Planificación: Instrumentos para la progresiva abolición del sistema político y del sistema económico previstos en la Constitución de 1999," in *Revista de Derecho Público* 115, *(Estudios sobre los Decretos Leyes)*, Editorial Jurídica Venezolana, Caracas 2008, pp. 221-32.

Law,[259] wherein the basis of the "planning, production and distribution system oriented towards socialism" was established, providing that "the relevant matter is the progressive development of social ownership of the means of production."

2. Communal Economy

Communal economy, as defined in Article 18 the LOPP, is an "area of Popular Power that allows organized communities to form economic and financial institutions and means of production, for the production, *distribution*, exchange and consumption of goods and services, as well as of knowledge and expertise developed under communal forms of social ownership, in order to satisfy collective needs, the social reinvestment of the surplus, and contribute to the country's overall social development in a sustainable manner, in accordance with the provisions of the Economic and Social Development Plan of the Nation and the law governing the matter."

This area of Public Power has been regulated by the Organic Law of the Communal Economic System,[260] which is defined in the Organic Law of the Communes as a set of social relations of production, distribution, exchange *and* consumption of goods and services, as well as the knowledge and expertise developed by the instances of Popular Power, Public Power, or by agreement between them, through socio-productive organizations under communal forms social property" (Art. 4.13). This Communal Economic System,[261] on the other hand, must be exclusively developed through "socio-productive organizations under communal social property forms" created as public enterprises, family productive units, or bartering groups, which exclude private initiative and private property.

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259 *Official Gazette* N° 5.554 of Nov. 13, 2001.

260 See *Official Gazette* Nº 6.011 Extra. of Dec. 21, 2010

261 See the comments on thjs matter in Allan R. Brewer-Carías, "Sobre la Ley Orgánica del Sistema Económico Comunal o de cómo se implanta en Venezuela un sistema económico comunista sin reformar la Constitución," in *Revista de Derecho Público*, No. 124, (octubre-diciembre 2010), Editorial Jurídica Venezolana, Caracas 2010, pp. 102-109.*Official Gazette* Nº 6.011 Extra. of Dec. 21, 2010

This system radically changes the mixed economic system of the 1999 *constitutional* framework, replacing it with a state-controlled economic system, mixed with provisions pertaining to primitive societies, and even allowing the creation of local or "communal" currencies in a society that must be ruled only "by the socialist principles and values" of the doctrine of Simon Bolivar, on which the Law declares to be inspired, with no historical support, ." (Art. 5).

The socialist productive model established in the Law (Art. 3.2), is *precisely* defined as a "production model based on *social property*, oriented toward the *elimination of the social division of labor* that appertains to the capitalist model," directed to meet the increasing needs of the population through new means of generation and appropriation as well as the *reinvestment of the social surplus*" (Art. 6.12). This is none other than to legally impose a communist system by copying isolated phrases of a perhaps forgotten old manual of a failed communist revolution, paraphrasing what Karl Marx and Friedrich Engels wrote 170 years ago (1845-1846) on the "communist society,"[262] precisely based upon those three basic concepts: the social ownership of the means of production, the elimination of social division of labor, and the social reinvestment of surplus (Art. 1).

3. Social Comptrollership

In terms of social *comptrollership*, Article 19 of the LOPP defines it as an "area of Popular Power designed to exercise the surveillance, monitoring, supervision and control of the Public Power management, Popular Power instances and activities of the private sector that affect the common good, individually or collectively by citizens, based on the terms established by the law governing the matter. This area of Public Power has been regulated by the Organic Law of Social ***Comptrollership***,[263] which defines it as "a function shared among instances of Public Power and citizens, and

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[262] See in Karl Marx and Frederich Engels, "The German Ideology," en *Collective Works*, Vol. 5, International Publishers, New York 1976, p. 47. Véanse además los textos pertinentes en http://www.educa.madrid.org/cms_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf

[263] See *Official Gazette* Nº 6.011 Extra. of Dec. 21, 2010

organizations of Popular Power, to guarantee that Public investment is carried out transparently and efficiently for the benefit of the interests of society, and that private sector activities do not affect social or collective interests." (Art. 2)

This Law that imposes the socialist doctrine as an official and compulsory one, which by organizing this social comptrollership system, has eventually created an obscure general system of social espionage and surveillance, which is attributed to individuals or to communal organizations, based on the denunciation and persecution of any private person that could be deemed not to act in accordance with the imposed *socialist* doctrine, and who for such reason could be considered to be acting against the "common good" or affecting the "social or collective interests."

4. Organization and Management of the Territory

The organization and management of the territory under Article 20 of the *LOPP*, is an "area of Popular Power, with the participation of organized communities, through their spokespersons, in the various activities of the organization and management of the territory, in the terms established by law governing the matter."

5. Communal Justice

Article 21 the LOPP defines Communal Justice as an "area of Popular Power that promotes, through alternative means of justice of the peace, arbitration, conciliation, mediation and other forms of conflict resolution in situations resulting directly from the exercising the right of participation and communal coexistence, in accordance to the constitutional principles of *Democratic* and Social State of Law and Justice, without violating the legal competences of the ordinary justice system.[264]

Article 22 of the LOPP refers to a special law that will regulate the special communal jurisdiction, establishing the organization, operation, procedures and rules of communal justice and its special jurisdiction. The Organic Law of the Communes is more explicit in

[264] The same definition is established in Article 56 of the Organic Law of the Communes.

stating that "the pertinent law shall determine the nature, legal procedures, rules and conditions for the creation of a special communal jurisdiction that envisage its organization and operation, as well as the instances competent to hear and decide at a communal level, whose communal judges shall be elected by universal, direct and secret suffrage by the communal area residents over the age of fifteen"(Art. 57).

The action of this communal jurisdiction, as required by Article 22 of the LOPP, "will be framed within the principles of free, accessible, impartial, suitable, transparent, autonomous, independent, responsible, equitable and expeditious justice, without undue delay or formalities for useless repetitions."

With these provisions, Municipalities have been totally emptied of their assigned constitutional competence on matters of justice of the peace (*Art*. 178.7), which idea was attempted before in the rejected constitutional reform of 2007, seeking to control the justices of the peace that, according to Article 258 of the Constitution, should be elected by universal suffrage, directly and by secret ballot.[265]

VI. RELATIONS BETWEEN PUBLIC AND POPULAR POWER (OR THE "MATAPALO" or "KILLER TREE" TECHNIQUE")

As noted above, the Communal State established in the LOPP, whose bodies are directed by "spokespersons" that are not "representatives" directly elected by the people to exercise Popular Power, has been established as a "Parallel State" of the Constitutional State whose bodies, on the contrary, are elected through direct universal and secret popular vote and exercise Public Power. These two Parallel States established one in the Constitution and the other in an unconstitutional Law, with provisions that, if implemented, will enable the Communal State to drown and empty the Constitutional State, behaving as the *Ficus benjamina L*. tree, native of India, Java and Bali, known as the "killer tree" that can grow as a strangler

[265] See the Organic Law of Justice of the Peace in *Official Gazette* Nº 4.817 Extra. of Dec. 21, 1994.

surrounding and choking the host tree, forming a hollow tree, destroying it.

To this end, in the LOPP, provisions are established to regulate relations between the State of Public Power (Constitutional State) and State of Popular Power (Communal State), which are generally provided to be "governed *by* the principles of equality, territorial integrity, cooperation, solidarity, conjoint responsibility, within the frame of the decentralized federal system sanctioned by the Constitution of the Republic"(Art. 26). These provisions are:

First, a legal obligation established on bodies, entities and agencies of Public Power to promote support and accompany people's initiatives for the *creation*, development and consolidation of various forms of organization and self-government of the people (Art. 23).[266] In particular, even the Organic Law of the Communes stipulates that "bodies of the Citizen Power Branch of government will support community control councils for the purpose of contributing to the fulfillment of their duties" (Art. 48).

Second, all bodies of the Constitutional State that exercise Public Power are subject to the mandates of the organizations of Popular Power, *establishing* a new principle of government, to "govern by obeying." Article 24 of the LOPP, in fact states:

> "Article 24. Proceedings of the bodies and entities of Public Power. All bodies, entities and agencies of Public Power will guide their actions by the principle of "govern by obeying," with regard to the mandates of the citizens and organizations of Popular Power, according to the provisions of the Constitution of the Republic and the laws."

As Popular Power organizations have no political autonomy, since their "spokespersons" are not democratically elected by universal, direct and secret ballot, but appointed by citizen assemblies controlled and operated by the governing party and the Executive Branch, who controls and guides the entire organizational process of the Communal State in the sphere of socialist ideology, there is no way there can be a spokesperson who is not a socialist,

[266] There is a similar regulation in article 62 of the Organic Law of the Communes, for the "establishment, development, and consolidation of the communes as a self-government form."

ultimately this "govern by obeying" principle is a limitation of the political autonomy of the elected bodies of the Constitutional State, such as the National Assembly, Governors and Legislative Councils of States, Mayors and Municipal Councils, upon whom there is ultimately imposed an obligation to obey any provision made by the National Government and the ruling party, framed exclusively within socialist concepts as a political doctrine. The will of the people, expressed in the election of representatives of the Constitutional State, therefore, has no value whatsoever, and the sovereignty has been confiscated from the people by transferring it to assemblies who do not represent them.

Third, in particular, an obligation is established for the Executive Branch "in accordance with the development and consolidation initiatives *originated* from Popular Power," to plan, articulate and coordinate "joint actions with social organizations, organized communities, communes and the aggregation and articulation systems that may arise among them, in order to maintain consistency with the strategies and policies at the national, regional, local, communal and community level" (Art. 25).

Fourth, an obligation is set for the agencies and entities of Public Power in their relationships with Popular Power, to give "preference to organized communities, the communes and the aggregation and articulation systems that may arise among them, according to the requirements the they formulate to satisfy their needs and exercise their rights under the terms and periods established by law" (Art. 29). It also provides that authorities of bodies, entities and agencies of Public Power, at their various territorial political levels, take "measures to ensure that socio-productive organizations of socio-communal property have priority and preference in government procurement processes for the acquisition of goods, services and execution of public works" (Art. 30)[267]

[267] In particular, Article 61 of the Organic Law of the Communes states that "all the bodies and entities of the Public Power committed to financing projects for the communes and its aggregation systems, will give priority over those aiming to promote communities with less relative development, so as to guarantee a balanced development.

Fifth, an obligation is established for the Republic, states and *municipalities*, in accordance with the law governing the process of transference and decentralization of powers and competences. The obligation of transferring "to organized communities, communes and aggregation systems that may arise among them: the management, administration, service control and execution of public works attributed to them in the Constitution of the Republic, to improve efficiency and results for the collective benefit" (Art. 27). [268] This legally voided the competences of states and municipalities, leaving empty structures with government representatives elected by the people, but no matters on which to rule.

Sixth, the Law establishes that agencies and grassroots organizations of Popular Power covered by the LOPP are exempt from any kind of payments of national taxes and registration fees, and for that purpose, laws and *ordinances* may be established in the respective states and municipalities, setting the exemptions provided herein for the instances and grassroots organizations of Popular Power (Art. 31).

FINAL REMARKS

With this Organic Law of Popular Power framework, there is no doubt about *the* political decision made in December 2010 by the completely delegitimized National Assembly that was elected in 2005, and that no longer represented the majority of the people's will expressed in the September 26, 2010 parliamentary elections to impose socialist policies upon Venezuelans, against the people's will and defrauding the Constitution. The political decision has been to impose in Venezuela a Socialist State model, called "the Communal State," conceived as a Socialist State in order to supposedly exercise Popular Power directly by the people, as an alleged form of direct exercise of sovereignty (which is not true because it is exercised

[268] The same rule is repeated in the Organic Law of the Communes (Art. 64). By December 31, 2010, the second discussion of the draft of organic law of the System of Competences and Power Transfer from the States and Municipalities to Popular Power organizations was still pending before the National Assembly.

through "spokespersons" who "represent" them and who are not elected by universal, direct and secret suffrage).

This Communal State has been established in parallel to the *Constitutional* Federal State (the Decentralized Federal Democratic and Social State of Law and Justice provided in the Constitution of 1999) established for the exercise of Public Power by people, both indirectly through elected representatives in universal, direct and secret elections, and directly, through mechanisms authorized in the Constitution, which include Citizens Assemblies.

This regulation, in parallel, of two States and two ways of exercising sovereignty, one, the Constitutional State governed by the Constitution and the other, the Communal or Socialist State governed by unconstitutional organic laws, has been arranged in such a way that the latter will act as the "killer tree," strangling the former, surrounding it in order to destroy it. That is why, in 2012, a Decree-Law has been enacted for the "Communitarian Management of Competences, Services and other attributions"[269] in order to regulate the process of transfer of powers, competences and resources, from the National Power and the political entities (States and Municipalities) to the organized people, who will assume *such* powers through Social Property Communal Enterprises. The result of the application of this Law will be the voiding of powers and competences of the Constitutional Federal State for the benefit of the Communal State.

This way, in addition to defrauding the Constitution, a technique that has been consistently applied by the authoritarian regime in Venezuela since *1999*, in order to impose its decisions beyond the frame of the Venezuelan Constitution,[270] now adding fraud against

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269 See *Oficial Gazette* No. 39954 of June 28, 2012

270 See on the 1999 constitutional making process: Allan R. Brewer-Carías, *Golpe de estado y proceso constituyente en Venezuela,* Universidad Nacional Autónoma de México, Mexico City 2002; "The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the development of an Authoritarian Political Regime," in Laura E. Miller (Editor), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington 2010, pp. 505-531; "Constitution Making in Defraudation of the Constitution and Authoritarian Government in

the will of the people, by imposing upon Venezuelans through organic laws, a State model for which nobody has voted and that radically and unconstitutionally changes the text of the 1999 Constitution, which has not been reformed as they had wished, and in open contradiction of the popular rejection that the majority expressed in the attempt to reform the Constitution in December 2007, even in violation of the Constitution, and the popular rejection that the majority of the people expressed regarding the policies of the President of the Republic and his National Assembly on the occasion of the parliamentary elections of September 26, 2010.

What is clear about all this is that there are no masks to deceive anyone, or whereby someone can purport to be deceived or fooled.

New York, December 2012

Defraudation of Democracy. The Recent Venezuelan Experience", in *Lateinamerika Analysen*, 19, 1/2008, GIGA, German Institute of Global and Area Studies, Institute of Latin American Studies, Hamburg 2008, pp. 119-142; *Reforma constitucional y fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009; and *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010. See also Alessandro Pace, "Muerte de una Constitución," in *Revista Española de Derecho Constitucional*, Año 19, No, 57, Madrid 1999, pp. 271-283.

Chapter VI

STATE OF EMERGENCY AND ITS CONSTITUTIONAL IMPLICATIONS (2018)

I. THE CONSTITUTION, ITS SUPREMACY AND THE MECHANISMS FOR ITS PROTECTION

The Venezuelan Constitution of 1999,[271] which, as every contemporary Constitution, follows the core principles for the organization of the State that are essential in modern constitutionalism, is deemed the Supreme Law of the Nation. For this purpose, Article 7 defines it as the "supreme law and the foundation of its legal system," to which "all persons and the bodies that exercise the Public Power" are subject[272], further establishing the constitutional duty for all citizens and officials to "observe and obey" the Constitution (Art. 131).

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271 See *Official Gazette* No. Extra 5.453 of March 24, 2000. The original text was published in *Official Gazette* No. 36.860 of December 30, 1999. See the comments about the Constitution of 1999, by Allan R. Brewer-Carías in *La Constitución de 1999,* Editorial Arte, Caracas 2000; and *La Constitución de 1999. Derecho Constitucional Venezolano*, Editorial Jurídica Venezolana, 2 volumes, Caracas 2004.

272 I proposed to the Assembly the express sanctioning of this constitutional principle. See Allan R. Brewer-Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente),* Tomo II, (9 septiembre-17 octubre 1999), Fundación de Derecho Público-Editorial Jurídica Venezolana, Caracas, 1999, p. 24.

Therefore, the Magna Carta, as supreme law, has among its essential functions the political integration of the Nation, the regulation of society and the organization of the State, the latter being subject to the three basic principles of the relationship between the main bodies of the Public Power (branches of government), defined by the Constitutional Chamber of the Supreme Court of Justice as follows:

> "In the first place, the *principle of competence*, which is an instrument that regulates the exercise of power once it has been legitimized; there follows the *principle of separation of powers*, whereby the Constitution assigns to various institutions the performance of certain public functions within a more or less specific objective sphere; and the third one is *the principle of legality*, an essential element of the Rule of Law and the democratic system. These principles, while fundamental to the Rule of Law, call for the distribution of functions among various bodies, subjecting their actions to preset rules, either as a means for interdiction of arbitrariness or as defense mechanism in attaining the State's purposes; but, at the same time and through the proper enforcement and righteous performance, they guarantee the objectives of political unity and peaceful coexistence."[273]

The Constitution, being the supreme law of the Nation, is therefore at the cusp of the legal system, wherefore its rules prevail over all others contained therein, being directly enforceable over the State's officials, inhabitants and citizens, and mandatory for all.

The guaranty of said supremacy of the Constitution is achieved based on three fundamental principles: in the first place, the Constitution has, by itself, a derogatory power regarding all the rules preceding its coming into effect to the extent they are contrary to its provisions; second, all decisions issued by State bodies after its effective date that are contrary to its tenets are deemed null and void (objective guarantee); third, the Constitution has the nature of a

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[273] Regarding these functions of the Constitution, see Decision No. 23 by Constitutional Chamber of the Supreme Court of Justice dated January 22, 2003 Case: *Interpretación del artículo 71 de la Constitución*), in *Revista de Derecho Público*, No. 93-96, Editorial Jurídica Venezolana, Caracas 2003.

source of interpretation for the entire legal system according to its rules; and fourth, the Constitution is subject to the principle of rigidity in the sense that its text cannot be changed by the ordinary mechanisms used for creating laws, and can only be modified by the constitutional review procedures (derived constitutional power) expressly foreseen by the Constitution with the people's participation, reserving to the people the original constitutional power (constitutional amendment, constitutional reform, national constituent assembly: Arts 340-349).

Finally, the supremacy implies that the constitutional rules, both those relating to the organization and functioning of the State, and those pertaining to constitutional guaranties and fundamental rights, have permanent effect, and it is a duty and commitment not only of public officials but of all citizens, to guarantee its enforcement, so if the Constitution should cease to be observed by an act of force or were derogated by means other than those provided therein, all citizens, whether vested or not with authority, have the "duty to cooperate in the restoration of its full force and effect." This is expressly provided in Article 333 of the Constitution, establishing Article 350 of the Constitution, a further guaranty providing for the right of the people to repudiate "any regime, legislation or authority that goes against the democratic values, principles and guaranties or impairs the human rights" set forth in the Constitution.

Additionally, in order to ensure its permanent effect, a specific title was added to the Constitution regarding "the protection of this Constitution," (Title VIII), divided into two Chapters.

The first Chapter regulates the "guarantee of the Constitution" through judicial protection mechanisms, setting forth a mixed system for constitutional control (*judicial review*). This system is regulated, first, in Article 334, which established the so-called diffuse method for judicial review by assigning to "all judges of the Republic, within the scope of their jurisdiction, the power and obligation to guarantee the integrity of this Constitution," providing that:

> "In the event of incompatibility between this Constitution and a law or other legal provision, the provisions of the Constitution shall prevail, and the courts shall rule accordingly in any case, even ex officio."[274]

Second, establishing in the same article, the so-called concentrated method for judicial review, assigning to the Constitutional Chamber of the Supreme Court of Justice the exclusive power or competence to exercise "Constitutional Jurisdiction," in order to:

> "void laws and other decisions of bodies exercising the Public Power issued in direct and immediate enforcement of the Constitution, or having the rank of law, whenever they collide with the former."

As to the Second Chapter of the Title on the "Protection of the Constitution," the same is designed to regulate the "states of exception," in order to ensure the effective force of the constitutional text even under exceptional circumstances that may give rise to special situations that seriously affect the security of the Nation, the institutions and persons, and which call for the adoption of political and constitutional measures to confront them.

The purpose of these notes is precisely to analyze the constitutional implications of said states of exception conceived in the Constitution in order to protect it.

II. STATES OF EXCEPTION IN THE CONSTITUTION

Article 337 of the Constitution expressly defines states of exception as:

> "circumstances of a social, economic, political, natural or ecological nature that seriously affect the security of the Nation, institutions and citizens, in the face of which the powers available to cope with such events are insufficient."

In order to regulate these exceptional situations or circumstances that cannot be dealt with through the institutional mechanisms foreseen for normal circumstances, the Constitution itself, for its protection, provided in its Article 338 that an organic law should be

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[274] In this same regard, see Article 20 of the Code of Civil Procedure and Article 19 of the Organic Code of Criminal Procedure.

enacted to further determine the measures that may be adopted on the basis thereof. Accordingly, in 2001, the Organic Law on States of Exception (OL)[275] was enacted for the purpose not only of regulating the various forms of states of exception, but also to establish provisions regarding the "exercising of fundamental rights that could be restricted in order to restore normalcy within the shortest time

[275] See in *Official Gazette* No. 37.261 de 15-08-2001. See, in general, about states of exception in the Constitution: Jesús M. Casal H., "Los estados de excepción en la Constitución de 1999", in *Revista de Derecho Constitucional,* No. 1 (septiembre-diciembre), Editorial Sherwood, Caracas, 1999, pp. 45-54; María de los Ángeles Delfino, "El desarrollo de los estados de excepción en las Constituciones de América Latina," in *Constitución y Constitucionalismo Hoy*. Editorial Ex Libris, Caracas, 2000, pp. 507-532; Allan R. Brewer-Carías, "Comentarios al régimen constitucional y legal de los decretos de estados de excepción," in Víctor Bazan (Coordinador), *Derecho Público Contemporáneo. Libro en Reconocimiento al Dr German Bidart Campos***,** Ediar, Buenos Aires, 2003, pp.1137-1149; Salvador Leal W., "Los estados de excepción en la Constitución", in *Revista del Tribunal Supremo de Justicia*, No. 8, Caracas, 2003, pp. 335-359. More recently, see the works on states of exception and their constitutional and legal regime, published in *Revista de derecho público*, No. 143-144, julio-diciembre 2015, Editorial Jurídica Venezolana, Caracas 2016, by Carlos García Soto**, "***Notas sobre el ámbito y requisitos de; estado de excepción*," pp. 9-12; Manuel Rojas Pérez, "*Suspensión de garantías, cierre de frontera y desviación de poder*," pp. 13-16; Allan R. Brewer-Carías, **"***La masacre de la Constitución y la aniquilación de las garantías de los derechos fundamentales*," pp. 17-50; Gabriel Sira Santana**, "***La restricción de garantías y el estado de excepción en la frontera colombo-venezolana*," pp. 51-78; Luis Alfonso Herrera Orellana, **"***¿Estado de excepción o ley habilitante*?," pp. 79-86; Jorge Luis Suárez, *"El verdadero sentido de los poderes de gobierno bajo estado de excepción: Recuerdos de un fallo de la Corte Suprema de Justicia y de un Estado que ya no existe*,"pp. 87-102; Mauricio Rafael Pernía-Reyes, **"***De los actos sublegales dictados con ocasión de la declaratoria de estados de excepción en Venezuela en el año 2015*," pp. 103-107; Antonio Silva Aranguren, "*El Tribunal Supremo de Justicia y los decretos de estado de excepción de 2015: Ningún control y numerosos excesos*," pp. 109-118; Alberto Blanco-Uribe Quintero, "*El Código Orgánico Tributario de 2014... Un Estado de excepción permanente,*" pp. 119-129; José Ignacio Hernández G., "*Integridad electoral y estado de excepción en Venezuela,* pp. 130-133; Eglée González Lobato, "*Decretos de estados de excepción y su impacto en las parlamentarias del 6D-2015,"* pp. 134-146.

possible (Art. 1, OL). For such purpose, the Law further provides that the measures to be adopted in such states of exception should be framed within principles of logicality, rationality, reasonableness and proportionality, which are set as a limit for exercising of the exceptional powers of emergency.

To define the states of exception, the Organic Law characterized them as "*circumstances* of a social, economic, political, natural or ecological nature that seriously affect the security of the Nation, its citizens or its institutions," setting forth as a general principle that: (i) "they may only be decreed in extremely serious objective situations that render insufficient the normal means available for the State to confront them (Art. 2, OL); (ii) they may only be decreed in cases of "strict necessity to settle the abnormal situation" (Art. 6, OL); (iii) the "measures of exception" to be issued "must be proportionate to the situation that is to be coped with as regards the severity, nature and sphere of application thereof" (Art. 4, OL); and (iv) such measures must also "be valid for a limited term according to the demands of the situation that is sought to be confronted, without losing their exceptional or non-permanent" nature (Art. 5, OL).

What should be noted with respect to the declaration of the state of exception and its relationship with the Constitution is that, as expressly set forth in its text, in no event does the state of exception interrupt the functioning of the bodies of the Public Power (branches of government) (Art. 339 C.) nor their constitutional competences, as confirmed in the respective Organic Law (Art. 3, OL); and, furthermore, that in no event will a case of exception modify the principle of the responsibility of the President of the Republic, nor that of the Executive Vice-President or Ministers, under the Constitution and the Law (Art. 232 C.).

III. THE VARIOUS KINDS OF STATES OF EXCEPTION

The Constitution, in its Article 388, lists the following four specific kinds of states of exception: the state of alarm, the state of economic emergency, the state of internal commotion and the state of external commotion, which are also regulated in Articles 8 through 14 of the Organic Law.

1. State of alarm

According to Article 338 of the Constitution and Article 8 of the Organic Law, the state of alarm may be decreed in all or part of the national territory whenever there occur catastrophes, public calamities or other similar events that seriously endanger the security of the Nation or its citizens, and its institutions (Art. 8, OL).

The state of exception can only last for thirty days and may be extended for another thirty days as of the date of its promulgation.

2. State of economic emergency

The state of economic emergency may be decreed in all or part of the national territory when there arise extraordinary economic circumstances that seriously affect the economic life of the Nation (Art. 338 C; Art. 10 OL).

It cannot last more than sixty days, with a possible extension for an equal term.

3. State of internal commotion

A state of internal commotion may be also decreed in the event of an internal conflict that seriously endangers the security of the Nation, its citizens or its institutions (Art. 338 C; Art. 13 OL).

According to Article 13 of the Organic Law, the following, among others, are causes for declaring a state of internal commotion: all exceptional circumstances that imply major disruptions of the internal public order and pose an evident or imminent danger for the stability of institutions, the citizens' coexistence, public safety, the maintenance of a free and democratic order, or when there is disruption in the functioning of the Public Powers (branches of government).

In this case, the term may be of up to ninety days, with a possible extension for an equal term.

4. State of external commotion

A state of external commotion may be decreed in the event of an external conflict that seriously endangers the security of the Nation,

its citizens or its institutions (Art. 338 C; 14 OL), including situations that imply a threat to the Nation, the integrity of the territory or the sovereignty (Art. 14 OL).

The state of external commotion also cannot exceed ninety days, and may be extended for an equal term.

IV. THE DECLARATION OF THE STATE OF EXCEPTION AS AN ACT OF STATE

1. The declaration of a state of exception as an act of the government

Under the exceptional circumstances referred to above, the President of the Republic, in Council of Ministers, has the power to decree the states of exception, directly exercising the competences (function of government) set forth in the Constitution (Art. 337 C.),[276] such decree having the "rank and force of Law," as provided in Article 22 of the Organic Law.

2. Term and publication

Having the rank and value of law, a decree of state of exception, as any other law, can only become effective upon its publication in the *Official Gazette* of the Republic. According to Article 215 of the Constitution, any law only becomes effective when it is published with its pertinent statement of "to be enforced" in the *Official Gazette*, and according to Article 1 of the Civil Code the "Law is mandatory *as of its publication* in the Official Gazette" or as of the subsequent date set forth therein (Art. 1).

However, it is noted that Article 22 of the Organic Law, contrary to what is stated in the Constitution, provides that the decree of state of exception "becomes effective upon being issued by the President

[276] See Allan R. Brewer-Carías, *Reflexiones sobre el constitucionalismo en América,* Editorial Jurídica Venezolana, Caracas, 2001, pp. 201 et seq.; and Allan R. Brewer-Carías, "Los actos ejecutivos en la Constitución venezolana de 1999 y su control judicial," in *Acto Administrativo y Reglamento. Jornadas Organizadas por la Universidad Austral, Facultad de Derecho*, 30-31 mayo y 1º junio 2001, Ediciones RAP S.A., Argentina 2002, pp. 531-579.

of the Republic, in Council of Ministers," adding that "it should be published in the *Official Gazette* and announced in all the social media as soon as possible." This legal provision is without doubt unconstitutional, no Decree that has the rank and force of law can become effective prior to its publication, that is, from the moment the President of the Republic issues it.

Consequently, the decree of a state of exception can only become effective upon its publication in the *Official Gazette*, this requirement of publication and effect not being a mere additional formality for diffusion, as apparently inferred by the text of Article 22 of the Organic Law.

3. Adjustment to the provisions of international instruments pertaining to human rights

Additionally, the decree on the state of exception, as required by the Constitution itself, must be in line with the requirements, principles and guaranties set forth in the International Covenant on Civil and Political Rights and in the American Convention on Human Rights (Art. 339 C).

Pursuant to Article 4 of the International Covenant on Civil and Political Rights, the provisions adopted in the state of exception can affect the obligations assumed (by the States) by virtue of said Covenant, and "suspend" the applicability of particular provisions thereof to the extent required by the situation; and the measures adopted cannot be "incompatible with the other obligations imposed by international law or imply any discrimination solely based on race, color, sex, language, religion or social background." The same is provided in Article 27 of the American Convention on Human Rights.

Additionally, the International Covenant requires that all States "that use the right of suspension" of some provisions of the Covenant must immediately give notice to all the other Member States, through the Secretary General of the United Nations, "of the provisions whose enforcement has been suspended and the reasons for such suspension." They must also notify the date "on which the suspension is to be terminated" (Art. 4.3). The American Convention contains a similar provision for giving notice to the Member States of the

Convention, through the Secretary General of the Organization of American States (Art. 27.3).

4. Extension of the Decree

Finally, the Organic Law provides that the President of the Republic may request the National Assembly to extend the Decree for a similar term, and the Assembly shall have the responsibility to approve or deny said extension (Art. 338).

The decree of state of exception may be revoked in any case by the Executive Branch of the Government, or by the National Assembly or its Delegate Committee, before completion of the term set, once the causes that gave rise to it cease.

V. MEASURES THAT MAY BE ADOPTED BY VIRTUE OF A STATE OF EXCEPTION

1. General system for the measures that may be issued

According to Article 15 of the Organic Law, the President of the Republic, in Council of Ministers, has the following powers with regard to states of exception:

> "a) To issue all the measures it deems convenient under circumstances that seriously endanger the security of the Nation, its citizens or institutions, in accordance with Articles 337, 338 and 339 of the Constitution of the Bolivarian Republic of Venezuela.
>
> b) To issue social, economic, political or ecological measures whenever the ordinary powers of the agencies of the Public Power are not sufficient to confront such events."

Additionally, specifically regarding a decree of economic state of emergency, according to Article 11 of the Organic Law, the decree may provide "timely measures to satisfactorily solve the abnormality or crisis and prevent the propagation of its effects."

Also, in the specific case of a decree of state of external commotion, it may take "all measures deemed advisable in order to defend and safeguard the interests, the national goals and the survival of the Republic" (Art. 14).

In any event, upon decreeing the state of exception, the President of the Republic may delegate the enforcement thereof, in whole or in part, to governors, mayors, garrison commanders or any other duly appointed authority designated by the Executive Branch of the Government (Art. 16).

With regard to the "measures," which generally have a regulatory content, one should bear in mind that the Organic Law of the Public Administration sets forth a precise mechanism for citizen participation by regulating the mandatory consultation procedure for organized communities and non-state political organizations regarding preliminary drafts of legal or regulatory rules that the President of the Republic intends to issue (Arts. 135, 136). Essentially, a decree of state of exception, as stated below, may contain a legal regulation pertaining to the exercising of the right whose guarantee is limited thereby, wherefore this consultation is mandatory in the sphere of decrees of states of exception.

However, in the case of decrees of states of exception, the mandatory consultation to promote citizen participation could not be conducted before, but after the issuance of the decree. In fact, Article 137 of the Organic Law of the Public Administration provides that "in cases of manifest emergency and by force of the State's obligation regarding the security and protection of society," the President of the Republic may issue decrees that have a regulatory content without prior consultation; but in any event, it is obliged to thereafter consult the organized communities and non-state public organizations "using the same procedure" set for public consultations, and shall be obliged to take the outcome of the consultation into consideration.

2. The possibility of restricting constitutional "guaranties" and its limitations

Article 337 of the Constitution provides that in cases in which states of exception are decreed, the President of the Republic, in Council of Ministers, may also temporarily restrict the constitutional guaranties of fundamental rights declared in the Constitution.

This is the only case according to the Constitution of 1999 in which the President may "restrict" the constitutional guaranties of

fundamental rights (Art. 236.7), there having disappeared from the constitutional system the possibility to "suspend" such guaranties, as was authorized in the Constitution of 1961 (Art. 241). On the other hand, according to the 1999 Constitution, what can be decreed are only "restrictions" regarding the "guaranties" of fundamental rights, it not being possible to restrict the fundamental rights themselves. On the contrary, Articles 190.6 and 241of the previous 1961 Constitution authorized otherwise, which gave rise to numerous institutional abuses.[277]

Regarding this restriction of constitutional guaranties of fundamental rights that can be included in the decree of state of exception,[278] which always must be of "temporary" nature, Article 6 of the Organic Law provides as follows:

> "*Article 6*: The decree declaring states of exception shall be issued in a case of strict necessity to solve the abnormal situation, broadening the powers of the Executive Branch of the Government with the temporary restriction of the constitutional guaranties allowed and with the enforcement, monitoring, supervision and inspection of the measures adopted according to law. The President of the Republic, in Council of Ministers, may ratify the measures that do not imply the restriction of a constitutional guaranty of rights. Said decree would be subject to the controls set forth in this Law."

3. Constitutional guaranties that cannot be restricted

According to Article 337 of the Constitution, however, not all constitutional guaranties of fundamental rights may be restricted, expressly excluding the restriction of the guaranties:

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277 See Allan R. Brewer-Carías, "Consideraciones sobre la suspensión o restricción de las garantías constitucionales," in *Revista de Derecho Público,* No. 37, Editorial Jurídica Venezolana, Caracas, 1989, pp. 5 et seq.

278 Regarding the importance and conceptual scope of the "restriction of constitutional guarantees," see Alfonso Rivas Quintero, *Derecho Constitucional,* Valencia 2002, pp. 590 et seq.

> "that refer to the right to life, the prohibition of solitary confinement or torture, the right to due process, the right to information and the other intangible human rights."

Therefore, this provision states that, in addition to the guaranties of the specific rights listed (the right to life, prohibition of solitary confinement or torture, the right to due process, the right to information) that cannot be restricted (regulated in Articles 43; 43.2; 46.1; 49 and 58 of the Constitution), also the guaranties of "other intangible human rights" cannot be restricted, which are enumerated in the International Covenant on Civil and Political Rights (Art. 4), and in the American Convention on Human Rights (Art. 27). These are the guarantee of equality and non-discrimination; the guarantee of not being sentenced to prison for contractual obligations; the guarantee of non-retroactivity of law; the right to a name; religious freedom; the guarantee of freedom from slavery or servitude; the guaranty of personal integrity; the principle of legality; the protection of the family; the rights of children; the guarantee of non-arbitrary deprivation of nationality and the exercise of political rights, suffrage and access to public office.[279]

As a result, thereof, Article 7 of the Organic Law precisely broadens the Constitution's list of guaranties that cannot be restricted, setting forth that:

> "According to the provisions of Articles 339 of the Constitution of the Bolivarian Republic of Venezuela, 4.2 of the International Covenant on Civil and Political Rights and 27.2 of the American Convention on Human Rights, the guaranties of the following rights cannot be restricted: 1. Life; 2. The acknowledgment of legal standing; 3. The protection of the family; 4) Equality under law; 5. Nationality; 6. Personal liberty and the prohibition of forced disappearance of persons; 7. Physical, psychic and moral personal integrity; 8. Not being subject to slavery or servitude; 9. Freedom of thought, conscience and religion; 10. The legality and non-retroactivity of laws, especially criminal laws; 11. Due process; 12. The right to constitutional protection; 13. The right to participate, vote and hold public office; 14. The right to information."

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279 See Allan R. Brewer-Carías, *La Constitución de 1999, cit.,* (2000), pp. 236 y 237.

Unfortunately, in this listing, the Organic Law omitted "the prohibition of solitary confinement or torture" provided by Article 337 of the Constitution; the guarantee of not being sentenced to prison for contractual obligations; and the rights of children, set forth in the abovementioned International Conventions, which have a constitutional rank (Art. 23).

4. The obligation to regulate the exercising of the restricted guaranties.

One of the most important provisions of the 1999 Constitution on these matters is that it expressly requires that whenever a decree of a state of exception restricts any constitutional guarantee of fundamental rights, it is mandatorily for the decree to "regulate the exercise of the right whose guarantee is being restricted" (Art. 339).

That is, it is not possible for the Executive decree to purely and simply "restrict" a constitutional guarantee, but rather it is indispensable that the text of the decree specifically regulate, by means of rules, the exercising of the right whose guarantee is being restricted. For example, if the freedom of transit is being restricted, the same restrictive decree must therefore have a normative content, it must specify the scope of the restriction, setting forth, for example, the prohibition to circulate at certain times (curfew), or on certain vehicles or through certain areas.[280]

However, the Organic Law unfortunately did not elaborate on this constitutional requirement, -perhaps the most important one regarding the restriction of constitutional guaranties-, not giving meaning by means of legal provisions to those of Article 21 of the Organic Law, which set forth that:

> *"Article 21*: The decree declaring the state of exception temporarily suspends the articles of the current law that are not compatible with the measures of the decree."

In order for this temporary "suspension" of legal rules to be possible, it is obviously necessary and indispensable that the decree

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[280] See Allan R. Brewer-Carías, "Foreword," of the book by Daniel Zovatto, "Los estados de excepción y los derechos humanos en América Latina," cit., pp. 24 ss.

establish the pertinent substituting regulations that will temporarily govern the exercise of the rights during the state of exception.

5. Military mobilization measures

According to Article 23 of the Organic Law, upon decreeing the state of exception, the President of the Republic, in its capacity as Commander in Chief of the National Armed Forces, can also order the mobilization of any unit or the entire National Armed Forces, subject to the provisions set for this purpose in the respective law.

6. Measures restricting property (requisitions)

Additionally, due to the decree of state of exception, according to Article 24 of the Organic Law, the Executive Branch has the power to requisition (seize) real and personal property that must be used in order to restore normalcy.[281]

In these cases, in order for any requisition to be enforced, it is indispensable to have a prior written order by the President of the Republic or the competent authority designated for such purpose, setting forth the class, amount of the consideration, and the immediate evidence thereof to be issued.

In any event, once the state of exception ceases, the requisitioned property must be restored to its legitimate owners, in an "as is" condition, without impairment to the indemnification due for the use and enjoyment of such property. If the requisitioned property cannot be restored, or consists of consumable or perishable goods, the Republic must pay the full value of such property, calculated on the basis of its price at the time of the requisition (Art. 25 OL).

7. Measures pertaining to essential goods and public services

Furthermore, the decree of state of exception may also limit or ration the use of services or the consumption of essential goods, take

[281] On requisitions, see Allan R. Brewer-Carías, "Adquisición de propiedad privada por parte del Estado en el Derecho Venezolano" in Allan R. Brewer-Carías, *Jurisprudencia de la Corte Suprema 1930-1974* y *Estudios de Derecho Administrativo,* Tomo VI, Caracas, 1979, pp. 24 y 33.

the measures needed to ensure the supply to markets and the operation of services or utilities and production centers (Art. 19 OL).

8. Budgetary measures regarding public expenditures

According to Article 20 of the Organic Law, upon decreeing the state of exception, the Executive Branch may make disbursements charged against the National Treasury that are not included in the Budget Law and issue any other measure it deems necessary for the return to normalcy, based on the Constitution and the Law.

This way, it was purported to establish an exception to the constitutional principle in Article 314 of the Constitution that, to the contrary, strictly provides –without a possibility of exception- "not making any kind of expenses that have not been foreseen in the Budget Law."

Consequently, this exception in Article 20 of the Organic Law is without doubt unconstitutional, because the Constitution in no way authorizes making expenses or disbursements that are not contemplated in the Budget Law, except through the mechanism of "additional credits" authorized by Article 314 of the Constitution itself.

9. Legal effects of states of exception vis-à-vis the citizens: the obligation to cooperate

As stated above, the decree of state of exception has the rank and value of law, wherefore its provisions have the same binding value as the laws for all citizens.

Additionally, according to Article 17 of the Organic Law, all individuals and legal entities, public or private, have the obligation to cooperate with the competent authorities in the protection of persons, property and places, and they may be obliged to perform extraordinary services according to the term or nature thereof, with the respective indemnification, as the case may be.

The failure or refusal to perform this obligation to cooperate under Article 18 of the Organic Law "shall be penalized according to the provisions of the respective laws," even including criminal penalties for contempt of authority, for example.

In any event, if officials perpetrated these actions, they may be immediately removed from office and their hierarchical superior notified for the purpose of applying a timely disciplinary measure. Regarding authorities elected by popular vote, Article 18 only provides "proceeding according to the provisions of the Constitution and the laws thereof." However, the only provision in the Constitution regulating this matter is the recall referendum. (Art. 72).

VI. JUDICIAL CONTROL OF THE CONSTITUTIONALITY OF STATE OF EXCEPTION DECREES

According to Article 339, the decree of state of exception must be submitted within eight days of it being issued to the National Assembly or Delegate Committee, for consideration and approval, and to the Constitutional Chamber of the Supreme Court of Justice, for it to decide on the constitutionality thereof (Art. 336.6).[282]

This is a dual general control in parallel, one in the political-parliamentary sphere, and the other, in the constitutional judicial sphere, developed by the Organic Law setting particular rules regarding the control by the Constitutional Chamber of the Supreme Court, including by the judges in charge of constitutional protection, and by the National Assembly.

Regarding the judicial control of the constitutionality of decrees of states of exception, Article 366.6 of the Constitution assigns competence to the Constitutional Chamber of the Supreme Court to "review in any case, even *ex officio*, the constitutionality of the decrees declaring states of exception issued by the President of the Republic." This is an automatic and mandatory constitutional control that the Chamber may exercise even *ex officio*.[283]

The Organic Law develops the exercising of this control by setting forth various regulations that should be noted.

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[282] See Allan R. Brewer-Carías, *Reflexiones sobre el constitucionalismo en América, op. cit.,* p. 279.

[283] See Allan R. Brewer-Carías, *El sistema de justicia constitucional en la Constitución de 1999 (Comentarios sobre su desarrollo jurisprudencial y su explicación, a veces errada, en la Exposición de Motivos),* Editorial Jurídica Venezolana, Caracas 2000.

1. Submit the decree to the Constitutional Chamber

According to Article 31 of the Organic Law, the decree declaring the state of exception, its extension or the increase of the number of guaranties restricted, must be sent by the President of the Republic within eight calendar days after the issuance thereof to the Constitutional Chamber of the Supreme Court of Justice, for it to decide on its constitutionality. Within the same term, the Chairman of the National Assembly must send to the Constitutional Chamber the Resolution whereby it approves or rejects the state of exception.

If the President of the Republic or the Chairman of the National Assembly, as the case may be, should fail to comply with the mandate set in this rule within the term set, the Constitutional Chamber of the Supreme Tribunal of Justice shall decide *ex officio* (Art. 31). Obviously, this is not the only case in which the Constitutional Chamber may review the decree *ex officio*, for it can do this from the moment the same is issued and published in the Official Gazette, not only at the end of the term set nor only if the decree is not officially sent to it.

It should be noted that by providing this automatic and mandatory system for constitutional control, once the same is done by the Constitutional Chamber and for example, it declares that the decree is constitutional, then no action for unconstitutionality against the decree could be filed, for this would be contrary to the constitutional principle of *res judicata*.

Additionally, it should be noted that Article 33 of the Organic Law provides the following:

> "Article 33: The Constitutional Chamber of the Supreme Court of Justice shall omit any decision if the National Assembly or the Delegate Committee rejects the decree of state of exception or the extension and declare the extinguishment of the matter."

As we have explained since 2003, this provision undoubtedly may be deemed unconstitutional because it sets a limitation on the Chamber's exercise of its powers of judicial review, which is not

authorized in the Constitution.[284] The review of the decree of state of exception, even *ex officio*, may be conducted by the Constitutional Chamber, regardless of the rejection of approval by the National Assembly, moreover if the decree has caused effects by entering into force "immediately," as provided in the Organic Law, even before it has been published.[285]

2. Reasons for judicial review on constitutionality

The Constitutional Chamber has competence to review the constitutionality of decrees of states of exception, particularly, for example, to determine whether their issuance has satisfied the requirements set in the Constitution (formal constitutionality) and in the Organic Law; and further ensuring that the decree does not breach constitutional regulations nor those set in the Organic Law. Furthermore, in our view, the reasons for unconstitutionality that must be considered by the Chamber should be able to be alleged by parties interested in the constitutionality of the decree.

Regarding the reasons for unconstitutionality that should be weighed by the Constitutional Chamber, it should be noted that the Chamber must make sure that the decree of state of exception restricting a constitutional guarantee effectively regulates "the exercise of the right whose guarantee is being restricted" (Art. 339); that is, it should review and verify that the decree has the necessary regulatory content regarding the restrictions for exercising the relevant constitutional right.

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[284] See in Allan R. Brewer-Carías, "Comentarios al régimen constitucional y legal de los decretos de estados de excepción," in Víctor Bazan (Coordinador), *Derecho Público Contemporáneo. Libro en Reconocimiento al Dr German Bidart Campos***,** Ediar, Buenos Aires, 2003, pp.1137-1149.

[285] By decision No. 7 of February 11, 2016, the Constitutional Chamber deemed this rule unconstitutional, rejecting its enforcement through the diffuse control of constitutionality. See http://historico.tsj.gob.ve/decisiones/scon/febrero/184885-07-11216-2016-16-0117.HTML. See comments on this decision in Allan R. Brewer-Carías, "El desconocimiento judicial de los poderes de control político de la Asamblea Nacional," in *Revista de Derecho Público*, No. 145-146, enero-junio 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 349-369

As stated before, the basic principle of the constitutional regulation of fundamental rights and freedoms in Venezuela, that is, the true "guarantee" thereof, lies in the reservation established in favor of the legislature in order to limit or restrict such rights. Limitations to rights and freedoms declared in the Constitution can only be established by law. However, the Constitution itself admits the possibility that constitutional guaranties be restricted in exceptional circumstances by decision of the President of the Republic in Council of Ministers, which means that during the effective term of the restrictions, the guaranties of the rights and freedoms must be regulated by executive action.

For this reason, the main consequence of a decree of exception that calls for the restriction of constitutional guaranties is the Executive Branch's obligation to regulate the exercising of the right, assuming competences that would normally pertain to Congress. If the essence for the limitation and regulation of a constitutional guarantee is the legal reservation, in the case of restriction of a constitutional guarantee, this implies a restriction of the legislature's monopoly to regulate or limit the rights, and the consequential broadening of the powers of the Executive Branch to regulate and limit said constitutional guaranties by way of decree.[286]

Evidently, as the Constitution itself sets clear, the decree of a state of exception (and the eventual restriction of guaranties) "does not interrupt the functioning of the bodies of the Public Power" (Art. 339); that is to say, although it broadens the regulatory competences of the Executive Branch, it does not prevent, for instance, nor affect the ordinary legislative competences of Congress.

3. Principles of the Proceeding and of the participation of interested parties

According to Article 32 of the Organic Law, the Constitutional Chamber of the Supreme Court must decide on the constitutional review of the decree of state of exception within a term of 10 calendar days after the communication is given by the President of the

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[286] See Allan R. Brewer-Carías, *Las garantías constitucionales de los derechos del hombre,* Caracas, 1976, pp. 33, 40 y 41.

Republic or the Chairman of the National Assembly, or upon expiration of the term of 8 calendar days provided for in the Law.

If the Constitutional Chamber does not decide within said term, according to Article 32 of the Organic Law, the Justices of said Chamber will "incur disciplinary liability, and may be removed from office according to the provisions of Article 265 of the Constitution." This was the first condition of a "serious fault" for removal of Justices of the Supreme Court set forth in the legislation by the National Assembly.

During the proceeding, for which all days and hours are deemed to be court business hours (Art. 39 OL), the interested parties may, within the first five days of the term for the Constitutional Chamber to decide, submit the allegations and elements that evidence the constitutionality or unconstitutionality of the decree declaring the state of exception, agreeing on the extension thereof or increasing the number of guaranties restricted.

The article, however, does not define who may be deemed to be "interested parties," wherefore it should be understood that since it is decision on the constitutionality of a decree having the "rank and value of law," it should be treated as an action open to the people, that is, it suffices to allege a simple interest in the constitutionality of the matter in order to be deemed an interested party.

In any event, the Constitutional Chamber of the Supreme Tribunal of Justice, within the next two days, must admit the allegations and elements of proof that are pertinent and dismiss those which are not. The Organic Law further provides that "no appeal shall be admitted" against this decision, but this is superfluous because in constitutional law, all decisions issued by the Constitutional Chamber are final and not subject to appeal.

The Constitutional Chamber of the Supreme Tribunal of Justice must decide within three calendar days following that on which it has admitted the allegations and evidence submitted by the interested parties (Art. 36). In its decision, according to Article 37 of the Organic Law:

> *Article 37*: The Constitutional Chamber of the Supreme Tribunal of Justice shall declare the total or partial nullity of the decree declaring a state of exception, the extension thereof or

increase in the number of guaranties restricted, whenever such decree does not comply with the principles of the Constitution, international treaties on human rights and this Law.

Regarding the term of the effects of the decision by the Constitutional Chamber, the Organic Law expressly provides that its effects are *ex tunc*, stating that:

> *"Article 38*: The decision on the nullity of the decree shall have retroactive effects, and the Constitutional Chamber of the Supreme Tribunal of Justice must immediately restore the infringed general juridical situation by voiding all decisions issued under the decree that declared the state of exception, its extension or increase of the number of constitutional guaranties restricted, without impairment to the private parties' right to request the restoration of their individual juridical situation and to exercise all actions available. This decision shall be published in full in the *Official Gazette* of the Bolivarian Republic of Venezuela.

4. Control by other courts through proceedings for constitutional protection (amparo)

According to Article 27 of the Constitution, the right to constitutional protection "in no way may be affected by a decree of state of exception or the restriction of constitutional guaranties," tacitly abrogating the provision of the article in the 1988 Organic Law regarding the *Amparo* or protection of Constitutional Rights and Guaranties, which restricted the exercising of an action for constitutional protection in situations where the constitutional guaranties were restricted.[287] For this reason, the Organic Law itself lists the constitutional protection ("*amparo*") among the guaranties that cannot be restricted (Art. 7.12).

Consequently, Article 40 of the Organic Law provides that:

> *Article 40*: All judges of the Republic, within the sphere of their competence for constitutional protection or *amparo*, are

[287] See Allan R. Brewer-Carías, "El amparo a los derechos y la suspensión o restricción de garantías constitucionales", *El Nacional,* Caracas, 14-4-89, p. A-4.

empowered to control the justification and proportionality of the measures adopted based on a state of exception.

However, this rule may be deemed inconveniently restrictive, for it could seem that constitutional protection judges would be able to exercise their full protection powers against the breaches of constitutional rights and guaranties in these situations of states of exception only with regard to aspects pertaining to the justification and proportionality of the measures adopted by reason thereof.

VII. PARLIAMENTARY POLITICAL CONTROL REGARDING DECREES OF STATES OF EXCEPTION AND THE NEUTRALIZING THEREOF IN CONSTITUTIONAL PRACTICE

1. Submitting the decree of state of exception to the consideration of the National Assembly for its approval or disapproval

As stated above, according to the Constitution, the decree of state of exception must be sent by the President of the Republic to the National Assembly, within eight calendar days after it has issued it, for the latter's consideration and approval or disapproval.

Decrees requesting the extension of a state of exception or an increase of the restricted guaranties should be submitted to the National Assembly within this same term.

If the President of the Republic fails to comply with this mandate within the term set, the National Assembly must decide *ex officio* (Art. 26).

The decree of state of exception, and the request for extension thereof or increase of the number of guaranties restricted, must be submitted to the National Assembly for its approval or disapproval, and this must be decided by the absolute majority of the representatives present in the special session to be held, without prior call therefor, within 48 hours after the decree has been announced to the public (Art. 27). The matter of publicity, again, must be related to the publication of the decree in the *Official Gazette*.

Regarding this power of the Assembly, when exercising political control over decrees of states of exception, the Constitutional

Chamber of the Supreme Tribunal, in Decision No. 7 of February 11, 2016, deciding on an action for interpretation of the constitutional provisions pertaining to states of exception,[288] recognized that, although the Constitution did not expressly set forth that the National Assembly, when exercising political control over decrees of state of exception, could disapprove them, according to "pure juridical logic, the express reference to the approval in the 1999 Constitution is coupled with the possibility to do otherwise, that is, to disapprove, as acknowledged by this Chamber."

The Chamber further added that "the approval or disapproval of the decree of state of exception by the National Assembly affects it from a political control standpoint and, consequently, conditions it politically, but not from a juridical-constitutional standpoint," which doubtlessly pertains to the Constitutional Chamber, without the former political control invalidating the latter, for even if it is prior, it is no longer valid.

However, in the referred decision, the Constitutional Chamber, with no grounds, affirmed that the "political control of the National Assembly over decrees of state of exception does not affect their legitimacy, validity, legal force and effect." If it does not affect them, it would then be truly useless to establish the political control, which is not limited to the sole possibility for the Assembly to repeal the extension of the decree of state of exception before expiration of the term set, once the causes for the decree have ceased. This interpretation, however, was really the first step to try to neutralize the National Assembly's political control over the decrees of state of exception.

The cited constitutional rule additionally provides that if due to an act of God or force majeure the National Assembly does not issue its decision within eight calendar days after receiving the decree, the latter shall be deemed approved. This establishes a positive parliamentary silence procedure with tacit approving effects.

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[288] See in http://historico.tsj.gob.ve/decisiones/scon/febrero/184885-07-11216-2016-16-0117.HTML. See comments on this decision in Allan R. Brewer-Carías, "El desconocimiento judicial de los poderes de control político de la Asamblea Nacional," in *Revista de Derecho Público*, No. 145-146, enero-junio 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 349-369

If the decree declaring a state of exception, its extension or increase in the number of restricted guaranties, is issued during the National Assembly's recess period, the President of the Republic must send it to the Delegate Committee, within the same term set in Article 26 of the Organic Law. In this case, according to Article 29 of the Organic Law, the Delegate Committee can only consider the approval of the decree of state of exception, its extension, or the increase of the number of guaranties restricted, if it is impossible, due to the circumstances, to call an ordinary session of the National Assembly within the 48 hours referred to in Article 27 of the Organic Law, or if the absolute majority of the deputies does not attend the session.

In any event, Article 30 of the Organic Law provides that the agreement issued by the National Assembly "becomes effective immediately, wherefore it must be published in the *Official Gazette* of the Bolivarian Republic of Venezuela and disseminated within the shortest term possible, through all mass media, on the day after it has been issued, if possible." (Art. 30). Here, again, we find the inconsistency of considering that a parliamentary decision approving a decree "having the rank and force of law," may become effective before its publication in the *Official Gazette*, which is inadmissible.

2. The denial, in political and judicial practice, of the National Assembly's political control powers over states of exception decrees as of 2016

During the past twenty years, except in cases with reduced territorial scope (states bordering with Colombia, 2015)[289] there was never issued a decree of state of exception and economic emergency for the entire territory, until January 15, 2016, when the President of the Republic gave his annual Address to the National Assembly and submitted the text of Decree No. 2184 dated January 14, 2016,[290] whereby it decreed the state of economic emergency throughout the national territory. The state of exception was issued for a term of 60

[289] See on these cases, the works published in the monographic issue about the matter of states of exception, in *Revista de Derecho Público*, No. 143-144, July-December 2015, Editorial Jurídica Venezolana, Caracas 2015.

[290] See in *Official Gazette* No. Extra 6.214. Of January 14, 2016

days, based, as stated by the Decree, not on the disastrous consequences of wrong economic policies that had been carried out by the State, destroying the national production, economy and the standard of living of the population, but on totally non-existent alleged factors alien to the government and even to the country.

The importance of this decree of state of exception of 2016, which has been extended *sine die,* up to current times, lies in its constitutional repercussions, because in practice it has implied the unconstitutional elimination of the political control that the Constitution assigns to the National Assembly with regard to the government and the Public Administration and, further, specifically regarding the decrees of state of exception.

As to the country's economic crisis, which definitely was not due to factors alien to the State, since it was the result of its errors and inefficiency, it could evidently not be solved with decrees, and much less decrees such as the one issued on January 14, 2016, but with a change in the government's economic policy that would at least (i) restore domestic production, within a framework of economic freedom, restoring companies and production factors that had been confiscated and expropriated from their owners, (ii) dismantle the enormous state bureaucratic apparatus that had managed the nation's economy with the history's highest indexes of inefficiency in the public sector; and (iii) deregulate the economy, allowing the private sector to carry out the initiatives required pertaining to production and employment, with access to foreign exchange within a true frame of currency value.

But no. Instead of tackling the economic problem, the decree of economic emergency of January 2016, was not more than the government's acknowledgment of its failure in economic matters, without proposing any solution to solve the crisis, but rather with proposals to aggravate it, and which in no event required a decree of emergency to be issued according to Articles 337 et seq. of the Constitution, because all that was vaguely enunciated in the decree could be carried out by the Government with the arsenal of diverse laws, decree-laws and regulations that had been issued during the past 15 years. No new regulation was necessary to face the economic crisis, which could only be attacked by the government itself

developing an economic policy different to the one that gave rise to such crisis.

A. The political control exercised by the National Assembly regarding the decree of economic emergency of January 2016 and its neutralization by the Supreme Tribunal of Justice

As Decree No. 2184 of January 14, 2016, declaring the economic emergency in the country, was filed in person by the President of the Republic before the National Assembly on January 15, 2016, the term of eight calendar days that the National Assembly had in order to approve or disapprove it, independently from the juridical review power to be exercised by the Constitutional Chamber, ended on January 22, 2016; day in which the National Assembly precisely voted a Resolution "*disapproving* Decree No. 2184, of January 14, 2016, published in Special *Official Gazette* No. 6.214 of January 14, 2016, declaring the State of Economic Emergency throughout the National Territory."

According to Article 30 of the Organic Law, said political parliamentary decision "became effective immediately," that is, on the same day, January 22, 2016, on which according to law it should have been published in the *Official Gazette* and "publicized within the shortest term possible, through all mass media, on the day after it has been issued, if possible" (Art. 30).

This meant, that according to the Constitution, the Decree No. 2184 of January 14, 2016, upon being disapproved by the National Assembly it had ceased to have legal effects, in spite of having been controlled by the Constitutional Chamber of the Supreme Tribunal which declared it to be according to the Constitution, guaranteeing its "legitimacy, validity, force and legal effect thereof, within the constitutional framework." Through its decision, the Constitutional Chamber, in fact, exceeded its judicial review power and, in an unconstitutional manner, eventually exercised a "political control" over the Decree, usurping the functions of the National Assembly, when it declared in the same decision, the "relevance, proportionality and appropriateness," of the Executive Decree, considering that with it, the President had pursued:

> "with solid legal bases and high popular significance, the safeguarding of the people and its harmonic development in face of unprecedented and extraordinary adverse factors in our country, in accordance with the Constitution; without impairment to the subsequent control that this Chamber may exercise pursuant to its constitutional attributes."

B. Constitutional Chamber's rejection of the Assembly's power to exercise political control over decrees of state of exception

In face of this confrontation between the Legislative and Executive Branches of Government, a few days after the National Assembly disapproved the Presidential Decree of economic emergency, on February 3, 2016, a group of citizens alleging to be members of some Communal Councils and Communes, filed before the Constitutional Chamber an appeal for "constitutional interpretation" of Article 339 of the Constitution, and Articles 27 and 33 of the Organic Law on States of Exception, alleging that they had, among others, "*the following doubts"* that, in summary, referred to the scope of the National Assembly's powers to exercise political control:

> "(i) that the [Constitution and Organic Law] stated nothing regarding the "consequences for the Decree declaring the state of exception" of the disapproval by the National Assembly; (ii) that once the Decree has been "declared to be according to the Constitution" by the Constitutional Chamber "then, what is the nature of the disapproval by the National Assembly?" (iii) to determine whether the President's decision in an emergency situation remains subject to "the assessing and discretionary power of the National Assembly, even if its constitutionality has been declared [by the Constitutional Chamber]?" and (iv) whether the President of the Republic is not the "sole Judge of the merits of his act of government or Decree?"

All these "doubts," were set forth to finally request the Constitutional Chamber to decide "on the effect of Decree No. 2.184," after it was already disapproved by the National Assembly. Eventually, the Chamber decided the matter one week later by means

of Decision No. 7 of February 11, 2016,[291] issued in overt violation of the guarantee of due process and the right to defense, expressing that it had the exclusive power to decide on the "juridical-constitutional legitimacy, effect and force" of the decrees of state of emergency, and that "the National Legislative Power" is only able to "repeal" the decrees of exception once the causes that gave rise to them have ceased, thus limiting the latter's power for political control. The Chamber concluded reaffirming that it has "the supreme control of the acts of the Public Power," the political control powers of the National Assembly being a "relative control" that allegedly is subject to judicial review. The decision affirmed that the judicial review power of the Constitutional Chamber:

> "in addition to being a juridical and rigid control, is absolute and binding, affecting the validity, legitimacy and effect of legal actions, including decrees of states of exception."

And, after this "reasoning" with which the Chamber had allegedly answered the "interpretative concerns filed," it went on to affirm that:

> "the political control of the National Assembly over decrees that declare states of exception does not affect the juridical legitimacy, validity, force and effect thereof; and the Constitution expressly provides that the National Assembly may repeal the extension of the decree of state of exception, before the term set, once the causes that gave rise to it cease."

That is to say, the Chamber simply ignored the Constitution and the National Assembly's powers for political control to approve or disapprove the decree of exception, reducing them purely and simply to only being able to "repeal the decree" afterwards, further stating that in such cases, the decision could be subject to judicial review by the Chamber itself, concluding that Decree No. 2.184 of January 14, 2016:

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[291] See http://historico.tsj.gob.ve/decisiones/scon/febrero/184885-07-11216-2016-16-0117.HTML. See the comments on this decisión in Allan R. Brewer-Carías, "El desconocimiento judicial de los poderes de control político de la Asamblea Nacional," in *Revista de Derecho Público*, No. 145-146, January-June 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 349-369.

> "became effective when it was issued and its juridical-constitutional legitimacy, validity, force and effect *irrevocably remain unscathed*, according to the provisions of the Magna Carta."

The consequence of these assertions was to consider that the Resolution of the National Assembly, in spite of having being adopted within the term of eight days and procedural form established in the Constitution – although not in the short term of 48 hours after the issuance of the Decree:

> "breached the procedural legality, the legal certainty and the due process sanctioned by Article 49 of the Constitution, fundamental pillars of the Constitutional Rule of Law (*vid*. Arts. 2, 7, 137, 334, 335 and 336 of the Magna Carta), therefore voiding the process that concluded with the *constitutionally null* Resolution issued by the maximum representation of the National Legislative Power on January 22, 2016."

The Chamber also added that since it had exercised its judicial review power within the same term of eight calendar days after the date of issue of the Decree,

> "there is objectively no constitutional controversy to be settled between bodies of the Public Power with regard to that factual situation, in spite of the negative *void* decision issued by the National Assembly on January 22, 2016, *which should be deemed to be non-existent and with no juridical-constitutional effect."*

All this, because, in the Chamber's opinion, in this case, after the Executive Branch exercised its competence of issuing the decree of economic emergency:

> "the Legislative Power failed to comply with its obligation to consider it in a special session within 48 hours after the decree was made public, and the Constitutional Chamber exercised its attribution of declaring the constitutionality thereof in due time, by means of decision No. 4 of January 20, 2016."

The consequence of these arguments was the Constitutional Chamber's decision to consider the Resolution of the National Assembly disapproving the Decree of Economic Emergency, as "*non-existent and with no constitutional legal effect,"* all in a judicial

process for abstract interpretation of the Constitution, in which it could not "annul" a decision of the National Assembly, for this can only be done through a judicial review process for annulment, guaranteeing due process.

C. Declaration of constitutionality regarding the extension of the Decree of Economic Emergency and its mandatory effect on the Public Power (including the National Assembly) decreed by the Constitutional Chamber

The abovementioned Decree of State of Economic Emergency for the entire national territory, No. 2.184 of January 14, 2016, was extended for an additional term of 60 days by Decree No. 2.270 of March 11, 2016,[292] and pursuant to the same constitutional standards referred to above, was submitted to the Constitutional Chamber of the Supreme Tribunal of Justice to decide on its constitutionality.

The Constitutional Chamber by means of decision No. 184 of March 17, 2016,[293] immediately declared the constitutionality of the extension decree, adding, in an attempt to usurp the functions of the National Assembly, a "political control" over the decree (more than a juridical review control), its "organic support" "toward the measures contained in the Decree under constitutional examination"; ending with the general statement that the Decree "should be observed and enforced by the entire Public Power," which obviously included the National Assembly, thus disavowing the latter's constitutional powers to exercise the political control of the decree and be able to disapprove it; and further reaffirming for avoidance of doubt that "in its capacity as maximum and ultimate interpreter of the Constitution […] its decisions about such rules and principles are strictly binding in order to ensure the protection and effective force of the Carta Magna."

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[292] See *Official Gazette* No. Extra 6219 of March 11, 2016.

[293] See in http://historico.tsj.gob.ve/decisiones/scon/marzo/186437-184-17316-2016-16-0038.html. See the comments on this decisión in Allan R. Brewer-Carías, "El desconocimiento judicial de los poderes de control político de la Asamblea Nacional," in *Revista de Derecho Público*, No. 145-146, January-June 2016, pp. 349-369.

With this decision, the Constitutional Chamber definitively stripped the National Assembly of all its power of political control over states of exception, overtly and artfully violating the Constitution.

D. The restriction imposed on the political control powers of the National Assembly by the President of the Republic while the state of exception is in force

Not satisfied with having annihilated the controlling powers of the National Assembly through the actions of the Constitutional Judge, the President of the Republic also went against the Constitution and the National Assembly by issuing Decree No. 2.309 of May 2, 2016,[294] whereby it "restrained and suspended" the Assembly's constitutional power to approve votes of censure or no confidence against the Ministers "*until the effects of the Decree of Economic Emergency cease,"* in order to guarantee the continuity in the enforcement of the economic emergency measures entrusted to the Executive Cabinet on which there depend the stabilization of the national economy and the timely and continued satisfaction of the economic needs of Venezuelans," whenever the President deems this politically opportune and convenient, in its sole judgement.

This presidential decision can be considered null and void according to the terms of Article 138 of the Constitution, because it usurped the powers of the National Assembly. In effect, when Decree No. 2.184 of state of exception and economic emergency issued on January 14, 2016, was initially considered, the National Assembly summoned the Ministers of the Cabinet to go before the National Assembly to be questioned and heard, but they failed to appear. Therefore, after the Assembly approved a Resolution disapproving

[294] See *Official Gazette* No. Extra 6225 of May 2, 2016. See comments on said decree in Allan R. Brewer-Carías, "Comentarios al Decreto No. 2.309 de 2 de mayo de 2016: La inconstitucional "restricción" impuesta por el Presidente de la República, respecto de su potestad de la Asamblea Nacional de aprobar votos de censura contra los Ministros," in *Revista de Derecho Público*, No. 145-146, enero-junio 2016, Editorial Jurídica Venezolana, Caracas 2016, pp., pp. 120-130.

the Decree,[295] it also approved a vote of censure or non-confidence against one of the responsible Ministers, due to his failure to appear before the Assembly, considering this action as a "reluctance by the Government to explain the situation of food dearth in the country."[296]

Notwithstanding the constitutional rule that provides that a decree of state of emergency does not affect the functions of the branches of government (Art. 339), the President of the Republic immediately reacted against the National Assembly, stating on the same day, April 28, that "nobody removes the Minister,"[297] and rejecting the vote of censure against him,[298] deeming said decision as "null and void," threatening that, by virtue of the economic emergency, the government would be "reviewing" the articles of the Constitution pertaining to this matter:

> "in order to issue a decree within the framework of the current decree, constitutional, that I issued since January, so as to leave without constitutional effect during the term of the economic emergency, any sabotage by the National Assembly against any minister, institution or body of the people's power, we are going to issue a special decree as soon as tomorrow [sic]."[299]

And accordingly, supplementing a previous decision of the Constitutional Chamber that had "restricted" the manner for summoning Ministers to question them,[300] the President of the Republic himself, on the following day, April 29, specifically regarding his determination to "review" the articles of the Constitution and by means of an executive decree, *de facto*

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295 See "Asamblea aprueba voto de censura al ministro de Alimentación Marco Torres," in newspaper *El Universal*, April 28, 2016, in http://www.eluniversal.com/noticias/politica/asamblea-aprueba-voto-censura-ministro-alimentacion-marco-torres_307078 Also see: http://m.pano-rama.com.ve/politicayeconomia/AN-debate-voto-de-censura-a-ministro-de-Alimentacion-Rodolfo-Marco-Torres-20160428-0027.html

296 *Idem.*

297 See in http://www.eluniversal.com/noticias/politica/maduro-rechaza-voto-censura-ministro-alimentacion-marco-torres_307192.

298 See in http://notiexpresscolor.com/maduro-ministro-no-lo-remueve-nadie/.

299 *Idem.*

300 *Idem.*

"overruled" the constitutional powers of the National Assembly,[301] announcing that:

> "he will promulgate a decree in order to "overrule" any "sabotage" by the Parliament against any minister or body of the people's power" with regard to the motion for censure approved against the Minister of Food.
>
> "We are going to review those articles of the Constitution to issue a decree to constitutionally nullify, during the economic emergency, any sabotage by the Assembly against any minister, institution or body of the people's power…"
>
> "Effective tomorrow, we are going to issue it, because we are not going to tolerate any sabotage."[302]

And, in fact, on May 4, the media reported that the President of the Republic had issued a decree that "strips powers from the National Assembly of Venezuela," [303] to:

> "restrict and defer the motions for censure issued by the Parliament, consisting of a majority of opposition members, against his ministers that would result in the removal of those officials from office, according to the Constitution."
>
> The decree that was published states that this governmental decision will remain in force "until the ceasing of the effects of the Decree of Economic Emergency issued by the president" in order to "guarantee the continuation of the enforcement of the emergency economic measures."[304]

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301 See: "Maduro promulgará decreto para "dejar sin efecto" decisiones del Parlamento," in *Diario Las Américas*, 29 de abril de 2016, in http://www.diariolasame-ricas.com/4848_venezuela/3782331_maduro-promulgara-decreto-dejar-efecto-decisiones-del-parlamento.html.

302 *Idem.*

303 See "Decreto de Maduro resta poderes a la Asamblea Nacional de Venezuela," May 4, 2016, in http://noticias.terra.com/decreto-de-maduro-resta-poderes-a-la-asamblea-nacional-de-venezuela,b9ab08070bf18b140ca4e473ca4bbbaekpx40avv.html.

304 *Idem.*

The Executive Branch's decision was issued in Decree No. 2309 of May 2, 2016,[305] whereby the Assembly's jurisdiction to issue a Vote of censure against the Ministers of the Executive Cabinet, was simply and freakishly "*restricted and suspended*" by the Head of the Executive Branch of the Government, who is the controlled body, in overt breach of the Constitution[306] and the Organic Law on States of Exception. One of the absurd motives of this decree was that since the President had the competence to appoint his ministers, then, nobody could remove them, and their removal by consequence of a vote of censure was deemed to go against "the continuity of the enforcement of public policies, causing a delay in the activities of the Public Administration."

The President of the Republic further deemed that the National Assembly's decision, pursuant to its constitutional powers for political control, had "an undoubtable political motive" and had been issued "obeying political conveniences" - as if this were a fraud, when a motion for censure as a result of political control could have no other motive than a political one.

In any case, the truth is that it is difficult to find an example of a decision issued with such an abuse of power, arbitrariness and constitutional ignorance by the State, as this restriction of the constitutional powers of the National Assembly by the Executive Branch, which, if judged by an autonomous and independent Constitutional Judge, would doubtlessly be annulled *in limine*.

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[305] See in *Special Official Gazette* No. 6225 of May 2, 2016. See comments on this decree in Allan R. Brewer-Carías, "Comentarios al decreto No. 2.309 de 2 de mayo de 2016: La inconstitucional "restricción" impuesta por el Presidente de la República, respecto de su potestad de la Asamblea Nacional de aprobar votos de censura contra los Ministros," in *Revista de Derecho Público*, No. 145-146, January-June 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 120-132.

[306] See José Ignacio Hernández, "¿Ahora la AN no podrá dictar votos de censura?, in *Prodavinci*, 4 de mayo de 2016, in http://prodavin-ci. com/blogs/ahora-la-an-no-podra-dictar-votos-de-censura-por-jose-ignacio-hernandez-g/. See also "El Presidente prohíbe que la AN dicte votos de censura: "Algo huele mal en Dinamarca," in *Acceso a la Justicia, Observatorio Venezolano de la Justicia*, 10 de mayo de 2016, in http://www.accesoalajus-ticia.org/wp/infojus-ticia/noticias/el-presidente-prohibe-que-la-an-dicte-votos-de-censura-algo-huele-mal-en-dinamar.

E. New decree of state of exception and economic emergency and definitive overtaking of the legislative functions by the executive branch, and the suspension of the Assembly's remaining controlling powers by reason of the decree of state of exception and economic emergency

The President of the Republic, by means of Decree No. 2.323 of May 13, 2016,[307] again decreed the state of exception and economic emergency, delivering a final blow to the Constitution, totally overstepping the National Assembly's power to legislate, stripping it of its essential function – which the Constitutional Chamber had already prevented it from exercising – and also suspending its control powers that still had not been stripped by the Constitutional Chamber, regarding legislative authorizations for additional indebtedness in the budget and for entering into agreements or contracts of national interest.

According to the constitutional provisions related to the states of exception, the President of the Republic may issue in the same decree the measures required in view that "the powers available to face such events are insufficient," and "in case of *strict necessity to solve the abnormal situation*, broadening the powers of the Executive Branch," but the President is in no way authorized to "announce" – as if the person issuing the decree were a body of the State other than the Executive Branch - that it will enforce or adopt in the future:

> "exceptional and extraordinary measures to ensure the people's full enjoyment of their rights, preserve internal order, the timely access to essential goods and services, and also reduce

[307] See in *Official Gazette* No. Extra 6.227 of May 13, 2016, which however was released three days after, on Monday, May 16, 2018. See comments on this decree in Allan R. Brewer-Carías, "Nuevo golpe contra la representación popular: la usurpación definitiva de la función de legislar por el Ejecutivo Nacional y la suspensión de los remanentes poderes de control de la Asamblea con motivo de la declaratoria del estado de excepción y emergencia económica," 19 de mayo de 2016, in http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20Golpe%20final%20a%20la%20democracia.%20%20Edo%20excepci%C3%B3n%20%2019%20mayo%202016.pdf.

the effects of the natural circumstances that have affected power generation, access to food and other products essential for life." (Arts. 1 and 3).[308]

From the start, this formula was a mockery against the controlling powers of the National Assembly and the Constitutional Chamber regarding decrees of state of exception, because the decree was drafted as a mere shell, only with enunciates and no content, enumerating future "measures;" that is, a decree in which the Executive Branch authorized itself to issue various future and unnamed measures. On the contrary, the emergency decree must set forth the measures to be issued; it cannot be a mere announcement of imprecise future measures. Its text must contain the measures that are deemed necessary; that is, the decree of state of exception "is" the decision that must contain the measures that are deemed necessary in order to cope with the exceptional circumstances, which cannot be tended to with the powers available that are not sufficient for facing the circumstances –which must further be alleged.

Therefore, a decree of state of exception such as that issued by the President of the Republic by Decree No. 2.323 of May 13, 2016, was inadmissible because it did not contain any specific measure and only purported to announce future measures, which would consequently escape all the political and juridical control demanded by the Constitution.

Much less can a decree of state of exception be conceived, -as in this case of Decree 2.323-, as a sort of "enabling law" granted by the Executive Branch to itself; that is, it cannot be an instrument in favor

[308] However, COFAVIC rightfully warns in this regard that in said "Article 3 of the decree, the Executive Branch grants itself very broad powers that exceed its scope of competence, which implies meddling with the independent attributes of the Judicial and Legislative powers. Our Constitution expressly provides in its Article 339, that the declaration of a state of exception does not interrupt the functions of the other bodies of the Public Power, which means that the Executive Branch cannot substitute the functions of other Public Powers." See: COFAVIC. "Comunicado Público: Los Estados de Excepción no pueden ser usados para coartar libertades públicas, perseguir o discriminar," Caracas, May 17, 2016, in http://www.cofa-vic.org/comunicado-publico-los-estados-de-excepcion-no-pueden-ser-usados-para-coartar-libertades-publicas-perseguir-o-discriminar/6.

of the Executive Branch, which does not exercise the Legislative Power, usurping the exclusive functions of the National Assembly, purporting to "delegate" upon itself a set of matters to be regulated by decree-laws.

And precisely this was the content of the Decree of State of Exception and Economic Emergency No. 2.323, which was none other than an unconstitutional "authorization" that the Executive Branch granted itself to adopt "opportune exceptional and extraordinary" measures, without specifying what these measures were, nor why they were necessary, nor how the powers available to it at the time of issuing it were not sufficient to cope with the circumstances.[309] The same pattern has been followed in all the successive decrees that have been issued each 60 days, up to the last one, Decree 3.610 of September 10, 2018, [310] which was extended for 60 more days by Decree No. 3655 of November 9, 2018,[311] in an endless state of economic emergency.

In any case, if all the announced measures that were purported to be adopted in the future because the legal powers of the public entities were not sufficient to deal with the events, exceeded what was provided for and regulated by law, then, in order to issue such measures it was unavoidable and indispensable to have used the power to restrict the constitutional guaranties of the rights, as provided in Article 337 of the Constitution, specifically, the guarantee of legal reservation to regulate the limitations and restrictions on rights. However, Decree No. 2.323 and all the successive decrees, did not restrict any guarantee, wherefore the

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309 See the comments on this decree, in Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de derecho. El Juez constituconal y la destrucción de la democracia en Venezuela* (Prólogo de Santiago Muñoz Machado), Ediciones El Cronista, Fundación Alfonso Martín Escudero, Editorial IUSTEL, Madrid 2017.

310 See in *Official Gazette* N° 41.478 of September 10, 2018. The National Assembly disapproved the Decree on September 19th, 2018 (see in: http://www.el-nacional.com/noticias/asamblea-nacional/anulo-decreto-emergencia-economica_252316); but the Constitutional Chamber, through decision No 638 of September 24, 2018, declared the constitutionality of the Decree.

311 See in *Official Gazette* N° 41.521 of November 9, 2018.

"measures" announced therein could only be carried out within the frame of the current legislation. [312]

Furthermore, the measures that have been announced have not gone beyond a definition of public policies, so the only thing that the President of the Republic had to do was to enforce the public policies he deemed necessary, and proceed to observe and apply the current legislation to implement such measures. Decrees of exception and economic emergency such as all those issued between 2016 and 2018 were not necessary, but rather redundant, issued on the fringes of the Constitution and in fraud against it by purporting to allow for the "actions" eventually enforcing it to escape political and judicial control.

For this reason, the true motive for the decrees of exception has actually been a different one, even from the implementation that could be made of such public policies by enforcing the legislation, and have been really intended to provoke, in breach of the Constitution (Art. 339), the undue interruption of the functioning of the National Assembly, eliminating its constitutional competences, especially its control over public finances.

In fact, according to the Constitution, "the State's economic and financial administration shall be governed by a budget to be approved each year by law" (Art. 313), so "no kind of expense not provided for in the Budget Law can be made" (Art. 314), although there may be issued additional credits to the Budget "*with the authorization of the National Assembly"* or of its Delegate Committee" (Arts. 187.7; 196.3; 236.13).

However, ignoring the provisions of all these constitutional rules as to the necessary and essential authorizing intervention of the National Assembly in order to decree additional credits to the budget, for example, in Decree No. 2.323 of May 13, 2016, which can also be found in Decree 3.610 of September 10, 2018, both of state of exception and economic emergency, the President of the Republic, breaching the Constitution, gave himself the authorization to

[312] In a bizarre provision, in the Decree 3.610 of September 10, 2018 of state of "economic emergency," the only right "restricted" was the right to bear arms. See in *Official Gazette* N° 41.478 of September 10, 2018.

continue to breach it, when providing in said Decrees the following "measure" that he could issue:

> "4. The authorization for the President of the Republic, in Council of Ministers, to make disbursements charged against the National Treasury and other financing sources not contemplated in the Budget Law, in order to optimize the attention of the exceptional situation. In this case, the resource receiving bodies and agencies will adjust the relevant income budgets." (Art. 2.4).

Therefore, we see that by issuing these decrees, the President of the Republic purely and simply eliminated the application of four constitutional provisions: Articles 187.7, 196.3, 236.13 and 314, annulling the controlling powers of the National Assembly over public expenditures, which obviously was a direct and overt breach of the Constitution.

But, this curtailment of the National Assembly's political control functions did not stop there, because, for instance, Decree No. 2.323 of May 13, 2016, also eliminated the exercising of the National Assembly's competences regarding the authorization of public interest contracts entered into by the Executive Branch (Arts. 150; 198.9; and 236.14), breaching the constitutional norms and replacing them by a self-assignment of attributes to the President of the Republic, to do the following:

> "5. The approval and signing by the Executive Branch of public interest contracts to obtain financial resources, technical advice and use strategic resources for the economic development of the country, without submitting them to the authorization or approval of other Public Powers."

The same provision was included in Decree 3.610 of September 10, 2018 (Art. 2.16).

That is, by another stroke of a pen, the President of the Republic purely and simply eliminated the application of other three constitutional provisions, annulling the National Assembly's power to control the entering into public interest contracts, which evidently was also a direct and overt breach of the Constitution.

F. The unconstitutional declaration of an "advanced impunity" for officials of the Executive Branch of the Government vis-à-vis the political control of the National Assembly

Decree No. 2.323 of state of exception of May 13, 2016, also included among the "measures" that the President authorized himself to issue, a bizarre provision stating the following:

> "7. To decide on the temporary and exceptional suspension of the enforcement of political sanctions against the top authorities of the Public Power and other high officials, whenever such sanctions may hinder the continuity of the implementation of economic measures for the urgent reactivation of the national economy and the supply of essential goods and services for the Venezuelan people, or undermine the nation's security" (Art. 2.7).

With this provision, the President of the Republic blatantly repudiated the constitutional attribution of the National Assembly set forth in Article 187.10 of the Constitution, to "issue a vote of censure [or of non-confidence] against the Executive Vice-President and the Ministers," whereby the Assembly could even decide on the removal of the Executive Vice-President and/or the Ministers by the qualified vote of three-fifths of the deputies. This attribution of the Assembly is confirmed and supplemented in Articles 240 and 246 of the Constitution.

Contrary to such norms, in Article 2.7 of Decree No. 2.323, the President decided to leave exclusively in his own hands the decision to "suspend" the exercising of the National Assembly's constitutional power to approve votes of censure against the Executive Vice-President and the ministers, ignoring the Constitution, as it had been ignored by the Executive Branch itself in Decree No. 2.309 of May 2, 2016.[313]

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[313] See in *Official Gazette* No. Extra 6225 of May 2, 2016. See the comments on this decree in Allan R. Brewer-Carías, "Comentarios al decreto No. 2.309 de 2 de mayo de 2016: La inconstitucional "restricción" impuesta por el Presidente de la República, respecto de su potestad de la Asamblea Nacional de aprobar votos

That is, also in this case, with an additional stroke of the pen, the President of the Republic purely and simply eliminated the application of other constitutional norms, annulling the political control powers of the National Assembly regarding the approval of votes of censure against the Executive Vice-President and the Ministers, and the possibility of issuing a legislative order to remove such officials from office, which evidently was also a direct and overt breach of the Constitution.

G. Definitive elimination of the National Assembly's power to legislate during states of exception: the case of the declaration of unconstitutionality of the Special Law to address the national health crisis

In spite of the constitutional provision that a declaration of state of exception does not interrupt the normal functioning of the Public Powers, after the Executive Branch itself had eliminated the political control powers over the government, as referred to above, it was the turn of the Constitutional Chamber of the Supreme Court of Justice to definitively eliminate the National Assembly's power to legislate during the term of states of exception, by issuing Decision No. 460 of June 16, 2016,[314] whereby it exercised the precautionary judicial review of a specific statute, at the request of the President of the Republic.

The decision was, in fact, issued with regard to the Special Law to address the National Health Crisis that the National Assembly enacted on May 3, 2016, because of the *"humanitarian crisis"* that Parliament deemed existed in the country, and due to the Executive Branch's refusal to authorize receiving humanitarian aid from abroad. The President of the Republic submitted this statute, pursuant to Article 214 of the Constitution, to the consideration of the

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de censura contra los Ministros," in *Revista de Derecho Público*, No. 145-146, January-June 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 120-132.

[314] See in http://historico.tsj.gob.ve/decisiones/scon/junio/188165-460-9616-2016-16-0500.HTML See comments on this decision in Allan R. Brewer-Carías, "El desconocimiento judicial del poder de la Asamblea Nacional para legislar," in *Revista de Derecho Público*, No. 145-146, January-June 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 378-429.

Constitutional Chamber, requesting a pronouncement about its constitutionality, given the "reasonable doubts" he had regarding the same, by virtue that: *first*, once the state of exception due to economic emergency was decreed, the requesting President believed that "the legislative powers pertaining to the rights and guaranties of an economic nature affected by the decree of state of exception should be temporarily suspended;" *second*, that the National Assembly had shown with this legislation "a lack of political vision about the national situation" by issuing "a law that purports to 'solve the national health crisis' speaking of "international cooperation and aid" but that "blocks all the initiatives of the Executive Branch" on this matter; and deeming that the "conduct and lack of sense of the opposition's deputies and the directors of the National Assembly in their manner of legislating, generates a *presumption of unconstitutionality* of the law," which is very similar to a "misuse of power;" and *third,* that in enacting it, the Assembly had not followed the criterion imposed by that Chamber in its Decision No. 269 of April 21, 2016, stating that prior to the enactment, Parliament should obtain the approval of the Executive Vice-President regarding the economic viability of the approved legislation.

In this regard, the Constitutional Chamber, exercising its precautionary judicial review powers, issued said Decision No. 460 of June 16, 2016, declaring the law unconstitutional by deeming that its purpose was to:

> "impose upon the National Government to receive from the World Health Organization (WHO), as humanitarian aid, a certain number of medicaments qualified as "essential" by the same specialized agency of the United Nations, for the purpose of addressing the "humanitarian crisis" declared by the same National Assembly by means of legislative accord dated January 26, 2016."

In order to decide, the Constitutional Chamber based is decision in a previous Decision N° 411 of May 19, de 2016, [315] which, as

[315] See in http://historico.tsj.gob.ve/decisiones/scon/junio/188165-460-9616-2016-16-0500. HTML. See the comments on this decisión in Allan R. Brewer-Carías, "La usurpación definitiva de la función de legislar por el Ejecutivo Nacional y la suspensión de los remanentes poderes de control de

already said, declared the constitutionality of Decree No. 2.323 of May 13, 2016, of State of Exception and Economic Emergency, and unconstitutionally considering that since the same had a rank of law, the President of the Republic had vested in himself all the powers, "temporarily suspending in the current laws, the articles that were incompatible with the measures issued in the Decree"; and, further, that once a state of exception had been decreed, this prevented the "concurrence of competences of any other body of the Public Power," that is, it finally meant the elimination of the National Assembly's power to legislate.

Hence, the Constitutional Chamber concluded, -contrary to the provisions of Article 339 of the Constitution that provides that the "declaration of state of exception does not interrupt the functioning of other bodies of the Public Power,"- stating that once the state of exception was decreed, the National Assembly allegedly only "maintains its competence to legislate on matters *other* than those included within the scope of the circumstances" contained in the decree of State of Exception and Economic Emergency. With regard to Article 339 of the Constitution, the Chamber simply mutated and changed its contents by deciding that the same did "not imply" that the Assembly could:

> "issue rules or decisions for addressing the emergency situation, because the enabling granted to the Executive Branch by virtue of the state of exception does not admit concurrence and temporarily excludes the regulatory power of other bodies regarding the same material scope of the special regime, for this could give rise to contradictions in the guarantee of the fundamental rights and the constitutional order."

The Chamber therefore concluded that once the state of exception is decreed, this allegedly implied –contrary to the provisions of the Constitution- that the measures issued to solve the situation that caused it "are part of the material scope of the state of exception regime that is reserved to the President of the Republic in

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la Asamblea con motivo de la declaratoria del estado de excepción y emergencia económica," in *Revista de Derecho Público*, No. 145-146, January-June 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 455-470.

Council of Ministers." This being allegedly so, the Chamber then deemed that the public powers should act on the basis of "understanding, dialogue, tolerance and respect," concluding in its decision that the Special Law to Address the National Health Crisis, enacted by the National Assembly infringed upon "the competences conferred to the President of the Republic by Article 15 of the Organic Law on States of Exception."

This obviously was entirely false, because that rule of the Law only sets forth the constitutional consequence of the power to decree states of exception, which is none other than adopting the exceptional measures required *in the decree itself.* But, inferring therefrom that once a decree of state of exception is issued, the President can thereafter adopt all the measures he wishes, regardless of the measures contained in the decree, eliminating the National Assembly's power to legislate, is absolutely contrary to the provisions at the end of Article 339 of the Constitution, which precisely state otherwise: that "the declaration of the state of exception *does not interrupt the functioning of the bodies of the Public Power."*

Additionally, in order to declare the unconstitutionality of the Law on the crisis in the health system, the Chamber deemed that since the National Assembly had omitted requesting the prior approval from the Executive Vice-President to enact the law, as was unconstitutionally imposed by the same Constitutional Chamber itself in its Decision N° 269 of April 21, 2016, referred to above, the Assembly had then incurred in "procedural vices that give rise to the declaration of unconstitutionality."

However, the Chamber's unconstitutional statement did not end there; the decision continued with a pronouncement on the contents of the special Law itself, specifically regarding the rules than imposed upon the Executive Branch the obligation to submit reports to the National Assembly on the enforcement of the Law (Art. 5; 14), which the Chamber considered to be unconstitutional and "totally irrational and disproportionate" based on its own "binding doctrine for constitutional interpretation" established with regard to constitutional norms pertaining to states of exception in its Decision N° 9 of March 1, 2016, also referred to above; and on the unconstitutional declaration of unconstitutionality of the rules in

Articles 3, 11, 12 and 21 through 26 of the Law on the System for the Appearance of Public Officials and Private Persons before the National Assembly or its Committees, voiding all possibility for the Assembly to exercise its political and administrative control powers over the government and the Public Administration, also referred to above.

Finally, the Constitutional Chamber concluded, -unconstitutionally, of course- that no Law can establish parliamentary control mechanisms over the administrative actions of the Executive Branch of the Government based on terms other than or additional to those set forth in Articles 237 and 244 of the Constitution," that is, "the rendering of the annual report and accounts."

Furthermore, the Chamber deemed that the provision of the Law on the crisis in the health sector that gave the National Assembly the power to act as "intermediary in the request for International Cooperation to address the national health crisis," meant conferring "upon the National Assembly competences to formulate, direct and carry out the foreign relations of the Republic," which, in the opinion of the Chamber, allegedly and additionally breached the provisions of Articles 226 and 236.4 of the Constitution that reserves to the President of the Republic the "direction of the foreign relations of the Republic." Finally, the Chamber deemed that when it issued the Law under analysis, -which it declared to be unconstitutional-, the National Assembly had "usurped" the "competences ascribed to the President of the Republic regarding the direction of the government's actions within the scope of states of exception, as well as regarding international relations."

Therefore, this decision by the Constitutional Judge ultimately provides that it suffices that the President of the Republic declare a state of exception in order to interrupt the National Assembly's exercising of its functions and eliminate its power to legislate. This interpretation obviously goes against the text of the Constitution, which specifically provides otherwise, as stated above, "the declaration of the state of exception does not interrupt the functioning of the bodies of the Public Power."

Nonetheless, the final blow against the National Assembly was given in July 2017, when a National Constituent Assembly was unconstitutionally convened, assuming not only the "sovereignty of

the people," but all powers of the State, with a supra-constitutional character,[316] eliminating *de facto* all the powers and functions of the National Assembly; and regarding the state of economic emergency, it has been permanent since January 2016, the last Decree declaring it being No. 3610 of September 10, 2018,[317] for 60 days, which was extended for 60 more days by Decree No. 3655 of November 9, 2018.[318]

New York, November 28, 2018

316 See Allan R. Brewer-Carías, *La inconstitucional convocatoria de una Asamblea Nacional Constituyente en mayo de 2017. Un nuevo fraude a la constitución y a la voluntad popular*. Colección Textos Legislativos, No. 56, Editorial Jurídica Venezolana, Caracas 2017, pp. 178 pp., and *Usurpación Constituyente 1999, 2017. La historia se repite: una vez como farsa y la otra como tragedia***,** Colección Estudios Jurídicos, No. 121, Editorial Jurídica Venezolana International, 2018, 654 pp.

317 See in *Official Gazette* N° 41.478 of September 10, 2018.

318 See in *Official Gazette* N° 41.521 of November 9, 2018.

PART THREE

THE CONSTITUENT ASSEMBLY UNCONSTITTUTIONALLY CONVENED AND ELECTED IN 2017

Chapter VII

FRAUD AGAINST THE VENEZUELAN CONSTITUTION AND THE WILL OF ITS PEOPLE: THE UNCONSTITUTIONAL DECREE CALLING A CONSTITUENT ASSEMBLY TO APPROVE THE CONSTITUTIONAL REFORM THAT WAS REJECTED BY POPULAR VOTE IN 2007 (2017)*

Presidential Decree No. 2830 of May 1, 2017 (published on May 3, 2017)[319] calling for a National Constituent Assembly is a constitutional fraud and a fraud against the people's will.

Through this Decree, issued in direct violation of the Constitution that merely ascribes to the President to voice an initiative to call the Constituent Assembly (Art. 348 of the Constitution), and not to directly convene it, since this is the exclusive right of the people as holder of the sovereignty and depository of the originating constituent power (Art. 348), the

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* Available at: http://allanbrewercarias.com/wp-content/uploads/2017/05/ 156.-doc-New-Fraud-against-the-Venezuelan-Constitution-and-the-will-of-its-people.-May-4-2017.pdf

319 See Special *Official Gazette*, No. 6255 of May 1st, 2017.

President, in perpetrating a fraud against the Constitution, has usurped and snatched from the people its exclusive right to convene the National Constituent Assembly by means of a referendum. This assembly cannot be convened by decree in Venezuela, marginalizing the people, and it is false that the President has "the constitutional and exclusive initiative to call" a Constituent Assembly. It suffices to read Article 348 of the Constitution to confirm that also other bodies of the State and the people themselves are entitled to this initiative.

The Decree, in addition to being a fraud against the Constitution, is a fraud against the people's will that was expressed by majority vote in the referendum held in December 2007, rejecting the constitutional reform[320] that is now sought to be approved again, but this time without the people's participation. In that rejected reform, Hugo Chávez had proposed to eliminate the democratic and social State of Law and Justice and turn it into a "Communal State" or "of the People's Power,"[321] and now, without the people's participation, Maduro purports to implement the constitutional reform that was then rejected by the people by calling a Constituent Assembly to carry out the same reform, but refusing the people its right to directly exercise democracy.

Therefore, the offer made in the Decree of calling a Constituent Assembly as an alleged "participative and protagonist platform" is false and contradictory because it precisely takes away from the people its main right to political participation, that is, to directly exercise its sovereignty by expressing its will by means of

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320 See Allan R. Brewer-Carías, "La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario", en *Anuario de Derecho Público 2007,* Año 1, Instituto de Estudios de Derecho Público de la Universidad Monteávila, Caracas 2008, pp. 17-65

321 See Allan R. Brewer-Carías, *Hacia la consolidación de un Estado socialista, centralizado, policial y militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Colección Textos Legislativos, No. 42, Editorial Jurídica Venezolana, Caracas 2007; *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Colección Textos Legislativos, No. 43, Editorial Jurídica Venezolana, Caracas 2007.

referenda, especially regarding constitutional reform (Arts. 5, 72, 347 of the Constitution).

Furthermore, the Decree stated the "programmatic objectives" purported to be ascribed to the National Constituent Assembly, briefly listing the following: (1) peace; (2) the economy; (3), the subsidies or "*Misiones*"; (4) the judicial competences; (5) the Popular Power; (6) the defense of sovereignty; (7) pluri-culturalism; (8) youth, and (9) ecology.

To achieve these objectives -except for one-, it is logically not necessary to terminate the Constitution of 1999, nor any constitutional reform, because the only thing needed in order to enforce them is an adequate State policy that this regime refuses to adopt and implement, there being no need for any Constituent Assembly, wherefore the mere calling thereof is a tremendous political fraud.

In addition to being a fraud against the Constitution and the will of the people, the Decree is totally useless and misleading, because the objectives promised therein, we insist, could not be achieved by a Constituent Assembly or by eliminating the Constitution of 1999, and consequently, approving a new Constitution. All, except one, can be achieved through proper State policies that can only be adopted by the government and public powers.

The only one of the "programmatic objectives" listed in the Decree, that does need a Constituent Assembly due to being a reform that modifies the structure and core principles of the Constitution of 1999, is that mentioned in the fifth "programmatic objective" of the Decree, that is:

> "5. The constitutionalizing of the new forms of the participative and protagonist democracy, by acknowledging the new subjects of the Popular Power, such as the Communes and Communal Councils, Workers' Councils, among other forms of organization of the population's territorial and social base."

This "programmatic objective" is none other than a re-editing of the rejected constitutional reform proposed by H. Chávez in 2007, which was overwhelmingly rejected by the majority vote of the people in the December 2007 referendum whereby the people manifested its will not to approve it.

Now, Mr. Maduro purports, in a fraud against that people's will, breaching the Constitution and depriving the people of its right to political participation by means of a referendum in any constitutional reform, to impose upon the people by his own will, a State system that was rejected by the people, and that he falsely describes as allegedly being of a "participative and protagonist democracy."

That is, by refusing the people its right to directly take part in the democracy through a referendum, he purports to deceive it and proposes a form and scheme of State that is anything except a "participative and protagonist democracy," as evidenced in the 2007 proposed constitutional reform that was rejected by the majority, and that was unconstitutionally enforced through a set of unconstitutional organic laws issued in 2010 that have established a centralized system of populist instances, in which all functions are entirely controlled by a Ministry of the National Executive,[322] and that the Supreme Tribunal refuses to control.

In addition to setting the abovementioned "programmatic objectives," the Decree defined some elements pursuant to which

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322 See Allan R. Brewer-Carías, "Las leyes del Poder Popular dictadas en Venezuela en diciembre de 2010, para transformar el Estado Democrático y Social de Derecho en un Estado Comunal Socialista, sin reformar la Constitución," en *Cuadernos Manuel Giménez Abad,* Fundación Manuel Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, No. 1, Madrid, Junio 2011, pp. 127-131; "La Ley Orgánica del Poder Popular y la desconstitucionalización del Estado de derecho en Venezuela," en *Revista de Derecho Público*, No. 124, (octubre-diciembre 2010), Editorial Jurídica Venezolana, Caracas 2010, pp. 81-101; "*Introducción General al Régimen del Poder Popular y del Estado Comunal (O de cómo en el siglo XXI, en Venezuela se decreta, al margen de la Constitución, un Estado de Comunas y de Consejos Comunales, y se establece una sociedad socialista y un sistema económico comunista, por los cuales nadie ha votado)," en Allan R. Brewer-Carías,* Claudia Nikken, Luis A. Herrera Orellana, Jesús María Alvarado Andrade, José Ignacio Hernández y Adriana Vigilanza**,** *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal (Los consejos comunales, las comunas, la sociedad socialista y el sistema económico comunal*) Colección Textos Legislativos Nº 50, Editorial Jurídica Venezolana, Caracas 2011, pp. 9-182

the President purports to put together the unconstitutionally convened National Constituent Assembly," by stating that its:

> "formation will answer to the political structure of the Federal and Decentralized State, based on the primary political unit of the territorial organization sanctioned by our Constitution."

This wording, in addition to being unintelligible, is obviously deceitful and contradicts what has been the State policy since the enactment of the 1999 Constitution.

Maduro knows that the "Federal and decentralized State" defined in the 1999 Constitution (Art. 4), was never instituted in the country, and was rather totally crushed by the government's centralist policy that has been gradually choking and taking away the competences of States and Municipalities. It is an insolent and inadmissible irony that the government now purport to appeal to a non-existing form of Federal and decentralized State, which the government itself has dismantled and de-constitutionalized, to convene the unconstitutional Assembly.

Additionally, the "primary political unit of territorial organization" also mentioned in the Decree in order to "form" the Assembly, according to the Constitution (Art. 168) is none other than the Municipality, which has precisely been the target of the 2010 Laws of Popular Power, which sought to gradually "de-municipalize" the country, suffocating the Municipalities and replacing them by the Communal Councils.[323]

It is therefore a contradiction, and a laughable deceit, to propose a Constituent Assembly structured according to a form of State (Federation and decentralization) that has not only been crushed by the regime, but precisely is intended to be eliminated by the

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[323] See Allan R. Brewer-Carías, **"**El inicio de la desmunicipalización en Venezuela: La organización del Poder Popular para eliminar la descentralización, la democracia representativa y la participación a nivel local", en *AIDA, Opera Prima de Derecho Administrativo. Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Facultad de Estudios Superiores de Acatlán, Coordinación de Postgrado, Instituto Internacional de Derecho Administrativo "Agustín Gordillo", Asociación Internacional de Derecho Administrativo, México, 2007, pp. 49 a 67.

proposed Constituent Assembly itself, by reason that the sole programmatic objective that could justify it is instituting the State of Popular Power, which precisely implies eliminating the States and Municipalities.

Finally, the Decree, when referring to the election of the members of the National Assembly (Art. 2) incurred a constitutional breach and an unsurmountable contradiction by stating that they:

> "shall be elected in the sectorial and territorial domains […] by universal, direct and secret vote."

It is worth reminding the "constitutionalists" who drafted the Decree for the person who discharges the presidency, that according to the Constitution (Art. 63), a "universal election" is that in which all the citizens who are electors vote, without any kind of discrimination or exclusion. Therefore, in Venezuela, the integration of the bodies of the State can only be made by universal election, in which all citizens are entitled to participate and vote. Consequently, an election that is carried out in "sectorial domains," precisely by referring to "sectors," is the exact opposite of universality.

A "sectorial election" may be admitted outside the scope of the State bodies, for example, for a political party, a workers' union or a chamber of commerce, where only the members of those organizations are electors; but not for a National Constituent Assembly that must represent the universality of the people, as the sole depository of the sovereignty and the originating constituent power.

New York, May 4, 2017

Chapter VIII

THE GREAT LIE: THE NATIONAL CONSTITUENT ASSEMBLY IS NEITHER SOVEREIGN NOR IS IT A DEPOSITORY OF THE ORIGINAL CONSTITUENT POWER, AND HAS NOT BEEN GLOBALLY RECOGNIZED (2018)*

On August 8, 2017, the fraudulent National Constituent Assembly –unconstitutionally elected on July 30, 2017– adopted a "Resolution in support of the *Fuerza Armada Nacional Bolivariana* [Bolivarian National Armed Forces]", containing several statements that are constitutionally false.

In fact, in the heading of the Resolution, it is falsely affirmed that the one dictating it is:

> *"The Sovereign National Constituent Assembly, depository of the Original Power, elected on July 30, 2017 by a free, universal, direct and secret suffrage, carried out by the Electoral Power, after being convened by the Constitutional* President *of the Republic Nicolas Maduro Moros, and installed in Caracas on August 4, 2017 and in use of its constitutional powers."*

This text encompasses a Great Lie, which is broken down in the following ones:

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* See on this matter: Allan R. Brewer-Carías, *Usurpación constituyente 1999 / 2017. La historia se repite: una vez como farsa y la otra como tragedia,* Colección Estudios Jurídicos, No. 121, Editorial Jurídica Venezolana International, 2018. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/02/14-2-2018-USURPACI%C3%93N-CONSTITUYENTE-1.pdf

First, the fraudulent National Constituent Assembly cannot characterize itself as "Sovereign National Constituent Assembly," because this is false and unconstitutional, since Article 5 of the Constitution of 1999 provides, on the contrary, that:

> *"The sovereignty rests inalienably with the people, who exercise it directly in the* manner *provided for in this Constitution and in the law, and, indirectly, by means of the suffrage, by the bodies that exercise the Public Power. The bodies of the State emanate from the popular sovereignty and they are subject to it."*

According to the Constitution, therefore, all the bodies of the State are subject to the popular sovereignty, which rests untransferable with the people. No body of the State, -much less the fraudulent National Constituent Assembly –which in no form emanated from the popular sovereignty– may therefore assume a "sovereign" capacity. This violates the Constitution and is a usurpation of the popular sovereignty, such that the acts decreed by such Constituent National Assembly, in purporting to exercise such usurped capacity, are void, of absolute nullity, according to Article 136 of the Constitution, and cannot be recognized either nationally nor internationally.

Second, the fraudulent National Constituent Assembly cannot characterize itself as "depository of the Original Power," because this is false and unconstitutional, since Article 347 of the Constitution, on the contrary, clearly states that "The Venezuelan people are the depository of the original constituent power."

No organ of the State, therefore, and much less the fraudulent National Constituent Assembly –which was not the result of a popular demonstration called by a referendum– can usurp the capacity as depository of the Original constituent power, for only the people [possessing] such capacity, which can never be even delegated. Consequently, the decisions that such fraudulent National Constituent Assembly should issue under such usurped and alleged capacity as "depository of the original power" are absolutely null and void, according to Article 136 of the Constitution, and cannot be recognized either nationally nor internationally.

Third, the fraudulent National Constituent Assembly was by no means elected through free, universal, direct and secret suffrage.

It is a public, notorious and communicational fact that the election held on Sunday, July 30, was not free, because the government threatened and forced public officials and employees to vote in the electoral process.

Neither was it a universal election, because the sheer electoral bases that governed it established a "territorial" and "sectorial," or corporate, electoral system that annulled the universal nature of the vote.

Further, it was not secret, because, as Smartmatic –the company responsible for the machines counting the votes– has openly reported/confessed, the votes were manipulated by the National Electoral Council.

Fourth, the fraudulent National Constituent Assembly, even if it had been constitutionally elected, would only have, as "constitutional powers," those specifically established in Article 347 of the Constitution, which are: to formulate ideas for "transforming the State, creating a new legal system and drafting a new Constitution," which is the sole purpose of a National Constituent Assembly.

There are no "other" constitutional powers in the Constitution that the fraudulent National Constituent Assembly may invoke to issue Resolutions that do not refer to its purpose and mission. As an illegitimate and illegal *de facto* body, it may adopt as many Resolutions as it may, but it may never invoke the use of "constitutional powers" that it does not have.

Fifth. On July 30, 2017, when the fraudulent National Constituent Assembly was unconstitutionally elected –and this too is a public, notorious and communicational fact– contrary to what is stated in the Resolution, there was no "massive attendance to its election", but rather a massive electoral absenteeism, and an extraordinary solitude at the polling stations throughout that day, of which, precisely the Fuerza Armada Nacional Bolivariana (the Bolivarian National Armed Forces) were privileged witnesses, through the so-called "Plan República."

Sixth, the Government has been lying about the whole process of the unconstitutional election of the fraudulent National Constituent

Assembly –that the regime has imposed, and has been corroborated by the National Constituent Assembly with its resolutions–; a lie regarding its origin, its election and its functions, thinking that repeating a lie a thousand times, can lead someone to believe it.

It is well known, however, that even though lies are repeated, they will never become true, because, as Sophocles said, "a lie never lives to become old;"[324] and less, when the regime has not even been able to have it said or repeat it "appropriately" a thousand times. Thus, the fraudulent National Constituent Assembly cannot even base itself on the well-known and foolish phrase generally attributed to Joseph Goebbels, Minister of Propaganda of the III Reich, that "A lie appropriately repeated a thousand times becomes a truth."[325] If it has been therefore inappropriately repeated, and if there is communicational evidence to unmask it, even in spite of censorship, nobody believes it.

Thus, the most accurate evidence of the Big Lie that the regime is intent on selling –i.e., that the fraudulent National Constituent Assembly installed in Venezuela on August 4, 2017 was constitutionally elected, and can legitimately act as a "sovereign" or as a "depository of an original power"– has been rejected, not only by the Resolution adopted by the National Assembly on August 7, 2017, when reaffirming *"the validity of the Constitution, and ignore the acts contrary to the constitutional and democratic order and human rights, emanating from the fraudulent National Constituent Assembly,"* but also by the very important "Lima Declaration" on the situation of Venezuela, adopted by the Foreign Ministers and Representatives of Argentina, Brazil, Chile, Colombia, Costa Rica, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay and Peru (See http://www.infobae.com/america/venezuela/2017/08/08/los-cancilleresOf-17paises-de-america-condemned-the-rupture-of-democratic-order-in-venezuela), where they have declared –as a continental rebuttal of all the lies that [the Venezuelan regime] intends to spread through controlled media– nothing more and nothing less, [among other things] that:

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[324] See https://proverbia.net/autor/frases-de-sofocles

[325] See https://www.abc.es/cultura/20140305/abci-para-gobbels-mentira-repetida-201403051128.html

1. They condemn the rupture of the democratic order in Venezuela;

2. They decided not to recognize the National Constituent Assembly, nor the acts that emanate from it, due to its illegitimate nature;

3. They fully support and are solidary with the democratically-elected National Assembly; and

4. The legal acts that, according to the Constitution require authorization of the National Assembly, will only be recognized when said Assembly has approved them.

New York, August 8, 2017

PART FOUR

HUMAN RIGHTS ABANDONED

Chapter IX

HUMAN RIGHTS IN LATIN AMERICA: ARE WE SERIOUS IN PROTECTING THEM? (2016)*

I. It is impossible to protect human rights in political systems where the Supreme Court of a country is politically controlled by any of the other two branches of government, whether the Legislative or the Executive, and where the independence and autonomy of the Judiciary is not guaranteed. Therefore, one cannot seriously talk about human rights in countries that lack independence of the Judiciary.

And this is precisely the situation of Venezuela, where, after a continuous gradual and systematic process of dismantling democracy,[326] no separation of powers principle exists in the

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* Presentation at the Conference on: *Human Rights in the Americas: Are we Serious?, James Madison Program in American Ideals and Institutions*, Princeton University, Princeton, May 6, 2016. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/ Brewer.%20On%20the%20Protection%20of%20HHRR%20in%20Venezuela.%20Princeton,%20may%202016.pdf

326 See Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010; "La demolición del Estado de derecho y la destrucción de la democracia en

Totalitarian State that during the past fifteen years has been assembled, and no independence and autonomy of the Judiciary exists.[327] The consequence is that the current Venezuelan State is not functioning at all as a Rule of Law State, in spite of the very florid constitutional definition of the State, as a social, decentralized and democratic rule of law State of justice (art. 2).

Venezuela," in *Revista Trimestral de Direito Público (RTDP)*, Nº 54, Instituto Paulista de Direito Administrativo (IDAP), Malheiros Editores, Sao Paulo, 2011, pp. 5-34

327 See in *general*, Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004),"en *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Barquisimeto, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, 2007. El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial, Allan R. Brewer-Carías, 2007. *Estudios Sobre el Estado Constitucional (2005-2006)*, Caracas: Editorial Jurídica Venezolana, pp. 245-269; and Allan R. Brewer-Carías 2007. La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006), *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Madrid: Marcial Pons, pp. 25-57; Allan R. Brewer-Carías, "Sobre la ausencia de independencia y autonomía judicial en Venezuela, a los doce años de vigencia de la constitución de 1999 (O sobre la interminable transitoriedad que en fraude continuado a la voluntad popular y a las normas de la Constitución, ha impedido la vigencia de la garantía de la estabilidad de los jueces y el funcionamiento efectivo de una "jurisdicción disciplinaria judicial"), in *Independencia Judicial*, Colección Estado de Derecho, Tomo I, Academia de Ciencias Políticas y Sociales, Acceso a la Justicia org., Fundación de Estudios de Derecho Administrativo (Funeda), Universidad Metropolitana (Unimet), Caracas 2012, pp. 9-103; and The Government of Judges and Democracy. The Tragic Situation of the Venezuelan Judiciary," in Sophie Turenne (Editor.), *Fair Reflection of Society in Judicial Systems. A Comparative St*udy, Ius Comparatum. Global Studies in Comparative Law, Vol 7, Springer 2015, pp. 205-231; also published in the book: *Venezuela. Some Current Legal Issues 2014, Venezuelan National Reports to the 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, 20-26 July 2014*, Academia de Ciencias Políticas y Sociales, Caracas 2014, pp. 13-42.

This situation is well known by all the political analysts in the country, but is generally ignored abroad by the public, and even by some political leaders. Deliberately or not, conveniently or not, many still consider that democracy is only defined through the prism of electoral processes, not bearing in mind that democracy is much more than elections; and even regarding elections, their focus on democracy without considering the problems of legitimacy regarding the effective representation and participation in some electoral exercises, hence, the lack of democracy in Venezuela has been generally disregarded.

Notwithstanding, we must recognize that some very important exceptions can be identified.

First, I must refer to the case of the Inter-American Commission on Human Rights, which in many of its Annual Reports, since 2003, has referred to the situation of the Judiciary in Venezuela. For instance, as far as 2003, after legal reforms were introduced in 2000 to the Law of the Supreme Tribunal regarding the appointment of the Justices of the Supreme Tribunal,[328] the Commission warned about the lack of "the necessary safeguards in order to prevent other branches of government from undermining the Supreme Tribunal's independence and to keep narrow or temporary majorities from determining its composition."[329] The Commission clearly understood the significance of such reforms that have allowed since then, the total control of the Supreme Tribunal by other branches of government.

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[328] For this reason, in its 2003 *Report on Venezuela,* the Inter-American Commission on Human Rights observed that the appointment of Judges of the Supreme Tribunal of Justice did not apply to the Constitution, so that "the constitutional reforms introduced in the form of the election of these authorities established as guaranties of independence and impartiality were not used in this case. See Inter-American Commission of Human Rights, 2003 *Report on Venezuela*; paragraph 186.

[329] See IACHR, *2004 Annual Report* (Follow-Up Report on Compliance by the State of Venezuela with the Recommendations made by the IACHR in its Report on the Situation of Human Rights in Venezuela [2003]), para. 174. Available at http://www.cidh.oas.org/annualrep/2004eng/chap.5b.htm

The Commission also warned since the same year 2003, about the lack of stability of judges in general,[330] highlighting the dismissal of almost all the judges of the country without any due process guaranties, being replaced by provisional or temporary judges. The Commission considered that provisional judges are susceptible to political manipulation, as has been demonstrated in the case of Venezuela, altering the right of the people to access justice. In this regard, the Commission reported on the numerous cases of dismissals and substitutions of judges decided in retaliation for issuing decisions contrary to the government or to the will of some public officials.[331]

In its *2008 Annual Report*, the Commission again verified the provisional nature of the members of the Judiciary qualifying it as an "endemic problem" of the country, particularly because the appointment of judges was made without applying the constitutional provisions on the matter that provide for the incorporation of judges to the judicial career only through public contest exams, thus exposing judges to discretionary dismissal, highlighting what the Commission called the "permanent state of urgency" in which the appointments of judges were made. [332]

That is why the same Inter-American Commission on Human Rights, also in 2009, after describing "how a large numbers of judges

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330 The Inter-American Commission on Human Rights said: "The Commission has been informed that only 250 judges have been appointed by opposition contests according to the constitutional text. From a total of 1772 positions of judges in Venezuela, the Supreme Tribunal of Justice reports that only 183 are holders, 1331 are provisional and 258 are temporary," *Informe sobre la Situación de los Derechos Humanos en Venezuela*; OAS/Ser.L/V/II.118. d.C. 4rev. 2; December 29, 2003; paragraph 11. The same Commission also said that "an aspect linked to the autonomy and independence of the Judicial Power is that of the provisional nature of the judges in the judicial system of Venezuela. Today, the information provided by the different sources indicates that more than 80% of Venezuelan judges are "provisional". Idem, Paragraph 161.

331 See *Informe sobre la Situación de Derechos Humanos en Venezuela*; OAS/Ser.L/V/II.118. doc.4rev.2; December 29, 2003, Paragraphs 161, 174, available at http://www.cidh.oas.org/coun-tryrep/Venezuela2003eng/toc.htm.

332 See *Annual Report 20*08 (OEA/Ser.L/V/II.134. Doc. 5 rev. 1. 25 febrero 2009), paragraph 39.

have been removed, or their appointments voided, without any due process guaranties on the applicable administrative proceedings," noted "with concern that in some cases, judges were removed almost immediately after adopting judicial decisions in cases that had a major political impact." The Commission concluded by affirming that "the lack of judicial independence and autonomy vis-à-vis political power is, in the Commission's opinion, one of the weakest points of Venezuelan democracy."[333]

Second, I must also refer to some important decisions adopted by international institutions for the protection of human rights. For instance, the Human Rights Committee of the United Nations, in a recent case related to Venezuela, in which a judge was arrested for applying a recommendation of a UN Committee on arbitrary detentions, expressed the need for the States to adopt "specific measures in order to guarantee the independence of the Judicial Power, and to protect judges from any kind of political influence, establishing clear procedures and objective criteria for their appointment, remuneration, mandate, promotion, suspension and dismissal," adding that "any situation in which the functions and attributions of the Judicial and the Executive Branches are not clearly distinguishable or in which the latter could control or direct the former, is incompatible with the concept of an independent tribunal."[334]

On the other hand, the Inter American Court on Human Rights has also condemned the Venezuelan State on three occasions due to the lack of guaranties for the stability of the Judiciary,[335] declaring

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[333] See in ICHR, *Annual Report 2009*, paragraph 483, available at http://www.cidh.oas.org/-annualrep/2009eng/Chap.IV.f.eng.htm .

[334] CDH (4 de diciembre de 2012) *Eligio Cedeño vs. Venezuela,* Comunicación N° 1940/2010, párr. 7.3. See the *Observación general Nº 32 (2007) del Comité sobre el derecho a un juicio imparcial y a la igualdad ante los tribunales y cortes de justicia* .

[335] Corte IDH, *Caso Apitz Barbera y otros* ("Corte Primera de lo Contencioso Administrativo") Vs. Venezuela, Excepciones Preliminares, Fondo, Reparaciones y Costas, Serie C Nro. 182, párr. 253; CorteIDH, *Caso Maria Cristina Reverón Vs. Venezuela*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Serie C Nro. 197, párr. 190; CorteIDH, *Caso*

that a court integrated by provisional judges that can be discretionally removed, is not consistent with the independence of the Judiciary. In this regard, the Court in a case decided in 2009, after affirming that "the stability of provisional judges is closely linked to the guaranty against external pressures," that in Venezuela "since August 1999 until now, provisional judges have no stability in office, are appointed in a discretionary way and may be removed without any kind of pre-established procedure," recognizing at that time that 80% of judges of the Republic were appointed on a provisional basis; concluding that they were exposed to "external pressure," which strongly affected their judicial independence.[336].

Third, I also want to mention, the important public comments and warnings expressed during 2015, by a very important group of former Latin American Presidents, gathered through the *Iniciativa Democrática España América.* In its First Declaration issued in Panama about the political situation of the country, thirty-three former Latin American Presidents expressed that:

> "Democracy and its effective exercise, based on the solidarity among States, consists of the respect and guaranty of human rights, the exercise of power according to the rule of law, the separation and independence of powers, political pluralism, free and fair elections, freedom of expression and press, probity and government transparency, among other standards, as stated in the Organization of American States' declaration of Santiago de Chile of 1959, later extended and developed by the Inter-American Democratic Charter of 2001.
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> Notwithstanding, the government of Venezuela has denounced the American Convention on Human Rights, and supports a policy of not recognizing nor accepting the decisions and statements of the international and Inter-American bodies for the protection of human rights, gravely affecting the right of

Mercedes Chocrón Chocrón Vs. Venezuela, Excepciones Preliminares, Fondo, Reparaciones y Costas, Serie C Nro. 227.

336 Corte Interamericana de Derechos Humanos, *Caso Reverón Trujillo vs. Venezuela*, Sentencia de 30 de Junio de 2009, *(*Excepción Preliminar, Fondo, Reparaciones y Costas*)*.

international protection of rights declared in the Constitution of said State for the benefit of all persons.

In particular, the absence of independence of the Judiciary is manifest, as well as the judicial persecution of all those that manifest and politically express dissidence toward the government; the reiterative presence of acts of torture by public officials of the State; the existence of armed para-State groups that support the government in a situation of total impunity, whereby it requested the immediate liberation of the political prisoners, among them, democratic leaders Leopoldo López and mayors Antonio Ledezma and Daniel Ceballos."[337]

Fourth, I also must recall the direct public expressions, made through Open Letter by the Secretary General of the Organization of American States, Dr. Luis Almagro, addressed to Nicolás Maduro, President of the Republic, on January 12, 2016, in which he said:

"Unfortunately, your Government decided to integrate public institutions according to a partisan policy, as the National Electoral Council, the Supreme Tribunal of Justice and all organs of control. This means that the decisions adopted by such organs, not only have no legal content, but also adds other of political content. The political career of these public officials is not compatible with the impartiality and objectivity needed to exercise justice. The rule of law State lost credibility with a judicial system perceived as partial.

When a branch of government, confers upon itself conditions enabling it to control, affect, decide, void or manipulate the attributions of other branches of government, the situation is more than worrisome, putting at risk the balance of the powers of the State." [338]

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[337] See IDEA, "Declaración de Panama," 9 de bril de 2015, available in http://static1.squarespace.com/static/5526d0eee4b040480263ea62/t/5591aa83e4b046b88ece6976/1435609731706/ESPECIAL+CUMBRE+AMERICAFINALWEB.pdf.

[338] Available at http://www.oas.org/documents/spa/press/CARTA.A.PRESIDENTE.MADURO.12.01.16.pdf.

Fifth, I must also recall the few but very important expressions made during the past years by various Legislative bodies in Latin America, expressing concern about the situation of Democracy in Venezuela, as has been the case of the Senates of Colombia, Paraguay, Brazil, Uruguay and Mexico. Nonetheless, we have to recognize that in some cases, the Legislators of those countries have reacted more motivated by public opinion or the visits made by the wives and other family members of the political prisoners, than due to any official State reaction facing the serious general political situation of Venezuela.

And *sixth*, I must also mention the astonishing and very important reaction during 2015, undoubtedly without any precedent in Latin America, not of one, but of three important Latin American Supreme Courts, regarding the situation of the Judiciary in Venezuela, denouncing in a direct, clear and unambiguous way the absence of judicial guaranties in the country, particularly with respect to the protection of human rights. This was the case, not only of the Supreme Court of Chile, but also, even before, the same regard, the cases of decisions issued by the Supreme Court of Costa Rica and the Supreme Federal Court of Brazil.[339]

II. In all these cases, the Supreme Courts' decisions have also dealt with the matter of the lack of judicial guaranties and minimal conditions for the protection of human rights in Venezuela, due to the lack of independence of the Judiciary.

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[339] See Allan R. Brewer-Carías, "Las Cortes Supremas de *Costa Rica, Brasil y Chile* condenan la falta de garantías judiciales en Venezuela. De cómo, ante la ceguera de los gobiernos de la región y la abstención de la Corte Interamericana de Derechos Humanos, han sido las Cortes Supremas de estos países las que con base en la jurisdicción universal de protección de los derechos humanos, hay comenzado a juzgar la falta de autonomía e independencia del Poder Judicial en Venezuela, dictando medidas de protección a favor de ciudadanos venezolanos contra el Estado venezolano," Noviembre 2015, available at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20CORTES%20SUPREMAS%20DE%20COSTA%20RICA,%20BRASIL%20Y%20CHILE%20%20Poder%20judicial%202015.pdf

The first case was a decision of the very important Constitutional Chamber of the Supreme Court of Justice of Costa Rica, issued on July 31, 2015,[340] granting an *habeas corpus* in order to protect a Venezuelan citizen that was imprisoned in Costa Rica, pending a request for extradition by the Venezuelan Government, by considering that the prisoner could not have a fair trial in his country.

In order to grant the constitutional protection rejecting the extradition petition, the Costa Rican Supreme Court directly questioned the absence of independence of the Judiciary in Venezuela, considering that it lacked all "the minimal guaranties required by a system of objective and impartial justice," adding that nobody could expect in Venezuela to be subject to a trial with minimal judicial guaranties according to international law standards, even in a case as the one decided, related to a common crime, namely, fraud.

Additionally, the Court considered that the lack of the "basic guaranty of independence of judges and prosecutors," was due to Venezuela's having denounced in 2012 the American Convention on Human Rights, considering that decision as "a grave threat regarding the effective respect of fundamental rights." For the Costa Rican

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[340] Véase el texto de la sentencia en http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&nValor1=1&nValor2=644651&strTipM=T&strDirSel=directo&_r=1. Véase la noticia de prensa sobre dicha sentencia en http://www.nacion.com/sucesos/poder-judicial/Sala-IV-extradicion-cuestiona-Venezuela_0_1504049615.html See on this decision: Allan R. Brewer-Carías, "El cuestionamiento del Poder Judicial venezolano por un tribunal extranjero. De cómo la Sala IV (Sala Constitucional) de la Corte Suprema de Justicia de Costa Rica liberó a un presunto estafador cuya extradición había sido solicitada por el Estado de Venezuela, por errores inexcusables en la petición de extradición formulada, y además, por constatar que la ausencia de autonomía e independencia del Poder Judicial en Venezuela no le garantiza a nadie posibilidad alguna de debido process." Available at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20SOBRE%20EL%20CUESTIONAMIENTO%20DEL%20PODER%20JUDICIAL%20VENEZOLANO%20POR%20LA%20CORTE%20SUPREMA%20DE%20COSTA%20RICA.%20agosto%202015.pdf

Court that meant that the Venezuelan State had "serious judicial and political weakness in order to guarantee the accused person the basic due process according to the Constitution and to the international law on human rights."

The Supreme Court eventually concluded affirming that:

> "No due process of law can exist if judges are appointed without stability; if the accusation is made by provisional prosecutors without guaranties that could assure their independence when protecting fundamental rights, and a fair trial. Separation of powers, which is the political condition that supports a criminal trial, does not exist under those conditions."

Consequently, and regarding the request for extradition, in this case, the Supreme Court of Costa Rica decided that in Venezuela the extradition procedure "contains elements that demonstrate that there are no institutional conditions to assure the effective defense of the fundamental rights of the accused," adding that, regarding the essential conditions for the protection of freedom,

> "a system of independent justice must exist that guarantees the objectivity and impartiality of judges, without which it is impossible to guarantee freedom in face of the punitive power of the State."

The consequence of all this reasoning was for the Court to reject the Venezuelan State's petition for extradition, freeing the accused.

However, in particular, regarding the fact that Venezuela has denounced the American Convention, the Costa Rican Court added that:

> "To send a citizen to a country that has denounced the Convention that protects fundamental rights, does not give enough confidence to admit that the person that is sent to that other jurisdiction would be treated according to the basic guaranties that any citizen must have, regardless of its nationality."

Finally, in the decision, the judges of the Supreme Court of Costa Rica expressed their opinion that no confidence can exist regarding "a system of justice lacking independence as the Venezuelan, that has been proven to be inefficient to accomplish its functions," particularly, when in:

> "many cases it has been used as a mechanism for the persecution of political opponents or dissidents, or simple critics of the political process, including political leaders, human rights defendants, trade unions leaders and students."

III. Following the decision of the Supreme Court of Costa Rica, the Supreme Federal Tribunal of Brazil, through a decision issued on November 11, 2015,[341] also in a process for extradition of another Venezuelan citizen at the request of the Venezuelan Government, eventually protected the indicted and also granted his freedom, rejecting the request of the Venezuelan State. The Court justified its decision based on the "fear that the accused could not have in his country the right to an impartial trial in of the event of a possible extradition." The Tribunal considered that it was more important to protect the basic rights of individuals, and among them, the right to a trial by an independent and impartial judge, according to the due process rules, than the international cooperation on criminal matters.

IV. After these two cases, we then have the very important decision of the Supreme Court of Chile, issued on November 18, of 2015,[342] in which the "universal jurisdiction for the protection of human rights" was implemented, based on international treaties and on *ius cogens,* concluding by granting constitutional protection in favor of two Venezuelan political leaders imprisoned in Venezuela, Leopoldo López y Daniel Ceballos, because – the Court said - :

> "it seems that the courts in Venezuela are not duly acting in order to protect human rights of its own individualized citizens; and it can further be considered that they are acting at least with

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341 Véase la reseña de la sentencia en: "Brasil otorga libertad a venezolano por dudar de imparcialidad de la justicia en Venezuela," en *lapatilla.com*, 11 de noviembre de 2015, en http://www.lapatilla.com/site/2015/11/11/brasil-otorga-libertad-a-venezolano-por-dudar-de-imparcialidad-de-la-justicia-en-venezuela/

342 Véase la reseña de la sentencia en: "Corte Suprema acoge recurso de protección de venezolanos Leopoldo López y Daniel Ceballos detenidos en penales de Caracas," en http://www.pjud.cl/web/guest/noticias-del-poder-judicial/-/asset_publisher/kV6Vdm3zNEWt/content/corte-suprema-acoge-recurso-de-proteccion-de-venezolanos-leopoldo-lopez-y-daniel-ceballos-detenidos-en-penales-de-caracas/

some collusion with the political purposes of the government."[343]

I want to stress that the Court argued that universal jurisdiction is recognized by Chilean Law, mentioning various cases previous cases in comparative law, including the "Pinochet case" in Spain, the "Adolfo Scilingo case" (2005) in Argentina, the "Guatemala Genocide" case (1999), and the "Tibet Genocide" case (2005).

Based on those international precedents, the Court admitted the possibility to issue an injunction for the protection of essential human rights even regarding foreigners not residing in Chile and imprisoned in another country, alleging that the "action for protection" of human rights in Chile, particularly for the protection of life, was established in Article 19 of the Constitution in order to protect the rights of "all persons, without distinction or geographical situation." The Court also referred to Article 20 of the Chilean Constitution that establishes the possibility for the interested party or for anybody on his behalf, to file an action for protection before a court against any action or

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343 El Defensor del Pueblo de Venezuela calificó la declaración de la Corte Suprema de Chile como "insólita y grosera" aseverando que la sentencia contra Leopoldo López "no se encuentra en el margen de la Ley de un país soberano como Venezuela." Véase: "Saab: Decisión de la Corte chilena sobre López y Ceballos es insólita y grosera," en *NOBITOTAL*, 20 de noviembre de 2015, en http://notitotal.com/2015/11/20/saab-decision-de-la-corte-chilena-sobre-lopez-y-ceballos-es-insolita-y-grosera/. Por su parte, el Tribunal Supremo de Venezuela, mediante Comunicado, rechazó "la ofensa a la institucionalidad, a la democracia y a la soberanía de nuestro país, al situar infundadas afirmaciones, al margen de la verdad y del Derecho Internacional," indicando que la sentencia de la Corte Suprema de Chile "carece de validez y es absolutamente inejecutable en el orden internacional e interno por violentar principios y normas universales del Derecho Internacional." Para fundamentar su rechazo, la Presidenta del Tribunal Supremo de Venezuela "Recordó que los tribunales en el país actúan cabalmente y preservando los derechos humanos, por lo que Venezuela se constituye en un verdadero Estado garantista de la esfera de los derechos ciudadanos." Agregó que el Poder Judicial honra su misión de preservar la soberanía por lo que nunca. Véase el texto enhttp://www.tsj.gob.ve/-/poder-judicial-venezolano-condena-decision-injerencista-de-la-corte-suprema-de-chile

omission that harms the rights and guaranties established in the Constitution.

Based on these principles, the Court concluded that because the "respective court" that should grant protection was not defined in the Constitution, and due to the fact that, in this case, the right to life of the Venezuelan citizens Leopoldo López y Daniel Ceballos, could be impaired, it decided to grant the constitutional protection, ordering:

> "to request through the Government of Chile, to the Organization of American States Commission on Human Rights represented by its President or an authorized delegate, to go to Caracas, Venezuela, to the *Ramo Verde* and *Guarico* prisons where they are imprisoned and verify their health condition and the lack of freedom of both protected persons."

The Court also asked the government in its decision to ask the Commission to prepare a case file and

> "a Report to be sent to the General Assembly of the Organization of American States regarding the compliance of the international treaties on the matter, in order for such body to adopt the proper measures for the protection of the essential rights, regarding which the Court must be informed."

The order was exclusively directed to the Chilean Government, for it to request the Inter-American Commission on Human Rights to send representatives to Venezuela. The Executive refused to comply with the order, arguing that is was an exclusive power of the Government to conduct international relations, and a petition for its nullity was filed by the Council of Defense of the State. After this rejection, the Court rejected the motion of nullity and modified its decision on December 28, 2015, substituting the order given to the Government by a direct request to the Inter-American Commission. Nonetheless, the Commission, on February 8, 2016, rejected the request arguing that the Commission was beyond the jurisdiction of national courts.

Besides, it is useful to remember that during the past decade, Venezuela had systematically rejected any *in loc*o visit by the Inter-American Commission; so, even if the Commission had decided in line with the request of the Chilean Court, the visit would have been denied by the Government.

Nonetheless, the importance of the Chilean Supreme Court decision, even though it has not been enforced, is the relevant fact that a Supreme Court of a Latin American country formally reacted in relation to the lack of judicial guaranties in Venezuelan for citizens to have their human rights protected while being imprisoned for political motives.

V. In all three cases, the facts denounced by the Supreme Courts of Justice of Costa Rica, Chile and Brazil, exactly reflect the current situation of the Judiciary in Venezuela, where since 2000, through the progressive control by the Government of the Supreme Tribunal of Justice, which in Venezuela has the constitutional function of governing and administering the whole Judiciary, the Judiciary is completely politically controlled.

And this has been possible due to the discretionary power that a Commission of the Supreme Tribunal has in order to appoint and dismiss judges,[344] with the result that all the courts have been packed with temporary and provisional judges, lacking any sort of stability, and being subject to political instructions.

That means that the judicial career provided for in the Constitution, seeking the appointment of judges only through open and public contest never has been implemented; nor has the Judicial Disciplinary Jurisdiction, also provided in the Constitution (Articles 254 and 267), never been effectively implemented. Consequently, judges are dismissed in a discretionary way, without due process, it being impossible under such conditions for them to be effective

344 See Rafael J. Chavero Gazdik, 2011. *La Justicia Revolucionaria. Una década de reestructuración (o involución) Judicial en Venezuela*, Caracas: Editorial Aequitas; Laura Louza Scognamiglio, 2011. *La revolución judicial en Venezuela*, Caracas: FUNEDA; Allan R. Brewer-Carías, 2005. La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004), *XXX Jornadas J.M. Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Barquisimeto: Instituto de Estudios Jurídicos del Estado Lara, pgs. 33-174; and Allan R. Brewer-Carías, 2007. La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006), *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Madrid: Marcial Pons, pp. 25-57.

instruments for the protection of human rights, and furthermore, the Judiciary being the main tool used by the Government for implementing the structure of a Totalitarian State, and persecuting political dissidents.[345]

VI. Under these conditions, the Venezuelan political system has ceased to be a democratic one, even if elections have taken place during the past years in the country. As I mentioned at the beginning, democracy is much more than the mere popular or circumstantial election of government officials, as has been formally declared in the Inter-American Democratic Charter adopted by the Organization of American States in 2001. [346].

As a matter of fact, that Charter has, among the *essential elements of representative democracy,* in addition to having periodical, fair and free elections, the respect for human rights and fundamental liberties; the access to power and its exercise with subjection to the rule of law; the plural regime of the political parties and organizations; and, what is the most important of all, the "separation and independence of public powers" (Article 3); all of which can only be satisfied when a system of mutual control by the different branches of government has been implemented in a country.

In addition, the same Inter-American Democratic Charter refers to what it is called the *fundamental components of democracy,* namely: the transparency of governmental activities; the responsibility of governments; the respect of social rights and freedom of speech and press; the constitutional subordination of all institutions of the State, including the military, to the legally

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345 See Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública*, Nº 180, Madrid 2009, pp. 383-418; *Reforma Constitucional y Fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009.

346 See on the Inter-American Democratic Charter, in Allan R. Brewer-Carías, 2002. *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Caracas: Ediciones El Nacional, pp. 137 ff.; Asdrúbal Aguiar, 2008. *El Derecho a la Democracia*, Caracas: Editorial Jurídica Venezolana.

constituted civil authority; and the respect of the rule of law by all the entities and sectors of society.

These fundamental elements and components of democracy can only be guaranteed in a system where the principle of separation and independence of powers is established and guaranteed, by means of a checks and balances system based on their independence and autonomy, such principle being the ones that can allow the functioning of a democracy.

That is, only when the separation of powers exists, all the other essential factors of democracy can exist: namely, fair elections and political pluralism; effective democratic participation; effective transparency in the exercise of government; a government subject to the Constitution and the rule of law; the possibility to access justice; and most important, a true and effective guaranty for the respect of human rights.[347]

VII. All these elements and components of democracy have been lacking in Venezuela during the past decade, being that the explanation of the abuses against human rights that have been committed by the Government, with the support of the Constitutional Chamber of the Supreme Tribunal; which has been in addition, in collusion with the Government the main instrument in order to neutralize the National Assembly, recently elected with a new majority controlled by the opposition.

Nonetheless, on matters of political persecution, it must be mentioned the case of *Radio Caracas Televisión* in 2007, which in violation of freedom of expression and information, was shut down and its assets were confiscated of by the Supreme Tribunal, assigning all the equipment to a State-owned enterprise.[348] In that case,

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[347] See Allan R. Brewer-Carías, "Democracia: sus elementos y componentes esenciales y el control del poder. Nuria González Martín (Comp.)**,** in *Grandes temas para un observatorio electoral ciudadano, Vol. I, Democracia: retos y fundamentos,* Instituto Electoral del Distrito Federal, México 2007, pp. 171-220.

[348] See the Constitutional Chamber Decision N° 957 (May 25, 2007), in *Revista de Derecho Público* 110, Editorial Jurídica Venezolana, Caracas 2007, 117ff. See the comments in Allan R. Brewer-Carías, 2007. El juez constitucional en Venezuela como instrumento para aniquilar la libertad de expresión plural y

although the owners, directors, and employees obtained protection from the Inter-American Court of Human Rights in 2015, the response issued by the Supreme Tribunal, was to declare that the Inter-American Court decision was not enforceable in Venezuela,[349] violating not only international obligations of the State, but also the Constitution.

Other examples of political persecution related to freedom of expression that can be mentioned are the criminal cases filed, without any serious grounds, against the main shareholders of *Globovisión*, the other independent TV station that remained with a critic line of opinion vis-à-vis the government, accused before criminal courts without grounds; and against the editors and members of the Board of Directors of the two main opposition newspapers, *Tal Cual* and *El Nacional.*[350]

This confirms that the Judiciary, particularly on criminal matters, has been used as the government instrument to pervert Justice, in

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para confiscar la propiedad privada: El caso RCTV, *Revista de Derecho Público*", Nº 110, (abril-junio 2007), Caracas: Editorial Jurídica Venezolana, pp. 7-32.

349 See Allan R. Brewer-Carías, "La condena al Estado en el caso *Granier y otros (RCTV) vs. Venezuela,* por violación a la libertad de expresión y de diversas garantías judiciales. Y de cómo el Estado, ejerciendo una bizarra "acción de control de convencionalidad" ante su propio Tribunal Supremo, ha declarado inejecutable la sentencia en su contra." 14 de septiembre de 201,"available at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20La%20condena%20al%20Estado%20en%20el%20caso%20CIDH%20Granier%20(RCTV)%20vs.%20Venezuela.%2014%20sep.%202015.pdf

350 See "Admiten demanda de Cabello contra Tal Cual y El Nacional," in Globovisión 13 august 2015, available at http://archivo.globovision.com/mp-admitio-demanda-de-diosdado-cabello-contra-tal-cual-y-el-nacional/. On this same day (May 6, 2016) it was announced that Cabello has also filed a suit against *The Wall Steret Journal.* See: "Cabello demanda en EEUU al Wall Street Journal por vincularlo al narcotráfico," in Analitica.com, May 5, 2016, available at http://www.analitica.com/actualidad/actualidad-nacional/diosdado-cabello-demanda-al-diario-wall-street-journal-por-articulo-sobre-narcotrafico/; and in *La Opinión*, Cúcuta, May 6, 2016, available at: http://www.laopinion.com.co/venezuela/cabello-demanda-en-eeuu-al-wall-street-journal-por-vincularlo-al-narcotrafico-111375#ATHS

many cases distorting the facts in specific cases of political interest, converting innocent people into criminals, and liberating criminals from all suspicion. It was the unfortunate case of the mass killings committed by government agents and supporters as a consequence of the enforcement of the so-called *Plan Avila*, a military order that encouraged the shooting of people participating in the biggest mass demonstration in Venezuelan history which, on April 11, 2002, was asking for the resignation of the then President of the Republic. The shooting provoked general military disobedience by the high commanders, in a way witnessed by all the country on TV, and ended with the military removal of the President, although just for a few hours, because the same military later reinstated him in office. Nonetheless, in order to change history, the shooting and mass killing were re-written, and those responsible seen by everybody on live TV, due to being government supporters were gratified as heroes, and the Police Officers who were trying to guarantee order in the demonstration, were accused of crimes they did not commit, and sentenced for murder with the highest punishment term of 30 years in prison.[351]

In other cases, the Constitutional Chamber of the Supreme Tribunal has been the instrument of the government to assume direct control of other branches of government, as happened in 2003 with the take-over of the Electoral Power, which since then has been totally controlled by the Executive Branch. Through a decision r regarding the judicial review of legislative omissions, the Supreme Tribunal, in a way contrary to the Constitution, decided, usurping the role of the National Assembly as electoral body, to elect its high officials, and directly appointed the new members of the National Electoral Council, of course, without complying with the conditions

[351] As was recognized publicly by a former Chief Justice of the Criminal Chamber of the Supreme Tribunal of Justice, Eladio Aponte Aponte, in 2012. See the text of the statement on, in *El Universal*, Caracas 18-4-2012, available at: http://www.eluniversal.com/nacional-y-politica/120418/historias-secretas-de-un-juez-en-venezuela

established in the Constitution for such indirect popular election, with a specific supermajority of votes.[352]

Through this decision, the Constitutional Chamber assured the Government the full control of the Electoral Council, kidnapping the citizens' rights to political participation through the 2004 recall referendum, and allowing the official governing party to manipulate the electoral results of almost all the elections that have taken place in the country. The same situation was repeated in December of 2014, and again, the Constitutional Chamber of the Supreme Tribunal has appointed the members of the Electoral Council, usurping the legislative body's constitutional attributions. It is not surprising that the proposed recall referendum that is currently taking place could be subject to the same slow operation undergone in 2004, to prevent its effectiveness.

The Constitutional Chamber of the Supreme Tribunal has also been the instrument for attacking the democratic principle in the country, imposing a non-elected person as Head of State, as was the case of Nicolás Maduro in 2013, when the death of President Chavez had not yet being announced[353] or revoking the popular mandate of elected officials not having jurisdiction to do so. In the first case, as mentioned above, the Supreme Tribunal in January 2013 imposed

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352 See Decision Nº 2073 of August 4, 2003, Case: *Hermánn Escarrá Malaver y oros*), and Decision Nº 2341 of August 25, 2003, Case: *Hemann Escarrá y otros*. See in Allan R. Brewer-Carías, "El secuestro del poder electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004," *Stvdi Vrbinati, Rivista tgrimestrale di Scienze Giuridiche, Politiche ed Economiche*, Año LXXI – 2003/04 Nuova Serie A – N. 55,3, Urbino: Università degli Studi di Urbino, 2003/2004, pp.379-436

353 See the text of the decisions in http://www.tsj.gov.ve/decisiones/scon/Enero/02-9113-2013-12-1358.html and in in http://www.tsj.gov.ve.decisioes/scon/Marzo/141-9313-2013-13-0196.html. See on these decisions: Allan R. Brewer-Carías, "Crónica sobre la anunciada sentencia de la Sala Constitucional del Tribunal Supremo de 9 de enero de 2013 mediante la cual se conculcó el derecho ciudadano a la democracia y se legitimó la usurpación de la autoridad en golpe a la Constitución," en Asdrúbal Aguiar (Compilador), *El Golpe de Enero en Venezuela (Documentos y testimonios para la historia),* Editorial Jurídica Venezolana, Caracas 2013, pp. 133-148

Vice-President Nicolás Maduro in charge of the Presidency and to continue in that position, although not being an elected official because he had appointed by the former President.[354] The Supreme Tribunal further allowed him, contrary to the express text of the Constitution, to be candidate to the same position in the subsequent election, without leaving the post.[355]

In the second case, the Constitutional Chamber of the Supreme Tribunal revoked the popular mandate of two mayors (one of which was Vicencio Scarano Spisso), usurping the people's right to revoke mandates through referendum (Art. 74);[356] and also revoked the mandate of a member of the National Assembly, Maria Corina Machado, a matter that also can only be decided by the people through a referendum,[357] just because she spoke before the General

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354 See on the Supreme Tribunal decision: Allan R. Brewer-Carías, "Crónica sobre la consolidación, de hecho, de un gobierno de sucesión con motivo del anuncio del fallecimiento del Presidente Chávez el 5 de marzo de 2013," en Asdrúbal Aguiar (Compilador), *El Golpe de Enero en Venezuela (Documentos y testimonios para la historia),* Editorial Jurídica Venezolana, Caracas 2013, pp. 199-218

355 See on the Supreme Tribunal decisions, the comments in Allan R. Brewer-Carías, "Crónica sobre las vicisitudes de la impugnación de la elección presidencial de 14 de abril de 2013 ante la sala electoral, el avocamiento de las causas por la Sala Constitucional, y la ilegítima declaratoria de la "legitimidad" de la elección de Nicolás Maduro mediante una "Nota de prensa" del Tribunal Supremo," en Asdrúbal Aguiar (Compilador), *El Golpe de Enero en Venezuela (Documentos y testimonios para la historia),* Editorial Jurídica Venezolana, Caracas 2013, pp. 297-314

356 See decision No. 138 of March 17, 2014 in http://www.tsj.gov.ve/decisiones/scon/marzo/162025-138-17314-2014-14-0205.HTML See the comments on this decision in Allan R. Brewer-Carías, "La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento "sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarno Spisso y Daniel Ceballo)," en *Revista de Derecho Público,* No 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 176-213.

357 See María Corina Machado case, decision No. 207 of March 31, 2014, in http://www.tsj.gov.ve/decisiones/scon/marzo/162546-207-31314-2014-14-0286.HTML. Also in *Official Gazette* No. 40.385 April 2, 2014. See the

Assembly of the Organization of American States, denouncing the lack of democracy in the country.

Finally, in another decision, the Supreme Tribunal, also violating the democratic principle, accepted that the right of a citizen to be elected, which is a constitutional right, could be limited by an administrative body such as the General Comptroller's Office, disqualifying him from running for elected positions. This was the case of Leopoldo López Mendoza, former Mayor of one of the Municipalities of Caracas, regarding which the Supreme Tribunal [358] refused to declare that such disqualification for the exercise of a political right was contrary to the American Convention on Human Rights, and to the Constitution.

The lack of justice in Venezuela led López to file a petition before the Inter-American Court of Human Rights, seeking the protection of his political rights, which he effectively obtained in 2011, in a decision in which the State was condemned for violating his rights. Nonetheless, in this case, again, at the express request of the Government, the Supreme Tribunal also decided that the Inter-

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comments on this decision in Allan R. Brewer-Carías, "La revocación del mandato popular de una diputada a la Asamblea Nacional por la Sala Constitucional del Tribunal Supremo de oficio, sin juicio ni proceso alguno (El caso de la Diputada María Corina Machado)," in *Revista de Derecho Público,* No 137 (Primer Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 165- 189; and

[358] See decision Nº 1265 of August 5, 2008 in http://www.tsj.gov.ve:80/decisiones/scon/Agosto/1265-050808-05-1853.htm See on this decisions the comments in Allan R. Brewer-Carías, "La incompetencia de la Administración Contralora para dictar actos administrativos de inhabilitación política restrictiva del derecho a ser electo y ocupar cargos públicos (La protección del derecho a ser electo por la Corte Interamericana de Derechos Humanos en 2012, y su violación por la Sala Constitucional del Tribunal Supremo al declarar la sentencia de la Corte Interamericana como "inejecutable"), en Alejandro Canónico Sarabia (Coord.), *El Control y la responsabilidad en la Administración Pública, IV Congreso Internacional de Derecho Administrativo*, *Margarita 2012*, Centro de Adiestramiento Jurídico, Editorial Jurídica Venezolana, Caracas 2012, pp. 293-371

American Court decision was not enforceable in the country,[359] requesting the Government to denounce the American Convention on Human Rights, which it eventually did.

VIII. Within this panorama, therefore, it is not surprising to find a judicial decision like the one issued by a criminal court in 2015, condemning Leopoldo López Mendoza to 13 years, 9 months and 12 hours in prison, for crimes that he did not commit, being in fact a condemnation for the supposed "felony" of having expressed his political opinion, publicly, against the government of Venezuela, in full exercise of his freedom of expression of his thoughts which nonetheless is guaranteed in the Constitution;[360] and for having been one of the leaders of the pacific street demonstration that were convened throughout the country in February of 2014, generating popular protest and rejection regarding the authoritarian régime; only disrupted by violence provoked by government agents.

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[359] The decision of the Inter-American Court in the *Leopoldo López vs. Venezuela* case was pronounced on 1 September 2011, but was declared "non-executable" in Venezuela by a decision of Constitutional Chamber No. 1547 dated 17 October 2011 (*Venezuelan State vs. Inter-American Court of Human Rights,* at http://historico.tsj.gob.ve/decisiones/scon/Octubre/1547-171011-2011-11-1130.html. See on this decision Allan R. Brewer-Carías, "El ilegítimo "control de constitucionalidad" de las sentencias de la Corte Interamericana de Derechos Humanos por parte la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela: el caso de la sentencia *Leopoldo López vs. Venezuela, 2011*," in *Constitución y democracia: ayer y hoy. Libro homenaje a Antonio Torres del Moral*. Editorial Universitas, Vol. I, Madrid, 2013, pp. 1.095-1124. Véase también el Comunicado de 37 juristas a favor de Leopoldo López, en *El Universal*, 28 September 2011, at http://www.eluniversal.com/nacional-y-politica/110928/comunicado-de-37-juristas-a-favor-de-leopoldo-lopez.

[360] As José Ignacio Hernandez said, "The trial against Leopoldo López began as a result of the opinions he had expressed. That is to say, López is not on trial for having destroyed or having set fire to buildings. Those violent acts doubtlessly deserve total rejection and the start of the respective investigations. But the trial against López has nothing to do with that. This criminal trial is basically about judgment being passed upon López's political opinions." See José Ignacio Hernández, "Todo lo que debe saber para entender por qué se enjuicia a Leopoldo López," in *Prodavinci*, 16 June 2014, at http://prodavinci.com/blogs/todo-lo-que-debe-saber-para-entender-por-que-se-enjuicia-a-leopoldo-lopez-por-jose-i-hernandez/

To these ends, the court in charge of his case, which without doubt is part of the group of "Judges of Horror" that make up the Venezuelan judiciary, through a decision issued on September 10, 2015,[361] considered that Leopoldo López was a "public instigator" and was an allegedly determiner of having other citizens commit the felony of arson and damage to public properties, and furthermore, considered that he had become associated with others with the intention of committing crimes, thus applying no other that the Law against Organized Crime and Terrorism, but without demonstrating which was the association, or who were its members, or what was the felonious motive of such supposed association.

This judicial atrocity is one more example of the *de facto* suspension of the validity of the Constitution, which is nevertheless always invoked by any official who might have a copy, not in order to apply the Constitution but to violate it; being another example of the fact that all powers of the State have been placed at the service of authoritarianism,[362] and, particularly, the criminal judges who have become agents of the political persecution.

The order given by the Government was to persecute López Mendoza, which was comply by the Pubic Ministry controlled by the Executive Branch, accusing him of all imaginable crimes, such as homicide, terrorism, arson and damage to properties, and furthermore, of the felonies of public instigation and association to

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361 See on this decision Allan R. Brewer-Carías, "The Sentencing of Leopoldo López for the "felony" of opinion." Or How the Judges of Horror are Forcing the People into a Citizens' Rebellion," October 2015," available at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20The%20Sentencing%20of%20Leopoldo%20L%C3%B3pez%20for%20the%20felony%20of%20opinion.%20Oct.%202015.pdf Also in Spanish: ""La condena contra Leopoldo López por el "delito de opinión." O de cómo los jueces del horror están obligando al pueblo a la rebelión popular." 10 de octubre de 2015," available at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20I,%202,%20119.%20CONDENA%20DE%20LEOPOLDO%20L%C3%93PEZ.%2010%20Oct.%202016.pdf

362 See Allan R. Brewer-Carías, *Authoritarian Government v. The Rule of Law. Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014.

commit crime, [363] and thus, immediately upon the request of the prosecutor, and without any proof, an arrest warrant was issued against López in that same month of February 2014.[364]

Eventually, the criminal court issued the decision condemning Leopoldo López, as mentioned, for having been presumably the determiner of the felonies of arson and damages, and the author of the felonies of public instigation and association to commit crime.[365] As Amnesty International rightly considered the matter, the sentence was issued "without any credible evidence" against López, "which demonstrates the absolute lack of judicial independence and impartiality in Venezuela."[366]

In any case, the accusation and the Venezuelan court decision, was directed to persecute and prosecute no other hat the "felony" of opinion, made through the analysis of Lopez's speeches by a linguistic expert witness who only affirmed, in a hypothetical way, that Leopoldo López, "upon cultivating anger in his discourse,

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[363] See the text of the writ of accusation at http://cdn.eluniversal.com/2014/06/02/ACUSACION_LEOPOLDO.pdf. See "Fiscalía presentó acusación contra Leopoldo López," *El Nacional*, Caracas 14 April 2014, at http://www.el-nacional.com/politica/Fiscalia-General-acusacion-Leopoldo-Lopez_0_385161540.html

[364] See "Un tribunal ordena la detención de Leopoldo López," en *El Tiempo.com.ve*, Puerto la Cruz, 13 February 2014, at http://eltiempo.com.ve/venezuela/politica/un-tribunal-ordenala-detencion-de-leopoldo-lopez/126105

[365] See the text of the writ of accusation at http://cdn.eluniversal.com/2014/06/02/ACUSACION_LEOPOLDO.pdf

[366] Amnesty International said: "The charges against Leopoldo López were never adequately substantiated and the prison sentence against him has a clearly political motive. His only 'crime' is being the leader of an opposition party in Venezuela. He never should have been arrested arbitrarily nor tried in the first place. He is a prisoner of conscience and ought to be released immediately and unconditionally. With this decision, Venezuela is choosing to ignore basic human rights principles, and giving a green light to more abuses See statements by Erika Guevara-Rosas, Americas Director at Amnesty International, in: "Venezuela: Sentence against opposition leader shows utter lack of judicial independence," Amnesty International, 10 September 2015, at https://www.amnesty.org/en/latest/news/2015/09/venezuela-sentence-against-opposition-leader-shows-utter-lack-of-judicial-independence/

arguing against the current national government, *could have transferred* this sentiment to his audience." Thus, based just a hypothetical assumption, Lopez was condemned as having been "determiner" or "inducer" of crimes supposedly committed by others. The prosecutor agreed that the participation of López "did not consist of deploying the felonies of arson and damage to property in a direct manner," but considered that there were supposed elements,

> "such as the expert evidence in the analysis of the speeches of the indicted Leopoldo López, sufficient to deem that he did indeed command and induce demonstrators to conduct an attack against the seat of the Public Ministry, and against the property of the Venezuelan State*."*

Drawing from the aforementioned, in consequence, the Judge in her sentence considered that Leopoldo López used "*the art of the word*, - yes this is the main element of the decision – "the art of the word in order to make his followers believe that there was an alleged constitutional way out, when the conditions he sought were not present, such as the resignation of the President of the Republic," but at the same time recognizing that López in his discourse "appealed for peace and tranquility."

IX. In the end, as mentioned, Leopoldo López was condemned to prison, not because he committed any crime, but because the State deemed that his political discourse had to be criminalized. In other words, there was a need to criminalize the exercise of his freedom of expression of his political ideas; all under the fallacious argument that he had allegedly been the "determiner" of having other persons, whom he didn't even know, who, during the course of a public protest had allegedly damaged and set fire to public property, even when those facts were not proven and he never made reference or incited to such actions in his speech.

Furthermore, the Judge added that López was supposedly part of an "association to commit punishable acts" and that he allegedly had instigated disobedience of the laws, without even identifying said "felonious association to commit crime" or the alleged "associated" conspirators.

Of course, all this was a vulgar parody in order to declare Leopoldo López guilty of the crimes linked to the exercise of his freedom of expression and other political rights, staged by the Executive Branch through the Public Prosecutor's Office, using the criminal judicial system as the vindictive tool.

The most unbelievable fact of all this parody has been the tragic confession made by the public prosecutor who was then in charge of the accusation against López, once he defected a few weeks after the publication of the decision, explaining in Miami that he had decided to leave the country in order to avoid continuing "with the farce that was staged" against López and a few students, denouncing – although rather late – the "pressure" exercised against him by the "Executive Branch and his superiors in order to continue arguing based on the false evidence that was used to condemn López."

He expressed regrets, and explained that he did not want "to continue with the farce of such trial unjustly violating the rights" of the persecuted, encouraging judges and prosecutors to "tell the truth," to "lose fear" and "raise their voices and express their discontent for the pressure that our superiors exercised against us, threatening to destroy us, and send us to jail."[367] This has also been the situation of Antonio Ledezma, Mayor of Caracas, also imprisoned without trial for expressing political opinions about the need to change the authoritarian government and the need for a transitional government in the future.

In a situation like this, indeed it is not serious at all to talk about human rights, much less about their protection; as neither is serious the decision adopted by the United Nations in October 2015, to elect

[367] See the confessions of Franklin Nieves, on October 24, 2015 in the video available at https://www.youtube.com/watch?v=gfbJ8CUOiuo y en https://www.youtube.com/watch?v=GQeC7DCV7_s. On such confession, see Allan R. Brewer-Carías, "Lo que faltaba: la confesión del fiscal Franklin Nieves, acusador en el caso de Leopoldo López y otros estudiantes, condenados por los inexistentes "delitos" de "opinión" y de "manifestar," reconociendo la ausencia de independencia y de autonomía de los jueces y fiscales en Venezuela," 25 octubre de 2015," available at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/LO%20QUE%20FALTABA.%20Confesi%C3%B3n%20Fiscal%20del%20caso%20Leopoldo%20L%C3%B3pez.%20Pruebas%20falsas,%20oct%202015.pdf

Venezuela, a country in which human rights cannot be protected against the Government, as a member of the United Nations' Commission on Human Rights. [368]

Certainly, the question is: What could be expected from Venezuela for the protection of human rights in the world, if in the country the Government and the Judiciary colluded for the violation of such rights without any possibility to obtain protection? A situation that has been aggravated by the denunciation of the American Convention of Humans Rights, made in 2012 by the current President when he was the Minister of Foreign Affairs.

Simply, and unfortunately, nowadays it is not really serious at all to talk about the protection of humans rights in Venezuela, or by the Venezuelan Government, in international forums; and much less during the past months, when an elected body representing the people, such as the National Assembly, has been systematically blocked and annulled in his legislative and political control roles, precisely by the Supreme Tribunal, who is now governing the country.

If the representatives of the people cannot control the Government or the Public Administration or even pass an amnesty law, precisely for the protection of human rights, particularly of those incarcerated without cause, as the one enacted last month, which the same Constitutional Chamber considered unconstitutional in its entirely, obviously violating the Constitution; there is very little that can be done in the country if the authoritarian government continues squashing human rights with absolute impunity.

In that situation, expressions like the one of the Supreme Courts of Chile, Costa Rica and Brazil, as well as of International institutions, and events like this one at Princeton University, all are welcomed and appreciated by all Venezuelans defending democracy, democratic values and human rights.

Princeton, May 6, 2016

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[368] "The election was considered as a "diplomatic triumph" by the President of the Republic." See in "Venezuela reelegida miembro del Consejo de DD.HH. de la ONU," in *Telesur*, 28 october 28, 2015 available at: http://www.telesurtv.net/news/Venezuela-reelegida-miembro-de-la-Comision-de-DD.HH.-de-la-ONU--20151028-0039.html

Chapter X

THE JUDGES OF HORRORS IN ACTION: THE CONVICTION OF LEOPOLDO LÓPEZ TO PRISON FOR THE "CRIME" OF EXPRESSING HIS OPINION

(2015)*

I. Leopoldo López, a former mayor and distinguished leader of Venezuela's opposition, was sentenced to prison by a criminal court for the "felony" of having expressed his political opinion, publicly, against the government of Venezuela, in full exercise of his freedom to express his thoughts guaranteed by the Constitution. To this end, the court (Eighteenth Court of Appeals for Trial Functions of the Judicial Circuit of the Caracas Metropolitan Area), which is part of the "Judges of Horror" that make up the Venezuelan judiciary, totally submissive to and dependent on the Executive Branch, by means of the sentence of September 10, 2015, whose text was not published until one month later, on October 9, 2015, imagined herself that López had been a "public instigator" and was allegedly a determiner for having other citizens commit the felony of arson and damage to public properties, and furthermore, considered that he had become

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* Available at: http://allanbrewercarias.com/wp-content/uploads/2015/10/122.-Brewer.-The-Sentencing-of-Leopoldo-L%C3%B3pez-for-the-felony-of-opinion.-Oct.-2015.pdf. See the text in Spanish: "La condena contra Leopoldo López por el "delito de opinión". O de como los jueces del horror están obligando al pueblo a la rebelión popular," en *Revista de Derecho Público*, No. 143-144, (julio- diciembre 2015, Editorial Jurídica Venezolana, Caracas 2015, pp. 438-459. Available at: http://allanbrewercarias.com/wp-content/uploads/2016/11/864.-863.-Brewer.-LA-CONDENA-DE-LEOPOLDO-L%C3%93PEZ-POR-EL-DELITO-DE-OPINI%C3%93N.-9-Oct.pdf

associated with others with the intention of committing crimes, thus applying the Law against Organized Crime and Terrorism, but without demonstrating what this association was, nor who were its members, nor the felonious motive of such association.

This judicial atrocity is yet another example of the *de facto* suspension of the effect of the Constitution, which is nevertheless invoked by any official who might have a copy thereof, not in order to enforce the Constitution but to violate it, as a result of a process that began even before the Constitution had come into force in December of 1999, when it was modified behind the people's back, as part of a set of unconstitutional transitional mandates.[369] Starting with these mandates, there began an unbridled race for consolidating the empowerment of the State, carried out by those who had stormed it by means of the National Constituent Assembly of 1999, thus dismantling the separation of powers, and demolishing the democratic institutions from within, while using the very mechanisms of democracy for said purpose.[370]

The result of all this is there for all to see, and the sentence against Leopoldo López is another example of the fact that all the powers of the State have been placed at the service of authoritarianism,[371] beginning with the Supreme Court of Justice and all the Judiciary, and, particularly, on the one hand, the criminal judges who have become agents of political persecution, and, on the other, the Constitutional Chamber, which has become the most

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369 See the commentaries on the Decreto de Transición Constitucional of 20 December 1999 in Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002.

370 See Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010; "La demolición del Estado de derecho y la destrucción de la mocracia en Venezuela," in *Revista Trimestral de Direito Público (RTDP)*, Nº 54, Instituto Paulista de Direito Administrativo (IDAP), Malheiros Editores, Sao Paulo, 2011, pp. 5-34

371 See Allan R. Brewer-Carías, *Authoritarian Government v. The Rule of Law. Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014.

diabolical instrument of the Totalitarian State, moreover, because, although it is supposed to be the "guardian of the Constitution," there is nobody there to control it.[372]

The result has been that after fifteen years, almost all of the Judiciary is now made up of temporary or provisional judges that are therefore dependent on the Political Power;[373] and the other powers of control have been subjected and neutralized by the Executive Branch of the Government, so we have a Comptroller that does not control, a Public Defender that neither protects nor defends, a Public Ministry that does nothing but persecute members of the opposition, while letting hundreds of street killings go unpunished; and an Electoral Power that appears to be the political agent of the State's candidates.

But one thing is certain: they create propaganda that says they are acting "legally," as expounded by the Public Defender in March of 2014, as she referred to the unconstitutional detention and jailing

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372 See Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública*, Nº 180, Madrid 2009, pp. 383-418; *Reforma Constitucional y Fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009.

373 See Allan R. Brewer-Carías, "Sobre la ausencia de independencia y autonomía judicial en Venezuela, a los doce años de vigencia de la constitución de 1999 (O sobre la interminable transitoriedad que en fraude continuado a la voluntad popular y a las normas de la Constitución, ha impedido la vigencia de la garantía de la estabilidad de los jueces y el funcionamiento efectivo de una "jurisdicción disciplinaria judicial"), in *Independencia Judicial*, Colección Estado de Derecho, Tomo I, Academia de Ciencias Políticas y Sociales, Acceso a la Justicia org., Fundación de Estudios de Derecho Administrativo (Funeda), Universidad Metropolitana (Unimet), Caracas 2012, pp. 9-103; and The Government of Judges and Democracy. The Tragic Situation of the Venezuelan Judiciary," in Sophie Turenne (Editor.), *Fair Reflection of Society in Judicial Systems - A Comparative St*udy, Ius Comparatum. Global Studies in Comparative Law, Vol 7, Springer 2015, pp. 205-231; also published in the book: *Venezuela. Some Current Legal Issues 2014, Venezuelan National Reports to the 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, 20-26 July 2014*, Academia de Ciencias Políticas y Sociales, Caracas 2014, pp. 13-42.

of an opposition mayor, Vicencio Scarano Spisso, ordered by the Supreme Court without any due process, thus usurping the criminal jurisdiction, for the alleged felony of disregarding a writ of mandamus, while at the same time revoking his office as an elected official,[374] intending to justify such action by saying:

> "It is impossible that an illegal act be committed in the presence of all the public powers."[375]

That is to say, presumably, that if the Totalitarian State –which controls all the powers and the lives of the citizens– violates human rights, if it does so *with the participation of the public powers*, including the controlled Judiciary, even though it might be contrary to the Constitution, it is then "legal," which reminds one of the dreadful conclusion reached by a prominent reader of Carlos Armando Figueredo's translation of Ingo Müller's book, *Hitler's Justice: The Courts of the Third Reich,* about the demeanor of judges during the Nazi period,[376] namely that "the abuses, prisons, torture and even mass exterminations were legally done and adhered to the norm," because they were supported by all the public powers that

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374 See Sentencia Nº 138 de la Sala Constitucional del Tribunal Supremo de Justicia de 17 de marzo de 2014, at http://www.tsj.gov.ve/decisiones/scon/marzo/162025-138-17314-2014-14-0205.html . See the commentaries in Allan R. Brewer-Carías, "La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento "sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarno Spisso y Daniel Ceballo)," in *Revista de Derecho Público*, No 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 176-213

375 See statement by Gabriela Ramírez, Public Defender, in Juan Francisco Alonso, "Con el caso Scarano, el TSJ echó a la basura 12 años de jurisprudencia. Juristas alertan que Sala Constitucional no puede condenar a nadie", in El Universal, Friday 21 March 2014, at http://www.eluniversal.com/nacional-y-politica/140321/con-caso-scarano-tsj-echo-a-la-basura-12-anos-de-jurisprudencia

376 See Ingo Müller, *Hitler's justice: The Courts of the Third Reich*, Cambridge University Press, 1991. German original title: *Furchtbare Juristen: Die unbewältigte Vergangenheit der deutschen Justiz*. Droemer Knaur Verlag, 1989. Spanish translation by Carlos Armando Figueredo: Ingo Müller, *Los Juristas del Horror*, Caracas 2006.

were being commanded by an autocrat.

II. In Venezuela, the absolute control that the authoritarian régime wields over the Judiciary is precisely the only thing that explains why, among the innumerable abuses committed against opposition leaders, it is Leopoldo López who has been jailed and sentenced to more than 13 years in prison solely for having been one of the leaders of the street demonstration movement that was convened throughout the country in February of 2014, generating peaceful demonstrations of protests against the régime.

For that, and for having expressed his political opinion at these demonstrations, the Pubic Ministry, controlled by the Executive Branch, accused him of all the crimes imaginable, such as homicide, terrorism, arson and damage to properties, and furthermore, of the felonies of public instigation and association to commit crime,[377] and thus, immediately upon its request, and without any proof, an arrest warrant was issued against López in that same month of February 2014.[378] For this, it did not matter that several of the felonies cited were in fact being committed by members of the military, agents of the political police or paramilitary extermination groups, as was evidenced in hundreds of videos that circulated through the social networks, which, instead of being accepted as evidence by the Attorney General of the Republic, she instead decided to judge such networks as being "perverse." These networks were the only means for providing any existing information about the acts that were being committed, precisely because of the ironclad control wielded by the State over the communications media, and by the censorship.[379]

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377 See "Fiscalía presentó acusación contra Leopoldo López," *El Nacional*, Caracas 14 April 2014, at http://www.el-nacional.com/politica/Fiscalia-General-acusacion-Leopoldo-Lopez_0_385161540.html

378 See "Un tribunal ordena la detención de Leopoldo López," en *El Tiempo.com.ve*, Puerto la Cruz, 13 February 2014, at http://eltiempo.com.ve/venezuela/politica/un-tribunal-ordenala-detencion-de-leopoldo-lopez/126105

379 See Luisa Ortega Díaz: "Las redes sociales se han convertido en un mecanismo perverso", *Noticiero Digital.com*, 23 March 2014, at http://www.noticierodigital.com/2014/03/luisa-ortega-diaz-las-redes-sociales-se-han-convertido-en-un-mecanismo-perverso/

After discarding the criminal indictment and filing charges as absurd as homicide and terrorism,[380] and once the accusation was formalized, more than a year after the parody conducted under the nomenclature of a "trial," which had commenced in June of 2014,[381] prepared by none other than a subordinated Judiciary, a Judge whose name does not deserve to be mentioned in this chronicle (she presides over the Eighteenth Court of Appeals for Trial Functions in the Judicial Circuit of the Caracas Metropolitan Area), through a sentence issued on September 10, 2015, condemned Leopoldo López to 13 years, 9 months and 12 hours in prison, in accordance with what was demanded in the accusation, for having been *presumably the determiner of the felonies of arson and damages, and the author of the felonies of public instigation and association to commit crime*.[382] As Amnesty International rightly assessed the matter, the sentence was issued "without any credible evidence against him," which demonstrates the absolute lack of judicial independence and impartiality in Venezuela," adding that:

> "The charges against Leopoldo López were never adequately substantiated and the prison sentence against him has a clear political motive. His only 'crime' is being the leader of an opposition party in Venezuela. He never should have been arrested arbitrarily nor tried in the first place. He is a prisoner of conscience and ought to be released immediately and unconditionally. With this decision, Venezuela is choosing to ignore basic human rights principles, and giving a green light to more abuses."[383]

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380 See "desechan cargos por terrorismo y homicidio a Leopoldo López," in *El Universal*, 20 February 2014, at http://www.eluniversal.com/nacional-y-politica/140220/desechan-cargos-de-terrorismo-y-homicidio-a-leopoldo-lopez

381 See "Ministerio Público logró pase a juicio de Leopoldo López por hechos de violencia del 12 de febrero," in *Correo del Orinoco*, 5 June 2014, at http://www.correodelorinoco.gob.ve/nacionales/ministerio-publico-logro-pase-a-juicio-leopoldo-lopez-por-hechos-violencia-ocurridos-12-febrero/

382 See the text of the writ of accusation at http://cdn.eluniversal.com/2014/06/02/ACUSACION_LEOPOLDO.pdf

383 See statements by Erika Guevara-Rosas, Americas Director at Amnesty

III. The accusation against Leopoldo López, being the result of the text of the prosecutor's accusation itself, was based on the fact that, reportedly, he had expressed himself by means of three different communications media, making:

> "appeals to violence, ceasing to recognize the legitimate authorities, and disobedience of the laws, which precipitated the excessive attack by a group of people who acted individually, but were prompted by the speeches of the person mentioned, against the headquarters of the Public Ministry, against seven cars, six of which were patrol cars belonging to the Scientific, Penal and Criminal Investigations Corps. They likewise attacked and destroyed the square at Parque Carabobo, these being acts of vandalism executed using blunt and incendiary objects."

All these acts, in the judgment of the accuser:

> "were executed as a consequence of the persuasion and inducement made by Citizen Leopoldo Eduardo López Mendoza, who wielded a strong influence not only on their way of thinking, but also on the potential actions of his audiences, who thoroughly acted and carried out the message to go after the heads of the Public Powers and stop recognizing the legitimate authorizes.

The Public Ministry concluded by saying that it was:

> "evident that the whole apparatus utilized by Leopoldo Eduardo López Mendoza did not create itself. He necessarily relied on a felonious structure that allowed him to operate, [through] specialists in discourse, Twitter, telephony, financing, among other things, all aimed at carrying out his criminal plan, which was none other than to persuade and induce a group of people that share his discourse in order to cease the recognition of the legitimate authorities and the laws and to propitiate the

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International, in: "Venezuela: Sentence against opposition leader shows utter lack of judicial independence," Amnesty International, 10 September 2015, at https://www.amnesty.org/en/latest/news/2015/09/venezuela-sentence-against-opposition-leader-shows-utter-lack-of-judicial-independence/

> ousting of the President of the Bolivarian Republic of Venezuela."[384]

The accusation was set up in order to prosecute a "felony of opinion," by dedicating a good portion of the text to quoting an expert witness report by a linguistics expert (Rosa Amelia Azuaje León),[385] who upon analyzing Leopold López's "discourse," was able to affirm –only in a hypothetical way– that "from the findings presented by the analyzed texts, the speeches of Leopoldo López (on the days prior to February 12 of the current year) *were capable of preparing* his followers for activating what he called #LaSalida [the Way Out] for the 12th day of February and on following days; the expert further considered that:

> "the speaker (Leopoldo López), upon cultivating anger in his discourse, arguing against the current national government, ***could have transferred*** this sentiment to his audience (followers) by means of a discourse mechanism he called #LaSalida [the Way Out], under the argument that he was denouncing the current government (led by President Nicolás Maduro) of having committed a series of offenses, excesses and omissions that *could have exacerbated* those who followed Leopoldo López in order to materialize that way out through potentially violent means, every time the speaker (Leopoldo López) addressed his audience without explaining that the way out was going to be peaceful, for example, and that it would be protected within the framework of the Constitution…"

The expert witness then went on to refer to Article 350 of the Constitution –which certainly has nothing to do with expertise in linguistics– stating that the article would be "activated if and when the conditions provided for therein were present: if the governmental regime, whatever it may be, were to thwart the democratic values, principles and guaranties or diminish human rights," adding that:

> "Leopoldo López's speech of January 23 of this year alleges that the current national government, headed by President

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[384] See the text of the writ of accusation at http://cdn.eluniversal.com/2014/06/02/ACUSACION_LEOPOLDO.pdf

[385] It is noteworthy that this expert in linguistics is a columnist for the website *Aporrea.org*. See http://www.aporrea.org/autores/rosa.asuaje/

> Nicolás Maduro, is anti-democratic, among other qualifiers, and that it has no respect for the fundamental rights of Venezuelans, such as life, health, safety, food or work; nonetheless, it does not suffice for the speaker to enunciate them for these to be true.
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> "It is of consequence, it is important to reiterate that to propose a way out by any democratic government, outside the framework of the Constitution, and whose scenario would be the streets, does not lead one to think, at any moment and under any logical sense, that this struggle would have non-violence as its purpose. An act of subverting the established order, the status quo, will always lead to the danger of being violent."

In other words, always within the realm of these hypotheses, the expert witness in linguistics went on to consider legal matters such as those surrounding the interpretation of Article 350 of the Constitution, arriving at the conclusion that all persons invoking citizens' rights of civil disobedience and resistance in response to governments considered to be illegitimate, although guaranteed by the Constitution, under such norm would have a violent purpose.

That analysis was precisely the foundation for the accusation formulated against Leopoldo López for the "felony of opinion," even when such grounds had been masked by the Public Ministry in its conclusion of the accusation by stating that:

> "the conduct deployed by the indicted *Leopoldo Eduardo López Mendoza* is subsumed in the felonies of *determiner in the felony of arson*, contemplated and sanctioned in Article 343 in relation to Article 83, both being part of the criminal code; *determiner in the felony of damages*, contemplated and sanctioned in Articles 473, Numeral 3rd, and 474 in relation to Article 83, all part of the Criminal Code, *author in the felony of public intimidation*, contemplated and sanctioned in Article 285, of the Criminal Code and *association*, contemplated and sanctioned in Article 37 of the Organic Law Against Organized Crime and the Financing of Terrorism, in *real concurrence of felonies*, according to Article 88 of the Criminal Code; all of which is maintained in the diverse elements of conviction obtained in an impartial, objective, expedited and scientific investigation, and based on the following allegations."

In other words, it is not that the accused has been the author of the felony of arson or damage, but rather, that the thing he was accused of was his having been the "determiner" or "inducer" thereof, in the sense of having caused "the criminal resolve in another person" to commit said felonies considering the accusation, for such purpose, that his action and his political discourse were the "*sine qua non* condition of the author's felonious resolve, in such a way that it is not possible to induce a person who was already convinced or had already decided to commit the typically prosecutable act."

In other words, as the Prosecutor said:

> "The person who induces another person into committing a crime is not the one that carries it out, nor the one that collaborates in its perpetration. A criminal idea is transmitted. As the instigator carries in his mind the same objective that he inculcates in the mind of the person being instigated, they co-participate in the same criminal act."

By that, the Prosecuting Attorney explained that allegedly:

> "The strategy established by Leopoldo Eduardo López Mendoza and his structured group was clearly to utilize the conventional and alternative social communications media to give strength to his speeches with violent content, since his only purpose was to make the public tranquility disappear, as he called upon a group of people who were in agreement with his discourse calling for the cessation of recognition of the legitimate authorities and of the laws."

And the Prosecutor's conclusion then was that:

> "Leopoldo López's participation did not consist of deploying the felonies of Arson and Damage to Property in a direct manner, but there are elements, such as the *expert evidence in the analysis of the speeches of the indicted Leopoldo López*, sufficient to deem that he did indeed command and induce demonstrators to conduct *an attack against the seat of the Public Ministry, and against the property of the Venezuelan State,* which was done publicly, starting some days beforehand, and even on February 12, 2014 itself, in a speech where he incited others to cease to recognize the legitimately constituted authority and to go after the heads of the Public Powers, this being doubtlessly a

significant psychological influence for a group of people that acted after *having been instigated by the speeches of Leopoldo López*, and consequently *carried out the instructions provided*, resulting first in the attack against the Public Ministry. Later, other institutions of the State were attacked, also instigated by the call to disobedience and attack formulated by the indicted person, *as evidenced in the expert evidence of discourse analysis*, which brings forth among other particulars '…that Leopoldo López possesses a discourse ethos that dominates and has an impact on the ethos of his audience; consequently, everything that the originator or speaker says to his audiences would wield a strong influence not only on their way of thinking but also on the potential actions that the audiences might carry out, consequently acting out thenceforth in a way that, whatever he might say or transmit to his audience, would in fact be transferred, to such an extent, that his audiences feel compelled to follow, by actions, whatever he might instruct them to do, even though he may not explain it to them clearly…'

On the occasion of such call for action, with the *full and total conviction that his summons would be heeded by the group*, especially by the students, the indicted Leopoldo López *called on them to go after the heads of the public powers and the institutions, wherefore a group of people, some of them already accused by the Public Ministry, went and heeded the appeal from Leopoldo López, and charged at the seat of the Institution, with the intention of causing damages, setting fire* to said headquarters, as reflected by the Technical Inspection conducted by the officials assigned to the Crime Unit, with the intention of infringing upon the Fundamental Rights of the Public Ministry, the result being that in the area of the Central Library of the Public Ministry, as well as the front door, there had been combustion, which was subsequently neutralized by officials assigned to the Security Office of the Institution, all of which presents evidence of the felony of arson" (our emphasis).[386]

In other words, based on a political speech by the opposition, in

[386] See the text of the writ of accusation at http://cdn.eluniversal.com/2014/06/02/ACUSACION_LEOPOLDO.pdf

which attention was called to the illegitimacy of the government and to the need to have it replaced, but where there was never any mention of, nor was anything said, directly or indirectly, that there was any need to damage or set fire to certain property or buildings, and much less public property, the Prosecutor had drawn the conclusion that, solely on the basis of a "linguistic" sleight of hand, Leopoldo López had allegedly imparted instructions to the demonstrators to go do damage and set fire to public properties, inducing them, particularly, to go do damage and set fire to the seat of the Public Ministry. As simple and aberrant as that.

For that reason, stemming from that accusation, as emphasized by José Ignacio Hernández, what became evident was:

> "that the trial against Leopoldo López began as a result of the opinions he had expressed. That is to say, López is not on trial for having destroyed or having set fire to buildings. Those violent acts doubtlessly deserve total rejection and the start of the respective investigations. But, the trial against López has nothing to do with that. This criminal trial is basically about judgment being passed upon López's political opinions."[387]

Hence, the conclusion rightly drawn by José Ignacio Hernández was that, as far as he could tell:

> "it has not been reflected upon whether Leopoldo López directly and emphatically called for the burning or destruction of buildings or for disobedience of the Laws. On the contrary, what is being reflected upon is whether his political discourse, when calling for protests aimed at the Government's ousting, might have degenerated into acts of violence and incitements to violate Laws. That is to say, the criminal trial is based on the interpretation of political discourse, more than on the discourse itself. The causal relationship is approximate, rather than immediate. Such is the case that, in order to give credence to the felonies for which he was accused, more than two hundred pages were required and even an expert report. In order to be consistent

[387] See José Ignacio Hernández, "Todo lo que debe saber para entender por qué se enjuicia a Leopoldo López," in *Prodavinci*, 16 June 2014, at http://prodavinci.com/blogs/todo-lo-que-debe-saber-para-entender-por-que-se-enjuicia-a-leopoldo-lopez-por-jose-i-hernandez/

> with freedom of expression, a felony of opinion allegedly committed by a politician must not be subject to such detailed analysis. There can only be a felony of opinion in the case of a politician if his discourse constitutes a felony clearly, directly, expressly, and without any margin of doubt whatsoever. Case in point: freedom of expression must be favored."[388]

None of that happened in this case: López did not call upon anybody, nor incite anybody, directly or indirectly, much less intentionally to go do damage or set fire to properties of any kind, because he could never have been able to be the "determiner" of these felonies; nor did he associate himself with anybody with a criminal intention, for the purpose of having those felonies committed. And, in any case, based on the long narration of the text of the sentence, none of that was proved at the trial.

IV. But, this was not taken into account either by the Public Ministry nor by the Judge. In the case of Leopoldo López, the government's objective was to jail him and take him out of the political scene. The Comptroller General of the Republic had already tried to do so, doubtlessly following orders from the government, by decreeing his political disqualification, something that is prohibited not only by the Constitution,[389] but also by the American Convention

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388 See José Ignacio Hernández, "Todo lo que debe saber para entender por qué se enjuicia a Leopoldo López," in *Prodavinci*, 16 June 2014, at http://prodavinci.com/blogs/todo-lo-que-debe-saber-para-entender-por-que-se-enjuicia-a-leopoldo-lopez-por-jose-i-hernandez/

389 Allan R. Brewer-Carías, "The absence of competence on the part of the Comptroller's Administration to dictate administrative acts of political disqualification restricting the right to be elected and hold public office (The protection of the right to be elected, as per the InterAmerican Court of Human Rights in 2012, and its violation by the Constitutional Chamber of the Supreme Court when it declared the Inter-American Court's decision to be "non-enforceable"), Alejandro Canónico Sarabia (Coord.), *El Control y la responsabilidad en la Administración Pública, IV Congreso Internacional de Derecho Administrativo, Margarita 2012*, Centro de Adiestramiento Jurídico, Editorial Jurídica Venezolana, Caracas 2012, pp. 293-371; and "El derecho político de los ciudadanos a ser electos para cargos de representación popular y el alcance de su exclusión judicial en un régimen democrático (O cómo la Contraloría General de la República de Venezuela incurre en

on Human Rights, for which reason the Court declared that the State had been responsible for committing this violation.[390]

Now, there was a need to jail him for what he was saying, for his pro-opposition discourse and for his leadership, and no other thing can be deduced from the prosecutorial accusation against him, wherein it is absurdly argued that in February of 2014, it wasn't so much that, as political leader of the opposition, Leopoldo López had a political party and some followers, but rather "a complete apparatus" that, according to the Prosecutor's Office, constituted a "felonious structure" that furthermore relied on "specialists in discourse, Twitter, telephony, and financing, among other things," in other words, everything that a political party and political groups have and do in a democratic country, going so far as to state that all of that is not for participating legitimately in the democratic game, but rather "for developing his criminal plan," which was solely "to persuade and induce a group of people who shared his discourse aimed at the cessation of recognition of the legitimate authorities and the laws, and propitiating the ousting of the President of the Bolivarian Republic of Venezuela."

That is to say that with this accusation anybody who acts in opposition in Venezuela, in other words, accuses the government of

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Inconstitucionalidad e inconvencionalidad al imponer sanciones administrativas de inhabilitación política a los ciudadanos)," in *Revista Elementos de Juicio*, Año V, Tomo 17, Bogotá 2011, pp. 65-104.

390 The decision of the Inter-American Court in the *Leopoldo López vs. Venezuela* case was pronounced on 1 September 2011, but was declared "non-executable" in Venezuela by a decisión of Constitutional Chamber No. 1547 dated 17 October 2011 (*Venezuelan State vs. Inter-American Court of Human Rights,* at http://historico.tsj.gob.ve/decisiones/scon/Octubre/1547-171011-2011-11-1130.html). Regarding this see Allan R. Brewer-Carías, "El ilegítimo "control de constitucionalidad" de las sentencias de la Corte Interamericana de Derechos Humanos por parte la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela: el caso de la sentencia *Leopoldo López vs. Venezuela, 2011*," in *Constitución y democracia: ayer y hoy. Libro homenaje a Antonio Torres del Moral*. Editorial Universitas, Vol. I, Madrid, 2013, pp. 1.095-1124. Véase también el Comunicado de 37 juristas a favor de Leopoldo López, en *El Universal*, 28 September 2011,at http://www.eluniversal.com/nacional-y-politica/110928/comunicado-de-37-juristas-a-favor-de-leopoldo-lopez

being illegitimate, and who advocates its exit from power, runs the risk of being accused of any felony, because any political party seen from this prosecutorial point of view is a "felonious structure" or a "band of criminals."

The consequence of this authoritarian focus, as was expected, and government officials had announced, was that on September 10, 2015, the trial Judge issued a condemnatory sentence against Leopoldo López because she deemed that the trial had supposedly lent "credence to his criminal responsibility for having committed the felonies of being the ***determiner in*** *the felony of arson*, contemplated and sanctioned in Article 343, first subsection, in conjunction with Article 83, both of the Criminal Code; of being the *determiner in the felony of damage to property* contemplated and sanctioned in Articles 473.3 and 474 of the Criminal Code, in conjunction with Article 83 of the same Code; of being the *author in the felony of pubic instigation***,** contemplated and sanctioned in Article 285 of the Criminal Code; and *association to commit crime***,** contemplated and sanctioned in Article 37 of the Organic Law against Organized Crime and the Financing of Terrorism" (p. 2).[391]

The aberrant sentence was not published until October 1, 2015, the lawyers for the defense were unable to get a copy thereof until several days after,[392] and it was not possible to make it known publicly until almost a month after the sentencing, on October 9, 2015. Regarding the sentence, the lawyer in charge of coordinating Leopoldo López's defense, even before having a copy of the sentence and of the study that he made of its reading in Court, considered that, generally, it is:

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391 With some variants, that was what the press was able to report upon pronouncement of the sentence. See "Tribunal sentenció a Leopoldo López 13 años de prisión por responsabilidad en violencia de 2014," at *Venezolana de Televisión*, September 10, 2015, at http://www.vtv.gob.ve/articulos/2015/09/10/tribunal-sentencio-a-leopoldo-lopez-a-mas-de-13-anos-y-9-meses-8551.html

392 See the report by Edgar López**,** "Sentencia contra López y los estudiantes es una narración de hechos sin pruebas," in *El Nacional*, October 3, 2015, at http://www.el-nacional.com/politica/Sentencia-Lopez-estudiantes-narracion-pruebas_0_712729003.html

> "full of errors and that its reasoning is weak. It is weak especially from the evidentiary point of view: there was never any credibility assigned to the determiner of damages, there is an absence of evidence relating to felony or to the association to commit felonies. It is based on the testimony of Rosa Amelia Azuaje and Mariano Alí, the experts who analyzed López's discourse and Twitter, but with a pair of tweezers they take out extracts that do not reflect the reality of what was said and they contradict the testimony of other witnesses who clarified that Leopoldo López never called for violence."[393]

That is why, as reported by the press, when the judge pronounced the sentence, Leopoldo López himself said to her:

> "You are more afraid of pronouncing this sentence than I am of hearing it."

The same press article further reported that:

> "López maintained that the trial against him sought to criminalize words, whereby he was being accused of inciting to commit acts of violence occurring last year in order to give impetus to 'The Way Out'…he reiterated that 'The Way Out' was constitutional and enumerated the constitutional mechanisms that, according to him, allowed it; and justified it by giving assurances that the public powers in Venezuela were violating the Constitution."[394]

With regard to this sentence, José Ignacio Hernández, in synthesis, and rightly so, observed that it is none other than "a grievous case of violation of Human Rights that noticeably affects the democratic system," considering that Leopoldo López 'is a prisoner of conscience," in other words, "a person who has been tried and convicted for his political opinions." In this case, Hernández

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393 See the report by Álex Vásquez, "Con declaraciones de los propios testigos rebatirán la condena de López," in *El Nacional*, October 5, 2015, at http://www.el-nacional.com/politica/declaraciones-propios-testigos-rebatiran-Lopez_0_713928718.html

394 See the reports: "Jueza condena a Leopoldo López a casi 14 años de cárcel por hechos del 12F," in *El Universal*, 10 September 2015, at http://www.eluniversal.com/nacional-y-politica/150910/jueza-condena-a-leopoldo-lopez-a-casi-14-anos-de-carcel-por-hechos-del

noted, López was "condemned for the State's interpretation of what he had said and not for any true and concrete act," in "a trial full of political content where, from the beginning, one already knew the outcome."[395]

As Luis Ugalde, S.J. saw it:

> "Without any proof of a crime being committed, Leopoldo López was sentenced to 14 years in jail. Many of us knew that Venezuela was under a not-so-well-disguised dictatorship, but now the world will start to discover that this regime is the grand impoverisher of the poor, with an inflation that has exceeded 200% in two years and shortages that constitute a national calamity, and that there is no rule of law in Venezuela.
>
> "What is the crime committed by Leopoldo López, by Antonio Ledezma and the four convicted students, by the political prisoners, and by those politically disqualified and persecuted? Neither violence nor death; if it were about that, the Government and its judges would be hard at work dealing with the 25,000 homicides that occur each year. *Their "felony" consists of being members of the opposition that have leadership. The regime, at its pleasure, decides who is to be defamed, submitted to ridicule, incarcerated, exiled or politically disqualified*. That is how it was in Nazi Germany, in the Soviet Union, in China, or in Cuba: *any dissident, any leader that expresses his disagreement is a "criminal."* Now that the decision has been made, what follows is simply theatrical staging and decoration of the scenery, aimed at justifying the sentencing and the public execution. No felony has been proved against Leopoldo López in order to sentence him to 14 years, but that was the will of the dictatorial power."[396]

V. And that's the way it was; in a parody of a trial, Leopoldo

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395 See José Ignacio Hernández, "Sobre el juicio y la condena a Leopoldo López," in *Prodavinci*, 11 September 2015, at http://prodavinci.com/blogs/sobre-el-juicio-y-condena-a-leopoldo-lopez-por-jose-ignacio-hernandez/

396 See Luis Ugalde, "Leopoldo, dictadura, elecciones," in *El Nacional*, Caracas, September 24, 2015 at http://www.el-nacional.com/sj-_luis_ugalde/Leopoldo-dictadura-elecciones_0_707329426.html

López was sentenced to prison, not because he had committed a crime, but because the State deemed that his political discourse had to be criminalized. In other words, there was a need to criminalize the exercise of his freedom to express his political ideas; and all, under the fallacious argument that, by his own words, he had allegedly been the "determiner" of having other persons, whom he didn't even know, had allegedly damaged and set fire to public property , during the course of a public protest gathering, , even when he never made reference to such actions in his speech, and furthermore, because he allegedly was part of an "association to commit punishable deeds" and that he allegedly had instigated disobedience of the laws, without even identifying said "felonious association to commit crime" or the alleged "associated" conspirators.

As we were reminded by the Inter-American Commission on Human Rights when it stated its concern for the failure of Venezuela's Judiciary to publish, for almost a month, the text of the sentence against López, which was a proceeding intended to declare Leopoldo López *"guilty of the crimes linked to the exercise of freedom of expression and his political rights,*" thus sentencing him for the felonies of "public instigation, damage to property, intentional arson, association to commit crimes," considering that:

> "the abuse by means of vague and ambiguous criminal categories, which allow for responsibilities to be attributed to those who participate in, or convene a demonstration, generates an intimidating effect on the exercise of the right to protest, which results in it being incompatible with democratic principles."

The Inter-American Commission, in its Press Release of September 25, 2015, showing its concern for the failure to publish the sentence, further added that:

> "the right to protest includes the right to choose the cause and objective thereof; and the non-violent call for a change in the state's policy or in the government itself is part of the specially protected kinds of speech," in such a way that, "the responsibility

for acts of violence committed during a protest must be attributed in an individual manner."[397]

VI. These felonies that are being attributed to him, regarding which the Judge in the case against Leopoldo López ruled that he had supposedly been the "determiner" in their perpetration by others, had in fact been the felonies of "arson" and "damage," in addition to considering him the "author" of the felonies of "public instigation" and "association for purposes of committing crime."

According to the text of the sentence, the first of the felonies mentioned, attributed to Leopoldo López, that of having been *the determiner* in the *felony of arson*, which is one of the felonies "against the preservation of public and private interests," with regard to setting fire to buildings, which is contemplated and sanctioned by Article 343 of the Criminal Code, where it is mandated that:

"*Article 343.* Anyone who has set fire to a building or other construction, crops yet to be harvested or gathered, or combustible material storage areas, will be penalized with three to six years' imprisonment.

"If the fire has been caused in buildings intended for habitation or in public buildings, or intended for public use, public utility enterprises or industrial plants, religious worship, stores or warehouses for industrial or agricultural use, merchandise, flammable raw materials or explosives or materials for mines, railroads, trenches, arsenals or shipyards, the imprisonment shall be for a term of four to eight years.

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397 Inter-American Commission on Human Rights, "Comunicado de Prensa," September 25, 2015, in http://www.oas.org/es/cidh/prensa/comunicados/2015/107.asp See the short note in the critique "CIDH pide a Venezuela publicar sentencia contra Leopoldo López," where it is mentioned that "OAS Secretary General Luis Almagro recently requested that the international community have access to the sentence issued to López, who has received gestures of support and solidarity from Governments, former presidents, non-governmental organizations and artists. See *Noticias Caracol*, September 25, 2015, in http://www.noticiascaracol.com/mundo/cidh-pide-venezuela-publicar-sentencia-contra-leopoldo-lopez

> "Anyone who by other means causes damage to buildings or other industrial or commercial facilities will incur the same penalty.
>
> Anyone who has damaged the means employed for the transmission of electric energy, or gas, or who has caused the interruption of its distribution, shall be penalized with two to six years' imprisonment."

The second of the felonies regarding which the sentence imputes Leopoldo López of having been *the determiner*, in the **felony of damages**, which is one of the felonies "against property," provided and sanctioned in Articles 473.3 and 474 of the Criminal Code, where it is mandated that:

> "*Article 473*. Anyone who in any way has destroyed, annihilated, damaged or deteriorated real estate or personal property belonging to another, shall be punished, upon petition by the aggrieved party, with imprisonment of one to three months.
>
> "The imprisonment shall be of forty-five days to eighteen months, if the act was committed under any of the following circumstances […]:
>
> "3. In public buildings or in buildings intended for some public use, public utilities or religious worship; or in buildings or works of the kind indicated in Article 349, or in public monuments, cemeteries or their spaces…"
>
> "*Article 474.* When the act contemplated in the preceding article has been committed on the occasion of acts of violence or resistance to authority, or at a meeting of ten or more persons, all of whom have come together to the place of the felony shall be punished in the following manner:
>
> "In the case of the first part, with imprisonment of up to four months and in the cases contemplated in the sole subsection, with imprisonment of one month to two years, the procedure always being *sua sponte*.

In the sentencing, these felonies are seen as related to what is provided in Article 83 of the same Code that governs the gathering of several people in the same punishable act, and establishes:

> "*Article 83.* When several people gather in the execution of a punishable act, each of the perpetrators and of the immediate cooperators is subject to the penalty applicable to the perpetrated act. The one who has determined that another person commits the act incurs the same penalty."

The third of the felonies attributed to Leopoldo López, in this case as the *author,* is the *felony of public instigation,* which is one of the felonies "against public order," which governs instigation to commit crime, and is provided in Article 285 of the Penal Code, as follows:

> "*Article 285.* Whoever instigates to disobedience of the laws or to hatred among the people or advocates in favor of acts that the law considers to be crimes, in such a way that public tranquility will be placed in jeopardy, shall be punished with imprisonment of three to six years."

And the fourth of the felonies, also attributed to Leopoldo López as *author*, is that of *association to commit crime* contemplated in Article 37 of the Organic Law Against Organized Crime and the Financing of Terrorism (*Gaceta Oficial* No. 39.912 of April 30, 2012), in both of which it is mandated that the following be included among the "felonies against public order":

> "*Article 37.* Anyone who is part of an organized crime group shall be punished for the sole fact of association with imprisonment of six to ten years."

As for the definition of what is understood to be "organized crime," Article 4.9 of the Law defines it as:

> "*Article 4.9.* Organized crime: the action or omission by *three or more persons* associated *for a certain time with the intention of committing the felonies* established in this Law and *directly, or indirectly, obtaining a benefit, whether economic* or of any other kind, for himself or herself or for third parties. Likewise, activity conducted by a sole person acting as an entity of a corporation or association, with the intention of committing the felonies provided by this Law, shall be considered to be organized crime."

In addressing all these felonies, in order to convict a person, the first thing that the judge would have to clearly demonstrate is that the

person being convicted has acted *with malice aforethought*, that is to say, that he has "the intention of carrying out the act" that constitutes a felony (Art. 61, Criminal Code). In this case, the Judge should have proved that Leopoldo López had acted with felonious intent, in other words, that he personally urged several people in particular to set fire to buildings and cause damage to property, and to those ends he incited with malice aforethought and became associated with others in a permanent way for a definite time by means of some criminal plan to be carried out by a criminal organization made up of individuals who have all resolved to commit crime, that is to say, with malice aforethought; and furthermore, with the intention of gaining some benefit for themselves.

Of course, none of that happened nor could have been proved by the Judge. As advised by Jesús Ollarves, this alleged "intention to commit felonies" attributed to Leopoldo López, as a way to convict him, would have to be proved "on the basis of true evidence and not on mere suggestions by the prosecution and, much less, on conjecture that emerges at the last moment."[398] And, in particular, they should have proved that:

> "calling and leading a march constitutes association to commit crime, and the conjunction of activities and intentions by followers of Leopoldo López fit in with a permanent criminal plan."[399]

VII. Of course, as has been stated, none of that could be proved in the trial, in view of the fact that on the occasion of the student demonstrations of February 12, 2014, Leopoldo López did not set fire to anything, nor was he present when something was set on fire, nor was it proved that he damaged anything or with malice of forethought induced anyone to go damage or set fire to property, much less, the facilities of the Public Ministry, nor did he instigate to

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398 See Jesús Ollarves, "La jueza Barreiros está en aprietos," in *Provea*, 17 September 2015, at http://www.derechos.org.ve/2015/09/17/jesus-ollarves-la-jueza-barreiros-esta-en-aprietos/ Likewise in *ACN Agencia Carabobeña de Noticias*, at http://agenciacn.com/opinion/articulo-de-jesus-ollarves-la-jueza-barreiros-esta-en-aprietos/

399 *Idem.*

disobedience of the laws, nor did he associate with anyone in a criminal enterprise, not for a definite time nor for a long time, in order to commit crime or with the intention of committing felonies, nor was he part of any criminal organization aiming to execute some criminal plan to damage or set fire to properties.

On the contrary, nonetheless, the Judge in this case, in her sentence, after allegedly having analyzed the "evidence" about the actions that occurred on the date February 12, 2014, concluded that:

> "it had been demonstrated that a sizeable group of demonstrators […] heeded the call uttered by Leopoldo López and other leaders of the Voluntad Popular political party, in which Leopoldo López, *expressing himself through different mass media*, called out for people to take to the streets, which produced a series of violent acts, the cessation of the recognition of the legitimate authorities and disobedience of the law, which set off the disproportionate attack by a group of people that *acted after having been instigated by the speeches of said citizen*, against the seat of the Public Ministry, as well as setting fire to seven cars, six of which were patrol cars belonging to the Scientific, Penal and Criminal Investigations Corps, these acts of vandalism having been executed using blunt and incendiary objects." (pp. 257- 258) (Our italics).

Likewise, after analyzing the testimony by witnesses, all of them government officials, the Judge deemed that it had been "evidenced that a group of persons gathered in the vicinity of the seat of the Public Ministry, and after the speech given by Leopoldo López, once he had left the place, they had proceeded to commit a series of violent acts, causing serious damage to said premises, to seven units of the Criminal and Scientific Investigations Corps, and to Parque Carabobo," deeming that the demonstrators "were in the midst of instigation" (pp.258-259) (Our italics).

Likewise, after the statements by the group of witnesses had been analyzed, concerning the veracity of the acts that occurred on February 12, 2014, the Judge concluded that:

> "after his speech and *once Citizen Leopoldo López had left the place*, an irregular situation emerged where serious damage was done to the seat of the Public Ministry, to FIVE units of the

> Criminal, Penal and Scientific Investigations Corps, which resulted in these units no longer having any commercial value and damages to Parque Carabobo," (p. 261) (Our italics).

VIII. Aside from the aforementioned evidence, the Judge lent credence to the statement by two experts who had analyzed Leopoldo López's speeches.

In the first place, she lent credence to the statement by expert Mariano Alfonso Alí, who had analyzed Leopoldo López's discourse, as formulated in his Twitter account @leopoldolopez during three months, between January 1, and March 18, 2014, referring to the "parameters that a leader must take into account at the moment of issuing his messages and transmitting his speeches," concluding that:

> "Leopoldo López utilized Twitter as a real power […] launching messages against the current government, ceasing to recognize its legitimacy," stating, "for example, 'those who remain silent lose' which was re-tweeted, […]'the way out', 'sosVenezuela' and 'the delinquent State', which was widely disseminated."

In particular, the expert observed that:

> "As for the date of February 12, there was a discrediting of the representatives of the powers of the State, and some of the relevant adjectives he stated were: a delinquent, murderous, drug trafficking State, among other things," the expert considering that "those messages had a purpose, which is to reach the listener, by building a basic model of communication that is the sender, the medium (by which the message is transmitted), the message, and the listener, in order to construct an idea around a vision of the country so that it might reach his followers, which at that moment were more than 2 million 700 thousand." (p. 262).

Other characteristics of Leopoldo López's discourse, emphasized by the expert, were that:

> "he speaks for all Venezuelan men and women; he does not just speak in the first person, but speaks on behalf of the entire opposition and speaks on behalf of all other Venezuelans who are not part of the opposition […] affirming that the country is

> divided in two, and that Venezuelans have allegedly been abducted by a delinquent State and by a President that orders his armed groups to murder Venezuelans, and a small group, and I say small, because he considers them to be a sort of upper echelon that has hijacked the powers of the State. Such messages cause aggressive behavior in the will of his followers, thus producing the development of large and evident signs of violence." (pp. 262-263).

In any case, based on the foregoing, one must note that the matter over which the expert is right within his opinion, upon which the Judge relied in pronouncing her sentence, is his accurate appreciation of the fact that for the opposition, what really exists in Venezuela is a delinquent State, controlled by a small group that has high jacked all the powers of the State. That is something nobody can deny, such that it would hardly be felony to tell the truth, which, furthermore, everybody knows. [400]

But secondly, the Judge, in her decision, also gave credence to the testimony of another expert already mentioned, Rosa Amelia Azuaje León,[401] who also conducted a "linguistic study" of Leopoldo López's *four speeches*, judging that "through his speeches he sent discrediting messages that set off violent actions and imminent dangers against the seat of the Office of the Prosecutor and the Investigative Corps," the expert then went on to give advice and rules of conduct regarding what a political leader may say, and the way he may say it, indicating among other things that:

> "the right thing to do in his position as leader is to call for calm, tranquility, peace, and the utilization of proper mechanisms established by the Law for bringing up his discontent about the current government," (p. 263).

In fact, according to the decision, the expert recognized that López addressed "a population he knows very well […] consisting

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[400] See, for example, Carlos Tablante and Marcos Tarre, *Estado delincuente. Cómo actúa la delincuencia organizada en Venezuela* (Prologue by Baltazar Garzón), La Hoja del Norte, Caracas 2013.

[401] As already mentioned, Rosa Amelia Azuaje León, expert in linguistics, is a columnist at the website Aporrea.org. See http://www.aporrea.org/autores/rosa.asuaje/

mainly of young people who are restless, who feel outraged, who have legitimate reasons to feel outraged." According to the expert, López addressed these people, bringing up "topics" pertaining to "change of system, change of government," beginning with "a very powerful appeal that is the way of expressing that this system does not work." Nevertheless, despite these affirmations, the expert claimed that she was not offering any political criteria, but only:

> "doing work that is descriptive of what Citizen Leopoldo López had done, and he might tell me if I am right or I am wrong, because ultimately it was, he who spoke and not me, about this topic of changing the system and changing the government." (p. 263).

Of course, López's defense counsel correctly alleged that the expert was wrong, but that had no importance for the Judge, despite the exception made by the expert.

In any case, according to the expert, those changes of system mentioned in Leopoldo López's speech would allegedly take place by way of what he called "*la salida* [the way out]," which the expert considered to be a "negative program" that advocated "changing the current system for another system that would be more democratic […], where there is justice for all and not just for one group." (p. 263).

Another "topic" that the expert analyzed in López's political speeches was his having made political reference to the name of Rómulo Betancourt, which apparently leads to the absurdity of the expert's mind to think that it would be a felony. Nevertheless, after admitting that it was difficult to find that the figure of Betancourt could have an impact on "a young listener," the expert stated that López's having compared two "historic moments in Venezuela's history," namely "January 23, 1958 with January 23, 2014," was not an innocent act, since she considered that "there is no innocent discourse here and I do not want to say that I am criminalizing it, but all discourse is constructed by way of some determined purposes and that is a social practice." Such that, after saying "may the defense correct me if I am wrong," and clarifying that she (the expert) was not going to "meddle with the truth, as truths are much too evasive for me to touch upon them," she judged that the reference to Betancourt had been made in order to turn to his "*auctoritas* ," (p.

264).

From there, the expert went on to analyze another one of the "topics" in López's speeches, which was "the very clear distinction between the people and the government" which she deduced from the speeches, in the sense that "the people are good, but not the government, the people are being humiliated, the people are being subjected to violations of their human rights, but not the government," and the expert even added a digression on another "topic," which was that "furthermore, the people consider it lawful to cease recognizing an illegitimate government," and she added that:

> "If one were to delegitimize the government and clearly say that this is an illegitimate government, going out on the street to gain democracy by constitutional means, in this day and age, is very complicated constitutionally, in other words, discursively, it is a titanic feat," (p. 265).

In her sentence, the Judge continued protecting the expert by judging that credence had been given to the fact that Leopoldo López, in a press conference he held on January 23, 2014, "intensified his discourse and began an aggressive public campaign" against the President of the Republic, Nicolás Maduro and the State's institutions, stating "that the current Government has ties to drug trafficking," in addition "to being corrupt, oppressive, anti-democratic, and that it was necessary to step out to win democracy, and that this change, the so-called way out, was going to be possible only with the people out on the street," (pp. 265-266). For this, the expert surmised that López had prepared a speech, recalling the defeat of Pérez Jiménez, based on the expression "We have to step out to win democracy," which, in her judgment, meant that:

> "His purpose was none other than to plant the idea in his followers' minds that only the street could generate a change, inviting them to be protagonists, with the aim of ceasing recognition of the legitimacy of the Executive Branch of the government, as well as that of the heads of the Public Powers, (these were words that he emphasized during an interview conducted before the *CNN en Español* channel, on the 11th day of February of the year 2014," (p. 266).

From all that, the expert deduced that the strategy established by

Leopoldo López and his "structured group" was clear:

> "to utilize the conventional and alternative social communications media to give strength to his speeches having violent content, since his only purpose was to make public tranquility disappear, calling upon a group of people who agreed with his speech, in order to cease recognition of the legitimate authorities and the Laws," (p. 266).

The expert then went into legal arguments as she analyzed López's proposal that the people stay out on the streets "until such time as when the President of the Republic 'would leave'," and the expert considered that this "was impossible constitutionally," given that the President had been elected by the people for the period 2014 to 2019.

Whereupon the expert went on to refer to another speech, "violent in form," by López, delivered on February 12, 2014, in which he established "as a slogan '#LaSalida - #LaCalle' [the way out – the street]" the expert deducing from this that his purpose was:

> "to accomplish a total and profound change of those who administer the National Public Power, with the intention of removing them from office and replacing them," thus reinforcing "again his intention of ceasing recognition of the legitimate authorities," (p. 266).

The expert further referred to the claim that upon López's arrival at the seat of the Public Ministry, the intention was to demand the release of the students that were detained in the State of Táchira, and, after not having been received by the Attorney General, the protesters:

> "were shouting slogans directed against the institution and its highest authority; not to mention the aggressive speech, all of this always under the gaze of their leader and spokesman Leopoldo López, *who then decided to withdraw from the location*," (p. 267). (Our italics).

IX. The text of the sentence continued by affirming, -and here one does not know whether or not the text was paraphrasing the expert-, that other citizens "assumed a violent attitude, with uncontrolled anger, and began to charge at the seat of the Public Ministry, directly throwing rocks, blunt objects, Molotov cocktails,

causing great damage to the building's façade" […], instigating other citizens, as well as the rest of the protesters, to disobey the laws, thus placing public tranquility in danger, while large and conspicuous symbols alluding to violence were appearing on the building […] they threw Molotov cocktails into the interior of the building […] causing combustion," (p. 267). The text of the sentence likewise described in detail the expert analysis conducted on the texts of all the graffiti, drawings and annotations formulated by the protesters against the government (p. 268), from which the Judge deduced "that the people who went to the seat of the Office of the Attorney General of the Republic were followers of Citizen Leopoldo López," judging from the "pamphlets alluding to the Voluntad Popular party, as well as messages alluding" to The Way Out […] "demanding the resignation of the President of the Republic, as well as transcriptions of words said by Citizen Leopoldo López," (p. 268).

Drawing from the foregoing, in her sentence, the Judge deemed that:

> "it is clearly determined that Citizen Leopoldo López, *did not utilize appropriate means established in the Constitution*, in order to have his demands tended to, *but rather utilized the art of the word*, in order to make his followers believe that there was an alleged constitutional way out, when the conditions he sought were not present, such as the resignation of the President of the Republic, as the recall referendum could only be scheduled in the year 2016, his objective as a political leader, *despite his appeals for peace and tranquility*, was to accomplish the ousting of the current government by way of *appeals to go out onto the streets, disobedience of the law, and the cessation of recognition of the Public Powers of the State, all legitimately constituted*," (p. 269).

In other words, according to the Judge, Leopoldo López did not utilize the appropriate means for his political discourse, and without telling him what the appropriate ones were, she definitely condemned him for a felony of omission, in other words, for not having done what the Judge considered to be appropriate, but without saying what it was. For this reason, the conclusion of the sentence was that, despite the fact that the Constitution guarantees the right to free expression of thought (Art. 57) and the right to peaceful protest (Art.

68), Leopoldo López, nevertheless, "sent *an inappropriate message to his followers*, who were mostly young people, beckoning them onto the streets for an alleged *constitutional and democratic way out, when he should have done so through the constitutional means, by activating those mechanisms*," (p. 270). In other words, again, the sentence was for not having acted in an "appropriate" way, according to the Judge's criterion, deciding then that:

> "*credibility was established that Citizen Leopoldo Eduardo López Mendoza, is criminally responsible in the felonies of determiner of the felony of arson,* provided *and sanctioned in Article 343, first p, in relation to Article 83, both of the Criminal Code; determiner of the felony of damages, provided and sanctioned in Articles 473, paragraph 3, and 474 in relation to Article 83, all of the Criminal Code, author of the felony of public instigation, provided and sanctioned in Article 285 of the Criminal Code and Association to Commit Crime, provided and sanctioned in Article 37 of the Organic Law Against Organized Crime and the Financing of Terrorism,"* (p. 270) (Italics in the original text).

X. After this categorical affirmation, expressed as a result of her having "appraised" the evidence, the Judge went on to expound upon the "de facto and de jure fundamentals" of her decision (Chapter IV), analyzing the various norms in the Criminal Code upon which she based the sentence.

Concerning Article 285 of the Criminal Code, which refers to *public instigation to commit crime*, the Judge was precise in recognizing that the felonious category entails:

> "leading another person to do something "intentionally; it is not merely proposing that it be committed, but rather promoting this in a certain coercive way, taking advantage of the people's state of excitement, of the instincts of the person being instigated […] The instigator wants the act to happen, but wants it done by someone else, he wants to persist on that action by way of the other person's acts[sic], instigating in the latter the resolution to execute it," (p. 273).

That is to say, in the case of Leopoldo López, in order to sentence him for this felony of public instigation to commit crime, the Judge

must have had to consider proving that, with malice aforethought, Leopoldo López had wanted Citizens Damián Daniel Martín García, Ángel de Jesús González and Christian René Holdack Hernández, specifically, to set fire to the Public Ministry building in particular and cause damage to public property located there, thus inducing them to do so. In other words, she had to have proved in the words of the sentencing itself, that the alleged instigator [Leopoldo López] wanted the act [arson and damage to public property], but wanted it done by others [Damián Martín, Ángel González and Christian Holdack], that he wanted to persist in this action through the "psychiatry" of others, thus determining in them the resolution to execute it.

Of course, that is not proved in any way in the court record, given that the Judge had limited herself to making the false generic statement, far removed from the felonious category, namely that what "was demonstrated" was that these citizens:

> "acting, determined [sic] by Citizen Leopoldo López, they instigated to disobedience of the laws, for purposes of generating violence and in this way create chaos and disrupt the peace and tranquility of the citizenry, as in fact did occur on the 12th day of February of 2014, since both defendants were at the place of the acts, together with the rest of the protesters who were causing destruction," (p. 273).

In this affirmation there is no reference at all to an alleged induction coming from López to specifically set fire to or damage specific properties by these determined persons; for which reason it is but a judicial aberration "to deduce" that Leopoldo López "was the determiner in the felony of public instigation," (p. 274). In order to arrive at this outrageous conclusion the Judge based her decision solely on what she considered to be López's "speeches of violent content," whose allegedly "sole purpose was to make public tranquility disappear," by leading a march toward the Public Attorney's Office "with the purpose of delivering an alleged document petitioning for the release of some students," advocating "a total and profound change of those who administer the National Public Power, with the intention of having them replaced and removed from office," which in the opinion of the Judge, "again reinforces his intention of ceasing to recognize the legitimate

authorities." The Judge also referred to the fact that the protesters:

> "were shouting slogans directed against the institution and its highest authority; not to mention the aggressive speech, all of this always under the gaze of their leader and spokesman Leopoldo López, who then decided to withdraw from the location," (pp. 274-275)

Furthermore, in the decision, the Judge recalled that the "violent acts" in fact began to occur after López had withdrawn from the place, but without explaining, according to her own definition of instigation to commit crime, how Leopoldo López could then "lead" the other defendants "to intentionally" set fire to or damage something; in other words, how could Leopoldo López "promote in a certain coercive way" setting fire to or damaging determined property belonging to the Public Ministry; in short, how was it that Leopoldo López, as instigator, could have wanted "the act, but wanted it done by someone else," how is it that he could want "to persist in that act [arson and damage to determined property of the Public Ministry] through the psychiatry [sic] of others, thus determining in these persons the resolution to execute it," (p. 273).

XI. The Judge then went on to analyze the *felony of damages* provided in Article 473 of the Penal Code, for which the other persons were sentenced, explaining that it suggests the destruction or deterioration of real estate or other property perpetrated by the other convicted persons, who in the specific case caused "a series of serious damages to the seat of the Public Ministry and to Parque Carabobo," thus affirming, purely and simply, that these persons had been "determined [sic] by Citizen Leopoldo López," (p. 277); but without defining how, in what form, or when.

The same thing happens in the decision with respect to the felony of *arson*, contemplated and sanctioned in Article 343 of the Criminal Code, for which other people were convicted, the Judge having explained that in order to apply the rule, a person has to try "to cause a large fire to make something burn that was not supposed to burn, thus causing danger to the public," (p. 277), affirming, also purely and simply, that the same act had been "determined by Citizen Leopoldo López," (p. 277); but without saying how, in what form, or when Leopoldo López could have determined that the ones who were supposed to commit those felonies were these specific citizens.

XII. The sentence also mentioned of the *felony of association to commit crime* contemplated and sanctioned in Article 37 of the Organic Law Against Organized Crime and the Financing of Terrorism (2012), explaining that this has to do with "an autonomous criminal category that sanctions the simple association" such that the norm "punishes the mere criminal intention," what Alberto Arteaga rightly considers to be an "absurdity" as neither thoughts nor simple intentions can commit a crime.[402] Nevertheless, the Judge considered it to be that way, adding that the norm pursues "the direct malice aforethought (the intention of committing the characterized objective and the will to do it)," thereby punishing, "without requiring even the beginning of the execution of the felonious ends, nor of course, a damage to the judicial asset for which there was an intention to offend, all of which means, *as the conspiracy that it is*, an obvious anticipation of the limit of the punishment that is normally presented by the commencement of the execution." (pp. 277-278).

From there, the Judge maintained that the subjective requirement for being able to apply the felonious category "consists of the criminal objective consistent with the purpose of committing one or more felonies," all of which:

> "requires malice aforethought *ab initio*, *for which reason the agents need to have associated in order to commit crime*, in such a way and form that there is no felony in cases where an ordinary association is constituted with a legitimate purpose, opposed from the specifically criminal objective demanded by the construct, which does not cause the nature of the organization to change from lawful to unlawful," (p. 278). (Our italics).

That is to say, according to the Judge, this felonious category

[402] About this, Alberto Arteaga is of the opinion that the text of the sentence "makes an out-of-place remark giving assurances that this has to do with a felony of danger for which the criminal intention, as such, is punished. Thoughts do not commit felonies, and simple intentions do not commit felonies. To sustain the opposite, as done by Judge Barrieros on page 277 of the text of the sentence, is an absurdity." See critique by Edgar López, "Sentencia contra López amenaza a todos los líderes de oposición," in *El Nacional*, Caracas October 9, 2015, at http://www.el-nacional.com/politica/Sentencia-Lopez-amenaza-lideres-oposicion_0_716328542.html

requires that "a criminal enterprise" exist and be constituted, thus there a consummation of felony "by the sole reason of being part of the association, regardless of the felonies that that group may ultimately commit."

For that reason, in order to make this felony applicable to Leopoldo López, in the case at issue, in the Judge's own words, it had to have been proved in the court record that he was associated with a "criminal enterprise," that had malice aforethought from the beginning, given that the people in the association must have associated in order to commit crime; the association had to have been "constituted with a criminal objective," in other words, with a specific purpose, which together with its associates had to have "malice aforethought from the beginning," which is that of committing a determined crime (p. 278).

Nevertheless, none of that existed, and of course, none of that could be considered as proved in the aberrant sentence, given that the Judge limited herself to explaining that in the case of Leopoldo López, he supposedly had "a structured group made up of other political leaders, among them Citizens María Corina Machado and Gaby Arellano, who were not part of the criminal proceedings nor were being tried, and they had been in front of the seat of the Public Ministry together with thousands of protesters, all of whom, based on what has been seen, could also be considered to be part of the alleged and false "criminal enterprise."

In other words, what that means is that the Judge's aberrance, by her sentence, in trying to say that there were *three persons* in the "criminal enterprise" that her mind imagined, which is what is required by the felonious category in Articles 37 and 4.9 of the Organic Law Against Organized Crime and the Financing of Terrorism, for which purposes she included, in an imprudent way, María Corina Machado and Gaby Arellano in the association to commit crime, as well as a multitude of persons who were at the demonstration, all of whom supposedly were also part of the "criminal association" for which the Judge convicted Leopoldo López.

This judicial aberration is supplemented by the Judge's affirmation, created out of nothingness, that it had supposedly been demonstrated that Leopoldo López "is part of a felonious

association," simply because his purpose was allegedly "to initiate a public and aggressive campaign" against the President of the Republic and the institutions of the State, "making it known to the audience, cohorts, and in general people with affinity toward his speech, that the current Government has ties to drug trafficking," further stating that the government was "corrupt, oppressive, anti-democratic, and that, furthermore, it was necessary to go out to win democracy," which was going "to be possible" only "with the people out on the streets […] without taking into account that his appeal is not the appeal coming from an ordinary citizen, but rather from someone who moves the masses," (p. 279).

And thus, without explaining how or when the alleged criminal enterprise or association made up of three or more persons had been formed or defined, even for purposes of profit, or with which persons, or what was the felony that had been intentionally agreed upon to be jointly perpetrated, or when they were going to commit it, or in what way was there evidence of the malice aforethought in the intention of committing crime; the Judge ended her sentencing by convicting all of the defendants, and in particular Leopoldo López, for allegedly being *a determiner in the felony of arson*, (4 to 8 years in prison); *a determiner in the felony of damages*, (one month to two years in prison); *an author in the felony of public instigation*, (3 to 6 years in prison) and *association to commit crime* (6 to 10 years in prison) *"the definitive penalty to be imposed being thirteen (13) years, nine (9) months, seven (7) days and twelve (12) hours in prison.*"

XIII. When this sentence is read, what stands out as evidence is its vicarious nature with respect to the Public Ministry and the Totalitarian State's apparatus for persecution and repression, given that the Judge who issued such a decision went on to blindly follow what doubtlessly had been "ordered" by the prosecutors at the Public Ministry, without even bothering to try to argue the contradiction into which she fell by applying diverse felonious categories in order to convict Leopoldo López, by means of what she herself described in the sentence in order that they could be applied.

About the felony of public instigation, the Judge said that it could only be applied to a person who has intentionally led someone else to commit a particular felony, which that person wanted to be committed by the other person, by imposing upon the latter the

resolution to perpetrate the felony (p. 273); but nothing appears in the records stating that Leopoldo López, with malice aforethought, had specifically wanted to have Citizens Damián Daniel Martín García, Ángel de Jesús González and Christian René Holdack Hernández set fire to or damage something, or that he had induced them to do so. Leopoldo López was not even at the place where the acts took place when a fire occurred and property was damaged, and it is possible that he did not even personally know those who had caused it, such that it was impossible to prove that he had intentionally ordered them, specifically, to set fire to or damage a specific property. It is, therefore, simply impossible for the Judge to have irresponsibly arrived at the conviction that Leopoldo López had been the "determiner" of the felonies of damages and arson allegedly committed by the other convicted students, without establishing how, in what form, or when Leopoldo López could have ordered that they, precisely those specific citizens, be the ones who were expected to commit those specific felonies.

Likewise, it is an inexcusable aberration, the source of the Judge's individual responsibility, for her to have sentenced Leopoldo López, for none other than the felony of association to commit crime, provided and sanctioned in a Law such as the Organic Law Against Organized Crime and the Financing of Terrorism, just for having expressed his political opinion, as political leader of the opposition, against the government, precisely through speeches before a multitude of people. The same Judge explained in the sentence that in order to apply this kind of felonious category, she had to prove that López was part of a criminal association or enterprise, consisting of more than three persons, with malice aforethought from the beginning in the intention of committing a specific felony.

But, in nothing the record appears in this regard, wherefore in the sentence, the only thing the Judge irresponsibly identified as having any relation to some "association" was the fact that when López gave his speech on the 12th day of February of 2014, in front of the building that is the seat of the Public Ministry, he had "a structured group consisting of other political leaders, among them Citizens María Corina Machado and Gaby Arellano," and a multitude of people. For this reason, Jesús Ollarves made a comment about the sentence stating that it has not only brought in the "risk of going to jail for

publicly expressing an opinion that is critical of the authorities of the bodies of the public power," but also that:

> "On this occasion, a judge dares do something even more serious: that is, to rule that any political organization of the opposition, in and of itself, is an association to commit crime. By stating without any proof whatsoever that former Assemblywoman María Corina Machado and Voluntad Popular leader Gaby Arellano are part of an organized crime group, political parties and any expression by civil society become criminalized."[403]

There is no way to assess this sentence, other than affirming that it is an insult to the law and to intelligence, and a clear example of how the totalitarian régime despises the Law. Therefore, for that reason, José Miguel Vivancos, of Human Rights Watch, stated that decisions such as this:

> "are made at the Presidential Palace and not at the Judiciary. I have no greater hope but that courts higher than the Judiciary can reverse a sentence that constitutes an act of arbitrariness. Leopoldo López has been sentenced without any evidence. We have had access to his court record and there is no evidence whatsoever that would even justify an arrest warrant."[404]

Therefore, the only thing worthy of being read in this sentence is actually the recognition and the advocacy made therein by the Judge concerning the good that has been accomplished by Leopoldo López's political leadership in the country, as a leader of the

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[403] Ollarves added: "The sentence does not specify how López, Machado and Arellano had assembled together to execute felonious acts nor does it demonstrate the permanent character of the organization from its creation up until the moment of the punishable acts, in this case, the acts of vandalism that occurred during the outcome of the opposition's march of February 12, 2014." See critique by Edgar López, "Sentencia contra López amenaza a todos los líderes de oposición," in *El Nacional*, Caracas 9 October 2015, at http://www.el-nacional.com/politica/Sentencia-Lopez-amenaza-lideres-oposicion_0_716328542.html

[404] See critique in "HRW: Los jueces en Venezuela son soldados de la causa chavista," in *El Nacional*, Caracas,October 9, 2015, at http://www.el-nacional.com/politica/HRW-jueces-Venezuela-soldados-chavista_0_716928318.html

opposition, which definitely is what explains its issuance, as an order that was given to the Judge in order to silence him.

The "felony" for which Leopoldo López was sentenced, , as becomes evident from the analysis of the text of the sentence, was none other than "the felony of opinion," which meant that he was convicted for his discourse, such that what was pursued was the "felony" of having publicly stated his opinion, as a successful leader of the opposition,[405] against the totalitarian government suffered by us, the people of Venezuela, and of having denounced all the corruption that affects the régime, by advocating the need that this government be removed from the exercise of power.

New York, October 10, 2015

[405] For that reason, and rightly so, Alberto Arteaga has stated, concerning the sentence, that "López was sentenced solely for having been a political leader of the opposition;" and Luis Ollarves has stated that the sentence creates "a very broad and illegitimate interpretation about the nature of the message of political leaders against the government," having therefore "as its objective to criminalize and intimidate dissidence, and it violates freedom of expression." See the critique by Edgar López, , "Sentencia contra López amenaza a todos los líderes de oposición," in *El Nacional*, Caracas 9 October 2015, in http://www.el-nacional.com/politica/Sentencia-Lopez-amenaza-lideres-oposicion_0_716328542.html

Chapter XI

THE BACHELET REPORT: AN EVICTION NOTICE TO THE REGIME (2019)*

The purpose of the *Bachelet Report,* issued on July 4th, 2019, was to display an "overview of the human rights situation" in Venezuela from January 2018 to May 2019,[406] stressing what it called "*patterns of violations directly and indirectly affecting all human rights – civil, political, economic, social and cultural*" (§2); in other words, every right of all Venezuelans, also affecting all the population.

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* Available at: http://allanbrewercarias.com/wp-content/uploads/2019/08/198.-Brewer.-THE-BACHELET-REPORT-July-2019.pdf. See the text in Spanishj in: See tne text in Allan R. Brewer-Carías and Asdrúbal Aguiar (Editors El Informe Bachelet: desahucio al régimen," en *Informes sobre violaciones graves a los derechos humanos en Venezuela* (Editores: Allan R. Brewer-Carías, Asdrúbal Aguiar), Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana International**,** Miami 2019, pp. 12-46.

406 See "Report of the United Nations High Commissioner for Human Rights on the situation of Human rights in the Bolivarian Republic of Venezuela" of July 4th, 2019, at https://www.ohchr.org/EN/HRBodies/HRC/Regular Sessions/Session41/Documents/A_HRC_41_18_SP.docx. The "Comments by the State" ("Statements on factual errors in the United Nations High Commissioner's Report on the human rights situation of the Bolivarian Republic of Venezuela"), can be found at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18_Add.1.docx

The *Report* is, in itself, an eviction notice to the regime, namely, a formal notice to dispossess the power in Venezuela and soon, moreover, "immediately".

To that effect, the *Report* explains and thoroughly documents all those violations, after it evaluated "the credibility and reliability of all sources and crosschecked the information gathered to confirm its validity" (§8). It reveals not only an unbearable picture of horror that affects every aspect of human dignity, but above all, that *the regime of the totalitarian State is the sole culprit and responsible of this*, which has been led by a government that acts as some kind of evil and irresponsible "gang" that raided the power as soon as 1999, first, in order to destroy, annihilate and persecute all that could exist as institutions and principles of the country, and second, in order to subdue an unarmed population to their own will; all of which has been ensured through an incompetent and amorphous bureaucracy, in many cases in association with all sort of criminal groups in order to keep on controlling the reins of power for their own benefit.

Therefore, after reading the *Report*, the only conclusion that can be drawn from it, when adequately interpreted, is that besides demonstrating in broad terms the horror that the country is living, which, as a matter of fact, are "notorious media facts," well known by everyone, and hence not requiring much evidence to disclose, what it raises –particularly in its recommendations– is a set of measures that could only be applied and executed by a government different from the one that has caused and is causing all the horrifying acts denounced. It would require a democratic government, democratically elected, and operating within the Rule of Law parameters.

In other words, it is simply impossible for the government that rules Venezuela since 1999 to apply the recommendations contained in the *Report,* and Mrs. Bachelet is aware of this. This is the reason why, it should be seen as an authorized denunciation referring to the systemic violations of all human rights in the country, and as a "direct message" to the predator regime, that it must evict power, that "they have to go, the usurpation must cease and the democratic order restored. And nothing else".[407]

[407] @arbrewercarias.Tweet of July 6,2019

In my opinion, this is how we must assess the *Report,* so it does not become another of the many other reports that have been drawn regarding human rights violations in so many countries and that, Venezuelans and all the democratic governments that have supported the transition process to democracy lea by the National Assembly, can continue to work on the ceasing the usurpation and restoring the Rule of Law and the mechanisms to protect human rights in the country.

I. THE HIGH COMMISSIONER'S ACKNOWLEDGEMENT OF THE PROCESS OF DISMANTLING THE DEMOCRATIC INSTITUTIONS

In fact, the *Report* proves, as we have been denouncing since 1999, that the regime has dismantled all democratic institutions and eradicated any idea of separation of powers, provoking the disappearance of all the checks and balances on the functioning of the State; with the consequence that currently in Venezuela there is an uncontrolled State, managed by an irresponsible group of leaders with oppressive inclinations.

1. The disappearance of the separation of powers

As a matter of fact, the *Report* gives an account of how:

> "Over at least a decade, the Government and government-controlled institutions enforced laws and policies that have accelerated the *erosion of the rule of law and the dismantlement of democratic institutions*, including the National Assembly" (§30).

With regard to the National Assembly, the *Bachelet Report* was emphatic in stating, in footnote (26), that:

> "[The National Constituent Assembly] [e]stablished in August 2017 after an electoral process that lacked political inclusivity and was marred with irregularities. […] assumed *de facto* the constitutional responsibilities of the National Assembly".

Moreover, the *Report* asserts in another footnote (23):

> "The "*Tascón List*" was an early marker of discrimination and persecution on political grounds. A database of over 3 million Venezuelans who supported a referendum to revoke the mandate of the then President Hugo Chávez in 2003-2004, the list was used to massively dismiss civil servants" (§30).
>
> "These measures are aimed at neutralizing, repressing and criminalizing political opponents and people critical of the Government" (§30).
>
> "This trend has accelerated since 2016, after the opposition won the majority of National Assembly seats, resulting in *increased repression targeting the political opposition, and steadily reducing the already limited democratic space*" (§30).

2. The absence of Justice: the disappearance of a reliable Judicial Power and of its autonomy and independence

Especially within this framework, with regard to the massive violations of human rights denounced in the *Report* –which are impossible to control due to the total erosion of State institutions needed for it– the dire situation of the Judiciary and of the rest of the State's control organisms is analyzed in detail.

A. Lack of autonomy and independence

With regard to the Judiciary, justice and the rights for citizens to access it, the *Report* states the following:

> "For over a decade, Venezuela has adopted and implemented a series of laws, policies and practices, which *have restricted the democratic space, weakened public* institutions, *and affected the independence of the judiciary"* (§76).
>
> "The *lack of independence of, and corruption within the judiciary* are also major obstacles faced by victims in their search for justice and reparation" (§56).

Justice as such, aside from being innocuous for the protection of human rights, has become the instrument by excellence to persecute the dissident, as highlighted in the *Report* when mentioning that:

> "[In] 2019, 22 deputies of the National Assembly, including its President, have been stripped of their parliamentary immunity

by the Supreme Court of Justice. Many of them have been charged with treason, conspiracy, incitement to insurrection, civil rebellion, […]" (§37).

B. Violation of the judicial guaranties and the absence of the right to access justice and judicial protection

The *Report* notes that "The Government has recognized that a problem exists regarding access to justice for all people" (§53), illustrating, for instance, that the people that have claimed for those "killed during the mass protests of 2017 continue to face pervasive obstacles to their rights to truth, justice, and reparation" (§55).

It also asserts that:

"The majority of victims of human rights violations highlighted in this report have had no effective access to justice and remedies" (§54).

"According to interviewees, few people file complaints for fear of reprisals and lack of trust in the justice system. When they do, authorities do not investigate or do not conduct prompt, effective, thorough, independent, impartial and transparent investigations" (§54).

"judicial authorities have often reversed the burden of proof refusing to open investigations if the victims did not identify perpetrators" (§43).

C. The overall situation of impunity

The absence of justice and to the right of access to it, causes an overall situation of impunity that characterizes the situation in the country, regarding which the *Report* states that:

"The State has systematically denied victims of human rights violations their rights to truth, justice, and reparation. Impunity has enabled the recurrence of human rights violations, emboldened perpetrators, and side-lined victims" (§80).

"Impunity factors identified in 2018 remain, including the lack of cooperation of security and armed forces with investigations, the tampering with crime scenes and evidence by security forces, undue delays in judicial proceedings, high

turnover of prosecutors and judges, and de facto immunity of senior officials" (§56).

3. The disappearance of other control functions and of the autonomy and independence of the Citizen Power

The dismantling of democratic institutions and of the principle of separation of powers, referred to above, has not only affected the Legislative Power and the body in charge of exercising it, that is, the National Assembly, but also, in the field of protection of human rights, it has affected the bodies of the Citizen Power, regarding which the *Report* expressed that:

> "Institutions responsible for the protection of human rights, such as the Attorney-General's Office, the courts and the Ombudsperson, usually *do not conduct prompt, effective, thorough, independent, impartial and transparent investigations* into human rights violations and other crimes committed by State actors, bring *perpetrators to justice, and protect victims and witnesses*. Such *inaction contributes to impunity and the recurrence* of violations" (§33).
>
> "*The* authorities *have failed to conduct prompt, effective, thorough, independent, impartial and transparent investigations into credible allegations of torture and ill-treatment, including SGBV, to bring the alleged perpetrators to justice and to provide reparation to the victims*" (§43).
>
> "The Attorney-General's *Office has regularly failed to comply with its obligation to investigate and prosecute perpetrators*, and the Ombudsperson *has remained* silent *vis-à-vis human rights violations*" (§57).
>
> "Neither of these institutions, nor the Government or the police provide protection to victims and witnesses of human rights violations" (§57).
>
> "Further, the Attorney-General *has contributed to public rhetoric stigmatizing* and *discrediting the opposition and those critical of the Government, in violation of the principle of presumption of innocence*" (§57).

4. Recommendations

Among the recommendations, on all this situation of destruction of the democratic institutions and the eradication of separation of power principle, the *Report* calls on the regime, "to immediately:"

> "(j) Take effective measures to restore the independence of the justice system and ensure the impartiality of the Attorney-General's Office and the Ombudsman" (§81).

It is evident that in order to implement this recommendation it is crucial that the power assailants be evicted, and to establish a democratic regime functioning under the Rule of Law, which would be the only one that would allow reestablishing the independence and autonomy of all the branches of government.

II. THE REGIME AND THE STATE AS RESPONSIBLE FOR THE MASSIVE VIOLATION OF ECONOMIC AND SOCIAL RIGHTS

In that state of dismantlement of the democratic principles and institutions, the uncontrolled State, managed by an insatiable bureaucracy, is directly responsible through actions, errors or omissions, of the violations of social rights, especially the right to food and the right to health, to which the *Report* dedicates the first observations, mentioning that:

> "OHCHR considers there are reasonable grounds to believe that grave violations of economic and social rights, including the rights to food and health, have been committed in Venezuela" (§75).

The *Report* also states that "the Government refused to acknowledge the scale of the crisis and failed to adopt appropriate measures" (§75); stressing that "The Government has assigned blame for the economic crisis on sanctions imposed on Venezuela" (§26).

In this regard, the *Report* was emphatic when specifying that "The economy of Venezuela, particularly its oil industry and food production systems, were already in crisis before any sectoral sanctions were imposed" (§27), although it granted that "Recent economic sanctions are exacerbating the economic crisis" (§75).

In any event, the truth is that the crisis and the massive violation of fundamental rights to food and health were due to the existence or lack of governmental policies, on which the *Report* stressed that:

> "*Misallocation of resources, corruption, lack of maintenance of public* infrastructure*, and severe underinvestment* has resulted in violations of the right to an adequate standard of living related to the collapse of public services such as public transportation, access to electricity, water, and natural gas" (§12).

1. Regarding the violation of the right to food and the State's obligation to ensure the population is free from hunger

Particularly, in terms of the "violations of the right to food, *including the State's obligation to ensure the population is free from hunger*" (§13), the *Report* clearly states that:

> "The Government *has not demonstrated* that it has used all resources at its disposal to ensure the progressive realization of the right to food, nor that it has unsuccessfully sought international assistance to address gaps" (§13).
>
> "[The] economic and social policies adopted over the past decade *have undermined food* production *and distribution systems, increasing the* number *of people that rely on food assistance programs*" (§15.)
>
> "Lack of access to food has a particularly adverse impact on women [...] Local sources reported some *women being compelled to exchange sex for food*" (§14).

2. Regarding the violation of the right to health

As it is accounted for in the *Report* "The situation regarding the right to health in Venezuela is dire" (§16), stating:

> "Violations of the right to health resulted from the Government's *failure to fulfil its core obligations*, which are non-derogable, even for economic reasons" (§20).
>
> "Violations of core obligations were linked to the *widespread lack of availability of, and access to, essential medicines and treatment, the deterioration of conditions in hospitals, clinics, and maternity clinics, insufficient provision of underlying*

determinants of health, including water and adequate nutrition, deterioration of immunization and preventative health programs, and restrictions on access to sexual and reproductive health" (§20).

Also, with regard to health matters, the *Report* stresses that: "Blackouts have caused irreparable harm, as evidenced by reports that indicate that 40 patients died as a result of the March 2019 power outages" (§19).

The *Report* adds that:

"Moreover, the *failure of the Government to publish comprehensive data on public health, essential for the development and* implementation *of an adequate* response to the health crisis is a violation of the right to health" (§20).

All this has caused, as confirmed in the *Report,* not only "an exodus of doctors and nurses" (§16), but also "severe *shortages in basic medical equipment*, supplies and medicines" and "60 to 100 percent of essential drugs" (§16) to the point that "*patients have to provide all necessities*" (§16), and as a result "people died due to lack of supplies in hospitals" (§19); but also "previously controlled and eliminated diseases, including vaccine-preventable diseases such as measles and diphtheria, *have re-emerged*" (§17).

Adding to the latter the "risk of contracting HIV and other sexually transmitted diseases, and of unwanted and adolescent pregnancies" (§18) and the increase of "maternal mortality" due to the "[l]ack of skilled birth attendants, medical supplies and hospital conditions has driven many women to give birth abroad" (§18).

3. Regarding the political discrimination imposed on food and health programs

The widespread destruction of the institutions in the country, progressively caused that the "*Misiones Bolivarianas*," which were economic and social programs aimed at fighting poverty and social exclusion" (§21) would gradually become instruments for domination since, as the *Report* stresses, "*Venezuelans are increasingly relying on social programs to access minimum levels of income and food*" (§21).

As the *Report* stressed, this implied, among other serious consequences, that:

> "As the economic crisis deepened, the *authorities began using social* programs *in a* discriminatory *manner, based on political grounds,* and as an instrument of *social control*" (§75).

The *Report* gives broad account of this when it refers, for example, to the "Local Committees for Supply and Food Distribution (CLAP)" and the local structure of "Community Councils" which "along with military and security forces" had as a mission "to distribute food assistance," but it did not reach many "people, who despite not having adequate access to food, *were not included* in the distribution lists of the CLAP boxes because *they were not Government supporters*" (§22).

The *Report* makes a similar reference to the program "*Carnet de la Patria*", noting that this is:

> "a card through which all social programs would now be delivered, including a new system of direct financial transfers to families. The list of beneficiaries of these programs *is managed by the local structures of the governing parties, as opposed to Government institutions*. Interviewees reported that members of these local structures *monitor beneficiaries' political activity*" (§23).

The *Report* makes an extensive analysis of the discriminatory impact that government social programs had on women, noting that while they are the ones "who carry the burden of household tasks and child rearing, [they] are the majority of beneficiaries of social programs related to health, food, and housing" (§24), and they also constitute, according to information provided by the government "72 percent of the membership of local community councils" (§24), however:

> "discrimination *based on political grounds and social control* through ″carnets″ has had a direct impact on their ability to exercise their rights" (§24).

The *Report* gives an account of cases in which women, even local leaders, "have been targeted due to their activism" for their participation in "anti-government protests", and how they were:

> "*threatened* by community leaders and *pro-government civilian armed groups* (armed *"colectivos"*) and excluded from social programs. Women reported not exercising their rights, including not speaking out against the Government, for fear of reprisals" (§24).

4. One of the consequences of the violations of economic and social rights: the exodus of Venezuelans

The *Report* concluded that the violations "of the rights to food and health are the primary drivers" (§70), that:

> "The number of people compelled to leave Venezuela *has increased* dramatically since 2018 and reached over four million as at 6 June 2019 (https://r4v.info/en/situations/platform)" (§69).

Among the factors that motivated this exodus, the *Report* lists the fact that "[m]any seek *protection of their right to life with dignity*" (§70); "Other drivers are violence and insecurity, the collapse of basic services, and the deterioration of the education system" (§70); another factor is the "*lack of access* to pre and post-natal care, and insufficient protection mechanisms from domestic violence" (§70). Overall, "*persecution on political grounds* is also forcing many Venezuelans" to leave e country (§70).

Also, the *Report* stresses that:

> "The violations of economic and social rights that drive migration also affect the conditions in which people leave the country, the way people move, and the situations of vulnerability they face during migration" (§71).

5. Recommendations

Among the recommendations in the *Report,* regarding all these violations of economic and social rights, the *Report* calls on the regime, "*to immediately:"*

> "(a) Take all necessary measures to ensure *availability and accessibility of food, water, essential medicines and healthcare services*, including comprehensive preventative healthcare programs with particular attention to children's and maternal services, including sexual and reproductive healthcare" (§81).

In addition, it calls on the regime to:

"(b) *Allocate the maximum available resources towards* the progressive realization of economic and social rights in a *transparent and accountable manner* that allows the assessment of expenditures;

(c) Allow access *to information* of public interest;

(d) Ensure provision of all social programs in a *transparent, non-politicized, and non-discriminatory* manner, including effective oversight and accountability measures;

(e) Increase *vaccination* coverage for preventable diseases and take adequate measures to control outbreaks of communicable diseases;

(f) Prioritize measures to *decrease early pregnancies, and ensure that all plans* regarding sexual and reproductive rights include measurable indicators and monitoring mechanisms" (§82).

Naturally, in order to implement these recommendations, it is essential to evict the assailants of power, and establish a democratic regime in the country, functioning in a State under the Rule of Law, which can be the only way to impose an economic and social policy change, in order to guarantee the enjoyment of human rights.

III. THE REGIME AND THE STATE AS RESPONSIBLE FOR THE MASSIVE VIOLATION OF CIVIL AND POLITICAL RIGHTS

In that global situation of dismantlement of the democratic principles and institutions that the *Report* accounts for, the same uncontrolled State, managed by the same insatiable and corrupted bureaucracy, is directly responsible through actions, errors or omissions, for the violations of civil and political rights, especially the right to freedom of speech, right to security and individual freedom, on which the second observations of the *Report* are focused.

1. Regarding the violations to the freedom of expression and opinion

Regarding the violations of the freedom of expression and opinion, the *Bachelet Report* explains how, over the past years:

> "the Government has attempted to *impose a communicational hegemony* by *enforcing* its own version of events and creating an environment that *curtails independent media*" (§28).

As it is stressed in the *Report,* "this situation has continued to worsen in 2018-2019" (§28), providing an account of how:

> "*Dozens of printed media were closed, and the Government shut down radio* stations and banned television channels" (§28).
>
> "*Detention of journalists* increased, including of foreign journalists who were *expelled or* left *the country* immediately after having been released. Hundreds of Venezuelan journalists now live in exile" (§28).

In view of this general situation, in addition to documenting that this situation has led to "*arbitrary detention of people for expressing opinions* on social media" (§29), the *Report* also observes that:

> "The Internet and social media have become the main means of *communication* and information for the population, *further limiting access to independent information* for those who do not have Internet access" (§28).

However, regarding this, according to the *Report* the reality is that:

> "Internet speed is also steadily decreasing, even because of lack of *investment* in infrastructure" (§28).
>
> "Additionally, in recent years, the Government *has blocked independent news websites* and regularly blocked the main social media platforms" (§28).

2. Regarding the violations of individual security and freedom, selective repression and persecution for political reasons

A. The violations instrument: the massive development of security forces and measures

The *Report* describes in detail the massive violations of civil and political rights and shows a picture of true horror. All this has been made possible by the deliberate development of an institution framework and security measures aimed to repress any dissidence, according to a repressive policy defined by the State.

The *Report* stresses that since 2016, in addition to having had "a ″state of exception,″ which has since been renewed every 60 days," the government has:

> "activated the Plan Zamora, a civil-military strategic security plan for *the* joint operation of armed forces, militias and civilians" (§31).
>
> "These policies involve the *increased militarization of State institutions*" (§31).
>
> "They also extend the use of the population in intelligence gathering and defense tasks, through local structures such as Community Councils, the *Unidades de Batalla Bolívar y Chávez* (UBChs), the *Comités Locales de Abastecimiento y Producción* (CLAPs) and the *Redes de Articulación y Acción Sociopolítica* (RAAS)" (§31).

The *Report* also stressed that:

> "Although these measures have been adopted with the declared aim of preserving public order and national security against alleged internal *and* external threats, they have *increased the militarization of State institutions and the use of the civilian population in intelligence gathering and defense tasks*" (§76).

In terms of the security apparatus structured by the government, as the *Report* describes it, this includes:

> "the Bolivarian National Guard (GNB), the Bolivarian National Police (PNB) and its Special Action Forces (FAES), the Bureau for Scientific, Criminal and Forensic Investigations (CICPC), the Bolivarian National Intelligence Service (SEBIN), and the Directorate General of Military Counterintelligence (DGCIM)" (§32).

Regarding such forces, the *Report* elaborates regarding the Bolivarian National Guard (GNB) –part of the Armed Forces– and the Bolivarian National Police (PNB), that they:

> "have been responsible for the *excessive use of force in demonstrations* since at least 2014" (§32).

Regarding the Special Action Forces (FAES) and the Bureau for Scientific, Criminal and Forensic Investigations (CICPC), the *Report* underscores that although it was:

> "a rapid-response unit created in 2017 to combat organized crime, [it] *has allegedly been* responsible *for numerous extrajudicial executions* in security operations, as well as the CICPC" (§32).

Regarding the Bolivarian National Intelligence Service (SEBIN) and the Directorate General of Military Counterintelligence (DGCIM), the *Report* points out that they:

> "have been *responsible for arbitrary detentions, ill-treatment and torture of political opponents and their relatives*" (§32).

Lastly, regarding the "Armed *colectivos*", the *Report* underlines that they:

> "contribute to this system by exercising social control in local *communities*, and supporting *security forces in repressing demonstrations* and dissent" (§32).

B. The persecution policy against the opposition and dissidents

One of the conclusions of the *Report* is that all this apparatus "has *enabled the Government to commit numerous human rights violations,*" especially mentioning that:

> "The authorities have *particularly targeted certain individuals and groups, including members of the political opposition* and those *perceived* as threats to the Government due to their capacity to articulate critical positions and to mobilize others. This *targeted repression manifests itself in a multitude of human rights violations*, which may amount to *persecution on political grounds*" (§77).

Thus, the *Report* gives account of the development and usage of the security forces to persecute and repress:

> "accompanied by a *public rhetoric*, including by high-level authorities, that constantly *discredits and attacks those who criticize or oppose the Government*" (§34).
>
> "The *political* opposition, human rights activists and journalists, among others, are frequently the *targets of discourse labelling them as ″traitors″ and ″destabilizing agents″*"" (§34).
>
> "This *rhetoric* is widely *disseminated through pro-government media*, such as the weekly TV program *″Con el*

Mazo Dando," presented by the President of the National Constituent Assembly (NCA)" (§34).

Additionally, the *Report* underscores that:

"laws and reforms have facilitated the *criminalization of the opposition and of anyone critical of the Government* through vague provisions, increased sanctions for acts that are guaranteed by the right of freedom of peaceful assembly, the *use of military jurisdiction* for civilians, and restrictions on NGOs to represent victims of human rights violations" (§35).

C. The persecution policy against workers, employees, civil servants and dissidents and their families for political reasons

With reference to persecution in the labor field, for political reasons, the *Report* realized that:

"In *2018*-2019, *various trade union leaders and many workers were fired or detained* after protesting for decent salaries and working conditions" (§36).

"Dozens of *health professionals* who denounced the state of healthcare *were dismissed and/or threatened*" (§36).

"*University* staff *critical of the Government was threatened with non-payment of salaries*, prevented from accessing their workplace and travelling abroad, and arbitrarily detained" (§36).

"*Human rights defenders were victims of defamation campaigns* in pro-government media, *and subjected to surveillance, intimidation, harassment, threats and arbitrary detention*" (§36).

"Attacks have also targeted *supporters of former President Hugo Chávez and military* dissidents as well as civil servants" (§36).

Regarding dissident women, the *Report* indicates that they:

"have faced gendered attacks such as sexist comments, *online gender-based violence, and public humiliation*" (§36).

Overall, it was found that:

"The *targeted repression of opposition members and social leaders instils fear* by demonstrating the possible consequences

of opposing or merely criticizing the Government or expressing dissent." (§36).

Regarding the families of the persecuted, the *Report* showed that "Attacks against relatives of political opponents are part of the *targeted repression*" (§38); having documented "an increasing number of *arbitrary detention of relatives, particularly women, of alleged political opponents*" (§38).

3. Repression against the right to demonstrate and the violation of the right to individual security and to life

The *Report* emphasizes in particular the repression that has taken place against the citizen's political right to demonstrate, where the trait has been the excessive use of force and deaths in demonstrations against the government, that go unpunished.

In fact, the *Report* confirmed that in certain political protests or demonstrations against the government that had "increased in number and intensity since 2014," the security forces:

> "GNB, PNB, FAES and some state and municipal police forces, allegedly *used excessive force deliberately, to instill fear and discourage further* demonstrations" (§39).

In addition to the latter:

> "Armed "*colectivos*" *also resorted to violence against demonstrators, often in coordination with security forces*. In many cases, these actions resulted in deaths and serious injuries" (§39).

Overall, the *Report* noted that "security forces also conducted *illegal house-raids* targeting demonstrators" (§40); that a large group of people were detained "for political reasons" "in the context of the demonstrations" (§41) and that specifically with reference to women protestors, they "were *arbitrarily detained and ill-treated or tortured*" (§40).

4. The violation of the right to physical integrity: arbitrary detentions, enforced disappearances, tortures and ill-treatments

The *Report* placed special emphasis in the arbitrary deprivation of liberty of hundreds of people, for political reasons, underlining that:

> "the Government has used *arbitrary detentions* as one of *the principals means to intimidate* and *repress the political opposition and any real or perceived expression of dissent* since at least 2014" (§41).

Stressing that:

> "In most cases, people were *detained* for exercising their fundamental rights, particularly *freedom of opinion, expression, association and peaceful assembly*" (§42).

The *Report* also mentioned cases of:

> "…*enforced disappearances* until the authorities revealed the whereabouts of the individuals, days or weeks after their arrests." (§42)

The *Report*, mentioned additionally in connection with the detentions for political reasons that:

> "conditions of detention of a significant number of persons deprived of *their* liberty *do not meet basic international standards* for the humane treatment of detainees, and often constitute ill-treatment" (§45).
>
> "Detention centers, especially preventive detention centers, are often *overcrowded and* insalubrious" (§45).
>
> "*Detainees* have *limited access to food, water, sanitation, sunlight, and recreation facilities*. Their access to essential healthcare is restricted or even denied" (§45).

Another aspect stressed in the *Report* is the *torture and ill-treatment* of the detainees, noting that:

> "In most cases, women and men *were subjected to one or more forms of torture or cruel,* inhuman *or degrading treatment or punishment, including electric shocks, suffocation with plastic bags, water boarding, beatings, sexual violence, water and food deprivation, stress positions and exposure to extreme temperatures"* (§43).

> "Security forces and intelligence services, particularly SEBIN and DGCIM, *routinely resort to such practices to extract information and confessions, intimidate, and punish the detainees*" (§43).

Especially regarding women, the *Report* states:

> "*documented* cases of SGBV against women and girls in detention, particularly by SEBIN and DGCIM elements and officers of GNB" (§44).
>
> "*physical assaults, such as being dragged by the hair and inappropriate touching, threats of rape, forced nudity and gendered and sexist insults*, aiming at humiliating and punishing them, as well as extracting confessions" (§44).

5. Security operations, excessive use of force and contempt for life

When referring to the security operations, the *Report* referred to "the FAES as a ″death squad″ or ″extermination group″" (§47), considered in NGO's reports as "responsible for hundreds of killings" (§47).

Based on the testimonies received, the *Report* found that in order to perpetrate the abuses and atrocities, the FAES used a similar "*modus operandi,*" as:

> "FAES would arrive in black pickup trucks without license plates and block access points in the area. They were dressed in black, without any personal identification, with balaclavas covering their faces. They would also carry long weapons" (§48).

The *Report* notes that following that procedure, the FAES:

> "*breaking into* their *houses, taking their belongings, and exercising gender-based violence* against women and girls, including forced nudity" (§48).
>
> "They *would* separate young men from other family members before shooting them. According to their relatives, *almost all of the victims had one or more shots* in the chest." (§48)

6. Concealment as a State policy

With regard to the proceedings of FAES in those operations, the *Report* stresses:

> "how FAES *manipulated the crime scene and evidence. They would plant arms and drugs and fire their weapons against the walls or in the air to suggest a confrontation* and to show the victim had ″resisted *authority*″" (§49).
>
> "In many cases, FAES brought the victims to hospitals even though they *were* already dead, apparently with the *intention of manipulating the bodies and modifying the crime scene*" (§49).
>
> "The authorities classify the killings resulting from security operations as ″*resistance* to authority″" (§50).
>
> "*Information* analyzed by OHCHR suggests *many of these killings may constitute* extrajudicial *executions*" (§50).

The *Report* highlights the case of:

> "…*young* men executed by FAES in reprisal of their role in anti-*government* protests in 2019" (§52); and that:
>
> "These *extrajudicial executions took place during illegal house-raids after* demonstrations *had ended and followed the same modus operandi* described above" (§52).

As a result, the *Report's* conclusions indicated that:

> "Thousands of people, mainly young men, *have been killed in alleged confrontations* with state forces during the past years" (§78).
>
> "There are reasonable grounds to believe that *many of these killings constitute extrajudicial executions* committed by the security *forces*, particularly FAES" (§78).
>
> "OHCHR is concerned that the authorities may be using FAES, and possibly *other* security forces, as part of a *policy of social control*." (§78).

7. Recommendations

Among the recommendations of the *Report,* regarding all those violations of *civil and political rights*, it calls on the regime "*to immediately:*"

"(b) Take immediate measures to halt, remedy and prevent human rights violations, in particular, gross violations such as torture and extrajudicial executions;

(c) Conduct prompt, effective, thorough, independent, impartial, and transparent investigations into human rights violations, including killings of indigenous peoples, and bring perpetrators to justice;

(d) *Release* all persons arbitrarily deprived of their liberty;

(e) Halt, publicly condemn, punish and prevent all acts of persecution and targeted repression based on political grounds, including stigmatizing *rhetoric* and smear campaigns;

(f) Adopt *effective* measures to protect human rights defenders, and media professionals;

(g) Cease any intimidation and attacks against indigenous peoples, including *leaders*, and ensure their protection and take all necessary measures to protect their individual and collective rights, including their right to land;

(h) Cease and prevent excessive use of force during demonstrations;

(i) Dissolve FAES and establish an impartial and independent national mechanism, with the support of the international community, to investigate extrajudicial executions during security operations, ensure accountability of perpetrators and redress for victims;

(k) *Ensure* the right to a remedy and reparation for victims, with a gender-sensitive approach, as well as guarantee their protection from intimidation and retaliation; (§81)

In addition, to:

(g) *Reverse* closures of media outlets, and cease other measures of censorship against media; guarantee access to Internet and social media, including to news websites, and impartiality of governing bodies in the allocation of radio spectrum frequencies;

(h) Disarm and dismantle pro-government armed civilian groups (armed "*colectivos*") and ensure investigations into their crimes;

(i) Protect persons, including those on the move, from abuses, corruption, and extortion by state agents;" (§82)

Of course, in order to implement all these recommendations, it is also indispensable to evict its assailants from power, and to establish a democratic regime, that must function according to the rule of law, which is the only way through which is possible to guarantee human rights.

IV. THE REGIME AND THE STATE AS RESPONSIBLE FOR THE VIOLATION OF THE RIGHTS OF INDIGENOUS PEOPLE

With regard to the overall situation of human rights reviewed in the *Report*, according to its own wording, particularly "[t]he economic and social rights of many indigenous peoples have been disproportionately affected" (§61).

About this, the *Report* elaborates that:

> "*There are violations of* indigenous *peoples' collective rights* to their traditional lands, territories, and resources" (§62), and that:
>
> "They have *lost* control of their land, including from militarization by State actors. Their presence has led to *violence and insecurity* in their territories in recent years, in addition to the presence of organized criminal gangs, and armed groups" (§62).

In particular, it addressed the toxic effects of:

> "*Mining*, particularly in Amazonas and Bolivar [States], including in the *"Arco Minero del Orinoco"* region, has resulted in *violations of various collective rights*, including rights to maintain customs, traditional ways of life, and a spiritual relationship with their land" (§63).
>
> "Mining *also* has *grave environmental and health impacts*, such as increased malaria, and contamination of waterway." (§63).

The *Report* especially addresses the "*Pemon* communities who oppose the Government," (§64), elaborating that:

> "On 22 *February soldiers open-fired on members of the Pemon community* of Kumaracapay, killing three and wounding 12 others" (§66).

Among the recommendations of the *Report,* regarding all these violations of the rights of indigenous people, there was a special emphasis in the death of indigenous people by security forces, and calls on the regime "to *immediately*:"

> "(c) *Conduct* prompt, effective, thorough, *independent, impartial, and transparent* investigations into human rights violations, including killings of indigenous peoples, and bring perpetrators to justice." (§81)

Once again, and of course, in order to implement these recommendations, it is equally essential to evict the assailants of power, and establish a democratic regime in the country, functioning in a State under the Rule of Law, which would be the only that could guarantee the enjoyment of human rights.

FINAL COMMENT

As we indicated at the beginning, after the picture of horror exposed by United Nations High Commissioner for Human Rights, Michelle Bachelet, following her visit to Venezuela in June 20 – 22, 2019, when in the "Recommendations" of the *Report* she *"calls on the Government of Venezuela to immediately"* to cease every action and omission of the Government bodies, which have provoked, for a couple of decades, the heinous violations to human rights depicted in the *Report*, such recommendations cannot be understood in any other way than as a firm request to such government to abandon power, and immediately.

All the Recommendations presented in the *Report,* and Mrs. Bachelet is aware of this, can only be executed and implemented by a *democratic regime in the country, functioning in a State under the Rule of Law*. That is why, since the current regime is not a democratic government, the recommendations are a call on the government to step away from power "immediately" so the transition to democracy, ceasing of usurpation and the implementation of free elections can take place, being the only way to guarantee the enforcement of the Recommendations in the *Report.*

And to verify this, one only needs to mention that while Mrs. Bachelet was staying in Caracas, precisely on June 21st, 2019, while she was holding meetings, as the *Report* mentioned, with "President Nicolás Maduro, the Vice-President, the Minister of Foreign Affairs, high-level officials from 17 ministries (including Interior, Defense, Health, Economy and Education)" (§4), officers of the Bolivarian Intelligence Service and the General Directorate of Military Counterintelligence, were at that precise moment arresting Frigate-Commander of the Venezuelan Navy Rafael Acosta Arevalo,[408] along with other officers at a coffee shop in Caracas, who would die just a few days after the visit of Mrs. Bachelet concluded and before the *Report* was submitted on June 29th, as a consequence of the tortures he was subjected to.[409] The last time he was seen alive, the day before, was in a wheelchair before a judge, where the only thing he could utter to his lawyer was "help."[410]

It is certainly impossible to conceive a bigger mockery to what was to be one of the Recommendations of the *Bachelet Report,* that the government "*take immediate measures to halt, remedy and prevent human rights violations, in particular gross violations such as torture and extrajudicial executions*."

Similarly, days before Mrs. Bachelet submitted her *Report,* in a brutal repression led by members of the Bolivarian National Police

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408 See article by Sandra Guerrero "El cadáver del capitán Acosta Arévalo lleva ocho días en la morgue" published in *El Nacional*, July 6th, 2019 in http://www.el-nacional.com/noticias/sucesos/cadaver-del-capitan-acosta-arevalo-lleva-ocho-dias-morgue_287620

409 See article: "Venezuela: Denuncian que militar detenido fue torturado hasta morir. El capitán de corbeta Rafael Acosta Arévalo estaba detenido desde la semana pasada. La fiscalía de Venezuela lo investigaba por un supuesto plan para derrocar y asesinar a Nicolás Maduro. La activista Tamara Suju denunció que fue torturado hasta morir," published in *El Comercio* on June 29th, 2019 at https://elcomercio.pe/mundo/venezuela/venezuela-rafael-acosta-arevalo-capitan-corbeta-murio-torturado-agentes-direccion-general-contrainteligencia-militar-dgcim-denuncia-tamara-suju-noticia-650701.

410 See article: "Comunidad internacional pide investigación por muerte de Rafael Acosta Arévalo por presuntas torturas," published in *CNN Español* on July 3rd, 2019 at https://cnnespanol.cnn.com/2019/07/03/comunidad-internacional-pide-investigacion-muerte-por-presuntas-torturas-contra-militar-venezolano/

(PNB) against a peaceful demonstration of neighbors that were denouncing the lack of domestic gas services in *Táchira* State, a teenager was shot point-blank with pellets that left him blind.[411]

Similarly, it is certainly impossible to conceive a bigger mockery of what is also one of the Recommendations of the *Bachelet Report*, that the government immediately "*Cease and prevent excessive use of force during demonstrations*."

As Mary Anastasia O'Grady assessed "The findings put into the U.N. record what the humanitarian groups have been documenting for years: Venezuela is a pit of state-sponsored brutality."[412] So that only by changing the regime that mandates that State, is that such well can be cleaned and disinfected.

New York, July 8, 2019.

411 See article: "La brutal represión de Maduro dejó ciego a un adolescente de 16 años. Rufo Chacón había ido a reclamar por la falta de gas junto con su madre en el estado de Táchira cuando le dispararon directamente al rostro. Lo van a operar, pero los médicos ya confirmaron que no podrá volver a ver." Published in *Infoae* on July 2nd, 2019 at https://www.infobae.com /america/Venezuela/2019/07/02/un-adolescente-de-16-anos-perdio-sus-ojos-por-la-brutal-represion-del-regimen-de-nicolas-maduro-durante-una-protesta-en-venezuela/.

412 See Mary Anastacia O'Brady's article "Life and Death in Caracas" published in *The Wall Street Journal* on July 8th, 2019. Page A15.

Chapter XII

THE SEPTEMBER 2020 REPORT OF THE *UNITED NATIONS INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON HUMAN RIGHTS IN VENEZUELA* AND ITS EFFECTS WITH REGARD TO THE RULE OF LAW AND ON ELECTION (2020) *

I

After having sent a diplomatic mission to Venezuela on September 24, 2020, to confirm whether the parliamentary elections called for December 2020 could be postponed in order to open a space for dialogue and change the existing conditions, the Office of Mr. Borrell, High Commissioner of the European Union for Foreign Affairs and Security Policy, issued a Press Release that became known on September 30, 2020, in which he reported that:

> "at this time there are no conditions for carrying out a free, fair and democratic electoral process."[413]

The truth is that it would have sufficed for him to read the *Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela*, (21 pp)[414] submitted on

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* Text written for the Presentation at the event "*Informe ONU sobre delitos de lesa humanidad caso Venezuela)*," held at the Academy of Political and Social Sciences, October 1, 2020, Via Zoom. Universitas Fundación.

413 Available at: https://www.france24.com/es/20201001-la-ue-no-recono-cer%C3%A1-las-elecciones-legislativas-en-venezuela-si-no-se-aplazan-los-comicios

414 Available at: https://www.ohchr.org/_layouts/15/WopiFrame. aspx? source doc=/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_33_AUV. pdf&action=default&DefaultItemOpen=1

September 15, 2020 before the Human Rights Council of the United Nations, in compliance with the Council's Resolution 42/25 of September 27, 2019, and the "*Detailed findings of the independent international Fact-Finding Mission on the Bolivarian Republic of Venezuela (443 pp.),*[415] containing said *Mission*'s findings "regarding extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014," in order to have easily reached that conclusion, without the need to generate useless diplomatic and political expectations.

For the purpose of this Presentation, on the many violations reported in such *Report* and *Detailed Findings,* I want just to highlight the following five fundamental aspects: first, the horror depicted by the offenses and crimes perpetrated against human rights; second, the determination that the same were committed as part of a State policy; third, the characterization thereof as crimes against humanity; fourth, the determination of liabilities; and fifth, their development in a situation of lack of rule of law.

II

The *first aspect* is that both documents clearly show in detail a *horror picture*, that is truly unimaginable, not only in the past but current –it is happening now -, made up of horror officials, horror police, horror prosecutors, horror judges and horror custodians, which the *Report* summarizes by stating that the actions and behaviors described therein:

> "amount to arbitrary killings, including extrajudicial executions, torture and other cruel, inhuman or degrading treatment or punishment – including sexual and gender-based violence – enforced disappearances (often short term) and arbitrary detentions, in violation of Venezuela's national law and international obligations." (par. 151).

To these actions and behaviors, the *Report* adds the crimes of:

> "murder, imprisonment and other severe deprivations of physical liberty, torture, rape and other forms of sexual violence,

[415] Report of September 15, 2020, available at: https:// www.ohchr.org/ Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP.11.pdf

> enforced disappearance of persons in the *Barlovento* case, and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health."

The Mission considers that these crimes are crimes against humanity, and that "some of the same conduct may also constitute the crime against humanity of persecution, as defined by the Rome Statute" (par. 161).

III

The *second aspect* that I wanted to note is that all the violations and crimes described and analyzed by the *Mission*, as evidenced in the *Report*, were part of *a State policy,* and that it had "reasonable grounds to believe that *most*" of them:

> "were committed as part of a widespread and systematic attack directed against a civilian population, with knowledge of the attack, pursuant to or in furtherance of two distinct State policies: Firstly, there was a policy to silence, discourage and quash opposition to the Government of President Maduro, including by targeting individuals who, through various means, demonstrated their disagreement with the Government, or were perceived as being against the Government, as well as their relatives and friends who were targeted for being associated with them. Secondly, there was a policy to combat crime, including by eliminating individuals perceived as "criminals" through extrajudicial execution." (par. 160).

This was reiterated by the *Mission* in its *Detailed Conclusions*, by stating that it:

> "has reasonable grounds to believe that most of the violations and crimes documented in this report were committed as part of a *widespread and* systematic *attack directed against a civilian population*, with knowledge of the attack, pursuant to or in furtherance of a State policy. In relation to these crimes, the Mission has reasonable grounds to believe that crimes against humanity were committed in Venezuela in the period under review" (par. 2086).

In this same regard, in the *Detailed Conclusions*, the Mission was explicit about these crimes by stating that such crimes:

"were committed as part of an attack directed against a civilian population. Indeed, first, the acts constituted a "course of conduct" in the sense that there was a multiple commission of acts, which formed part of an overall flow of events as opposed to crimes committed by isolated and uncoordinated individuals acting randomly on their own. Second, the attack was directed against the civilian population as the primary, as opposed to incidental, target of the attack. As noted below, acts committed against members of the military that have been placed hors de combat may properly fall under this definition. Third, the crimes listed above were, respectively, committed in furtherance of the following two distinct State policies:

a. A policy to silence, discourage and quash opposition to the Government of President Maduro, including by targeting individuals who, through various means, demonstrated their disagreement with the Government, or were perceived as being against the Government, and their relatives and friends who were targeted for being associated with them.

b. A policy to combat crime, including by eliminating individuals perceived as "criminals" through extrajudicial execution (par. 2088).

IV

The *third fundamental aspect* arising from the *Mission*'s *Report* and the *Detailed Conclusions* is that the majority of the crimes documented, as noted in the quotes thereof, were expressly characterized by the *Mission* as *crimes against humanity*, particularly those perpetrated within the frame of "repression in a security and social control context," and "violations in the context of protests," that is, as an offense to Venezuelan society and humanity, stating that such crimes:

"correspond to conduct that may be legally qualified, under Article 7 of the Rome Statute, as the crimes against humanity of murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape or any other form of sexual violence of comparable gravity, enforced disappearance of persons and other inhumane acts of a similar character

intentionally causing great suffering or serious injury to body or to mental or physical health " (par. 2084).[416]

Specifically, many of these crimes were analyzed in the *Detailed Conclusions,* among which we note those pertaining to *targeted political repression* (Chapter III) and those perpetrated as "violations in a *security and social control context* (Chapter IV), some of which the same Mission also considered may "also constitute the crime against humanity of persecution" (par. 2085), consistent in the:

> "intentional and severe deprivations of the following rights: the rights to life, liberty and security of the person, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, the right not to be subjected to rape and other forms of sexual violence, and the right not to be subjected to arbitrary arrest or detention. Taken together, these violations may constitute acts of persecution, while also consisting of distinct crimes against humanity." (par. 2085).

In the *Detailed Conclusions*, with regard to this *crime of "persecution*," the Mission stressed its "materially distinct elements,"

> "meaning the targeting of a person or persons, or a group, on the basis of discriminatory grounds, is made out when targeting is based inter alia on "political grounds." The direct victims of the crimes discussed in the cited Chapters (III and IV) were targeted due to their identity as perceived political opponents to the regime (par. 2085).

For further clarification, the *Mission* specified in the *Detailed Conclusions* that those crimes include:

> "a. The imprisonment and other severe deprivations of physical liberty in violation of fundamental rules of

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[416] The Ministers of Fotreign Affairs of the countries conforming the rupo de Lima, on October 13 2020, "requested the Prosecutor of the International Criminal Court to go forward in its Preliminary examen to determine if the illegitimate government of Nicolás Maduro has commited crimes against Humanity." See, "Declaración del Grupo de Lima sobre Venezuela: Reunión de Cancilleres en Chile," october 2020, available at: https://www.cancilleria.gob.ar/es/destacados/declaracion-del-grupo-de-lima-sobre-venezuela-reunion-de-cancilleres-en-chile.

international law, the acts of torture, rape and other forms of sexual violence, and other inhumane acts of a similar character documented in Chapter III (*Selective Political Repression*), as well as the acts of torture, rape and other forms of sexual violence, and other inhumane acts of a similar character documented in Chapter V. (*Violations in the Context of Protests*).

b. The murders (referred to as arbitrary killings and extra-judicial executions throughout the report), the imprisonment and other severe deprivations of physical liberty in violation of fundamental rules of international law, the enforced disappearances, the acts of torture and other inhumane acts of a similar character, committed against members of the civilian population in the context of security or social control operations. (par. 2087).

V

The *fourth aspect*, regarding *responsibilities*, was expressed clearly and precisely by the *Mission* in its *Report* by stating that it:

"has reasonable grounds to believe that both the President and the Ministers of People's Power for Interior Relations, Justice and Peace and for Defense, ordered or contributed to the commission of the crimes documented in this report, and having the effective ability to do so, failed to take preventive and repressive measures." (par. 164);

And, further, to also believe that:

"the Directors of the security and intelligence entities involved in the commission of the crimes documented in this report ordered or contributed to the commission of these crimes, and having the effective ability to do so, failed to take preventive and repressive measures." (par. 165).

With regard to these responsibilities, in its Detailed Conclusions, the Mission was also very careful and explicit when setting forth, regarding the severe violations and crimes *against targeted political dissidents* that took place at the SEBIN (par. 1982), that:

"there are reasonable grounds to believe the President knew of violations and crimes, notably the arbitrary detentions and acts of torture or cruel, inhuman and degrading treatment,

> including acts of sexual violence, documented in this report and carried out within SEBIN since 2014. There is information that at times, he gave orders to the Director General and to Directors of other units in SEBIN. The Mission also believes that the Vice President knew or should have known of the same crimes. Although they had the effective authority to do so, they failed to prevent the crimes and violations, or to repress them." (par.1988).

Likewise, regarding the actions of the officials of the DGCIM, the *Mission* stated that they:

> "engaged in a pattern of human rights violations and crimes against military dissidents, including arbitrary detentions, short term enforced disappearances and torture and cruel, inhuman and degrading treatment, including rape and other acts of sexual violence" (par. 1996).

Furthermore, in the same *Detailed Conclusions*, regarding the responsibilities for the crimes documented, the *Mission* was also careful and precise to indicate that:

> "has reasonable grounds to believe that President Maduro, given his position of effective authority and control over DGCIM, and the existing reporting system, had knowledge of violations committed in DGCIM against military dissidents and their associates, in particular, acts of torture and/or cruel, inhuman or degrading treatment, and has failed to take necessary measures to prevent these acts from occurring, or to repress them. In several cases, there is credible information that he participated directly through ordering or instigating certain criminal acts. (par. 2005).

Afterwards, in the same *Detailed Conclusions,* the Independent *Mission* set forth that it:

> "has information indicating that the President and the Ministers of Interior and of Defense were aware of the crimes. They were in close contact with other members of the FANB, including the GNB, and also with the Directors of the PNB, CICPC, SEBIN and DGCIM. They gave orders, coordinated activities, and supplied resources in furtherance of the plans and policies set out in the report." (par. 2100)

And it infers in the *Detailed Conclusions*:

> "For all these reasons, the Mission has reasonable grounds to believe that both the President and the Ministers of Interior and of Defense, ordered or contributed to the commission of the crimes documented in this report, and having the effective ability to do so failed to take preventive and repressive measures" (par. 2103).
>
> "The Mission also has reasonable grounds to believe that the Directors of the security and intelligence entities involved in the commission of the crimes documented in this report ordered or contributed to the commission of these crimes, and having the effective ability to do so failed to take preventive and repressive measures" (par. 2104).

VI

And, finally, the *fifth aspect,* regarding the *Rule of Law*, all these violations of human rights, many of which, as stated, have been characterized as crimes against humanity, as indicated in the *Report* – and this could not be otherwise - "*took place amid a gradual breakdown of democratic institutions and rule of the law in Venezuela since 2014* " (par. 12), and caused the consequential "*weakening of democratic, judicial and institutional accountability mechanisms,"* giving way to a "policy to silence, discourage and quash opposition to the Government" (par. 2088.a, DC), in the midst of a "growing impunity, which exacerbated the violations."

Specifically, the Mission confirmed, for example, how "the National Assembly, the State's legislative branch, has been continuously stymied since the opposition coalition won two-thirds of seats in December 2015 (par 14, *Report*); how "opposition parliamentarians became a focus of repression," stating that this "targeting opposition parliamentarians continued at the time of writing" the *Report* (Par. 28); and, how the National Constituent Assembly "has acted as a de facto legislative branch" (par. 15, *Report*).

The *Mission* further confirmed that "one of the elements that contribute to the violations and crimes determined herein… is the "lack of independence of the judiciary" (par. 148, *Detailed Conclusions*), and that the "Supreme Tribunal has failed to act as a

check on the other State actors" (154, *Detailed Conclusions*), and "the judiciary itself" has "become an instrument of repression" (par 165, *Detailed Conclusions)*.

Particularly in this regard, the *Mission*:

> "documented cases in which members of the judiciary participated, by action or omission, in the perpetration of severe violations of human rights. This is especially true regarding the case of criminal prosecution of political opponents, which cases have proven recurring violations of due process guarantees. Additionally, the cases investigated by the Mission show that the State has resorted ever more to the military courts to try its political dissidents." (par. 164, *Detailed Conclusions*).

Specifically regarding political rights, the *Mission* found "reasonable grounds to believe that arbitrary detentions were used to target individuals based on their political affiliation, participation, views, opinions or expression," (par. 34, *Report)*; "that some political opponents and persons associated with them were subject to short term enforced disappearance during the period under review;" (par. 46, *Report*) and that "there was a policy to silence, discourage and quash the opposition to the Government …, including by targeting individuals who, through various means, demonstrated their disagreement with the Government, or were perceived as being against the Government, as well as their relatives and friends who were targeted for being associated with them." (160, *Report*).

VII

Therefore, both the *Report* and the *Detailed Conclusions* of the *Independent Mission* set forth the absolute lack of the essential elements of democracy defined in the Inter-American Democratic Charter, which are always based on the principle of the separation and independence of the branches of government in order to guarantee that the exercise of power be subject to control, specifically under an autonomous and independent Justice, because, ultimately, without the separation of powers or a power control check system, it is simply impossible to hold truly free, fair and reliable elections; there cannot be political pluralism, nor access to power according to the Constitution; there cannot be an actual

participation in the management of public affairs, or administrative transparency in the exercise of government, nor rendition of accounts by those in charge of the government; finally, there cannot be an actual submission of the government to the Constitution and the laws, nor a subordination of the military to the civil government; there cannot be effective access to justice; nor a real and effective guaranty of respect to human rights, including the freedom of expression and social rights.[417]

This is why the United Nations' High Commissioner for Human Rights, Michelle Bachelet, expressed in connection with regime's call for parliamentary elections in December, 2020, -specifically referring to the judiciary-, her concern for the decisions of the Supreme Court of Justice "that obstruct the freedom to elect the representatives of seven political parties and the non-consensual designation of the members of the National Electoral Council;" as well as her concerns in view of the modification of "the mechanism for the selection of indigenous representatives to the National Assembly, the changes in the electoral system and the structure of the National Assembly without an inclusive prior consultation process."[418]

VIII

And it was precisely within this framework of violations of rights, among which, the political rights, of political persecution and the absence of the minimum elements of a democratic regime that Luis Almagro, *Secretary General of the Organization of American States*, noted when acknowledging and supporting the *Report* on September 16, 2020:

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417 See Allan R. Brewer-Carías, "Foreword" to the book by Gustavo Tarre Briceño, *Solo el poder detiene al poder, La teoría de la separación de los poderes y su aplicación en Venezuela*, Colección Estudios Jurídicos Nº 102, Editorial Jurídica Venezolana, Caracas 2014, pp. 13-49.

418 See in: ews.un.org/es/story/2020/09/1481232. Also in *El Nacional,* September 25, 2020, at https://www.elnacional.com/venezuela/bachelet-expreso-preocupacion-por-la-obstruccion-de-la-libertad-en-venezuela-ante-las-elecciones-parlamentarias

> "It is absurd to think that criminals against humanity who suppress and eliminate opposition and dissent can organize free and fair elections." [419]

For this reason, a few months before, the same *Permanent Council of the Organization of American States*, in its session of June 26, 2020 (Resolution CP/RES. 1156 (2291/20), particularly regarding the political-electoral issues, had already resolved to "*not recognize the illegal designation* of the members of the National Electoral Council by the Supreme Court of Justice;" recognizing in the National Assembly as the "only democratically-elect institution."

The Permanent Council also condemned the "continued harassment by the *illegitimate* regime of Nicolás Maduro against the functions of the National Assembly"; also rejecting "in the strongest terms" and deciding *not to recognize,* "the *illegal designation* of the boards of the "Primero Justicia" and "Acción Democrática" parties."[420]

In this same regard, the *Lima Group*, on June 18, 2020, expressed that they "*reject and disregard the illegal appointment* of the members of the Venezuelan National Electoral Council (CNE) by a ruling of the Supreme Court of Justice."[421]

Consequently, as noted by the members of the *Lima Group* in a press release on September 17, 2020, upon receiving the *Report* by the Independent Mission, it is evident that in Venezuela "there are not met the conditions for a transparent, inclusive, free and fair" electoral process, and that "all the obstacles to political participation must be suppressed in order to hold a meaningful electoral process," which requires, -they stated-:

> "respect the constitutional mandate of the democratically-elected National Assembly, the return of the control of the political parties to their legitimate administrators, the ceasing of

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419 See "Statement from the OAS General Secretariat on the UN Report on Crimes against Humanity in Venezuela," September 16, 2020; available at: https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-096/20

420 See: http://scm.oas.org/doc_public/spanish/hist_20/cp42611s03.docx

421 See in *El País*, June 18, 2020, available at: http:// www.elpais.cr/2020/06/16/ grupo-de-lima-desconoce-designacion-de-consejo-electoral-venezolano/

> the disqualification and prosecution of political leaders, the full restoration of their rights and those of other candidates to political equality and participation, the full update of the electoral register, to include young voters and Venezuelans abroad, and an independent and balanced CNE, and equal participation and unrestricted access to all media." [422]

All this had been expressed by various institutions in the country and abroad in the sense that parliamentary elections called under the existing conditions were not in line with any democratic principle nor the international principles and standards for holding free, fair, verifiable, reliable and transparent elections.[423]

This even was affirmed by the National Assembly, before the *Report* was published, on June 30, 2020, by adopting the "*Resolution that ratifies the integral political route proposed to the country, that enables free and transparent presidential elections as a way out of the general crisis and that brings about Venezuela's democratic re-constitutionalization,*" in which, disavowing the "illegal designation of the members of the National Electoral Council by those who usurp the Supreme Court of Justice," it set forth the "necessary conditions" for holding such elections, listing the following:

> "The restoration of the right to vote for all Venezuelans, in the country and abroad, wherefore it is necessary to have a reliable and audited Electoral Registry.
>
> To guarantee that the vote be freely exercised, without coercion or harassment. Ban the migration of lectors from their natural electoral centers.
>
> The ceasing of the disqualification, prosecution and imprisonment of political leaders and the full restoration of their rights to political participation.

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422 Communiqué of September 17, 2020, available at: https://evtvmiami.com/grupo-de-contacto-internacional-dice-que-no-hay-condiciones-para-elecciones-en-venezuela/

423 See the most important communiqués and statements published by IDEA, with an introduction by Asdrúbal Aguiar: Allan R. Brewer-Carías and José Ignacio Hernández, *Venezuela. La ilegítima e inconstitucional convocatoria a elecciones parlamentarias en diciembre de 2020,* Iniciativa democrática España y las Américas IDEA, 2020.

> Full participation of all political parties; the restoration of their natural leaders and the use of their symbols, colors and assets.
>
> A legitimate New Electoral Power, appointed by the National Assembly in exercising its constitutional competences and this way have an electoral timetable that guarantees the right to vote and the relevant terms, an equitable electoral campaign and the adequate behavior of the "Plan República," respecting the electoral process and forbidding any alien intervention in the protection of the electoral event.
>
> Audit of all the electoral system's processes, as well as qualified national and international observation in all stages of the process."

On August 2, 2020, also before the publication of the UN Mission's *Report*, twenty-seven (27) Venezuelan political parties issued a Statement entitled: "*United we debate and united we decide: we shall NOT participate in the fraud, we WILL fight for true free elections*," "*unanimously*" deciding "*not to participate in the electoral fraud*" called by the regime, considering that such call is "*not for an election*," therefore rejecting the "new attempt by the dictatorship to disguise a fraudulent process as an election, as it did in 2018 when it sequestered the presidential election that was due to be held according to our constitutional order."[424]

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424 See text of "Por unanimidad: los partidos políticos de la Unidad deciden no participar en el fraude y convocan a un pacto nacional para la salvación de Venezuela," Asamblea nacional, Centro de Comunicación Nacional, Caracas August 2, 2020, avaiable at: https://presidenciave.com/presidencia/por-unanimi-dad-los-partidos-politicos-de-la-unidad-deciden-no-participar-en-el-fraude-y-convocan-a-un-pacto-nacional-para-la-salvacion-de-venezuela/. See Alonso Moleiro, "La oposición a Maduro oficializa su decisión de no participar en las elecciones legislativas. Los partidos que apoyan a Guaidó defienden la celebración de una votación con garantías en Venezuela," *El País*, August 2, 2020, available at: https://elpais.com/inter-nacional/2020-08-02/la-oposicion-a-maduro-oficializa-su-decision-de-no-participar-en-las-elecciones-legislativas.html; and in "La oposición de Venezuela no participará en las próximas elecciones legislativas," at público.com, August 2, 2010, available at: https:// www.publico.es/

Moreover, they insisted in this Statement that the "conditions for achieving *free*, fair and competitive elections," according to the minimum standards accepted by all democratic countries in the world are:

> "1) The restoration of the right to vote for all Venezuelans, including those who have been forced to emigrate (reliable and audited Electoral Registry).
>
> 2) Guarantee the free exercise of the vote, without coercion or harassment. Forbid the migration of electors from their natural electoral centers.
>
> 3) Ceasing the disqualifications and prosecutions of political leaders and full restoration of their rights to public participation.
>
> 4) Full participation of all political parties; restoration of their legitimate authorities that were suppressed by a null and void intervention, as well as the use of their parties' symbols and colors.
>
> 5) An independent CNE, appointed by the National Assembly, according to the National Constitution and the Law. Independent designation of all the subordinate bodies, as well as the Electoral Boards and members of voting stations. Respect the work of electoral witnesses and other officials in all the processes.
>
> 6) Electoral timetable that guarantees the right to vote and the terms required for each of the activities in the process, starting with the call therefor.
>
> 7) Equitable electoral campaign, with equal access to public and private mass media; prohibition of broadcasting chains. Equitable access to public spaces and guarantee of free transit throughout the national territory.
>
> 8) Adequate behavior by the "Plan República," respecting the fact that the electoral process is essentially a civil event. Forbid undue interventions in the process.

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internacional/oposicion-venezuela-no-participara-proximas-elecciones-legislativas.html

9) Audits of all the processes of the electoral system, including the new voting machines and the automated process system.

10) Qualified national and international electoral observation in all stages of the process and in the various phases of the electoral cycle. Qualified electoral accompaniment in each electoral process."[425]

It is evident that none of those minimum conditions for holding free and transparent democratic elections is currently guaranteed in Venezuela, much less can we think that they can exist within the framework of the situation denounced in the *Report* of the UN's Independent *Mission*.

Consequently, the parliamentary elections that have been illegitimately and unconstitutionally called for December, 2020, if they should be held under the current conditions (October 2020), would only result in a fake "election" of deputies to the National Assembly, which has been declared beforehand to be illegitimate by the National Assembly, with the unavoidable outcome that said election (as happened with the fake election of Nicolás Maduro in May 2018) must also be deemed as "non-existent" due to vices in the manifestation of the voters' will and the purpose thereof, by being regulated in "norms" and "regulations" issued by a National Electoral Council whose members were appointed unconstitutionally, and violate the Organic Law on Electoral Processes, being an election called by "order" of a body that lacks jurisdiction to do this, such as the Constitutional Chamber, which did this through decision No. 68 of June 2020 (Sixth item of the decision),[426] and for having been held without meeting the minimum essential conditions for being free, fair, reliable, verifiable and transparent elections.

Therefore, in this case, as with the fake election of Nicolás Maduro in May 2018, the so-called "principle of the preservation of

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425 *Idem*.

426 The sixth item of the "decision" of the Constitutional Chamber: "It orders the National Electoral Council (CNE) to call elections of deputies to the National Assembly, whose mandate expires on January 4, 2021."

the *presumed* electoral will"[427] would also not apply, because it would be an illegitimate and unconstitutional election, wherefore the alleged deputies that might be "elected" could not legitimately assume their seats in the National Assembly that should begin its functions as of January 5, 2021.

October 1, 2020.

[427] To which Claudia Nikken referred to in "Reflexiones sobre la eventual continuidad institucional de la Asamblea Nacional," en *WOLA.ORG, Venezuelan Politics and Human Rights*, August 18, 2020, available at https://www.venezuelablog.org/reflexio-nes-sobre-la-eventual-continuidad-institucional-de-la-asamblea-nacional/

PART FIVE

THE PROCESS OF TRANSITION TOWARDS DEMOCRACY DECREED BY THE NATIONAL ASSEMBLY, SINCE JANUARY 2019

Chapter XIII

THE DEFINITIVE COLLAPSE OF THE RULE OF LAW AND THE REACTION OF THE NATIONAL ASSEMBLY (2019)*

I. THE DISRUPTION OF THE DEMOCRATIC ORDER AFTER THE PARLIAMENTARY ELECTION OF DECEMBER 2015

After the election of new members of the National Assembly held the 5 December 2015, in which the Government lost the absolute majority it previously had during more than one decade (since 2005), the opposition gained control of the National Assembly, and from that moment the Executive Branch of government in collusion with the Judiciary, which by that time had already entirely lost its independence and autonomy,[428] particularly with the participation of

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* Text of the Presentation made at the Event on "Perspectives on Venezuela: Present and Future Challenges," organized for the launching of the New York Chapter of the Inter-American Bar Association (*Federación Interamericana de Abogados*), New York, 17 July 2019.

428 See Allan R. Brewer-Carías, "The Government of Judges and Democracy. The Tragic Institutional Situation of the Venezuelan Judiciary," Venezuelan

the Constitutional Chamber of the Supreme Tribunal, has consistently attempted to neutralize and undermine the National Assembly's functions, in an effort to obstruct and suffocate the Legislative Branch, depriving it of all its legislative powers as well as of its of political and administrative control powers regarding the Government and Public Administration.[429]

That control of the Supreme Tribunal of Justice was sealed with the appointment, by the outgoing National Assembly the 23 December 2015, of thirteen titular justices and twenty one substitutes,[430] without complying with the procedure and conditions set forth in the Constitution (art. 264) and in the Internal and Debates Regulations of the National Assembly, in particular, ignoring the

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National Report, *19th International Congress of Comparative Law*, International Academy of Comparative Law, Vienna, July 2014 pp. 4-12 Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/II,%204,%2078-,%20Brewer.THE%20GOVERNMENT%20OF%20JUDGES%20AND%20DEMOCRACY.%20Venezuelan%20National%20Report.%20Vienna%20Congress,%20April.pdf .

429 See comments in Allan R. Brewer-Carías, "El ataque de la Sala Constitucional contra la Asamblea Nacional y su necesaria e ineludible reacción. De cómo la Sala Constitucional del Tribunal Supremo pretendió privar a la Asamblea Nacional de sus poderes constitucionales para controlar sus propios actos, y reducir inconstitucionalmente sus potestades de control político sobre el gobierno y la administración pública; y la reacción de la Asamblea Nacional contra a la sentencia Nº 9 de 1-3-2016," [The Constitutional Chamber's attack on the National Assembly and its necessary and inescapable reaction.] How the Constitutional Chamber of the Supreme Tribunal sought to deprive the National Assembly of its constitutional powers to control its own acts, and unconstitutionally reduce its political control powers over the government and the Public Administration; and the National Assembly's reaction to sentence No. 9 of 1-3-2016. pp. 4-9 Available at http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf .

430 See the "Acuerdo mediante el cual se designa a los Magistrados y Magistradas Principales y Suplentes del Tribunal Supremo de Justicia, in *Gaceta Oficial* Nº 40.816, 23 Dicember 2015; and the "Acuerdo mediante el cual se corrige por error material el Acuerdo de fecha 23 de diciembre de 2015, donde se designa a los Magistrados y Magistradas Principales y Suplentes del Tribunal Supremo de Justicia," in *Gaceta Oficial* Nº 40.818 of 29 Dicember de 2015.

qualified majority needed to approve such appointments as well as all the basic provisions on the procedure of nominating the candidates, having been appointed as justices former representatives to the National Assembly affiliated to the government party. The appointments were absolutely unconstitutional, as it was denounced at the time, being the result the complete political control by the Executive over the Supreme Tribunal, and particularly over its Constitutional Chamber.[431]

With the loss of control of the majority in the National Assembly, in which the opposition obtaining a qualified majority of representatives, the Government began to obstruct the opposition from developing its legislative agenda, and gradually stripped the Legislative body of all its powers and functions by means of using the Constitutional Chamber for such purpose. During 2016 and 2017, the Chamber issued more than 100 rulings giving rise to a sort of "Judicial Dictatorship" or "Judicial Tyranny,"[432] in which the Supreme Tribunal declared the unconstitutionality of all the statutes

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431 See my comments on the matter in Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de derecho. La Sala Constitucional y la destrucción de la democracia en Venezuela*, Colección Estudios Políticos, No. 13, Editorial Jurídica Venezolana International, Caracas 2016, 453 pp. 67-73; Segunda edición ampliada. New York-Caracas, 2016. Available at http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf; See also José Ignacio Hernández, "5 violaciones cometidas durante la designación de los magistrados del TSJ," en *Prodavinci*, 23 de diciembre de 2015, en http://prodavinci.com/blogs/5-violaciones-cometidas-durante-la-designacion-de-los-magistrados-del-tsj-por-jose-i-hernandez/

432 See *Idem*, pp. 9 - 37; and Allan R. Brewer-Carías, *La consolidación de la tiranía judicial. El Juez Constitucional controlado por el Poder Ejecutivo, asumiendo el poder absoluto*, Colección Estudios Políticos, No. 15, Editorial Jurídica Venezolana International, Caracas / New York, 2017 pp. 9-32. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/06/ALLAN-BREWER-CARIAS-LA-CONSOLIDACI%C3%93N-DE-LA-TIRAN%C3%8DA-JUDICIAL-EN-VZLA-JUNIO-2017-FINAL.pdf

sanctioned by the National Assembly;[433] reformed its *interna coporis* in order to subject the exercise of its legislative functions to the prior approval by the Executive Branch;[434] eliminated the Assembly's political power of controlling the government and the Public Administration;[435] eliminated the possibility for the Assembly to oppose and disapprove the decrees of states of emergency enacted by the Executive;[436] eliminated the possibility for the National

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433 See Allan R. Brewer-Carías, "El desconocimiento judicial del poder de la Asamblea Nacional para legislar," en *Revista de Derecho Público,* No. 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 377-378. Available at: http://allanbrewercarias.com/wp-content/ uploads /2017/01/9789803653699-txt.pdf . See also Allan R. Brewer-Carías, "La aniquilación definitiva de la potestad de legislar de la Asamblea Nacional: el caso de la declaratoria de inconstitucionalidad de la Ley de reforma de la Ley Orgánica del Tribunal Supremo de Justicia"] May 16, 2016. Available at: http://allanbrewercarias.com/wp-content/uploads/2016/05/135.-Brewer.-Aniquilaci%C3%B3n-Asamblea-Nacional.-Inconstituc.-Ley-TSJ-15-5-2016.pdf

434 See Allan R. Brewer-Carías, "El fin del Poder Legislativo: la regulación por el Juez Constitucional del régimen interior y de debates de la Asamblea Nacional, y la sujeción de la función legislativa de la Asamblea a la aprobación previa por parte del Poder Ejecutivo," en *Revista de Derecho Público***,** No. 145-146, (enero-junio 2015), Editorial Jurídica Venezolana, Caracas 2016, pp. 428-443. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653699-txt.pdf

435 See for instance, Allan R. Brewer-Carías, "El intento fallido de la Asamblea Nacional de ejercer el control político sobre la administración pública investigando la actuación de PDVSA, y su anulación por la Sala Constitucional," en *Revista de Derecho Público***,** No. 147-148, (julio-diciembre 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 358-359. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/12/9789803654108-txt-147-148.pdf

436 See Allan R. Brewer-Carías, "El control político de la Asamblea Nacional respecto de los decretos de excepción y su desconocimiento judicial y Ejecutivo con ocasión de la emergencia económica decretada en enero de 2016**,** en *VI Congreso de Derecho Procesal Constitucional y IV de Derecho Administrativo*, *Homenaje al Prof. Carlos Ayala Corao*, *10 y 11 noviembre 2016*, FUNEDA, Caracas 2017. pp. 8-12. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/02/4.-887.-I-1-1130.-Brewer.-

Assembly to approve votes of non-confidence against the Ministers;[437] canceled the constitutional obligation of the President to submit its Annual State of the Nation before the National Assembly, imposing its submission before the same Supreme Tribunal;[438] eliminated the legislative approval of the national budget law, transforming the Budget Law into an executive decree to be approved by the Tribunal;[439] eliminated the Assembly's power to

CONTROL-POL%C3%8DTICO-DE-LOS-DECRETOS-DE-EXCEPCI %C3%93N-Y-SU-DESCONOCIMIENTO-JUDICIAL-Y-EJECUTIVO.-Congreso-U.-Monte%C3%A1vila-nov.pdf; "La usurpación definitiva de la función de legislar por el Ejecutivo Nacional y la suspensión de los remanentes poderes de control de la Asamblea con motivo de la declaratoria del estado de excepción y emergencia económica," en *Revista de Derecho Público,* No. 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 466-468. Available at: http://allanbrewer carias.com/wp-content/uploads/2017/01/9789803653699-txt.pdf

437 See Allan R. Brewer-Carías, "Comentarios al decreto Nº 2.309 de 2 de mayo de 2016: La inconstitucional 'restricción' impuesta por el Presidente de la República, respecto de su potestad de la Asamblea Nacional de aprobar votos de censura contra los Ministros" in *Revista de Derecho Público*, No. 145-146, Enero-Junio 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 125-128; and Allan R. Brewer-Carías, "El desconocimiento judicial de los poderes de control político de la Asamblea Nacional," en *Revista de Derecho Público***,** No. 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 356-360. Available at: http://allanbrewercarias.com/wp-content /uploads/2017/01/9789803653699-txt.pdf

438 See Allan R. Brewer-Carías, "Comentarios a la sentencia de la Sala Constitucional N° 3 de 11 de enero de 2017, declarando la omisión de la Asamblea Nacional, disponiendo que el mensaje anual de Presidente de la República no podía presentarse ante la Asamblea Nacional," en *Revista de Derecho Público***,** No. 149-150, (enero-junio 2017), Editorial Jurídica Venezolana, Caracas 2017, pp. 271-275. Available at: http://allanbrewer carias.com/wp-content/uploads/2018/05/9789803654245-txt.pdf

439 See Allan R. Brewer-Carías, "La cremación de la Asamblea Nacional y la usurpación de sus funciones presupuestarias por parte del Juez Constitucional," en *Revista de Derecho Público,* No. 147-148, (julio-diciembre 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 334-349. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/12/978 9803654108-txt-147-148.pdf

review its own decisions and repeal them,;[440] eliminated the power of the National Assembly even to express political annulling all the major political Resolutions and Declarations that it has adopted;[441] and in a few decisions issued in 2017, based on an alleged contempt of court regarding a ruling by the Electoral Chamber of the same Supreme Tribunal, the Constitutional Chamber declared null and void all present and future decisions of the National Assembly, threatening to revoke the popular mandate of its members and to imprison them.[442]

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[440] See Allan R. Brewer-Carías, "El desconocimiento judicial de la potestad de la Asamblea Nacional para revisar y revocar sus propios actos cuando sean inconstitucionales: El caso de la revocación de los actos de designación de los magistrados del Tribunal Supremo," en *Revista de Derecho Público,* No. 145-146 (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 373--376. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653699-txt.pdf; Allan R. Brewer-Carías, "La ratificación por la Sala Constitucional del Tribunal Supremo de su decisión de desconocimiento de la potestad de la Asamblea Nacional para revisar y revocar sus propios actos," en *Revista de Derecho Público,* No. 147-148, (julio-diciembre 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 305-311. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/12/9789803654108-txt-147-148.pdf

[441] See Allan R. Brewer-Carías, "El desconocimiento judicial del poder de la Asamblea Nacional para expresar opiniones políticas sobre asuntos de interés nacional," en *Revista de Derecho Público,* No. 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 471-473. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653699-txt.pdf

[442] See on all these decisions, the comments by Carlos M. Ayala Corao y Rafael J. Chavero Gazdik, *El libro negro del TSJ de Venezuela: Del secuestro de la democracia y la usurpación de la soberanía popular a la ruptura del orden constitucional (2015-2017)*, Editorial Jurídica Venezolana, Caracas 2017, 394 pp.; *Memorial de agravios 2016 del Poder Judicial. Una recopilación de más de 100 sentencias del TSJ,* pp. 25-35, research by ONGs: Acceso a la Justicia, Transparencia Venezuela, Sinergia, espacio público, Provea, IPSS, Invesp. Available at: https://transparencia.org.ve/project/memorial-de-agravios-del-poder-judicial-una-recopilacion-de-mas-de-100-sentencias-del-tsj/; and José Vicente Haro, "Las 111 decisiones inconstitucionales del TSJ ilegítimo desde el 6D-2015 contra la Asamblea Nacional, los partidos

The last of these succession of notorious and shameful decisions of the Constitutional Chamber, was the issuing of two decisions in March 2017 (No. 155 of March 27, 2017, and No. 156 of March 29, 2017), in which it eliminated the parliamentary immunity of the representatives; assumed and usurped in an arbitrary way all the parliamentary powers of the National Assembly;[443] and even delegated legislative powers upon the President of the Republic,

políticos, la soberanía popular y los DDHH," en *Buscando el Norte*, 10 de julio de 2017. Available at: http://josevicenteharogarcia.blogspot.com/2016/10/las-33-decisiones-del-tsj.html; Ramón Guillermo Aveledo (Coodrinador), *Contra la representación popular. Sentencias inconstitucionales del TSJ de Venezuela*, Instituto de Estudios Parlamentarios Fermín Toro Universidad Católica Andrés Bello, Caracas 2019 pp. 5-31. Available at http://www.fermintoro.net/portal/wp-content/uploads/2019/07/CONTRA-EL-PODER-LEGISLATIVO-WEB.pdf . For wider comment on all decisions of the Constitutional Chamber issued between 2016-2017, seeAllan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de derecho. La Sala Constitucional y la destrucción de la democracia en Venezuela*, Colección Estudios Políticos, No. 13, Editorial Jurídica Venezolana International, Caracas 2016, 453 pp.; Segunda edición ampliada. New York-Caracas, 2016; Available at http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf ; For wider comment on all decisions of the Constitutional Chamber issued in 2017, see Allan R. Brewer-Carías, *La consolidación de la tiranía judicial. El Juez Constitucional controlado por el Poder Ejecutivo, asumiendo el poder absoluto*, Colección Estudios Políticos, No. 15, Editorial Jurídica Venezolana International, Caracas / New York, 2017, Available at: http://allanbrewercarias.com/wp-content/uploads /2017 /06/ALLAN-BREWER-CARIAS-LA-CONSOLIDACI%C3%93N-DE-LA-TIRAN%C3%8DA-JUDICIAL-EN-VZLA-JUNIO-2017-FINAL.pdf .

443 See Allan R. Brewer-Carías, "El reparto de despojos: La usurpación definitiva de las funciones de la Asamblea Nacional por la Sala Constitucional del Tribunal Supremo de Justicia al asumir el poder absoluto del Estado (Sentencia N° 156 de la Sala Constitucional)," en *Revista de Derecho Público,* No. 149-150, (enero-junio 2017), Editorial Jurídica Venezolana, Caracas 2017, pp. 291-299. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/05/9789803654245-txt.pdf

ordering him to reform laws and Codes at his discretion. [444] These rulings were even partially reversed by the same Constitutional Chamber, through judgements No. 157 and 158 of April 1, 2017, which were issued at the request of the Government (Council of National Defense) in violation of the most elemental principle of irreversibility of judicial decisions by the same court.[445]

The result of all what has been said has been that in Venezuela, not only does the Judiciary totally lack independence and autonomy,[446] but, the Constitutional Chamber of the Supreme Tribunal has acted as an instrument of authoritarianism,[447] issuing *ex officio* unconstitutional decisions in violation of all the rules and

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444 See Allan R. Brewer-Carías, "Transition from Democracy to Tyranny through the Fraudulent Use of Democratic Institutions: The Case of Venezuela (1999-2018)," Lecture at the Clough Center for the Study of Constitutional Democracy, Boston College, Boston September 25, 2018 pp.9-12. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/09/1218.-Brewer.-conf.-Transictiion-Democracy-to-Tyranny.-B.C.-2018.pdf.

445 Decision No.157 of April 1, 2017. Decision No.158 of April 1, 2017. See the comments on those decisions in Allan R. Brewer-Carías, "*La consolidación de la tiranía judicial. El Juez Constitucional controlado por el Poder Ejecutivo, asumiendo el poder absoluto*, Colección Estudios Políticos, No. 15, Editorial Jurídica Venezolana International, Caracas / New York, 2017, pp. 209-228. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/06/ALLAN-BREWER-CARIAS-LA-CONSOLIDACI%C3%93N-DE-LA-TIRAN%C3%8DA-JUDICIAL-EN-VZLA-JUNIO-2017-FINAL.pdf

446 See, in particular, Carlos Ayala and Rafael J. Chavero Gazdik, "El libro negro del TSJ de Venezuela: Del secuestro de la democracia y la usurpación de la soberanía popular a la ruptura del orden constitucional (2015-2017)," Editorial Jurídica Venezolana, Caracas 2017, pp. 28-35.

447 Since the parliamentary elections of 2015, the Constitutional Chamber has issued many other rulings with the purpose of seizing the general constitutional powers of the Legislature. A good summary of some of those judgments and their sought effect can be found in Gabriel Sira, "The National Assembly by the Supreme Tribunal of Justice, after the parliamentary elections of December 2015," in *Revista de Derecho Público* N° 145-146, Editorial Jurídica Venezolana, Caracas 2016, pp. 267 ff. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653699-txt.pdf

principles of due process; and in addition, has decided cases in which the same Chamber had an interest, violating the prohibitions imposed to the courts to not serve as *judex in sua causa*. In particular, the Constitutional Chamber, following an unconstitutional trend established since 2000,[448] decided cases concerning the appointments of its own justices, as occurred in Decision No. 614 of 19 July 2016, deciding on the constitutionality of the appointments of its own Magistrates,[449] precisely those appointed in December 2015.

These actions mainly conducted by the Constitutional Chamber of the Supreme Tribunal provoked a serious alteration the constitutional order, which gave motives to the Secretary-General of the Organization of American States, Luis Almagro, to produce two Reports in 2016, requesting Permanent Council of the Organization to apply Article 20 of that organization's Charter[450] by deeming that

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448 See Allan R. Brewer-Carías, Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela. Colección Instituto de Derecho Público, Universidad Central de Venezuela, No. 2, Editorial Jurídica Venezolana, Caracas 2007, pp. 11-18. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/09/113.-CRONICA-SOBRE-LA-IN-JUSTICIA-07-07-2017-2.pdf

449 Decision No. 614 of 19 July 2016. See the comments of such decision and of the violation of the principle of the rule of law that no court can be judge in its own cause in Allan R. Brewer-Carías, La dictadura judicial y la perversión del Estado de derecho. El Juez Constitucional y la destrucción de la democracia en Venezuela. Editorial Jurídica Venezolana, Caracas 2016 pp. 250, 251, 256 Available at: http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf

450 The first Report dated June 23, 2016, was named *Report on the situation in Venezuela in relation to compliance with the Inter-American Democratic Charter* of May 30, 2016 (See the communication of the Secretary-General of the OAS of May 30, 2016 with the *Report on the situation in Venezuela in relation to compliance with the Inter-American Democratic Charter*, in oas.org/documents/spa/press/OSG-243.es.pdf. See this text and the other Reports of the Secretary-General of the OAS cited in this Opinion, in *La crisis de la democracia en Venezuela, la OEA y la Carta Democrática Interamericana. Documentos de Luis Almagro. (2015-2016)*, Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2016). The

"*in the current situation in Venezuela"* the country is *"facing serious disruptions of the democratic order.*"[451] He observed, in brief:

That "*there is no clear separation and independence of public* authorities *in* Venezuela*, where there is observed one of the clearest cases of co-optation of the Judiciary by the Executive Branch,*" [452] reporting on:

"the continuation of violations of the Constitution, especially with regard to the balance *of powers, the functioning, and structure of the Judiciary*, human rights violations,"[453]

In his report, he urged the Executive Branch:

To "eliminate all forms of non-compliance with constitutional and political precepts regarding the balance of State powers," [454]

To stop "the *permanent blockading by the Executive Branch regarding the laws approved by the National Assembly*" [455] and

"to ensure the validity of laws that have been passed so far;"[456]

He also requested:

"a *new integration of the Supreme Tribunal of Justice* [...] *since the current* integration *is completely flawed, both by the appointment procedure and by the political bias of virtually all its members*." [457]

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second, dated March 14, 2017, was called *Follow-up Report on Venezuela.* See the communication of the Secretary-General of the OAS of March 14, 2017 with the *Follow-up report on Venezuela* at http://www.oas.org/documents/spa/press/informe-VZ-spanish-signed-final.pdf .

451 See the communication of the Secretary-General of the OAS of May 30, 2016 with the *Report on the situation in Venezuela in relation to compliance with the Inter-American Democratic Charter*, p. 125. Available at http://www.oas.org/documents/spa/press/OSG-243.es.pdf .

452 *Idem*. p. 73.

453 *Idem*, p. 128.

454 *Idem*, p. 127.

455 *Idem.*

456 *Idem*.

457 *Idem*.

In short, as Dr. Almagro stated on June 23, 2016, before the Permanent Council of the Organization of American States, summarizing his first *Report* of May 30, 2016, in relation to the situation of the "alteration of the constitutional order that disrupts the democratic order" of Venezuela, that what he had:

> "attested to in Venezuela is the loss of the moral and ethical purpose of politics. The Government has forgotten to defend the greater good, the collective good [...] The *Venezuelan* people are facing a government that is no longer accountable. A Government that no longer protects citizens' rights. A *Government that is no longer democratic* [...] In Venezuela, we have witnessed *a constant effort by the executive and judiciary branches of government to prevent or even invalidate the normal functioning of the National Assembly*. *The Executive Branch has repeatedly used unconstitutional interventions against the legislature, in collusion with the Constitutional Chamber of the Supreme Tribunal of Justice. The evidence is clear* [...] These examples clearly demonstrate the *lack of* independence *of the judiciary*. The tripartite system of democracy has failed, and the *judiciary has been co-opted by the executive branch* [...][458]

That is why in his first *Report* he proposed the adoption of measures seeking to "return to normal some situations that, analyzed in the most objective way, *are not compatible* with the provisions of the OAS Charter, the America Convention on the Rights of Man and Inter-America Conventions on Human Rights, as well as the Inter-American Democratic Charter."[459]

Even more explicit and tragic was what Secretary-General Almagro stated in an open letter addressed to one of the Venezuelan political leaders, dated August 22, 2016, on the occasion of his conviction that he called a "political horror," reaffirming:

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458 Text of Secretary-General Luis Almagro's statement to the Permanent Council of the OAS, June 23, 2016, available at: http://www.el-nacional.com/poli-tica/PresentacindelSecretarioGeneraldelaOEAante_NACFIL20160623_0001.pdf .

459 *Idem*, pp. 198.

"*the pitiful end of democracy in Venezuela*. Paragraph by paragraph it is, likewise, the *end of the Rule of Law*." [460]

Saying that in Venezuela, "a threshold has been crossed, which means that it is *the very end of democracy*." [461]

And concluding by saying that, "*today in Venezuela, there is no democracy or Rule of Law."* [462]

All this has been recently confirmed in July 2019, in the "Report of the United Nations High Commissioner for Human Rights Michelle Bachelet, on the status of Human Rights in the Bolivarian Republic of Venezuela," in which she stated that:

> "30. For at least a decade, the *Government and government-controlled institutions enforced laws and policies that have* accelerated *the erosion of the rule of law and the dismantlement of democratic institutions*, including the National Assembly. These measures are aimed at *neutralizing*, repressing and criminalizing political opponents and people critical of the Government. This trend has accelerated since 2016, after the opposition won the majority of National Assembly seats, resulting in increased repression targeting the political opposition, and steadily reducing the already limited democratic space.
>
> 76. For over a decade, Venezuela *has adopted and implemented a series of laws, policies and practices, which have restricted the democratic space, weakened public institutions, and affected the independence of the judiciary*. Although these measures have been adopted with the declared aim of preserving public order and national security against alleged internal and external threats, they have increased the militarization of State

460 Text of Secretary-General Luis Almagro's open letter to Leopoldo López, of August 22, 2016, is available at *Lapatilla.com*, August 23, 2016: http://www.lapatilla.com/site/2016/08/22/almagro-a-leopoldo-lopez-tu-injusta-sentencia-marca-un-hito-el-lamentable-final-de-la-democracia-carta/.

461 *Idem*.

462 *Idem*.

> institutions and the use of the civilian population *in* intelligence gathering and defense tasks." [463]

In the same sense, for instance, the organization Human Right Watch, in its report on *Venezuela* of 2018, on this matter of the absence of independence and autonomy of the Judiciary in Venezuela expressed:

> "As was pointed out by Human Right Watch: "Since former President Chávez and his supporters in the National Assembly *conducted a political takeover of the Supreme Court in 2004, the judiciary has ceased to function as an independent branch of government. Members of the Supreme Court have openly rejected the principle of separation of powers, and publicly pledged their commitment to advancing the current administration's political agenda*. Since the opposition assumed the majority in the National Assembly in January 2016, *the Supreme Court has struck down almost every law it has passed. In March 2017, it took over all legislative powers,* and partially backtracked only after strong criticism in Venezuela and abroad." [464]

This explains why the rulings of the Supreme Tribunal of Venezuela have been rejected by the National Assembly and even have provoked reaction from abroad, for instance, from the Highest Courts of Costa Rica, Brazil and Chile, which in different specific cases in 2015 issued decisions considering that the Judicial Power in Venezuela lacks of independence and autonomy, considering

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[463] The text of the Report of Mme. Bachelet is available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18.docx See the comments on such report in Allan R. Brewer-Carías, "Informe Bachelet: Desahucio al régimen," 8 de julio de 2019, published in: *Diario Constitucional*, Escuela de Derecho de la Universidad Mayor, Santiago de Chile, 11 de julio de 2019, p. 1; available at https://www.diarioconstitucional.cl/noticias/actualidad-internacional/2019/07/10/publican-el-informe-bachelet-desahucio-al-regimen-por-allan-r-brewercarias/?utm_source=General+2&utm_campaign=e66498c4b2-EMAIL_CAMPAIGN_2019_07_10_07_58&utm_medium=email&utm_term=0_b01d5feada-e66498c4b2-127880117

[464] See in *Human Right Watch, judicial independence* https://www.hrw.org/world-report/2018/country-chapters/venezuela.

therefore that the rights of its own citizens cannot be effectively guaranteed. [465]

The rulings of the Supreme Tribunal of Venezuela have also provoked reactions from Governments abroad, as was the case of the U.S. Government, which has declared it as illegitimate, because it "usurped the authority of Venezuela's democratically-elected legislature, the National Assembly, including by allowing the Executive Branch to rule through *emergency* decree, thereby restricting the rights and thwarting the will of the Venezuelan people."[466] Also the US Government sanctioned the President of the Supreme Court of Justice, as well as the seven principal members of the Constitutional Chamber, because they prevented "the democratically-elected National Assembly [from] performing its constitutional functions." [467] On March 12, 2020 (as was announced on March 26, 2020), the United States filed before the United States District Court for the Southern District of Miami, a criminal complaint against Mr. Maikel José Moreno Pérez, current President of the Supreme Tribunal of Justice for "conspiracy to Commit Money

[465] See the comments to those decisions in Allan R. Brewer-Carías, "Las Cortes Supremas de Costa Rica, Brasil y Chile condenan la falta de garantías judiciales en Venezuela. De cómo, ante la ceguera de los gobiernos de la región y la abstención de la Corte Interamericana de Derechos Humanos, han sido las Cortes Supremas de estos países las que con base en la jurisdicción universal de protección de los derechos humanos, han comenzado a juzgar la falta de autonomía e independencia del Poder Judicial en Venezuela, dictando medidas de protección a favor de ciudadanos venezolanos contra el Estado venezolano," in *Revista de Derecho Público,* No. 143-144, (julio- diciembre 2015, Editorial Jurídica Venezolana, Caracas 2015, pp. 495-500. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/REVISTA-143-144-.....-2015-AGOSTO-11.pdf

[466] See U.S. Department of The Treasury, *Treasury Sanctions Eight Members of Venezuela's Supreme Court of Justice* (Press Release, May 18, 2017), available at https://www.treasury.gov/press-center/press-releases/Pages/sm0090.aspx

[467] *See Idem., and* OFAC, *Specially Designated Nationals List Update*, (Resource Center, May 18, 2017) available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170518.aspx.

Laundering Offenses Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity."[468]

Taking into consideration all the aforementioned and the fact that no due process of law principles have been respected in Venezuela in the last two decades, it would be difficult if not impossible for the Judiciary in a foreign democratic State to recognize judicial decisions claiming to restrict the Constitutionally guaranteed power of the National Assembly of the sort that have been issued by the Supreme Tribunal of Venezuela.

II. THE NATIONAL ASSEMBLY AS THE ONLY LEGITIMATE ELECTED BODY AND ITS CONSTITUTIONAL POWERS

In January 2019, in the context of this scenario of total disruption of the constitutional order, and after the also unconstitutional convening of an illegitimate National Constituent Assembly in May 2017,[469] that the National Assembly legitimately elected in December 2015, through its members representing popular sovereignty, and as the primary political and legislative interpreter of the Constitution,[470] took the leading role in the transition process

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468 The complaint was unsealed and announced by the Attorney General William P. Barr, on March 26, 2020. See the Press release: "Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges. Maduro and other High Ranking Venezuelan Officials Allegedly Partnered with the FARC to Use Cocaine as a Weapon to "Flood" the United States," March 26, 2020; available at: https://www.justice.gov/opa/pr/nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism. : . See the text of the criminal complaint at: https://www.justice.gov/opa/page/file/1261816/download

469 See on this matter, Allan R. Brewer-Carías, *La inconstitucional convocatoria de una Asamblea Nacional Constituyente en fraude a la voluntad popular*, Colección Textos Legislativos, No. 56, Editorial Jurídica Venezolana, Caracas 2017. Available at: http://allanbrewercarias.com/page/3/?s&categoria_de_biblioteca=libros&taxonomy_year

470 In this sense, José Vicente Haro has correctly affirmed that "the Constituent has given the Parliament the task of being the first interpreter of the Constitution

towards democracy and the restoration of the supremacy of the Venezuelan Constitution.

Pursuant to the Constitution, the National Assembly can be considered as the only constitutionally legitimate legislative body in Venezuela, being currently the only legitimately elected democratic body in the Country. It exercises one of the National Branches of Government or National Public Power National (*Poder Público Nacional*) (Legislative Branch), the others being the Executive, the Judicial, the Citizen and the Electoral Branches (article 136). According to article 136 of the Constitution, "each of the branches of Public Power has its own functions, but the organs charged with exercising the same shall cooperate with one another in attaining the ends of the State," and according to article 137 of the same, all the attributions of the branches of Public Power "are defined in the Constitution and the law," to which "the activities carried on by such organs shall be subject." Consequently, as also provided in article 138 of the same Constitution, "any usurped authority is of no effect, and its acts are null and void." The usurpation occurs when somebody without having the authority, acts as such; it is the gravest case of lack of attribution.[471] It is precisely the case of Nicolás Maduro, when

due to the fact that it is by excellence the body of popular representation, being its members elected by the people." See José Vicente Haro, "La interpretación de la Constitución y la sentencia No. 1077 de la Sala Constitucional (Un comentario sobre los límites del juez constitucional)," in *Revista de Derecho Constitucional*, No. 2, Editorial Sherwood, Caracas 2000, pp. 2 ,7.

471 See on this matter, Allan R. Brewer-Carías, Allan R. Brewer-Carías, *Las Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana,* Universidad Central de Venezuela, Caracas, 1964, p. 59. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II.1.1%20(TESIS)%201964.pdf; Allan R. Brewer-Carías, *La Constitución de 1999: Estado Democrático y Social de Derecho, Colección Tratado de Derecho Constitucional, Tomo VII*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014, p. 324. Available at: http://allanbrewercarias.com/wp-content/uploads/2014/07/BREWER-TRATADO-DE-DC-TOMO-VII-9789803652548-txt.pdf

purported to act as President of the Republics after January 10, 2019, without having been legitimately elected.[472]

Regarding the National Legislative Branch of government, according to the Constitution, it corresponds exclusively to the National Assembly (Articles 186-224), which is an elected body composed by members (*diputados*) elected every five years through universal, direct and secret suffrage (Article 186). The last parliamentary election took place in Venezuela on December 2015.

The first and more important exclusive attribution of the National Assembly as the primary official interpreter of the Constitution is to "legislate on matters of national competence and on the *functioning* of the various branches of National Power " (Article 187.1), *enacting* for such purpose, as the only national "legislative body," all the laws or statutes (*leyes*) as provided in the Constitution (article 202). According to the Constitution laws are to be enacted by the National Assembly acting as legislative body (article 202), after receiving two discussions (article 207-209), and once promulgated by the President of the Republic must be published in the *Official Gazette* (article 214 and 215 of the Constitution). Laws are only repealed by other laws, which can exceptionally be abrogated through a referendum (Article 218). No other body of the State can repeal or abrogate the laws enacted by the National Assembly, which can only be annulled by the Constitutional Chamber of the Supreme Tribunal of Justice in a process of judicial review and in the circumstances that are prescribed by the Constitution (Article 266.1; 336.1).

On the other hand, the exclusive role of the institution called in the Constitution the "National Constituent Assembly" is "to transform the State, to create a new legal order and to draft a new Constitution" (art. 347). That body, when duly convened by the people through a referendum, has no legislative functions, and cannot

[472] As it is explained below, the May 20, 2018 "election" of Mr. Maduro was declared inexistent by the National Assembly. See the text of the Resolution (*Acuerdo*), in the *Legislative Gazette* no. 8 of June 5, 2018, on pages 6-7. The text also available at http://www.asambleanacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica .

replace or substitute the National Assembly which is the only constitutionally legitimate legislative body in the country.

Regarding the provisions of the laws passed by the National Assembly, they always prevail over those of the previous laws, which therefore are expressly or tacitly repealed. The laws sanctioned by the National Assembly also prevail over any other normative act of the bodies of the State, and particularly over all the decrees, regulations and administrative acts issued by the National Executive and by the organs and entities that comprise the Public Administration, which must always be issued according to their competencies and functions as defined in the Constitution and the laws issued by the National Assembly (Article 137). That is to say, all the acts issued by the National Executive and by the organs and entities that comprise the Public Administration, and in particular, administrative acts are always to be adopted "with full submission to the law" (article 142), having always a "sub-legal" character.

In addition, the National Assembly, according to the Constitution, has the power and competency to exercise functions of control over the *Executive* and the Public Administration, as established in the Constitution and the laws (Article 187.3). When exercising such control, the National Assembly as the political representative of the people, and as the deliberative political organ of the State, can adopt the Resolutions and political declarations that it deems necessary according to its role. Therefore, for instance, the National Assembly can declare, when considering that according to the Constitution an authority has been usurped, that such authority is ineffective and its acts are to be deemed null (Article 138). In the latter case, the National Assembly is not "annulling" any State act (a power that only the Judiciary has); it is considering it unconstitutional precisely because the act has been performed by a usurped authority.

III. THE NATIONAL ASSEMBLY REJECTION OF THE UNCONSTITUTIONAL CONVENING OF A CONSTITUENT ASSEMBLY IN 2017, AND OF THE PRESIDENTIAL ELECTION ON MAY 2018

It was precisely in such general situation of the total rupture of the constitutional order, that in May 2017,[473] the President of the Republic Nicolás Maduro, violating the Constitution, and without the needed popular referendum to do so, convened a Constituent Assembly in order to reform the State and establish a new legal order. Such Constituent Assembly, usurping the powers of the National Electoral Council, made an unconstitutional call for the realization, in an advance way, of a presidential election to be held on May 20, 2018, in order to elect the President for the term 2019-2025.

Once such election took place resulting with the "reelection" of Nicolás Maduro, the National Assembly legitimately elected in December 2015, made up by the representatives of the people, representing popular sovereignty, and as the primary political and legislative interpreter of the Constitution, began to define the basis for a transition process for the restauration of the enforcement of the Constitution and the restauration of democracy, on May 22, 2018[474] issued one of its most important Resolutions denouncing the flawed electoral as a "farce," stating that such process:

> "breached all electoral guaranties recognized in Human Rights Treaties and Agreements, as well as in the Constitution of the Bolivarian Republic of Venezuela, and the Organic Law

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[473] See on this matter, Allan R. Brewer-Carías, La inconstitucional convocatoria de una Asamblea Nacional Constituyente en fraude a la voluntad popular, Colección Textos Legislativos, No. 56, Editorial Jurídica Venezolana, Caracas 2017 pp. 178 pp. Available at: http://allanbrewercarias. com/page/3/?s& categoria_de_biblioteca=libros&taxonomy_year

[474] Text of the Resolution available at http://www.asambleanacional.gob.ve /actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. Similarly, in the review "Asamblea Nacional desconoce resultados del 20M y declara a Maduro "usurpador," available at *NTN24*, May 22, 2018, available at http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas

> on Electoral Processes, taking into account the effective absence of the Rule of Law; the bias of the electoral arbitrator; the violation of the effective guaranties for the exercise of the right to suffrage and for the exercise of the right to be elected to offices of popular election; the absence of effective controls against the acts of electoral corruption perpetrated by the Government; the systematic violation of the right to freedom of expression, in addition to the partiality of government-controlled social media and the absence of effective and transparent mechanisms of electoral observation."

In addition, the National Assembly interpreted that, since "the people of Venezuela" had abstained from participating in the illegitimate electoral process, it was said people whom:

> "in defense of our Constitution and under the protection of its Articles *333* and 350, *had decided to reject, ignore, and not validate the farce* called for May 20, despite government pressure by means of social control."

By virtue of the above, the National Assembly, again, *as a legitimate political and legislative body representing popular sovereignty, and as primary interpreter of the Constitution on behalf of the people,* in said Resolution of May 22, 2018, agreed:

> "1. *To declare as non-existent the farce of May 20, 2018*, for having been carried out completely outside the provisions of Human Rights Treaties, the Constitution, and the Laws of the Republic.
>
> 2. *Not to accept the alleged results announced by the National Electoral Council* and, in particular, the alleged election of Nicolás Maduro Moros as President of the Republic, who should be regarded as a usurper of the office of the Presidency of the Republic.
>
> 3. *Not to accept any illegitimate and illegal acts of proclamation and swearing in* whereby it is intended to constitutionally vest citizen Nicolás Maduro Moros as the

alleged president of the Bolivarian Republic of Venezuela for the 2019-2025 term." [475]

All these declarations were ratified by the National Assembly in Resolution of November 13, 2018 in a "Resolution intended to promote a political solution to the national crisis, strengthening the democratic forces of the people of Venezuela with the support of the international community," declaring:

> "Nicolas Maduro Moros's claim to continue usurping the presidential powers as of January 10, 2019 as unconstitutional, and convening the people of Venezuela and the international community to defend the Constitution and bring about political change in our country." [476]

This was also ratified by the national Assembly in the text of the "*Statute governing the transition to democracy to restore the validity of the Constitution of the Bolivarian Republic of Venezuela*" of February 5, 2019, providing the following:

> *Article 8*. The political event that took place on May 20 2018 was not a legitimate *presidential* election. Consequently, no

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[475] See comments on that Resolution in Allan R. Brewer-Carías, "Reflexiones sobre la dictadura en Venezuela después de la fraudulenta reelección de Nicolás Maduro en mayo 2018," available at http://allanbrewer-carias.com/wp-content/uploads/2018/05/184.-Brewer.-doc.-SOBRE-LA-DICTADURA.-VENEZUELA.-5-2018pdf, New York, May 27, 2018. This study was included in the book: Allan R. Brewer-Carías, *Crónica Constitucional de una Venezuela en las Tinieblas*, Editions Olejnik, Santiago, Buenos Aires, Madrid, 2019, pp.43-86 (Available at: http://allanbrewer carias.com/wp-content/uploads/2019/04/188.-CRONICA-CONSTITUCIONAL-VZLA-EN-TINIEBLAS-Car%C3%A1tula-e-%C3%ADndice.pdf); and in the book Allan R. Brewer-Carias, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 115-149 (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf).

[476] Available at http://www.asambleanacional.gob.ve/actos/detalle/acuerdo-con-el-objeto-de-impulsar-una-solucion-politica-a-la-crisis-nacional-fortaleciendolas-fuerzas-democraticas-del-pueblo-de-venezuela-con-el-respaldo-de-la-comunidad-internacional-315.

> President elect exists to legitimately assume the Presidency of the Bolivarian Republic of Venezuela."[477]

In addition, the National Assembly, by Resolution of May 21, 2019, ratified what it had resolved in May 22, 2018, declaring as "non-existent the farce that took place one year ago, and which has instituted the greatest continued fraud to the Constitution, which has provoked the usurpation of the Presidency of the Republic." [478]

IV. THE GENERAL REJECTION OF THE MAY 2018 PRESIDENTIAL ELECTION BY THE INTERNATIONAL COMMUNITY

The so-called presidential election of May 20, 2018, declared non-existent by the National Assembly, also caused an important international reaction, beginning on May 21, 2018, with the important declaration of the *Lima Group*, in which the Governments of Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, and Saint Lucia agreed to exert diplomatic pressure on the regime, ratifying their willingness "to help preserve the powers of the National Assembly," but expressing, among other things, that:

> "They do not *recognize* the legitimacy of the electoral process carried out in the Bolivarian Republic of Venezuela, which concluded on May 20, for not *complying* with the international standards for a democratic, free, fair, and transparent process."[479]

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477 The text of the *Statute for Transition* is available at http://www.asamblea nacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf

478 See in *Gaceta Legislativa* (*Legislative Gazette)*, No 8, June 5 2019, available at http://www.asambleanacional.gob.ve/documentos/gaceta/gaceta_1569936245.pdf

479 See information on *Politico.mx*, May 21, 2018, at https://politico.mx/minuta-politica/minuta-politica-gobierno-federal/m%C3%A9xico-y-el-grupo-lima-

There should also be noted the position of the United States, whose Secretary of State stated, quite simply:

> "The United States condemns the fraudulent election that took place in Venezuela *on* May 20. This so-called "election" is an attack on the constitutional order and an affront to Venezuela's tradition of democracy."[480]

Likewise, we should point out the reaction of the G7 Group, which brings together the leaders of Germany, Canada, the United States, France, Italy, Japan, and the United Kingdom, and the European Union, who in a joint statement denounced said presidential election for "not meeting international standards" nor ensuring "basic guaranties," concluding that "Venezuela's presidential election and its outcome, do not represent the democratic will of the citizens of Venezuela."[481]

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no-reconocen-elecci%C3%B3n-en-venezuela/ U.S. Vice President Mike Pence, through his official Twitter account @VP, after calling the May 20 electoral process a "farce," stated that: "The United States stands up against dictatorship and in favor of the Venezuelan people calling for fair and free elections." See *93.1Costa del Sol*, May 21, 2018, available at http://www.costadel-solfm.net/2018/05/21/mike-pence-estados-unidos-se-levanta-contra-la-dictadura-vienen-mas-acciones-contra-el-gobierno-de-venezuela/ .

480 See Mike Pompeo's statement: "The United States condemns the fraudulent election that took place in Venezuela on May 20. This so-called 'election' is an attack on constitutional order and an affront to Venezuela's tradition of democracy," in "An Unfair, Unfree Vote in Venezuela," Press Statement, *Secretary of State*, Washington, DC., May 21, 2018, en https://www.state.gov/secretary/remarks/-2018/05/282303.htm .

481 See "G7 Leaders' Statement on Venezuela," on the official website of Canada's Prime Minister Justin Trudeau, May 23, 2018, in https:// pm.gc.ca/eng/news/2018/05/23/g7-leaders-statement-venezuela. See also, in the review "The G7 denounced the elections in Venezuela for 'not meeting international standards' or ensuring 'basic guarantees,' in *Infobae*, May 23, 2018, in https://www.infobae.com/america/venezuela/2018/ 05/23/el-g7-denuncio-las-elecciones-en-venezuela-por-no-cumplir-los-estandares-internacionales-ni-asegurar-garantias-basicas/. See also the information in "G7 and European Union unite to reject recent election in Venezuela," *north shore news,* The Canadian Press, May 23, 2018, in http:// www.nsnews.

Subsequently, all these premises were ratified by the National Assembly in the Explanatory Statement for the sanctioning of the "*Statute governing the transition to democracy to restore the validity of the Constitution*" of February 5, 2019, declaring that the political process:

> "that began on January 10, 2019, had its origins when opposition forces refused to participate in the fraudulent process of May 20, 2018, after refusing to sign the Electoral Agreement proposed by the emissaries of Nicolás Maduro Moros in the Dominican Republic. On May 20, 2018, the *de facto regime* intended to simulate an electoral process in which Venezuelans were unable to exercise their right to vote in freedom and laid the foundations for the current usurpation scenario." [482]

com/news/national/g7-and-european-union-unite-to-reject-recent-election-in-venezuela-1.23310884 .

[482] Text available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf

Chapter XIV

THE ROLE OF THE NATIONAL ASSEMBLY INTERPRETING THE CONSTITUTION IN THE ABSENCE OF A LEGITIMATELY ELECTED PRESIDENT THAT COULD TAKE OATH IN JANUARY 2019*

I. THE NATIONAL ASSEMBLY AS PRIMARY INTERPRETER OF THE CONSTITUTION, AND THE ROLE OF ITS PRESIDENT AS PRESIDENT IN CHARGE OF THE REPUBLIC SINCE JANUARY 10, 2019

In this context, it can be said that the National Assembly assumed the role imposed by political and constitutional circumstances, and, as *the legitimate political and legislative body representing popular sovereignty, and as the primary interpreter of the Constitution on behalf of the people,* it effectively proceeded to *interpret the Constitution* in order to solve the political crisis arising from the unprecedented political event in the history of the country, which was that, on January 10, 2019, the country lacked a legitimately elected and recognized president who could be sworn in and take office as President of the Republic for the 2019-2025 term under Article 231 of the Constitution; in particular, because the election of Mr. Nicolás Maduro held on May 20, 2018, *since May 22, 2018 was declared as*

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* The text of this Chapter is based on the Presentation I delivered in an Event organized by *SOS Venezuela, in* Fordham University at Lincoln Center, Law School Costantino, RM 2-02, New York, NY, February 2

"non-existent" by the same National Assembly, when formally rejecting the results thereof. [483]

In this political situation of constitutional crisis, the *National Academy of Political and Social Sciences*, which is the highest consultative entity of the country on institutional matters, on January 4th, 2019, highlighted that due "to the non-existence of the necessary conditions in order to hold free and fair elections," the illegitimate presidential "re-election" of May 2018, has placed the country in an "unprecedented situation" (which was the one that Venezuelans faced in January 2019), "due to the fact that on next January 10th, 2019, date on which, as provided in Article 231 of the Constitution, the president for the constitutional term 2019-2019 had to be sworn in, the country lacks a president legitimately elected by means of a free and fair election." [484]

Furthermore, the Academy, confronting the country's grave situation *confirmed* by these "unconstitutional and illegitimate facts," and considering it necessary "to comply with the citizens' duty established in article 333 of the Constitution," demanded "the

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[483] Text of the Resolution available at http://www.asambleanacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. Similarly, in the review "National Assembly does not accept the results of 20M and declares Maduro an 'usurper,' in *NTN24*, May 22, 2018, available at http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas

[484] See the Declaration of the *Academia de Ciencias Políticas y Sociales*: "Ante el 10 de enero de 2019: fecha en la que ha de juramentarse al presidente de la República conforme a la Constitución," January 4, 2019; available at: http://www.acienpol.org.ve/cmacienpol/Resources/Pronunciamientos/PRONUNCIAMIENTO%20DE%20LA%20ACADEMIA%20DE%20CIENCIAS%20POLITICAS%20Y%20SOCIALES%20SOBRE%20EL%20RECHAZO%20A%20LA%20DEMANDA%20DE%20GUYANA%20CONTRA%20VENEZUELA%20def..pdf. See the reference in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitutcionalización democática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, caracas 2019, pp. 332 ff. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf

different Branches of Government to respect the Constitution," and to "proceed to the full reestablishment of the constitutional and democratic order of the country." This message was directly addressed to the National Assembly, recognized as the only Branch of government with democratic legitimacy in the country, due to the fact that all the other Branches were completely subdued to the National Executive Power, particularly, the Supreme Tribunal of Justice, the National Electoral Council, as well as the organs of the Citizens Branch, led by the Republic's General Prosecutor.[485]

The National Assembly, as said, assumed its role in such circumstances, and proceeded, as the representative of the people, to exercise the Legislative Power of the State as *the main official and primary interpreter of the Constitution*,[486] sanctioning laws (Articles 202-218) as well as other parliamentary decisions that, without having the form of law, may also be issued on behalf of the people, in direct and immediate execution of the Constitution.

The Constitution, of course, can and should be interpreted by all persons, all officials, and all the bodies of the Government who are responsible for applying it. No body of the State, not even the Supreme Tribunal of Justice when acting as the maximum and ultimate interpreter of the Constitution (Article 335), has a monopoly

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485 See the Declaration of the *Academia de Ciencias Políticas y Sociales*: "Ante el 10 de enero de 2019: fecha en la que ha de juramentarse al presidente de la República conforme a la Constitución," January 4, 2019; available at: http://www.acienpol.org.ve/cmacienpol/Resources/Pronunciamientos/PRONUNCIAMIENTO%20DE%20LA%20ACADEMIA%20DE%20CIENCIAS%20POLITICAS%20Y%20SOCIALES%20SOBRE%20EL%20RECHAZO%20A%20LA%20DEMANDA%20DE%20GUYANA%20CONTRA%20VENEZUELA%20def..pdf. See the reference in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitutcionalización democática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, Caracas 2019, pp. 332 ff. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf

486 See Claudia Nikken, *Consideraciones sobre las fuentes del derecho constitucional y la interpretación de la Constitución,* Centro de Derecho Público y de la Integración Editorial Jurídica Venezolana, Caracas 2019, p. 85.

on constitutional interpretation.[487] However, the National Assembly, as the body representing popular sovereignty is "the primary interpreter of the Constitution and the most important one," being the Legislator, "the normal, ordinary interpreter of the Constitution."[488] In other words, as expressed by José Vicente Haro: "Although the Constitutional Chamber of the Supreme Court of Justice is the highest and last interpreter of the Constitution, it is not technically the first. The first interpreter of the Constitution is the legislator, the National Assembly." [489]

The National Assembly, as the representative body of popular sovereignty, -as stated by Javier Perez Royo-, it is "the first interpreter of the Constitution and the most important one," the Legislator being "the normal, ordinary interpreter of the Constitution," adding that:

> "the Constitution is a legal rule that refers, in first instance, to a political *interpreter*. Parliament is the political body that

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487 See Nestor Pedro Sagués, *La interpretación judicial de la Constitución,* Second edition, Lexis Nexis, Buenos Aires 2006, p. 2; See Elisur Arteaga Nava, "La interpretación constitucional," in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación Constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, Mexico 2005, Volume I, pp. 108 and 109.

488 As for instance it has been stated byt Joaquín Pérez Royo, adding that: "the Constitution is a legal rule that refers at first instance to a political interpreter. Parliament is the political body that interprets the Constitution in the only way it knows how to do so: in a political sense. It is also a *privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will*." That is precisely why its interpretation in the form of a law is imposed on the whole of society." See Javier Pérez Royo, "La interpretación constitucional," in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación Constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2005, Volume I, pp. 889.

489 See José Vicente Haro, "La Interpretación de la Constitución y la Sentencia 1077 de la Sala Constitucional (Un comentario sobre los límites del juez constitucional), en *Revista de Derecho Constitucional*, No. 2, Editorial Sherwood, Caracas 2002, p, 455. This author adds: "the first interpreter of the Constitution is not nor can it be the Constitutional Chamber. That high function corresponds constitutionally to Parliament in exercise of its power to legislate," p. 456.

> interprets the Constitution in the only way it knows how: in a political sense. It is also a *privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will*." That is precisely why its interpretation in the form of a law is imposed on the whole of society." [490]

It was precisely in the context of the aforementioned political crisis that the National Assembly, interpreting the Constitution on behalf of the people, in the absence of an express text regulating the denounced situation, decided, in order to solve it, to apply in an analogous manner, Article 233 of the Constitution itself, which refers to cases of "absolute lack of a president before the inauguration of office." Consequently, it considered then that, in the absence of a legitimately elected president who could be sworn in as President of the Republic for the 2019-2025 term, the President of the National Assembly had a duty to take the office of the Presidency of the Republic, since he has, among the functions inherent in his office, precisely that of taking charge of the presidency in cases of absolute lack of the President of the Republic.

Thus, on the same day January 10, 2019, the country being in the unique situation previously described, the National Assembly decreed the "emergency due to the total disruption of constitutional continuity," and began to set the path for the "ceasing of the usurpation." [491] That same day, Juan Guaidó, in his capacity as President of the National Assembly, stated that "Today there is no Chief of State, today there is no commander-in-chief of the Armed Forces, today there is a National Assembly that represents the people

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490 See Javier Pérez Royo, "La interpretación constitucional," in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación Constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2005, Volume I, pp. 889

491 See: "Venezuela: Asamblea Nacional se declara "en emergencia" por jura de Nicolás Maduro. Su presidente, Juan Guaidó hizo un llamado a las fuerzas militares de Venezuela para que acompañen una eventual transición política, en Tele13, 10 de enero de 2019, available at: http://www.t13.cl/noticia/mundo/venezuela-asamblea-nacional-se-declara-emergencia-juranicolas-maduro.

of Venezuela,"[492] and that he would begin, according to the Constitution, to be in charge of the duties of the Presidency of the Republic.

This was later ratified by the same National Assembly in a Resolution of January 15, 2019 "regarding the declaration of usurpation of the Presidency of the Republic by Nicolas Maduro Moros and the reinstatement of the Constitution," [493] in which the Assembly decided "to formally declare the usurpation of the Presidency of the Republic by Nicolas Maduro Moros and, consequently, consider the *de facto* status of Nicolas Maduro as legally ineffective, and declare all the alleged actions of the Executive Branch to be null and void, pursuant to Article 138 of the Constitution, and to "apply by analogy Article 233 of the Constitution, in order to fill in the absence of a president-elect while concurrently acting to restore the constitutional order based on Articles 333 and 350 of the Constitution, and cause the ceasing of the usurpation by effectively forming a Transition Government and proceeding to organize free and transparent elections." All these political decisions interpreting the Constitution, regarding the role of the President of the National Assembly as Interim President of the Republic, were ratified in the *Statute that governs the transition to democracy in order to reinstate the Constitution of the Bolivarian Republic of Venezuela*, of February 5, 2019, setting forth in Article 14, the following:

> Article *14*. The President of the National Assembly is, according to Article 233 of the Constitution, the legitimate President in Charge of the Bolivarian *Republic* of Venezuela. The decisions of the Interim President shall be subject to the

[492] See "Juan Guaidó: Hoy no hay jefe de Estado," in Noticiero52, 10 de enero de 2019," available at https://noticiero52.com/juan-guaidohoy-no-hay-jefe-de-estado/.

[493] Available at: http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-dela-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion.

parliamentary control of the National Assembly, according to Article 187.3 of the Constitution."[494]

Consequently, after these formal constitutional interpretations issued by the National Assembly, applying by analogy Article 233 of the Constitution due to the absence of a legitimate president-elect that could be sworn in as president of the Republic for the 2019-2025 term, this implied, as we have already stated, that as of January 10, 2019, Representative Juan Guaidó, in his capacity as president of the National Assembly, by mandate of the Constitution and without losing his capacity as such president of the Assembly, became by law the interim President of the Republic (President in charge of the Presidency of the Republic of Venezuela), and, consequently, according to article 226 of the Constitution, at the same time, the Head of State and the Head of the National Executive of Venezuela, having the constitutional authority to direct, as such, the actions of the Government.

Among other public statements, was expressed by Juan Guaidó himself in a public rally held on January 23, 2019. By assuming the interim presidency of the Republic in his capacity as President of the National Assembly, Representative Juan Guaidó merely fulfilled a duty imposed by the Constitution. Consequently, there was no "self-proclamation" as has been affirmed, but the assuming of one of the functions that have been constitutionally vested on him as president of the National Assembly. As expressed by Guaidó himself:

> "My assumption as interim president is based on Article 233 of the Venezuelan Constitution, according to which, if at the onset of a new presidential term there is no chief of state elected, the power shall be ascribed to the president of the National Assembly until the holding of fair elections. For this reason, my oath of January 23 cannot be deemed a "self-*proclamation*." I

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494 The text of the *Statute for Transition* is available at http://www.asamblea nacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com /mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_ LPRFIL20190205_0001.pdf.

did not assume the presidency of my own accord but in pursuance of the Constitution."[495]

In this way, and in accordance with this interpretation, it can be said that the president of the National Assembly did not "proclaim himself [President]" as has been wrongly stated,[496] but took charge of Presidency of the Republic by virtue of law, without any additional swearing in, for he had already been sworn in for that purpose when he accepted the office of President of the Assembly on January 5, 2019.

In other words, on January 23, 2019 the National Assembly did not declare Juan Guaidó as Interim President of Venezuela, nor that on that date at a public rally he took formally "oath" as President in Charge of the Republic. Juan Guaidó, who was sworn al President of the National Assembly on January 5th 2019, due to the absence of a legitimately President-elect that could took its Oath before the Assembly on January 10th, since that same day, according to the Constitution (art. 233) automatically (*ex-constitutione*) began to be

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495 See Juan Guaidó, "How the World Can Help Venezuela," en The New York Times, New York, 31 de enero de 2019, p. A23. See also, on this: José Ignacio Hernández, "De juramentos y proclamas: una explicación," in Prodavinci, 24 de enero de 2019, available at: https://prodavinci.com/de-juramentos-y-proclamas-una-explicacion/

496 See on this topic Allan R. Brewer-Carías, "Juan Guaidó is not 'Self-Proclaimed.' He assumed the Interim Presidency of the Republic of Venezuela as of January 10, 2019, in observance of the Constitution, due to the absence of a legitimately-elected President," March 8th, 2019, available at: http://allanbrewercarias.com/wp-content/uploads/2019/03/189.-Juan-Guaid%C3%B3-is-not-Self-Procalaimed.-March-2018.pdf . See also the text in the book: Allan R. Brewer-Carías, *Crónica Constitucional de una Venezuela en las Tinieblas,* Ediciones Olejnik, Santiago, Buenos Aires, Madrid, 2019, pp. 289-290 (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/04/188.-CRONICA-CONSTITUCIONAL-VZLA-EN-TINIEBLAS-Car%C3%A1tula-e-%C3%ADndice.pdf); and in the book Allan R. Brewer-Carias, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores,* Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 227-238 (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf).

in Charge of the Presidency of the Republic, due to the absence of legitimately elected President; a fact that had been formally ratified by the National Assembly as the legitimate political and legislative body that represents the sovereign will of the people and as primary interpreter of the Constitution on behalf of the people, by means of Resolutions issued on May 22, 2018. [497]

Apart from the interpretation of article 233 of the Constitution, as already mentioned, the *National Assembly, moreover, as a legitimate representative of popular sovereignty*, on the same day, January 10, 2019, proceeded to declare itself "in a state of emergency due to the complete breakdown of the constitutional thread," proceeding, *as the primary interpreter of the Constitution*, to establish what it called "the path to the cessation of usurpation."[498]

II. THE DECLARATION OF THE USURPATION OF THE PRESIDENCY OF THE REPUBLIC BY NICOLÁS MADURO IN JANUARY 15, 2019 AND THE STEPS FOR THE RESTAURATION OF THE VALIDITY OF THE CONSTITUTION TO BE CONDUCTED BY THE ASSEMBLY

The route for the ceasing of the usurpation" announced in the January 10th, 2019 decision of the National Assembly decreeing the "emergency due to the total disruption of constitutional continuity," was subsequently defined by the National Assembly through another Resolution, dated January 15, 2019, whereby, acting *as the only authority with democratic legitimacy of the Venezuelan State, and as*

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[497] See the text of the Resolution in http://www.asambleanacional.gob.ve /actos/_acuerdo-reiterando-el-desconocimiento-de-lafarsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. See also: "Asamblea Nacional desconoce resultados del 20M y declara a Maduro "usurpador," en NTN24, 22 de mayo de 2018; available at http:// www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declaranicolas.

[498] See the report "Venezuela: National Assembly declares itself 'in emergency' due to Nicolas Maduro's swearing into office**.** Its president, Juan Guaidó, called on Venezuela's military to accompany an eventual political transition, in *Tele13*, January 10, 2019, available at: http://www.t13.cl/noticia/mundo/ venezuela-asamblea-nacional-se-declara-emergencia-jura-nicolas-maduro

representative of the Venezuelan people, it *declared* "*the usurpation of the Presidency of the Republic by Nicolás Maduro Moros and the restoration of the validity of the Constitution*" [499]-[500] or "*of the constitutional order"* based on what is establish "in Articles 5, 187, 233, 333, and 350[501] of the Constitution."

In particular the National Assembly, in this Resolution of January 15, 2019, referred to the constitutional obligation of all citizens and officials set forth for in Article 333 of the Constitution,[502] to cooperate in the restoration of the effective validity of the Constitution when it has been violated; given "the right to civil disobedience in the face of the usurpation of Nicolás Maduro," which derives from Article 350 of the Constitution,[503] also referred to above. Based on those provisions and given "the absence of a

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499 Available at http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion

500 Text available at https://www.infobae.com/america/venezuela/2019/01/15/la-asamblea-nacional-de-venezuela-declaro-a-maduro-usurpador-del-presidencia/. See comments to said Statute and its constitutional basis in Allan R. Brewer-Carias, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores* (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf), Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 219 ff.

501 Article 350 states: "The people of Venezuela, faithful to their republican tradition, to their struggle for independence, peace, and freedom, will not recognize any regime, legislation, or authority that contradicts the democratic values, principles, and guarantees or undermines human rights."

502 Article 333 states: "This Constitution will not lose its validity or cease to be observed by act of force or because it is repealed by any means, other than those provided for therein. In such an event, any citizen, whether or not vested with authority, shall have a duty to cooperate in the restoration of its effective validity."

503 Article 350 states: "The people of Venezuela, faithful to their republican tradition, to their struggle for independence, peace, and freedom, will not recognize any regime, legislation, or authority that contradicts the democratic values, principles, and guarantees or undermines human rights."

constitutional rule regulating the current situation," the Assembly then proceeded to interpret the Constitution, deciding to:

> "*apply* by analogy *Article 233 of the Constitution*, *in order to supplement the absence of an elected president* while taking action to *restore constitutional order based on articles 333 and 350 of the Constitution*, and, thus, cause the ceasing of the usurpation, effectively form the *Transitional* Government, and proceed to the organization of free and transparent elections."

In this way, *the National Assembly, as the primary interpreter of the Constitution and as a body through which the people exercise their sovereignty*, in an act, without a doubt, of civil disobedience,[504] formally declared, "*the usurpation of the Presidency of the Republic by Nicolás Maduro Moros,* and, therefore, assumed as legally ineffective the *de facto* status of Nicolás Maduro, deeming as null and void all the alleged acts of the Executive Branch, in accordance with Article 138 of the Constitution.*"*

This was ratified by the National Assembly in its Resolution of November 13, 2018, and in the text of the "*Statute governing the transition to democracy to restore the validity of the Constitution of the Bolivarian Republic of Venezuela*" of February 5, 2019, providing the following:

> *Article 9*. By virtue of the provisions of the preceding article, the exercise of the Presidency of the Bolivarian Republic of

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[504] See comments in Allan R. Brewer-Carías, "El desconocimiento del régimen de Nicolás Maduro y de su ilegítima "reelección" del 20 de mayo de 2018, expresado por el pueblo a través de sus representantes en la Asamblea Nacional, en 2018 y 2019: Un caso elocuente de desobediencia civil en el constitucionalismo contemporáneo," March 22, 2019, at: http://allanbrewercarias.com/wp-content/uploads/2019/03/192.-Brewer.-Desconocimiento-r%C3%A9gimen-art.-350-C.pdf. See in Allan R. Brewer-Carias, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores,* Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 199-225 (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf),; and in Allan R. Brewer-Carías, *El derecho constitucional a la desobediencia civil. Estudios,* Ediciones Olejnik, Santiago, Buenos Aires, Madrid 2019, pp. 187-198.

> Venezuela by Nicolas Maduro Moros or any other official or representative of the *de facto* regime is a usurpation of authority according to Article 138 of the Constitution."[505]

As a result of the analogous application of Article 233 of the Constitution*, in the absence of a legitimately elected president to be sworn in as president for the 2019-2025 term, the Assembly considered that the President of the National* Assembly *would be in charge of the Presidency of the Republic*; deciding, in the aforementioned Resolution of January 15, 2019, pursuant to Articles 333 and 350 of the same Constitution, to:

> *"Adopt, within the framework of the application of Article 233, measures to restore conditions of electoral integrity, so that, once the usurpation has ceased and the Transitional Government has been effectively established*, proceed to the convening and holding of free and transparent *elections* within the shortest possible time, as provided for in the *Constitution* and other laws of the Republic and applicable treaties."[506]

Under this framework, adopted in a parliamentary act without form of law, issued in direct and immediate implementation of the Constitution, it can be said that the National Assembly assumed the political process of restoring democratic order, ceasing the usurpation of the Presidency by Nicolás Maduro, establishing the framework for political transition, anticipating that the President of the National Assembly, that is, of the Legislative Power, would take over the functions inherent in his office to take over the Presidency of the Republic, formally entrusting him, "to ensure compliance with

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505 The text of the *Statute for Transition* is available at http://www.asamblea nacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com /mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_ LPRFIL20190205_0001.pdf

506 Available at http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion

legal regulations approved until the democratic order and the Rule of Law in the country are restored." [507]

In that situation, moreover, as regards Mr. Maduro, in spite of being formally considered by the National Assembly as illegitimately "re-elected" President of the Republic for the 2019-2025 term, in an election formally declared "non-existent," and who, therefore, could not be sworn in for that period before the popular representation as ordered by the Constitution, did so illegitimately, not before the National Assembly, but before the Supreme Tribunal of Justice, controlled by the Executive Power; an act that had no value, and which was not accepted nor recognized by the National Assembly as well as by many of the national institutions and of the international community.[508]

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[507] The National Assembly, one year later, on May 19, 2020, issued a "Resolution of Ratification for the support of the National Assembly to Juan Gerardo Guaidó Márquez as President In Charge of the Bolivarian Republic of Venezuela and the need for a National Emergency Government as a solution to the crisis of Venezuela" (*Acuerdo de ratificación del respaldo de la Asamblea Nacional a Juan Gerardo Guaidó Márquez como Presidente Encargado de la República Bolivariana de Venezuela y a la necesidad de un gobierno de emergencia nacional como solución a la crisis de Venezuela*).

[508] Indeed, on the same day, January 10, 2019, the Permanent Council of the Organization of American States, decided "not to recognize the legitimacy of Nicolás Maduro's regime," by approving the proposal made by Argentina, Chile, Colombia, Costa Rica, the United States, Perú and Paraguay, approved with the favorable vote of Jamaica, Panamá, Paraguay, Peru, The Dominican Republic, Santa Lucía, Argentina, Bahamas, Brazil, Canada, Colombia, Costa Rica, Ecuador, Grenada, Guatemala, Guyana, Honduras, and Haití. See information in *El País*, January 11, 2019, at https://elpais.com/internacional/2019/01/10/estados_unidos/1547142698_233272.html. See *El Nacional*, January 10, 2019, at http://www.el-nacional.com/noticias/mundo/oea-aprobo-resolucion-para-desconocer-juramentacion-maduro_265882

III. THE REACTION OF THE CONSTITUTIONAL COURT, ACTING *EX OFFICIO*, AGAINST THE RESOLUTION OF THE NATIONAL ASSEMBLY OF JANUARY 15, 2019, BY MEANS OF A "UNILATERAL DECLARATION" NO. 3 OF JANUARY 21, 2019

In view of the important Resolution of the National Assembly of January 15, 2019, the Constitutional Chamber of the Supreme Tribunal of Justice, issued "judgment" No. 3 of January 21, 2019.[509] This decision was issued as a kind of *unilateral declaration* rendered without any process, case or controversy, that is, without trial or parties, without anyone having asked for it, violating all the most fundamental rules and principles of due process of law, as set forth in article 49 of the Constitution.[510] Needless to say, such decision, in terms of article 25 of the Constitution must be considered null and void and with no effect;[511] being a decision that could not be recognized in other foreign jurisdictions, like for instance, in the United States, where in order for a court to recognize as a comity a foreign judicial ruling, as has been decided by the US Supreme Court since 1895, the courts must assure that the foreign judgement is issued by an independent and autonomous judicial tribunal, respecting the principles and rules of due process and the right to defense.[512]

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509 See the references in the report: "SJ [Supreme Tribunal of Justice] declares the current Board of Directors of the National Assembly null and void" *Runrunes.com*, January 21, 2019, at https://runrun.es/noticias/370711/tsj-declara-nula-actual-junta-directiva-de-asamblea-nacional/

510 Article 49 of the Constitution states, among many other provisions that: "All judicial and administrative actions shall be subject to due process, therefore:1. Defense and legal assistance are inviolable rights at all stages and levels during the investigation and proceeding […]"..

511 "Article 25: Any act on the part of the Public Power that violates or encroaches upon the rights guaranteed by this Constitution and by law is null and void, and the public employees ordering or implementing the same shall incur criminal, civil and administrative liability, as applicable in each case, with no defense on grounds of having followed the orders of a superior.".

512 See US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895). Available at: https://supreme.justia.com/cases/federal/us/159/113/

1. The ex officio decision

The decision, in fact, was rendered *ex officio*, and relied only on a previous ruling issued by the same Chamber two years before (No. 2 of January 11, 2017), whereas the same Chamber had declared the National Assembly in "contempt," and had provided that the "action of the National Assembly and any person or individual contrary to what is decided here will be null and void." Starting from there, and considering that it was "a public, flagrant, and communicative fact" that the National Assembly had disrespected that ruling by engaging in an alleged "repeated constitutional omission," the Chamber purely and simply stated:

> "That the National Assembly has no valid Board of Directors, incurring the invalid 'Board' elected on January 5, 2019 (like those unconstitutionally 'appointed' in 2017 and 2018), in usurpation of authority, so all its acts are void, with absolute nullity, in accordance with the provisions of article 138 of the Constitution. [513] It is thus declared."

This declaration, of course, has no sense nor effect, because the Legislative Power according to the Constitution, corresponds exclusively to the elected National Assembly, not being possible to consider that it is a usurped authority

In its pronouncement[514] (Decision No. 3 of January 21, 2019),[515] the Chamber further "declared" that the National Assembly's Resolution of January 15, 2019, "implies an act of force that seeks to

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513 Article 138 of the Constitution: "An usurped authority is of no effect, and its acts are null and void."

514 See the references in the report: "SJ [Supreme Tribunal of Justice] declares the current Board of Directors of the National Assembly null and void" *Runrunes.com*, January 21, 2019, at https://runrun.es/noticias/370711/tsj-declara-nula-actual-junta-directiva-de-asamblea-nacional/

515 See the references in the report: "SJ [Supreme Tribunal of Justice] declares the current Board of Directors of the National Assembly null and void" *Runrunes.com*, January 21, 2019, at https://runrun.es/noticias/370711/tsj-declara-nula-actual-junta-directiva-de-asamblea-nacional/

repeal the constitutional text (Article 333)[516] and all the consequential acts of the National Public Power," which, the Chamber said, forced it "*to act ex* officio for the protection of the fundamental text, in accordance with Articles 266.1, 333, 334, 335, and 336, the latter of Title VIII (Regarding the Protection of the Constitution)."

Conversely, the National Assembly acted interpreting the Constitution in order to restore its validity, and it is not possible to consider that its Resolution was an "act of force." It was an act issued according to the Constitution, seeking to restore it, due to the act of force of usurping the Presidency of the Republic performed by Nicolás Maduro after January 10, 2019, and the seizure of legislative functions by the Constitutional Chamber purporting to neutralize the National Assembly.

The Chamber also considered it "unheard of" to seek to apply "analogically" the clauses contained in Article 233 of the Constitution in order to justify the alleged absolute lack of the President of the Republic," considering that it could not:

> "add to these clauses, another 'accommodative' clause, through a purported legal fiction, to determine that there were no elections in our country on May 20, 2018, and that from the results of the elections convened by the Constituent Power and the Electoral Power, that no Head of Government was elected.
>
> Such clauses are of strict law and may not be modified and/or expanded analogously, without violating the Constitution. It is thus decided."

The Constitutional Chamber, however, ignored that what the National Assembly had done in making that Resolution, had been precisely to interpret article 233 of the Constitution analogously, without "adding" to said rule any alleged additional "clause." Simply, as the first interpreter of the Constitution and, in particular, because it was called to apply this rule, the National Assembly

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[516] Article 333 of the Constitution says, "This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because or repeal in any manner other than as provided for herein. In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect"

interpreted it analogously, applying it to the situation, to resolve the constitutional crisis affecting the country, in execution of what had already been agreed upon since May 22, 2018, that is, to "declare as non-existent the farce carried out on May 20, 2018," "not accepting the alleged results announced by the National Electoral Council and, in particular, the alleged election of Nicolás Maduro Moros as President of the Republic, who should be regarded as a usurper of the office of the Presidency of the Republic," and "to ignore any null and illegitimate acts of proclamation and swearing in under which it is intended to vest the citizen Nicolás Maduro Moros as the alleged president of the Bolivarian Republic of Venezuela for the 2019-2025 term."[517]

The Constitutional Chamber, cutting off the right of popular representation to apply and interpret the Constitution, and in particular, to invoke article 350 (that gives the people of Venezuela the essential right to "disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights"), it declared it "absolutely impertinent," ending its "declarative argument" stating that "the National Assembly cannot assume the role of a Supreme Tribunal of Justice to declare a purported usurpation, since it would imply the characterization of the conduct described in Articles 138 and 139, in accordance with Articles 136 and 137, all of the Constitution. It is thus declared." In this way, the Chamber again ignored the essential power of the National Assembly to be the original body for the interpretation of the Constitution,[518] a body through which the people exercise their sovereignty.

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[517] Text of the Resolution of May 22, 2018 (ratified by National Assembly in *Legislative Gazette* no. 8 of June 5, 2018, on pages 6-7) available at http://www.asambleanacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica . Similarly, in the review "National Assembly does not accept the results of 20M and declares Maduro a 'usurper,'["] in *NTN24*, May 22, 2018, available at http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas

[518] As mentioned before, and as Javier Pérez Royo stated: "The first interpreter of the Constitution and the most important, by far, is the legislator. The

But the declaration of the Constitutional Chamber did not stop there. With regard to the National Assembly Resolution of January 15, 2019, it declared that it allegedly violated "Articles 130, 131, and 132 of the Constitution, in particular the duty that 'everyone' has to comply with and abide the Constitution, the laws, and other acts that the bodies of the Public Power order in the exercise of their duties," because they did not recognize "the Judiciary by disregarding its judgments, the Electoral Power that conducted the electoral process which elected, proclaimed, and swore in" Mr. Maduro as President "for the 2019-2025 term," and "the Executive Power by ignoring the investiture of its holder and, most seriously, the sovereignty holder, the people, who made its choice in transparent elections, through universal, direct, and secret suffrage," which had "elected" the *Constituent Assembly* "who was the convener of the aforementioned presidential elections."

As already argued, on the contrary, it was the National Assembly as the legitimate representative of the people, the one that declared the unconstitutionality of the Constituent Assembly, the usurpation by it of the attributions of the Electoral Power, the non-existence of the purported election of Nicolás maduro in May 2018, and the usurpation of the Presidency of the Republic by Maduro since January 10, 2019.

2. The violation by the decision No. 3 of the Constitutional Chamber of the most elemental principles of judicial review

This "decision" of the Constitutional Chamber cannot be considered as a valid and effective judicial review ruling, being

legislator is the normal, ordinary interpreter of the Constitution. Consequently, the Constitution is a legal rule that refers at first instance to a political interpreter. Parliament is the political body that interprets the Constitution in the only way it does: in a political register. It is also a privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will." See Javier Pérez Royo, "La interpretación constitucional," in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, Mexico 2005, Volume I, pp. 889.

contrary to what the Venezuelan constitutional and legal standard establishes on matters of judicial review.

In fact, according to the Venezuelan Constitution (Article 336), the Constitutional Chamber of the Supreme Court has the power to exercise judicial review *of* constitutionality over the laws and the other acts of the National Assembly having the rank of law or issued in direct and immediate execution of the Constitution. However, those judicial review powers can only be exercised by the Constitutional Chamber, as imposed by the Organic Law on the Supreme Tribunal of Justice,[519] at the request of an interested party (Article 89), through the filing of a "popular action of unconstitutionality" (*actio popularis*) (Article 32), with which a process of unconstitutionality against a law or other acts by the State can be initiated. That is, in Venezuela, as is the general trend on matters of judicial review in comparative law, judicial review of legislation can only take place at the request of an interested party by means of a popular action, in a case and controversy judicial process, with all the due process of law guaranties.[520] The only exception to this principle is the possibility for the Constitutional Chamber to exercise judicial review control in an *ex officio* manner, or at its own initiative, only of the Executive decrees declaring states of exception (Article 366.6). [521]

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519 See in *Official Gazette* No 39.483 of August 9, 2010.

520 See Allan R. Brewer-Carías, "The Citizen's Access to Constitutional Jurisdiction: Special Reference to the Venezuelan System of Judicial Review," in *Cuadernos de Soluções Constitucionais*, No. 4, Associaçào Brasileira de Constitutionalistas Democratas, ABCD, Malheiros Editores, São Paulo 2012, pp. 13-29, available at http://allanbrewercarias.com/wp-content/uploads/2012/06/II-4-711.-THE-CITIZENS-ACCES-TO-CONSTITUTIONAL-JURSIDICTION-Round-Table-IACL-Brasil-2009-_Lecture_.doc.pdf.

521 See Allan R. Brewer-Carías, "Judicial Review in Venezuela," in *Duquesne Law Review*, Volume 45, NO. 3, Spring 2007, pp. 439-465; available at http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,%204,%20502.%20Judicial%20Review%20in%20Venezuela.%202006%20Duquesne%20Nov.%202006%20Revised%20version.pdf.

So, there is no other way that the Constitutional Chamber of the Supreme Tribunal of Justice may initiate, *ex officio,* a judicial process for judicial review over any act of the State, and much less, in no way can the Constitutional Chamber purport to annul a State's acts without a case and controversy process, and without giving notice to and hearing the interested State entity in a judicial procedure in which the rules of due process of law rules must be respected.

So that was the case of Decision No. 3, of January 21, 2019, which was issued, *ex officio*, only based on a previous ruling issued by the same Chamber two years before, No. 2 of January 11, 2017, that voided all the actions of the National Assembly for "contempt" of court. So, starting from there, the Constitutional Chamber, considering that it was "a public, flagrant, and communicative fact" that the National Assembly had disrespected that 2017 ruling by incurring an alleged "repeated constitutional omission," it simply stated:

> "That the National Assembly has no valid Board of Directors, incurring the *invalid* 'Board' elected on January 5, 2019 (like those unconstitutionally 'appointed' in 2017 and 2018), in usurpation of authority, so all its acts are void, with absolute nullity, in accordance with the provisions of Article 138 of the Constitution. It is thus declared."

But the declaration of the Constitutional Chamber did not stop there. With regard to the National Assembly Resolution of January 15, 2019, it declared that it allegedly violated "Articles 130, 131, and 132 of the Constitution, in particular, the duty that 'everyone' has to comply with and abide by the Constitution, the laws, and other acts that the bodies of the Public Power order in the exercise of their duties," because they did not recognize "the Judiciary by disregarding its judgments, the Electoral Branch that conducted the electoral process that elected, proclaimed, and swore in" Mr. Maduro as President "for the 2019-2025 term," and "the Executive Branch, by ignoring the investiture of its holder and, most seriously, the sovereignty holder, the people, who made its choice in transparent elections, through universal, direct, and secret suffrage," which had "elected" the Constituent Assembly "who was the convener of the aforementioned presidential elections."

On this basis, the Chamber "declared" that the National Assembly's Resolution of January 15, 2019, allegedly "implies an act of force that seeks to repeal the constitutional text (Article 333) and all the consequential acts of the National Public Power," all of which, the Chamber said, forced it "*to act ex officio* for the protection of *the* fundamental text, in accordance with Articles 266.1, 333, 334, 335, and 336, the latter of Title VIII (Regarding the Protection of the Constitution). It is thus decided."

The Chamber also considered it "unheard of" to seek to apply "by analogy" the causes contained in Article 233 of the Constitution in order to justify the alleged absolute lack of the President of the Republic," considering that it could not:

> "add to these causes, another 'accommodative' cause, through a purported legal fiction, to determine that there were no elections in our country on May 20, 2018, and that from the results of the elections convened by the *Constituent* and the Electoral Branches, that no Head of Government was elected.
>
> Such clauses are of strict law and may not be modified and/or expanded *analogously*, without violating the Constitution. It is thus decided."

The Constitutional Chamber, however, ignored that what the National Assembly had done in sanctioning that January 15, 2019 Resolution, had been precisely to interpret Article 233 of the Constitution by analogy, without "adding" to said rule any alleged additional "clause." Simply, as *the first interpreter of the Constitution and, in particular, because it was called to apply this rule, the National Assembly interpreted it analogously, applying it to the situation, in order to resolve the constitutional crisis affecting the country, in execution of what had already been agreed upon since May 22, 2018*, resolving :

> [To] "*declare* as non-existent the farce carried out on May 20, 2018,"
>
> [Not to *accept*] "the alleged results announced by the National Electoral Council and, in particular, the alleged election of Nicolás Maduro Moros as President of the Republic, who should be regarded as a usurper of the office of the Presidency of the Republic," and

> "to ignore any null and illegitimate acts of proclamation and swearing in under which it is intended to vest citizen Nicolás Maduro Moros as the alleged president of the Bolivarian Republic of Venezuela for the 2019-2025 term." [522]

The Constitutional Chamber, cutting off the right of popular representation to *apply* and interpret the Constitution, when referring to Article 350 thereof, declared it "absolutely impertinent," ending its "declarative argument" by stating that:

> "the National Assembly cannot assume the role of a Supreme Tribunal of Justice to *declare* a purported usurpation, since it would imply the characterization of the conduct described in Articles 138 and 139, in accordance with Articles 136 and 137, all of the Constitution. It is thus declared."

In this way, the Chamber again ignored the essential power of the National Assembly to be the original body for the interpretation of the Constitution,[523] a body through which the people exercise their sovereignty.

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[522] Text of the Resolution of May 22, 2018 available at http://www.asamblea nacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. Similarly, in the review "National Assembly does not accept the results of 20M and declares Maduro a 'usurper,'" in *NTN24*, May 22, 2018, available at http://www.ntn24.com/america-latina/la-tarde/venezuela /asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas

[523] As mentioned before, and as Javier Pérez Royo stated: "The first interpreter of the Constitution and the most important, by far, is the legislator. The legislator is the normal, ordinary interpreter of the Constitution. Consequently, the Constitution is a legal rule that refers in first instance to a political interpreter. Parliament is the political body that interprets the Constitution in the only way it does: in a political register. It is also a privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will." See Javier Pérez Royo, "La interpretación constitucional," in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, Mexico 2005, Volume I, pp. 889.

3. The reaction of the Constitutional Chamber of the Supreme Tribunal based on its previous Decisions holding the National Assembly, as an institution, in contempt, and sanctioning it by annulling all its acts, present and future

The basis of the Constitutional Chamber No. 3 of January 21, 2019 related to the previous decision No. 2 of January 11, 2017, is above all, unconstitutional, because in Venezuela no contempt measure is admissible against institutions, and can only be imposed upon individuals or public servants in a criminal procedure. An institution like the National Assembly, as an organ of the State integrated by the representatives of the people, cannot be declared in contempt, and certainly cannot be "sanctioned" for contempt, and in any event there is no type of sanction of a declaration that all its acts, present and future, are null and void, which would otherwise ignore the very existence of the National Assembly, as the representative of the people.

Article 122 of the Organic Law of the Supreme Tribunal of Justice expressly provides that the Supreme Tribunal can only impose *fines* on those *individuals* or *public officers* that refuse to comply with its orders, notwithstanding the criminal, civil, administrative or disciplinary sanctions that could be applied by the competent authorities.

As for contempt, in Venezuela the matter is regulated in article 485 of the Penal (Criminal) Code, providing *sanctions of fines and arrest* from five to thirty days to be applied on those individuals who have disobeyed an order legally issued by a competent authority. Some special laws, like the Organic Protection of Fundamental Rights Law (*amparo*), establish a sanction of six to fifteen years of prison to be imposed on one who breaches a judicial order for constitutional protection. Therefore, in Venezuela, the sanction of contempt can only be imposed by a criminal court in a criminal proceeding, and it can only be imposed upon an individual or a public official and not upon an institution (such as the National Assembly). Despite of it, it must be mentioned that through ruling No. 145 of June 18, 2019 (Case: *Joe Taouk, Jajaa*), the Constitutional Chamber issued a "binding interpretation," by which all amparo judges were assigned

jurisdiction to impose such criminal punishment, under the control of the Chamber.[524]

Before such interpretation, the situation was that no court acting in civil, administrative or constitutional proceedings had the power to impose a sanction of contempt, upon an individual or a public official who refuses to comply with an order of that court. In such cases what the specific court was obligated to do was to send the case, regarding the specific individuals or public officials that have refused to comply, to the competent criminal court, according the Penal Code and the Criminal Procedure Code.[525]

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524 See in Revista *de Derecho Público*, No. 158-159, enero-junio 2019, Editorial Jurídica Venezolana, Caracas 2019, pp. 332 ss.

525 It must be noticed that before the aforementioned binding interpretation, the doctrine of the Supreme Tribunal considering that sanctions for contempt could only be imposed by a criminal court in criminal proceedings was constant before and after the enactment of the Constitution of 1999, expressed, for instance, in the following decisions: No. 789 of the Politico-Administrative Chamber of the Supreme Court of Justice dated November 7, 1995 (See in *Revista de Derecho Público*, No. 63-64 (julio-diciembre 1995), Editorial Jurídica Venezolana, Caracas 1995, pp. 370-373. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/1995-REVISTA-63-64.pdf); No. 895 of the Constitutional Chamber of the Supreme Tribunal of Justice dated May 31, 2001 in the case of "*Aracelis del Valle Urdaneta;*" (Available at: http://tsj.gob.ve/decisiones/scon/mayo/895-310501-00-2788.HTM.. See the quotation in Allan R. Brewer-Carías, "La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento "sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarno Spisso y Daniel Ceballo)," en *Revista de Derecho Público,* No 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 185-187. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653125-txt.pdf), and No. 74 of the Constitutional Chamber of the Supreme Tribunal of Justice dated January 24, 2002 (Available at: http://tsj.gob.ve /decisiones/scon/enero/74-240102-01-0934.HTM. See the quotation in Allan R. Brewer-Carías, "La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento "sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarno Spisso y Daniel Ceballo)," en *Revista de Derecho Público,* No. 138

In any case, in addition, if the failure to comply by an individual or a public official relates to a judicial order issued by the Supreme Tribunal, according to article 122 of its own Organic Law of the Supreme Tribunal of Justice, and notwithstanding the criminal, civil, administrative or disciplinary sanctions that could be applied, the Supreme Tribunal can impose fines on individuals or public officials that refuse to comply with its orders. Such sanctions, in any case, can only be imposed upon individuals or public officials, and not upon an institution (such as the National Assembly).[526]

4. The decision No. 3 of January 21, 2019 of the Constitutional Chamber within the general pattern of conduct of the Constitutional Chamber against the National Assembly

As I already referred, the Constitutional Chamber has been instrumental for the authoritarian regime in Venezuela for many years,[527] trying to neutralize the action of the National Assembly, by

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(Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 185-187. Available at: http://allanbrewercarias.com/wp-content/uploads /2017/01/9789803653125-txt.pdf).

526 And even in very controversial cases in which the Constitutional Chamber of the Supreme Tribunal of Justice violated the competencies of the Criminal Jurisdiction and assumed and usurped in an unconstitutional way such competency in order to directly impose criminal sanctions for contempt established in the Amparo Proceeding Law (*Ley Orgánica de Amparo sobre derechos y garantías constitutionales*) against some Mayors that have disobeyed its orders, they were imposed only on the public officials and of course not on the Municipal Executive (*Alcaldía*) institution. See Idem.

527 See among others: Allan R. Brewer-Carías, *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela.* Colección Instituto de Derecho Público, Universidad Central de Venezuela, No. 2, Editorial Jurídica Venezolana, Caracas 2007. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/09/113.-CRONICA-SOBRE-LA-IN-JUSTICIA-07-07-2017-2.pdf ; "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)," in *Revista de Administración Pública,* No. 180, Madrid 2009, pp. 383-418. Available at: http://allanbrewercarias.net/Content/449725d9-

considering all its actions null and void. In that context, Decision No. 3 of January 21, 2019[528] was not the first judgement issued by the Chamber in this sense. It was issued, as already mentioned, only based in a reference it made to a previous judgment No. 2 of January 11, 2017,[529] which declared null and void both the act of the Assembly's constitution for its second annual period held on of January 5, 2017, and the Resolution of January 9, 2017 that declared the absolute lack of a President. Decision No.2 of January 11, 2017 stated that:

> "Any action of the National Assembly and of anybody or individual against what is decided herein shall be null and void of any validity and legal effectiveness, without prejudice to the liability to which there may be in place."

With such a declaration, ratified in the same Constitutional Chamber decision No. 3 of January 11, 2017,[530] it sought to definitively take away from the people their most elementary right in a Rule of Law, that is, to exercise sovereignty through their representatives. This was all again confirmed in another judgment No. 7 of January 26, 2017, whereas the same Chamber again declared the absolute nullity and unconstitutionality of all the actions of the Assembly.[531]

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f1cb-474b-8ab2-41efb849fea8/Content/BREWER-CARIAS.pdf ; "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)," in *IUSTEL, Revista General de Derecho Administrativo*, No. 21, June 2009, Madrid, ISSN-1696-9650. Available at: http://allanbrewercarias.com/wp-content/uploads/2009/07/607.-599.-JUSTICIA-CONSTITUCIONAL-Y-DEMOLICI%C3%93N-DEL-ESTADO-DE-DERECHO.-Seminario-EGE-marzo-2009.doc.pdf .

528 Available at http://historico.tsj.gob.ve/decisiones/scon/enero/194892-03-11117 -2017-17-0002.HTML

529 Available at http://historico.tsj.gob.ve/decisiones/scon/enero/194891-02-11117-2017-17-0001.HTML .

530 Available at http://historico.tsj.gob.ve/decisiones/scon/enero/194892-03-11117-2017-17-0002.HTML .

531 Available at http://historico.tsj.gob.ve/decisiones/scon/enero/195578-07-26117-2017-17-0010.HTML .

The above mentions serve to highlights how, since 2016, as has been mentioned before, the Supreme Tribunal has sought to strip the National Assembly of all its legislative constitutional powers, having also nullified its powers of political and administrative control,[532] and annulled almost all the laws adopted by the National Assembly.[533]

The National Assembly response to such abuse of power was to reject and not recognize the Constitutional Chamber's rulings rendered against the popular representation, considering that, despite being rulings of the Supreme Tribunal, they cannot unlawfully change the text of the Constitution, nor can its rules be repealed by such Chamber Moreover, as the latter has indeed happened through many of these Chamber´s rulings, the National Assembly, as stated in Article 333 of the Constitution, has assumed "the duty to cooperate in the restoration of its effective validity." Congressmen who were

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[532] See Allan R. Brewer-Carías, "El desconocimiento de los poderes de control político del órgano legislativo sobre el gobierno y la administración pública por parte del juez constitucional en Venezuela", in *Opus Magna Constitucional*, *Tomo XII 2017 (Homenaje al profesor y exmagistrado de la Corte de Constitucionalidad Jorge Mario García Laguardia,* Instituto de Justicia Constitucional, Adscrito a la Corte de Constitucionalidad, Guatemala. 2017, pp. 9-12; 20-23. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/06/891.-desconocim.-libro-h.Garcia-LaG. pdf

[533] See the comments in Allan R. Brewer-Carías, "El fin del Poder Legislativo: La regulación por el Juez Constitucional del régimen interior y de debates de la Asamblea Nacional, y la sujeción de la función legislativa de la Asamblea a la aprobación previa por parte del Poder Ejecutivo," in *Revista de Derecho Público,* No. 145-146, Enero-Junio 2016, Editorial Jurídica Venezolana, Caracas 2016, pp. 428-443; Available at: http://allanbrewercarias.com/wp-content/uploads/2017/01/art.-4-879.-Fin-Poder-legislativo-sujeci%C3%B3n-al-Poder-Ejecutivo-RDP-145-146-.2016.docx.pdf ; and in Allan R. Brewer-Carías, *La dictadura judicial y la perversión del Estado de derecho. El Juez Constitucional y la destrucción de la democracia en Venezuela.* Editorial Jurídica Venezolana, Caracas 2016 pp. 259-276, Available at: http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf . Carlos Ayala and Rafael J. Chavero Gazdik, *"El libro negro del TSJ de Venezuela: Del secuestro de la democracia y la usurpación de la soberanía popular a la ruptura del orden constitucional (2015-2017),"* Editorial Jurídica Venezolana, Caracas 2017, pp. 101-103; 215-217; 354-356

elected represent the popular sovereignty and they have the duty, on behalf of the people who elected them, to reject the illegitimate mutations and changes to the Constitution, by doing what is in their hands within their powers to restore its effective validity.

The National Assembly has therefore assumed the duty to confront not only the illegitimate Executive Power, but the Constitutional Chamber of the Supreme Tribunal controlled by the latter, and is not obliged to abide any of its decisions that are in violation of the Constitution.[534] In the structure of the Constitution, there is no body of the Government other than the National Assembly itself that can assure the enforcement and imposition of its decisions adopted in accordance with the Constitution and on behalf of the popular will. The National Assembly has therefore been compelled to formally declare that the Constitutional Chamber's unconstitutional judgments and the unconstitutional decisions of the Executive Power do not have and cannot have any legal effect.[535]

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534 On this, see the work of José Amando Mejía, "El deber de la Asamblea Nacional de desconocer a la Sala Constitucional" in Teodulo López Méndez, *Siglo XXI. La Democracia del Siglo XXI,* available at: https://teodulo lopez melendez.wordpress.com/2016/04/24/el-deber-de-la-asamblea-nacional-de-desconocer-a-la-sala-constitucional/

535 It is inescapable to cite, as a precedent, the National Assembly Resolution of March 22, 2007 (*Official Gazette* No. 38,635 of March 1, 2007, which left *without any legal effect* an unconstitutional judgment of Constitutional Chamber No. 301 of February 27, 2007 (Case: *Adriana Vigilanza and Carlos A. Vecchio*) published in *Official Gazette* No 38,651 of March 23, 2007. The Resolution was preceded by the following motives: "That, as provided for in article 187 of the Constitution of the Bolivarian Republic of Venezuela, 'It is for the National Assembly to legislate in matters of national jurisdiction and on the functioning of the various branches of the National Power', except for the exception provided for in Article 203 ejusdem; // It is for the National Assembly to exercise supervisory functions over the Government and the National Public Administration under the terms enshrined in the Constitution and in the laws; //That 'Any act dictated in the exercise of the Public Power that violates or impairs the rights guaranteed by this Constitution and the Law is null and void…,' as established by article 25 of our Constitution; // That 'All usurped authority is ineffective and its acts are null and void', in accordance with article 138 of our constitutional text; // That the content of that judgment shows an analysis and decision that, exceeding its functions

This was precisely the case with judgment No. 9 of March 1, 2016, by which that Chamber "intended to limit the constitutional powers of the National Assembly," and which the National Assembly rejected by Resolution dated March 3, 2016, [536] not just for formal reasons,[537] but for the unconstitutional content of the judgment, stating, among other reasons:

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and invading the privative powers of the National Assembly, 'constitutionally interprets the meaning and scope of the proposition contained in Article 31 of the Income Tax Act…' substantially altering the content of the article, its scope, and legal consequences, even if the nullity of that article was not denounced and thus expressly stated in numeral 2 of the decision." Based on these Recitals, the Assembly agreed: *First*: To consider null and void number 2 of the judgment of the Constitutional Chamber of the Supreme Tribunal of Justice no. 01-2862, dated February 27, 2007 and published in the Official Gazette of the Bolivarian Republic of Venezuela No. 38,635 of Thursday March 01, 2007, as well as the reasoning with which it was supported and, consequently, [left] without any legal effect. // *Second*: To urge the Venezuelan people, and in particular the taxpayers, as well as the National Integrated Customs and Tax Administration Service (Seniat), not to apply number 2 of the operative part of said ruling, as it is considered to be a violating act of the Constitution of the Bolivarian Republic of Venezuela." See, on that judgment No. 301 of 27 February 2007, my comments in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como legislador positivo de oficio en materia tributaria," *Revista de Derecho Público*, No. 109 Enero-Marzo 2007, Editorial Jurídica Venezolana, Caracas 2007, pp. 193-212. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/2007-REVISTA-109.pdf

536 See "Asamblea Nacional aprobó acuerdo de rechazo contra sentencia del TSJ", at *Infome 21.com.* March 1, 2016, at http://infor-me21.com/politica/asamblea-nacional-aprobo-acuerdo-de-rechazo-contra-sentencia-del-tsj.

537 The President of the National Assembly, Henry Ramos Allup, in addition, in rejecting sentence No. 9 of March 1, 2016, highlighted the fact that "The TSJ invalidated its own sentence by a lack of signatures of the magistrates," Ramos Allup said in the legislative plenary debate./ The President of the National Assembly (AN) stressed that the ruling was signed by four judges of the Constitutional Chamber, instead of at least five of the seven judges who make up the chamber./ "Therefore, this judgment does not exist," added Ramos Allup, who warned that "the country will not accept" that now, seeing the error, the TSJ will issue a correction of the ruling with the signatures required for its validity." See *Grupo Fórmula,* March 3, 2016,

(xi) That "the Constitutional Chamber's judgment No. 9 of March 1, 2016, in attempting to take away the constitutional powers of parliament because of the change that has democratically taken place in the parliamentary majority, represents a blow to popular *sovereignty*."

(xii) That "this judgment is part of a sequence of decisions of the Supreme Tribunal of Justice aimed at cutting off the integrity and functioning of the National Assembly, as well as not accepting the institutional consequences of the outcome of the elections of December 6, 2016."

On the same Resolution of March 3, 2016, the National Assembly finally resolved to "Categorically reject the alleged judgment No. 9 of March 1, 2016, of the Constitutional Chamber of the Supreme Tribunal of Justice, as non-existent for violating Article 40 of the Organic Law of the Tribunal Supreme Tribunal of Justice."

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http://www.radioformula.com.mx/no-tas.asp?Idn=575332&idFC=2016 . See also: Henry Ramos: "La sentencia número 9 del TSJ no existe" http:// www.eluniversal.com/nacional-y-politica/ . In reality, the important thing is that the fact that there appear on the website of the Supreme Tribunal the names of all seven judges (*Gladys M. Gutiérrez Alvarado, Arcadio de Jesús Delgado Rosales, Carmen Zuleta de Merchán, Juan José Mendoza Jover, Calixto Ortega Ríos, Luis Fernando Damiani Bustillos, Lourdes Benicia Suárez Anderson*) at the end of the judgment, without any indication of whether some of them rejected it or not, and only an indication that the last three did not sign it, presumes that they participated in the debate and consideration of the judgment, which was inadmissible. Available at http://historico.tsj.gob.ve/decisiones/scon/mar-zo/185627-09-1316-2016-16-0153.HTML

IV. THE ASSUMPTION BY THE PRESIDENT OF THE NATIONAL ASSEMBLY, JUAN GUAIDÓ OF THE INTERIM PRESIDENCY OF THE REPUBLIC OF VENEZUELA AS OF JANUARY 10, 2019, IN OBSERVANCE OF THE CONSTITUTION, DUE TO THE ABSENCE OF A LEGITIMATELY-ELECTED PRESIDENT. HE WAS NOT "SELF-PROCLAIMED"*

Representative Juan Guaidó, in his capacity as president of the National Assembly, took charge of the Presidency of the Republic as of January 10, 2019, at the end of the 2013-2019 presidential term, pursuant to a mandate contained in the Constitution and fulfilling an obligation provided thereby, because at that date there was no president of the Republic legitimately elected for the subsequent constitutional presidential term (2019-2025), since the same National Assembly, on May 2018, had declared and deemed as "non-existent" the alleged election of Nicolas Maduro held on May 20 of that same year for said presidential term. Nonetheless, a persistent "disinformation" tends to spread the affirmations that Juan Guaidó, President of the National Assembly of Venezuela, had "proclaimed himself" as interim President of the Republic; an information that was false and erroneous.

It was not a decision adopted by Representative Guaidó of his own will, that is, he did not "*self-proclaim*" himself as interim President, but rather he assumed that office in compliance with one of the duties inherent in his position as President of the National Assembly, pursuant to the oath sworn on January 5, 2019.

In fact, as aforementioned, the so-called "re-election" of Nicolas Maduro held on May 20, 2018, was an election process that did not

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* The text of this Section is based on the Presentation I made in the Event: *"Ask a Venezuelan: On the Current Constitucional Situation of the Country, March 2019*," at the Northwestern Pritzker School of Law, Northwestern University, Chicago, March 8th, 2019. See Allan R. Brewer-Carías, "Juan Guaidó is not "Self-Proclaimed." He assumed the Interim Presidency of the Republic of Venezuela as of January 10, 2019, in observance of the Constitution, due to the absence of a legitimately-elected President," March 8th, 2019. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/03/189.-Juan-Guaid%C3%B3-is-not-Self-Procalaimed.-March-2018.pdf.

meet the national and international standards set for democratic, free, fair and transparent election processes and, furthermore, was illegitimately called by a fraudulent and unconstitutional National Constituent Assembly installed in 2017, and not by the National Electoral Council, the body in charge of calling election processes.

As a result of that usurpation of power, the National Assembly, on May 22, 2018 denounced it as "farce," declaring it as *"non-existent"* considering that as a consequence of the alleged election of Nicolas Maduro Moros as President of the Republic, he was to be "deemed as an usurper of said office."[538] A few months later, on November 13, 2018, the National Assembly declared that "as of January 10, 2019, Nicolas Maduro *continues to usurp* the office of President of the Republic," declaring that all the decisions of "the National Executive Branch are ineffective *as of that date*, pursuant to the terms of Article 138 of the Constitution."

Based on such declarations, the National Assembly interpreted the Constitution, and applying the rule by analogy, decided that in the situation that occurred on January 10, 2019, since there was no legitimately elected president that could be constitutionally sworn in to said office for the constitutional presidential term of 2019-2025, and as the same National Assembly had decided since May 2018, it should consider, pursuant to Article 233 of the Constitution, in view of the absolute lack of a president-elect, that the president of the National Assembly had the duty to take charge of the Presidency of the Republic, this being precisely one of the functions inherent in his duties in the cases of absolute lack of a president of the Republic, fully by operation of law, without the need for any additional swearing in before the Assembly, for he had already done this when accepting the position as President of the Assembly on January 5, 2019.

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[538] See the original text of Resolution, available at: http://www.asamblea nacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. See also the reference in: "Asamblea Nacional desconoce resultados del 20M y declara a Maduro "usurpador," en *NTN24*, 22 de mayo de 2018, available at: http://www.ntn24.com/america-latina/la-tarde/ venezuela /asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas

In this case, whereas Mr. Maduro had been illegitimately "re-elected" as president of the Republic for the 2019-2025 term, in an election declared "non-existing" by the National Assembly, and for this reason could not be sworn in for this term before the people's representatives as ordered by the Constitution, he did this illegitimately before the Supreme Tribunal of Justice, which is controlled by the Executive Branch; this being an act void of all legal effect and which has furthermore been disavowed by the international community. [539]

The *interpretation of the Constitution made by the National Assembly as the legitimate representative of the sovereign will of the people,* began to be sanctioned in the Resolution issued by the Assembly on the same January 10, 2019, when it decreed the "emergency due to the total disruption of constitutional continuity," and acted as *the primary interpreter of the Constitution*, setting the path for the "ceasing of the usurpation;"[540] wherefore, the president of the National Assembly stated on that same day that "Today there is no Chief of State, today there is no commander-in-chief of the Armed Forces, today there is a National Assembly that represents the people of Venezuela." [541]

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[539] In effect, the same day January 10th, 2019, the Permanent Council of the Organization of American States decided "not to recognize the legitimacy of the regime of Nicolas Maduro," adopting a motion proposed by Argentina, Chile, Colombia, Costa Rica, Estados Unidos, Peru and Paraguay, approved by the favorable vote of Jamaica, Panama, Paraguay, Peru, a Dominican Republic, Saint Lucia, Argentina, Bahamas, Brazil, Canada, Colombia, Costa Rica, Ecuador, Grenada, Guatemala, Guyana, Honduras and Haití. See in *El País*, 11 enero 2019, available at https://elpais.com/internacional/2019/01/10/estados_unidos/1547142698_233272.html. Véase en *El Nacional*, 10 de enero de 2019, en http://www.el-nacional.com/noticias/mundo/oea-aprobo-resolucion-para-desconocer-juramentacion-maduro_265882

[540] See: "Venezuela: Asamblea Nacional se declara "en emergencia" por jura de Nicolás Maduro**.** Su presidente, Juan Guaidó hizo un llamado a las fuerzas militares de Venezuela para que acompañen una eventual transición política, en *Tele13*, 10 de enero de 2019, available at: http://www.t13.cl/noticia/mundo/venezuela-asamblea-nacional-se-declara-emergencia-jura-nicolas-maduro

[541] See "Juan Guaidó: Hoy no hay jefe de Estado," en *Noticiero52,* 10 de enero de 2019," available at https://noticiero52.com/juan-guaido-hoy-no-hay-jefe-de-estado/

Afterwards, the National Assembly, "*as sole legitimate authority of the State and representative of the Venezuelan people*," completed the interpretation of the Constitution when it issued the Resolution of January 15, 2019 "regarding the declaration of usurpation of the Presidency of the Republic by Nicolas Maduro Moros and the reinstatement of the Constitution," adopting a set of "decisions *to proceed to restore the force of the constitutional order, on the basis of Articles 5, 187, 233, 333 and 350 of the Constitution*."

Specifically, the National Assembly, considering the constitutional obligation of all citizens and officials set forth in Article 333 of the Constitution,[542] which provides the obligation to cooperate in the restoration of the effective force of the Constitution whenever it has been breached, and considering the "right to civil disobedience in view of the usurpation perpetrated by Nicolas Maduro" arising from Article 350 of the Constitution,[543] "in the absence of a constitutional rule that regulates the current situation," decided to:

> "*apply by analogy Article 233 of the Constitution, in order to fill in the absence of a president-elect* while concurrently acting to *restore the constitutional order based on Articles 333 and 350 of the Constitution*, and cause the ceasing of the usurpation by effectively forming a Transition Government and proceeding to organize free and transparent elections."

This way, *the National Assembly, as primary interpreter of the Constitution and as body through which the people exercises its sovereignty*, agreed on the analogical application of Article 233 of the Constitution*, meaning that in the absence of a legitimate president-elect that can be sworn in as president for the 2019-2025 term, the president of the National Assembly took charge of the*

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542 Article 333: "This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because or repeal in any manner other than as provided for herein. In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect."

543 Article: 350: "The people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights."

presidency of the Republic; further deciding, officially, pursuant to Articles 333 and 350 of the same Constitution, among other things, the following:

> "*First*: *to formally declare the usurpation of the Presidency of the Republic by Nicolas Maduro Moros* and, consequently, consider the *de facto* status of Nicolas Maduro as legally ineffective, and declare all the alleged actions of the Executive Branch to be null and void, pursuant to Article 138 of the Constitution.
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> *Second*: *to adopt, within the frame of the application of Article 233, the measures that allow restoring the conditions of electoral integrity so that, once the usurpation ceases and a Transition Government is formed and installed*, to call and hold free and transparent elections within the shortest term possible, as provided in the Constitution and other Laws of the Republic and applicable treaties."[544]

For this transition process, the National Assembly enacted on February 5, 2019, the Law of the *Statute that governs the transition to democracy in order to reinstate the Constitution of the Bolivarian Republic of Venezuela*,[545] which confirmed, in its Article 14, that "the president of the National Assembly is the legitimate acting president of the Bolivarian Republic of Venezuela in accordance with Article 233 of the Constitution."

Consequently, after the *constitutional interpretation made by the National Assembly* in the aforementioned Resolution of January 15, 2019, and in the Statute for the Transition, to apply by analogy Article 233 of the Constitution due to the absence of a legitimate president-elect that could be sworn in as president of the Republic for the 2019-2025 term, this implied that *as of January 10, 2019*, *representative Juan Guaidó, in his capacity as president of the*

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544 Available at: http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion

545 Available at: http://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf

National Assembly, by mandate of the Constitution and without losing his capacity as such president of the Assembly, became by law the interim President of the Republic, which, among other public statements, was expressed by Juan Guaidó himself in a public rally held on January 23, 2019**.**

By assuming the interim presidency of the Republic in his capacity as President of the National Assembly, Representative Juan Guaidó merely fulfilled a duty imposed by the Constitution. There was no "self-proclamation" as has been affirmed, but the assuming of one of the functions that have been constitutionally vested on him as president of the National Assembly. As expressed by Guaidó himself:

> "My assumption as interim president is based on Article 233 of the Venezuelan Constitution, according to which, if at the onset of a new presidential term there is no chief of state elected, the power shall be ascribed to the *president* of the National Assembly until the holding of fair elections. For this reason, my oath of January 23 cannot be deemed a "self-proclamation." I did not assume the presidency of my own accord but in pursuance of the Constitution." [546]

Therefore, the "oath" expressed at a rally on January 23, 2019, although it was a very important political formality, did not replace the *formal oath that he did swear as president of the National Assembly on January 5, 2019, to fulfill, among others, precisely the duty of taking charge of the Presidency of the Republic,* which is constitutionally according to law under the Constitution, as of January 10, 2019.

This was understood by the country, represented by the majority of its citizens in demonstrations; this was understood by the international community, acknowledging him as the legitimate acting president of the Republic, and also, without doubt, was also recognized by the European Parliament by Resolution of January 31,

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[546] See Juan Guaidó, "How the World Can Help Venezuela," en *The New York Times*, New York, 31 de enero de 2019, p. A23. See also, on this: José Ignacio Hernández, "De juramentos y proclamas: una explicación," in *Prodavinci*, 24 de enero de 2019, available at: https://prodavinci.com/de-juramentos-y-proclamas-una-explicacion/

2019,[547] when it decided to "*acknowledge Juan Guaidó ("the legitimate and democratically elected president of the National Assembly") as the legitimate interim president of the Bolivarian Republic of Venezuela, in accordance with the Venezuelan Constitution, pursuant to the provisions of its Article 233,* and to fully support his road map." [548]

V. THE GENERAL RECOGNITION OF THE TRANSITION DEMOCRATIC PROCESS LED BY THE NATIONAL ASSEMBLY AND THE PRACTICAL INFFECTIVENESS OF THE CONSTITUTIONAL COURT DECISION REGARDING THE NATIONAL ASSEMBLY'S RESOLUTION OF JANUARY 15, 2019

Within the explained situation of confrontation between the branches of Government, one that represents the popular will - the National Assembly - and the other – the Supreme Tribunal - controlled by the illegitimate Executive Power, the Constitutional Chamber, through the already mentioned decision No. 3 of January 21, 2019, proceed to "annul" *ex officio*, without trial, and violating all constitutional rules of due process, the National Assembly's Resolution of January 15, 2019, establishing the basis of the route for the transition towards democracy in Venezuela; a Resolution that has followed its course, among other factors, with almost full national and international recognition. None of the decisions of the Constitutional Chamber have really become effective, as they were rejected by the National Assembly, and those decisions are, in practice, not recognized.

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547 Exhorting all the European States to do the same: See in "El Parlamento Europeo reconoce a Juan Guaidó como "legítimo presidente interino de Venezuela," in *ABC España*, 31 de enero de 2019, available at: https://www.abc.es/espana/abci-parlamento-europeo-reconoce-juan-guaido-como-legitimo-presidente-interino-venezuela-201901311357_video.html.

548 See the text of the Resolution on the situation in Veneuela (2019/2543(RSP), in *Parlamento Europeo, 2014-2019*, Textos Aprobados, P8_TA-PROV (2019) 0061 Situación en Venezuela, availale at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0061+0+DOC+PDF+V0//ES

Hence the importance, for example, at the national institutional level, of the Statement of the *Academy of Political and Social Sciences* of January 29, 2019, in which it considered that:

> "The National Assembly has proceeded to invoke and apply article 333 of the Constitution and its president, Congressman Juan Guaidó, assumed on January 23, 2019, the presidency on an interim basis for the restoration of the *democratic* institutions and the effective validity of the Constitution, receiving recognition from a major group of countries."

And, on that basis, disregarding completely the "decision" of the Constitutional Chamber of the Supreme Tribunal of Justice No. 3 of January 21, 2019, the Academy agreed:

> "To support the *People* of Venezuela and the National Assembly in their struggle for the restoration of the Rule of Law and the democratic system, as well as for the respect of citizens' rights and freedoms and to recognize, following article 333 of the Constitution, the legitimacy of the actions that, with the limit of constitutional principles and values, the National Assembly carries out so that free, universal, direct, and secret elections that are in accordance with the constitutional principles that impose the guarantee of freedom, impartiality, participation, equality, and transparency, take place." [549]

For its part, at the international level, on January 23, 2019, the United States Government declared that:

> "It recognizes Juan Guaidó as Venezuela's new interim president and strongly supports his courageous decision to assume that role under article 233 of the Venezuelan Constitution

[549] See "Pronunciamiento sobre la legitimidad de la aplicación del artículo 333 de la Constitución por la Asamblea Nacional a los fines de la restitución de su vigencia efectiva," January 29, 2019, at http://acienpol.org.ve/cmacienpol/Resources /Pronunciamientos/Acuerdo%20de%20Acienpol %20Art.% 20333.pdf. See also in the book: *Doctrina Académica Institucional. Instrumento de reinstitucionalización democrática, Pronunciamientos 2012-2019*, Academia de Ciencias Políticas y Sociales, Editorial Jurídica Venezolana, Caracas 2019, pp. 332-334 (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf).

> and with the backing of the National Assembly, to restore democracy in the country […].
>
> We will work in close cooperation with the legitimately elected National Assembly to facilitate Venezuela's transition to the restoration of democracy and the Rule of Law, in line with the Inter-American Democratic Charter [...]
>
> The new Venezuelan government carries the flame of democracy on behalf of Venezuela. The United States expresses its continued support for President Guaidó, the National Assembly, and the People of Venezuela."[550]

In the United Kingdom, Her Majesty's Government also recognized the President of the National Assembly Juan Guaidó, as Interim President of the Republic, being of importance to highlight what the Minister for Europe and the Americas of the United Kingdom, Sir Alan Duncan expressed on January 28, 2019:

> "[…] we no longer regard Maduro as the legitimate leader of Venezuela […] The world knows that the National Assembly is legitimate, and the Constituent Assembly, and hence the subsequent flawed election of Nicolás maduro, is not legitimate." [551]

On February 7, 2019, the same Sir Alan Duncan expressed that the United Kingdom together with the 19 Members States of the European Union recognized the president of the National Assembly, Juan Guaidó, as Interim President of the Republic expressing that:

> "On 23 January, the president of the National Assembly, Juan Guaidó, announced, with constitutional authority, that he will act as interim President of the country until free and fair elections take place. He spoke with the full backing of the National Assembly which, as an institution, is the sole legitimate survivor of Maduro's systematic dismantling of the country's democracy. This moment saw Venezuela's democratic leaders

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[550] See the statement "Recognition of Juan Guaido as Venezuela's Interim President," U.S. Embassy in Peru, January 23, 2019 at https://pe.usembassy.gov/es/reconocimiento-de-juan-guaido-como-presidente-interino-de-venezuela/

[551] See the statement at Hansard HC Deb. vol.653 cols.481, 28 January 2019. Available at: at https://www.youtube.com/watch?v=xN2wdJgzyS0

> taking courageous steps to set things right and to put the needs of the people before themselves. It was legal and gave the international community a responsibility to act immediately, as the U.S, Canada and the Lima Group countries did by supporting Juan Guaidó and Venezuela's legitimate representatives." [552]

After this recognition of congressman Juan Guaidó as legitimate President of Venezuela and of the National Assembly as legitimate representative of the people, other recognitions followed by almost all the countries of America (except Cuba, Mexico, Uruguay, Nicaragua),[553] and by a large number of countries around the world (not including Russia, China, Iran, Turkey),[554] including the recognition of the European Parliament, which urged all the States of the European Union to do the same.[555]

The government of Interim President Guaidó also received recognition from other European countries, including Spain, Portugal, Germany, Denmark, the Netherlands, France, Hungary, Austria, Finland, Belgium, Luxembourg, the Czech Republic, Latvia,

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552 See the statement at Hansard HC Deb. vol.654 cols.453, 07 February. See the statement at https://www.youtube.com/watch?reload=9&v=DoI3reHZZPE

553 On November 2019 the new government of Bolivia recognized the Government of Juan Guaidó in Venezuela. See the information in: "Nuevo Gobierno de Bolivia reconoce a Guaidó como Presidente de Venezuela," *La Tercera*, November 14, 2019. Available at: https://www.latercera.com/mundo/noticia/nuevo-gobierno-bolivia-reconoce-guaido-presidente-venezuela/900394/

554 See "Estos son los países que reconocen a Juan Guaidó como presidente (i) de Venezuela y los que apoyan a Maduro," in *El Comercio*, January 28, 2019, available at: https://www.elcomercio.com/actuali-dad/juan-guaido-venezuela-reconocimiento-diplomacia.html

555 See Information in "El Parlamento Europeo reconoce a Juan Guaidó como 'legítimo presidente interino de Venezuela,'" in *ABC España*, January 31, 2019, availale at: https://www.abc.es/espana/abci-parlamento-europeo-reconoce-juan-guaido-como-legitimo-presidente-interino-venezuela-201901311357_video.html. By February 4, 2018, 8 a.m. ET, the following European countries had already recognized Juan Guaidó as Venezuela's legitimate interim president: Spain, France, Sweden, United Kingdom, Denmark, Portugal, Latvia, Austria, Lithuania, Poland, Netherlands, Germany.

Lithuania, Estonia, Poland, Sweden and Croatia. [556] Also, the Government of Greece, announced it had "decided to recognize the president of the democratically elected National Assembly, Juan Guaidó, as the interim president of Venezuela in order for him to call free, fair and democratic presidential elections." [557]

Regarding international organizations, on March 15, 2019, the government of the President in Charge Juan Guaidó received the very important recognition of the Inter-American Development Bank, when its officers approved "a resolution recognizing the appointment by Mr. Juan Guaidó of Mr. Ricardo Hausmann" as 'Governor of the IDB for Venezuela.'" In this way, the IDB became the first international financial institution to recognize a representative of the government of Guaidó. [558]

With regard to the European Parliament's Resolution of January 31, 2019 on the situation in Venezuela (2019/2543(RSP), it is important to note that:

> "Juan Guaidó is recognized as the legitimate interim president of the Bolivarian Republic of Venezuela, in accordance with the Venezuelan Constitution and in accordance with Article

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[556] See Andrés Gil, "The main EU countries recognize Guaidó as interim president of Venezuela" in *eldiario.es*, February 4, 2019, available at: https://www.eldiario.es/internacional/principales-UE-Guaido-presidente-Venezuela_0_864413573.html ; and "The joint statement of the 19 EU countries that have recognized Guaidó as interim president of Venezuela" at *eldiario.es,* February 4, 2019, available at: https://www.eldiario.es/ internacional/declaracion-conjunta-UE-reconocido-Guaido_0_864414451. html

[557] See Greece Foreign Ministry statement, July 12, 2019, available at: https://www.mfa.gr/en/current-affairs/statements-speeches/ministry-of-foreign-affairs-announcement-on-the-recognition-of-guaido-as-president-ai-of-venezuela.html See also at: https://www.washingtonpost.com/world/ the_ americas/greece-recognizes-venezuelas-guaido-as-interim-president/2019/ 07/12/bcc87e74-a484-11e9-a767-d7ab84aef3e9_story.html?noredirect=on &utm_term=. 7191db57ad8d

[558] See information: "IDB recognizes Ricardo Hausmann as Venezuela's representative," *El Nacional*, March 15, 2019, at http://www.el-nacional. com/noticias/mundo/bid-reconoce-ricardo-hausmann-como-representante-venezuela_274824 .

233 thereof, and [the European Parliament] fully supports his roadmap."

In particular, in order to take that decision, the Parliament proceeded from the following recitals:

"A. Whereas the elections held on May 20, 2018 were held without complying with the minimum international standards necessary for the development of a credible process, and without respecting political pluralism, democracy, transparency, and the Rule of Law; whereas the European Union, together with other regional organizations and democratic countries, did not recognize either the elections or the authorities that emerged from this illegitimate process.

B. Whereas, on January 10, 2019, Nicolás Maduro illegitimately usurped the presidential power before the Supreme Tribunal of Justice, in breach of the constitutional order.

C. Whereas on January 23, 2019, Juan Guaidó, legitimate and democratically elected president of the National Assembly, was sworn in as interim president of Venezuela, in accordance with article 233 of the Venezuelan Constitution." [559]

All the previously mentioned international recognitions, were followed by the important recognition of the government led by the President of the National Assembly, Juan Guaidó, by the Organization of American States, not only by having accepted the representation of Venezuela by the Ambassador appointed by Guaidó as Interim President, in the Permanent Council's meeting of April 10, 2019;[560] but also by accepting the cessation of the effects of the

[559] See text in European Parliament, 2014-2019, Approved Texts, P8_TA-PROV(2019)0061 Situation in Venezuela, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0061+0+DOC+PDF+V0//ES .

[560] The Permanent Council of OAS vote don April 10, 2019 "to accept the appointment of Mr. Gustavo Tarre as permanent representative selected by the National Assembly, until new elections takes place and a Government democratically elected is appointed." See Andrea Rincón, "Reconocen al enviado de Guaidó, Gustavo Tarre, como representante del Parlamento ante la OEA," in *France 24*, April 10, 2019, available at:

denunciation of the OAS's Charter that Nicolás Maduro filed two years earlier (April 27, 2017) seeking to withdraw Venezuela from the OAS, which was due to enter into effect on April 27, 2019.[561]

On the contrary, the OAS gave full legal effect to the letter of the Interim President Juan Guaidó, dated February 8, 2019, issued under his functions as set forth in the *Statute of Transition* (art. 14) and according to articles 233, 236.4, 152 and 333 of the Constitution, and sent to the Secretary General of the OAS, ratifying "the will of the Venezuelan nation to remain as Member State in the Charter of the Organization of American States," as had been previously decided by the National Assembly by means of Resolutions of May 2, 2017 and January 22, 2019; and consequently, asking it "leave without effects the alleged denunciation of the OAS's Charter, so that Venezuela could remain as member State of the Organization."[562]

The recognition by the OAS of the representatives appointed by the Interim President Juan Guaidó, was ratified on June 27, 2019, in the 49th General Assembly of OAS held in Medellín, Colombia, whereas the Member States by majoritarian vote ratified the recognition of the representatives appointed by the President of the National Assembly, as Interim President of the Republic."[563]

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https://www.france24.com/es/20190409-oea-reconocimiento-tarre-guaido-venezuela.

561 On April 27, 2017, in effect, the government of Nicolas had notified the Secretary of the OAS the "indeclinable decision to denounce the Charter of the Organization of American States according to its article 143, which starts the definitive withdraw of Venezuela from that Organization." See the information and the text of the letter, in: "Gobierno de Venezuela entregó carta de denuncia para iniciar formalmente su salida de la OEA," en *Nodal*, 26 de abril de 2017, available at: https://www.nodal.am/2017/04/venezuela-inicio-formalmente-su-salida-de-la-oea/ .

562 See the information and text of the letter, in Ana María Matute, "Guaidó dejó sin efecto salida de Venezuela de la OEA," en *El Nacional*, 7 de marzo de 2019, available at: http://www.el-nacional.com/no-ticias/mundo/guaido-dejo-sin-efecto-salida-venezuela-oea_273818 .

563 See the note "OEA ratificó reconocimiento a representantes de Guaidó," in *Runrunes*, 28 de junio de 2019, available at: https://runrun.es/noticias/383500/oea-ratifico-reconocimiento-a-representantes-de-guaido/. On this,

In this national and international political situation, with the President of the National Assembly, Juan Guaidó being recognized as the person in charge of the Presidency of the Republic, and the National Assembly as the only legitimately elected body in the country, [564] the invalidity of the statements of the Constitutional Chamber of the Supreme Tribunal of Justice that the National Assembly has formally rejected, is evident, in particular in the jurisdiction of the countries that have recognized them politically. Said recognition implies that the decisions of the National Assembly, in the event of a conflict, have their full legal effects.

Accordingly, during the whole year 2019, Juan Guaidó as President of the National Assembly, and as Interim President of the Country performed all its functions according to the *Transition Statute* and the Constitution. On January 5, 2020, the National Assembly was due to be installed for the ordinary period of sessions

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the representative of the United States before the OAS, Kimberly Breir, said that: "Being this the first Assembly of OAS in which the interim government of Juan Guaidó takes its seat at the table, this meeting demonstrates a broad international acknowledgment to the legitimate government of Venezuela." See the note: "Venezuela divide a OEA, Uruguay se retira de Asamblea en protesta contra delegación Guaidó," in *Reuters*, 27 de junio de 2019, available at: https://lta.reuters.com/articulo/venezuela-politica-oea-idLTAKCN1TS27G-OUSLT

564 In such character, and recognized as such, Juan Guaido, as Interim President of Venezuela, was received by many Head of Government in Europe and North America in January 2020, as well as in the World Economic Forum of Davos. On January 23, 2020, the Forum announced: "Juan Guaidó, President of the National Assembly of Venezuela and recognized by more than 50 countries as the interim President of Venezuela, will participate in the World Economic Forum Annual Meeting 2020 in Davos. Guaidó will speak on the economic, political and social situation of Venezuela and its road to recovery." See: World Economic Forum, Media release: "Juan Guaidó to Attend Annual Meeting 2020," January 23, 2020. Available at: https://www.weforum.org/press/2020/01/juan-guaido-to-attend-annual-meeting-2020/ In London, Mr. Guaidó was received by Prime Minister Boris Johnson. See the report "Venezuelan president Guaidó meets Johnson in London; in Caracas his office was raided by Maduro's secret service agents," in *MercoPress*, 23 January 2020, available at: https://en.mercopress.com/2020/01/23/venezuelan-president-guaido-meets-johnson-in-london-in-caracas-his-office-was-raided-by-maduro-s-secret-service-agents

of 2020, and pursuant to the Constitution was due to elect its Executive Board (*Junta Directiva*). On that date, the seat of the Assembly (*Palacio Federal Legislativo*) was besieged by the National Guard preventing the representatives to have free access to the building, and in particular, impeding Juan Guaidó, as President of the Assembly, who was the one called to preside the Commission of Installment of the Assembly, to have access to the building.[565] This factual situation assured a group of representatives related to the usurping Government of Nicolás Maduro, leaded by representative Luis Parra, to pretend, without the constitutionally required quorum, [566] to install the National Assembly, and to "elect" a new Executive Board of the Assembly presided by himself.[567] In the afternoon of the same day, the President of the National Assembly Juan Guaidó installed it with 100 representatives over 167, which was more than the constitutionally required quorum (84 representatives), and the new Executive Board for 2020 was elected presided by the same Juan Guaidó, who continued to exercise as Interim President of Venezuela.[568]

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565 See the news in: "Venezuela's Guaido and Rival Lawmaker Call for Competing Legislative Sessions," in VOANews, 6 January 2020, available at: https://www.voanews.com/americas/venezuelas-guaido-and-rival-law maker -call-competing-legislative-sessions

566 See regarding the quorum needed for the installment of the Assembly: Allan R. Brewer-Carías, "Sobre el quorum y el régimen de las votaciones en la Asamblea Nacional con particular referencia a la elección de los miembros de la Junta Directiva de la Asamblea," New York, January 4, 2020. Available at: http://allanbrewercarias.com/wp-content/uploads/2020/01/Brewer.-SOBRE-EL-QURUM-Y-EL-R%C3%89GIMEN-DE-LAS-VOTACIONES-EN-LA-ASAMBLEA-NACIONAL-4.1-2020.pdf

567 See on this whole irregular and unconstitutional situation, the comments in: Allan R. Brewer-Carías, "La instalación de la Asamblea Nacional de Venezuela el 5 de enero de 2020 y desalojo de los *okupas* del Palacio Federal Legislativo," New York, de enero de 2020. Available at: http://allan brewercarias.com/wp-content/uploads/2020/01/202.-Brewer.-INSTALACI %C3%93N-AN-EL-5-DE-ENERO-DE-2020-Y-DESALOJO-DE-LOS-OKUPAS.pdf

568 See on this process: Allan R. Brewer-Carías, "La instalación de la Asamblea Nacional de Venezuela el 5 de enero de 2020 y desalojo de los *okupas* del

The purported election of the Assembly's Board presided by representative Parra was evidently unconstitutional, and was rejected in the country and worldwide. In particular, for instance, it was ignored and rejected by the Government of the United States. In particular, Elliott Abrams, President Donald Trump's special representative for Venezuela, affirmed that:

> "despite the disruption, the United States will continue to recognize Guaidó as president until a free and fair vote is held." "Abrams said that Maduro's decision to physically block the building amounts to a "last resort," and that he would face increased international isolation as a result." "But a State Department official confirmed after the events on Sunday that Abrams' remarks still hold, and that the United States will continue to recognize Guaidó despite the declared victory of another, controversial opposition figure."[569]

Palacio Federal Legislativo," New York, January 7, 2020. Available at: http://allanbrewercarias.com/wp-content/uploads/2020/01/202.-Brewer.-INSTALACI%C3%93N-AN-EL-5-DE-ENERO-DE-2020-Y-DESALOJO-DE-LOS-OKUPAS.pdf

569 See Michael Wilner, "Guaidó remains president.' U.S. warns Maduro amid disrupted vote in Venezuela," in White House, January 5, 2020, available at: https://www.mcclatchydc.com/news/politics-government/white-house/article238982143.html In addition, on January 13, 2020, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) "designated seven Venezuelan government officials who, on behalf of former Venezuelan President Nicolás Maduro, led a failed attempt to illegitimately seize control of the National Assembly and block interim President Juan Guaidó and other deputies from participating in a constitutionally required election of National Assembly leadership. The following individuals have been designated as current or former officials of the Government of Venezuela for their actions undermining democracy: Luis Eduardo Parra Rivero; Jose Gregorio Noriega Figueroa; Franklyn Leonardo Duarte; Jose Dionisio Brito Rodriguez; Conrado Antonio Perez Linares; Adolfo Ramon Superlano; and Negal Manuel Morales Llovera." U.S. Department of the Treasury Press release, January 13 2020. Available at: https://home. treasury.gov/news/press-releases/sm871. See also regarding new sanctions, the statement of James Story, Chargé d' Affaires, for the Venezuela Affairs Unit, United States Embassy in Bogota, in "Venezuela.- EEUU avanza sanciones contra Luis Parra, jefe del Parlamento elegido por 'chavismo' y

A few month later, in May 2020, the Constitutional Chamber, again through a unilateral declaration No. 65 of May 29, 2020,[570] issued also *ex officio*, violating all the basic rules of due process, without being asked by anybody and without parties in a process, purported to declare "valid" the Executive Board of the National Assembly presided by representative Luis Parra, and to "prohibit" or ban the majority of representatives of the National Assembly that had elected Juan Guaidó as President of the National Assembly, from meeting; all in violation, additionally, of the constitutional liberty of reunion.[571] This decision, criticized and completely ignored in the country,[572] considered by Rafael Chavero as "an ode to nonsense," nothing more that "a political document, alien to any sense of justice and good sense. Simply a shame of decision,"[573] has to be considered null and void in terms of article 25 of the Constitution, for violation of articles 49 and 53 of the same text, not being possible for any court in a democratic state to recognize it, much less as a matter of comity.

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oposición minoritaria," in *Notiamérica*, Madrid June 5, 2020, available at: https://www.notimerica.com/politica/noticia-venezuela-eeuu-avanza-sanciones-contra-luis-parra-jefe-parlamento-elegido-chavismo-oposicion-minoritaria-20200605130303.html

570 Decision available at: http://historico.tsj.gob.ve/decisiones/scon/mayo/309867-0065-26520-2020-20-0001.HTML

571 See the comments on the vices of unconstitutionality this decision in Allan R. Brewer-Carías, "La fraudulenta y fallida "magia" del Juez Constitucional en Venezuela. de cómo se "transforma" un juicio de amparo, que se declara sin lugar, en una vía para emitir declaraciones políticas, sobre hechos políticos, ignorando la justicia y el debido proceso (Sobre la sentencia de la Sala Constitucional No. 65 del 26 de mayo de 2020,"New York, May, 29 2020. Available at: http://allanbrewercarias.com/wp-content/uploads/2020/05/Brewer.-LA-FRAUDULENTA-Y-FALLIDA-%E2%80%9CMAGIA%E2%80%9D-DEL-JUEZ-CONSTITUCIONAL-EN-VENEZUELA.-sentencia-No-65.-26-5-2020.pdf

572 See for instance: Juan Manuel Raffalli, "Contenido y efectos de la sentencia Parra," en *Prodavinci*, 28 de mayo de 2020, disponible en: https://prodavinci.com/contenido-y-efectos-de-la-sentencia-;

573 See Twit: @rchavero, May 27, 2020.

Regarding this decision, for instance, the High Representative of the European Union, on June 4th, 2020 issued the following "Declaration:"

> "On May 26, Venezuela's Supreme Court ratified Luis Parra as President of the National Assembly. As previously stated, the EU considers that the voting session that led to the "election" of Luis Parra was not legitimate. It did not respect legal procedure nor democratic constitutional principles. The EU continues to fully support Juan Guaidó as President of the National Assembly. It strongly rejects the violations of the democratic, constitutional and transparent functioning of the National Assembly, as well as the intimidations, violence and arbitrary decisions against its Members."[574]

The declaration of the Constitutional Chamber No. 65 of May 29, 2020, in any case, as all the decisions such Chamber has issued *ex officio*, without a case or controversy, violating the most elemental principles of the rule of law and due process, being issued by a partisan tribunal acting in collusion with the usurped Executive, and without autonomy and independence;[575] is a decision that cannot be recognized in other foreign jurisdictions, like for instance, the United States, where to recognize as a comity a foreign judicial ruling, as has been decided by the US Supreme Court since 1895, the courts must assure that the foreign judgement:

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574 See *European Council. Council of the European Union*, Press release, "Declaration by the High Representative, on behalf of the European Union, on the latest developments in Venezuela," 4 June 2020; available at: https://www.consilium.europa.eu/en/press/press-releases/2020/06/04/declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-latest-developments-in-venezuela/

575 See, for instance, all the declarations and pronunciations of the National Academy of Political and Social Sciences on these matters of lack of autonomy and independence of the Judiciary, in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitutcionalización democática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, Caracas 2019, pp. 27 ff.; 29 ff; 31 ff.; 85 ff.; 138 ff.;175 ff. 190 ff. 217 ff.; 222 ff.; Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf

"appears to have been rendered by a *competent court*, *having jurisdiction of the cause and of the parties*, and *upon due allegations and proofs and opportunity to defend against them*, and its *proceedings are according to the course of a civilized jurisprudence*, and are stated in a clear and formal record."[576]

[576] See US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895). Available at: https://supreme.justia.com/cases/federal/us/159/113/

Chapter XV

THE DEMOCRATIC TRANSTITION PROCESS ESTABLISHED BY THE NATIONAL ASSEMBLY AND ITS INTERNATIONAL REOGNITION

I. THE *STATUTE GOVERNING THE TRANSITION* TOWARD DEMOCRACY TO RESTORE THE VALIDITY OF THE CONSTITUTION SANCTIONED BY THE NATIONAL ASSEMBLY ON FEBRUARY 5TH, 2019 AND ITS BASIC RULE FOR THE PROTECTION OF THE INTERESTS OF THE REPUBLIC ABROAD

In any event, in view of the irrelevance of what was unconstitutionally "declared" *ex officio* by the Constitutional Chamber of the Supreme Tribunal of Justice, without trial or proceeding, in the abovementioned decision No. 3 of January 21, 2019, in relation to the National Assembly's Resolution dated January 15, 2019, the *first fundamental decision* adopted pursuant to said Resolution to conduct the democratic transition process was precisely the sanctioning of the "*Statute governing the transition to democracy to restore the validity of the Constitution of the Bolivarian Republic of Venezuela*," [577] sanctioned by the National Assembly on

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[577] Text available at http://www.asambleanacional.gob.ve/documentos_archivos /estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf. See comments to said Statute and its constitutional basis in Allan R. Brewer-Carias, *La transición a la democracia en Venezuela. Bases constitucionales*

February 5, 2019, in accordance with Articles 7 and 333 of the Constitution,[578] for the purpose of "establishing the regulatory framework governing the democratic transition in the Republic" (Article 1). Article 7 refers to the supremacy of the Constitution and Article 333 establishes the duty of any citizen and authorities, to "cooperate in the restoration of its effective validity."

The said *Statute for Transition* was formally characterized by the National Assembly as a "normative act," having the rank and value of law, issued "in direct and immediate implementation of Article 333 of the Constitution of the Bolivarian Republic of Venezuela," being -as its Article 4 points out-, "of mandatory compliance for all public authorities and officials, as well as for individuals" (article 4).

In such character, having the rank of law issued according to Article 187.1 and 202 of the Constitution, the Statute has the effect of *lex speciali* and *lex posterior,* that is, with power to abrogate or amend any legislation then in force, as well as any other State acts of inferior normative rank, during the period of the "transition toward democracy to restore the validity of the Constitution." That is why the Statute has been considered a "constitutional normative act" and "a normative act superior to the formal laws;"[579] and "as a legislative

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y obstáculos usurpadores, Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 239 ff. (Available at: http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf)

578 Text available athttp://www.asambleanacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf

579 See José Duque Corredor, "Bloque Constitucional de Venezuela. Comentarios y reflexiones sobre el Estatuto de Transición de la dictadura a la democracia de Venezuela," Epilogue to the book: Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, IDEA, Editorial Jurídica Venezolana, Caracas/Miami 2019, pp. 332, 332, available at: http://allanbrewercarias.com/wp-content

act of constitutional rank, or at least, the authentic interpretation of the Constitution itself, and consequently, of obligatory compliance under the principle of constitutional supremacy." [580]

Regarding this *Statute for Transition*, on the other hand, it was formally recognized by the National Academy of Political and Socials Sciences, the highest consultative entity of Venezuela on institutional matters, in a Pronouncement issued on February 15, 2019, in which it decided:

> First: To manifest its conformity with the constitutional legal regime established by the National Assembly in the *Statute governing the transition to democracy to restore the validity of the Constitution of the* Bolivarian *Republic of Venezuela,*" as an unknown political process that it is carrying out in *representation* of the popular sovereignty in order to re-establish the enforcement of the Constitution and achieve the conditions for holding free, fair, and competitive elections.
>
> Second: Support in a special way the constitutional function of political conduction and direction of the State exercised by the National Assembly and its Board of Directors, as well as constitutional functions of the Interim *President* of the Republic, assumed legitimately and on a temporary basis, according to the Constitution and to said Statute, by Engineer Juan Guaidó, which must be exercised under the public law principle of coordination

/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf)

580 See Asdrúbal Aguiar, "Transición hacia la democracia y responsabilidad de proteger en Venezuela: Mitos y realidades," prologue to the book: Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, IDEA, Editorial Jurídica Venezolana, Caracas/Miami 2019, p. 39, available *at* http://allanbrewer carias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI% C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf)

and parliamentary control, without subordination or undue interferences. [581]

The Statute has, inter alia, the following objectives relating to the institutional reorganization of the Republic:

> "1. Regulate the actions of the various branches of the Public Power during the *democratic* transition process in accordance with Article 187, paragraph 1 of the Constitution,[582] allowing the National Assembly to initiate the process of restoring constitutional and democratic order."
>
> 2. Establish the guidelines according to which the National Assembly will protect, *before* the international community, the rights of the Venezuelan government and people, until a provisional government of national unity is formed."

That is why, the *Transition Statute* was formally qualified to be a "normative act," (article 4), having the rank and value of law, issued "in direct and immediate implementation of Article 333 of the Constitution of the Bolivarian Republic of Venezuela," being as its article 4 points out, "of mandatory compliance for all public authorities and officials, as well as for individuals" (article 4).

Having the rank of law issued according to articles 187.1 and 202 of the Constitution, the Statute has the effect of *lex specialis* and *lex posterior,* that is, with power to abrogate or amend any legislation then in force, as well as any other State acts of inferior normative rank, during the period of the "transition towards democracy to restore the validity of the Constitution." That is why the Statute has even been considered by some authors as a "constitutional normative

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[581] Available at http://www.acienpol.org.ve/cmacienpol/Resources /Pronuncia mientos/ Pronunciamiento%20sobre%20Estatuto%20de%20Transici% C3% B3n.%20def.pdf ; and in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitutcionalizacin democática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, Caracas 2019, p. 337 ff. Available at: http://allanbrewercarias. com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf."

[582] Article 187.1 states: "The National Assembly is responsible for: 1. Legislating on the matters of national competence and on the functioning of the various branches of the National Power."

act" and "a normative act superior to the formal laws;"[583] and "as a legislative act of constitutional rank, or at least, the authentic interpretation of the same Constitution, and consequently, of obligatory compliance under the principle of constitutional supremacy."[584]

That is also the reason why the *Transition Statute* includes in its text the statement that "Any action decreed by entities of the Public Branch to carry out the guidelines established in this Statute are also based on article 333 of the Constitution, and are mandatory for all authorities and public officials, as well as all individuals" (article 4). Conversely, in article 11 of the same *Transition Statute*, it is provided that no individual, invested or not with authority, will obey orders from the usurped authority, adding that public officials that cooperate with the usurpation, will be liable, as established in articles 25 and 139 of the Constitution. The same provision establishes that all public officials have the duty to comply with articles 7 and 333 of the Constitution in order to obey the orders of the legitimate Branches of Government in Venezuela, in particular those acts enacted in order to implement the *Transition Statute.*

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583 See José Duque Corredor, "Bloque Constitucional de Venezuela. Comentarios y reflexiones sobre el Estatuto de Transición de la dictadura a la democracia de Venezuela," Epilogue to the book: Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, IDEA, Editorial Jurídica Venezolana, Caracas/Miami 2019, pp. 321, 331-333 Available at: http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf)

584 See Asdrúbal Aguiar, "Transición hacia la democracia y responsabilidad de proteger en Venezuela: Mitos y realidades," prologue to the book: Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, IDEA, Editorial Jurídica Venezolana, Caracas/Miami 2019, p. 26, 39-40, available *at* http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf)

The *Transition Statute* was formally recognized by the National Academy of Political and Socials Sciences, in a Pronouncement issued on February 15, 2019, whereas it decided:

> *First*: To manifest its conformity with the constitutional legal regime established by the National Assembly in the *Statute governing the transition to democracy to restore the validity of the Constitution of the* Bolivarian *Republic of Venezuela,*" as an unknown political process that it is developing representing the popular sovereignty in order to reestablish the enforcement of the Constitution and achieve the conditions for the celebration of free, just, competitive elections.
>
> *Second*: Support in a special way the constitutional function of political conduction and direction of the State exercised by the National Assembly and its Board of Directors,; as well as constitutional functions of the President in Charge of the Republic, legitimately and in a temporal condition assumed, according to the Constitution and to the referred Statute, by Engineer Juan Guaidó, which must be exercised under the public law principle of coordination and parliamentary control, without subordination nor undo interferences," [585]

This means, the Academy supported in a special way the constitutional function of political conduction and direction of the State exercised by the National Assembly and its executive committee [*Junta Directiva*], as well as the constitutional functions of the President in Charge of the Presidency of the Republic, legitimately and in a temporary condition assumed by Engineer Juan Guaidó according to the Constitution and to the referred *Transition Statute.*

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[585] Available at http://www.acienpol.org.ve/cmacienpol/Resources/Pronunciamientos/Pronunciamiento%20sobre%20Estatuto%20de%20Transici%C3%B3n.%20def.pdf ; and in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitutcionalización democática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, Caracas 2019, p. 337 ff. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf."

II. THE NEW REACTION OF THE CONSTITUTIONAL CHAMBER AGAINST THE STATUTE FOR TRANSITION, ALSO EXPRESSED THROUGH AN INVALID UNILATERAL DECLARATION No. 6 OF FEBRUARY 8th, 2019, ISSUED EX OFFICIO

The *Transition* Statute, as was also expected, was the subject matter of another *unilateral declaration*, also issued *ex officio*, called "judgment" No. 6, of February 8, 2019,[586] by which the Constitutional Chamber, citing for this purpose:

> (i) the abovementioned judgment No. 2 of January 11, 2017, declaring the contempt of the National Assembly, the nullity of the act of installation of the same of January 5, 2017, and the appointment of its board of January 9, 2017, and the nullity and invalidity of any action of the National Assembly against what was decided therein;
>
> (ii) the aforementioned unilateral declaration *ex officio* No. 3 of January 21, 2019, which declared the Resolution of the National Assembly of January 15, 2019 to be invalid, "on the declaration of the usurpation of the Presidency of the Republic by Nicolas Maduro Moros and the restoration of the validity of the Constitution;" and
>
> (iii) the judgment No. 4 of January 23, 2019, where it made reference to previous decisions stating that "any action of the National Assembly and of any person or individual against what is decided herein shall be null and void of any validity and legal effect, without prejudice to the liability applicable."

Based on those previous decisions, the Constitutional Chamber declared null and void the *Transition Statute* towards democracy, without anyone having asked for it or having claimed it. The judgement said that the Transition Statute had been adopted, "in plain contempt and without a validly appointed or sworn in executive committee [*Junta Directiva*];" and furthermore, ratifying "that any action of the National Assembly and any person or individual against

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[586] Exp. No. 17-0001. See the "Notice" of the Decision at http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-declara-nulo-estatuto-que-rige-la-transicion-a-la-democracia-emanado-de-la-asamblea-nacional-en-desacato

what is decided herein will be null and void of any validity and legal effect."

This "unilateral statement" by the Chamber that is supposed to be a "judgment" made without any case or controversy, trial or process, without arguments made by anyone, and, -as has already said-, issued in violation of the most basic rules of due process, without legal effect, let alone the mention of alleged defects of unconstitutionality of the articles of the *Statute*, which no one has claimed and to which, of course, no one has responded, and that, according to the legal system, the Constitutional Judge is prohibited from "arguing" on his own account.[587]

The same applies to the Constitutional Chamber's claim to qualify the issuance of the above-mentioned *Statute* as an "act of force" or "coup d'état," when what the National Assembly has sought to achieve is precisely the cessation of the usurpation, which indeed is an act of force, and put an end to the "permanent coup d'état" that has been carried out by the Constitutional Chamber itself,[588] all of which has produced a "constitutional and legal abnormality,"[589] which is what it intended to overcome.

In any event, particularly with regard to the transitional regime of PDVSA and its subsidiaries provided in the *Statute*, in face of the

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587 See Allan R. Brewer-Carías, "Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela", in *Revista IURIDICA,* No. 4, Legal Research Center Dr. Aníbal Rueda, Arturo Michelena University, Valencia, July-December 2006, pp. 13-40 Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,4%20497.%20INCONSTITUCIONALIDAD%20DE%20OFICIO%20EN%20MATERIA%20DE%20JUSTICIA%20CONSTITUCIONAL.%20SANTIAGO%202006.pdf

588 See Allan R. Brewer-Carías, *La dictadura judicial y la perversión del Estado de derecho. El Juez Constitucional y la destrucción de la democracia en Venezuela,* (Prologue of Santiago Muñoz Machado), Ediciones El Cronista, Fundación Alfonso Martín Escudero, Editorial IUSTEL, Madrid 2017, pp. 30 ff.

589 See Claudia Nikken, *Consideraciones sobre las fuentes del derecho constitucional y la interpretación de la Constitución*, Centro para la Integración y el Derecho Público, Editorial Jurídica Venezolana, Caracas 2019, pp. 141 ff.

irregular functioning of the management that used to exist in such enterprises that put Venezuela's assets abroad at risk, the only "observation" issued by the Chamber was that "everything concerning acts of government corresponds to the President of the Republic as a body of the Executive Branch," which is precisely the reason why the National Assembly authorized the Interim President of the Republic to make the appointments provided for in the norm.

In addition, in face of this confrontational situation of the Constitutional Chamber against the National Assembly, and the existing national and international political situation, whereas Juan Guaidó, President of the National Assembly has been recognized as being in charge of the Presidency of the Republic, and the National Assembly has been recognized as the only legitimately elected body in the country, the legal and political ineffectiveness that the decisions of the Constitutional Chamber of the Supreme Tribunal of Justice is evident, in particular in the countries that have recognized them. Such recognition implies that the decisions of the National Assembly have all their legal effects, as is precisely the case in the United States and Colombia in the aforementioned court cases, where the judges have recognized Juan Guaidó as the legitimate President in charge of the Republic, and the National Assembly as the only legitimate representative of the people.

Regarding the election and swearing in of the executive committee [*Junta Directiva*] of the National Assembly, it was made, as it occurs each year, in January 2019, at the beginning of the ordinary session of the Assembly, according to the Constitution (articles 194 and 219). It ought to be noted that the Constitutional Chamber's claim of the issuance of the *Transition Statute* as an "act of force" or "coup d'état," is absolutely baseless. Conversely, what the National Assembly has sought to achieve is precisely the cessation of the usurpation, which indeed is an act of force, and put an end to the "permanent coup d'état" the Constitutional Chamber itself has participated in,[590] all of which has produced a

[590] See Allan R. Brewer-Carías, *La dictadura judicial y la perversión del Estado de derecho. El Juez Constitucional y la destrucción de la democracia en Venezuela,* Editorial Jurídica Venezolana, 2016 pp. 18; 51-59; 140; 194. Available at: http://allanbrewercarias.com/wp-content/ uploads /2016/06/

"constitutional and legal abnormality,"[591] that the Transition Statute was designed to overcome.

Under Venezuelan constitutional and legal system, the Constitutional Judge exercising the concentrated method of judicial review is banned from initiating *ex-officio* a process of nullity (judicial review) and then "argue" in it on his own account.[592] Regardless of this, the new "unilateral statement" by the Chamber, was pronounced without any action filed or any case or controversy, trial or process, without arguments made by anyone, as has already been said. It was issued in violation of the most basic rules and principles of due process as set forth in article 49 of the Constitution, not having legal effect and being null according to article 25 of the same Constitution; let alone the mention of alleged defects of unconstitutionality of the articles of the *Statute*, which no one had claimed and to which, of course, no one had responded. Such a decision, as already mentioned, and as it has been held by the US Supreme Court since 1895, cannot not be recognized by a US court, because it has not been issued by an independent and autonomous

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Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf

591 See Claudia Nikken, *Consideraciones sobre las fuentes del derecho constitucional y la interpretación de la Constitución*, Centro para la Integración y el Derecho Público, Editorial Jurídica Venezolana, Caracas 2019, pp. 141 ss.

592 See Article 32, Organic Law of the Supreme Tribunal Of Justice, in *Official Gazette* No. 39483 of August 9, 2010. See also in Allan R. Brewer-Carías, "Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela," in *Revista IURIDICA,* No. 4, Centro de Estudios Jurídicos Dr. Aníbal Rueda, Universidad Arturo Michelena, Valencia, Julio-Diciembre 2006, pp. 5-10. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content /II,4%20497.%20INCONSTITUCIONALIDAD%20DE%20OFICIO%20EN%20MATERIA%20DE%20JUSTICIA%20CONSTITUCIONAL.%20SANTIAGO%202006.pdf

judicial tribunal, respecting the principles and rules of due process and the right to defense.[593]

In connection with the transitional regime, for instance, in the case of *Petróleos de Venezuela S.A*. and its subsidiaries provided for in the *Statute*, in the face of the irregular functioning of the management that used to exist in such enterprises that put Venezuela's assets abroad at risk, the only "observation" issued by the Chamber in its ruling was that "everything concerning acts of government corresponds to the President of the Republic as a body of the Executive Power," which is precisely the reason why the National Assembly authorized the President in charge of the Republic to carry out the appointments of the Ad-Hoc Board of Directors provided for in the norm.

III. THE BASIC PROVISIONS ESTABLISHED IN THE *TRANSITION STATUTE* FOR THE DEFENSE AND PRTECTIONS OF INTEREST OF THE REPUBLIC AND ITS DECENTRALIZED ENTITIES ABROAD

As already mentioned, in Article 15 of the *Transition Satute*, the National Assembly regulated various mechanisms for the "defense of the rights of the Venezuelan people and government," providing for the possibility that the necessary decisions be "taken to that end;"

> "in order to ensure the safeguarding of the assets, goods, and interests of the Government abroad and to promote the protection and defense of the human rights of the Venezuelan people, all in accordance with the treaties, conventions, and international agreements in force."

These safeguard measures were therefore conceived to be applied abroad, that is, regarding the assets and interest of the Republic outside the country, and for that purpose Article 15 of the *Statute*, confirmed that the President of the National Assembly, is the "legitimate President in charge of the Republic" (article 14), and that "under article 333 of the Constitution," has the power to exercise, inter alia, the following powers, "subject to the authoritative scrutiny

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593 See US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895). Available at: https://supreme.justia.com/cases/federal/us/159/113/

of the National Assembly under the principles of transparency and accountability":

> "a. *Appoint Ad-Hoc Management Boards of Directors* to assume the management and administration of public institutes, autonomous institutes, state foundations, state civil associations or societies or State enterprises, including those incorporated abroad, and any other decentralized bodies, in order to appoint its administrators and, in general, to take the necessary measures for the control and protection of their assets. Decisions taken by the President in charge of the Republic shall be immediately complied with and shall have full legal effects."
>
> b. While the Attorney General of the Republic is validly appointed pursuant to Article 249 of the Constitution, in line with the provisions of Articles 15 and 50 of the Organic Law of the Office of the *Special Attorney General of the Republic*, the President in Charge of the Republic may designate the person to discharge the office of special attorney general for the defense and representation of the rights and interests of the Republic, the State-owned corporations and other decentralized entities of the Public Administration abroad. This special attorney will have the authority to appoint judicial attorneys-in-fact, even in international arbitration proceedings, and shall exercise the functions referred to in paragraphs 7, 8, 9 and 13 of Article 48 of the Organic Law of the Office of the Special Attorney General of the Republic, with the limitations arising from Article 84 of that Law and from this Statute. This representation shall be directed especially towards ensuring the protection, control and recovery of the State's assets abroad, and to carry out any action that may be necessary in order to safeguard the rights and interests of the State. The attorney so appointed shall have the power to carry out any action and exercise all the rights that would pertain to the Special Attorney General with regard to the assets referred to herein. To this end, he must satisfy the same conditions demanded by Law to hold the office of Attorney General of the Republic."

Therefore, according to these provisions of the *Transition Statute*, two main attributions were assigned by the National Assembly to the "President of the National Assembly, as President

in charge of the Republic," to be exercised "subject to the authoritative scrutiny of the National Assembly under the principles of transparency and accountability," for the purpose of protecting the assets and interest of the Republic outside the country, and therefore conceived to have their main effects abroad:

On the one hand, *to appoint a Special Attorney* in order to defend and represent abroad the rights and assets of the Republic, State-owned enterprises and the decentralized entities of Public Administration. Accordingly, and in spite of the "declaration" of the Constitutional Chamber No. 6, of February 8, 2019 against the *Transition Statute*, Interim President Juan Guaidó, through an administrative act dated February 5, 2019, appointed Mr. José Ignacio Hernández as Special Attorney General. This appointment was authorized by the Permanent Commission on Interior Policy of the National Assembly as was officially notified by letter of February 26, 2019 to the Secretary General of the National Assembly;[594] authorization that was approved by the National Assembly in Plenary Session of February 27, 2019. Such administrative act of appointment duly authorized by the National Assembly was later ratified by the same Assembly through a Resolution dated March, 19, 2019.[595]

Mr. Hernández began to perform his duties within the regulatory framework of the Transition Statute, assuming "the defense and representation of the rights and interests of the Republic, the state-owned enterprises and all other *decentralized entities* of Public Administration *abroad*,"[596] within the scope of Articles 15 and 50 of the Organic Law of the Office of the Attorney General of the

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[594] Letter from the Permanent Commission on Interior Policy of the National Assembly to the Secretary General of the National Assembly dated February 26, 2019.

[595] See *Legislative Gazette* No. 5 of March 19, 2019 pp. 6-7. Available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1567518481.pdf

[596] See the text in *Gaceta Legislativa*, No. 4, February 20, 2019. Available at: http://www.asambleanacional.gob.ve/gacetas

Republic.[597] On June 23, 2020, after Mr. Hernandez resigned his position, the Interim President Juan Guaidó by Decree No. 21 appointed Mr. Enrique Sánchez Falcón as Special Attorney General.[598]

On the other hand, also for protecting the assets and interest of the Republic outside the country, and therefore conceived to have their main effects abroad, the Transition Statute authorize the Interim President *to appoint Ad-Hoc Management Boards of Directors* to assume the management and administration of public institutes, autonomous institutes, state foundations, state civil associations or societies or State owned enterprises, as was the case of *Petróleos de Venezuela S.A* (PDVSA), and its subsidiaries, including those incorporated abroad, and any other decentralized bodies of the State, like the Central Bank of Venezuela, in order to appoint its administrators and, in general, to take the necessary measures for the control and protection of their assets .

The enumeration of the decentralized entities of the Venezuelan State in this provision of article 15.a of the *Transition Statute* is exhaustive. Almost all of them are expressly enumerated in the same text ("public institutes, autonomous institutes, state foundations, state civil associations or societies or State-owned enterprises"), adding the catch-all expression "any other decentralized body," including within this term, without doubt, the Central Bank of Venezuela a decentralized entity of the Venezuelan State .

This concept of "decentralized entity" is a general concept used in Venezuela public law in order to identify public "entities" or entities of the State, characterized by the fact that they have their own personality of public or private law (different to the legal person of the State – the Republic -), for the purpose of differentiating such entities, from the "organs" of the National State that comprise the

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[597] See the text of the Organic Law in in *Official Gazette* Extra Nº 6.210 of December 30, 2015, re-printed in *Official Gazette* Extra Nº 6.220 of March 15, 2016.

[598] See the text in *Gaceta Legislativa*, No. 24, July 1, 2020.

centralized government (the Ministries, for instance).[599] From the point of view of administrative law the distinction between organs and entities, gives origin to the classical distinction between central public administration and decentralized public administration, the latter being the decentralized entities of the State with their own legal personality.[600]

In particular, regarding Petróleos de Venezuela, article 34 of the same *Statute*, specifically referred the appointment of an Ad-Hoc management Board of Petróleos de Venezuela S.A. PDVSA (from now onwards: Ad-Hoc PDVSA Board), due to "the risks in which PDVSA and its subsidiaries are in as a result of usurpation," Interim President Guaidó, appointed such Ad-Hoc PDVSA, as a "transitional regime of PDVSA and its affiliates," to govern, "while such a situation persists."

That is to say, the *Transition Statute* expressly empowered the "President in charge of the Republic, under the authoritative control of the National Assembly and within the framework of the application of Article 333 of the Constitution," to appoint "the *Ad-hoc Management Board of Petróleos de Venezuela S.A*. (PDVSA) pursuant to Article 15, section a," of the *Statute*, so that the Ad-Hoc PDVSA Board "exercises the rights that correspond to PDVSA as a shareholder of *PDV Holding, Inc*." (article 34).

Accordingly, and also regardless the invalid and ineffective "declaration" of the Constitutional Chamber No. 6 of February 8, 2019 against the Statute for Transition, the National Assembly

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599 See Allan R. Brewer-Carías, "Sobre las personas jurídicas en el derecho administrativo: personas estatales y personas no estatales, y personas de derecho público y de derecho privado," in the book: Estudios de derecho público en Homenaje a Luciano Parejo Alfonso (Coordinadores: Marcos Vaquer Caballería, Ángel Manuel Moreno Molina, Antonio Descalzo González, Editorial Tirant lo Blanch, Valencia 2018, pp. 2093-2100. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/05/Brewer.-art.-personas-jur%C3%ADdicas.-Libro-Homenaje-Luciano-Parejo. pdf

600 See Allan R. Brewer-Carías, *Principios del régimen jurídico de la Organización Administrativa venezolana*, Editorial Jurídica Venezolana, Caracas 1991, pp. 117-120 ss. Available at: http://allanbrewercarias.net /Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II.1.62%20 PRINC.REG.JUR.ORG.ADM.%201991.pdf

passed on February 13, 2019 the "*Resolution by which it is authorized the appointment to serve as the intervention body, called "Ad-hoc Management Board," to assume the functions of the Shareholder's Assembly and Board of Directors of Petróleos de Venezuela S.A., to act on its behalf and, as the sole* shareholder *of PDV Holding, Inc., proceed to appoint its Board of Directors, and consequently to appoint the Board of Directors of Citgo Holding, Inc., and Citgo Petroleum Corporation."* [601] Based on this Resolution the President in charge of the Presidency of the Republic, Juan Guaidó, made appointed Messrs. Simon Antunes, Gustavo J. Velásquez, Carlos José Balza, Ricardo Alfredo Prada, and David Smolansky as the members of the Ad-Hoc PDVSA Board.[602]

The National Assembly, on April 9, 2019, at the request of Interim President Guaidó, issued a Resolution reforming the original Resolution of the National Assembly of February 12, 2019, extending the attributions assigned to the *Ad-Hoc PDVSA Board*, as well as the number of its members from seven to nine members, authorizing the Interim President to appoint the following individuals as such members of the *Ad-Hoc PDVSA Board*: Simón Altunez, Gustavo J. Velazquez, Carlos José Balza, Ricardo Alfredo Prada, Luis Pacheco, Claudio Martinez, León Miura, María Lizardo and Alejandro Grisanti, providing that the Presidency of the *Ad-Hoc PDVSA Board* was to correspond to Luis Pacheco (article 5). [603] The appointments were made by Decree No. 3 of the Interim President of

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[601] Available at: http://www.asambleanacional.gob.ve/actos/_acuerdo-que-autoriza-el-nombramiento-para-ejercer-los-cargos-del-organo-de-intervencion-llamado-junta-administradora-ad-hoc-que-asuma-las-funciones-de-la-asamblea-de-accionista-y-junta-directiva-de-pe.

[602] Published in *Legislative Gazette*, No 4, February 20, Available at: https://pandectasdigital.blogspot.com/2019/03/gaceta-legislativa-de-la-asamblea_20.html

[603] Acuerdo para la ampliación de las facultades otorgadas y el número de miembros de la Junta Administradora Ad-Hoc de Petróleos de Venezuela, April 9, 2019. Published in *Legislative Gazette*, No 6, April 10, 2019. Available at: https://asambleanacionalvenezuela.org/actos/detalle/acuerdo-para-la-ampliacion-de-las-facultades-otorgadas-y-el-numero-de-miembros-de-la-junta-administradora-ad-hoc-de-petroleosde-venezuela-sa-pdvsa

the Republic, of April 10, 2019. [604] The National Assembly, in June 11, 2019, authorized the appointment of Mr. Julián Cárdenas García as one of the members of the Ad-Hoc PDVSA Board, which was communicated to him by Interim President Juan Guaidó, by letter dated June, 12, 2019. [605]

In the aforementioned Resolution of April 9, 2019 of the National Assembly it was expressly provided that the Ad Hoc PDVSA Board "will exercise *all the powers that in accordance to the law, the by-laws and other regulations correspond to the Shareholders Meeting, the Board of Directors and the Presidency of PDVSA* and of its affiliated enterprises" por the exercise, among others, of "the legal representation of PDVSA and its affiliates" (article 2.2). In the same sense, in Decree No. 3 of April 10, 2019, the Interim President of the Republic, Juan Guaidó not only appointed the Ad-Hoc PDVSA Board, but more important, he also established "special rules" regulating the actions of such Ad-Hoc Board for the purpose of adopting the necessary measures to protect the interests, assets and rights of PDVSA, assigning in particular to the Ad-Hoc PDVSA Board the "*powers that corresponds to the Shareholders meeting, the Board of directors and the Presidency of PDVSA*" (Article 2).

This means that according to the National Assembly Resolution of April 9, 2029 and to the Decree No. 3 of the Interim President, the Ad-Hoc PDVSA Board has all the global attributions that corresponds to all the corporate organs of the Corporation (*Shareholders meeting, the Board of directors and the Presidency of PDVSA*), establishing Decree No 3, in addition, that these provisions "shall be applied *in a preferable and exclusive manner regarding the provisions contained in the By-laws of PDVSA* and its affiliates, and *of any other decree, document of incorporation or by law related with the matters hereto established*" (Article 15).

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[604] Published in *Legislative Gazette*, No 8, June 5, 2019. Available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1569936245.pdf

[605] Published in *Legislative Gazette*, No 9, July 3, 2019. Available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1568216208.pdf

Within the decentralized bodies of the Venezuelan State, another of particular importance is the Central Bank of Venezuela, so pursuant to the abovementioned provision of article 15 of the *Transition Statute*, Interim President Guaidó also appointed the members of the *Ad-Hoc* Administrative *Board of the Central Bank of Venezuela*, by issuing Decree 8 of July 18, 2019 (amended by Decree No. 10 of August 13, 2019 and by Decree No. 11 of 23 August 2019), in strict execution of what is provided by the *Transition Statute,* and in the Resolution issued by the National Assembly on July 16, 2019.[606]

Such appointment was possible because the Central Bank of Venezuela, although not being any of the entities expressly enumerated in article 15.a of the *Transition Statute* (*public institutes, autonomous institutes, state foundations, state civil associations or societies or State enterprises*), is one of the "other decentralized bodies" of the Venezuelan State also mentioned in the same provision, with the purpose of precisely assuring that all decentralized bodies of the Venezuelan State are within the scope of the *Transition Statute*.

In this case, the that National Assembly issued Resolution dated July 16, 2019, authorizing, as was summarized in the recitals of the Decree No. Decree 10 of August 11, 2019, "the appointment by the Interim President of the Republic, of an *Ad -Hoc Administrative Board of the Central Bank of Venezuela,* made up of five (5) members, *with the only purpose of representing such Institution en the contracts and other operations carried out abroad and related to the administration of the International Reserves*."[607] The Resolution, in fact, stated in article that the "the Ad-Hoc Board "*have the purpose of rescuing and protecting the international reserves owned by the*

[606] See in *Legislative Gazette* No. 11, August 28, 2019 Available at https://asambleanacional-media.s3.amazonaws.com/documentos/gaceta/gaceta_1570106471.pdf

[607] See in *Legislative Gazette* No. 11, August 28, 2019 Available at http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570106471.pdf

Republic, for whose purpose their functions are limited, therefore, the funds rescued may not be used or disposed of" (art. 1). [608]

Within the motives of the Resolution of July 16, 2019, as stated in its Recitals, were mentioned two previous Resolutions of the National Assembly: *first*, Resolution dated January 15, 2019, issued "to request to the countries of Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Panama, Paraguay, Peru, United States, Bulgaria, Russia, China, Turkey, Arab Emirates and of the European Union, for the protection "of assets of the Venezuelan State, In the face of the flagrant usurpation of the Executive Power on the part of citizen Nicolás Maduro, Moros, [Resolution] in which it was decided to protect the assets of the Venezuelan State, by virtue of the usurpation of the Executive National by Nicolás Maduro Moros;" [609] *second*, Resolution dated June 26 2018, through which the National Assembly "reject[ed] the appointment of Calixto Ortega Sánchez as President of the Central Bank of Venezuela, which declared the unconstitutionality and illegality of the procedure for the appointment of Calixto Ortega Sánchez as President of the Central Bank of Venezuela."[610]

Based on the aforementioned Resolution of the National Assembly dated July 16, 2019, Interim President Juan Guaidó, issued

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608 See in *Legislative Gazette* No. 10, August 14, 2019 Available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570197827.pdf

609 See "Acuerdo en solicitud de protección de activos del Estado Venezolano ante los países de Argentina, Brasil, Canadá, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Panamá, Paraguay, Perú, Estados Unidos, Bulgaria, Rusia, China, Turquía, Emiratos Árabes y la Unión Europea ante la flagrante usurpación del Poder Ejecutivo por parte del ciudadano Nicolás Maduro Moros, 15 enero 2019, Available at: http://www.asamblea nacional.gob.ve/actos/detalle/acuerdo-en-solicitud-de-proteccion-de-activos-del-estado-venezolano-ante-los-paises-de-argentina-brasil-canada-chile-colombia-costa-rica-guatemala-guyana-honduras-panama-paraguay-peru-estados-unidos-b-332

610 See "*Acuerdo de rechazo a la designación de Calixto Ortega Sánchez como Presidente del Banco Central de Venezuela*," 26 junio 2018, Available at: http://www.asambleanacional.gob.ve/actos/detalle/acuerdo-de-rechazo-a-la-designacion-de-calixto-ortega-sanchez-como-presidente-del-banco-central-de-venezuela-283

Decree 8 of July 18, 2019 (amended by Decree No. 10 of August 13, 2019), appointing the five members[611] of the *Ad-Hoc* Administrative *Board of the Central Bank of Venezuela,* based among others, in the following motives, as mentioned in its "Recitals:" *first*, that "currently the Central Bank of Venezuela is being usurped by whoever holds the position of President due to the supposed appointment authorized by the illegitimate and fraudulent National Constituent Assembly;" *second*, that the National Assembly on that in the session of June 16, 2019 "decided the appointment of five ad hoc directors of the Central Bank of Venezuela, in order to ensure its autonomy pursuant to article 318 of the Constitution." Consequently, through such Decree 8 of July 18, 2019 (amended by Decree No. 10 of August 13, 2019), the following five individuals: Ricardo Adolfo Villasmil Bond, Nelson Andrés Lugo Cordero, Manuel Rodríguez Armesta, Guaicoma Cuius Cortesía and Carlos Antonio Suárez Villarroel, were appointed members of the *Ad-Hoc* Administrative *Board of the Central Bank of Venezuela;* being the latter appointed President of the Bank (art. 1). [612]

The Decree No. 8 of July 18, 2019 was very precise by establishing that the Ad-Hoc Administrative Board "will act on behalf of the Central Bank of Venezuela before financial institutions domiciled abroad, as well as with international organizations, in relation to all contracts that that institution has signed or may sign for the *administration of international reserves, including gold, all to the purposes of administering the international reserves owned by the Republic*, according to the provisions of article 127 of the Central Bank Law" (art. 3). Article 5 of the Decree, also stated that "the legal representation of the Central Bank of Venezuela falls on the President of the Ad-Hoc Board, while judicial and extrajudicial representation falls on the Special Attorney" (art. 5). In addition, article 6 of the

611 According to article 15 of the Central Bank Law, the Board of the Bank is made up of the President and six members, one of which is the Minister of the National Executive in charge of the economic sector. Text of the Law available at: http://www.bcv.org.ve/marco/decreto-ley-del-banco-central-de-venezuela

612 See in *Legislative Gazette* No. 11, August 28, 2019 Available at http:// www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570106471.pdf

decree, included an express indication that the Members of the Ad-Hoc Administrative Board would "*accomplish their functions with autonomy*, without following instructions of the Presidency of the Republic, under the control of the National Assembly" (Article 6). This provision safeguarded the autonomy of the Institution.

IV. THE REACTION OF THE CONSTITUTIONAL CHAMBER AGAINST THE APPOINTMENTS OF THE SPECIAL ATTORNEY GENERAL, THE AD HOC BORAD OF PDVSA AND THE AD HOC MANAGEMENT BOARD OF THE CENTRAL BANK OF VENEZUELA MADE ACCORDING WITH THE TRANSITION STATUTE

As set out above, the Constitutional Chamber of the Supreme Tribunal issued unconstitutional *ex officio* and unilateral declarations in decisions No. 3 of January 21, 2019, and No. 6 of January 18, 2019, declaring the supposed nullity of the Resolutions and of the *Transition Statute* issued by the National Assembly. This was followed by the same Constitutional Chamber declaring the supposed nullity of the decisions adopted by the same National Assembly in execution of the said Transition Statute related to the appointments of the Special Attorney General of the Republic and of the Ad-Hoc Administration Board of the Central Bank of Venezuela, issuing for such effects, decisions No. 39 of February 14, 2019, No. 74 of April 11, 2019, and 247 of July 25, 2019.

All such decisions are null and void and ineffective in Venezuela and abroad, according to article 25 of the Constitution, because they violate all the rules and principles of due process declared in article 49 of the same Constitution.

In the case of the National Assembly *"Resolution by which the appointment to* serve as *the intervention body, called 'Ad-hoc Management Board,' is authorized to assume the functions of the Shareholder's Assembly and Board of Directors of Petróleos de Venezuela S.A., to act on its behalf and, as the sole shareholder of PDV Holding, Inc., proceed to appoint its Board of Directors, and consequently to appoint the Board of Directors of Citgo Holding, Inc., and Citgo Petroleum Corporation,"* dated February 13, 2019,

passed following the mandate contained in the *Transition Statute*, it was also expected that the Constitutional Chamber would rule *ex officio* purporting to annul it, which it did immediately, also by a unilateral and unconstitutional declaration or "judgment" No. 39 of February 14, 2019. [613]

Again, this new decision of the Constitutional Chamber is an invalid and unconstitutional judicial review ruling, issued ex-officio, which, as already explained, is prohibited in the Organic Law of the Supreme Tribunal of Justice. It was delivered by the Chamber only on the basis of its decision taken a week earlier, in the aforementioned judgment No. 6 of February 8, 2019, whereas the absolute nullity of the *Transition Statute* had been declared; also formulated, as already explained, without any process, case or controversy, that is, without trial or parties, without anyone having asked for it. In this case, it was based only, on its turn, the previous already referred to ruling issued by the same Constitutional Chamber two years before (No. 2 of January 11, 2017), whereas the National Assembly was declared to be in "contempt," and it was provided that the "action of the National Assembly and anybody or individual contrary to what is decided here will be null and void."[614]

All these "unilateral declarations," are no more than that, not having pursuant to the Venezuelan constitutional system of judicial review, any validity. They have been issued, in the process of confrontation of the Constitutional Chamber against the legitimately elected National Assembly, particularly after the parliamentary

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[613] Available at: https://www.accesoalajusticia.org/wp-content/uploads/2019/02/SC-39-14-02-2019.pdf

[614] Available at http://historico.tsj.gob.ve/decisiones/scon/enero/194891-02-11117-2017-17-0001.HTML . See comments to this judgment in Allan R. Brewer-Carías, *La consolidación de la tiranía judicial en Venezuela*, Editorial Jurídica Venezolana, Caracas 2017, pp. 21, 81, 116 ff. and 131 ff.. Available at: http://allanbrewercarias.com/wp-content/uploads/2017/06/ALLAN-BREWER-CARIAS-LA-CONSOLIDACI%C3%93N-DE-LA-TIRAN%C3%8DA-JUDICIAL-EN-VZLA-JUNIO-2017-FINAL.pdf) .

elections of December 2015, in which the Government lost the absolute majority control it used to have in such Assembly.[615]

In any case, in its "declaration" No. 39 dated February 14, 2019, the Constitutional Chamber, after analyzing the legal status of PDVSA in accordance with the Constitution (articles 302 and 303) and its own Bylaws, which regulates everything relating to the PDVSA Board of Directors, and its appointment by the President of the Republic, went on to state purely and simply that the above-mentioned Resolution was issued by the National Assembly "in pure and contumacious contempt of all the decisions of this Chamber as the highest instance of the constitutional jurisdiction of the Republic," simply resolving, and without anyone having asked, without trial or process, that the Resolution "is null and void, without legal effect, as it emanates from the National Assembly in serious and contumacious contempt," and it constitutes an "usurpation of the constitutional president of the Bolivarian Republic of Venezuela," with the Resolution constituting "a flagrant and gross violation of the Constitutional Text and the socio-economic system of the Republic."

In this new unilateral declaration No. 39, the Constitutional Chamber, again without trial or process, usurping the competences that would fall within the commercial courts, in addition, went on to declare that the Resolution "contains appointments of authorities of the Board of Directors of PDVSA and some of its Affiliate Companies, which are null and void," and usurping the competences that would fall within the criminal courts, further state that "those who appear there engage in crimes of usurpation of functions and other crimes of public action enshrined in the Venezuelan criminal legal order relating to corruption, organized crime, and terrorism, among others." I even issued various "precautionary measures" against the persons named in the Resolution, such as those of the "prohibition of leaving the country," "prohibition of selling and

615 See on the attempt of the Constitutional Chamber to suffocate the National Assembly in Allan R. Brewer-Carías, "Transition from Democracy to Tyranny through the Fraudulent Use of Democratic Institutions: The Case of Venezuela (1999-2018)," Lecture at the Clough Center for the Study of Constitutional Democracy, Boston College, Boston September 25, 2108. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/09/1218.-Brewer.-conf.-Transictiion-Democracy-to-Tyranny.-B.C.-2018.pdf.

compromising assets," and "blocking and freezing bank accounts," without them having any relation with any constitutional process as required by article 130 of the Organic Law of the Supreme Tribunal.

Again, as mentioned above with regard to the other unilateral and *ex officio* declarations issued by the Constitutional Chamber, in the current situation of confrontation of the Constitutional Chamber against the National Assembly, whereas the National Assembly has formally rejected and not recognized the decisions of the Supreme Tribunal of Justice, and in the existing national and international political situation, whereas the President of the National Assembly, Juan Guaidó, has been recognized as the person in charge of the Presidency of the Republic, and the National Assembly recognized as the only legitimately elected body in the country, the legal and political inefficiency that the decisions of the Constitutional Chamber may have is evident, in particular in those countries that have recognized the legitimacy of the National Assembly and the government of the Interim President, where such recognition implies that the decisions of the National Assembly have all their legal effects, as was for instance the case of the United States of America and of Colombia, where as detailed above, the Courts have recognized Juan Guaidó as the legitimate President in charge of the Presidency of the Republic, and the Assembly as the legitimate representative of the people.

Moreover, the act of appointment of the Ad-Hoc PDVSA Board by the President in charge, Juan Guaidó, dated February 8, 2019, and modified by decree of the same Juan Guaidó, dated April 10, 2019, is an administrative act, and as such, is solely and exclusively subject to judicial review by the Administrative Political Chamber of the Supreme Tribunal of Justice (article 259, 266.5 of the Constitution) and not the Constitutional Chamber.

This means that pursuant to article 26.5 of the Organic Law of the Supreme Tribunal of Justice, and article 23.5 of the Organic Law of Administrative Contentious Jurisdiction,[616] the Constitutional Chamber cannot adopt any ruling regarding such administrative acts; which is another reason to sustain that ruling No. 39 of February 14, 2019, in no case could affect the validity of the administrative acts

[616] *Official Gazette* No. 39.451, June 22, 2010.

issued by the President in charge, Juan Guaidó, appointing the directors of the Ad-Hoc PDVSA Board. Moreover, those administrative acts also enjoy a presumption of validity until declared null and void by the competent courts.

It follows that all the aforementioned appointment of the members of the *Ad-hoc Management Board* of Petróleos de Venezuela, S.A., made by the President of the National Assembly, Juan Guaidó Márquez, in his role as person in charge of the Presidency of the Republic and within the framework of the *Status of Transition to Democracy* of February 5, 2019, should be regarded as a constitutional and legal appointment, with all legal effects; just as the appointments made by the Ad-Hoc PDVSA Board, by the members of the Board of Directors of the company *PDV Holding, Inc.*; the appointment made by the members of the latter company of the members of the Board of Directors of *Citgo Holding Inc.*; and the appointment made by the members of the latter company of the members of the Board of Directors of the company *Citgo Petroleum Corporation,* all located outside the territory of Venezuela, should also be considered as constitutional and legal, within the framework of the same Statute.

After issuing the aforementioned ex officio decision No. 39 of February 14, 2019, the same Constitutional Chamber of the Supreme Tribunal on April 5, 2019, was requested by the representative of PDVSA in Venezuela to expand the precautionary measures that it had issued against in t, the persons appointed in the Ad-Hoc Management Board of Directors of PDVSA and of its affiliates through the aforementioned

Then, on the basis of the same arguments of the supposed situation of contempt of the National Assembly regarding previous decisions of the Constitutional Chamber issued since 2016, the same Constitutional Chamber, also ex-officio issued decision No. 74 of April 11, 2019,[617] not only ratified and expanded the precautionary measures according to what was requested, but also in an *ex-officio* way, without having being requested by anybody and without hearing anybody, proceed to ratified its prior purported declaration of the nullity of the appointment of the Ad-Hoc Management Board

[617] Text http://tsj.gob.ve/decisiones/scon/enero/74-240102-01-0934.HTM

of Directors of PDVSA made by Juan Guaidó, President in Charge of the Republic contained in Decree No. 3 of President in Charge Juan Guaidó, of April 10, 2019, in which he amended his previous decision on the matter,[618] as well as of the appointment of the Special Attorney General of the Republic in order to defend and represent the rights and interests of the Republic and all other Public Administration decentralized entities abroad.[619]

Specifically, the Constitutional Chamber, declared such Appointment of the Special Attorney General as "not having legal effects," considering that "the attribution assigned to him of taking care of the matters related to the Venezuelan oil industry, usurps the exclusive attributions of the President of *Petróleos de Venezuela S.A*. according to the By Laws of the company, declaring the Ad-Hoc PDVSA Board appointed by the National Assembly and Interim President Guaidó, also absolutely null.

As I have already stated this unilateral declaration, issued ex officio, No. 74 of April 11, 2019, as was also the case of the previous decisions No. 3 of January 21, 2019 and No. 6 of February 8, 2019, is also to be considered null and void, according to what is established in Article 25 of the Constitution, because having been issued in violation of all the rules and principles of due process, as declared in Article 49 of the Constitution; as well than in violation to what is established in article 32 of the Organic Law of the Supreme Tribunal of Justice.

Finally, following the same pattern of unilateral declarations aforementioned, issued *ex officio*, without any case or controversy, also in violation of all the most elemental rules and principles of due process enumerated in article 49 of the Constitution, the Constitutional Chamber of the Supreme Tribunal issued Decision

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618 *Legislative Gazette* N° 6, dated April 10, 2019. Available at: http:// www.asambleanacional.gob.ve/gacetas

619 On February 26, 2019, José Ignacio Hernández was appointed special Attorney General of the Republic. In the brief filed by the representative of PDVSA before the Constitutional Chamber, it was reported that he had send requests before the International Center for Settlement of Investment Disputes ICSID, and the lawyers representing PDVSA, objecting the legitimacy of the representatives of the Republic.

No. 247 of July 25, 2019,[620] in which it declared the absolute nullity of the "Resolution of the National Assembly rejecting the appointment of Calixto Ortega Sánchez as President of the Central Bank of Venezuela" passed on June 26, 2019; as well as of the "Resolution of the same National Assembly on the appointment of the Ad-Hoc Administration Board of the Central Bank of July 16, 2019." Consequently, the Constitutional Chamber, in a decision which was also an absolute nullity under article 25 of the Constitution because it was issued in violation of its article 49, purported to decide that the appointments of the said authorities of the Central Bank of Venezuela that could be made according to such Resolutions were to be deemed null and void.

This unilateral declaration of the Constitutional Chamber also began with the transcription of what the Chamber declared in its own previous and also unilateral ruling No. 6 of February 8, 2019, also issued *ex-officio*, in which it declared the *Transition Statute* null and void and without legal effects, considering it as an act of force that "had the ultimate purpose of repeal the constitutional text (article 333) and all the subsequent acts of the National Branch of Government" (*Poder Público Nacional*). Consequently, based in such previous unilateral declaration, the Constitutional Chamber in its decision No. 247 proceeded also in an unilateral *ex officio* way to declare that, due the fact that the "Resolution of the National Assembly rejecting the appointment of Calixto Ortega Sánchez as President of the Central Bank of Venezuela" passed on June 26, 2019, was issued based on the *Transition Statute*, declaring that it has the same legal consequences being also vitiated of absolute nullity.

The Constitutional Chamber, in addition, condemned the decision adopted by the National Assembly to notify of its Resolutions of appointment of the members of the Ad-Hoc Board of the Central Bank, to the authorities of the United Kingdom of Great Britain and Northern Ireland asking them to ignore such appointment, considering that it was issued "only for the purpose of attacking the socioeconomic system of the Nation and to break the constitutional

620 Available at: http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-declara-nulo-acuerdo-del-parlamento-en-desacato-para-designar-directorio-ad-hoc-del-bcv

order," then asking the same authorities of foreign countries to ignore such petition, considering it without legal effects and nonexistent as explained in the decision No. 6 of the same Chamber.

V. GENERAL COMMENT ON THE UNCONSTITUTIONALITY OF THE "NEW MODALITY" OF *EX OFFICIO* JUDICIAL REVIEW CREATED BY THE CONSTITUTIONAL CHAMBER OF THE SUPREME TRIBUNAL

All these previously mentioned "*unilateral declarations*" adopted *ex-officio* by the Constitutional Chamber of the Supreme Tribunal, specifically, the decisions No. 3 of January 21, 2019; No. 6 of February 8, 2019; No 39 of 14 February 14, 2019; No 74 of April 11, 2019 and No. 247 of July 25, 2019, issued by the Constitutional Chamber confronting the legitimately elected National Assembly, particularly after the parliamentary elections of December 2015 (when the Government lost the absolute majority control it used to have in such Assembly), amount to no more than that: "unilateral declarations" issued *ex officio* by the Constitutional Chamber, which under the Venezuelan constitutional system of judicial review, have no validity whatsoever on matters of judicial review, being null and void because they violate all the rules and principles of due process guaranteed in article 49 of the Constitution, and as established in article 25 of the same Text.

The situation of confrontation that provoked the unconstitutional means of judicial review reflected in these decisions was denounced by the Secretary General of the Organization of American States in his *Report* of June 2016, in which he expressed how the world has "witnessed *a constant effort by the executive and judiciary powers to prevent or even invalidate the normal functioning of the National Assembly*. *The Executive Power has repeatedly used* unconstitutional *interventions against the legislature, with the collusion of the Constitutional Chamber of the Supreme Tribunal of Justice. The evidence is clear* [...] These examples clearly demonstrate the *lack of independence of the judiciary*. The tripartite system of democracy has

failed, and the *judiciary has been co-opted by the executive power* [...].”[621]

In Venezuela, according to the Constitution there cannot be any sort of judicial review process without the existence of a case or controversy, that must have been initiated before the competent court through a demand, action or request filed by an interested party.622 That is, in Venezuela, no judicial review process can be initiated by the Constitutional Chamber of the Supreme Tribunal on its own initiative. The powers of the Constitutional Chamber to act *ex officio,* are limited solely to *existing judicial processes*.[623] That is why prior to 2019 when the present constitutional crisis in Venezuela arose, there had been no examples of any case of application of the concentrated method of judicial review with such characteristic of unilateral *ex officio* declarations issued in violation of the most elemental rules and principles of due process guaranteed by article

621 Text of Secretary-General Luis Almagro’s statement to the Permanent Council of the OAS, June 23, 2016, available at: http://www.el-nacional.com/poli-tica/PresentacindelSecretarioGeneraldelaOEAante_NACFIL20160623_0001.pdf.

622 See Allan R. Brewer-Carías, *El sistema de justicia constitucional en la Constitución de 1999 (Comentarios sobre su desarrollo jurisprudencial y su explicación, a veces errada, en la Exposición de Motivos),* Editorial Jurídica Venezolana, Caracas 2000 p. 78. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2090.%20EL%20SISTEMA%20DE%20JUSTICIA%20CONSTITUCIONAL%20DEFINITIVO.pdf

623 See Allan R. Brewer-Carías, Allan R. Brewer-Carías, “Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela,” in *Revista IURIDICA,* No. 4, Centro de Estudios Juridícos Dr. Aníbal Rueda, Universidad Arturo Michelena, Valencia, Julio-Diciembre 2006, pp. 5-10. http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,4%20497.%20INCONSTITUCIONALIDAD%20DE%20OFICIO%20EN%20MATERIA%20DE%20JUSTICIA%20CONSTITUCIONAL.%20SANTIAGO%202006.pdf; Juan Alberto Berríos Ortigoza, “El control concentrado de oficio de la constitucionalidad 2000-2011), en Revista Cuestiones Jurídicas de la Universidad rafael Urdaneta, Vol V, No. 2 (julio-diciembre 2011), pp.42-45. Available at: https://www.redalyc.org/pdf/1275/127521837003.pdf

49 of the Constitution, like those contained in the aforementioned unilateral *ex officio* declarations.

The system of judicial review in Venezuela, as in many other Latin American countries, is a mixed one, which combines the concentrated method of judicial review (Austrian Model) with the diffuse method of judicial review (American Model).[624] In the first system of judicial review (*Concentrated method of judicial review*), the Constitutional Chamber of the Supreme Tribunal is empowered to annul laws, acts of state with similar rank and value, and other acts issued in direct and immediate execution of the Constitution (like decree-laws, acts of government and acts of parliament) (articles 266.1 and 336 of the Constitution)[625] when they are challenged on grounds of unconstitutionality through the filing of a popular action (*action popularis*) (articles 266.1; 334 *in fine*; 336.1-336.4 of the Constitution).[626] This mean that a *concentrated method of judicial review* can be applied by the Constitutional Chamber, only when a popular action is filed by an interested party, and a judicial process is initiated and is underway according to the rules and principles of due process of law. No judicial review decision *annulling a law* can

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624 See Allan R. Brewer-Carías*, Judicial Review in Comparative Law,* Cambridge University Press, Cambridge 1989 pp. 275-287 Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849 fea5/Content/II.1.59.pdf; and *Judicial Review. Comparative Constitutional Law Essays, Lectures and Courses (1985-2011),* Fundación Editorial Jurídica Venezolana, Editorial Jurídica Venezolana, 2014, 1198 pp. 1079-1087. Available at: http://allanbrewercarias.com/wp-content/uploads /2014/ 02/JUDICIAL-REVIEW.-9789803652128-txt-PORTADA-Y-TEXTO-PAG-WEB.pdf

625 According to articles 259, 266.5 of the Constitution, administrative acts are not subjected to judicial review by the Constitutional Chamber, but only by the Political/Administrative Chamber of the Supreme Tribunal on grounds of unconstitutionality and illegality.

626 See Allan R. Brewer-Carías, *El control concentrado de la constitucionalidad de las leyes. Estudio de derecho comparado*, Editorial Jurídica Venezolana, Caracas-San Cristóbal 1994, pp. 50-52 Available at: http://allanbrewercarias. net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,% 2071.%20EL%20CONTROL%20CONCENTRADO%20DE%20LA%20 CONSTITUCIONALIDAD%20DE%20LAS%20LEYES%20ESTUDIO%2 0DE%20DERECHO%20COMPARADO.%20LIBRO%20ARBCDOC.pdf

therefore be issued by the Constitutional Chamber according to the Constitution, without a request (action, recourse) filed by a party before the Constitutional Chamber. In this sense a concentrated judicial review of constitutionality process cannot be initiated *ex officio* by the Constitutional Chamber, as did occur in the aforementioned Decisions No. 3, 6,74 and 247.

This principle is expressly established in article 32 of the Supreme Tribunal of Justice Organic Law (2010), which provides that the Constitutional Chamber exercises the "*concentrated control of constitutionality in the terms provided in this Law, by means of the filing of a judicial popular action* (*demanda*), in which case, being a matter of public policy, once the action is filed, the Chamber "could *supplement*, *ex officio*, the deficiencies of the claimant request." That is to say, in order for the Constitutional Chamber to decide on a concentrated process of judicial review of legislation, an action must be formally filed by an interested party, and only in cases of deficiencies of the request or complaint filed by the claimant is the Constitutional Chamber empowered to supplement, *ex officio,* such deficiencies. The only exception to this principle is established in article 34 of the same Organic Law of the Supreme Tribunal of Justice in cases in which in a particular judicial process (case or controversy), a court declares the inapplicability of a norm to the case, based in the exercise of a diffuse judicial review method, in which case the Constitutional Chamber may order to begin a process of nullity according to the provisions of the Organic Law. This can also occur, when the diffuse judicial review method is applied in a particular process by the same Chamber.

According to article 335 of the Constitution, when deciding on matters of judicial review, the Constitutional Chamber can declare that a particular interpretation on the content or scope of constitutional provisions and principles related to The core or holding of the decision in a particular case, that is, to the *thema decidendum*, is to be considered binding for the other Chambers of the Supreme Tribunal and for all the courts of the Republic.[627] This interpretation

[627] See Allan R. Brewer-Carías, "La potestad de la Jurisdicción Constitucional para interpretar la Constitutición con efectos vinculantes," en Jhonny Tupayachi S. (Coordinador), *El precedente constitucional vinculante en el*

must be expressly identified in the final decision of the specific constitutional process, which in any case, always must be initiated through a petition, an action or a recurse filed by an interested party; and it must be published in the *Official Gazette*.

In the second system of judicial review (*diffuse method*) (article 334, Second paragraph of the Constitution), all judges in the country, when deciding a particular case that must have been initiated by a party, that is, in a cases or controversy, have the power to give priority to the Constitution over statutory provisions, applying the Constitution and not the law, when they deem it would be unconstitutional.[628] In this second case, the courts do not "annul" the law, but only declare it inapplicable because its application would be unconstitutional. The court thus gives preference to the Constitution. In this system of judicial review also, the ruling by the court on matter of unconstitutionality may be adopted only when the court is deciding a case that has been initiated by means of a party's claim.

Until 2019, whether before or after the passage of the 1999 Constitution, we have never witnessed in Venezuela any decision by a constitutional judge similar to the aforementioned unilateral declarations issued by the Constitutional Chamber in 2019 under the Numbers, 3, 6, 74 and 247 (and Decision 39 relating to PDVSA), in which the Supreme Tribunal has adopted *ex officio* judgments exercising the concentrated method of judicial review, in judicial procedures that no party has initiated, and that consequently, have been initiated by the same Chamber, at its sole initiative, relying only on transcripts of parts of previous decisions, without any claim by a

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Perú (Análisis, comentarios y doctrina comparada), Editorial Adrus, Lima 2009, pp. 10-11. Available at: http://allanbrewercarias.com/wp-content/uploads/2011/02/638.II-4-648-LA-INTERPRETACI%C3%93N-VINCULANTE-DE-LA-CONSTITUCI%C3%93N-_Venezuela_.-Lima-2009.doc.pdf (pp. 10-11)

628 See Allan R. Brewer-Carías, "El método difuso de control de constitucionalidad de las leyes en el derecho venezolano," en Victor Bazán, *Derecho Procesal Constitucional Americano y Europeo*, Edit. Abeledo Perrot, Tomo I, Buenos Aires 2010, pp. 15-20. Available at: http://allanbrewercarias.com/wp-content/uploads/2010/05/643.-634.-El-m%C3%A9todo-difuso-de-control-de-constitucionalidad-en-Venezuela.-Brewer.-VBaz%C3%A1n-Argentina-2008.doc.pdf

party, without hearing any legal argument and without giving any party the right to be heard.

These decisions are contrary to the constitutional right to due process and to self-defense declared in article 49 of the Constitution, and are therefore null and void according to article 25 of the same Constitution. Thus, they have no legal value or effect in the Venezuelan system of judicial review, and consequently, having being issued in violation of the most fundamental principles and rules of due process of law, they cannot be considered as legitimate judicial decisions, being in my opinion impossible for a court of a democratic rule of law state to recognize as legitimate judicial rulings.

VI. THE RECOGNITION OF THE DECISIONS ISSUED BY THE NATIONAL ASSEMBLY REGARDING THE PROTECTION OF THE ASSETS OF THE REPUBLIC ABROAD BY FOREIGN COURTS

In any event, in the face of the confrontational situation of the Constitutional Chamber against the National Assembly, and the existing national and international political situation, whereas Juan Guaidó, President of the National Assembly has been recognized as to be in charge of the Presidency of the Republic, and the National Assembly has been recognized as the only legitimately elected body in the country, the legal and political inefficiency that the decisions of the Constitutional Chamber of the Supreme Tribunal of Justice may have is evident, in particular in the countries that have recognized them. As already mentioned, such decisions, issued ex-officio in violation of all the rules and principles of due process declared in article 49 of the Constitution, must be considered null and void in terms of article 25 of the Constitution. In the United States, US Courts are bound to ignore them, since as already mentioned, as a matter of comity, only foreign judicial decision issued by an independent and autonomous judicial tribunal, respecting the principles and rules of due process and the right to defense, may be recognized.[629]

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[629] See US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895). Available at: https://supreme.justia.com/cases/federal/us/159/113/

On the same token, the recognition of the National Assembly and of the Interim President of the Republic results in the recognition of their decisions by foreign courts, as has occurred in countries like the United States and Colombia where the courts have recognized Juan Guaidó as the legitimate President in charge of the Republic, and the National Assembly as the only legitimate representative of the people.[630]

For example, the *United States Court of Appeals for the District of Columbia*, in an Order issued on May 1, 2019, in the case of *Rusoro* Mining *Ltd. vs. Bolivarian Republic of Venezuela.* No. 18-7044, Doc. No. 1785518 (D.C. Cir. May 1, 2019), considering a request made to prevent the representatives of the government of Juan Guaidó, President of the National Assembly and, as such, President in charge of the Republic, from being accepted to represent Venezuela in litigation, denied the request and accepted such representation, stating:

> "The application includes a request by the administration on Nicolas Maduro to bar Juan Guaidó and his representatives from arguing this appeal on behalf of Venezuela. On January 23, 2019, the Executive Branch of the United States recognized Guaidó as Interim President of Venezuela. "What government is to be regarded here as representative of a foreign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938)*. The executive branch's "action in recognizing a foreign government… is conclusive on all domestic courts, which are bound to accept that determination…" *Id.* At 138. Furthermore, "the rights of a

630 See the references to such cases in Allan R. Brewer-Carías, "Presentation on "Some Constitutional and Legal Challenges posed by the process of transition towards democracy decreed by the National Assembly of Venezuela, Since January 2019," at the Event on "Perspectives on Venezuela: Present and Future Challenges," organized for the Launching of the New York Chapter of the Inter-American Bar Association (*Federación Interamericana de Abogados*), New York, 17 July 2019, pp. 49-51. (Text available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/1232.-Brewer.-Constitutional-challenges.-Process-Transcition-towards-Democracy.-FIA.-17-July-2019-1.pdf)

> sovereign state are vested in the state rather than in any particular government which may purport to represent it, and . . . suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our government as the authorized government of the foreign state." Id. At 137; see also Pfizer v. Government of India, 434 U.S. 308, 319-20 (It has long been established that only governments recognized by the United States … are entitled to access to our courts."[631]

This decision has been followed, inter alia, by the *United States District Court for the District of Columbia*, in a *Memorandum of Opinion* issued in the case *OI European Group B.V., vs. Bolivarian Republic of Venezuela*, Civil Action No. 16-1533 (ABJ), 21 May 2019.632 In other cases, and in the same sense, the Courts have accepted as representatives of *Petróleos de Venezuela S.A*. those appointed in accordance with the provisions of the *Transition Statute* towards democracy adopted by the National Assembly, as is the case with the decision issued by the United *States District Court of New York,* in the case *Red Tree Investments, LLC v. Petróleos de Venezuela S.A*., Order 19-cv-2519 AJN, May 6, 2019; 633 and the case with the decision issued by Court of Chancery of the State of Delaware *Rodolfo Enrique Jiménez Et Al Vs. Luisa Palacios, Edgar and PDV Holding, Inc., Citgo Holding, Inc., and Citgo Petroleum Corporation,* August 2, 2019.634 In the later, on the matter of

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631 Available at https://www.italaw.com/sites/default/files/case-documents/italaw10521.pdf

632 Pp. 7-10. Available at https://www.italaw.com/sites/default/files/case-documents/ italaw10546.pdf

633 Available at https://www.courtlistener.com/recap/gov.uscourts.nysd.512231 / gov.uscourts.nysd.512231.33.0.pdf

634 On the matter of analyzing the decisions of the Constitutional Chamber of the Venezuelan Supreme Tribunal, the Court of Chancery of the State of Delaware in its decisions argued as follows: "In case this court were to rule otherwise, the defendants argued that the Venezuelan Constitutional Court's decision is unworthy of deference, and they invoke a series of multifactored tests for recognizing foreign judgments under federal and Delaware law. *See* Defs.' Ans. Br. 19-26. This decision need not conduct this analysis, as the

analyzing the decisions of the Constitutional Chamber of the Venezuelan Supreme Tribunal, the Court of Chancery of the State of Delaware argued as follows:

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act of state doctrine resolves this issue. The act of state doctrine requires that this court assume the official act of the Guaidó government as valid, precluding this court from giving deference to the Constitutional Court's ruling purporting to invalidate the Guaidó government's appointments to the PDVSA board. Moreover, as discussed *infra* nn.120–21, the recognition of one sovereign government must be construed to exclude other bodies, including legal tribunals, from purporting to wield authority on behalf of a different government. Underscoring this point, the U.S. Executive Branch has taken the extraordinary step of declaring the Constitutional Court of Venezuela to be illegitimate and sanctioning the members of that tribunal. Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Eight Members of Venezuela's Supreme Court of Justice (May 18, 2017), *available at* https://www.treasury.gov/press-center/pressreleases/Pages/sm0090.aspx" pp. 18-30. Available at: https://courts.delaware.gov/Opinions/Download.aspx?id=293330

https://www.treasury.gov/press-center/pressreleases/Pages/sm0090.aspx."[635]

More recently the United States District Court for the Southern District of Texas Houston Division, in its judgement issued on May 20, 2020 (Case: *Impact Fluid Solutions LP; aka Impact Fluid Solutions LLC vs Bariven S.A*.) (Civil Action No. 4:19-CV-00652), considering that "the United States has recognized Interim President Guaidó as the legitimate leader of Venezuela" when "on January 23, 2019, the President issued a statement "officially recognizing the President of the Venezuelan National Assembly, Juan Guaidó as the Interim President of Venezuela;" ruled that:

> "it is beyond the adjudicative powers of this Court to question the Executive Branch's recognition of the Guaido Government. The Supreme Court has held that the Executive Branch holds the exclusive power to recognize foreign nations and governments. *Zivotofsky,* 576 U.S. 1. In light of *Zivotofsky* and the acts by the President and State Department officially recognizing the Guaidó Government, the Court need not inquire any further into the legitimacy of Interim President Guaidó. […] the legitimacy of Interim President Guaidó confers presumptive validity to the acts of his regime that occur within Venezuela, including commercial acts." (p. 5)[636]

The conclusion of the United States District Court for the Southern District of Texas Houston Division was then to recognize the validity and legal effects of the Transition Statute enacted by the National Assembly, as well as all acts passed by Juan Guaidó as Interim President of Venezuela declaring that:

> "the Court will not question the validity of any laws promulgated by the Venezuelan National Assembly or any acts taken by Interim President Guaidó pursuant to those laws. In accord with other courts confronted by similar issues, this

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635 *Idem*, p. 34

636 Available at: https://www.courtlistener.com/recap/gov.uscourts.txsd.1640090/gov.uscourts.txsd.1640090.55.0.pdf

recognition extends to acts regarding the management of Venezuela's state-owned corporations." (p. 6) [637]

Specifically, regarding the *Transition Statute* and the appointment of the Ad-Hoc *Management* Board of PDVSA, the Court affirmed that:

> "The *Transition Statute* empowered Interim President Guaidó to appoint an Ad Hoc Management Board of PDVSA to "exercise the rights of PDVSA as a shareholder of PDV Holding, Inc." (Doc. No. 38-5 at 20). Pursuant to the authority vested in him by the Transition Statute, Interim President Guaidó appointed five individuals to form the Ad-Hoc Management Board. On April 5, 2019, the National Assembly passed the Resolution. (Doc. No. 52-1). Under the Fourth Article of the Resolution, the "Ad-Hoc Management Board of [PDVSA], together with the Special Prosecutor appointed by the President in charge of the Republic shall exercise the legal representation of [PDVSA], and its subsidiaries abroad." (p. 9) [638]

The same situation can be observed, for instance, in Colombia, where the Supreme Court of Justice, Criminal Cassation Chamber, in a ruling of June 12, 2019, due to the fact that on January 23, 2019 "the President of Colombia has recognized the President of the National Assembly, Juan Guaidó, as Interim President of the Bolivarian Republic of Venezuela," and that on February 23, 2019, it "received the credential letters of Humberto Calderón Berti, as Ambassador of Venezuela, appointed by the President of such State, Juan Guaidó;" the Court decided to terminate the extradition procedure in the case, initiated against Suyin Navarrete Balza at the request, in September 2018, of the Prosecutor General appointed by the National Constituent Assembly, due to the fact that the new Ambassador appointed by the Interim President, Juan Guaidó, Humberto Calderón Berti, on May 15, 2019, requested the termination of the extradition procedure, because it was requested by some one that "was usurping the functions of the Prosecutor General of the Republic," and that had "used the Venezuelan judicial system

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637 *Idem*

638 *Idem*.

in order to initiate a political persecution against such person."[639] In such way, the Supreme Court of Justice of Colombia formally recognized the Ambassador appointed by the Interim President of Venezuela, Juan Guaidó as the legitimate representative of that country in Colombia.

639 See the text, *Case AP2269-2019. Radicación No. 5425*, in http://www.cortesuprema.gov.co/corte/wp-content/uploads/2019/06/AP2269-2019.pdf

PART SIX

THE LAST BLOW AGAINST THE EFFORTS TO RESTORE DEMOCRACY

All the aforementioned process of transition for democracy decreed by the National Assembly since January 2019, received one important blow between June and July 2020, in the midst of the quarantine illegitimately imposed due to the Covid-19 pandemics,[640] given by the Constitutional Chamber of the Supreme Tribunal of Justice by setting up a great "electoral circus" in order to held parliamentary elections in December 2020. For such purpose, the Chamber usurped the functions of the National Assembly by appointing the members of the National Electoral Council, ordering them to unconstitutionally convene such parliamentary elections and to modify the Organic Law on Electoral Processes, a function that only corresponds to the National Assembly; and, further, by assaulting and sequestering the main political parties of the opposition and others, to place them at the orders of the regime and turning them into false participants of the planned electoral farce.

On the other hand, another blow to restore democracy, was the one given by the unconstitutional Constituent Assembly elected in 2017, by approving in October 2020, an unconstitutional so-called "Constitutional Law Anti-blockade" in order to change the economic policy ignoring the legal order.

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640 See Allan R. Brewer-Carías and Humberto Romero Muci (Editors), *Estudios Jurídicos sobre la Pandemia del Covit-19*, Academia de Ciencias Políticas y Sociales, Caracas 2020.

Chapter XVI

THE "ELECTORAL CIRCUS" ORGANIZED BY THE CONSTITUTIONAL CHAMBER OF THE SUPREME TRIBUNAL CALLING FOR AN UNCONSTITUTIONAL PARLIAMENTARY ELECTIONS FOR DECEMBER 2020 *

The Constitutional Chamber of the Supreme Tribunal of Justice in effect, began to stage the "Electoral Circus" with its decisions No. 68, 69, 70, 71, 72, 73 and 77, all issued between June 9 and July 7, 2020, to allegedly hold the aforementioned "legislative elections" on December 6, 2020, which, if held, can only be deemed to be null and void.

All this judicial activity began on June 4, 2020, when a group of citizens made up by a few known political leaders (Javier Bertucci, Claudio Fermín, Timoteo Zambrano, Felipe Mujica, Luis Romero, Rafael Marín, Juan Alvarado and Segundo Meléndez), some of whom were even former members of the Constituent Assembly of 1999, in their capacity as mere voters, requested that the Constitutional Chamber of the Supreme Tribunal of Justice declare the "legislative omission" by the National Assembly regarding the designation of the Rectors of the National Electoral Council according to the prevailing constitutional and legal provisions, adding an even more absurd petition for it to order such Council to "legislate" on electoral matters.

On the same date, the Constitutional Chamber admitted the "petition" and on the following day –yes, the exact following day, as

* Text written for the Presentation at the event "*Parliamentary Elections: Unconstoitutionality and Illegitimacy,"* organized by the Venezuelan Academy of Political and Social Sciences, September 17, 2020.

if it were all part of a previously written "script"-,[641] without having summoned, notified or heard any persons, and therefore, without contradiction, that is, without any judicial proceeding or trial (case and controversy), and breaching the m5ost elementary rules of due process set forth in Article 49 of the Constitution, by means of decision No. 68 of June 5, 2020,[642] decided the motion by *declaring the constitutional omission* by the National Assembly regarding the designation of the members of the National Electoral Council, *overriding articles* of the Organic Law of Electoral Processes, *ordering* the National Electoral Process to assume legislative functions and *ordering* it to adjust the electoral status regulations for the election of the indigenous representatives, according to their traditions and customs.

This decision, adopted in a "trial" with no parties that lasted only one day, the contents of which were made known more than ten days after, must be deemed null and void, according to the provisions of Article 25 of the Constitution.

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641 A few weeks after, one of the members of the National Electoral Council designated by the Constitutional Chamber, Rafael Simón Jiménez, would say about all it did, that "*to a certain extent we get things, let's say, "precooked" (from the "little board"), as when you go to get a pizza and you only have to put it for the last minutes in the oven,"* See, Víctor Amaya, "Rafael Simón Jiménez dice que el CNE recibe el mandado hecho desde la «mesita»," ein Tal Cual, Julio 13, 2020, available in: https://talcualdigital.com/las-confesiones-de-rafael-simon-jimenez-el-cne-recibe-el-mandado-hecho-desde-la-mesita/ This member of the Electoral Council resigned in August 2020, and was replaced by the Constitutional Chamber through decision No. 83 of August 7, 2020. See the information in: https://cnnespanol.cnn.com/2020/08/07/tsj-de-venezuela-designa-a-leonardo-morales-como-nuevo-vicepresidente-del-cne/

642 See http://historico.tsj.gob.ve/decisiones/scon/junio/309870-0068-5620-2020-20-0215.HTML

I. THE BIZARRE COMPLAINT FILED BEFORE THE CONSTITUTIONAL CHAMBER FOR LEGISLATIVE OMISSION

If analyzed in detail, the petition filed before the Chamber (according to the summary made by the Chamber itself in the text of the decision), one can see two separate "denunciations" for alleged "legislative omission."

In the first place, *a complaint requesting the declaration of legislative omission* regarding the election of the members (Rectors) of the National Electoral Council by the National Assembly, to which the plaintiffs unduly added an alleged *action for nullity* of all actions of the National Assembly for allegedly being in contempt.

Secondly, *another absurd and alleged "complaint" for "legislative omission,"* but not because the Assembly had failed to legislate on electoral matters (since the Organic Law on Electoral Processes was issued in 2009), but because, in the petitioners' view, the National Assemble had not "reformed" the electoral legislation according to what they thought, that is, according to the personal criterion of the plaintiffs. Based on such arguments, no "omission" could be alleged regarding the observance of a constitutional mandate to legislate. The National Assembly is not constitutionally obliged to legislate according to the personal criterion of every citizen of the country.

As grounds for the first petition, the claimants referred to the alleged existence of two boards of directors of the National Assembly for the 2020-2021 term, supposedly sworn in on January 5, 2020,[643] and to the status of "*contempt in which the National Assembly was immersed"* as had been decreed by the Constitutional Chamber itself since 2016, all of which made it "unlikely for it to be able to observe

[643] On these events, see Allan R. Brewer-Carías, "La instalación de la Asamblea Nacional de Venezuela el 5 de enero de 2020 y desalojo de los *okupas* del Palacio Federal Legislativo," Jan. 7, 2020. Available at: http://allanbrewercarias.com/wp-content/uploads/2020/01/202.-Brewer.-INSTALACI%C3%93N-AN-EL-5-DE-ENERO-DE-2020-Y-DESALOJO-DE-LOS-OKUPAS.pdf

the *constitutional and legal parameters required to effect the respective designations."* From there, they requested the "*the intervention of the Constitutional Chamber to guarantee the constitutional order (Articles 266.1 and 335 eiusdem), regarding the designation of the electoral authorities, as it has done by issuing decisions No.1865 and No. 1086 dated December 26, 2014 and December 13, 2016,"* referring to two previous occasions in which, the Constitutional Chamber had already unconstitutionally appointed the members of the National Electoral Council.[644]

As to the second request about the supposedly alleged "legislative omission," the petitioners only expressed their opinion that the current Organic Law on Electoral Processes was "*over-representing the personalization of the suffrage, to the detriment of its proportionality"* regulated in Article 63 of the Constitution, and requested the Chamber to examine the provisions of Articles 14 and 15 of the Organic Law of Electoral Processes, *"...for the purpose of overriding, replacing or amending them"* in order to guarantee those principles, and to set forth its opinion on the advisability of *"incorporating the concept of national or federal representatives for the purpose of offsetting the proportional representation."* The petitioners also considered that there should be "*guaranteed the will of the sovereign expression of the indigenous at the time of selecting their representatives to the National Assembly."* Regarding this opinion implying reforms that the petitioners deemed necessary, they only stated that the representatives of the current National Assembly had not progressed much in the review of the electoral legislation.

What is important is to note that regarding these "opinions" that the petitioners referred to on the reform of the electoral system, they did not request the Chamber to order the Assembly to legislate on them –which would have been absolutely unconstitutional-, but they asked for another thing, twice as unconstitutional, which was that the Constitutional Chamber itself "…*order the National Electoral*

644 Regarding these decisions, see: Allan R. Brewer-Carías, *Sobre la democracia*, (con Prólogo de Mariela Morales Antoniazzi). Editorial Jurídica Venezolana, New York / Caracas 2919, pp. 417 ss.

Council to set forth the procedures for allocating representatives to the National Assembly by applying the National Electoral Quotient, and establishing it according to its normative and procedural aspects…" and for this, they requested the "*amendment*" of Articles 7, 10 and 10 of the Organic Law on Electoral Processes (which could only be done by the Legislature), as well as a review of the rules relating to indigenous representation.

II. DECISION ON THE "LEGISLATIVE OMISSION" AND THE UNCONSTITUTIONAL APPOINTMENT OF THE MEMBERS OF THE NATIONAL ELECTORAL COUNCIL BY THE CONSTITUTIONAL CHAMBER

The Constitutional Chamber immediately went on to decide, based on the false assumption that the petitioners had based their petition on the Constitutional Chamber's decision No. 65 of May 26, 2020, whereby it had declared as "valid" the election of the Board of Directors of the National Assembly of January 5, 2020, chaired by deputy Luis Parra,[645] and the consideration that with this decision, supposedly the status of contempt referred to previously in decision No. 0003/2019 and previously in decisions Nos. 808/2016, 810/2016, 952/2016, 1012/2016, 1013/2016 y 1014/2016,[646] had been settled.

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645 See comments on this decisión in: Allan R. Brewer-Carías, "La instalación de la Asamblea Nacional de Venezuela el 5 de enero de 2020 y desalojo de los *okupas* del Palacio Federal Legislativo," Jan 7, 2020. Available at: http://allanbrewercarias.com/wp-content/uploads/2020/01/202.-Brewer.-INSTALACI%C3%93N-AN-EL-5-DE-ENERO-DE-2020-Y-DESALOJO-DE-LOS-OKUPAS.pdf

646 Obviously, as noted by the Academy of Political and Social Sciences in 2018, this "alleged" contempt that the Chamber imputes to the parliamentary body since early 2016," …not only does not exist juridically, but has been an artifice made up by the Supreme Tribunal of Justice to prevent the National Assembly that was elected in December 2015, from exercising its constitutional attributes." (Opinion of the Academy of Political and Social Sciences on the required independence and impartiality of the National Electoral Council as an essential guaranty for holding free and democratic elections, of March 3, 2018). On this notion of contempt, which I have

Nonetheless, the Chamber deemed that the National Assembly's situation of contempt persisted, and made impossible for it to exercise its competences of appointing the members of the National Electoral Council. Therefore, deeming that it was urgent to do so, the Chamber, by means of decision No. 69 of June 10, 2020,[647] decided that by a "separate decision, it would proceed to appoint the Principal Rectors and alternates of the National Electoral Council." However, for this purpose, in the text of decision No. 69, after considering that, since the National Assembly was in "contempt" and all its actions were void, it "urged" the members of the Electoral Nominations Committee of the National Assembly allegedly in "contempt" to immediately submit to the Chamber "the list of citizens pre-selected as members of the National Electoral Council." The Assembly did not comply and the Chamber, two days later, by means of decision No. 70 of June 12, 2020,[648] appointed the following five principal rectors: Indira Maira Alfonzo Izaguirre, as Chairwoman; Rafael Simón Jiménez Meleán, as Vice-Chairman and Tania D'Amelio Cardiet, José Luis Gutiérrez Parra, and Gladys María Gutiérrez Alvarado**.** All of whom, as noted by José Miguel Vivanco, from Human Rights Watch, "are supporters of the official governing party, including two former justices of the Supreme Tribunal who have

commented more than once (See Allan R. Brewer-Carías, *La consolidación de la tiranía judicial. El Juez Constitucional controlado por el Poder Ejecutivo, asumiendo el poder absoluto,* Colección Estudios Políticos, No. 15, Editorial Jurídica Venezolana International. Caracas / New York, 2017), Rafael Badell Madrid, has rightly stated that it is "a special class of sanction against the National Assembly, entirely unconstitutional, indeterminate, indefinite and unlimited in time." (See Rafael Badell Madrid, "Algunas consideraciones sobre las inconstitucionales sentencias de la *Sala* Constitucional relativas al nombramiento de las autoridades del Consejo Nacional Electoral" (in process of publication in *Boletín de la Academia de Ciencias Políticas y Sociales* No. 160, Jan-June 2020, Academia de Ciencias Políticas y Sociales, Caracas, 2020). Available at: http://badellgrau.com /?pag=229&ct=2600)

647 See at http://historico.tsj.gob.ve/decisiones/scon/junio/309871-0069-10620-2020-20-0215.HTML

648 See at http://historico.tsj.gob.ve/decisiones/scon/junio/309872-0070-12620-2020-20-0215.HTML

issued several decisions in favor of the government. Three of them are subject to sanctions issued by the United States, Canada, Panama or members of the Inter-American Treaty of Reciprocal Assistance."[649]

With these designations, the Chamber breached Article 296 of the Constitution, which requires that the members of the National Electoral Parties be "persons not related to political organizations: three of them nominated by the civil society, one by the faculties of juridical and political science of national universities, and one by the Citizens' Power," and shall be designated in second-degree election by the National Assembly "with the vote of two-thirds of its members."[650]

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649 See, Human Rights Watch, José Miguel Vivanco, "Venezuela: Sentencias ponen en jaque elecciones libres y justas. El Tribunal Supremo adepto al gobierno coopta a partidos opositores y a la autoridad electoral 7-7-2020. https://www.hrw.org/es/news/2020/07/07/venezuela-sentencias-ponen-en-jaque-elecciones-libres-y-justas

650 These constitutional rules are mandatory and, as we have held since 2004, cannot be avoided and ignored with the excuse of an alleged legislative "omission." As noted by the Academy of Political and Social Sciences: "The unconstitutional Constitutional Chamber goes against the democratic right of political participation of all Venezuelans in the structuring of the bodies that exercise the public powers, because the constitutional power to designate the heads of constitutional bodies is exercised by the National Assembly representing the will of the people through the vote of two-thirds of its members. This is an extension of the people's vote by means of the indirect political participation of citizens through their elected representatives, ensuring the citizens' participation in the nomination of candidates through the Nominations Committee. Thus, if this power is usurped or voided, there is a breach of the right to political participation and representation as the essence of the Venezuelan people's right to democracy. See Academia de Ciencias Políticas y Sociales. Pronunciamiento de la Academia de Ciencias Políticas y Sociales con relación a las sentencias de la Sala Constitucional del Tribunal Supremo de Justicia, Jun 18, 2020 Available at: https://www.acienpol.org.ve/wp-content/uploads/2020/06/Pronunciamiento-ACPS-contra-sentencias-68-69-70-71-72-SC.pdf. On this matter, Rafael Badell has properly noted that "this election consists of the designation of officials who, although not elected by a popular election, as is the case of the Representatives

In any event, violating these provisions, the Constitutional Chamber appointed the members of the National Electoral Council and had them sworn in on the same day, "ordering" them "to call the elections for representatives to the National Assembly, whose current term expires on January 4, 2021."

This decision by the Constitutional Chamber to appoint the members of the National Electoral Council is obviously unconstitutional from its onset, for violating the representative and participative democratic principles, and for the Supreme Tribunal having usurped the functions of the legislative body."[651]

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to the National Assembly, the President of the Republic, Governors or Mayors, must be appointed by the legislative body, as representatives of the people's will, hence it must comply with the constitutional and legally-established procedure and achieve, by means of deliberation and political consensus, the majority of two-thirds of the members of the National Assembly. The justification for this election, known as second-order election, is that the legislative body, being the highest collegiate body directly elected by the people through a first-order election, has the dignity and democratic legal standing required by the Constitution to act as an extension of the popular vote." Véase Rafael Badell Madrid, "Algunas consideraciones sobre las inconstitucionales sentencias de la Sala Constitucional relativas al nombramiento de las autoridades del Consejo Nacional Electoral," Disponible en: http://badellgrau.com/?pag=229&ct=2600

651 As stated by the Academy of Political and Social Sciences, the decisions of the Constitutional Chamber: "1. Usurp the constitutional powers of the National Assembly by invoking its prior and unconstitutional declaration of contempt, in breach of the separation of powers and the principle of legality sanctioned in Articles 136 and 137, respectively, of the Constitution; 2. Usurp the particular and exclusive functions of the National Assembly to appoint the rectors of the National Electoral Council and other members of its subaltern bodies, in breach of Article 296 of the Constitution and, therefore, violate the democratic right of political participation of all Venezuelans in the structuring of the bodies that exercise the political power, sanctioned in Articles 6, 62, 70, 295 and 296 of the Constitution, as well as the right to have an impartial, autonomous and independent electoral body formed by persons not related to political parties, as an essential guaranty for holding free and democratic elections, as inferred in Article 294 of the Constitution. See Academia de Ciencias Políticas y Sociales, "Pronunciamiento de la Academia de Ciencias Políticas y Sociales con relación a las sentencias de la Sala Constitucional del

Regarding these unconstitutional actions, the Permanent Council of the Organization of American States, stated in its Resolution of June 26, 2020, that the Supreme Tribunal went on:

> "with a biased position invoking an alleged "legislative omission," to appoint the members of the National Electoral Council, usurping the functions that pertain to the National

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Tribunal Supremo de Justicia," June 18, 2020. Available at: https://www.acienpol.org.ve/wp-content/uploads/2020/06/Pronunciamiento-ACPS-contra-sentencias-68-69-70-71-72-SC.pdf . In this same regard, Rafael Badell Madrid, stated; "The Constitutional Chamber, in exercising an alleged constitutional control of legislative omission, violated the democratic right of participation of all Venezuelans in political affairs, which is sanctioned in Articles 5, 6, 62, 63 and 70 of the Constitution, and in Articles 1 and 6 of the Inter-American Democratic Charter, and also breached the principle of separation of powers when it appointed the principal rectors of the CNE, and their alternates, and other members of the CNE's subaltern bodies, usurping the exclusive and excluding powers of the National Assembly set forth in Article 296 of the Constitution." Pronouncement of June 18, 2020. See Rafael Badell Madrid, "Algunas consideraciones sobre las inconstitucionales sentencias de la Sala Constitucional relativas al nombramiento de las autoridades del Consejo Nacional Electoral." Available at: http://badellgrau.com/?pag=229&ct=2600. On this matter, the National Academy of History, the National Academy of Medicine, the National Academy of Economic Sciences, in an inter-academic communiqué, stated: "The unconstitutional Constitutional Chamber again acts as a political agent in breach of constitutional principles of separation of powers and legality to, in lieu thereof, usurp the competence of the parliament and designate itself the electoral authorities, alleging to be justified by the hackneyed thesis of contempt for its decisions. This behavior seriously and flagrantly infringes the democratic principles of the Rule of Law, by snatching the right of political participation of all Venezuelans in the structuring of the bodies that exercise the public power, and the guaranty of an impartial, autonomous and independent electoral arbiter that is essential for holding free and democratic elections, as sanctioned and ordered by the Constitution, and which as a whole form the right to democracy." Inter-Academic pronouncement in view of the decisions issued by the Constitutional Chamber of the Supreme Tribunal of Justice, June 22, 2020. Available at: https://www.acienpol.org.ve/pronunciamientos/pronunciamiento-interacademico-en-vista-de-las-sentencias-dictadas-la-sala-constitucional-del-tribunal-supremo-de-justicia/

Assembly under the Constitution, also breaching the principle of autonomy, equilibrium and division of the Public Powers.[652]

Also regarding this matter, the *Grupo de Lima*, formed by representatives of the governments of Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Panama, Paraguay, Peru, St. Lucia and Venezuela, on June 18, 2020, had already issued a pronouncement stating that said decision of the Supreme Tribunal:

> "overtly infringes the Venezuelan Constitution and undermines the minimum guarantees required for any electoral process and the return of democracy to Venezuela," [reminding that] "the designation of the members of the CNE is an attribute of the National Assembly, *a legitimate and democratically elected body,* according to the Constitution of the Bolivarian Republic of Venezuela."[653]

III. THE DECISION ON THE "MOTION" TO REFORM THE ELECTORAL LEGISLATION, IN WHICH THE CHAMBER UNCONSTITUTIONALLY CREATED A REGULATORY VACUUM AND ORDERED THAT IT BE FILLED, NOT BY THE LEGISLATURE, BUT BY THE NATIONAL ELECTORAL COUNCIL THAT IT

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652 See Permanent Council of the Organization of American States Resolution CP/RES. 1156 (2291/20) of June 26, 2020, on "The recent *illegitimate* decisions of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela," Available at http://scm.oas.org/doc_public/spanish/ hist_20/cp 42611s03.docx. In this same regard, the *Contact Group*, made up by seven countries of the European Union (France, Germany, Italy, the Netherlands, Portugal, Spain and Sweden), and the United Kingdom and four countries of Latin America (Ecuador, Costa Rica, Panama and Uruguay), had also deplored "the manner how the Supreme Tribunal of Justice renewed the National Electoral Council of Venezuela without the participation of the National Assembly in the election of its members, *therefore against the provisions of the Venezuelan Constitution*." See: https://www.infobae.com/ america/venezuela/2020/06/17/el-grupo-de-lima-califico-de-ilegal-la-desig nacion-del-nuevo-consejo-electoral-chavista-y-pidio-elecciones-libres-en-venezuela/

653 See *El País* 18-6-2020http://www.elpais.cr/2020/06/16/grupo-de-lima-desco noce-designacion-de-consejo-electoral-venezolano/

APPOINTED, UNCONSTITUTIONALLY "DELEGATING" TO IT THE LEGISLATIVE FUNCTION

After the unconstitutional decision to appoint the National Electoral Council, the Constitutional Chamber went on to consider another aspect in order to complete the construct of the "Electoral Circus" that had been planned, consisting of changing the legally established electoral system at the whim of a handful of citizens (the petitioners).

In effect, the Chamber, in its decision No. 68 of June 5, 2020, went on to examine another request by the petitioners consisting of the *amendment* of certain rules of the Organic Law on Electoral Processes, allegedly for the purpose of adapting them to the constitutional principles of personalization of suffrage and proportional representation set forth in Article 63 of the Constitution, as well as to amend the rules of the Organic Law on matters related to the election of indigenous representatives.

Regarding the first issue, the Chamber deemed that the Law on Electoral Processes did not properly observe the principle of proportional representation and considered it "advisable to incorporate into the electoral system, in addition to the principles of concurrence, personalization of suffrage and proportional representation, the constitutional values of political pluralism, people's participation and the adjustment of the number of representatives in the legislative body by reason of the demographic increase of the country's population," deeming it convenient that the law be reformed because, allegedly, it was "constitutionally incompatible for the Organic Law of Electoral Processes, in its Articles 14 and 15, to provide that the representatives to be elected by lists according to the principle of proportional representation, would only be three (3) or two (2), according to the number of representatives to be elected, and the remaining shall be elected in nominal circuits by majority vote."

Thence, as if it were the sovereign, the Constitutional Chamber ordered in a totally unconstitutional manner that the National

Electoral Council that it was to appoint, obviously ignoring the National Assembly, proceed "through the regulatory norms" to modify the Organic Law with regard to the "percentage for the election of the nominal candidates and that pertaining to the election by proportional representation," based on the guidelines set forth in the decision.

In other words, the Constitutional Chamber not only usurped the functions of the Legislature, but also those of the Constituent.

The same thing happened regarding the election of the indigenous representatives contemplated in the Organic Law on Electoral Processes (Arts. 174-187), when the Chamber deemed that the law did not take "into account the cultural specificities of each ethnic group," and decided, applying the method of judicial review of constitutionality provided for in Article 334 of the Constitution, to "declare inapplicable" the rules of Articles 14, 15, 174, 175, 176, 177, 178, 179, 180, 181, 182 and 186 of the Law, disavowing the essentially *et casu et inter partes* effects of the decisions on the diffuse control of constitutionality of the laws,[654] thus creating a "legal vacuum" that could only be caused by an annulment judgment and that only the Legislature could fill by reforming the Organic Law on Electoral Processes.[655]

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654 See Allan R. Brewer-Carías, "El método difuso de control de constitucionalidad de las leyes en el derecho venezolano", en Víctor Bazán (coord.), *Derecho Procesal Constitucional Americano y Europeo*, Edit. Abeledo-Perrot, dos tomos, Buenos Aires, Rep. Argentina, 2010, Tomo I, pp. 671-690.

655 As noted by Professor Román José Duque Corredor immediately after the decision was issued: "This being a complaint for alleged omission, which only requires determining whether or not a mandate was observed, it is not fitting to override any rule, because the subject matter is not the unconstitutionality of the rule. It distorted the subject matter of the complaint and turned it into nullity for unconstitutionality, breaching the due process, which is a serious abuse of the jurisdictional function that is limited by the established competence and procedures." (See Román José Duque Corredor, "Tips sobre Sentencia en comandita y galimática No. 0068 de la Sala Constitucional de fecha 05/06/2020," June 7, 2020, Blog Román José Duque Corredor.

Nonetheless, ignoring this constitutional rule, and the Constitutional Chamber, again usurped the functions of the National Assembly proceeding to "delegate" the legislative functions, which it did not have and are exclusive of the Assembly,[656] to the National Electoral Council, ordering that it proceed to "assume the pertinent regulatory actions, according to the guidelines set forth in this decision" and "enabling it":

> "in exercising the regulatory powers conferred to it in subparagraph 1 of Article 293 of the Constitution, in view of the void resulting from the declaration of inapplicability of the abovementioned regulation, with *erga omnes* effects, to proceed to fill in the legal vacuum, according to the guidelines set forth in this decision. And so, it is decided."

Available at: http://justiciayecologiaintegral.blogspot.com/2020/06/tips-sobre-sentencia-en-comandita-y.html) As noted by Rafael Badell: The Constitutional Chamber purported to eliminate, with *erga omnes* effects, 12 legal provisions of an electoral nature through an alleged exercising of the diffuse control of constitutionality that is not that set forth in Article 334 of the Constitution and which can never have effects beyond the parties to the proceeding and never a general effect that is only reserved to the appeal for annulment due to unconstitutionality, sanctioned in Article 336.1 of the constitution. See in Rafael Badell Madrid: "Algunas consideraciones sobre las inconstitucionales sentencias de la sala constitucional relativas al nombramiento de las autoridades del consejo nacional electoral." Available at: http://badellgrau.com/?pag=229&ct=2600

656 As noted by Rafael Badell Madrid: "Usurping the legislative powers of the National Assembly, the Constitutional Chamber "enabled" the CNE to "fill in the legal vacuum" in view of the "void resulting from the overriding with *erga omnes* effects, through the regulatory powers conferred upon it by subparagraph 1 of Article 293 of the Constitution." This purported regulatory delegation is totally unconstitutional whereas under the Constitution, the National Assembly is the sole body with legitimacy to issue laws on the matter of elections, according to the provisions of Articles 187, subparagraph 1 and 156, subparagraph 32 of the Constitution, wherefore the CNE could not encroach this power that is solely vested in the Legislative Power." See Rafael Badell Madrid, "Algunas consideraciones sobre las inconstitucionales sentencias de la Sala Constitucional relativas al nombramiento de las autoridades del Consejo Nacional Electoral. Available at: http://badellgrau.com/?pag=229&ct=2600

No greater legal absurdity can be conceived under a Rule of Law governed by a Constitution according to the principle of separation of powers. This is the extent that the "constitutional injustice" of the Constitutional Chamber of Venezuela has reached as further proof of the degradation thereof, having usurped with this decision, as stated by the Academy of Political and Social Sciences, "the legal reserve and the legislative powers of the National Assembly regarding the regulation of electoral matters, in breach of Articles 156.32 and 187.1 of the Constitution."[657]

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[657] In this regard, the Academy of Political and Social Sciences explained precisely that: "the unconstitutional Constitutional Chamber acted arbitrarily by being unconstitutional, when through its alleged decision number 68, it purported to abrogate with *erga omnes* effects, 12 legal rules of an electoral nature (Articles 14, 15, 174, 175, 176, 177, 178, 179, 180, 181, 182 and 186 of the Organic Law of Electoral Procedures), through the distortion of the diffuse control of constitutionality, which can never have effects beyond the parties to the proceeding; and further lacks the general nature of the concentrated control exercised in deciding an appeal for annulment, which was not the case. We further reject the unconstitutional usurpation of the legislative powers of the National Assembly as a result of said decision No. 68 that "enabled" the National Electoral Council to "fill in the legal vacuum" in view of the "void caused" by the same Constitutional Chamber "as a result of overriding, with *erga omnes* effects" the abovementioned articles of the Electoral Law "*pursuant to the regulatory powers conferred upon it by subparagraph 1 of Article 293 of the Constitution*." Thus, the Chamber purports to effect a sort of enabling or regulatory delegation, which is totally unconstitutional because it does not exist, whereas this matter is exclusively reserved by law to the National Assembly. Therefore, the unconstitutional Constitutional Chamber, which lacks such competence, cannot purport to delegate or "enable" the National Electoral Council to exercise legislative power that is does not have, much less through regulatory rules of a sublegal rank. See Academia de Ciencias Políticas y Sociales. Pronunciamiento de la Academia de Ciencias Políticas y Sociales con relación a las sentencias de la Sala Constitucional del Tribunal Supremo de Justicia, Jun 18, 2020 Available at: https://www.acienpol.org.ve/wp-content/uploads/2020/06/Pronunciamiento-ACPS-contra-sentencias-68-69-70-71-72-SC.pdf. On this matter, as very properly noted by Professor Román José Duque Corredor, the Constitutional Chamber: "Incurred usurpation of the constituent power by modifying the Constitution, when it ascribed legislative competence to the CNE to legislate on the matter of electoral processes, and eliminating that competence from the

In any event, in exercising the "legislative power" unconstitutionally delegated to it by the Constitutional Chamber, the National Electoral Council not only called the parliamentary elections for December 6, 2020, but actually legislated on the holding thereof by issuing, evidently in breach of the Constitution, "Special Rules for the Parliamentary Elections for the 2021-2026 Term,"[658] increasing, as officially announced,:

> "by 66 percent the number of representatives to be elected to the National Assembly, going from 167 representatives to 277, in order to reach an equilibrium in the electoral system between the list vote and the nominal vote," whereby the "representation before the National Assembly would reflect 52% for the proportional vote, represented by 144 list votes, y un 48% for the nominal system, resulting in a total of 133 nominal votes. There will be elected 110 more representatives, strengthening the proportional election and the election by nominal vote. With these regulations, we are making an overwhelming progress toward meeting the demands of the Venezuelan people for parliamentary elections that are consistent with the country's realities," stated the maximum electoral authority."[659]

National Assembly. Hence, in addition to being a usurpation of functions, this legislative delegation is not contemplated in any proceeding that may be heard by the Supreme Tribunal of Justice. It could be said that the intention of the complaint was to strip that competence from the National Assembly, and that the Constitutional Chamber took part in that intention, wherefore there was an aggravated procedural fraud." See Román José Duque Corredor, "Tips sobre Sentencia en comandita y galimática No. 0068 de la Sala Constitucional de fecha 05/06/2020," June 7, 2020, Blog Román José Duque Corredor. Available at: http://justiciayecologiaintegral.blogspot.com/2020/06/tips-sobre-sentencia-en-comandita-y.html

658 See Consejo Nacional Electoral: "Normas Especiales para las Elecciones Parlamentarias período 2021-2026," July 1, 2020, Available at: http://www.cne.gov.ve/web/normativa_electoral/elecciones/2020/asamblea_nacional/documentos/normas_especiales_para_las_elecciones_a_la_asamblea_nacional_per%C3%ADodo_2021-2026.pdf

659 See: "CNE aprueba normativa especial para Elecciones Parlamentarias 2021-2026," 1 julio 2020, available at: http://mppre.gob.ve/2020/07/01/cne-

An aim that according to the Constitution, in Venezuela could only be reached by the Legislature, that is, by the National Assembly.

IV. THE UNCONSTITUTIONAL SEQUESTRATION AND CONFISCATION OF THE OPPOSING POLITICAL PARTIES DECREED BY THE CONSTITUTIONAL

aprueba-normativa-especial-elecciones-parlamentarias-2021-2026/.
Regarding this system, the vice-chair of the National Electoral Chamber appointed by the Supreme Tribunal of Justice said: "*the formula for this number of representatives "is not mathematical, it is political," that he does not know the details of how the distribution of seats was made per states, admitting that there may be a disproportion, neither how it was determined that the "national list" have 48 additional representatives; that the CNE's board is implementing the orders of the TSJ and that "to a certain extent, we get things, let's say, "precooked" (from the "little board"), as when you go to get a pizza and you only have to put it for the last minutes in the oven,"* See, Víctor Amaya, "Rafael Simón Jiménez dice que el CNE recibe el mandado hecho desde la «mesita»," in Tal Cual, July 13, 2020, available at: https://talcualdigital.com/las-confesiones-de-rafael-simon-jimenez-el-cne-recibe-el-mandado-hecho-desde-la-mesita/. The "fraudulent electoral system" designed as warned by the NPO *Acceso a la Justicia*, is not only contrary to the provisions of Articles 14 and 15 Of the Organic Law of Electoral Processes, which provide "a proportion equivalent to 70% for the personalized vote and of 30% for the proportional representation," but further: "breaches Article 186 of the Constitution, which expressly provides that the structure of the NA shall be "according to the population base of one point one percent of the country's total population." CNE's resolution affects the manner for electing the representatives and, therefore, alters the number of members of the NA, because according to the above-quoted constitutional rule, each state shall have as many representatives as pertain according to the population base, plus three representatives. For the parliamentary elections that are to be held this year, the CNE arbitrarily decided to increase the number of seats, without justifying the reasons for adopting this decision, much less stating the criteria or the basis for calculation used to increase the 110 seats." (Acceso a la Justicia, "10 claves sobre el sistema electoral aprobado por el írrito CNE," 7 de julio de 2020, disponible en: https://accesoalajusticia.us19.list-manage.com/track/click?u=a01a895f437199d5e7e999d4a&id=038100548b&e=b3a1996a73)

CHAMBER IN ORDER TO FORCE THEM TO PARTICIPATE IN THE "ELECTORAL CIRCUS"

After setting up the "Electoral Circus," the Constitutional Chamber only had to "capture" or "cage" the actors to make them take part in the farcical show, and it decided to do this none other than by sequestrating and confiscating the main political parties of the democratic opposition and even some of those that have always been supporting the government, purporting to "tame" them and turn them into docile players in the Circus performance; issuing for this purpose, to begin with, decisions No. 71, 72 and 77 of June15 and 16 and July 7, 2020, through which it designated, as noted by José Miguel Vivanco, of *Human Rights Watch*, "government supporting politicians to head Venezuela's opposing parties," this being "a serious affront to the possibility for dissenting voices to participate in the electoral process." [660]

Thus, through said decisions No. 71, 72 and 77, the Constitutional Chamber indeed sequestrated political parties *Acción Democrática, Primero Justicia* and *Voluntad Popular*, the first of which, without doubt, the country's most important party from a historical standpoint, and the other two, the most important ones developed in the last two decades, in order to purport to force them all to join the show of the "Electoral Circus" it has set up, and act, as the NGO *Acceso a la Justicia* noted, as a sort of "tailored opposition" of the regime.[661]

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660 See Human Rights Watch, José Miguel Vivanco, "Venezuela: Sentencias Ponen en Jaque Elecciones Libres y Justas. El Tribunal Supremo adepto al gobierno coopta a partidos opositores y a la autoridad electoral," 7 julio 2020, disponible en: https://www.hrw.org/es/news/2020/07/07/venezuela-sentencias-ponen-en-jaque-elecciones-libres-y-justas

661 See Acceso a la Justicia: "TSJ expropia a AD, PJ y VP con una «oposición» a la medida de Maduro," donde expresa que las decisiones de la Sala Constitucional lo que muestran es la "la aniquilación del pluralismo político por parte del régimen de Maduro y no favorecen la recuperación de la alternancia, el respeto de la Constitución y el restablecimiento de la institucionalidad en Venezuela." July 10, 2020, available at: https://www.

First came the sequestration of the party ***Acción Democrática,*** for which the Constitutional Chamber dusted off an action for constitutional protection (amparo) that had been filed two years before, on June 28, 2018, by two citizens (Otto Marlon Medina Duarte and Jesús María Mora Muñoz**)** who alleged to be active members of *Acción Democrática*. The action was filed against "Isabel Carmona de Serra, Henry Ramos Allup and Bernabé Gutiérrez, as top authorities" of said party, by reason of alleged "hostile acts," stating that they changed "the directors of the organization in the states or sections of the party at their whim and sole discretion," refusing to "call internal elections of said political organization." The petitioners asked the Chamber to "suspend" the current National Directorate of the party and proceed to appoint an *ad hoc* Board of Directors; that it order the National Electoral Council to accept only nominations submitted by such *ad hoc* Board that it would appoint, and that it order the financial intervention of the party.

The action for constitutional protection was admitted and decided by decision No. 71 of June 15, 2020,[662] whereby the

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accesoalajusticia.org/tsj-expropia-a-ad-pj-y-vp-con-una-oposicion-a-la-medida-de-maduro/ . Those decisions, are evidently unconstitutional, because in them, as noted by Rafael Badell Madrid, the Chamber, as it had done in the past regarding other parties, such as Copei,[661] has subjected them "to its own political project," by means of decisions that are in no way temporary or "precautionary", but final and irreversible, breaching, among others, "the constitutional right to association for political purposes and the right to political participation and, consequently, the democratic principles and values of liberty and political pluralism set in Articles 2, 5,6, 62, 64, 67 and 70 of the Constitution and 1, 3 and 6 of the Inter-American Democratic Charter." (See Rafael Badell Madrid, "Consideraciones sobre las sentencias de la Sala Constitucional por medio de las cuales se intervinieron los partidos políticos Acción Democrática, Primero Justicia y Voluntad Popular," p. 4 (currently in process of publication in *Boletín de la Academia de Ciencias Políticas y Sociales* No. 160, January-June 2020, Academia de Ciencias Políticas y Sociales, Caracas, 2020) Disponible en: http://badellgrau.com/?pag=229&ct=2601)

662 See http://historico.tsj.gob.ve/decisiones/scon/junio/309873-0071-15620-2020-18-0458.HTML

Chamber literally agreed with the motion by issuing the precautionary measures to suspend the National Directorate of the party, and appointing an "*ad hoc* Board of Directors chaired by Bernabé Gutiérrez, "who then was the National Organization Secretary," and who, to worsen the absurdity, was one of the persons accused as "offenders" in the action for constitutional protection that gave rise to the decision,[663] ordering him "to complete the list of said board of directors." The Chamber further provided that said *ad hoc* Board of Directors could use the electoral card, logo, symbols, emblems, colors and any other concept pertaining to the political organization *Acción Democrática*," in order to participate in what Carlos Canache Mata and other historical leaders of said party have described as "the farce that is being prepared under the auspices of the National Electoral Council that had been recently appointed in an irregular manner."[664]

And to culminate, the Constitutional Chamber warned "citizens Isabel Carmona de Serra, Henry Ramos Allup and Bernabé Gutiérrez, as the top authorities of political party *Acción Democratica*," that they must observe and enforce the precautionary measure "immediately and unconditionally, lest they incur contempt," further threatening them to be sentenced and arrested "according to the case law precedent contained in decisions 138/2014

663 As noted by Rafael Badell, this is a contradiction of the terms, because one cannot understand what precautionary measure is executed when the person designated to avoid the breaches against constitutional rights is the alleged aggressor." See Rafael Badell, "Consideraciones sobre las sentencias de la Sala Constitucional por medio de las cuales se intervinieron los partidos políticos Acción Democrática, Primero Justicia y Voluntad Popular," p. 12. Available at: http://badellgrau.com/?pag=229&ct=2601

664 See the Public Statement by "Carlos Canache Mata (ex-presidente y ex-secretario general del partido), Humberto Celli (ex-presidente y ex-secretario general del partido), Marco Tulio Bruni Celli, Paulina Gamus, Lilia Arvelo, Angela Cruz de Quintero, Gustavo Mirabal, Lilian Henríquez de Gómez," June 17, 2020. Available in El Nuevo País, 18 de junio de 2020, en: https://elnuevopais.net/2020/06/18/declaracion-publica-de-exmiembros-de-ad/

and 245/2014," which affected Mayors Vicencio Scarno Spisso and Daniel Ceballo in 2014.[665]

Then came the sequestration of the party ***Primero Justicia,*** when the Chamber settled another similar action for constitutional protection that had been filed on January 6, 2020, by two representatives of the National Assembly for the party "*Movimiento Primero Justicia*", José Dionisio Brito and Conrado Pérez Linares, who on November 30, 2019, had been sanctioned by a suspension from engaging in political activities of that party. The action was equally filed against "*hostile acts"* by the top authorities" of said party (Julio Andrés Borges. Tomás Ignacio Guanipa Villalobos and Edinson Antonio Ferrer Delgado), accusing them of violating their constitutional rights, requesting the Chamber to declare the *nullity of the decisions for suspension and expulsion from the party"* and, among other measures, that the Chamber order "the creation of an *ad hoc* Board," for the party.

The Constitutional Chamber, through decision No. 72 of June 16, 2020,[666] admitted the action filed and decreed all the precautionary measures requested, in the same way as it did for the party *Acción Democrática*, appointing an *ad hoc* Board of Directors for the party *Primero Justicia*, presided over precisely by José Dionisio Brito, then National Coordinator, and who was one of the plaintiffs in the action for constitutional protection, ordering him to complete the list of members of said *ad hoc* Board. So, we see that the plaintiff in the action for constitutional protection against the Board of Directors of *Primero Justicia*, by an act of wizardry of the Constitutional Chamber, became the chairman of the party, with unlimited powers

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665 See Allan R. Brewer-Carías, "La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento "sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarno Spisso y Daniel Ceballo)," in *Revista de Derecho Público,* No. 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 176-213.

666 See in http://historico.tsj.gob.ve/decisiones/scon/junio/309874-0072-16620-2020-20-0026.HTML

to "use the electoral card, logo, symbols, emblems, colors and any other concept pertaining" to the party."[667]

Finally, there came the sequestration of the party ***Voluntad Popular***, after an attempt made by the Attorney General of the Republic before the Chamber, by filing an action for the interpretation of Articles 31 and 32 of the Organic Law on Organized Crime and the Financing of Terrorism, in order to declare the *Voluntad Popular* party as a "*criminal organization with terrorist purposes and, consequently, that it be dissolved."* After declaring its lack of jurisdiction through decision No. 73 of June 16, 2020,[668] sending the files to the Criminal Cassation Chamber of the same Supreme Tribunal, the Chamber immediately proceeded to sequester the party**.**

It did this by deciding an action for constitutional protection (amparo) which had also been filed in this case on January 24, 2020, by two active members of party *Voluntad Popular*, José Gregorio Noriega Figueroa and Lucila Angela Pacheco Bravo, who had also been sanctioned in this case by the National Directorate of said party and being suspended from political activities as well as from the parliamentary fraction of the party, against Leopoldo Eduardo López Mendoza and Emilio Graterón Colmenares, in their capacity as General Coordinator and Political Coordinator of the party, denouncing the National Directorate of said party in the same terms of the action for protection that led to the sequestration of the party *Primero Justicia*, with similar petitions.

In this case, the Constitutional Chamber issued decision No. 77 of July 7, 2020,[669] to also suspend "the current Board of Directors of

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667 Information "Sala Constitucional del TSJ suspende la actual Dirección Nacional de Voluntad Popular," TSJ 7-7-2020 Available in https://www. facebook. com/notes/tribunal-supremo-de-justicia/sala-constitucional-del-tsj-suspende-la-actual-direcci%C3%B3n-nacional-de-voluntad-po/3116681231772993/

668 See in http://historico.tsj.gob.ve/decisiones/scon/junio/309875-0073-16620-2020-20-0205.HTML

669 See in http://historico.tsj.gob.ve/decisiones/scon/julio/309922-0077-7720-2020-20-0053.HTML

the party *Voluntad Popular*" and appointing an "*ad hoc* Board of Directors" in lieu thereof, "to carry out the necessary restructuring process" of said party. This *ad-hoc* board was precisely and absurdly made up in this case by the plaintiffs of the action for constitutional protection, José Gregorio Noriega Figueroa, as Chairman, and Lucila Angela Pacheco Bravo, as Organization Secretary, adding a third member, Guillermo Antonio Luces Osorio, as Secretary General, "to discharge the direction and representation functions" of the party "as well as to appoint the regional, municipal and local authorities thereof."[670]

In this case, the Chamber also authorized the *ad hoc* Board of Directors to "use the electoral card, logo, symbols, emblems, colors and any other concept pertaining to the party." The Chamber also repeated in this case its threat to prosecute and arrest whoever failed to comply with this decision "according to the case law precedent set forth in decisions 138/2014 and 245/2014," which was the abovementioned case pertaining to Mayors Vicencio Scarno Spisso and Daniel Ceballo.[671]

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[670] As noted by José Miguel Vivanco of Human Rights Watch: "The TSJ designated José Gregorio Noriega, Guillermo Luces and Lucila Ángela Pacheco as heads of Voluntad Popular. Noriega is a deputy that was expelled from the party after being involved in bribes of other legislators to vote against Guaidó as chairman of the National Assembly in January. Luces was also expelled after voting in favor of pro-government deputy Luis Parra to chair the National Assembly in that same election, which gave rise to forming a parallel, pro-government, directorate of the National Assembly. Both Parra and Noriega have been recently sanctioned by the European Union and the United States of America. Pacheco is a former deputy from the government party, the United Socialist Party of Venezuela (PSUV)." HRW vivanco Venezuela: Sentencias ponen en jaque elecciones libres y justas. *El Tribunal Supremo adepto al gobierno coopta a partidos opositores y a la autoridad electoral 7-7-2020.* https://www.hrw.org/es/news/2020/07/07/venezuela-sentencias-ponen-en-jaque-elecciones-libres-y-justas

[671] See Allan R. Brewer-Carías, "La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento "sumario de condena y encarcelamiento. (El caso de los

Regarding this case of the party *Voluntad Popular*, and those of parties *Acción Democrática* and *Primero Justicia*, José Miguel Vivanco of Human Rights Watch, noted that what ultimately occurred was "the court's designation of pro-government politicians to head the opposing parties of Venezuela," all in order to feign the participation of the "opposition" in the parliamentary elections called, which, -in his opinion-, "is a serious affront against the possibility for dissenting voices to take part in the electoral process and unjustifiably limits the human rights of its members to the freedom of association and expression."[672]

But the application of the expedite "procedure" for sequestering the political parties in order to make them take part in the illegitimate and unconstitutional elections process called for December 2020 did not stop there, and was applied by the Electoral Chamber of the Supreme Tribunal through decision No. 19 of June 20, 2020,[673] when

Alcaldes Vicencio Scarno Spisso y Daniel Ceballo)," in *Revista de Derecho Público,* No. 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp. 176-213.

672 See Human Rights Watch, José Miguel Vivanco: "Venezuela: Sentencias ponen en jaque elecciones libres y justas. *El Tribunal Supremo adepto al gobierno coopta a partidos opositores y a la autoridad electoral 7-7-2020.* https://www.hrw.org/es/news/2020/07/07/venezuela-sentencias-ponen-en-jaque-elecciones-libres-y-justas. At a national level, the reaction against all these unconstitutional actions by the Constitutional Chamber was summarized in the "Exhortación Pastoral de la CXIV Asamblea Ordinaria Plenaria del Episcopado Venezolano," issued in July 2020, in which the Bishops expressed the feeling of all Venezuelans: *We want to live in democracy.* "Los venezolanos queremos vivir en democracia. Para ello es necesario celebrar elecciones de modo imparcial para todos los partidos políticos y de respeto del voto ciudadano. El régimen, más preocupado por mantenerse en el poder que en el bienestar del pueblo, ha convocado unas elecciones parlamentarias, – para el 6 de diciembre-, valiéndose de un Tribunal Supremo de Justicia sumiso al Ejecutivo, de un Consejo Nacional Electoral ilegítimo y la confiscación de algunos partidos políticos." See this Call by the Bishops in: https://conferenciaepiscopalvenezolana.com/. See the reference in: https://www.vaticannews.va/es/iglesia/news/2020-07/venezuela-exhortacion-pastoral-obispos-pais-quiere-democracia.html

673 See in n: http://historico.tsj.gob.ve/decisiones/selec/julio/309930-019-20720-2020-2017-000096.html

deciding an electoral judicial action for protection (amparo) filed in 2017 by two "founding members and authorities (Manuel Rivas and Heriberto Cárdenas) of the party ***Movimiento Republicano***," against Mr. Julio Albarrán, Secretary General of that party, who was accused of violating "the collective and diffuse rights of the militancy" of the party. The Electoral Chamber's decision accorded the precautionary measures requested by the alleged aggrieved, and agreed to suspend the offender, "Julio Albarrán, from the position of Secretary General of *Movimiento Republicano*," appointing the aggrieved plaintiff, Manuel Rivas, as Secretary General to form the "*ad hoc* Board of Directors in order to carry out the process of restructuring and renovation of the organization's authorities," and authorizing the organization to "use the electoral card, logo, symbols, emblems, colors and any other concept that pertains" to the party.

After this sequestration by the Electoral Chamber, the Constitutional Chamber went on with the sequestration process, applying the same scheme to the party ***Tendencias Unificadas Para Alcanzar Movimiento de Acción Revolucionaria Organizada (Tupamaro)***, regarding which, by means of decision No. 119 of August 19, 2020, it admitted the action for constitutional protection filed by a group of party militants, -we imagine that against the board of directors of said organization-, according the measures requested and, among them, appointing a new *ad hoc* Board of Directors chaired by José Benavides Rondón, "to carry out the restructuring process needed by said organization," suspending the decisions for removal or exclusion from the party, and authorizing it to "use the electoral card, logo, symbols, emblems, colors and any other concept pertaining to the organization for political purposes.[674]

This sequestration was followed by that perpetrated against the party ***Patria Para Todos (PPT)*****,** which took place after August 20, 2020, when Mrs. Ilenia Medina, in her capacity as Organization Secretary, and Mrs. Lisette Sabino and other members of the National Secretariat and the Board of Directors of the party, filed an action for

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674 See in: http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-suspendio-la-actual-direccion-nacional-del-partido-tupamaro

constitutional protection against the Secretary General of the party, *Rafael* Uzcátegui, alleging the violation of the rights to "political participation of the militants" of the party. On the following day, August 21, 2020, by means of decision No 122,[675] the Constitutional Chamber decreed the precautionary measures requested, consequently deciding to suspend the National Directorate of the party and appoint the aggrieved Ilenia Medina, in her capacity as National Organization Secretary, and Lisett Sabino y Beatriz Barráez, Regional Secretary Generals, as members of an *ad hoc* Board of Directors that was to replace the National Directorate, and "carry out the necessary restructuring process" of said party, authorizing it to "use the electoral card, logo, symbols, emblems, colors and any other concept pertaining to *Patria Para Todos*," and ordering the National Electoral Council to "refrain from accepting any nomination for electoral processes that has not been agreed upon pursuant to the mandatory procedures, by the National Organization Secretary, who presides over the *ad hoc* Board of Directors designated" in the decision.

After the sequestration of the party *Patria para Todos* (PPT), which even caused an angry protest of the *Partido Comunista de Venezuela* accusing the Constitutional Chamber of "assaulting" said party,[676] there followed the sequestrations of other political parties by the Constitutional Chamber, apparently through more simple procedures, with final decisions issued *in limine litis*, without process nor any precautionary measures. At least this is what one infers from the information on the website of the Supreme Tribunal. According to the information contained therein, since the text of the decision

675 See in: http://historico.tsj.gob.ve/decisiones/scon/agosto/310061-0122-21820-.

676 In a Communiqué published on August 23, 2020, "The Political Bureau of the Central Committee of the Venezuelan Communist Party - Partido Comunista de Venezuela (PCV)- expresses its strong rejection, disapproval and repudiation of the assault that has been consummated through the Supreme Tribunal of Justice (TSJ) against the organization Patria Para Todos (PPT)> See in Panorama, August 23, 2020. Available in: https://www. panorama. com.ve/politicayeconomia/PCV-califica-de-asalto-decision-del-TSJ-sobre-Patria-Para-Todos-20200823-0013.htmlb

No.124 of August 24, 2020 had not been published, the Constitutional Chamber declared itself to have jurisdiction to hear the action for constitutional protection filed by Pedro Celestino Veliz, we assume against the board of directors of the party ***Bandera Roja*****,** and further, decided the action *in limine litis*, going on to enable the aggrieved plaintiff "in his capacity as chairman" of said organization "to submit nominations to the National Electoral Council (CNE) for the coming electoral process that is to be held on December 6, 2020."[677]

The same modus operandi was used with regard to party "***Compromiso País (Compa***)." The Constitutional Chamber, according to the information on the Supreme Tribunal's website, in view that the text of decision No. 125 of August 25, 2020 had not been published, the Constitutional Chamber declared itself to be competent to hear the action for constitutional protection filed by Olga Alejandra Morey, we assume against the board of directors of the party *Compromiso País (Compa),* decided the action *in limine litis*, and immediately enabled her, "in her capacity as national coordinator" of said party "to submit nominations before the National Electoral Council (CNE) for the coming electoral process to be held on December 6, 2020."[678]

Likewise, the Constitutional Chamber, according to information in the Supreme Tribunal's website, since the text of the decision No. 126 of August 25, 2020 had not been published, the Constitutional Chamber declared itself to be competent to hear the action for constitutional protection filed by Alfredo Alexander Boscan, we assume against the board of directors of the party "***Movimiento de Integridad Nacional-Unidad (Min-Unidad)***", and decided the action *in limine litis*, immediately enabling him, "in his capacity as militant" of said party, "to submit nominations before the National Electoral

677 See in: http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-habilito-a-pedro-celestino-veliz-para-realizar-por-bandera-roja-postulaciones-ante-el-cne-para -elecciones-parlamentarias

678 See in: http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-habilito-a-olga-alejandra-morey-para-realizar-postulaciones-ante-el-cne-para-elecciones-parlamentarias-por-compromiso-pais

Council (CNE) for the coming electoral process to be held on December 6, 2020."[679]

V. THE PARTICIPATION OF THE FRAUDULENT "NATIONAL CONSTITUENT ASSEMBLY" IN SETTING UP THE "ELECTORAL CIRCUS"

By issuing the several decisions considered above, the Constitutional Chamber purported to fix everything so the political parties *Acción Democrática, Primero Justicia* and *Voluntad Popular*, *Movimiento Republicano, Tupamaro, PPT, Bandera Roja*, *Compa and Min-Unidad* controlled by politicians aligned with the government, "participate" in the planned "Electoral Circus" as "tamed" entities, acting falsely as an opposition "tailored" by the regime.

But, there was an obstacle for this part of the show, and it was that the unconstitutional and fraudulent National Constituent Assembly had approved, in December 2017, a "Constituent Decree"[680]providing that the political parties that had not agreed to be part of the electoral farce marked by the national, regional or municipal electoral processes called by said Constituent Assembly, could not take part in any other electoral process without fully renewing their registration with the National Electoral Council, according to the Law on Political Parties, Public Meetings and Demonstrations.

This, of course, prevented many of the new sequestered parties, led by their duly tamed *ad hoc* Boards of Directors, from participating in the "Electoral Circus" of December, 2020.

Therefore, it was necessary to overcome that obstacle, for which purpose the same National Constituent Assembly, by means of a new "Constituent Decree" issued on June 17, 2020, came up with the juridical nonsense of approving "the suspension," *specifically regarding some of the parties mentioned*, of the rules of Constituent

679 See in: http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-habilito-a-alfredo-boscan-para-realizar-postulaciones-ante-el-cne-por-min-unidad-en-las-proximas-elecciones-parlamentarias

680 See in Gaceta Oficial 41.308 of December 27, 2017.

Decree of 2017, regarding the participation in electoral processes, for the alleged purpose of "propitiating the broadest participation of the people in the coming electoral process for the election of representatives to the National Assembly for the 2021-2025 term and facilitating the registration of the candidates before the National Electoral Council (CNE)"; deciding that "the political parties subject to criminal proceedings before the Venezuelan justice system,"[681] which were precisely some then "tamed" by the Constitutional Judge, were "exempt" from the burden or sanction set in the Constituent Decree of 2017.

To suspend the application of a rule by reasons of unconstitutionality is a competence ascribed by the Constitution to judges, effective only for the specific case that is being heard and the parties to it, it being, as said before, total nonsense that this be applied to a body with purported regulatory powers, such as the unconstitutional National Constituent Assembly, with regard to rules that the same has issued. That body can abrogate them, but, of course, cannot "suspend the application" thereof[682] and, much less, with *erga omnes* effects. This notion simply does not exist in the Venezuelan juridical system.

VI. THE VIOLATION OF THE PRINCIPLE OF REPRESENTATIVE DEMOCRACY BY ELIMINATING THE DIRECT AND SECRET VOTE IN THE ELECTION

681 See the Information in "ANC desaplica decreto constituyente para propiciar participación en elecciones de Asamblea Nacional," in *El Universal*, June 17, 2020; available at: https://www.eluniversal.com/politica/73427/anc-desaplica-decreto-constituyente-para-propiciar-participacion-en-elecciones-de-la-an; y en *CiudadCCS. La verdad está aquí*, 17 de junio de 2020, disponible en: http://ciudadccs.info/2020/06/17/anc-desaplica-decreto-constituyente-para-propiciar-participacion-en-elecciones-de-asamblea-nacional/

682 Text of the constituent decree, however, a month later, by July 15, it had still not been published.

OF THE REPRESENTATIVES REPRESENTING THE INDIGENOUS COMMUNITIES

One of the most traditional principles of Venezuelan constitutionalism established in the 1999 Constitution is that of representative democracy; so when the people *exercise their sovereignty* (Art. 5), they do this *through* representatives (Art. 62) that must be *elected exclusively by universal, direct and secret suffrage* (Art. 63); which principle is repeated expressly in Article 186 of the Constitution regarding the election of representatives to the National Assembly by providing that this must necessarily be done "by *universal, direct and secret vote*."

This principle implies that, in order to form any State institution *with representatives of the people*, the vote for this purpose is mandatorily *universal* with regard to all voters, and also *direc*t, and not through intermediaries or second-degree vote; and, in all cases, it must be *secret*, and not public or by a show of hands at citizens' assemblies.

There is *no exception* in the Constitution regarding the *direct and secret* suffrage; and, as to the *universal* suffrage, the constitution only provides *one* exception with regard to the structure of the indigenous representation at the National Assembly (Art. 125) –which is three representatives – that must be elected "*by the indigenous peoples*" according to the provisions set by Law, "respecting their traditions and customs" (Art. 186). That is the only possibility for representatives to a public institution to not be elected by *universal* vote, but by the vote of a fraction of citizens, the members of the indigenous peoples of the Republic. That is, the exception solely refers to the "*universal*" aspect of suffrage, by reason of the particular characteristics of those specific electors: the indigenous peoples. There is no other exception possible in the Constitution affecting the principle of *universal, direct and secret suffrage*.

Notwithstanding the above, all these constitutional principles have been swept away by the National Electoral Council[683] that was unconstitutionally appointed by the Constitutional Chamber of the Supreme Tribunal through decision No. 69 of June 10, 2020,[684] exercising a "legislative delegation" resulting from another unconstitutional decision also issued by the same Constitutional Chamber of the Supreme Tribunal by means of decision No. 68 of June 5, 2020.[685] In fact, said Council issued Resolution No 200630-0024 of June 30, 2020, containing *Special regulations for the 2020 election of the indigenous representation to the National Assembly,*[686] for the purpose of allegedly filling in the "legal vacuum" created by the Constitutional Chamber when it declared that articles 174, 175, 176, 177, 178, 179, 180, 181, 182 and 186 of the Organic Law on Electoral Processes were "not applicable *erga omnes*."

These special Regulations were issued to regulate the election of the members of the National Assembly representing the Indigenous Peoples and Communities for the elections that would take place in December 2020, establishing for this purpose an "electoral system" according to the "nominal mode, and through an election by relative majority of votes, expressed in popular assemblies according to their habits, traditions and customs" Art. 2) by show of hands (Art. 18).

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683 See Allan R. Brewer-Carías, "El fin de la democracia representativa basada en el *sufragio* universal*, directo y secreto* regulado en la Constitución. El caso de la inconstitucional reglamentación por parte del Consejo Nacional Electoral de un sistema electoral "indirecto" y "a mano alzada" para los tres diputados de representación indígena a la Asamblea Nacional. New York, 29-7-2020. Available at: http://allanbrewercarias.com/wp-content/uploads /2020 /07/209.-Brewer.-INCONSTITUCIONAL-SIST.-ELECTORAL-DIPUTA DOS-INDIGENAS.pdf

684 See at http://historico.tsj.gob.ve/decisiones/scon/junio/309871-0069-10620-2020-20-0215.HTML

685 See at http://historico.tsj.gob.ve/decisiones/scon/junio/309870-0068-5620-2020-20-0215.HTML

686 See the reference at: https://www.vtv.gob.ve/cne-reglamento-especial-eleccion-representacion-indigena-an/

To start with, these Regulations *violated the principle of direct and secret vote* sanctioned in the Constitution, which does not admit exceptions, setting up the election of indigenous representatives to the National Assembly, not by the direct vote of the indigenous citizens, but through "popular assemblies" as an *indirect vote*, or second-degree vote, also not admitted by the Constitution, and, further, "*in a public show of hands*," which is far from being a secret vote.

This "electoral system" of "indirect" and "public" suffrage is unconstitutional, and therefore taints to the root the entire contents of the Regulations issued by the National Electoral Council for such suffrage; these vices are further multiplied when the Regulations set unconstitutional limitations for being a candidate to the election of indigenous representatives and for their nomination, which is no longer free.

In fact, for the election of the three representatives of the indigenous peoples provided for in the Constitution, the Regulations set forth that the candidates to these seats, in addition to the general constitutional requirements applicable to all representatives (Art. 188), must be "indigenous persons, speak their language" and meet at least one of the following conditions:

> "to have held an traditional position of authority in their respective community; to have a known trajectory in the fight for the recognition of their cultural identity; or to have engaged in actions for the benefit of the peoples and communities at least during three years" (Art. 6).

The Constitution certainly provided that the election of representatives of the indigenous peoples must be conducted "*according to the provisions of the electoral law, respecting their traditions and customs*" (Art. 186), which could result in the setting of specific conditions therefor; but, in any event, this could only be "established by the electoral law," as expressly demanded by the Constitution. The Regulations issued by the National Electoral Council, *is neither a law nor the electoral law*, nor can the Constitutional Chamber in its tainted decision No. 68 of June 2020,

appropriate any power to transform regulations into laws, wherefore this regulatory limitation that parts from the provisions of Article 188 of the Constitution, having been set forth in regulations, is overtly unconstitutional.

Furthermore, the Regulations established another provision that violated the right to political participation guaranteed to be freely exercised by all citizens in the Constitution (Art. 62), by providing that the candidates to representatives of indigenous representation *can only be "nominated" by "indigenous organizations"* (Art. 7), without even defining what and how these organizations are and who can be members thereof.

This is an intolerable limitation to the right of political participation of all citizens who, as guaranteed by Article 67 of the Constitution, are entitled to be nominated by their own initiative to positions that are subject to popular vote; which implies that persons belonging to indigenous communities may, for example, nominate themselves to be candidates for the elections of representatives representing said communities. Eliminating the citizens' right to be nominated on their own initiative violates the Constitution, and also is a violation when it eliminates the possibility of groups of voters to make said nominations.

Additionally, a restriction on the nominations such as the one purported in the Regulations, overtly violates the right of political organizations (political parties), which also are entitled to take part in electoral processes by nominating candidates (Art. 67); and violates the right of the indigenous communities by establishing organizations for political purposes. The Constitution has no rule that limits those rights. Not even with respect to the election of representatives for indigenous representation, regarding which, although their election may be limited to being made by the indigenous peoples, the nomination of the candidates must be free, according to the Constitution.

To provide otherwise, that is, to restrict the nomination, implies an intolerable limitation that taints the election to its roots, because it eliminates the free vote and turns the "election" into a farce by

restricting the choice to persons nominated by "certain" organizations that are in no way identified, thus "narrowing" the election from the onset.

As to the electoral system established for the election of the representatives that represent indigenous peoples, the Regulations of the National Electoral Council, when eliminating the *direct* election, which is the only one admitted in the Constitution, established a system of *indirect election* stemming from "Community Assemblies" that must elect "spokespersons" who must later take part in the "General Assemblies" to elect the representatives, this being a specific application –unconstitutional- of the "Communal State" model that was submitted to referendum in 2007, as part of the proposal for constitutional reform, and that was rejected by the people.

In order to apply this "new" and unconstitutional *indirect election* system, the Regulations of the National Electoral Council identified the ten (10) states of the Republic where there are indigenous communities, grouping them in three electoral Circuits or Regions, each to elect a deputy representing the indigenous peoples (Art. 4):

first, the electoral region or circuit of the west or *Occidente,* made up by the states of Zulia, Mérida and Trujillo; *second*, the electoral region or circuit of the south or *Sur*, made up by the states of Amazonas and Apure; and, *third*, the electoral region or circuit of the east or *Oriente*, made up by the states of Anzoátegui, Bolívar, Delta Amacuro, Monagas and Sucre (Art. 3).

The Regulations set the rules for the unconstitutional election by indirect vote of the representatives representing the indigenous, providing for, as mentioned above, a two-degree voting system that starts with the convening of "*Community Assemblies,*" where the indigenous peoples and communities shall gather to elect the "spokespersons" or delegates that will afterwards attend the "General Assemblies" at which the representatives of the indigenous people will be elected (Art. 10).

The Regulations did not determine the number of Community Assemblies that should be called in each federal entity included in the electoral regions or circuits, neither their territorial location nor the way to be called or convened, nor the number of "spokespersons" that each must elect, nor how and by which method such election is to be made, relying for this determination on a "Manual for the Functioning of Community Assemblies, in proportion to the number of members in each Community" (Art. 11), without setting forth who and how said Manual is to be issued and approved.

If the rules set in the Organic Law on the Popular Power and specific laws are to be applied to such assemblies, the election method would be the show of hands, which, as stated above, is unconstitutional.

The second level of the unconstitutional indirect elections system set forth in the Regulations provides that once the "spokespersons" (without stating their number) have been "elected" at the Community Assemblies (without determining how many or where these are to be held), there shall be held "General Assemblies" "for each federal entity of the Indigenous Circuit" (Art. 16) with the participation of those spokespersons, who are responsible for "electing" the three representatives that will represent the indigenous "on behalf of each region of the Indigenous Peoples and Communities."

Article 17 of the Regulations, also in an overt unconstitutional manner and breaching the requirement of "secret" vote for the election of representatives imposed by the Constitution, provide that at these ten General Assemblies "the voting be effected by *show of hands*, subject to the provisions" of the unknown "Manual for the Functioning of the General Assemblies," setting on record the number of votes issued in favor of the candidates in "Minutes" of each Assembly, according to the form prepared by the National Electoral Council.

It truly is almost impossible to find so many unconstitutional vices in a same administrative decision issued by an organ of the State:

In this case, the Regulations violate the principle of legal reserve by intending to regulate matters that only pertain to the Legislature, given that the Constitutional Chamber purported to "delegate" the legislative function ascribed exclusively to the National Assembly to a body of the State such as the National Electoral Council, whose actions in no event can have the rank and value of law.

The Regulations further violate the constitution by providing an electoral system for the representatives of the indigenous peoples, through indirect and public vote by show of hands, which is openly contrary to the provisions of the Constitution, which only allow elections by direct and secret vote, without exception.

Additionally, the Regulations violate the right to political participation, by restricting the conditions for the eligibility of the candidates as representatives for indigenous representation, which could only be done pursuant to the electoral law enacted by the National Assembly.

And, finally, the Regulations violate the right to the free political participation of persons to nominate themselves for representative positions at their own initiative, and also violates the right of political parties and other political organizations to nominate their candidates for election processes, as guaranteed by the Constitution.

VII. AN "ELECTORAL CIRCUS" REJECTED AND DISAVOWED BY ALL AND WITH ABSOLUTELY NO CREDIBILITY AND THE DECISION TO CONFORM A GOVERNMENT OF NATIONAL EMERGENCY

All the unconstitutional actions described above, orchestrated by the Constitutional Chamber of the Supreme Tribunal of Justice, as could be expected, has caused a major institutional reaction, both internally and in the international sphere, not only rejecting this affront against the Constitution and the democratic principle, but announcing that the results thereof *will not be recognized,* because, no matter what it is, it will not be the outcome of any democratic principle or of international principles and standards for holding free, fair and trustworthy elections.

These principles, for the purpose of being able to call "a free, fair, verifiable and transparent presidential electoral process," as precisely stated by the National Assembly in the "Agreement ratifying the integral political route posed to the country allowing for free and transparent presidential elections as a way out to the generalized crisis and that will result in the reinstatement of democracy in Venezuela," dated June 30, 2020, when it "disavowed the illegal designation of the members of the National Electoral Council by those who usurp the Supreme Tribunal of Justice" (second), must meet the following "necessary conditions":

- "Restoration of the right to suffrage for all Venezuelans, within the country and abroad, wherefore it is necessary to have a reliable and audited Electoral Registry.
- Ensuring that the vote be exercised freely, without coercion or intimidation. Prohibition for electors to migrate from their natural electoral centers.
- Ceasing of the disqualification, prosecution and imprisonment of the political leaders and full reinstatement of their rights to political participation.
- Full participation of all political parties; the restoration of their natural leaders and the use of their symbols, colors and assets.
- A new legitimate Electoral Power, designated by the National Assembly in exercising its constitutional competences, and thus have an electoral timetable that guarantees the right to vote and the pertinent time frames, an equitable electoral campaign and the proper behavior of the Plan República, respecting the electoral process and forbidding any intervention not related to the protection of the electoral act.
- Audit of all processes of the electoral system, as well as qualified national and international electoral observation in all stages of the process."

The Venezuelan democratic political parties, on August 2, 2020, further issued a Declaration entitled: "*United we debate and united we decide: WE WILL NOT participate in the fraud, WE WILL fight for true and free elections,"* signed by 27 democratic political

organizations whereby they "unanimously" stated their decision "*not to participate in the electoral fraud called by the Maduro regime*, "considering that what has been called "*is not an election,"* therefore rejecting the "new attempt of the dictatorship to disguise as an election a process that is not, as it did in 2018 when it sequestered the presidential elections that should have been held according to our constitutional system." [687]

This Declaration further set forth that the "conditions for achieving free, fair and competitive elections that meet the minimum standards accepted by all democratic nations of the world, which are:

> "1) Reinstating the right to vote for all Venezuelans, including those who have been forced to flee the country (trustworthy and audited Electoral Register).
>
> 2) Guarantee that the right to vote be exercised freely, without coercion or intimidation. Prohibit the migration of voters from their natural electoral centers.
>
> 3) Cessation of the disqualifications and prosecution of political leaders and fully restoring their rights to political participation.

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687 See text in "Por unanimidad: los partidos políticos de la Unidad deciden no participar en el fraude y convocan a un pacto nacional para la salvación de Venezuela," Asamblea Nacional, Centro de Comunicación Nacional, Caracas August 2, 2020, available at: https://presidenciave.com/presidencia/por-unanimidad-los-partidos-politicos-de-la-unidad-deciden-no-participar-en-el-fraude-y-convocan-a-un-pacto-nacional-para-la-salvacion-de-venezuela/.
Also see information in Alonso Moleiro, "La oposición a Maduro oficializa su decisión de no participar en las elecciones legislativas. Los partidos que apoyan a Guaidó defienden la celebración de una votación con garantías en Venezuela, El País, August 2, 2020, available at: https://elpais.com/internacional/2020-08-02/la-oposicion-a-maduro-oficializa-su-decision-de-no-participar-en-las-elecciones-legislativas.html; y en "La oposición de Venezuela no participará en las próximas elecciones legislativas," en público.com, 2 de agosto de 2010, disponible en: https://www.publico.es/internacional/oposicion-venezuela-no-participara-proximas-elecciones-legislativas.html

4) Full participation of all political parties; reinstatement of their legitimate authorities suspended by invalid interventions, as well as the use of the parties' symbols and colors.

5) An independent National Electoral Council, appointed by the National Assembly, according to the National Constitution and the Law. Independent designation of all subordinate bodies, as well as the Electoral Boards and members of polling stations. Respect the work of the electoral witnesses and other officials in all the processes.

6) Electoral timetable that guarantees the right to vote and the times for each activity in the process, starting with the call thereof.

7) Equitable electoral campaign, with equal access to public and private mass media; prohibition of chained programs. Equitable access to public spaces and guarantee free transit throughout the national territory.

8) Proper behavior of the "Plan República" respecting that the elections process is essentially a civil act. Forbid undue interventions in the process.

9) Audits of all the processes of the electoral system, including the new voting machines and the system for the automatic process.

10) National and international qualified Electoral Observation in all stages of the process and in the various phases of the electoral cycle. Qualified accompaniment in each electoral process." [688]

These necessary conditions, from the standpoint of the international community, for instance, as summarized by the Secretary of State of the United States, Michael R. Pompeo, in his Declaration about "Free and fair presidential and parliamentary elections in Venezuela," issued on January 9, 2020, would be that:

"the electoral process be spearheaded by a new, balanced, and independent National Electoral Council (CNE) - selected

[688] *Idem*.

> through the National Assembly – as constitutionally mandated"; that the "elections be open to all parties and candidates," removing "all restrictions on individuals and political parties to allow their free participation in presidential and parliamentary elections," and "that all those arbitrarily detained be released, including political prisoners"; that there be "unrestricted media/telecommunications/internet access to independent news sources and equitable airtime for all candidates, parties and the electorate"; allowing "the exercise of the rights of peaceful assembly and freedom of expression without repression, reprisal or politically motivated disruptions of service"; and further, that the process be carried out under "independent electoral observation, free of undue restrictions, comprised of domestic and international experts."[689]

It should, therefore, not be surprising that the same Secretary of State of the United States, on June 15, 2020, also denounced that "on June 12, the Maduro regime-controlled Supreme Court continued to manipulate the Venezuelan Constitution by illegally naming a new, regime-aligned National Electoral Council," that "will rubber-stamp its decisions and ignore the conditions required for free elections," among which it again mentioned the need for "lifting the ban on political parties and candidates," and "the politically motivated judicial procedures against opposition politicians"; and the need for "releasing all political prisoners; respecting freedom of speech, the press and association" and resolving in a transparent manner all the technical challenges to free and fair elections including registration of voters and the procurement and handling of voting machines."[690]

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689 See the Declaration of "Free and Fair Presidential and Parliamentary Elections in Venezuela," Press Statement, Michael R. Pompeo, January 9, 2020. Available at: https://www.state.gov/free-and-fair-presidential-and-parliamentary-elections-in-venezuela

690 See the declaration "The United States Condemns Maduro's Latest Step To Rig the Next Venezuelan Election," Press Statement, Michael R. Pompeo, June 15, 2020. Available at: https://www.state.gov/the-united-states-condemns-maduros-latest-step-to-rig-the-next-venezuelan-election/

None of those conditions for free and transparent democratic elections is currently guaranteed in Venezuela, and neither were they in May 2018, when the National Assembly disclaimed and declared as "non-existent" the electoral "farce" for the "re-election" of Nicolas Maduro;[691] all of which was further confirmed by the words of the Minister of the Defense of Nicolas Maduro's regime in Venezuela, on July 5th, 2020, during the celebration of the Venezuelan Independence Day, when he declared, and purely and openly warned the "opposition" that they "will never again be able to exercise political power."[692]

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691 See text of Agreement of May 22, 2019 at http://www.asamblea nacional.gob.ve/-actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. Also in the report "Asamblea Nacional desconoce resultados del 20M y declara a Maduro "usurpador," en *NTN24*, May 22, 2018, at http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas.

692 See text in *El País*, 6 de julio de 2020, available at: https://elpais.com/ internacional/2020-07-06/el-ministro-de-defensa-de-maduro-advierte-a-los-opositores-de-que-nunca-podran-ejercer-el-poder-politico.html. Ello motivó, entre otras reacciones, la declaración de los expresidentes latinoamericanos que conforman la *Iniciativa Democrática España y las Américas*, de fecha 8 de julio de 2020, titulada **"***Declaración sobre la intervención dictatorial de la Fuerza Armada en los asuntos electorales de Venezuela,*" en la cual**: "**a) Expresan su alarma ante la muy grave manifestación del Alto Mando de la Fuerza Armada de Venezuela del pasado 5 de julio, por voz de su ministro de la Defensa, General Vladimir Padrino López, afirmando que los opositores "no serán poder político en Venezuela jamás en la vida, mientras exista una fuerza armada como la que hoy tenemos, antiimperialista, revolucionaria y bolivariana… nunca podrán ejercer el poder político en Venezuela, es bueno que lo entiendan." b) Urgen al Secretario General y al Consejo Permanente de la Organización de los Estados Americanos, por ende, proceder según los términos de la Carta Democrática Interamericana y rechazar expresamente la antidemocrática manifestación de un cuerpo armado que ha de subordinarse a la autoridad del poder civil legítimamente constituido y tiene a su cargo la dirección del Plan República durante toda elección popular; y a las autoridades de la Unión Europea, a que condenen categóricamente la ficción electoral que se intenta llevar a cabo a fin de dejar sin sustento al último reducto de la experiencia democrática venezolana, su actual Asamblea

In this framework, it is therefore not surprising that, even before that "confirmation-confession" by the Minister of Defense, there have been specific evidences that it is impossible to recognize anything resulting from the "Electoral Circus" set up by the Constitutional Chamber of the Supreme Tribunal.

Hence, the National Assembly itself was the first to react, when its Chairman stated that:

> "Our position is very clear (…) *We disavow* any false CNE appointed by a judicial arm of the dictatorship that has no competence to do so. […] "We shall not *recognize* any imposition nor anything that comes out of that false CNE."[693]

For its part, for example, the Permanent Council of the Organization of American States, in its session of June 26, 2020, in resolution CP/RES. 1156 (2291/20), resolved to "*disavow the illegal designation* of the members of the National Electoral Council by the Supreme Tribunal of Justice"; recognizing instead the National Assembly as the "sole institution democratically elected."

The Permanent Council further condemned "the continued harassment exercised by the *illegitimate* regime of Nicolas Maduro against the functions that Venezuelan laws grant to the National Assembly"; also rejecting "in the strongest terms" and *disavowing* "the *illegal designation* of the boards of directors of political parties *Primero Justicia* y *Acción Democrática*."[694]

In this same regard, as mentioned above, the *Grupo de Lima*, on June 18, 2020, stated that they "*reject and disavow the illegal*

Nacional, presidida por el diputado Juan Guaidó Márquez." July 8, 2020. Available at: https://static1.squarespace.com/static/5526d0eee4b040480263ea62/t/5f06155cf1d20d407d25ef02/1594234204454/IDEA+2020+FFAA+VENEZUELA.pdf

693 See Voz de América, June 14, 2020, available at: https://www.voanoticias.com/venezuela/parlamento-venezolano-no-reconoce-nuevo-consejo-electoral. See also in Guillermo D Olmo, "Crisis política en Venezuela: las 4 decisiones del Tribunal Supremo que golpean a la oposición (y qué significan para la democracia en el país)," in BBC News Mundo, Caracas June 17, 2020, available at: https://www.bbc.com/mundo/noticias-america-latina-53085142

694 See: http://scm.oas.org/doc_public/spanish/hist_20/cp42611s03.docx

designation of the members of the National Electoral Council of Venezuela made by a decision of the Supreme Tribunal of Justice."[695]

According to the Dictionary of the Royal Academy of the Spanish Language, to "disavow" is none other than "to disclaim or not recognize something or someone," and that is precisely what is announced from the onset, that nothing resolved by the Constitutional Chamber as part of its "Circus" shall be recognized, specifically, the alleged designations of the members of the National Electoral Council or the boards of directors of the sequestered political parties, nor the decisions that such persons may adopt in such capacity.

One must keep in mind that that was precisely what happened with regard to the unconstitutional election of the fraudulent Constituent Assembly in 2017, with the alleged call it then made for an unconstitutional presidential election that took place in May 2018, and with that election in which allegedly Nicolas Maduro had been "re-elected"; and this national and international disclaimer was precisely what gave rise to the process of transition toward democracy decreed and led by the National Assembly and by its Chairman, Juan Guaidó, as of January 2019,[696] this being the sole institution whose democratic legitimacy has been considered both at a national and international level.[697]

Due to all the foregoing, it is obvious that the general disavowing expressed beforehand regarding the possible outcome of the electoral "circus" unconstitutionally set up to hold an alleged "parliamentary

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695 See in *El País*, June 18, 2020, available at: http://www.elpais.cr/2020 /06 /16/grupo-de-lima-desconoce-designacion-de-consejo-electoral-venezolano/

696 See, in general, Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, (Con Prólogo de Asdrúbal Aguiar; y Epílogo de Román José Duque Corredor), Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana, Miami 2019.

697 See, in general, José Ignacio Hernández, *Bases fundamentales de la transición en Venezuela. El reconocimiento del Presidente de la Asamblea Nacional como Presidente encargado de Venezuela*, Editorial Jurídica Venezolana, Caracas 2020.

election" on December 6, 2020, can only lead to considering that the same –if carried out under the current conditions (September 2020)- is illegitimate and non-existing. That is why the Interim Government, by means of Communiqué dated September 1, 2020, issued a "public call […] not to validate the electoral fraud of the dictatorship," expressing that "The fight is for liberty and for true fair, free and verifiable elections" […] reaffirming "the decision not to participate in the fraud and to fight for the necessary electoral conditions that were approved by the National Assembly." [698]

That is why, for example, on September 1, 2020, the Government of Spain insisted that "the only way to settle the crisis in the country is to hold democratic elections;[699] the Minister of Foreign Affairs of Chile stated in view of the announcements of the "release of political prisoners in Venezuela [that it] should be accompanied by other measures focused on *giving legitimacy to the electoral process*. There must be guaranteed *free vote, independent electoral body and international observation*;[700] all of which was ratified by the Secretary of State of the United States, M. Pompeio, on September 3, 2020, when he stated that "the only solution to the crisis in

698 See "Comunicado del Gobierno Interino sobre las declaraciones del canciller de Turquía," Caracas 1 September 1, 2020. Available at: https://presidencia ve.com/presidencia/comunicado-del-gobierno-interino-sobre-las-declaraciones-del-canciller-de-turquia/

699 See Ministry of Foreign Affairs, EU and Cooperation (of Spain) "El Gobierno de España valora "positivamente" los indultos del presidente venezolano pero insiste en la celebración de elecciones democráticas," en *Córdoba buenas noticias*, September 1, 2020. Available at https://www.cordobabn.com/articulo/internacional/gobierno-espana-califica-positiva-decision/20200901113303058142.html

700 See statement by the Ministry of Foreign Affairs (of Chile), in *La Tercera,* September 1, 2020. Available at: https://www.latercera.com/politica/noticia/canciller-dice-que-indulto-a-presos-politicos-en-venezuela-debe-ser-acompanado-de-otras-medidas-para-garantizar-legitimidad-de-elecciones-legislativas/6RLNCLQSDBBYRN3UW3AL37WZ7A/

Venezuela *are actual free and fair elections, not this political farce*."[701] He further explained later that:

> "Conditions for free and fair elections do not exist in Venezuela and the release of a number of political prisoners does not change that.
>
> None of the political parties whose leadership was removed and their names, symbols, and assets stolen by the regime have been restored, including parties from the left that challenge the regime's control of Chavez's political legacy. Many political opponents of the regime are still prohibited from running for office and remain without political rights. The illegally appointed National Electoral Commission (CNE) remains under tight regime control, a fact that will become critical because complex registration processes are in its hands. Freedom of the press does not exist. Freedom of expression does not exist. Freedom of assembly does not exist.
>
> These minimum conditions to receive a credible international electoral observation mission remain absent.
>
> We urge all democratic actors, both within and outside of Venezuela, to continue to insist on the necessary, internationally accepted conditions for free and fair elections. We, and our democratic partners in Venezuela and the international community, will not contribute to legitimizing yet another electoral fraud carried out by the Maduro regime. Venezuelan citizens deserve our continuing solidarity in their struggle to restore democracy to their country."[702]

If the parliamentary elections called for December 6, 2020, should be held under the conditions of illegitimacy and unconstitutionality that currently exist (September 2020), they can

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701 See Michael Pompeo. Tweet. September 3, 2020. Available at: https://twitter.com/SecPompeo/status/1301521240289615878.

702 See Michael R. Pompeo "Acontecimientos recientes en Venezuela," 3 de septiembre de 2020, available at https://translations.state.gov/2020/09/03/acontecimientos-recientes-en-venezuela/?utm_medium=email&utm_source=govdeliveryD.

only be considered as an electoral "simulacrum" typical of "authoritarian regimes,"[703] for which, in this case, the government not only has designed "an election to its own just measure," but also "an opposition to its own measure."[704] For this reason, under these conditions it is not possible to fall into the false dilemma of "voting or not voting," which only leads, as Luis Ugalde S.J. put it, to play "the game of the dictatorship."[705]

Consequently, if such parliamentary elections are held in the current circumstances (September 2020), the only outcome would be an alleged "election" of representatives to the National Assembly that has been declared beforehand to be illegitimate by the National Assembly, with the unavoidable consequence that the same (as happened with the alleged election of Nicolas Maduro on May 2018), must also be deemed to be "non-existent."

And this will not change only because the Maduro's government released some political prisoners and dropped accusations against others persecuted,[706] or because a few dissidents from the opposition

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703 See Ángel Álvarez, interview with Hugo Prieto: "La cultura del petroestado no va a cambiar de la noche a la mañana," in *Prodavinci* July 5 2020; available at: https://prodavinci.com/angel-alvarez-la-cultura-del-petroestado-no-va-a-cambiar-de-la-noche-a-la-manana/.

704 See Ángel Álvarez, interview with César Miguel Rondón, "En Venezuela hay cinco oposiciones con agendas incompatibles," in *América digital*, July 6, 2020, available at: https://www.americadigital.com/columnistas/en-venezuela-hay-cinco-oposiciones-con-agendas-incompatibles-afirmo-el-profesor-y-phd-en-ciencias-politicas-angel-alvarez-85623.

705 See Luis Ugalde "Votar o no votar," en *América 2.1,* agosto 2020, available at: https://americanuestra.com/luis-ugalde-votar-o-no-votar/. See also: Manuel Llorens, "El dilema electoral: una interpretación esquizofrénica," en *Prodavinci,* September 7, 2020, disponible en: https://prodavinci.com/el-dilema-electoral-una-interpretacion-esquizofrenica/.

706 See the announcment made by Jorge Rodríguez, in Florantonia Singer, "Nicolás Maduro otorga el indulto a más de 100 presos políticos y diputados perseguidos. La medida de gracia es parte de la negociación del Gobierno con un ala de la oposición de cara a la participación en las elecciones parlamentarias," in *El País*, September 1, 2020. Available at: https://elpais.com/internacional/2020-08-31/nicolas-maduro-otorga-el-indulto-a-decenas-de-presos-politicos-y-diputados-perseguidos.html

have decided to participate in them, as was announced on September 2, 2020.[707] This isolated facts, do not give such elections the needed conditions to be democratic, free, fair, verifiable, transparent and competitive elections.[708]

Consequently, in this case, as well as in that alleged election of Nicolas Maduro in May 2018, the so-called "principle of preservation of the *presumed* electoral will"[709] could not be applied because it will be an illegitimate and unconstitutional election. For this reason, the alleged representatives that might be "elected" could not assume their duties legitimately as members of the National Assembly, which should start its functions as of January 2021, on which date, according to the Constitution, the representatives elected in December 2015, must cease in office as was also provided in article 13 of the *Transition Statute*.

Such *Transition Statute* established general regulatory framework of the process for the recovery of democracy and the restoration of the full force of the Constitution, setting forth in its Article 6.4, that it was enacted to guide:

> "the actions of the National Assembly for forming a national unity Government that *fills in the lack of an elected President until the holding of free and transparent elections within the shortest time possible*."

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707 See the announcment made by Henrique Capriles, in Florantonia Singer, "Capriles toma la iniciativa en la oposición y llama a participar en las elecciones parlamentarias en Venezuela," in *El País*, September 3, 2020. Available at: https://elpais.com/internacional/2020-09-03/el-lider-opositor-henrique-capriles-llama-a-participar-en-las-elecciones-parlamentarias-en-vene zuela.html

708 See Moisés Troconis Villarreal, "El día 6 de diciembre no habrá fraude, la elección ya se realizó," in *Somostuvoz*, August 18, 2020, available at: http://www.somostuvoz.net/destacado/ya-maduro-eligio/

709 Referred to by Claudia Nikken, in "Reflexiones sobre la eventual continuidad institucional de la Asamblea Nacional," en *WOLA.ORG, Venezuelan Politics and Human Rights*, August 18, 2020. Available at https://www.venezuela blog.org/reflexiones-sobre-la-eventual-continuidad-institucional-de-la-asam blea-nacional/

Within that framework, a few months after, on September 17, 2019, the National Assembly issued an "*Agreement to ratify the political route proposed by the National Assembly as a way out of the crisis prevailing in the country, in view of the blockade of democratic solutions by the usurping regime of Nicolas Maduro Moros*," where, among other decisions, it resolved:

> "FIRST: To ratify the Resolution approved by this National Assembly on January 15, 2019, *declaring the usurpation of the National Executive Power by the regime of Nicolás Maduro Moros and establishing the route for the restoration of constitutional order*. […]
>
> "THIRD. *To ratify the full force of all attributes of the National Assembly of Venezuela, the mandate of the representatives who have been democratically elected, and the sovereign will of the Venezuelan people, as well as legal itinerary set in the Statute Governing the Transition toward Democracy for the Restoration of the force of the Constitution* of the Bolivarian Republic of Venezuela, giving full and unlimited political support to the leadership of Juan Guaidó Márquez as Chairman of the National Assembly, and as Interim President of the Bolivarian Republic of Venezuela, until the ceasing of the usurpation."

Moreover, based on these decisions, the Assembly resolved to support the only proposal possible with regard to electoral matters, which is:

> "to *call free, fair and transparent presidential elections, with serious international observation and the free participation of all Venezuelans, which requires a new legitimate Electoral Power, designated by the National Assembly* in exercising its constitutional competences and the establishment of a Transition Government that leads the country to this process." [710]

None of this has been fulfilled, wherefore, it can be said that the *Statute for Transition* in no way runs out by reason of the holding of

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[710] Véase en *Gaceta Legislativa*, No.12, 19 de septiembre de 209. Disponible en: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570202248.pdf

the illegitimate and unconstitutional parliamentary elections called for December 2020. On the contrary, regardless of the holding or not of those parliamentary elections, the transition regime for democracy and the reinforcement of the Constitution established in the *Transition Statute* or in the substitutive normative framework that for such purpose could be enacted by the National Assembly pursuant article 333 of the Constitution, necessarily will remain in force, because the circumstances that gave rise to the same, that is, the lack of a legitimate President who in January 2019 could take office as President of the Republic for the 2019-2025 term, and the declared usurpation by Nicolás Maduro, will persist; and this will not change with such illegitimate and unconstitutional parliamentary elections.

Therefore, under the current circumstances (September 2020), the illegitimacy and usurpation of the *de facto* regime of Maduro, as declared in the *Statute for Transition*, will continue and evidently will not cease by the holding of parliamentary elections that, as declared, shall be illegitimate and unconstitutional, and will only cease once the usurpation ends and free, transparent and competitive presidential elections are held.

As was pointed out by Asdrúbal Aguiar:

> "From the last redoubt of formal legitimacy that remains to the country, the National Assembly already consulted the people in 2017 and twice ratified its legislative mandate. To this effect, it later coordinated a "provisional constitutional statute": The *Statute for the Transition*, to return to the Constitution from the Constitution itself, once the conditions have been reached so that Venezuelans can return to the polls, exercise our sovereignty, and give ourselves a destiny true and decent.
>
> The pending task to be carried out by the Assembly and its authorities does not have constitutional terms that are to be exhausted, precisely because the Constitution has been dismantled and is subject to the constitutional provisionally of the *Statute*, which sets a clear goal for them: Arrange and join

forces to interpret the truths of the nation and set it free. Never to serve the clientelist system and lies."[711]

Therefore, as long as the usurpation does not ceases and democratic, free and reliable elections are held in order to elect a legitimate President of the Republic for the 2019-2025 term and the representatives to the National Assembly for the term 2021-2026; in view to the fact that the representatives elected in December 2015 will ceased in their functions on January 5th, 2021, the transition regime must continue according to articles 233 and 333 of the Constitution since the country cannot be without legitimate authorities, particularly in its international relations.[712]

This would require the National Assembly, according to such provisions, to proceed to "lay the foundations" and organize the "National Emergency Government," announced in the *Unitary Pact for Freedom and Free Elections* dated September 7, 2020,[713] "whose

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711 See Asdrúbal Aguiar, "Llamado a los "políticos" de mi patria, Venezuela," in *Diario Las Américas*, septiembre 7, 2020. Available at: https://www.diario lasamericas.com/opinion/llamado-los-politicos-mi-patria-venezuela-n4206295

712 In this regard, for example, the chargé d'affairs of the External Office of the United States for Venezuela, James Story, as reported by José Gregorio Meza in its interview published on September 3, 2020, stated: "The United States only recognizes the interim government of president Juan Guaidó and the democratic parties […] Story stressed that *this would be this way until the ceasing of the usurpation*. "We are going to continue supporting president Guaidó and the international community will do likewise." *He said that the problem is not the National Assembly, but that Maduro usurps a power illegitimately, since the May 2018 elections were fraudulent."* See José Gregorio Meza, "Story: Estados Unidos reconocerá a Guaidó como presidente hasta el cese de la usurpación," *El Nacional*, 3 de septiembre de 2020. Available at: https://www.elnacional.com/venezuela/james-story-estados-unidos-reconocera-a-guaido-como-presidente-hasta-el-cese-de-la-usurpacion/.

713 Pact signed by 37 opposition political organizations. See "Partidos políticos y organizaciones sociales firmaron Pacto Unitario propuesto por Guaidó," in *El Nacional*, 9 septiembre 2020. Available at: https://www.elnacional.com/venezuela/partidos-politicos-y-organizaciones-sociales-firmaron-pacto-unitario-propuesto-por-guaido/ See the text in: https://www.elimpulso.com/2020/09/07/este-es-el-pacto-unitario-suscrito-por-las-fuerzas-democraticas-por-la-libertad-de-venezuela-7sep/

purpose is to *direct the transition*, to take urgent care of the economic crisis and *to call free elections*."

For such purpose, the National Assembly must proceed to regulate the actions of such Government of National Emergency, determining if it is the case, how and up to which point the *Transition Statute* will continue to be applied, including, if it is the case, the figure of the Interim President, in particular regarding the functions assigned in it to the a "legitimate President in charge of the Republic" (art. 14). The National Assembly will need also to regulate, in particular, in relation to the effects and projection of the National Emergency Government abroad, specifically through the actions of all the officials appointed by Interim President Juan Guaidó since January 2019, and the actions of the members of the *Ad-Hoc* Boards designated pursuant to the said *Statute* to manage the various decentralized entities of the State to protect their assets abroad.[714] It must not be forgotten that the Interim Government, the officials and those *Ad-Hoc* Boards have been recognized by many foreign States and International Organizations; and such situation would not change with the sole fact that parliamentary elections could take place, and much less if they are illegitimate and unconstitutional.[715]

In short, it will correspond to the National Assembly, in the frame of the aforementioned article 333 of the Constitution, to enact the provisions in order to guarantee the continuation of "the process

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[714] In this case, not being elected officials, the application of the principle of "administrative continuity," conceived in administrative law, to which Ricardo Combellas referred, would be applied to the administrative officers appointed within the transition regime. See Ricardo Combellas, "¿Continuidad administrativa?," in *El Nacional*, July 27, 2020, available at: https://www.elnacional.com/opinion/continuidad-administrativa/.

[715] That is why what Nicolas Maduro expressed on September 8, 2020, affirming that "Venezuela needs a National Assembly in order to recover Citgo, the London gold and the hijachked assets," had no sense. (See the video with the presentation of Nicolás Maduro in: https://www.youtube.com/watch?reload=9&v=7jZq-vUP0NY). The assets of the Nation were precisely recovered by the Interin Government established due to the urusation of Maduro until free presidencial elections can be held; and that situation would not change with the illegitimate and unconstitucional parliamentary elections

for the restoration of constitutional and democratic order" beyond January 5th, 2021.

New York, September 8, 2020

Chapter XVII

THE LAST BLOW TO THE RULE OF LAW: THE "ANTIBLOCKADE" "CONSTITUTIONAL LAW" TO TOP OF AND DISTRIBUTE THE REMAINS OF THE NATIONALIZED ECONOMY, WITHIN A FRAMEWORK OF SECRECY AND LEGAL UNCERTAINTY*

I. UNDERMINING THE LEGAL SYSTEM IN ORDER TO APPLY, IN SECRECY, A "NEW" ECONOMIC POLICY OF DESTATIZATION, DENATIONALIZATION AND PRIVATIZATION OF THE ECONOMY IN ORDER TO OBTAIN "ADDITIONAL INCOME"

The National Constituent Assembly, which was unconstitutionally and fraudulently called and elected in 2017,[716] in October 8th, 2020 approved without much debate[717] an *Anti-blockade*

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* Text written for the Presentation I made at the event *"The de facto Impact of the unconstitutional Antiblockade Law in Venezuela," organized by Analitica, Caracas Octrober 22, 2020.*

716 See on this matter, Allan R. Brewer-Carías y Carlos García Soto (Coordinators), *Estudios sobre la la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017* Colección Estudios Jurídicos Nº 119, Editorial Jurídica Venezolana, Caracas 2017

717 See on this matter the report by Sebastiana Barráez, "La Ley Antibloqueo dividió al chavismo: legisladores de su propia asamblea denuncian que viola la Constitución de Venezuela;" available at: *Infobae*, October 12, 2020, available at: https://www.infobae.com/america/venezuela/2020/10/12/la-ley-

Law for the national development and the guaranty of human rights, so called "Constitutional Law" (a concept that does not exist in the Venezuelan constitutional system, in which the sole body competent for enacting laws is the National Assembly),[718] which was drafted on the basis of a proposal[719] that was submitted by Nicolás Maduro a week before, on October 1, 2020.[720]

This "Constitutional Law,"[721] as it is expressed in its provisions, has the basic purpose of obtaining "additional income" (art. 18),

antibloqueo-dividio-al-chavismo-legisladores-de-su-propia-asamblea-denuncian-que-que-viola-la-constitucion/

718 See on this matter, Allan R. Brewer-Carías, *Usurpación Constituyente 1999, 2017. La historia se repite: una vez como farsa y la otra como tragedia*, Colección Estudios Jurídicos, No. 121, Editorial Jurídica Venezolana International, 2018.

719 See the text of the document in "Presidente Maduro presentó ante la ANC proyecto de Ley Antibloqueo," available at: *Aporrea*, 30/09/2020 ; available at: https://www.lapatilla.com/2020/09/30/este-es-la-ley-antibloqueo-presentada-ante-la-constituyente-cubana-documento/

720 See our comments on the proposal in Allan R. Brewer-Carías, "La Ley Antibloqueo: una monstruosidad jurídica para desaplicar, en secreto, la totalidad del ordenamiento jurídico," New York, October 4, 2020; available at: https://bloqueconstitucional.com/efectos-del-informe-de-la-mision-internacional-independiente-sobre-violaciones-a-los-derechos-humanos-en-venezuela-en-relacion-con-el-estado-de-derecho-y-las-elecciones/ Also see on this bill of law, the critique by: Ramón Peña, "El Anti-bloqueo: la panacea," in *The World News,* October 4, 2020; available at: https://theworldnews.net/ve-news/el-anti-bloqueo-la-panacea-por-ramon-pena; Luis Brito García, "Proyecto Ley Antiboqueo," in *News Ultimasnoticias*, October 3, 2020; available at: https://theworldnews.net/ve-news/proyecto-de-ley-antibloqueo-luis-brito-garcia; https://primicias24.com/opinion/294724/luis-britto-garcia-proyecto-de-ley-antibloqueo/; and https://ultimasnoticias.com.ve/noticias/especial/proyecto-de-ley-antibloqueo-luis-brito-garcia/; Juan Manuel Raffalli "Proyecto de Ley Antibloqueo crea cuarto oscuro que impide conocer documentos y procesos," in: *Lapatilla.com*, October 1, 2020, available at https://www.lapatilla.com/2020/10/01/juan-manuel-raffalli-proyecto-de-ley-antibloqueo-crea-cuarto-oscuro-que-impide-conocer-documentos-y-procesos/

721 See in en *Gaceta Oficial* No. 6.583 Extra. of October 12, 2020. See the comemets regarding the Law, in: Alejandro González Valenzuela, "Ley Antibloqueo: Hacia el deslinde definitivo con la Constitución y el Estado de

through the implementation of a "change" in the economic policy in order to destatisize, denationalize and indiscriminately and secretly privatize the economy, and of new public financial negotiations, in order to supposedly take care of the need of the country; but all of it, subverting the entire legal system.[722] The "Constitutional Law,"

derecho," in *Bloque Constitucional*, October 12, 2020, available at: https://bloqueconstitucional.com/ley-antibloqueo-hacia-el-deslinde-definitivo-con-la-constitucion-y-el-estado-de-derecho/; José Guerra, "Ley Antibloqueo es un golpe de Estado," in Enrique Meléndez, *La Razón*, Octubre 2020; available at: https://www.larazon.net/2020/10/jose-guerra-ley-antiblo queo-es-un-golpe-de-estado/; and *Acceso a la Justicia*, "Ley Antibloqueo de la írrita Constituyente en seis preguntas, en *Acceso a la Justicia*, 16 de octubre de 2020, disponible en: https://www.accesoalajusticia.org/ley-antibloqueo-de-la-irrita-constituyente-en-seis-preguntas/

722 The opinion of Alejandro González Valenzuela is that the "Anti-Blockade Law" reinforces a "constitutional exception regime" by assigning to the Executive Branch of the Government "extraordinary power such as: (i) the de-regulation of economic sectors and activities (by disapplying legal, and eventually, constitutional rules); (ii) holding and closing legal acts and deals; modifying the system for the organization, ownership, management and operation of public and mixed companies in Venezuela and abroad; the administration of assets and liabilities through transactions available in national and international markets; all the above without observing the regime that reserves economic activities instituted by Article 303 of the Constitution; (iii) the implementation of exceptional contracting mechanisms; (iv) the association with illegitimate capitals under illegal conditions, that are also harmful for Venezuela; (v) using a totalitarian repressive apparatus against whoever oppose the "enforcement thereof." See Alejandro González Valenzuela, "Ley Antibloqueo: Hacia el deslinde definitivo con la Constitución y el Estado de derecho," in *Bloque Constitucional*, October 12, 2020; available at https://bloqueconstitucional.com/ley-antibloqueo-hacia-el-deslinde-definitivo-con-la-constitucion-y-el-estado-de-derecho/. In similar sense, José Ignacio Hernández has summarized the purpose of the Law by pointing out that its purpose is to: " Dispose of State assets and manage the Venezuelan economy without parliamentary control, "for which purpose," articles "19, 24, 27 and 29 allow Maduro (i) to carry out public expenditures; (ii) Contract debt operations and, in general, renegotiation operations; (iii) Enter into public interest contracts; and (iv) Reorganize State-owned companies to transfer their assets to private investors, even with respect to assets that have not been formally acquired, as they are affected by

although did not expressly provide that it prevailed *in toto* over the Constitution (which nonetheless was proposed by the Bill of Law submitted by N. Maduro), it can be wielded to achieve an approximate effect, for it declares its articles to be of "preferential application" over all laws, of "public order and general interest," and of mandatory enforcement by all territorial levels of the government and by all persons (Art. 2).

This rupture of the legal system can be noted specifically in the following aspects:

First, in the conception of the "Constitutional Law" as a *regulatory framework of a supra-legal rank*, that is, above all, for organic and ordinary laws of the Republic, regarding which the "Constitutional Law" is declared to be of preferential application (First Transitory Provision), which is equivalent to stating what was proposed in the original bill of the Law: that all "rules that collided with the provisions thereof were now suspended" (Second Transitory Provision of the Bill of Law submitted by N. Maduro). In any event, the approved Law achieves similar purpose by setting forth that its provisions prevail over organic and ordinary laws.

Second, in granting a *unlimited power for the Executive Branch of the Government to "disapply" rules having a legal rank in specific cases,* as it deems necessary in order to attain the purposes of the Law (Art. 19), that is, giving it the power to decide in specific cases that an organic law or any other law *does not apply,* which undoubtedly implies establishing an *unlimited legislative delegation in favor of the Executive Branch, to exercise the power to legislate* in order to make up for the absence of rules or the legislative vacuum resulting from to the executive decision to "*disapply*" the rules of the legal order.

"occupation" measures. Anticipating the wave of litigation that these measures could unleash, the "Law" creates a special service for the exercise of legal actions abroad (Article 36)." See José Ignacio Hernández, "La Ley Constitucional Antibloqueo" y el avance de la economía criminal," en *La Gran Aldea*, Octubre 15, 2020; available at: https://lagranaldea.com/2020/10/15/la-ley-constitucional-antibloqueo-y-el-avance-de-la-economia-criminal-en-venezuela/

Third, it also grants the same *unlimited power for the Executive Branch to "disapply" in specific cases, that is, singularly, regulations and other rules of a sub-legal rank* that are deemed to be counterproductive for achieving the purposes of the Law (Art. 19), infringing the general principle of singular non-modifiability or non-derogability of the regulations that is guaranteed by Article 13 of the Organic Law on Administrative Procedure.

Fourth, the establishment of a *broad power to sign "international treaties, agreements and conventions*, bilateral or multilateral, favoring the integration of free peoples" that should be based on "pre-existing obligations of the Republic" (Art. 10), seeking with this to obviate the necessary approval of said instruments by a law enacted by the National Assembly, as required in the Constitution (Art. 154).

And fifth, the formal and express establishment of a *system of total lack of transparency*, by providing not only to disapply the laws on bids and public contracts (Arts. 21 and 28), but also that all the "procedures, formalities and records made on the occasion of implementing any of the measures" set forth in the Law that "imply disapplying *rules* of a legal or sub-legal rank" shall be *secret and reserved"* (Art. 42).

The foregoing is equivalent to a total undermining of the legal system of the State, which is entirely incompatible with the most elementary principles of the rule of law, materialized in the "regulation" or formal establishment of the "disapplying" of laws, in secrecy, by the Executive Branch. [723] Although qualified as a "*special*

[723] As expressed by the Venezuelan Episcopal Conference, "The so-called" anti-blockade law ", approved by the illegitimate National Constituent Assembly, is one more expression of the government's will to lead our country down paths other than legality, and thus squander the national resources that belong to all, with the aggravating factor, that now it tries to be done in a hidden and totally discretionary way." See, Conferencia Episcopal Venezolana, "Sobre la Dramática situación social, económica, moral y política que vive nuestro país," 15 de octubre de 2020, disponible en: https://conferenciaepiscopalvenezolana.com/downloads/exhortacion-pastoral-sobre-la-dramatica-situacion-social-economica-moral-y-politica-que-vive-nuestro-pais

and temporary regulatory framework that provides the *legal tools* for the Venezuelan Public Power" to achieve the purpose set in the Law, in fact it is an "exceptional regime with a vocation of permanence,"[724] to achieve what appears to be a radical change in the economic policy toward a destatization, denationalization and privatization of the economy, for the purpose of "counteracting, mitigating and reducing in an effective, urgent and necessary manner the harmful effects caused by the imposition against the Republic and its people," of what it characterizes as:

> "unilateral coercive measures and other restrictive or punitive measures originating from or issued by another State or group of States, or by actions or omissions arising therefrom, by international organizations and other foreign public or private entities."

According to such "Constitutional Law," those "coercive measures" would affect the human rights of the Venezuelan people, imply attacks against International Law and, as a whole, are crimes against humanity" (Art. 1); which affirmations clash and ignore the crimes against humanity perpetrated and denounced in the "*Detailed Conclusions of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (443 pp.),*[725] submitted barely a few weeks before, on September 15, 2020, to the United Nations Human Rights Council, in compliance with the Council's Resolution 42/25 of September 27, 2019, and which characterized

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[724] Véase Bloque Constitucional Venezolano, "Sobre la pretendida Ley Antibloqueo," en *Bloque Constitucional*, 16 de ocurre de 2020,; available at: http://digaloahidigital.com/noticias/el-bloque-constitucional-de-venezuela-la-opini%C3%B3n-p%C3%BAblica-nacional-e-internacional-sobre-la

[725] Report of September 15, 2020, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP.11_SP.pdf See the comments on this Report in Allan R. Brewer-Carías, "Efectos del Informe de la Misión Internacional Independiente sobre violaciones a los derechos humanos en Venezuela en relación con el Estado de derecho y en las elecciones,' 1 de octubre de 2020, disponible en http://allanbrewercarias.com/wp-content/uploads/2020/10/1261.-Brewer.-efectos-del-informe-de-la-mision-internacional-independiente-en-el-estado-de-derecho-y-en-las-elec ciones.pdf

several of the crimes perpetrated by government officials in Venezuela against human rights, as crimes against humanity.

On the other hand, all this regulatory framework, in the end, has been established for the purpose of obtaining public "new incomes" through the definition of a "new" economic policy of destatization, denationalization and privatization , and new ways of financing, all implemented in secrecy, with the excuse to attain objectives that are not new, for they are contained in the Constitution of 1999 (Arts. 112 - 118, and 399 - 321), and are simply repeated in the Law. This can be deducted from the enunciates of its various articles stating, for example, on the "harmonic development of the national economy geared toward generating sources of employment, high value added, raising the standard of living of the population and strengthening the country's economic sovereignty" (Art. 3.2); the "unalienable right to full sovereignty over all its wealth and natural resources" (Art. 3.3); the protection of "third-party rights, including other States, investors and other individuals or legal entities that deal with the Republic" (Art. 5.3); "guaranteeing the people's full enjoyment of their human rights, the timely access to goods, services, food, medicines and other products that are essential for life" (Art. 6); the development of "compensatory systems for the workers' salary or true income" (Art. 18.1); funding the "social protection system" (Art. 18.2); "recovering the capacity to provide quality public services" (Art. 18.3); "driving the national productive capacity, especially of the strategic industries, and the selective substitution of imports" (Art. 18.4); the "recovery, maintenance and expansion of public infrastructure"(Art. 18.5); "encouraging and promoting the development of science, technology and innovation" (Art. 18.6); "gradually restoring the value of social benefits, accrued termination benefits and savings obtained by the country's workers" (Art. 22); and the "implementation of national public policies regarding food, health, social security, provision of basic services and other essential economic goods" (Art. 23).

All this is provided in the Constitution, wherefore, if the purpose were to attain those goals, it would suffice for the government to have clearly and transparently defined a *change* in the orientation of the

economic policy toward the abandonment of the estatization and nationalizing policy that the government has been promoting pursuant to the guidelines of the so-called "21st Century Socialism," which have only brought economic stagnation, misery and poverty to the country. The opening and privatization of the economy that is now purported to be done in secrecy, could also have been effected, -as we noted when studying the first "economic emergency" decrees issued and extended as of 2016-, using the extraordinary and unconstitutional powers that the Executive Branch assigned to itself, beyond all constitutional limits, pursuant to which practically any decision could have been made.[726] However, all the unconstitutionality in these decrees was of no use.

Instead, with the "Constitutional Law," the path taken by the Constituent National Assembly at the request of the Executive Branch, for effecting that "change" of economic policy in order to obtain "new incomes," was to set up a "regulatory" framework, in order to *regulate a situation of disapplying the law*, that is, of all organic and ordinary laws and regulations deemed necessary and, in this regard, enabling all the measures, without limitations, that the Executive Branch deemed convenient.[727] For such purpose the Law has created a new term ("to disapply*"*) in the field of principles

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[726] See Decree No. 6214 of January 14, 2020, *Gaceta Oficial* Extra. No. 6219 of March 11, 2016. Allan R. Brewer-Carías, "La usurpación definitiva de la función de legislar por el Ejecutivo Nacional y la suspensión de los remanentes poderes de control de la Asamblea con motivo de la declaratoria del estado de excepción y emergencia económica," in *Revista de Derecho Público,* No. 145-146, (January-June 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 444-468.

[727] As expressed by José Ignacio Hernandez, all this is not new, "it is about the renewal of Maduro's goal of managing the economy at his discretion, thus facilitating arrangements that strengthen his kleptocracy and his alliances with organized crime. That objective, as we will see, began to be forged after the triumph of the opposition in the parliamentary elections of December 2015." See José Ignacio Hernández, "La "Ley Constitucional Antibloqueo" y el avance de la economía criminal en Venezuela," in *La Gran Aldea*, Octubre 15, de 2020; available at: https://lagranaldea.com/2020/10/15/la-ley-constitucional-antibloqueo-y-el-avance-de-la-economia-criminal-en-venezuela/

related to the temporary force of the law, implying an unlimited legislative delegation for the Executive Branch itself, enabling it to fill the regulatory "void" resulting from "disapplying" the rules.

Furthermore, as stated above, the "Constitutional Law" adds that the express provision of the entire system of prevalence of its provisions over all other organic and ordinary laws, and the disapplying of laws and regulations in specific cases, with the consequential delegation of the legislative power to the Executive Branch, shall be performed within the express frame of a total lack of transparency, that is, within a secrecy and confidential framework, by declaring now that the economic policy is a matter pertaining to the security of the Nation (Arts. 37, 42).

II. THE FUNDAMENTAL PURPOSE OF THE LAW: GENERATING "ADDITIONAL INCOME" THROUGH PRIVATIZATION OF THE ECONOMY BY MEANS OF ANY KIND OF CONTRACTS OR NEGOTIATIONS MADE IN SECRECY

The aim of the "Constitutional Law," as aforementioned, is to generate "new incomes," by "changing" in the economic policy to be accomplished outside the law and in full secrecy by the State, based on the destatization, denationalization and privatization of the economy and on engaging in new financial negotiations for "counteracting, mitigating and reducing in an effective, urgent and necessary manner," as stated in its Article 1, "the harmful effects caused by the imposition against the Republic and its people, of unilateral coercive measures and other restrictive or punitive measures."

Nonetheless, such "new income" are not to be spent within the budgetary discipline channel and according to the regime referred to public income in the Constitution, but to be used beside such provisions, for which purpose article 18 of the same "Constitutional Law" provides that it:

> "would be registered separately among the availabilities of the national treasury and would be used to satisfy the economic, social and cultural rights of the Venezuelan people, as well as for the recovery of its quality of life and generating opportunities by fostering their capacities and potentialities."

The consequence is that the measures for obtaining such additional income would be adopted outside the legal system, secretly, providing separate accounting, which overtly is contrary to the provisions of the Constitution regarding the system of public income and budgetary discipline (Arts. 311 – 315).

Among the mechanisms for obtaining "additional income," in addition to the policy of destatization, denationalization and privatization, the "Constitutional Law" provides for a set of *measures for public financing*, establishing that the Executive Branch may "create and implement *large scale* financial mechanisms" (Art. 22), as well as "create or authorize *any form of* new financing mechanisms or sources") Art. 23); adding in Article 32 that "for the purpose of protecting the transactions involving financial assets of the Republic and its entities, the Executive Branch may authorize *the creation and implementation of any financial mechanism* that enables mitigating the effects of the unilateral coercive measures, restrictions and other threats that give rise to this "Constitutional Law," including the use of crypto-assets and instruments based on blockchain technology."

On the other hand, for the obtainment of additional income, and for implementing the policy of destatization, denationalization and privatization of the economy, and of the financing negotiations mentioned, the "Constitutional Law" regulated a *total flexibilization of the public contracting system,* providing, in the first place, the "disapplying" of the legal rules that call for authorizations or approvals of national interest contracts by the National Assembly (Art.21), and, second, that the Executive Branch may "design and implement exceptional mechanisms for contracting, purchasing and paying for goods and services, preferably produced locally, destined for: 1) the satisfaction of the fundamental rights to life, health and food; 2) the generation of income, obtainment of foreign currency and the international mobilization thereof; 3) the normal

management of the entities that are subject to the unilateral measures, restrictions and other threats that give rise to this Constitutional Law, and 4) selective import substitution." (Art. 28)

All this implies, without doubt, the general "disapplying" of the provisions of the Law on Public Contracting, the Law on Concessions and all laws governing this matter.

III. THE REGULATIONS SET FOR IMPLEMENTING THE "NEW" ECONOMIC POLICY OF DESTATIZATION, DENATIONALIZATION AND PRIVATIZATION OF THE ECONOMY

The "Constitutional Law," in order to guarantee the "additional resources" referred to above, defines throughout its text the "new" economic policy that is sought, and which means a total reversal of the estatization policy applied in the last 20 years, which now consists in the destatization, denationalization and privatization of the economy.[728]

This result from the following provisions:

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[728] As noted by Pedro Luis Echeverría, the "Anti-Blockade Law" has been "Conceived by the regime in order not to admit the destruction it has caused to the national economy, avoid international sanctions against it, illegally benefit the groups that are loyal to the regime, unlawfully get hold of the property and assets of the Nation, eliminate legal or sub-legal rules that prevent the regime from carrying out certain actions and implement measures that facilitate their predatory efforts to sell out the country. It therefore purports to replace numerous provisions contemplated in the National Constitution by an absurdity full of ambiguities, secrecy, uncertainty, surreptitious sell-out of the assets of the Republic to whomever the regime may handpick, in addition to doing so without informing the public or complying with the comptrollership tasks that the legitimate National Assembly must perform. This new dirty trick by the government tries to hide from the country the current incapacity of the Venezuelan economy to generate and supply to the people the bolivars and foreign currency required to satisfy their needs." See Pedro Luis Echeverría, "Ley Antobloqueo / La nueva trampa de Maduro," en *Ideas de Babel.com*, October 12, 2020, available: https://www.ideasdebabel.com/?p=101616

1. The provisions pertaining to the generalized policy for destatization or denationalization

The "Constitutional Law," in order to "increase the flow of foreign currency toward the economy and the profitability of assets," provides that the Executive Branch may "develop and implement operations for the *management of liabilities*, as well as for the *management of assets*, through the transactions available in national and international markets, *without impairment to the provisions of the Constitution* (Art. 27), which implies the possibility of disposing of assets with the sole limitation of the provisions in the Constitution; a redundant reference, but this refers to the provisions of Article 303 thereof (as expressly set forth in the Bill of Law), which demands that the shares of PDVSA remain in the hands of the State.

Furthermore, the "Constitutional Law" expressly authorizes the Executive Branch to *"lift trade restrictions on certain categories of subjects in activities that are strategic for the national economy*" (Art. 31) "whenever this is necessary in order to protect the country's core productive sectors and the actors who engage therein."

For the purpose of implementing the denationalization policy that is implicit in its provisions, when providing that the Executive Branch has the power to "disapply" all the organic laws and ordinary laws, that implies that the "Constitutional Law" is empowering the Executive Brach of Government to disapply the organic laws that established the nationalization or reserved certain economic activities to the State, among which, basically those related to the industry and trade of hydrocarbons (the 2001 Organic Law on Hydrocarbons and the 2008 Organic Law for the Reorganization of the Domestic Liquid Fuels Market); the petrochemical industry (2009 Law reserving petrochemical activities to the State); the services related to the oil industry (2009 Organic Law that reserves to the State the assets and services related to the oil industry); the iron industry (1974 Organic Law that reserves to the State the industry of exploitation of iron, and the 2008 Organic Law on the nationalization of the industry of iron and steel); the cement industry (2007 Organic Law that reserves to the State the industry of cement); and the activities related to the

exploitation of gold (2011 Organic Law on the nationalization of gold mining and trade).

All the foregoing regulations aim specifically at the possibility of the total denationalization of the oil industry and the trade of oil by-products – among which, gasoline-, with the sole and exclusive limitation referred to above, that the shares of Petróleos de Venezuela S.A. (PDVSA), the oil industry's holding company, according to Article 303 of the Constitution must remain the property of the State (this was expressly set forth in Articles 22, 24 and 25 of the Bill of Law). This is inferred now from the equivalent text of Articles 24, 26 and 27 of the "Constitutional Law," which regulates, among its purposes, the privatization of the economy, "without impairment to the provisions of the Constitution." The clarification is obviously not necessary, because no State act or law can violate the Constitution.

In any case, the result of the provisions of the Law is that all the State-owned companies, subsidiaries or affiliates of PDVSA could be fully or partially privatized, without limitation, secretly.

This would even do away with the concept of mixed company or State shareholding participation in more than fifty percent of its capital, as regulated in the Organic Law on Hydrocarbons, which could be "disapplied" in all the "specific cases" that the Executive Branch deems necessary, and all of PDVSA's subsidiaries could become the property of private capitals, without limitation, given the prevalence of the "Constitutional Law" and the executive power to secretly disapply laws.

2. Provisions regarding the privatization of public companies

The implementation of the policy of destatization and denationalization of the economy naturally involves a process of *privatization of public companies,* to which end the "Constitutional Law" authorizes the Executive Branch to "*carry out into all formalities or negotiations that may be necessary* without impairment to the provisions of the Constitution" (that is, without affecting the State's full ownership of PDVSA's shares), in order to protect and "prevent or reverse actions or threats of freezing, seizing

or losing control of the assets, liabilities and patrimonial interests of the Republic or its entities as a result of the application of unilateral coercive measures, restrictions and other threats." (Art. 24).

With regard to the privatization of public companies, the "Constitutional Law" set provisions for the total reorganization of the public entrepreneurial sector, authorizing the Executive Branch, pursuant to the abovementioned policy for destatization and denationalization, to "modify the mechanisms for the organization, management, administration and operation of public or mixed companies, both in the national territory and abroad, without impairment to the provisions of the Constitution" (Art. 26). The Law further authorized the Executive Branch to:

> "proceed to organize and reorganize the decentralized state own enterprises, in the country or abroad, seeking their modernization and adjustment to the mechanisms used in international practices, according to the purpose and objectives of the given entity, improving their operation, commercial and financial relations, or the investment made by the Venezuelan State. The organization or reorganization must, above all, guarantee the safeguarding of the patrimony of the Republic and its entities." (Art. 25).

But a privatization, as State policy, can only be accomplished it the most rigorous transparency;[729] on the contrary, what we can

[729] As Asdrúbal Oliveros expressed it, "the regime could begin an asset transfer process that could focus on the metal sectors, mixed oil companies, especially for gasoline production, and hotels;" considering that "privatization is necessary in Venezuela, but a privatization in the context of the rule of law, with guarantees for both the State and for citizens and the investor. With transparency, open, carried out through a bidding transparent process and an evaluation of what is being done. Unfortunately, none of this exists because it is extremely opaque." See the report: "Asdrúbal Oliveros: Ley antibloqueo formaliza prácticas ocultas que el chavismo realiza desde hace años," en *El Nacional,* October 14, 2020; available at: https://www.elnacional.com/economia/asdrubal-oliveros-ley-antibloqueo-formaliza-practicas-ocultas-que-el-chavismo-realiza-desde-hace-anos/

witness is the secret distribution of State assets among specific allies of the regime. [730]

3. Provisions regarding the participation, promotion and protection of national and international capital in the economy

The destatization and denationalization policy, by providing for the privatization of public companies, obviously contemplates the need to regulate measures to ensure the participation of national and international private capital in the economy, for which purpose the "Constitutional Law" set forth several express provisions.

It the first place, the "Constitutional Law" defined *measures for alliances with the private sector with respect to companies that were expropriated (expropriated, confiscated, occupied) by the State*, providing the following in its Article 30:

> "the assets that are under Venezuela State's management as a consequence of *any administrative or judicial measure restricting the elements of property* [i.e. use, enjoyment and disposition], that may be required for their urgent incorporation to a productive process, could be the object of *alliances with entities of the private sector*, including small and medium industries, or with the organized People's Power, in order to maximize the production of goods and services for satisfying the fundamental needs of the Venezuelan people and achieve the best efficiency for the companies of the public sector."

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[730] That is why, José Ignacio Hernández has expressed about the policy established in the law, that it is rather about government measures to "please its economic and political allies, further promoting the *criminalization of the Venezuelan economy."* In other words, "this policy cannot be seen as a kind of "economic opening" towards "capitalism", since its objective is not to expand free enterprise, but rather to distribute strategic assets among Maduro's allies, as in 2016 Citgo was distributed among the 2020 Bond holders and Rosneft." See José Ignacio Hernández, "La Ley Constitucional Antibloqueo" y el avance de la economía criminal," en *La Gran Aldea*, Octubre 15, 2020, disponible en: https://lagranaldea.com/2020/10/15/la-ley-constitucional-anti bloqueo-y-el-avance-de-la-economia-criminal-en-venezuela/ .

This implies the possibility for the Executive Branch to privatize all companies and industries that were expropriated or confiscated through administrative and judicial measures during the last 20 years, by means of alliances, as was expressly provided in the Bill of Law proposed by Nicolás Maduro.

In the second place, to ensure the destatization of the economy through the privatization of public companies, the "Constitutional Law" issued *measures for promoting the participation of private capital in the national economy*, providing as an objective thereof, "the attraction of foreign investment, especially at a large scale (Art. 20), and assigning to the Executive Branch of the Government the power to "authorize and implement measures that encourage and favor the *integral or partial participation, management and operation of the national and international private sector* in the development of the national economy." (Art. 29).

In the third place, and in line with the previous measures, the "Constitutional Law" defined *measures for the protection of private investments*, authorizing the Executive Branch to agree "with its partners and investments, during the term contractually agreed upon, *on clauses for the protection of their investments […] for the purpose of generating trust and stability* (Art. 34). In this regard, under the "Constitutional Law" there could be signed, for example, "legal stability agreements," established in the Law for the Promotion and Protection of Investments of 1999 (now abrogated), which could never be signed because they were deemed to be contrary to the national interest. [731]

[731] As the Vice President of the Republic announced to the Diplomatic Corps: "It is expected to use "exceptional" mechanisms to attract additional income. To do this, alliances with private companies and investors of different kinds are established. […] This law will protect foreign economic investments, "under new forms of association, of society, and there will also be special forms of information protection, to protect those who come to invest in Venezuela." See the report: "Delcy Rodríguez vende la ley antibloqueo como protección a inversiones extranjeras," en *Tal Cual*, 13 de octubre de 2020, disponible en: https://talcualdigital.com/delcy-rodriguez-vende-la-ley-antibloqueo-como-proteccion-a-inversiones-extranjeras/. With that presentation, as explained by

Within the specific frame of the *protection of foreign investments*, Article 34 of the "Constitutional Law" further expressly allows "clauses" for the "settlement of disputes," among which there is without doubt the concept of *arbitration*, and particularly, international arbitration, a legal figure that was also very vilified in the last 20 years as contrary to the national interests. It should be noted that the "Constitutional Law" did not include the exhaustion of internal resources in order to be able to resort to arbitration, which was contained in the Bill of Law that was submitted to the National Constituent Assembly.

Finally, specifically with regard to fostering private initiative, the Law regulated what it called the "social initiative," providing that the Executive Branch must create and implement "programs that allow and guarantee investments by professionals, technicians, scientists, academicians, entrepreneurs and workers' groups or organizations in the public and private sectors and by the organized people's power, in projects or alliances in strategic sectors." Art. 33)

IV. THE IMPRELENTATION OF THE NEW ECONOMIC POLICY AND OF PUBLIC FINANCING BY MEANS OF THE EXECUTIVE "DISAPPLYING" OF LEGAL RULES

In the "Constitutional Law," as already mentioned, for the purpose of executing the "new" economic policy and the financial transactions aforementioned, the provision that must be more highlighted, is the First Transitory Provision (which is by no means "transitory"), according to which:

Rodrigo Cabezas, former Finance Minister, "it became clear" that "the anti-blockade law is aimed at the international economic sector" […] "The heart of the proposed law is the oil business and the possible privatizations of national companies and mixed, the privatization of assets such as ports, airports, mines (…) They want to scrape the assets of the Republic without any control." See the report: "Exministro chavista: Quieren 'raspar' los bienes de la República con la ley antibloqueo," en *Tal Cual*, 14 de octubre de 2020, disponible en: https://talcualdigital.com/rodrigo-cabezas-quieren-raspar-los-bienes-de-la-republica-sin-ningun-control/

> "The provisions of this Constitutional Law shall apply *on a preferential basis over the rules of a legal and sub-legal rank, including with regard to the organic and special laws that govern the matter, even in the system arising from the Decree granting the State of Exception and Economic Emergency* throughout the National territory […]."

The practical effect of the provision is that it can be deemed that *there are no pre-established legal rules* for adopting the measures that the Executive Branch may adopt in enforcing the economic policy –or the change thereof- purported in the Law, because if those contemplated in the current laws differ from the provision of the "Constitutional Law," they shall be in a sort of "suspended" or "inapplicable" status from the moment the Law was published (as expressly set forth in the original Project);[732] that is, a situation of the lack of applicable law, that is purported to be replaced by the authorization granted to the Executive Branch to decree the "disapplying" thereof in "specific cases" and therefore legislate to fill in the legislative void for the purpose of implementing the "economic policy" set forth in the Law.

Precisely for this purpose, the implementation of the general disruption of the legal order that is "decreed" in the Law, with the declaration of the general prevalence thereof, is detailed in its Articles 19 through 21, wherein the Executive Branch is authorized to proceed to "*disapply* rules of a legal or sub-legal rank," when

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[732] The *Bloque Constitucional Venezolano* regarding this Second Transitory Provision of the Law, has indicated that: "it leaves no doubt about the illegitimate purpose of this normative, by pointing out that all the norms that collide with that pseudo law are suspended, in practice promoting a constitutional disruption to create a new economic order (exceptional), starting from a "blank page", which amounts to a true legal aberration, because a "constitutional blank page", to be filled with the only unlimited will of the power holders, is the most unequivocal expression of arbitrariness, of the absence of the rule of law, which will generate greater vulnerability and unpredictability for Venezuelans." See Bloque Constitucional Venezolano, "Sobre la pretendida Ley Antibloqueo," 16 de Octubre 16, 2020, disponible en http://digaloahidigital.com/noticias/el-bloque-constitucional-de-venezuela-la-opini%C3%B3n-p%C3%BAblica-nacional-e-internacional-sobre-la

dealing with the implementation of the measures for economic and productive equilibrium" (Art. 21); furthermore, said Branch is specifically authorized to "disapply" laws of a legal or sub-legal rank, for specific cases," "when this is necessary in order to overcome the obstacles and offset the damage caused by the unilateral coercive measures and other restrictive or punitive measures to the administrative activity, or whenever this contributes to the protection of the heritage of the patrimony of the Venezuelan State in the face of any act of deprivation or immobilization, or to mitigate the effects of the unilateral coercive measures and other restrictive or punitive measures that affect the flow of foreign currency" (Art. 19), and when the "enforcement thereof is impossible or counterproductive as a result of the effects of a given unilateral coercive measure or other restrictive or punitive measure" (Art. 19).

It can be said that, as of the coming into effect of this "Constitutional Law," the previous existing legal uncertainty has been formalized in an express legal text, but now extends to the effects of the laws and regulations related to the matters governed by said Law, the enforcement of which can be "suspended" by the Executive Branch.

The realm of arbitrariness implied by this absolute executive power to decide when a law or regulations are to be applied or not, which obviously can only give rise to absolutely null and void acts, is only slightly limited by requiring that a "technical report" – obviously not legal at all- be prepared in each case, in order to clearly determine "the provisions being disapplied and the grounds therefor" (Art. 42); that some prior opinions be obtained from certain agencies (Art. 35), and that the suspension be:

> "indispensable for the adequate macro-economic management, the protection and promotion of the national economy, the stability of the local productive and financial systems, the attraction of foreign investments, especially on a large scale, or the procurement of resources to guarantee the basic rights of the Venezuelan people and the official social protection system." (Art. 20).

In any event, the Law established a general limit for exercising this unique and novel power to "disapply" laws, by expressly providing that "in no case will it be possible to disapply rules related to the exercise of human rights" (Art. 21); to do otherwise would be the total negation of the Constitution.

The other limit established is that rules "pertaining to the division of Public Powers" cannot be "disapplied" (Art. 21), but adding that this so long as it "*does not pertain to the power to approve or authorize*," which means that if a law requires the necessary approval by the National Assembly for certain acts or contracts, such rule may notwithstanding be suspended, as has occurred within the frame of the decrees for economic emergency when Nicolás Maduro authorized himself from the onset to sign contracts of national interest without the authorization or approval of the National Assembly,[733] which has been happening since 2016, under the status of judicial contempt in which the Constitutional Chamber has unconstitutionally placed the National Assembly.[734]

Consequently, for example, pursuant to this "Constitutional Law," the Executive Branch could "disapply" the provisions of the Organic Law on Hydrocarbons that require the National Assembly's authorization to incorporate mixed enterprises in the hydrocarbons sector, which would evidently be unconstitutional, because laws can only be abrogated by other laws, and their enforcement or application cannot be "suspended" by an executive decision.

In any event, it should be noted that the authorization given to the Executive Branch in the unconstitutional "Constitutional Law" to

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[733] See Allan R. Brewer-Carías, "El control político de la Asamblea Nacional respecto de los decretos de excepción y su desconocimiento judicial y Ejecutivo con ocasión de la emergencia económica decretada en enero de 2016**,** en *VI Congreso de Derecho Procesal Constitucional y IV de Derecho Administrativo*, *Homenaje al Prof. Carlos Ayala Corao*, *10 y 11 noviembre 2016*, FUNEDA, Caracas 2017. pp. 291-336.

[734] See Allan R. Brewer-Carías, "La paralización de la Asamblea Nacional: la suspensión de sus sesiones y la amenaza del enjuiciar a los diputados por "desacato," en *Revista de Derecho Público*, No. 147-148, (julio-diciembre 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 322-325

"disapply" organic laws and laws, in no case implies the possibility for it to also "disapply" the Constitution, particularly, the provision in its Article 151 that requires that all cases of national public interest contracts intended to be entered into with foreign states, foreign official entities or foreign companies not domiciled in the country must be previously authorized by the National Assembly (Art. 151). Of course, it would be totally inadmissible and unlawful that the Commercial Registry be deemed "secret" and conceal the information about foreign companies that might be domiciled in the country, in order to circumvent this constitutional requirement for parliamentary control.

V. SECRECY AS A RULE FOR IMPLEMENTING THE "CONSTITUTIONAL LAW" AND, PARTICULARLY, WITH REGARD TO DISAPPLYING LEGAL RULES

The framework of legal uncertainty that is expressly "regulated" in the "Constitutional Law," based on the power granted to the Executive Branch of Government to disapply all kinds of rules as it may deem indispensable for enforcing the economic measures in order to implement the purposes of the Law, is complemented in an aberrant and astonishing manner by providing that such "disapplying" of rules must necessarily be effected in a concealed frame of secrecy and confidentiality, behind the backs and not known by the citizens.[735]

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[735] As it has been recognized by the Vice President of the Republic: "The Law provides for mechanisms of confidentiality in the information, confidentiality in the identity in question, in the development of the activity, there is a system with a technological platform that will allow the protection of these investments." See in en Agencia Efe, "Delcy Rodríguez: No revelaremos la procedencia de las inversiones extranjeras o nacionales," en *Noticiero Digital ND*, October 18, 2020, available at: https://www.noticierodigital.com/2020/10/delcy-rodriguez-no-revelaremos-la-procedencia-de-las-inversiones-extranjeras-o-nacionales/ See also in: EFE, "El régimen dice que Venezuela recibirá inversiones sin revelar su procedencia de fondos," in *El Nacional*, October 18, 2020, available at in: https://www.elnacional.com/venezuela/el-regimen-dice-que-venezuela-

It is elementary that in order for any law or rule to have legal effects vis-à-vis the citizens, the same must be published. However, according to the provisions of this "Constitutional Law," the disapplying of laws and regulations that it authorizes in order to implement the change to an economic policy of destatization, denationalization and privatization, which also affects all the citizens, is declared a matter pertaining to the "security of the Nation" and considered a secret activity of the State. This place the citizens in the absurd situation of not knowing or being able to know –because this is forbidden, it is secret- what rule is applied or not, or what transaction has been made, and under the Organic Law of National Security they may even be subject to imprisonment if they purport to "disclose" the secret (Art. 55).

And it is within this framework that the regime purports the absurdity of implementing measures to "attract" investors, who primarily demand "legal certainty" in any part of the world; that is, unless the purpose of the law is to consider investors that only move in the shadows.

The clearest evidence of this juridical aberration is found in Article 43 of the Law, which provides that:

> "*the procedures, formalities and records made on the occasion of implementing any of the measures set forth"* […in] this Constitutional Law that "*imply disapplying rules of a legal or sub-legal rank*" are declared to be *secret and reserved* […].

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recibira-inversiones-sin-revelar-su-procedencia-de-fondos/. In this regard, Jesús Rangel Rachadell has stated that "it was said that the law was intended to "shield us," and the first shield is that it is forbidden to inquire about the economic transactions related to this law, because it precludes access to the information. […] It conceals who acquires State property, how much they pay, terms and conditions, guaranties, exceptions from liability, bids or direct awards, the formalities and records, the applicable jurisdiction (country where the obligations may be enforced), causes for nullity, methods of interpretation […] What is an outrage is that we citizens remain without knowledge about the disapplying of legal or sub-legal rules in order for the State to negotiate unchecked." See Jesús Rangel Rachadell, "Todo será secreto," in *El Nacional*, October 13, 2020, available at: https://www.el nacional.com/opinion/todo-sera-secreto/

If this were not enough, based on that general provision of reserve and secrecy, Article 37 establishes what it refers to as a "transitory system for the classification of documents having confidential and secret contents for the purpose of protecting and guaranteeing the efficacy of the decisions made by the Venezuelan Public Power to protect the State against coercive unilateral measures, punitive measures and other threats." –which system is not at all transitory, for it lasts, as stated in Article 43 "up to 90 days after the unilateral coercive measures and other restrictive or punitive measures that have propitiated the situation have ceased."

Article 39 of the "Constitutional Law" further insists on the confidentiality and secrecy, when authorizing the "highest authorities of the bodies and entities of the central and decentralized National Public Administration" to consider "by reasons of national interest and convenience," "as reserved, confidential or of limited disclosure any record, document, information, fact or circumstance, that they become aware of in the performance of their duties, by application of the Constitutional Law," which should be done "by means of a duly *justified* formality, for a given term and with the ultimate purpose of guaranteeing the effectiveness of the measures designed to counteract the adverse effects of the unilateral coercive measures, punitive measures or other threats imposed." The latter, obviously, is of no use because the motivation of state actions is set to allow control of their legitimacy, legality and proportionality; however, since they are secret, it is useless to require their rationale.

The consequence of the confidentiality statement is that said documentation, characterized as secret, confidential and reserved, "shall be filed in separate case files or records, using mechanisms that guarantee its safety," visibly placing in their "cover the relevant warning, stating the restriction to their access and disclosure and the liabilities incurred by officials or persons who may infringe the respective system" (Art. 40)

There is another consequence arising from this regulation expressing the lack of transparency and this is, as stated in Article 41 of the Law, the establishment of a prohibition to "access documentation that has been characterized as confidential or

reserved," which implies that no "simple or certified copies may be issued thereof."

This prohibition to access the documents, generally set forth in Article 41 and specifically developed in Articles 37 et seq., evidently is entirely incompatible with and contradicts the text of Article 38, which provides as a right of the people "to have access to administrative files and records, whatever their form of expression or type of material support that contain them, […] so as not to affect the effectiveness of the measures for counteracting the effects of the unilateral measures, punitive measures or other threats, nor the operation of public services, nor the satisfaction of the people's needs due to the interruption of the administrative processes set up for such purposes."

If everything is confidential, secret and has restricted access, which, of course, violates the Constitution, it is not possible to guarantee any right of access thereto.

Finally, the provisions in the Law about the subsequent "control" by the Office of the Comptroller General of the Republic (Art. 13), a body that, as is well known, has no autonomy, even appear to be innocuous, because in order for the Comptroller's office to have access to the secret documents, it must "coordinate" the manner of exercising its control with the Executive Branch (Art. 43), which in itself is a negation of control.

The "Constitutional Law" also reaches the absurdity of subjecting the judicial bodies that need the information labeled as confidential, in open violation of the autonomy and independence due to judges, to "formalize" their requests before the Office of the Attorney General of the Republic, who has the last word (Art. 44).

FINAL REMARKS

It can be deemed that the "Constitutional Law" approved by the fraudulent and unconstitutional National Constituent Assembly, convened and elected unconstitutionally in 2017, which –even if it had been lawfully elected- would in no event have legislative powers,

is of no legal value because it is contrary to the Constitution, being only an act of force against the legal system of the rule of law.[736]

Moreover, it delegated practically unlimited legislative powers to the Executive Branch to fill in the voids arising from the disapplying of laws, which ultimately purports to change the economic policy in a covert, opaque, secret and not at all transparent manner, by destatizing, denationalizing and privatizing the economy by promoting and protecting the participation of national and international private capital in the economy. But it only protects the participation of those who operate in darkness and opacity, being this the outcome of a framework of total legal uncertainty and secrecy that could only lead to the indiscriminate transfer of the State's assets to national and foreign individuals, handpicked at the regime's discretion, absent any guaranty of control or budgetary discipline.[737]

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[736] For this reason, the National Assembly, by means of Agreement dated October 13, 2020, when "reiterating that the fraudulent National Constituent Assembly is legally non-extant and its decisions are ineffective," agreed to "disavow all parts of the so-called "Anti-blockade law for national development and guaranty of human rights," and, consequently, consider it non-extant and ineffective." See "Acuerdo en desconocimiento de la irrita Ley Antibloqueo dictada de manera inconstitucional por la fraudulenta Asamblea Nacional Constituyente," available at: https://asambleanacional-media.s3.amazonaws.com/documentos/acto/acuerdo-en-desconocimiento-de-la-irrita-ley-antibloqueo-dictada-de-manera-inconstitucional-por-la-fraudulenta-asamblea-nacional-constituyente-20201013204743.pdf

[737] As Gustavo Rossen pointed out when commenting the "Law: "What can happen in a poorly managed, impoverished, indebted country, dislocated by a statist model? Many things can happen, some predictable, others surprising. Inventing, for example, a law that appeals to anti-blockade but is, in truth, anti-transparency, anti-accountability, anti-control. A law for the country's auction, which justifies or authorizes the sale to the highest bidder of the nation's assets, a "monumental operation of national plunder to launder foreign capital and those of drug cartels" as stated in a statement from a group of Venezuelan political leaders. A law that also blocks information and enshrines secrecy and complicity. Finally, a law that with the offer to save the present ends up seriously compromising the security of the new generations." Véase Gustavo Rossen, "La nueva oligarquía," en *El Nacional*, 19 de octubre de 2020, disponible en: https://www.elnacional.com/opinion/la-nueva-oligarquia/

Within this frame of legal uncertainty and executive disapplying of laws in secrecy and with no transparence, it is a total fallacy to expect to effectively attract and incorporate national and international private investments in Venezuelan productive centers, particularly in the oil sector, compatibles with the national interests;[738] with the serious threat that those who finally will be able to take part in the indiscriminate and secret share-out of the remains of the economy in order to deliberately conceal their implications, could not be the best in order to guarantee the rights and interests of the Venezuelan people.[739]

For those interested in history and in similar laws and policies sanctioned and enforced in other countries, one can say that this "Anti-blockade Law," *by itself*, poses the serious risk of ending up giving rise altogether to situations like those that, derived, *on the one hand*, from the Law to Remedy the Distress of People and the *Reich*, approved as an "enabling law" by the German Parliament on March 23, 1933, which delegated to Chancellor Adolf Hitler all the legislative powers (for example, Article 1 provided that: "In addition

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738 See the review: "Ley antibloqueo faculta a Maduro privatizar participación de PDVSA en empresas mixtas," in *Petroguí@,* October 4, 2020, available at: http://www.petroguia.com/pet/noticias/petr%C3%B3leo/ley-antibloqueo-faculta-maduro-privatizar-participaci%C3%B3n-de-pdvsa-en-empresas. See also in: "Ministro Tareck El Aissami: Ley Antibloqueo fortalecerá la industria petrolera nacional," 1 de octubre de 2020, Available at: https://www.vtv.gob.ve/el-aissami-ley-antibloqueo-fortalecera-industria-petrolera/; y en: "Ley Antibloqueo': Maduro busca más poder legal en Venezuela para sellar nuevos negocios petroleros," October 1, 2020, available at: https://albertonews.com/nacionales/ley-antibloqueo-maduro-busca-mas-poder-legal-en-venezuela-para-sellar-nuevos-negocios-petroleros/

739 See, for example, the opinión of several political leaders in the document "Acta de remate de la República," in the report, "Líderes políticos alertan: régimen de Maduro pretende rematar Venezuela. En un documento público, María Corina Machado, Antonio Ledezma, Diego Arria, Humberto Calderón Berti, Asdrúbal Aguiar, Enrique Aristeguieta Gramcko y Carlos Ortega se dirigen a los venezolanos y a la comunidad internacional para denunciar de las maniobras para liquidar y blanquear los activos de la nación en un acto de traición a la patria," in *El Nacional*, October 11, 2020, available at: https://www.elnacional.com/venezuela/lideres-politicos-alertan-regimen-de-maduro-pretende-rematar-venezuela/. Also available at: https://www.el-carabobeno.com/documento-publico-maduro-se-propone-rematar-en-secreto-bienes-de-la-nacion/

to the procedure prescribed by the constitution, laws of the Reich may also be enacted by the government of the Reich"; and Article 4, that "Treaties of the Reich with foreign states, which relate to matters of Reich legislation, shall for the duration of the validity of these laws not require the consent of the legislative authorities," which law was the fundamental legal basis for the final collapse of the Weimar Republic and the consolidation of Nazi Germany; [740] and, *on the other hand*, those resulting from the *giant program for the privatization of public companies of the former Soviet Union* carried out between 1991 and 1999 under the government of the first Russian President, Boris Yeltsin, and later under his successor Vladimir Putin, which allowed for the most important and oldest public companies to end up, in the midst of great corruption and crimes, in the hands of the so-called "Oligarchs," that is, the "nouveau riche" who were close to the regime.[741]

We hope that none of this would happen in Venezuela, and much less bearing in mind what Karl Marx wrote in 1851, that "history occurs twice: first as a tragedy and then as a farce."[742]

New York, October 20, 2020.

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740 See on this matter, among others, William Sheridan Allen, *The Nazi seizure of power*. Echo Point Books & Media, 2010; and the review published in *Rea Silva*, "La muerte de la democracia en Alemania. Una democracia liberal no muere de un día para otro. Para acabar con el marco legal de un estado de derecho es necesario una serie de actores capaces de minar su legitimidad y estabilidad mediante todo tipo de tácticas políticas," available at https://reasilvia.com/2017/09/la-muerte-la-democracia-alemania/

741 See on this matter, among others, Chrystia Freeland, *Sale of the Century: Russia's Wild Ride From Communism to Capitalism*, Crown Business, 2000; David Hoffman, *The Oligarchs: Wealth and Power in New Russia*, Public Affairs, 2002; and the review by Jeffrey Hay, in *Facts and details*, "Russian Privatization and Oligarchs. Privatization Of Russian Industry," 2016, available at http://factsanddetails.com/russia/Economics_Business_Agriculture/sub9_7b/entry-5169.html

742 Karl Marx's famous phrase with which he began his study about "The Eighteenth Brumaire of Luis Bonaparte," published in *Die Revolution*, New York, 1852, said: "Hegel remarks somewhere that all great world-historic facts and personages appear, so to speak twice. He forgot to add: the first time as tragedy, the second time as farce." See Karl Marx, *El 18 Brumario de Luis Bonaparte*, available at: https://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm