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Judicial Review in Venezuela*

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INTRODUCTION

Judicial review of constitutionality¹ is the power assigned to the courts to decide upon the constitutionality of statutes and other governmental acts; therefore, it can only exist in legal systems in which there is a written and rigid Constitution, imposing limits to the state organs, and particularly to Parliament. That is why judicial review of the constitutionality of state acts has been considered as the ultimate result of the consolidation of the *rule of law*, extensively developed in the Americas due to the democratization process.

In his welcoming letter to the seminar on "Judicial Review in the Americas . . . and Beyond," Professor Robert S. Barker referred to the fact that, since the United States Supreme Court decision of *Marbury v. Madison*² two hundred years ago, "judicial review of the constitutionality of statutes has been an integral part of the law and politics of the United States." To this we must add that in a certain way, that has also been the situation in all Latin American countries, particularly since democracy has been reinforced in the political systems of our countries, even with all its inconsistencies.

We must not forget when we talk about judicial review that, above all, it is an institutional tool which is essentially linked to democracy; democracy understood as a political system not just reduced to the fact of having elected governments, but where separation and control of power and the respect and enforcement of human rights is possible through an independent and autonomous judiciary. And precisely, it has been because of this process of reinforcement of democracy in Latin American countries that judicial review of the constitutionality of legislation and other

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1. See Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* 215 (Cambridge University Press 1989).

2. 5 U.S. 137 (1803).

governmental actions has become an important tool in order to guarantee the supremacy of the Constitution, the rule of law, and the respect of human rights. It is in this sense that judicial review of the constitutionality of state acts has been considered as the ultimate result of the consolidation of the *rule of law*, when precisely in a democratic system the courts can serve as the ultimate guarantor of the Constitution, effectively controlling the exercise of power by the organs of the state.³

On the contrary, as happens in all authoritarian regimes even having elected governments, if such control is not possible, the same power vested, for instance, upon a politically controlled Supreme Court or Constitutional Court, can constitute the most powerful and diabolical instrument for the consolidation of authoritarianism, the destruction of democracy, and the violation of human rights.⁴

Unfortunately, this is what has been happening in my country, Venezuela, where after decades of democratic ruling through which we constructed one of the most formally complete systems of judicial review in South America, that same system has been the instrument through which the politically controlled judiciary, and particularly the subjected Constitutional Chamber of the Supreme Tribunal, have been consolidating the authoritarian regime we now have.

With this important warning, allow me to try to explain the general trends governing the very comprehensive judicial review system established in Venezuela, in many aspects, since the nineteenth century, and to try to classify it within a constitutional comparative law framework.

I. A GENERAL OVERVIEW OF THE SYSTEMS OF JUDICIAL REVIEW AND THE VENEZUELAN SYSTEM

This guarantee can always be analyzed according to the criteria established a few decades ago by Mauro Cappelletti⁵ who, follow-

3. See Hans Kelsen, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)," *Revue du droit public et de la science politique en France et à l'étranger*, T. XLV, 1928, pp.197-257

4. See Allan R. Brewer-Carías, "Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación," *VIII Congreso Nacional de derecho Constitucional, Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, Sept. 2005, pp. 463-489.

5. See Mauro Cappelletti, *Judicial Review in the Contemporary World*, Indianapolis, 1971; "El control judicial de la constitucionalidad de las leyes en el derecho comparado,"

ing the trends of the so-called "North American" and "European" systems, distinguished between the "diffuse" (decentralized) and "concentrated" (centralized) methods of judicial review of the constitutionality of legislation. The former is exercised by all the courts of a given country, while the latter is only assigned to a Supreme Court or to a court specially created for that purpose such as a Constitutional Court or Tribunal.

In the diffuse, or decentralized, method, all the courts are empowered to judge the constitutionality of statutes, as is the case in the United States of America, where the "diffuse method"⁶ was born. That is why it is also referred as the "American model," initiated with *Marbury v. Madison*⁷ in 1803, later followed in many countries with or without a common law tradition. It is called "diffuse" or decentralized because judicial control is shared by all courts, from the lowest level up to the Supreme Court of the country. In Latin America, the only country that has kept the diffuse method of judicial review as *the only* judicial review method available is Argentina. In other Latin American countries, the diffuse method coexists with the concentrated method.⁸

The "concentrated" or centralized method of judicial review, in contrast with the diffuse method, empowers only one single court to control the constitutionality of legislation, utilizing annulatory powers. This can be achieved by a Supreme Court or a constitutional court created specially for that particular purpose. The concentrated or centralized system is also called the "Austrian" or "European" model because it was first established in Austria in 1920, and later developed in Germany, Italy, Spain, Portugal and France. This method has also been adopted in many Latin American countries, in some cases as *the only* form of judicial review applied.⁹ In other countries, as mentioned, it is applied conjunctly with the diffuse method.¹⁰

It has been this mixture, or parallel functioning, of the diffuse and concentrated methods, which has given rise to what can be

Revista de la Facultad de Derecho de Mexico, No. 61, Mexico 1966. See also Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* (Cambridge University Press 1989).

6. See Mauro Cappelletti, "El control judicial de la constitucionalidad de las leyes en el derecho comparado", *Revista de la Facultad de Derecho de México*, No. 61, México 1966, p. 28.

7. 5 U.S. 137 (1803).

8. Such is the case in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Perú and Venezuela.

9. This concentrated method of judicial review is the only method applied in Costa Rica, El Salvador, Bolivia, Chile, Honduras, Panama, Paraguay and Uruguay.

10. See *supra* note 8.

considered the "Latin American" model of judicial review. This model can be identified in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Perú and Venezuela. On the one hand, all courts are entitled to decide upon the constitutionality of legislation by autonomously deciding upon a statute's inapplicability in a particular case, with *inter partes* effects; and on the other hand, the Supreme Court or a Constitutional Court or Tribunal has been empowered to declare the total nullity of statutes contrary to the Constitution.¹¹ The Venezuelan judicial review system is precisely one of the latter, combining the diffuse and the concentrated methods of judicial review since the nineteenth century.¹²

In effect, article 7 of the 1999 Venezuelan Constitution¹³ declares *expressis verbis* that its text is "the supreme law" of the land and "the ground of the entire legal order." This provision assigns to all judges the duty "of guaranteeing the integrity of the Constitution"¹⁴ with the power to decide not to apply a statute that is deemed to be unconstitutional when deciding a concrete case. Article 335 of the Constitution also assigns the Supreme Tribunal of Justice the duty of guaranteeing "the supremacy and effectiveness of the constitutional rules and principles," as "the maximum and final interpreter of the Constitution," with the duty to seek for "its uniform interpretation and application."¹⁵

Additionally, the Constitutional Chamber of the Supreme Tribunal of Justice¹⁶ is the "Constitutional Jurisdiction," exclusively empowered to declare the nullity of *certain state acts* on the grounds of their unconstitutionality, in particular, statutes and

11. See Allan R. Brewer-Carías, "La jurisdicción constitucional en América Latina," in Domingo García Belaunde and Francisco Fernández Segado, *La jurisdicción constitucional en Iberoamérica*, Edit. Dickinson, Madrid 1997, pp. 117-61.

12. See Allan R. Brewer-Carías, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Bogotá 1995; Manuel Arona Cruz, "El control de la constitucionalidad de los actos jurídicos en Colombia ante el Derecho Comparado," in *Archivo de Derecho Público y Ciencias de la Administración*, Vol. VII 1984-1985, *Derecho Público en Venezuela y Colombia*, Instituto de Derecho Público, UCV, Caracas 1986, pp. 39-114; Allan R. Brewer-Carías, *El sistema de justicia constitucional en la Constitución de 1999*, Editorial Jurídica Venezolana, Caracas 2000.

13. The text of the Constitution of 12-30-99 was initially published in *Gaceta Oficial* No. 36.860 dated 12-30-99. Subsequently, it was published with corrections in *Gaceta Oficial* No. 5.453 Extraordinary dated 03-24-00. See the comments in Allan R. Brewer-Carías, *La Constitución de 1999*, Editorial Jurídica Venezolana, Caracas, 2 Vols, Caracas 2004.

14. Art. 334.

15. Art. 335.

16. Art. 266, par. 1º y 336.

other state acts issued in direct execution of the Constitution.¹⁷ The Tribunal also is empowered to judge the unconstitutionality of the omissions of the legislative organ.¹⁸

Other state acts, such as administrative acts and regulations, are also subject to judicial review by the "Administrative Jurisdiction." These courts are empowered to annul administrative acts because of their illegality or unconstitutionality.¹⁹

Also, according to article 29 of the Constitution, the courts have a duty to protect all persons in their constitutional rights and guaranties when deciding an action for protection, or "*amparo*." Such an action can be brought before the court against any illegitimate harm or threat to such rights.

Based on all the aforementioned constitutional provisions, judicial review of constitutionality in Venezuela can be exercised not only through the diffuse and concentrated methods, but also through a variety of other means.²⁰ Judicial review may occur through any of the following means:

(1) The diffuse method of judicial review of the constitutionality of statutes and other normative acts, exercised by all courts;

(2) The concentrated method of judicial review of the constitutionality of certain state acts, exercised by the Constitutional Chamber of the Supreme Tribunal of Justice;

(3) The protection of constitutional rights and guarantees through the actions for *amparo*;

(4) The concentrated method of judicial review of executive regulations and administrative actions, exercised by special courts controlling their unconstitutionality and illegality (*contencioso-administrativo*);

(5) The judicial review powers to control the constitutionality of legislative omissions;

(6) The concentrated judicial review power to resolve constitutional conflicts between the State organs;

(7) The protection of the Constitution through the abstract recourse for interpretation of the Constitution; and

17. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VI, *La Justicia Constitucional*, Editorial Jurídica Venezolana, Caracas 1996, pp. 131 ff.; Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* 190 (Cambridge University Press 1998); Allan R. Brewer-Carías, *El control concentrado de la constitucionalidad de las leyes (Estudio de Derecho Comparado)*, Editorial Jurídica Venezolana, Caracas 1994, p. 19.

18. Art. 336.

19. Art. 259C.

20. See decision No. 194 of the Constitutional Chamber dated Feb. 15, 2001, in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 416 ff.

(8) The Constitutional Chamber's power to remove from ordinary courts jurisdiction over particular cases.

According to a long Venezuelan tradition that can be traced back to the nineteenth century,²¹ all the principles of the mixed or comprehensive system of judicial review had been gathered in the 1999 Constitution.

II. THE DIFFUSE METHOD OF JUDICIAL REVIEW

Since 1897, the Venezuelan Civil Procedure Code has regulated the diffuse method of judicial review,²² which is currently set forth in article 20. This article prescribes:

In the case in which a law in force, whose application is requested, collides with any constitutional provision, judges shall apply the latter with preference.

The principle of the diffuse method of judicial review also has been more recently set forth in article 19 of the Criminal Procedure Organic Code, as follows:

Control of the Constitutionality. The control of the supremacy of the Constitution corresponds to the judges. In case that a statute whose application is requested would collide with it, the courts shall abide [by] the constitutional provision.

Based on this author's proposal,²³ article 334 of the 1999 Constitution consolidated the diffuse method of judicial review of the constitutionality of legislation,²⁴ as follows:

21. See Allan R. Brewer-Carías, "La justicia constitucional en la nueva Constitución," in *Revista de Derecho Constitucional* No. 1, Edigtorial Sherwood, Caracas Sep.-Dec. 1999, pp. 35-44; Allan R. Brewer-Carías, *El Sistema de justicia constitucional en la Constitución de 1999*, Editorial Jurídica Venezolana, Caracas 2000; Allan R. Brewer-Carías, "Standing to raise constitutional issues in Venezuela," in Richard S. Kay (ed.), *Standing to raise constitutional issues: comparative perspectives, XVIIth Congress of the International Academy of Comparative Law, Académie Internationale de Droit Comparé, Brisbane 2002*, Bruylant, Bruxelles 2005, pp. 67-92.

22. This was expressly established in the Civil Procedure Code of 1897. See Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* 127 ff. (Cambridge University Press 1989); Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VI, *La Justicia Constitucional*, Editorial Jurídica Venezolana, Caracas 1996, pp. 86 ff.

23. See the proposed draft for this article, in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. II, (9 Sept. - 17 Oct. 1999), Caracas 1999, pp. 24-34.

24. For instance, as it previously happened in other countries like Colombia, in 1910 (art. 4); Guatemala, in 1965 (art. 204); Bolivia, in 1994 (art. 228); Honduras, in 1982 (art. 315) and Perú, in 1993 (art. 138). See Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. III (18 Oct.-30 Nov. 1999), Caracas 1999, pp. 94-105.

In case of incompatibility between this Constitution and a law or other legal provision, constitutional provisions shall be applied, corresponding to all courts in any case whatsoever, even at their initiative, the pertinent decision.

Through this article, the diffuse method of judicial review acquired constitutional rank in Venezuela as a judicial power that can even be exercised *ex officio* by all courts,²⁵ including the different Chambers of the Supreme Tribunal of Justice.²⁶

This constitutional provision follows the general trends shown in comparative law regarding the diffuse method: it is based on the principle of constitutional supremacy, according to which unconstitutional acts are considered void and hold no value. Therefore, each and every judge is entitled to decide the unconstitutionality of the statute they are applying in order to resolve the case. This power can be exercised at the judge's own initiative, or *ex officio*. The decision of the judge has only an *inter partes* effect in each specific case and, therefore, is declarative in nature.²⁷

The general judicial procedural system in Venezuela is governed under the "by-instance principle," so that judicial decisions resolving cases on judicial review are subject to ordinary appeal. Therefore, the cases could only reach the Cassation Chambers of the Supreme Tribunal through cassation recourses.²⁸ Because this situation could lead to possible dispersion of the judicial decision on constitutional matters, the 1999 Constitution specifically set forth a corrective procedure. The Constitution granted the Constitutional Chamber of the Supreme Tribunal of Justice the power to review final judicial decisions issued by the courts of the Republic on *amparo* suits and when deciding judicial review of statutes in the terms established by the respective organic law.²⁹

Regarding this provision, it must be pointed out that it is neither an appeal nor a general second or third procedural instance. Instead, it is an exceptional faculty of the Constitutional Chamber to review, upon its judgment and discretion, through an extraor-

25. This has been a feature of the Venezuelan system. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VI, *La Justicia Constitucional*, op. cit., p. 101.

26. See decision No. 833 of the Constitutional Chamber dated Feb. 25, 2001, Case: Instituto Autónomo de Policía Municipal de Chacao, in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 369-71.

27. See Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* 127 ff. (Cambridge Univ. Press 1989).

28. Arts. 312 and ff. CCP.

29. Art. 336, 10C.

dinary recourse, similar to a writ of certiorari. Such review is exercised against last instance decisions in which constitutional issues are decided by means of judicial review, or in *amparo* suits.

It is a reviewing, non-obligatory power that can be exercised optionally.³⁰ The Constitutional Chamber is empowered to choose the cases it considers convenient to decide due to the constitutional importance of the matter. The Chamber also has the power to give a general binding effect to its interpretation of the Constitution, similar to the effect of *stare decisis*.³¹

Nonetheless, the Constitutional Chamber has distorted its review power regarding judicial decisions, extending it far beyond the precise cases of judicial review and *amparo* established in the Constitution. The Chamber has extended its review power over any other judicial decision issued in any matter when it considers it contrary to the Constitution — a power that the Chamber has proceeded to exercise without any constitutional authorization, even *ex officio*. For instance, the Chamber will step in and rule that a judicial decision was contrary to the Constitutional Chamber's interpretation of the Constitution, or that a decision was affected by a grotesque error regarding constitutional interpretation.³²

III. THE CONCENTRATED METHOD OF JUDICIAL REVIEW

The second traditional method of judicial review in Venezuela is the judicial power to annul unconstitutional statutes and other state acts of similar rank, which has been granted exclusively to the Supreme Court of the country since 1858. According to the 1999 Constitution, this power is now attributed to one of the Chambers of the Supreme Tribunal of Justice — the Constitutional Chamber — as Constitutional Jurisdiction.³³

30. In a certain way, the remedy is similar to the so-called writ of certiorari in the North American system. See Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* 141 (Cambridge Univ. Press 1998). See the comments of Jesús María Casal, *Constitución y Justicia Constitucional*, Caracas 2003, p. 92

31. Art. 335.

32. See decision No. 93 of Feb. 6, 2001 (Case: *Olimpia Tours and Travel v. Corporación de Turismo de Venezuela*), in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 414-15. See also Allan R. Brewer-Carías, "Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *VIII Congreso Nacional de derecho Constitucional, Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, septiembre 2005, pp. 463-89.

33. Arts. 266,1; 334 and 336 of the Constitution.

This method of judicial review can be exercised in three ways: (1) when the Chamber is requested through a popular action to decide upon the unconstitutionality of statutes already in force, (2) in some cases, in an obligatory way, or (3) when deciding on the matter in a preventive way before the publication of the challenged statute. In all of these cases, the Constitutional Chamber has the power to annul the unconstitutional challenged statutes with *erga omnes* effects.

A. *The Concentrated Method of Judicial Review Through Popular Action*

The second traditional method of exercising judicial review in Venezuela has been the judicial power to annul statutes and other state acts of similar rank issued in direct and immediate execution of the Constitution. This power is granted solely to the Constitutional Chamber of the Supreme Court of Justice, as the Constitutional Jurisdiction.³⁴

According to article 334 of the Constitution of 1999, following a tradition that began in 1858,³⁵ the Court retains competence in the following matters:

[To] [d]eclare the nullity of the statutes and other acts of the organs exercising public power issued in direct and immediate execution of the Constitution or being ranked equal to a law, [which] corresponds exclusively to the Constitutional Chamber of the Supreme Court of Justice.

This judicial review power to annul state acts on the grounds of their unconstitutionality refers to: (1) National laws or statutes and other acts which have the force of laws; (2) State constitutions and statutes, municipal ordinances, and other acts of the legislative bodies issued in direct and immediate execution of the Constitution; (3) State acts with rank equal to statutes issued by the National Executive; and (4) State acts issued in direct and immediate execution of the Constitution by any State organ exercising the public power.

Since the 1858 Constitution, constitutional jurisdiction was assigned to the Supreme Court of Justice in Plenary Session.³⁶

34. *Id.*

35. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Vol. VI La Justicia Constitucional*, Editorial Jurídica Venezolana, Caracas 1996, pp. 131 ff.

36. *Id.*

Therefore, one of the novelties of the 1999 Constitution was to assign constitutional jurisdiction to just one of the Chambers of the Supreme Court of Justice — the Constitutional Chamber.³⁷ This chamber, like all of the other chambers, has the mission of:

Guaranteeing the supremacy and effectiveness of the constitutional rules and principles: it shall be the last and maximum interpreter of the Constitution and guardian of its standard interpretation and application.³⁸

The specificity of the Constitutional Chamber in these cases, according to article 335 of the Constitution, is that:

The interpretations made by the Constitutional Chamber on the content or the scope of the constitutional rules are binding [on] the other Chambers of the Supreme Court and other courts of the Republic.

The most important feature of the concentrated method of judicial review under the Venezuelan system is that the standing necessary to raise an action resides in all individuals, being an *actio popularis*.³⁹ Consequently, according to article 5 of the Organic Law of the Supreme Tribunal of Justice, any individual or corporation with legal capacity is entitled to file a nullification action against the abovementioned state acts on grounds of the act's unconstitutionality.⁴⁰

According to the doctrine of the Supreme Tribunal, the objective of the popular action is that anybody has the necessary standing to sue.⁴¹ On August 22, 2001, the Constitutional Chamber of the Supreme Tribunal ruled:

any individual having capacity to sue has procedural and legal interest to raise [the popular action], without requiring a concrete historical fact [of] harm [to] the plaintiff's private legal sphere. The claimant is a guardian of the constitutionality and that guardianship entitles him to act, whether [or not] he

37. Arts. 262; 266,1.

38. Art. 335, first paragraph.

39. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VI *La Justicia Constitucional*, Editorial Jurídica Venezolana, Caracas 1996, pp. 137 ff.

40. *Id.* at 144.

41. According to this criterion, therefore, as the Supreme Court in Plenary Session has said, the popular action "may be exercised by any and all citizens with legal capacity." Decision dated Nov. 19, 1985, in *Revista de Derecho Público*, No. 25, Editorial Jurídica Venezolana, Caracas 1986, p. 131.

suffered a harm from the unconstitutionality of a law. This kind of popular action is exceptional.⁴²

This concentrated method of judicial review has traditionally been used in an extensive way, particularly by states and municipalities against national statutes, and conversely, by the Federal government against state and municipal legislation. Also, individuals have used this method against national, state and municipal statutes for the protection of individual rights.

B. The Obligatory Concentrated Method of Judicial Review of the "State of Exception" Decrees

Under the concentrated method of judicial review, particular emphasis must be made regarding the "state of exception" decrees that can be issued by the President of the Republic. Pursuant to article 339 of the Constitution, these executive decrees declaring a "state of emergency" shall be submitted by the President of the Republic before the Constitutional Chamber of the Supreme Tribunal in order for its constitutionality to be reviewed. Additionally, article 336,6 set forth that the Constitutional Chamber is entitled to, "Review, in any case, even *ex officio*, the constitutionality of decrees declaring states of exception issued by the President of the Republic."⁴³

This judicial power of obligatory judicial review is also a novelty introduced by the 1999 Constitution. This model followed the precedent of Colombia,⁴⁴ but added the Constitutional Chamber's power to exercise judicial review *ex officio*.

By exercising this control, the Constitutional Chamber can decide not only the constitutionality of the decrees declaring "states of exception," but also the constitutionality of its content. This control is exercised pursuant to the provisions of article 337 and the Constitution. In particular, in case of restriction of constitutional guaranties, the Chamber must verify that the decree effectively contains a *regulation* regarding "the exercise of the right whose guarantee is restricted."⁴⁵

42. Decision No. 1077, Case: *Servio Tulio León Briceño*, in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 247 ff.

43. Art. 336,6.

44. Art. 241,7.

45. Art. 339.

C. *The Preventive Judicial Review of the Constitutionality of Some State Acts*

In addition to the *actio popularis* and these cases of obligatory review, the concentrated method of judicial review can also be exercised by the Constitutional Chamber of the Supreme Tribunal in a preventive way regarding statutes that have been sanctioned but are not yet published. This preventive control can occur in three cases established as an innovation in the 1999 Constitution: (1) cases regarding international treaties, (2) cases involving organic laws, and (3) cases regarding non-promulgated statutes, at the request of the President of the Republic.

In the traditional system of judicial review in Venezuela, the sole mechanism of preventive concentrated judicial review of statutes was the Supreme Tribunal of Justice's power to decide the unconstitutionality of a statute that is already sanctioned, but not yet promulgated because of a presidential veto.⁴⁶

Presently, the Constitution of 1999 has expanded preventive control of constitutionality to cover treaties, organic laws, and non-promulgated statutes when requested by the President of the Republic.

1. *Preventive Judicial Review of International Treaties*

With regard to international treaties, there is the preventive judicial review method, foreseen in article 336,5 of the Constitution, which grants the Constitutional Chamber faculty to:

Verify, at the President of the Republic's or the National Assembly's request, conformity with the Constitution of the international treaties subscribed by the Republic before their ratification.

It is important to point out that this provision originated in the European constitutional systems, like those existing in France⁴⁷ and Spain, and subsequently adopted in Colombia.⁴⁸ This system is now incorporated in the Venezuelan system of judicial review, and permits the preventive judicial review of international trea-

46. See Allan R. Brewer-Carías *Instituciones Políticas y Constitucionales*, Vol. VI *La Justicia Constitucional*, Editorial Jurídica Venezolana, Caracas 1996, pp. 134 ff.

47. See Allan R. Brewer-Carías, *Implicaciones constitucionales de los procesos de integración regional*, Editorial Jurídica Venezolana, Caracas 1998, pp. 75 ff.

48. *Id.* at 590.

ties subscribed by the Republic, thereby avoiding the possibility of subsequent challenge of the statutes approving the treaty.

In this case, if the treaty turns out not to be in conformity with the Constitution, it cannot be ratified, and an initiative for constitutional reform to adapt the Constitution to the treaty may result. On the other hand, if the Constitutional Chamber decides that the international treaty conforms to the Constitution, then a popular action of unconstitutionality against the approving statute could not subsequently be raised.

2. *The Preventive Judicial Review of the Organic Laws*

The second mechanism of the preventive judicial review method refers to organic laws. According to article 203 of the Constitution, the Constitutional Chamber must decide, before their promulgation, the constitutionality of the "organic" character of the *organic laws* when qualified this way by the National Assembly.

Article 203 of the Constitution defines the organic laws in five senses: (1) those the Constitution itself qualifies as such;⁴⁹ (2) the organic laws issued in order to organize public branches of government (Public Powers);⁵⁰ (3) those intended to "develop the constitutional rights," which implies that all laws issued to develop the content of articles 19 to 129 shall be organic laws; (4) those

49. This happens in the following cases: Organic Law of Frontiers (art. 15); Organic Law of Territorial Division (art. 16); Organic Law of the National Armed Force (art. 41); Organic Law of the Social Security System (art. 86); Organic Law for the Land Planning (art. 128); Organic Law Establishing the Limits to Public Officer's Emoluments (art. 147); Organic Law of Municipal Regime (art. 169); Organic Law on the Metropolitan Districts (arts. 171 and 172); Organic Law Ruling Officers Ineligibility (art. 189); Organic Law Concerning the Nationalization of Activities, Industries or Services (art. 302); Organic Law of the Nation Defense Council (art. 232); Organic Law Ruling the Remedy of Reviewing Decisions Adopted on Actions of *Amparo* and on Diffuse Judicial Review (art. 336); Organic Law of State of Emergency (art. 338 and Third, 2 Transitional clause); Organic Law on Refugees and Asylum (Fourth, 2 Transitional clause); Organic Law on the Peoples Defendant (art. 5 Transitional clause); Organic Law on Education (Sixth Transitional clause); Organic Law on Indian Peoples (Seventh Transitional clause); Labor Organic Law (Fourth, 3 Transitional clause); Labor Procedural Organic Law (Fourth, 4 Transitional clause); Tributary Organic Code (Fifth Transitional clause).

50. Such as the Organic Law of the Public Administration (art. 236, paragraph 20); Organic Law of the Attorney General for the Republic (art. 247); Organic Law of the Judicial Power, Organic Law of the Supreme Tribunal of Justice (art. 262); Organic Law of the Electoral Power (art. 292 and Eighth Transitional clause); Organic Law of the Citizen Power, comprising the Organic Law of the General Controller of the Republic, Organic Law of the General Prosecutor of the Republic and Organic Law of the Peoples Defender (Ninth Transitional clause); Organic Law of Municipal regime (art. 169 and First Transitional clause); Organic Law ruling the States Legislative Councils (art. 162).

organic laws issued to “frame other laws;”⁵¹ and (5) those organic laws named “organic” by the National Assembly, when they are admitted by two-thirds vote of the present members before initiating the discussion.

This last case of laws, qualified as such by the National Assembly, are those that shall be *automatically* sent, before their promulgation, to the Constitutional Chamber of the Supreme Tribunal of Justice. The Tribunal will make a decision regarding the constitutionality of the laws’ organic character.

3. *Judicial Review of Statutes Sanctioned Before Their Promulgation*

The third mechanism of preventive judicial review of constitutionality set forth in article 214 of the Constitution is established in cases when the President of the Republic raises before the Constitutional Chamber the constitutional issue against sanctioned statutes before their promulgation.⁵² Thus, control over the constitutionality of sanctioned but not promulgated statutes is set forth in a different way than the traditional so-called “presidential veto” of statutes, which involves a devolution to the National Assembly.⁵³

IV. JUDICIAL REVIEW THROUGH THE ACTION FOR AMPARO OF CONSTITUTIONAL RIGHTS AND GUARANTEES

Beside the classical diffuse and concentrated methods of judicial review, with the aforementioned variations, in Venezuela, as in all other Latin American countries, there is a third method of judicial review. This method is a specific action established in the Constitution for protection of constitutional rights, which can also serve to control the constitutionality of statutes and other governmental actions applicable to the case.

The action or suit for protection, or *amparo*, as a specific judicial means for the protection of *all constitutional rights and guarantees*⁵⁴ has been constitutionalized in Venezuela since the 1961

51. For example, the Taxation Organic Code that shall frame all specific tax laws, or the Organic Law on the Financial Administration of the State that shall frame the annual or pluri-annual budget laws, or the specific laws referred to public credit operations.

52. The Constitutional Chamber considered that it is an exclusive standing of the President of the Republic. See decision No. 194 of Feb. 15, 2001.

53. Art. 214 of the Constitution.

54. See Allan R. Brewer-Carias, *Instituciones Políticas y Constitucionales*, Vol. V, *Derecho y la Acción de Amparo*, Editorial Jurídica Venezolana, Caracas 1998, pp. 19 ff.

Constitution. This provision implies the obligation of all the courts to protect persons in the exercise of their constitutional rights and guarantees. In the *amparo* suit decisions, judicial review of the constitutionality of legislation can also be exercised by the courts as part of their rulings.

Article 27 of the Constitution of 1999 establishes:

Every individual is entitled to be protected by the courts in the enjoyment and exercise of rights, even those which derive from the nature of man that are not expressly set forth in this Constitution or in the international treaties on human rights.

The *amparo* suit is governed by an informal, oral proceeding that shall be public, brief and free of charge. The judge is entitled to immediately restore the affected legal situation, and the court shall issue the decision with preference to all other matters.

As per the Organic Law on *Amparo* of Constitutional Rights and Guarantees of 1988,⁵⁵ in principle, all courts of first instance are competent to decide *amparo* suits.

Standing to file the action of *amparo* corresponds to every individual whose constitutional rights and guarantees are affected⁵⁶ — even those inherent rights that are not expressly provided for in the Constitution or in the international treaties on human rights that are ratified by the Republic. In Venezuela, such treaties rank on the same level as the Constitution, and they even prevail in the internal order as long as they establish more favorable rules on the enjoyment and exercise of rights than those established under the Constitution and other laws.⁵⁷

In Venezuela, the action of *amparo* may be instituted against state organs, against corporations and even against individuals whose actions or omissions may infringe or threaten constitutional rights and guarantees. In all cases of *amparo* proceedings, if the alleged violation of the constitutional right involves a statutory

55. See *Gaceta Oficial* No. 33.891 dated Jan. 22, 1988. See generally Allan R. Brewer-Carías & Carlos M. Ayala Corao, *La Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales*, Editorial Jurídica Venezolana, Caracas 1988.

56. Individual, political, social, cultural, educative, economic, Indian and environmental rights and their guarantees are listed in articles 19 through 129 of the Constitution. In Venezuela, there exists no limitation established in other countries (e.g., Germany and Spain), which reduces the action of *amparo* to protect just “fundamental rights.” See Allan R. Brewer-Carías, *El Amparo a los derechos y garantías constitucionales (una aproximación comparativa)*, Editorial Jurídica Venezolana, Caracas 1993.

57. Art. 23C.

provision, in his decision, the *amparo* judge can decide that the statute is unconstitutional and not apply it to the case.

Generally, "the individual directly affected by the infringement of the constitutional rights and guarantees" has standing in an action for *amparo*.⁵⁸ But by virtue of the constitutional acknowledgement of the legal protection of diffuse or collective interests, the Constitutional Chamber of the Supreme Court has admitted the possibility of exercising the action of *amparo* to enforce collective and diffuse rights. For instance, those rights related to an acceptable quality of life and also those pertaining to the political rights of voters, admitting precautionary measures with *erga omnes* effects.⁵⁹

In such cases, the Constitutional Chamber has admitted that:

any individual with legal capacity to bring suit, who is going to prevent damage to the population or parts of it to which he belongs, is entitled to bring the [*amparo*] suit grounded in diffuse or collective interests This interpretation, based on article 26, extends standing to companies, corporations, foundations, chambers, unions and other collective entities, whose object be the defense of the society, as long as they act within the boundaries of their corporate object, aimed at protecting the interests of their members regarding their object.⁶⁰

58. See, e.g., decision of the Constitutional Chamber dated Mar. 15, 2000, *Revista de Derecho Público*, No. 81, Editorial Jurídica Venezolana, Caracas 2000, pp. 322-23.

59. Decision of the Constitutional Chamber No. 483 of May 29, 2000 (Case: "*Queremos Elegir*" y otros), *Revista de Derecho Público*, No. 82, Editorial Jurídica Venezolana, Caracas 2000, pp. 489-91. See also decision of the same Chamber No. 714 of July 13, 2000 (Case: *APRUM*), in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 319 ff.

60. See decision of the Constitutional Chamber No. 487 of Apr. 6, 2001, Case: *Glenda López*, in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 453 ff. In these cases, as stated by the Constitutional Chamber in a decision dated February 17, 2000 (No. 1.048, Case: *William O. Ojeda O. v. Consejo Nacional Electoral*), in order to enforce diffuse or collective rights or interests, it is necessary that the following elements be combined:

- (1.) That the plaintiff sues based not only on his personal right or interest, but also on a common or collective right or interest.
- (2.) That the reason for the claim filed on the action of *amparo* be the general damage to the quality of life of all the inhabitants of the country or parts of it, since the legal situation of all the members of the society or its groups has been damaged when their common quality of life was unimproved.
- (3.) That the damaged goods are not susceptible of exclusive appropriation by one subject (such as the plaintiff).
- (4.) That the claim concerns an indivisible right or interest that involves the entire population of the country or a group of it [and] that a necessity of satisfying social or collective interests exists, before the individual ones.

On the other hand, regarding the general defense and protection of diffuse and collective interests, the Constitutional Chamber has also admitted the standing of the Defender of the People.⁶¹

In order to seek uniformity of the application and interpretation of the Constitution, article 336 of the Constitution also grants the Constitutional Chamber of the Supreme Tribunal the power to review, in a discretionary way, all final decisions issued in *amparo* suits. The extraordinary recourse can also be raised against judicial decisions applying the diffuse method of judicial review, being the review power of the Constitutional Chamber of facultative, non-obligatory character.

V. THE JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF EXECUTIVE REGULATIONS AND OTHER NORMATIVE ADMINISTRATIVE ACTS

The fourth method of judicial review of constitutionality is the concentrated method, also established in the Constitution, which applies to executive regulations and other normative administrative actions. For such purposes, article 259 of the Constitution sets forth the “Administrative Jurisdiction” exercised by Judicial Review Courts of Administrative Action (*contencioso-administrativo*), in the following way:

The Administrative Jurisdiction corresponds to the Supreme Tribunal of Justice and to the other courts determined by law.

See in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 375 ff.

61. The Chamber has granted the Peoples’ Defender standing, by stating: [T]o act to protect those rights and interests, when they correspond in general to the consumers and users (6, article 281), or to protect the rights of Indian peoples (paragraph 8 of the same article), since the defense and protection of such categories is one of the faculties granted to said entity by article 281 of the Constitution in force. It is about a general protection and not a protection of individualities.

Within this frame of action, and since the political rights are included in the human rights and guarantees of Title III of the Constitution in force, which [offer] general protection . . . it must be concluded that the Defender of the People is entitled on behalf of society to [file] suit [for] an action of *amparo* tending to control the Electoral branch of government, [for each] citizen’s benefit, in order to enforce[e] articles 62 and 70 of the Constitution, which were denounced . . . by the National Legislative Assembly . . . ([including the] right to citizen participation).

See decision of the Constitutional Chamber No. 487 of Apr. 6, 2001, Case: *Glenda López*, in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 453 ff.

The courts of the Administrative Jurisdiction have the power to annul general or individual administrative acts contrary to law, even because of deviation of power. Additionally, the courts may condemn the Administration to pay compensation of damages caused because of the Administration liability; decide claims for the fulfillment of public services and arrange what is necessary to restore the subjective legal situation damaged by the activity of the Administration.

Therefore, pursuant to this constitutional article, judicial review also corresponds to the courts of Administrative Jurisdiction when exercising their faculty of annulment of administrative acts, when contrary to statutes, executive regulations or other sources of administrative law.⁶² Similar to judicial review of constitutionality, decisions annulling administrative acts, both normative and specific ones, have *erga omnes* effects.⁶³

The difference between the "Constitutional Jurisdiction" (*Jurisdicción Constitucional*), attributed to the Constitutional Chamber of the Supreme Court of Justice, and the "Administrative Jurisdiction" (*Jurisdicción contencioso-administrativo*), attributed to the special courts for judicial review of administrative actions,⁶⁴ resides in the state acts subjected to control. On the one hand, Constitutional Jurisdiction is in charge of nullifying actions *against unconstitutional statutes and other acts of similar rank or issued in direct and immediate execution of the Constitution*. On the other hand, Administrative Jurisdiction is in charge of deciding *nullity actions against unconstitutional or illegal administrative acts or regulations*.

Therefore, as per article 266,5 of the Constitution, the Politico-Administrative Chamber of the Supreme Court is entitled:

To declare the total or partial nullity of bylaws (regulations) and other general or individual administrative acts of the National Executive

Regarding the standing to challenge administrative acts on the grounds of unconstitutionality and illegality, when referring to

62. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VII, *La Justicia Contencioso-Administrativa*, Editorial Jurídica Venezolana, Caracas 1997, pp. 26 ff.

63. *Id.*

64. See the author's proposal before the National Constituent Assembly. See Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Vol. II, (9 Sept. – 17 Oct. 1999), Caracas 1999, pp. 245 ff.

normative administrative acts or regulations, anybody can bring an action before the Court by means of the popular action of nullity. Consequently, a simple interest in the legality or constitutionality is enough for any citizen to be sufficiently entitled to raise the nullity action for unconstitutionality or illegality against regulations and other normative administrative acts.⁶⁵ This simple interest has been defined by the First Administrative Court, in a decision dated March 22, 2000, as "the general right granted by law upon every citizen to access the competent courts to raise the nullity of an unconstitutional or illegal administrative general act."⁶⁶

As to the administrative acts of particular effects, the standing to challenge such acts before the Administrative Jurisdiction courts corresponds solely to those who have a personal, legitimate and direct interest in the annulment of the act.⁶⁷ This has been the general rule on the matter even though some decisions have been issued by the Politico-Administrative Chamber of the Supreme Tribunal, giving standing to any person with only a legitimate interest.⁶⁸

Additionally, in the case of the Administrative Jurisdiction, even before the new Constitution took effect in 1999, the possibility of protecting collective interests was also made available. In particular, it is now widely accepted that a collective or diffuse right exists against city-planning acts.⁶⁹

Nonetheless, despite very impressive advances regarding judicial review of administrative actions experienced in the past decades, due to the political control of the Judiciary during the past seven years, the role of the Administrative Jurisdiction in controlling Public Administration has dramatically diminished in Venezuela, affecting the rule of law.⁷⁰

65. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VII, *La Justicia Contencioso-Administrativa*, Caracas 1997, pp. 74 ff.

66. See decision of the First Administrative Court dated Mar. 22, 2000, Case: *Banco de Venezolano de Crédito v. Superintendencia de Bancos*, *Revista de Derecho Público*, No. 81, Editorial Jurídica Venezolana, Caracas 2000, pp. 452-53.

67. Art. 5, Law.

68. See decision of the Supreme Court of Justice in Politico-Administrative Chamber of Apr. 13, 2000, Case: *Banco Fivenez v. Junta de Emergencia Financiera*, *Revista de Derecho Público*, No. 82, Editorial Jurídica Venezolana, Caracas, 2000, pp. 582-83.

69. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol. VII, *La Justicia Contencioso-Administrativa*, Editorial Jurídica Venezolana, Caracas 1997, pp. 130 ff.

70. See Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004," en el libro: *XXX Jornadas J.M. Domínguez Escovar, Estado de derecho, Administración de justicia y*

VI. JUDICIAL REVIEW OF LEGISLATIVE OMISSIONS

The fifth judicial review method established in the 1999 Constitution refers to legislative omissions, empowering the Constitutional Chamber to review the unconstitutional omissions of the legislative organ.⁷¹ This is another new institution in matters of judicial review established by the 1999 Constitution. In Article 336, the Constitution grants the Constitutional Chamber faculty:

To declare the unconstitutionality of municipal, state or national legislative organ omissions, when they failed to issue indispensable rules or measures to guarantee the enforcement of the Constitution, or when they issued them in an incomplete way; and to establish the terms, and if necessary, the guidelines for their correction.

This provision has given extended judicial power to the Constitutional Chamber, which surpasses the trends of the initial Portuguese antecedent on the matter, where only the President of the Republic, the Ombudsman or the Presidents to the Autonomous Regions had standing to require such decisions.⁷² On the contrary, the Venezuelan Constitution of 1999 does not establish any condition whatsoever for standing; whereby regarding normative omissions,⁷³ standing has been treated similarly as in *popular actions*.

In many cases, the Chamber has been asked to rule on omissions of the National Assembly in sanctioning statutes, like the Organic Law on Municipalities which, according to the Transitory dispositions of the 1999 Constitution, was due to be sanctioned within two years following its approval. Even though the Chamber issued two decisions in the case, the National Assembly failed to sanction the statute until 2005.⁷⁴ In these cases, fortunately, the Chamber has not itself decided (in this case to legislate) in place of the legislative body, as it has done regarding the election

derechos humanos, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33-174.

71. This institution has its origins in the Portuguese system. See Allan R. Brewer-Carías, *JUDICIAL REVIEW IN COMPARATIVE LAW* 269 (Cambridge Univ. Press 1989).

72. *Id.*

73. It has been called by the Constitutional Chamber: "legislative silence and the legislative abnormal functioning," decision No. 1819 of Aug. 8, 2000, of the Politico-Administrative Chamber, Case: *Rene Molina v. Comisión Legislativa Nacional*.

74. See the reference in Allan R. Brewer-Carías et al, *Ley Orgánica del Poder Público Municipal*, Editorial Jurídica Venezolana, Caracas 2005.

of the National Electoral Council. There, due to the failure of the National Assembly to elect those members with the needed two-thirds majority vote, the Constitutional Chamber, which has been completely controlled by the Executive, directly appointed them in violation of the Constitution. Through that decision, the Constitutional Chamber guaranteed the complete control of the Electoral body by the Executive.⁷⁵

VII. JUDICIAL REVIEW OF CONSTITUTIONAL CONTROVERSIES BETWEEN THE STATE ORGANS

The sixth judicial review method refers to the power attributed to the Constitutional Chamber of the Supreme Tribunal to “decide upon constitutional controversies aroused between any organ of the branches of government (public power).”⁷⁶

This judicial review power refers to controversies between any of the organs that the Constitution foresees, whether in the horizontal or vertical distribution of the public power. In particular, “constitutional” controversies — those whose decision depends on the examination, interpretation and application of the Constitution — refers to the distribution of powers between the different state organs, especially those distributing the power between the national, state and municipal levels.

The “administrative” controversies that can arise between the Republic, the states, municipalities or other public entities are to be decided by the Politico-Administrative Chamber of the Supreme Tribunal⁷⁷ as an Administrative Jurisdiction.

As the Supreme Court of Justice specified, in order to identify the constitutional controversy, it is required:

That the parties of the controversy are those who have been expressly assigned faculties for those actions or provisions in the constitutional text itself, that is, the supreme state insti-

75. See decisions No. 2073 of Aug. 4, 2003 (Case: *Hermán Escarrá Malaver y otros*) and No. 2341 of August 25, 2003 (Case: *Hermán Escarrá M. y otros*) in Allan R. Brewer-Carías, *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, p. 172; “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.

76. Art. 336.

77. Art. 266, para. 4°.

tutions, whose organic regulation is set forth in the constitutional text, different from others, whose concrete institutional frame is established by the ordinary legislator. . . .

On the contrary, “we are not in [the] presence of a constitutional controversy when the parties to same are not organs of the branches of government (public power), with attributes established in the constitutional text.”⁷⁸

In any case, the standing to raise a remedy in order to settle a constitutional controversy only corresponds to one of the branches of government (public power) party to the controversy.⁷⁹

VIII. RECOURSE OF CONSTITUTIONAL INTERPRETATION

Finally, regarding the jurisdiction of the Constitutional Chamber, mention must be made of the faculty to decide abstract recourses of interpretation of the Constitution. This is a judicial means that the Constitutional Chamber has created from the interpretation of article 335 of the Constitution, which grants the Supreme Tribunal the character of “maximum and final interpreter of the Constitution.”

In effect, the 1999 Constitution only grants the Supreme Tribunal of Justice power to “decide the recourses of interpretation on the content and scope of the *legal texts*,”⁸⁰ a faculty that is to be exercised “by the different Chambers [of the Tribunal] pursuant to the provisions of this Constitution and the law.”⁸¹ No reference is made in the Constitution to recourse for the interpretation of the Constitution itself.

Nonetheless, before the Supreme Tribunal of Justice Organic Law was sanctioned in 2005, and without any constitutional or legal support, the Constitutional Chamber of the Supreme Tribunal created an autonomous “recourse of interpretation of the Constitution.”⁸² The court’s ruling was founded on article 26 of the Constitution, which established the right to access justice, from which it was deduced that although said action was not set forth

78. Decision of the Politico-Administrative Chamber No. 1468 of June 27, 2000, in *Revista de Derecho Público*, No. 82, Editorial Jurídica Venezolana, Caracas 2000, pp. 744 ff.

79. See dissenting vote of Justice Héctor Peña Torrelles, Case: *José Amando Mejía y otros* (Decision Feb. 1, 2000).

80. Art. 266.6.

81. Art. 266C.

82. Decision No. 1077 of the Constitutional Chamber dated Sept. 22, 2000, Case: *Servio Tulio León Briceño*, in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 247 ff.

in any statute, it was not forbidden, either. Therefore, it was decided that "citizens do not require statutes establishing the recourse for constitutional interpretation, in particular, to raise it."⁸³

In order to raise this recourse for constitutional interpretation, the Constitutional Chamber has nonetheless considered that a particular interest shall exist in the plaintiff. The court ruled that:

a public or private person shall have a current legitimate legal interest, grounded in a concrete and specific legal situation, which necessarily requires the interpretation of constitutional rules applicable to the case, in order to cease the uncertainty impeding the development and effects of said legal situation.⁸⁴

In decision No. 1077 dated August 22, 2001, the Constitutional Chamber ruled that:

The purpose of such recourse for constitutional interpretation would be a declaration of certainty on the scope and content of a constitutional provision, and would form an aspect of citizen participation, which may be made as a step prior to the action of unconstitutionality, since the constitutional interpretation could clear doubts and ambiguities about the supposed collision. It is about a preventive guardianship [of the Constitution].

The Chamber added that the petition for interpretation might be inadmissible "if it does not specify which is the obscurity, ambiguity or contradiction between the provisions of the constitutional text."⁸⁵ The petition, if applicable, must also specify "the nature and scope of the applicable principles," or "the contradictory or ambiguous situations aroused between the Constitution and the rules of its transitory regime."⁸⁶ The interpretation of the Constitution made by the Constitutional Chamber in these cases has binding effects.⁸⁷

83. This criterion was ratified later in decision (No. 1347 dated Sept. 11, 2000), in *Revista de Derecho Público*, No. 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 264 ff.

84. *Id.*

85. Case: *Servio Tulio León Briceño*, in *Revista de Derecho Público*, No. 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 247 ff.

86. *Id.*

87. Decision No. 1347 of the Constitutional Chamber dated Nov. 9, 2000, in *Revista de Derecho Público*, No. 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 264 ff.

This extraordinary interpretive power, although theoretically an excellent judicial means for the interpretation of the Constitution, unfortunately has been extensively abused by the Constitutional Chamber to distort important constitutional provisions, to interpret them in a way contrary to the text, or to justify constitutional solutions according to the will of the Executive. This was the case, for instance, with the various Constitutional Chamber decisions regarding the consultative and repeal referendums between 2002 and 2004, where the Chamber confiscated and distorted the peoples' constitutional right to political participation.⁸⁸

IX. THE CONSTITUTIONAL CHAMBER'S POWER TO TAKE AWAY JURISDICTION FROM LOWER COURTS IN PARTICULAR CASES

Finally, mention must be made to the figure of the "*avocamiento*," that is, the authority of the Constitutional Chamber to remove cases from the jurisdiction of lower courts, at any stage of the procedure, in order for the cases to be decided by the Chamber itself.

This extraordinary judicial power was initially established in the 1976 Organic Law of the Supreme Court of Justice as a competence attributed only to the Politico-Administrative Chamber of the Supreme Court, which the Chamber used in a self-restricted way.⁸⁹ However, the Constitutional Chamber has now assumed for itself the *avocamiento* power in matters of *amparo* cases,⁹⁰ and eventually annulled the former Organic Law provision.⁹¹

88. See decisions No. 1139 of June 5, 2002 (Case: *Sergio Omar Calderón Duque y William Dávila Barrios*); No. 137 of Feb. 13, 2003 (Case: *Freddy Lepage y otros*); No. 2750 of Oct. 21, 2003 (Case: *Carlos E. Herrera Mendoza*); No. 2432 of Aug. 29, 2003 (Case: *Luis Franceschi y otros*); and No. 2404 of Aug. 28, 2003 (Case: *Exssel Alí Betancourt Orozco, Interpretación del artículo 72 de la Constitución*), in Allan R. Brewer-Carías, *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, p. 172; "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.

89. See Roxana Orihuela, *El avocamiento de la Corte Suprema de Justicia*, Editorial Jurídica Venezolana, Caracas 1998.

90. See decision No. 456 of Mar. 15, 2002 (Case: *Arellys J. Rodríguez v. Registrador Subalterno de Registro Público, Municipio Pedro Zaraza, Estado Carabobo*), in *Revista de Derecho Público*, No. 89-92, Editorial Jurídica Venezolana, Caracas 2002.

91. See decisión No. 806 of Apr. 24, 2002 (Case: *Sindicato Profesional de Trabajadores al Servicio de la Industria Cementera*), in *Revista de Derecho Público*, No. 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 179 y ss.

In 2004, the new Organic Law of the Supreme Tribunal granted to all the Chambers of the Tribunal a general power to remove cases from the jurisdiction of lower courts, *ex officio* or through a party petition, and when convenient, to decide the cases.⁹²

This power has been highly criticized as a violation of due process rights, and particularly, the right to a trial on a by-instance basis by the courts. It has allowed the Constitutional Chamber to intervene in any kind of process, including cases being tried by the other Chambers of the Supreme Tribunal, with very negative effects.⁹³ For instance, this Constitutional Chamber power was used to annul a decision issued by the Electoral Chamber of the Supreme Tribunal,⁹⁴ which protected the citizens' rights to political participation. There, the Electoral Chamber suspended the effects of a National Electoral Council decision,⁹⁵ objecting to the presidential repeal referendum petition of 2004.

In this way,⁹⁶ the Constitutional Chamber interrupted the process which was normally developing before the Electoral Chamber of the Supreme Tribunal, took the case away from that Chamber, and annulled its ruling. Instead, the Constitutional Chamber decided the case according to the will of the Executive, restricting the peoples' right to participate through petitioning referendums.⁹⁷

CONCLUSION

As abovementioned, judicial review has played a very important role in the contemporary world and can be considered as the ultimate result of the consolidation of the *rule of law*. Judicial review

92. Arts. 5,1,48; and 18,11.

93. See Allan R. Brewer-Carías, "*Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación*," in *VIII Congreso Nacional de Derecho Constitucional, Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, Sept. 2005, pp. 463-89.

94. See decisions No. 24 of Mar. 15, 2004) (Exp. AA70-E 2004-000021; Exp. x-04-00006); No. 27 of Mar. 29, 2004 (Case: *Julio Borges, César Pérez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón José Medina Y Gerardo Blyde v. Consejo Nacional Electoral*) (Exp. AA70-E-2004-000021- AA70-V-2004-000006).

95. See resolution No. 040302-131 of Mar. 2, 2004.

96. See decision No. 566 of Apr. 12, 2004.

97. See Allan R. Brewer-Carías, *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; "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.

can contribute to the consolidation of democracy, which ensures control over the exercise of state powers and guarantees the respect of human rights. When exercised for those purposes, judicial review powers are the most important instruments for a Supreme Court or a Constitutional Tribunal to guarantee the supremacy of the Constitution.

But when used against democratic principles for circumstantial political purposes, the judicial review powers attributed to a Supreme Court or to a Constitutional Tribunal can constitute the most powerful instrument for the consolidation of an authoritarian government.

Consequently, the provision of various methods of judicial review and the corresponding actions and recourses established in a Constitution is not, alone, a guarantee of constitutionalism and of the enjoyment of human rights. Nor does the mere existence of such provisions guarantee that there will be control of state powers, particularly, that there will be the division and separation of powers, which today still remains the most important principle of democracy.

The most elemental condition for this control is inevitably the existence of an independent and autonomous judiciary and, in particular, the existence of adequate institutions for controlling the constitutionality of state acts (Constitutional Courts or Supreme Tribunals) — institutions capable of controlling the exercise of political power and of annulling unconstitutional state acts.

Unfortunately, in Venezuela — notwithstanding the marvelous, formal system of judicial review enshrined in the Constitution, which I have intended to describe, combining all the imaginable instruments and methods for that purpose — due to the concentration of all state power in the National Assembly and in the Executive branch of government, and due to the very tight political control that is exercised over the Supreme Tribunal of Justice, the *rule of law* has been progressively demolished with the complicity of the Constitutional Chamber. Consequently, the authoritarian elements that were enshrined in the 1999 Constitution have been progressively developed and consolidated, precisely through the decisions of the Constitutional Chamber, weakening the democratic principle.

That is why, unfortunately, the politically controlled Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela, instead of being the guarantor of constitutionalism, of democracy, and of the *rule of law*, has instead been the a façade of “constitu-

tionality” or “legality,” camouflaging the authoritarian regime we now have installed in the country.

