CONSTITUTION MAKING PROCESS IN DEFRAUDATION OF THE CONSTITUTION AND AUTHORITARIAN GOVERNMENT IN DEFRAUDATION OF DEMOCRACY. THE RECENT VENEZUELAN EXPERIENCE*

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I

In modern constitutionalism, the Constitution, as a political pact sanctioned by the representative of the people, has always been the result of political conflicts, whether for their prevention or their conclusion, and consequently, has always tended to create democratic institutions in order to achieve political stability. This, of course, is the situation in democratic regimes to which we are going to refer, because in authoritarian ones, the Constitution, even covered by democratic veils when approved by voters, always remains as the sole expression of a ruler's will.

The question, of course in democratic regimes, as was suggested by the organizers of this VII Congress, imposes the need to determine *to what extent Constitutions can contribute to resolve conflict and to create stable democratic governments*; or in other words, how Constitutions must be adopted in order to effectively prevent conflicts and build stable democratic institutions.

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The fact is, as constitutional history shows, those goals have not always been achieved; Constitutions not being the magical instrument many think they are to guarantee the ending of political conflicts or the founding of a permanent stability. The real possibility for a Constitution to contribute to both resolve or prevent conflicts and assure stability basically depends on the way constitution making processes are conceived and developed and how Constitutions are drafted and adopted.

During the past two hundred years, all kind of constitutional review proceedings have been experienced, and still the ideal path of a constitution making process in order for a Constitution to contribute to resolve conflict and create stable democratic government has yet to be designed. However, one thing is clear and definitive: no constitution making process in a given country which is implemented by one political or social faction to impose a way of living or a specific political and economic system endures. In such cases, conflicts are not definitively resolved and constitution making processes restart, sometimes over and over in an endless process.

II

The Latin American countries have had a long history of constitution making processes by means of Constituent Assemblies many times convened and elected without being regulated in the Constitutions.

This has generally occurred after a factual rupture of the legal constitutional order produced by a *coup d' État*, a revolution, or a civil war. In such cases, the Constituent Assembly has always been convened by the winners and later, the sanctioned Constitution is legitimized by the new leadership. In these matters, without doubts and historically, Latin American countries have a recognized expertise constructed during almost two hundred years of political turmoil.

In such cases, the elected Constituent Assemblies normally have exercised unlimited constitution making power, pretending to represent the will of the people without being subject to the provisions of the previous Constitution. Nonetheless, some stony principles or clauses imposed by the republican form of government have always been preserved.

However, in the past decades a new constitution making process has taken shape in Latin America also by mean of the election of Constituent Assemblies not regulated in the Constitutions, but in this case, without previous rupture of the constitutional order. In these cases, the convening of the Constitu-

ent Assembly has been made by means of judicial interpretation of the Constitution and through democratic elections, as was the case in Colombia in 1991, in Venezuela in 1999 and is currently the case in Ecuador in 2007. Among this new modality, the case of Venezuela must be highlighted because in 1999 a rupture of the constitutional order effectively occurred but in an *ex post facto* manner, made by the same Constituent Assembly once elected. In such case, the *coup d'État* was given by the Constituent Assembly itself.[1]

That is why this new constitution making process can be characterized as being done in defraudation to the Constitution, that is, because the latter has been deliberately used and interpreted in order to elect a body with the final purpose of violating the same Constitution used to give birth to the Assembly, and, as has also happened in Venezuela since 1999, to set forth the foundations for the enthroning of an authoritarian regime and an institution demolishing process, in this case done in defraudation to democracy. That is, using relatively free but manipulated elections in order to conduct a process of destruction of democracy itself and of consolidation of an authoritarian government.

III

The defraudation of the Constitution occurred in Venezuela in January 1999 when the then newly elected President, Hugo Chávez Frías, following the experience of Colombia in 1991, convened a referendum without constitutional authorization in order to ask the opinion of the people regarding the installment of a National Constituent Assembly.[2] The referendum took place in April 1999, approving the convening of the Constituent Assembly, which was elected in June 1999, in a process where the principle of popular sovereignty was forced to prevail over the principle of constitutional supremacy.[3]

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1 See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002, pp. 181 ff.

2 See the political discussion regarding the constitution making process proposed in Allan R. Brewer-Carías, *Asamblea Constituyente y ordenamiento constitucional*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 1999, pp.38 ff.

3 See Allan R. Brewer-Carías, "El desequilibrio entre soberanía popular y supremacía constitucional y la salida constituyente en Venezuela en 1999", in *Revista Anuario Iberoamericano de Justicia Constitucional,* Nº 3, 1999, Centro de Estudios Políticos y Constitucionales, Madrid 2000, pp. 31-56. See also Allan R. Brewer-Carías, *Asamblea Constituyente y Ordenamiento Constitucional,* Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 152 ff.

Although with a different phraseology, but with the exact sense and content, in January 2007, the newly elected President of Ecuador, Rafael Correa, also convened a referendum in order to ask the people about the convening and the election of a National Constituent Assembly not established nor regulated in the 1998 Constitution still in force. After three months of bitter political and institutional conflicts, the referendum took place last April 15th, approving the presidential proposal.

In the three cases: the 1991 Colombian one which evolved democratically, the 1999 Venezuelan one which has produced eight subsequent years of endless political conflicts, and the 2007 Ecuadorian one which is in progress, the common trend is that the constitution making process was initiated without any constitutional foundation, but also without any previous *de facto* rupture of the Constitution, being the interpretation of the existing Constitution which allowed the election of the Constituent Assemblies. So in Colombia, Venezuela and Ecuador, no *coup d'Etat* preceded the election of the Constituent Assembly, as was the Latin American tradition.

In the case of Venezuela, as aforementioned, such Constituent Assembly was the one that gave a "constituent" *coup d'Etat* against the then in force 1961 Constitution and against all the existing constituted powers which were elected according to such Constitution. In this case, the existing Constitution and the democratic tools were fraudulently used in order to provoke the violation of the Constitution, to set forth the basis for the progressive undermining of the democratic form of government, and to allow the authoritarian seizure of all the State powers by the new political forces supporting the President, crushing the traditional political parties.

Such purposes, of course, were not previously announced, explained nor proposed to the people when the President of the Republic convened the Constituent Assembly by forcing the provisions of the existing Constitution. The main motives publicly proposed were ones that hardly anybody could possibly challenge and that everybody was willing to support, particularly in situations of political crisis of the State institutions and of the party system: to achieve the process of reform of the State institutions and to improve democracy.

The Venezuelan people in January 1999, like the Ecuadorian people in 2007, needed to know in advance and before the voting and election of the Constituent Assembly what kind of institution was being proposed to conduct the constitution making process.

From the text of the January 2007 Presidential Ecuadorian decree, the Constituent Assembly proposed to be elected was not only one for the drafting "of a new Constitution", but in addition, one with "full powers in order to transform the institutional frame of the State". Nonetheless, according to the by-laws of the Assembly, all those possible decisions could only have effects after the approval of the new Constitution through referendum. Nonetheless, this provision approved in the April 2007 referendum, unless the Constitutional Tribunal clarifies its contents and meaning before the election of the Constituent Assembly next September 2007, could lead, as happened in Venezuela in 1999, to a Constituent Assembly with two different and basic missions: first, to transform the institutional framework of the State; and second, to write a draft of a new Constitution. The first mission could signify a Constituent Assembly with full and unlimited powers to transform the institutional framework of the State during its functioning with the possibility to intervene in all the constituted powers, for example, removing or limiting the government; dissolving the Congress, assuming the legislative function; intervening in the provincial and municipal powers; removing the Justices of the Supreme Court, the Supreme Electoral Tribunal and the Constitutional Tribunal; the General Comptroller of the State, and in general, intervening in the Judiciary and the Public Prosecutors' Office.

That is why, precisely, the main subject on the constitutional discussion that took place in Ecuador during the first month of 2007 referred to the establishment of limits to the "full powers" attributed to the Constituent Assembly in order to assure the respect of the terms of the constituted powers that had just been elected in December 2006. To realize the intensity of the bitter political conflicts derived from this discussion during the first months of 2007, for instance, it is enough only to bear in mind the subsequent institutional decisions that were adopted in only three month, from January to April 2007.[4] Once the Supreme Electoral Council received the Presidential decree in January 16th, according to the Constitution but with the manifest opposition of the President, the Tribunal decided to submit the Decree to the Congress for its approval. The Congress then issued a decision considering urgent the convening of the Assembly, but introducing modifications to the original presidential

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4 See Allan R. Brewer-Carías, "El inicio del proceso constituyente en Ecuador en 2007 y las lecciones de la experiencia venezolana de 1999. Videoconference, University San Francisco de Quito, April 19, 2007. See in www.allanbrewercarias.com (Conferencias)

Decree. The Supreme Electoral Tribunal ignored the Congress' decision, and on March 1st convened the referendum only according to the original Presidential Decree with some modifications proposed by the President himself. The Congress, by a vote of 57 of its members, decided to dismiss the President of the Supreme Electoral Tribunal because he ignored the Congress' decision, and the Congress also decided to challenge the Supreme Electoral Tribunal's decision before the Constitutional Tribunal because they considered it unconstitutional. In response to these actions, the Supreme Electoral Tribunal dismissed the 57 Congressional representatives who adopted such decision because they interfered with a voting process, even though the current Constitution only establishes the possibility for a recall referendum for such purposes. Before the referendum took place on April 15th a few "amparo" actions were filed not only before the Constitutional Tribunal, but also before various lower courts arguing that the representatives were unconstitutionally dismissed. Some of the amparo judges granted constitutional protection to the dismissed representatives, ordering their reincorporation to Congress, a decision that was accepted by the President of the Congress, notwithstanding that the previous week, he had sworn their substitutes. Then, the Supreme Electoral Tribunal decided to dismiss the lower courts judges that had granted the amparo protection, ignoring their judicial adjudication that protected the dismissed representatives, considering them invalid. The President also considered those amparo decisions invalid, even though the Constitutional Tribunal has considered them obligatory as any constitutional judicial decision. Members of the Supreme Electoral Tribunal threatened to dismiss the members of the Constitutional Tribunal because they had admitted to considering some of the amparo actions filed against the convening of the referendum. After the referendum took place on April 15th, the Constitutional Tribunal after reviewing one of the lower courts' amparo decisions ruled granting constitutional protection to fifty of the dismissed representatives to Congress, ordering their reincorporation. The Congress, this time integrated by a new and different majority because of the substitutes already srorn in, on April 23rd decided to considered exhausted the term of the Magistrates of the Constitutional Tribunal from January 2007 which has given rise to endless discussions regarding the validity of all the Constitutional decisions adopted by the Tribunal since January 2007.

Thus, as can be deduced from this intense three months institutional quarrel, the constitutional discussion regarding the powers of the Constituent Assembly is far from ended, and on the contrary, if before the election of the Assembly next September 2007 the matter is not resolved, the bitter political

conflict that has occurred after the installment of the Assembly could be aggravated due to the natural tendency of such bodies to assume global powers.

IV

In general terms, this was precisely what happened in Venezuela in 1999 through the convening and the election of the Constituent Assembly which resulted in the sanctioning of the 1999 Constitution.

It was not the first Constituent Assembly convened in Venezuelan constitutional history,[5] but in contrast with all the other historical Constituent Assemblies, the 1999 one, as was the 1991 Colombian Constituent process and now the 2007 Ecuadorian one, had the peculiarity of not being the result of a factual rupture of the constitutional order because of a revolution, a war or a *coup d'État*, but was the result of a process developed under a democratic rule although in the middle of the most severe political crisis of the functioning of the democratic system.[6]

As mentioned, what characterized such process in Venezuela was that the *coup d'État* was given by the same Constituent Assembly after being elected in July 1999, which brushed aside the then in force 1961 Constitution whose interpretation had served to allow its birth.

This Venezuelan process is important to highlight not only because it marks a new trend to constitution making processes in Latin America done in defraudation of the Constitution, but because of the lessons that can be learned from it in order to avoid its repetition, or if repeated, to be conscience of their meaning; in particular, those implying the fraudulent use of the Constitution and of the democratic elective tools for the establishment of a system founded in the violation of the former and in the demolition of the latter. All of which

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5 See the text of all the previous Venezuelan Constitutions (1811-1961) in Allan R. Brewer-Carías, *Las Constituciones de Venezuela*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 1997. Regarding the constitutional history behind those texts, see this author's "Estudio Preliminar" in the same book, pp. 11-256.

6 See Allan R. Brewer-Carías, *La crisis de las instituciones: responsables y salidas*, Cátedra Pío Tamayo, Centro de Estudios de Historia Actual (mimeo) Facultad de Economía y Ciencias Sociales, Universidad Central de Venezuela, Caracas 1985; also published in *Revista del Centro de Estudios Superiores de las Fuerzas Armadas de Cooperación*, N° 11, Caracas 1985, pp. 57-83; and in *Revista de la Facultad de Ciencias Jurídicas y Políticas*, N° 64, Universidad Central de Venezuela, Caracas 1985, pp. 129-155. Also see Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales,* Vol I (*Evolución histórica del Estado)*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, San Cristóbal-Caracas, 1996, pp. 523-541.

has exploited the peoples' legitimate hopes and expectations for the need of a political recomposition of the State as a consequence of the decline of the party system.

In the middle of the terminal crisis of the Venezuelan political centralized democratic multiparty system that had been functioning since 1958, its necessary recomposition in order to assure its governance imposed the need to search for new political instruments to assure democratic conciliation between the political forces by means of political pacts or consensus among all the political actors and factions of society, for which purpose the convening of a Constituent Assembly could be justified and needed.[7] Accordingly, in the decree convening a Constituent Assembly issued by President Chávez on February 1999, the question submitted to popular vote referred to the election of a Constituent Assembly "with the purpose to transform the State and to create a new juridical order allowing the effective functioning of a social and participative democracy". Such was the formal *raison d'étre* of the 1999 Venezuelan Constituent process, a purpose that was difficult for anybody to contradict.

But what the country expected at that moment was a constitution making process based on political conciliation for which the participation of all the sectors of society needed to be assured. Nonetheless, this was not achieved, and those were not the intentions of the convening actors. What in fact resulted, due to the aggressive anti-party and anti-representative democracy presidential campaign and to the lack of effective popular participation, was the accentuation of the differences among the political sectors and the reinforcement of the fractioning of the country. So, far from being a mechanism for dialogue and peace consolidation, the constitution making process served to aggravate the existing political crisis.

V

Nowadays, eight years after the 1999 constitution making process, in spite of the political verbalism and the exuberant spending of an immense fiscal in-

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7 See Allan R. Brewer-Carías, "Reflexiones sobre la crisis del sistema político, sus salidas democráticas y la convocatoria a una Constituyente», in *Los Candidatos Presidenciales ante la Academia*. Ciclo de Exposiciones 10-18 Agosto 1998, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 1998, pp. 9-66; also published in *Ciencias de Gobierno Nº 4*, Julio-Diciembre 1998, Gobernación del Estado Zulia, Instituto Zuliano de Estudios Políticos Económicos y Sociales (IZEPES), Maracaibo, Edo. Zulia, 1998, pp. 49-88; and in Allan R. Brewer-Carías, *Asamblea Constituyente y ordenamiento constitucional*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 1999, pp.13-77.

come of a rich State in a poor country, the result has been that no effective reform of the State has been achieved in order to improve the social and participatory democracy, the process resulting in the configuration of a centralized and concentrated authoritarian regime covered with a democratic-elective veil in which the destruction of the direct representative democracy has been almost completed through centralized populist programs and institutions pretending to be participatory.

In this sense, it is possible to consider that from the democratic point of view, the 1999 Constitution making process was a failure, and if it is true that the country has experienced important political changes, what they have provoked is the accentuation of the crisis of the democratic system through the concentration of all power in the President's hands and through the centralization of all the former territorial and local governments which have limited representation. This process has, of course, caused great changes in the political actors of the country due to the seizure of all political power by new groups that have crushed the traditional parties and has accentuated the differences among Venezuelans in a context of extreme political polarization, making conciliation even more difficult.[8]

But from the authoritarian and antidemocratic point of view, the 1999 Constitution making process conversely can be considered a success, because it allowed the complete take over of all political power by only one faction or person and party which has been used to crush all the others, opening wounds and social and political rivalries which for decades were unknown in the country, and reinforcing social and political conflicts.

The 1999 crisis of the democratic and representative party system, in fact, imposed upon the Venezuelan leadership to seek for its transformation, but not for its destruction and demolition. What was needed for the democratic system was its improvement in order to give way to a more participative democracy which, of course, can only take place at local government levels with autonomy. Such was the main objective the people wanted to achieve through the constitution making process in 1999, drafting the effective decentralization of the Federal State, and transforming the Centralized Federation the country has had for decades into a decentralized democracy for participation.

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[8] See Allan R. Brewer-Carías, "El proceso constituyente y la fallida reforma del Estado en Venezuela" in *Estrategias y propuestas para la reforma del Estado,* Universidad Nacional Autónoma de México, México 2001, pp. 25-48; also published in Allan R. Brewer-Carías, *Reflexiones sobre el constitucionalismo en América,* Editorial Jurídica Venezolana, Caracas 2001, pp. 243-253.

In the modern world, consolidated democracies have always been the result and at the same time the cause of political decentralization, that is, decentralization has been a consequence of the democratization process and at the same time, it is has been a condition for democracy's survival and improvement. Thus, decentralization is the political instrument designed to articulate all the intermediate political powers within the territory, allowing the accomplishment of government actions close to the regions, communities and the people. That is why decentralized autocracies have never existed, being the decentralization a matter of democracies.

The convening of a Constituent Assembly in Venezuela in 1999, after more that 40 years of democratic regime, was supposed to have had that purpose of accentuating the democratic principle through the decentralization of power, but not to destroy it, as has currently been happening with the transformation of the Federal form of government into a simple constitutional label stamped over a completely centralized State ruled by one person who at the same time, is the Head of the State, the Head of the Executive, the Head of the military, the Head of the ruling single socialist party, and now is pretending to be called "the Leader".

Another aspect that needed the most important reforms in Venezuela referred to the equilibrium, or checks and balances, between the branches of government. This was another objective that everybody sought to achieve thought the constitution making process of 1999, particularly regarding the system of government, that is, the relations between the executive and legislative power. Paradoxically, the crisis of the democratic governance in the nineties was not due to the excess of presidentialism, but to the excess of party parliamentarism, particularly due to the tight political control the parties exercised over the Congress. In particular, for instance, regarding the classical problem of the exclusively partisan nomination and appointment of the non elected high public officials of State, like the Justices of the Supreme Court, the head of the General Comptroller Office, the Public Prosecutors Office, the Peoples Defendant Office and the Supreme Electoral Council, nasty criticisms were made due to the excessive partisan character of such appointments which were always made without any possibility of civil society organizations' participation. The need for reform in such matters were directed to assure more balance between the independent powers and more effective checks among them, limiting their partisan's conformation. But none of these reforms have

been applied because of the absolute concentration of State powers that has developed during the past seven years.

VI

The mechanism adopted in order to achieve all these reforms in Venezuela in 1999 was the convening of a Constituent Assembly which as mentioned, at the time had great support as an instrument for the introduction of reforms to reframe democracy and to allow the effective participation in the political process of all sectors, many of which were excluded from the democratic practice due to the monopoly that the traditional political parties exercised over political representation and participation.

Notwithstanding all its benefits, the proposal was not supported by the traditional political parties which ignored and rejected it. Their ignorance about the magnitude of the political crisis was pathetic, so the convening of the Constituent Assembly turned out to be the only and exclusive political project of Chávez, initially as presidential candidate, and later, once elected President in December 1998, in the beginning of his term.

But the election of the Constituent Assembly in 1999 faced the already mentioned basic constitutional obstacle derived from the fact that such institution was not established in the text of the in force 1961 Constitution as a system for constitutional review which only provided for two systems for such revision, the amendment process for partial reforms and the general reform of the Constitution. In this regard, as mentioned, the constitutional situations in Colombia in 1991 and now in Ecuador in 2007 were very similar.

That is why, after the December 1998 presidential election, the political discussion ceased to be about the need for the convening of a Constituent Assembly and turned to be about the way to do it, and particularly, about if it were necessary or not to previously amend or reform the Constitution in order to create the institution and establish its regime before its election. The discussion, or course, refers to the already mentioned dilemma that always exists in moments of political crisis and constitutional revision between constitutional supremacy and popular sovereignty and about the weight that one or the other principle must have in modern constitutional States.

But since the matter of constitutional reform is more political than legal, before the Supreme Court could issue any ruling as was requested by civil society organizations, the elected President publicly announced his intention, as his first act of government to be issued on his inauguration day (February 2,

1999), to decree the convening of the Constituent Assembly based only in the provision of the 1961 Constitution which referred to the principle of popular sovereignty, giving prevalence to that principle over constitutional supremacy.

For such purpose, the previous week (January 19th 1999) the Supreme Court, after having been the target of direct and open political pressure from the elected President, unfortunately ruled in a very ambiguous way without resolving the main question of the need for a previous reform of the Constitution before the Assembly could be convened. On this matter, the Court, in its decision, just referred in theoretical ways to the traditional constitutional doctrine on the constituent power, including quotations from the 1789 writings of the Abate Siéyes; quotations that were subsequently used by those defending the argument of the possibility of convening a Constituent Assembly even if it is not established in the Constitution.[9]

The result of this ambiguous ruling was precisely the issuing of the presidential decree convening the consultative referendum proposing not only a question referred to the election of a Constituent Assembly, but also allowing popular authorization for the President to define its composition, duration, mission and limits. The President pretended to convene a "blind" referendum on a Constituent Assembly without previously defining its composition, the number of representatives to be elected, the electoral system to be applied, and its mission, duration and limits without submitting those aspects to the popular vote.

The Presidential decree, of course, was challenged multiple times before the Supreme Court on the grounds of being unconstitutional[10] and after a few

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[9] See comments on the decisions in Allan R. Brewer-Carías, "La configuración judicial del proceso constituyente o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción"*, in Revista de Derecho Público,* No. 77-80, Editorial Jurídica Venezolana, Caracas 1999, pp. 453-514.; Allan R. Brewer-Carías, *Asamblea Constituyente y Ordenamiento Constitucional,* Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 152-228; .Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002, pp. 65 ff.; Lolymar Hernández Camargo, *La Teoría del Poder Constituyente. Un caso de estudio: el proceso constituyente venezolano de 1999,* Universidad Católica del Táchira, San Cristóbal 2000, pp. 53 ff.; Claudia Nikken, *La Cour Suprême de Justice et la Constitution vénézuélienne du 23 Janvier 1961,* Thèse Docteur de l'Université Panthéon Assas, (Paris II), Paris 2001, pp. 366 ff.

[10] See the text of the challenging action this author brought before the Supreme Court in Allan R. Brewer-Carías, *Asamblea Constituyente y Ordenación Constitucional*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 255-321. Regarding the other challenging actions brought before the Supreme Court, see Carlos M. Escarrá Malavé, *Proceso Político y Consti-*

rulings, one issued on March 18th 1999, imposed the National Electoral Council to submit to the popular vote not only the question about the convening of the Assembly, but also the complete text of its bylaws that the President was forced to produce.[11] This was the path followed in January 2007 in Ecuador by President Correa, without a doubt, learning from the Venezuelan experience. Nonetheless, like in Ecuador, even with this judicial correction, the content of the bylaws of the Constituent Assembly were unilaterally imposed by the President in his convening of the consultative referendum, not being the result of any kind of agreement or negotiation between the various interested political sectors.

The Venezuelan Supreme Court, regarding the by-laws of the Constituent Assembly, in another decision of April 13, 1999 expressly ruled that the Assembly, to be elected within the framework of the judicial interpretation of the 1961 Constitution, could not have "original constituent powers" as was proposed by the President, expressly ordering the National Electoral Council to eliminate from the by-laws to be submitted to the April 25th referendum those pretended full and unlimited powers.[12]

The consultative referendum took place on April 25th 1999, approving the convening of a Constituent Assembly, which gave way for the election on July 1999 of the 141 members of the Assembly. All but four of these members resulted to be followers that were proposed by the President himself which

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tuyente, Caracas 1999, Exhibit 4. See Allan R. Brewer-Carías, "Comentarios sobre la inconstitucional de la convocatoria a Referéndum sobre una Asamblea Nacional Constituyente, efectuada por el Consejo Nacional Electoral en febrero de 1999" in *Revista Política y Gobierno,* Vol. 1, Nº 1, enero-junio 1999, Fundación de Estudios de Derecho Administrativo, Caracas 1999, pp. 29-92.

11 See the text of the March 18, 1999, March 23, 1999, April 13, 1999, June 3, 1999, June 17, 1999, and July 21,1999, Supreme Court decisions in *Revista de Derecho Público*, No 77-80, Editorial Jurídica Venezolana, Caracas 1999, pp. 73-110.; and in Allan R. Brewer-Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente,* Editorial Jurídica Venezolana, Caracas 1999, pp. 169-198 and 223-251. See comments in Allan R. Brewer-Carías, "Comentarios sobre la inconstitucional convocatoria a referendo sobre una Asamblea Nacional Constituyente efectuada por el Consejo Nacional Electoral en febrero de 1999", *Revista Política y Gobierno,* Vol. I, Nº 1, Fundación de Estudios de Derecho Administrativo, Caracas, Enero-Junio 1999, pp. 29-92; and in Allan R. Brewer-carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico 2002, pp. 160 ff

12 In particular, see the Supreme Court decisions of April 13, 1999, June 17, 1999 and July 21,1999, in *Revista de Derecho Público*, No 77-80, Editorial Jurídica Venezolana, Caracas 1999, pp. 85 ff.; and in Allan R. Brewer-Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente,* Editorial Jurídica Venezolana, Caracas 1999, pp. 169-198, 223-251.

caused the Assembly to lack any sense of pluralistic character. The constitution making process was, on the contrary, conducted with a total exclusion of the traditional political parties of the country, the Assembly being oriented and conducted personally by the President himself through his followers.

An Assembly conformed in such way, of course was not a valid instrument for dialogue, political conciliation, negotiation and consensus, on the contrary, it was the exclusive political tool used by the group supporting the President to impose their own ideas upon the rest of society and the political spectrum with total exclusion of other groups and of any political participation. It was the main political tool used by the newly elected officials to complete the seizure of all political power and to control all the branches of government, even eliminating the political parties from the scene.

VII

One thing was initially clear, the 1999 Venezuelan Constituent Assembly was not elected in order to govern the country or to substitute all the elected branches of government; it had neither "full powers" or "original constituent powers", as was expressly decided by the Supreme Court when ruling on the challenged bylaws proposed for the Assembly's election. In principle it had the particular mission of drafting a new Constitution and was due to function in parallel with the constituted branches of government that were elected in December 1998, particularly, the National Congress, the States' Legislatures and Governors and the Municipal Councils and Mayors.

Nonetheless, in its first installment session, through the vote of the overwhelming majority of its members and without any constitutional support, the Assembly proclaimed itself as having "original constituent power", and in particular, the powers to "limit or to decide to cease the activities of the authorities conforming the branches of government", setting forth in its internal bylaws that "all the State entities are subordinated to the National Constituent Assembly and are obliged to execute and to provide for the execution of the public acts issued by the Assembly".[13]

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[13] See in *Gaceta Constituyente (Diario de Debates), Agosto-Septiembre 1999,* Session of August 3d, 1999, Nº 1, p. 4. See the author's dissenting vote in *Gaceta Constituyente (Diario de Debates), Agosto-Septiembre 1999*, Session August 7th, 1999, Nº 4, pp. 6-13; and in Allan R. Brewer-Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)* Vol. I *(8 agosto-8 septiembre 1999)*, Fundación de Derecho Público, Caracas 1999, pp. 15-39.

In this way, by proclaiming itself as a super State power, the Assembly set forth the provisions in order to give a *coup d'État* by usurping and intervening in all the branches of government in violation of the 1961 Constitution, provoking the rupture of the constitutional order. Accordingly, during its first month of its functioning (August - September 1999), the Assembly intervened in all the constitute branches of government that had been elected a few months earlier by declaring their reorganization,[14] in particular, intervening in the Judiciary and creating a "Judicial Emergency Commission" (still acting) which substituted the existing Judiciary Council harming the autonomy and independence of the courts;[15] ruling on the functioning of the Legislative Power by abolishing both the Senate and the Chamber of representatives and dismissing the elected senators and representatives, as well as the State Legislative Assemblies representatives.[16] The Assembly also intervened in the local government autonomous entities (Municipalities) and suspended the local elections that were scheduled for that same year, 1999.[17]

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[14] Decree of August 12, 1999. See the text in *Gaceta Constituyente (Diario de Debates), Agosto-Septiembre de 1999,* Session August 12, Nº 8, pp. 2-4, and in *Gaceta Oficial* Nº 36.764 de 13-08-99. See this author's dissenting vote in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea nacional Constituyente),* Vol. I *(8 agosto-8 septiembre 1999)*, Fundación de Derecho Público, Caracas 1999, pp. 43-56.

[15] Decree of August 19, 1999. See the text in *Gaceta Constituyente (Diario de Debates), Agosto-Septiembre de 1999,* Session de August 18, 1999, Nº 10, pp. 17 a 22, and in *Gaceta Oficial* Nº 36.782 de 08-September-1999. See this author's dissenting vote in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente),* Vol. I *(8 agosto-8 septiembre 1999)*, Fundación de Derecho Público, Caracas 1999, p. 57-73. See the comments in Allan R. Brewer-Carías, *Golpe de Estado y Proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002, pp. 184 ff.; and in Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004" in *XXX Jornadas J.M Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174.

[16] Decree of August 28, 1999. See the text in *Gaceta Constituyente (Diario de Debates), Agosto-Septiembre 1999,* Session of August 25, 1999, Nº 13. See this author's dissenting vote in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea nacional Constituyente),* Vol. I *(8 agosto-8 septiembre 1999)*, Fundación de Derecho Público, Caracas 1999, pp. 75-113.

[17] Decree of August 26,1999. See the text in *Gaceta Constituyente (Diario de Debates), Agosto-Septiembre 1999,* Session of August 26, 1999, Nº 14, pp. 7-8, 11, 13 and 14; and in *Gaceta Oficial* Nº 36.776 de 31-08-99. See the author's dissenting vote in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea nacional Constituyente),* Vol. I *(8 agosto-8 septiembre 1999)*, Fundación de Derecho Público, Caracas 1999, pp. 115-122.

No doubt, that first period of the Constituent Assembly's functioning was a time of confrontation and political conflict among the branches of government and the various political factions of the country since the Assembly was in no way a means for dialogue and peace consolidation nor an instrument to avoid conflict. On the contrary, the Assembly was the elected instrument for confrontation, for conflict and for crushing all opposition or dissidence, allowing a new political faction to seize control of all powers, conducted by the direct instructions of the President of the Republic.

VIII

Once all the branches of government were intervened in violation to the 1961 in force Constitution, the second period of the functioning of the Assembly (September - October 1999) was devoted to the drafting of the Constitution, for which purpose the Assembly did not dispose of any integral draft to be followed in the discussions which could allow public and popular participation. On the contrary, the Assembly, in its second month of functioning began to draft the new Constitution in a collective way, abandoning the orthodox way characterized by the previous drafting of a constitutional project generally by a plural Constitutional Commission in order for its subsequent discussion.

The model adopted was, of course, the less adequate, consisting of the appointment within the Assembly of twenty Commissions for the drafting, in an isolated way, of twenty different chapters of the Constitution. To such purpose the Assembly only devoted one month in which only scattered requests for advice from other institutions were made. No open participation by interest groups in each Commission was possible. By the end of September 1999, the twenty Commissions submitted to a Constitutional Commission, also appointed within the Assembly, the drafts of the twenty chapters of a Constitution they had prepared, comprising of more that 800 articles. The Constitutional Commission had the task of integrating such number of provisions into a reasonable text that could serve as a draft Constitution which the Commission accomplished in a very brief term of two weeks, preventing any possible public discussions and any possible popular participation.

The result was that in October 1999 the Constitutional Commission handed over to the Assembly a very deficient draft of 350 constitutional articles, conforming a conglomerate or catalogue of wishes, petitions, grievances

and good intentions, without any substantive consideration to the basic aspects of the organization of the State.[18]

The haste imposed by the government in order to have the new Constitution sanctioned as soon as possible forced the Assembly to discuss and approve those 350 articles of the Constitution in only 22 days of discussions which were held between October and November 1999: 19 plenary sessions devoted to the first discussion, and only 3 sessions to the second discussion.[19]

Within this short period of time subjected to an irrational and hastily pressure imposed by the President of the Republic, no political participation or public debate on the basic constitutional issues was possible, so popular participation was reduced to watching television broadcasts of the sessions of the Assembly. The basic principles of the Constitution, such as the presidential system of government, the separation of powers, the decentralization process, federalism, local government or the military status, or the basic principles of the political system such as democracy, representation, participation, rule of law, human rights or the economic system, were not a matter of public discussion nor of any debate in the Assembly. In addition, no public educational program was designed in order to allow the incorporation of civil society groups or non governmental organizations to the debate with exception made to the indigenous peoples who were directly represented in the Assembly.

Those who controlled the work of the Assembly were conscious that participation requires time and instead chose the fast track without participatory procedure. The result was that political participation eventually was reduced just to voting, first, in the consultative referendum on the convening of the Constituent Assembly in which only a turnout of 37% of the registered voters occurred; second, in July 1999, in the election of the members of the Assembly, which had only a turnout of 46% of the registered voters; and third, in December 1999, in the approval referendum of the new Constitution, with only a turnout of 44% of the registered voters.

IX

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[18] This author was also member of the Constitutional Commission. See the difficulties of its participation in the drafting process in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente),* Vol. II (9 Septiembre-17 Octubre), Fundación de Derecho Público, Caracas 1999, pp. 255-286.

[19] See the text of all of this author's 127 dissenting or negative votes in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente),* Vol. III (18 Octubre-30 Noviembre), Fundación de Derecho Público, Caracas 1999, pp. 107-308.

The 1999 Constitution, in any event and from the democratic point of view, did not result to be the promised document according to the question submitted to the people in the April 25th consultative referendum seeking to assure the transformation of the State and the democratic system; in the sense that it did not conform to the new vision that was needed to consolidate the democratic principles and to achieve the political reorganization of the country substituting the centralized party and State system for a decentralized one.[20]

On the contrary, the result was the consolidation in the Constitution of an authoritarian system of centralized government based in the State intervention in the economy, helped by the disposal of the uncontrolled public oil income, with a reinforced presidentialism that has concentrated and controlled all State powers with a sharp anti-party tendency and a military power framework never before incorporated in the Constitution, nowadays fueled by a single party system which is being embodied within the State.

It has been within this constitutional framework that during the past eight years an authoritarian government has been consolidated in Venezuela with a President that after eight years in office is currently proposing (since January 2007) new constitutional reforms in order to assure his indefinite reelection, to

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[20] See this author's critical comments regarding the new Constitution expressed immediately after its approval, in his papers on "Reflexiones Críticas y Visión General de la Constitución de 1999", Inaugural Lecture on the *Curso de Actualización en Derecho Constitucional*, Aula Magna de la Universidad Católica Andrés Bello, Caracas, February 2, 2000; on "*La Constitución de 1999 y la reforma política, Colegio de Abogados del Distrito Federal*, Caracas, February 9, 2000; on "The constitutional reform in Venezuela and the 1999 Constitution", Seminar on *Challenges to Fragile Democracies in the Americas: Legitimacy and accountability*, organized by the Faculty of Law, University of Texas, Austin, February 25, 2000; on "Reflexiones Críticas sobre la Constitución de 1999", *Seminario Internacional: El Constitucionalismo Latinoamericano del Siglo XXI en el marco del LXXXIII Aniversario de la Promulgación de la Constitución Política de los Estados Unidos Mexicanos*, Cámara de Diputados e Instituto de Investigaciones Jurídicas UNAM, México, January 31, 2000; on "*La nueva Constitución de Venezuela del 2000"*, Centro Internationale per lo Studio del Diritto Comparato, Facoltà di Giurisprudenza, Facoltà de Scienze Politiche, Universita'degli Studi di Urbino, Urbino, Italia, March 3, 2000; and on "Apreciación General sobre la Constitución de 1999", *Ciclo de Conferencias sobre la Constitución de 1999, Academia de Ciencias Políticas y Sociales*, Caracas, May 11, 2000. The text of these papers were published in Diego Valadés, Miguel Carbonell (Coordinadores), *Constitucionalismo Iberoamericano del Siglo XXI*, Cámara de Diputados. LVII Legislatura, Universidad Nacional Autónoma de México, México 2000, pp. 171-193; in *Revista de Derecho Público*, Nº 81, Editorial Jurídica Venezolana, Caracas, enero-marzo 2000, pp. 7-21; in *Revista Facultad de Derecho*, *Derechos y Valores*, Volumen III Nº 5, Universidad Militar Nueva Granada, Santafé de Bogotá, D.C., Colombia, Julio 2000, pp. 9-26; and in *La Constitución de 1999*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 2000, pp. 63-88.

erase the federation and to definitively collect all the debris of the demolished democratic institutions.

All these trends found their origin in the 1999 constitution making process, which far from being a mean for political conciliation of the country, accentuated the fundamental differences within social classes, multiplied and increased the political fractionation of the country, and provoked the extreme polarization which now exists. That process also served as the main instrument in order to assure that one and only one political group supporting the President could seize all powers of the State and take absolute control of all the institutions; all fueled by the extraordinary increase of public funds to be disposed without control. That is, the 1999 constitution making process, far from being an instrument for conciliation and inclusion, has been the instrument for exclusion of the political parties and all of those dissenting the President's will and for the establishment of an hegemonic control of power.

X

But the assault, seizure and take over of all power by the political group that controlled the Constituent Assembly did not finish with the drafting of the Constitution, on the contrary it continued after its approval in the December 15th referendum. This time the coup d'État given by the Constituent Assembly in open violation of the new Constitution, imposed new "constitutional" provisions never approved of by the people which allowed the complete seizure of all the branches of government and the final assault of power.

For such purpose, on December 22, 1999, one week after the popular approval of the Constitution, in parallel to the provisions of the Constitution and not submitted to popular approval, the Assembly adopted a "Decree for a Transitory Regime", through which, as expected, only the President of the Republic was ratified in his office and conversely, all the other elected and non elected high officials of the State were definitively dismissed.[21]

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[21] See the Decree of December 22, 1999, on the "Transitory Constitutional Regime", in *Gaceta Oficial* N° 36.859 of December 29, 1999. See the comments regarding this decree in Allan R. Brewer-Carías, *Golpe de Estado y Proceso Constituyente en Venezuela*, Universidad Nacional Autónoma de México, México, pp. 354 ff.; and in *La Constitución de 1999. Derecho Constitucional Venezolano*, Editorial Jurídica Venezolana, Vol II, Caracas 2004.

To fill the institutional gap and vacuum deliberately created by the same Constituent Assembly without popular approval, the Assembly directly and without fulfilling the new conditions established in the provisions of the new Constitution, appointed the members of the Supreme Tribunal and of the National Electoral Council, the Public Prosecutor, the Comptroller General and the Peoples' Defendant. In addition, also without any constitutional support, the Assembly created and appointed the members of a National Legislative Commission to act as a non elected Legislative body in substitution of the dismissed Congress until the election of the new National Assembly. The Constituent Assembly, in addition, without any constitutional authorization, directly assumed legislative functions and sanctioned some statutes, among them, the Electoral Law.

All these unconstitutional decisions, of course and unfortunately, were covered up and endorsed by the Supreme Tribunal of Justice whose members were precisely appointed by the same Assembly with the basic task of giving judicial support to the unconstitutional transitory regime in judicial proceedings where the Tribunal acted as judge in its own cause. Consequently, the new Tribunal appointed by the Assembly recognized the supposedly "original character" of the Constituent Assembly with "supra constitutional" power, justifying all the transitory political decisions adopted which have subsisted to the present, justifying and covering up the unconstitutional and endless intervention of the Judiciary.[22]

XI

The result of this 1999 Venezuelan constitution making process which was made fraudulently to the Constitution, in spite of the political changes that have taken place in Venezuela, has been the complete takeover of all levels of power and branches of government by the supporters of President Hugo Chávez, imposing on the Venezuelan people a centralized form of government and a political project whose meaning can easily be understood by decoding the sense of the newly favorite presidential phrase of "motherland, socialism or death" recurrently pronounced since taking the oath in his second presiden-

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[22] See for instance the January 26, 2000, decision No. 4 (*Caso Eduardo García*), and the March 28, 2000, Decision No 180 (*case: Allan R. Brewer-Carías and others*) in *Revista de Derecho Público*, No 81, Editorial Jurídica Venezolana, Caracas 2000, pp 93 ff. and 86 ff. See the comments in Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México, 2002, pp. 354 ff.

tial term in January 2007, for which nobody has voted nor approved, and now even imposed as a duty for the military to express in any salute.[23]

The 1961 Constitution was fraudulently used in order to provoke the 1999 constitution making process by means of the election of a Constituent Assembly not established in the Constitution, which after being democratically elected, staged a *coup d'État*. Since 2000, based on the authoritarian Constitution that resulted, it is now representative democracy's turn to be used, also fraudulently, in order to demolish democracy itself. That is, from the defraudation of the Constitution, Venezuela went to the defraudation of democracy. During the constitution making process of 1999, using the judicial interpretation of the Constitution, the result was its violation (Constitutional fraud); and in the same way, the regime that began with said fraud in 1999, during the succeeding years up to the present, has used representative democracy to eliminate it progressively, and supposedly substitute it for a "participative democracy" of the Popular Power; which only by name is participative and democratic (democratic fraud).

In this way, the democratic rule of law, due to this fraud committed against the popular will by means of the use of electoral mechanisms, has been and is being progressively substituted by a "State of the Popular Power", which pretends to establish the "democratic system" in a supposedly direct relation between a leader and the people, basically through popular mobilization, populism and the organization of "Communal Councils of the Popular Power". Its members are non elected and directly appointed by open Citizens Assemblies, which are, of course, controlled by the governmental single party, maintaining the populist system that has been developed based on the uncontrolled disposal of oil wealth.[24]

The main trend of such system is that all the power is concentrated in the Head of State, who in the near future may become "President of the Popular

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[23] See what was expressed by Albeto Muller Rojas, Military Presidetntial Chief of Staff, in *El Universal*, Caracas May 11, 2007; and by Hugo Chávez Frías, *El Nacional*, Caracas April 13, 2007, Políica p. 4.

[24] See Allan R. Brewer-Carías, "El autoritarismo en Venezuela construido en fraude a la Constitución (De cómo en un país democrático se ha utilizado el sistema eleccionario para eliminar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia")", Ponencia para para las VIII Jornadas de Derecho Constitucional y Administrativo y el VI Foro Iberoamericano de Derecho Administrativo, Universidad Externado de Colombia, Bogotá, 25-27 de julio de 2007. See in www.allanbrewercarias.com (Conferencias)

Power", being neither democratic, nor representative or participative, and on the contrary, being severely controlled and directed through the governing socialist single party.

All these proposals and reforms announced since January 2007 tend to consolidate what the Vice President of the Republic called the "the dictatorship of democracy"[25]. Nonetheless, in democracy no dictatorship is acceptable nor possible, not even an alleged "dictatorship of democracy", which in a different context and time is similar to the never accepted and failed "dictatorship of the proletariat" which emerged from the Russian revolution in 1918, based on the Soviets of soldiers, workers and peasants.

Unfortunately, and astonishingly out of date with a ninety year delay, something similar is currently being proposed and constituted in Venezuela, but with the creation of the aforementioned Communal Councils dependant on the President of the Republic in order to channel the Popular Power, with the supposed participation of the organized people, to install the "dictatorship of democracy".

History has shown that these supposed popular dictatorships have always been fraudulent instruments used by circumstantial leaders to gain control of power, and in the name of the popular power, to demolish every trace of democracy and to impose by force a socialist regime to a country without the people voting for it.

This prove that in some countries, nothing has been learned from what the recently deceased first ever elected President of the Russian Federation, Boris Yelstin, said in 1998, on the occasion of the burial of the remains of the Romanov family, expressing what can be considered as one of the most bitter lessons of human history when putting an end to the time of what was believed to be the most definite Revolution of all known to modern history; simply, he said that: "The attempts to change life by means of violence are doomed to fail"[26].

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25 Jorge Rodríguez, Vice-President of the Republic, in January 2007, expressed: "Of course we want to install a dictatorship, the **dictatorship of the true democracy** and the democracy is the dictatorship of everyone, you and us together, building a different country. Of course we want this **dictarorship of democracy** to be installed forever", in *El Nacional*, Caracas 02-01-2007, pg. A-2.

26 See in *The Daily Telegraph*, London, 08-08-98, p. 1.

But even without taking into account this lesson, what is true is that any dictatorship, whatever its origin and kind, being inevitably the result of the exercise of violence, physical or institutional, sooner or later is condemned to fail and collapse.

XII

But going back to the constitution making processes, all the experiences developed in Modern constitutionalism of durable democratic Constitutions when being the outcome of conflicts show that they have always been the product of a constitution making process characterized by political agreements and consensus among conflicting parties with extended public participation and consultation. On the contrary, when being the result of the imposition to the country by a political leader, a faction or a dominant party, of their own particular conception of the State and of society, without any inclusive dialogue or political participation, eventually they implode with the system imposed.

When being the result of an agreement and consensus, precisely of a constitution making process in which parties effectively talk to each other and where peace is the key opening all doors to all, constitutions can be, on the one hand, at the eve of a war, the final product of a political pact of different forces, parties or faction of a society that are in conflict, in order to avoid a civil war; or on the other hand, at the end of a war, the result of some kind of political armistice achieved by the conflicting parties once a civil war has exploded. In both cases, the Constitutions are the result of a conflict, and as political pacts, they tend to create the conditions for stability and stable democratic government.

But Constitutions are also often the result of an imposition made by one political force of society upon the others, for instance by means of a revolution, in the sense that they also are the result of a conflict but not the result of the agreement of the political forces in conflict, but in a deeply divided society, the expression of the sole will of one predominant faction of society that imposes itself upon the others. In these cases, eventually, in the post conflict transition no stability can be achieved, and of course, stability can never be identified with the silence of the graves.

The fact is that the impositions by force to a country of a specific political system of government, of a specific economic or social system, of a territorial artificial organization or of the predominance of an ethnic group or religion

over the others, has never attained long life. Eventually, the State and political institutions resulting from violence, in one way or the other always finish by being demolished or imploding. In other words, in any constitution making processes, any attempt to impose to a society, through violence - including institutional violence - a political system of government, a territorial division or a territorial integration of the State, a religion or an ethnic prevalence, even enshrining them in a Constitution, sooner or later are condemned to failure.