AUTHORITARISM IN VENEZUELA BUILT ON CONSTITUTIONAL FRAUD.

(About how, in a democratic country, the elective system has been used to eliminate democracy and to establish the authoritarian regime of an alleged "dictatorship of democracy")*

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I. THE ESTABLISHMENT OF THE AUTHORITARIAN PROCESS: THE CONSTITUENT ASSEMBLY OF 1999 AND THE CONSTITUTIONAL FRAUD

The installment of the authoritarian and antidemocratic regime currently existing in Venezuela (2007) and which has taken over all public and private institutions in the country in order to establish a socialist -or of Popular Power- regime, has not been the result of a sudden military *Coup d'état*, but of a systematic process of destruction of democracy fraudulently using democratic instruments; at the same time, this process had its beginnings, in a Constitutional fraud

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* See on this issue, all prior reflections we have made on the study, "*Los problemas de la gobernabilidad democrática en Venezuela: el autoritarismo constitucional y la concentración y centralización del poder*", published in the book coordinated by Diego Valades, *Gobernabilidad y constitucionalismo en America Latina*, Universidad Nacional Autónoma de México, Mexico 2005, pgs. 73-96; and in the report about "*El Estado democrático de derecho y los nuevos autoritarismos constitucionales en América Latina: el caso de Venezuela*", sent to the *IX Congresso Ibero-Americano de Direito Constitucional e VII Simposio Nacional de Direito Constitucional*, Associação Brasileira dos Constitucionalistas Demócratas, Seção Brasileira do Instituto Ibero-Americano de Direito Constitucional, Academia Brasileira de Direito Constitucional, November 11-15, 2006, Curitiba, Parana, Brasil.

committed in 1999, precisely by institutions that had also been elected democratically.

To that effect, in February 1999, Hugo Chavez, who, in December 1998, had been elected President of the Republic, during the most severe political crisis of the country during the second half of the 20th Century[1] and, particularly, of the political parties, which had controlled the political life of the preceding four decades[2]; acting as consequence of a forced interpretation of the Constitution of 1961 made by the Supreme Court of Justice in January of that same year, issued, with all the ambiguity possible, in the dilemmatic verge between popular supremacy and constitutional superiority[3]; proceeded to summon a Constituent Assembly elected in July of that year, after new constitutional interpretations issued by the same Supreme Court which had let loose all constitutional demons, while trying to prosecute them.

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[1] See Allan R. Brewer-Carias, *Cinco siglos de historia y un país en crisis (Estudio para el Discurso de Orden en la Sesión Solemne de las Academias Nacionales el día 7 de agosto de 1998 con motivo de la celebración del V Centenario de Venezuela)*, Academia de Ciencias Políticas y Sociales, Comisión Presidencial V Centenario de Venezuela, Caracas 1998.

[2] See Allan R. Brewer-Carias, *Problemas del Estado de los Partidos*, Editorial Jurídica Venezolana, Caracas 1998; *La crisis de las instituciones: responsables y salidas*, Cátedra Pío Tamayo, Centro de Estudios de Historia Actual (mimeographed) FACES, Universidad Central de Venezuela, Caracas 1985, published also in the *Revista del Centro de Estudios Superiores de las Fuerzas Armadas de Cooperación*, N° 11, Caracas 1985, pgs. 57-83; and in the *Revista de la Facultad de Ciencias Jurídicas y Políticas*, N° 64, Universidad Central de Venezuela, Caracas 1985, pgs. 129-155

[3] See Allan R. Brewer-Carias, *Poder constituyente originario y Asamblea Nacional Constituyente (Comentarios sobre la interpretación jurisprudencial relativa a la naturaleza, la misión y los limites de la Asamblea Nacional Constituyente)*, Colección Estudios Jurídicos N° 72, Editorial Jurídica Venezolana, Caracas 1999, pg. 296; and "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 the *Revista de Derecho Publico*, N° 77-80, Editorial Jurídica Venezolana, Caracas 1999. pg. 453 ss

Said Constituent Assembly, far from dedicating itself to write off the new Constitution, assaulted power and violated, with impunity, the Constitution that had created it[4], giving a constituent *Coup d'état*[5], but now, with the consent and complicity of the Supreme Court of Justice itself, which had allowed its creation and, as it always occurs in these illegitimate complicity cases, was inexorably the first victim of authoritarism, because, only months after, it was erased from the institutional scene[6].

The Constituent Assembly, installed in August 1999, in fact, assaulted all the powers of the State that had been constituted months earlier since November 1998, dissolving all those that had been elected democratically (National Congress, State Governors, Legislative Assemblies, Mayors, and Municipal Councils), with the sole exception of the President of the Republic, precisely the author of the constitutional fraud; and intervening all other unelected public powers, among them, and above all, the Judicial Power, whose autonomy and independence was progressive and systematically demolished[7], in a way that since then it is closely controlled by the Executive Power, having a Supreme Court of Justice at its service and a

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[4] See Allan R. Brewer-Carias, *Debate constituyente (Aportes a la Asamblea Nacional Constituyente)*, Volume I (August 8-September 8, 1999), *Fundación de Derecho Publico-Editorial Juridica Venezolana*, Caracas 1999.

[5] See Allan R. Brewer-Carias, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autonoma de Mexico, Mexico 2002.

[6] See the study about the effects of the transitory regime established by the Constituent Assembly after the approval, by popular referendum, of the Constitution of 1999, in its own margin, in Allan R. Brewer-Carias, *La Constitucion de 1999*. Editorial Arte, Caracas 2000; and *La Constitucion de 1999. Derecho constitucional venezolano*, Volume II, Editorial Juridica Venezolana, Caracas 2004, pg 1150 ss.

[7] See Allan R. Brewer-Carias, "*La progresiva y sistematica demolición de la autonomia e independencia del Poder Judicial en Venezuela (1999-2004)*", at the *XXX Jornadas J.M Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pgs 33-174.

flaming Constitutional Chamber that has been the most ominous instrument for the consolidation of authoritarism in the country[8].

But from the Constitutional fraud, we went to the democracy fraud, equally committed by the same institutions elected by the public power, officered by the President of the Republic. As well as during the constituent process of 1999, using the judicial interpretation of the Constitution, what happened was its violation (Constitutional fraud); in the same way, the regime that began with said fraud in 1999, has used, during the succeeding years, the representative democracy to eliminate it progressively, and supposedly substitute it for a participative democracy of the Popular Power; which is participative and democratic only by name (democracy fraud).

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, where all the power is concentrated in the Head of State, and thus, is neither democratic, nor it is representative or participative, and on the contrary, it is severely controlled and directed from the inside, and the summit of the political power that the President of the Republic exercises (as Head of the Executive and of the governing party that will be Only one), whom without a doubt, will self proclaim as "President of the Popular Power"; to this matter, progressively, there could be no dissidence of any kind because it is criminalized.

It is then, as announced by the Vice President of the Republic in January 2007, during the sanction act of the legislative delegation Law

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[8] See Allan R. Brewer-Carias, "Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación", at the *VIII Congreso Nacional de derecho Constitucional*, Peru, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pgs. 463-489.

(Enabling Act) in favor of the President of the Republic, which contains an authorization even to dictate laws in the margin of the Constitution, which has planned, no more, no less, is the installment of "the dictatorship of democracy"[9].

In democracy, no dictatorship is acceptable, not even an alleged "dictatorship of democracy", as it has never been tolerable the supposed and failed "dictatorship of the proletariat" in the old Soviet Union installed since 1918, established around "soviet soldiers, workers and country men". Somewhat similar to what is happening in Venezuela, ninety years later, with the creation of communal councils dependant of the President of the Republic in order to channel the Popular Power to, with the supposed participation of the organized people, install the "dictatorship of democracy".

Since the beginning, these supposed popular dictatorships have been and are the fraudulent instrument of the summit that controls power to, in the name of the popular power, end with every trace of democracy, and impose, by force, a socialist regime to a country, without voting for it. Something had to be learnt from what the President of the Russian Federation said in 1998, in occasion of the burial of the remains of the Romanov family, as expression of one of the bitterest lessons of human history by putting an end to the time of what was believed to be the most definite Revolution of all known to modern history; simply: "The attempts to change life by means of violence are doomed to fail"[10]. And every dictatorship, whichever it is, is inevitably the result of the exercise of violence.

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[9] 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.

[10] See in The Daily Telegraph, London, 08-08-98, pg. 1.

II. POPULAR AUTHORITARISM AND THE DEMOCRACY FRAUD

The truth is that, at the beginning of the 21st Century, regarding the Venezuelan case, Latin-America is starting to observe the apparition of a new model of authoritarian State supposedly of the Popular Power, that does not have its immediate origin in a military *Coup d'état,* like in many other occasions during the decades of the last century, but in popular elections, which has provided it with a suit or style which is also militarist, but this time, it is camouflaged with "constitutional" and "elective" marks, designed for the destruction of the representative democracy itself.

We are talking about a militarist authoritarism with an alleged popular support, like all fascist and communist authoritarism regimes of the last century, in many cases with some electoral origin. Neither authoritarian model, no mater how constitutionally and electively disguised may be or may have been, is democratic, nor can be considered to form a constitutional rule of law, because they lack the essential components of democracy, which are much more than the sole popular or circumstantial election of government.

In Latin-America, at the beginning of this century, following the experience of so many antidemocratic and militarist regimes we have had, and of many authoritarism regimes disguised as democratic that we have developed, we achieved to adopt, at the Organization of American States –not without the dissidence, precisely, on whom in Venezuela was scheming the democracy fraud[11]- a continental doctrine about democracy and what it means as political regime, approved in

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[11] President Chavez, since the meeting of the Heads of State of the OAS in Québec in April 2001, questioned the statement about "representative democracy", trying to substitute it by "participative democracy".

Lima on September 11, 2001; the Inter-American Democratic Charter *(Carta Democratica Interamericana)*. It is true that it is not a binding international agreement, but it is the most important document in the matter, adopted as line of democratic political conduct that, unfortunately, many Heads of State do not want to read once more.

That *Democratic Charter*, in fact, among the *essential elements of the representative democracy* mentioned in its article 3, that should be the corner stone of the organization and functioning of the States, among the **respect for human rights and fundamental liberties**; the **access to power and its exercise with subjection to the Rule of law**; of the **celebration of periodical elections, free, fair and based on the universal and secret vote, as expression of the ruling of the people**; and of the **plural regime of the political parties and organizations**; there is the necessary existence –reads- of "the **separation and independence of public powers"**.

And, precisely, all of these essential elements of democracy are the ones that, during the last few years, have unfortunately been ignored or fractured in Venezuela, specifically in the name of a supposed participative democracy and of a supposed Popular Power where the people participates directly.

In Venezuela, during these last years, the reality has been another, far more different to said essential elements of democracy: never before, there had been more violation of human rights and, it is enough to prove this tragedy, when we record the number of accusations made against the Venezuelan state before the Inter-American Commission on Human Rights. This has been both in the past, and today, the best thermometer to determine the degree of violations of human rights by a State.

Also, the access to power has been achieved contrary to the Rule of law, by violating the separation and independence of the judicial, popular and electoral powers. They are all controlled by the union established between the national Executive and the national Assembly, which is why is not possible to control the access to power according to what is stated in the Rule of Law[12]. Particularly, the Electoral Power, was kidnapped since 2003, with the complicity of the Constitutional Chamber of the Supreme Court, reason why the elections that have taken place have lacked of justice, and the last political reforms executed and proposed, simply aim to the substitution of the electoral representativity by supposed citizen groups in the communities and communal councils whose members are not elected, but consigned from the summit of the Popular Power controlled by the President of the Republic. The plural regime of parties has been destroyed and the already announced Single socialist Party, imbricated in the apparatus of the State and also controlled by the President of the Republic, will takeover, not only the supposed Popular Power, but all the political

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[12] See Allan R. Brewer-Carias, *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 *Revista Jurídica del Perú*, Año LIV Nº 55, Lima, March-April 2004, pgs. 353-396; "*El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela: 2000-2004*", in *Revista Costarricense de Derecho Constitucional*, Volume V, Instituto Costarricense de Derecho Constitucional, Editorial Investigaciones Jurídicas S.A., San José 2004, pgs. 167-312; "*El secuestro de la Sala Electoral por la Sala Constitucional del Tribunal Supremo de Justicia*, in *La Guerra de las Salas del TSJ frente al Referendum Revocatorio*", Editorial Aequitas, Caracas 2004, C.A., pgs. 13-58"; "*El secuestro del poder electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004*", *Stvdi Vrbinati, Rivista tgrimestrale di Scienze Giuridiche, Politiche ed Economiche*, Year LXXI – 2003/04 Nuova Serie A – N. 55,3, Università degli studi di Urbino, Urbino, 2004, pgs.379-436; "«*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, January-April 2005 pgs. 11-73.

and social life of the country, given the capitalism of State that has been intensified as consequence of the rich petroleum State. Because everything depends on the State, only those who are part of the Single Party could have a political, administrative, economical and social life. And this entire institutional distortion, without the existence of separation or independence between the public powers, not only in their horizontal division (Legislative, Executive, Judicial, People and Electoral) due to the control that the Executive Power has over them; but in their vertical distribution, where the proposals in circulation aim for the elimination of the federation, the substitution of the federated States by alleged "federal cities", and the elimination of municipalism and its replacement by communal councils and people assemblies. All of these in order to eliminate every trace of political decentralization, that is, of autonomous entities in the territory, which prevents every possibility for democratic participation. This is the tragic Venezuelan situation, which, in today's reality is no more than an empty word.

But besides the essential elements of democracy mentioned above, the *Inter-American Charter*, in its article 4, also defined the following *fundamental components of the democratic exercise*: the transparency of governmental activities, integrity, responsibility of governments in the public management, and the respect of social rights and freedom of speech and press. Also, the constitutional subordination of all institutions of the State to the legally constituted civil authority, and the respect to the Rule of law of all the entities and sectors of society, were declared equally fundamental for democracy. Thus, democracy is much more than just elections and voting.

Unfortunately, all these essential elements have been ignored or fractured in Venezuela, also in the name of a supposed Popular Power: the governmental activity deployed by the rich, and during the last years suddenly wealthy, State managed uncontrollably in a poor country, stopped being transparent due to the specific absence of fiscal control, given the submission of the Citizens Power (General

Comptroller, Attorney General and the Peoples' Defendant) to the Executive power; this situation has made the true concept of integrity disappear, because it is not possible to demand any kind of responsibility to the government for the public management, among other aspects due to the submission of the judicial power; all of this, campaigning corruption in a way never seen before. On the other hand, the careful management of social rights –which has been the main governmental slogan, particularly towards the international community- has been staged in a policy of uncontrolled distribution of petroleum wealth, like it is never going to diminish, nationalizing everything in the country, dismantling the productive apparatus and without generating investments; and all these without having poverty or unemployment levels decrease.

Finally, the freedom of speech and press, since the direct censorships of the last military dictatorship of the fifties, has never been so threatened, imposing self-censorship over the persecution base to reporters and dissident media, like it has repetitively been confirmed by the Rapporteurship of Freedom of Expression of the Inter-American Commission on Human Rights, and it derives from the multiple accusations made before the Commission and the recommendations and precautionary measures adopted by it.

Conversely, the militarism that has taken over the State, in a way that even though the authoritarian regime had been the result of a military *Coup d'état*, then, another fundamental value for democracy is the constitutional subordination of all the institutions of the State to the legally constituted civil authority, by the military empowering of the State and its imbrication with the Single Party, has been fractured, leaving the respect to the Rule of law as another value postponed by all entities and sectors of society.

During the last years then, only one of the elements of democracy has been used in Venezuela, to have elections, in order to destroy all

other values and essential components of democracy; thus, the democracy fraud that has taken place.

III. THE DEMANDS OF THE DEMOCRATIC RULE OF LAW: THE SEPARATION OF POWERS AND DEMOCRACY

Among all those essential elements and components of democracy, the one regarding the separation and independence of Public Powers is maybe the one formed on the more fundamental pillar of the Rule of law, because it is the one that can even allow other factors of democracy to be a political reality[13].

To be precise, democracy, as a political regime, can only function in a constitutional Rule of law system where the control of power exists; that is, one in which the classic and clear advice left as a legacy to the world by Charles Louis de Secondat, Baron of Montesquieu, decades before the French Revolution, is seriously taken to consideration with all its political consequences:

> "It is an eternal experience –he said- that **every man with power tends to abuse it**; and **he does it until he finds limits**… **To avoid the abuse of power**, it is necessary that, due to the disposition of things, **power limits power**"[14].

Decades later, as legacy from the North-American and the French Revolutions[15], this important political postulate about the division of

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[13] See about *La Carta Democrática Interamericana y la crisis de la democracia en Venezuela*, Allan R. Brewer-Carias, *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Ediciones El Nacional, Caracas 2002. pg. 137 and ss.

[14] *De l'Espirit des Lois* (ed. G. Tunc), Paris 1949, Vol. I, Book XI, Chapter. IV, pgs.162-163.

[15] See Allan R. Brewer-Carías, *Reflexiones sobre la Revolución Americana (1776) y la Revolución Francesa (1789) y sus aportes al constitucionalismo moderno*, Editorial Jurídica Venezolana, Caracas 1992.

the public power, began to be the inevitable premise of democracy as a political regime, in a way that it can not exist without said division, so that power finds limits and it can be stopped by power itself.

In consequence, for democracy as a political system to ensure the government of the people, legitimate holder of sovereignty, indirectly by means of the representatives or instruments for its direct exercise; it has to be forged over a constitutionally political system which in any case, and above all, impedes the abuse of those who have the power of the state, which is of the essence of the Rule of law. That is to say, in order for it to effectively exist and function, democracy requires of a constitutional frame that establishes and allows the control of power – its essential boundary- and where power, by means of its horizontal division and its vertical or territorial distribution, can stop power, in a way that the diverse powers of the State can limit each other. All of these, as an essential guaranty of all the values of democracy itself which, along with the respect to the popular will, is the force of human rights, political pluralism, republican variability and the submission of the Rule of law.

In Latin-America, in one way or another, with all the ups and downs of its efficiency, during the democratic periods that our countries have gone thru, there have always been institutions searching to assure the respect of human rights, the subjection of power to the law, elections almost regular and free, and a plural regime of parties. But if, in many cases, our democracies have not settled completely, and the Rule of Law has not absolutely taken over our political institutions, it is because in many cases we have failed to effectively establish the last of the elements mentioned about democracy and the most classical of all, referring precisely to the effective "separation and independence of powers". That is to say, to the constitutional order that must exist in every democracy, which gives sense to the Rule of law, to control and limit power, and that particularly, can allow an effective political representation; the true possibility for citizen's political participation, a transparent and

responsible government and the effective force of the empire of the law.

On the other hand, without the control of power, not only there is no and there can not be a true democracy, nor an effective Rule of law, but the efficient force of all essential factors of democracy mentioned before can not be achieved, because only by controlling Power is that there can be absolutely free and fair elections, that is, there can be efficient representativity; only controlling power is that political pluralism can exist; only controlling Power is that there can exist an effective democratic participation; by controlling Power the effective transparency in the exercise of government can be assured, with the existence of the rendering of accounts by all those in government; by controlling Power there can be a government submitted to the Constitution and the laws, that is, the Rule of law; only controlling Power there can be an effective access to justice, and it can function with valuable autonomy and independence; and only by controlling Power there can be a true and effective guaranty for the respect of human rights.

On the contrary, the excess concentration and centralization of power, as it occurs in any authoritarian government, despite its electoral origin, can lead inevitable to a short or long tyranny if there are no efficient controls over the governing parties, and even worst, if these have or believe to have the popular support. That was the story of humankind during the first half of the 20th Century, which showed us, precisely, those tyrants who used the vote of the majority to rise to power and apply, from there, Authoritarism to finish with democracy itself and all its elements, beginning with the respect of human rights.

Also, since the beginnings of modern constitutionalism, the principle of the separation of powers was stated in the French Declaration of the Rights of Man and of the Citizen (1789), when it proclaimed that "any society in which the guaranty of rights is not assured, nor the separation of powers is determined, has no

Constitution" (article XVI). However, regardless of the two centuries that have passed, and particularly during the last five decades because of the progress in democracy, both the principle of division or organic separation of powers as manifestation of the horizontal distribution of Power, like the principle of the territorial or vertical distribution of power as a sign of the political decentralization, have been and continue to be the strongest signs, and not necessarily the most developed in the practice, of contemporary constitutionalism to assure freedom, the democratic government and Rule of law. And they are, exactly, the ones being progressive and systematically demolished in Venezuela.

That is, if in the Venezuela of today –during the first years of the 21st Century the authoritarian government has taken roots- this has its origin exactly in the way the principle of separation of powers stated in the Constitution of 1999 has deformed itself, in a way that, regarding the organic separation of powers, has allowed the concentration of powers in the hands of the Executive Power in relation to the National Assembly, and in it, regarding all other Public Powers. That is to say, the Constitution of 1999 planted the germ of the concentration of power, and thus it was considered an authoritarian Constitution, a fact that no one took seriously.

Regarding the federal system of territorial distribution of Power regulated as well by the Constitution, contrary to the proclaimed "Federal decentralized State" (article 4, Constitution), what the constitutional text emphasized was the existing "centralized federation", worsened by the elimination of the old Senate, which existed since 1811 as an instrument to assure equal participation of the States in the preparation and control of national policies. Since 2000 then, Venezuela became a rare example of a federation without a federal Chamber, as it occurs in the few existing federations in States with very small territories. The Constitution of 1999 was an authoritarian constitution, not only for the germ of the concentration of

power contained in it, but for the distinctly centralized schema also contained in it, to which no one paid any attention either.

In the Venezuelan Constitution of 1999, in fact, if we take its words textually, supposedly a democratic government system "participative and protagonic" would have been regulated, built on the principles of the organic separation of powers and the territorial distribution of the Public Power by means of a decentralized Federation. However, in reality and contrary, what was designed, by using empty misleading words, was a government system structured on the basis of the concentration of the public power and the political centralization of the State that has affected other essential elements of democracy, leading to the exact denial of the Rule of law.

What has resulted from this is the organization of a new constitutional authoritarism in Latin-America that differs from what a democratic Rule of law should be, and built over the separation of powers and the political decentralization. In the case of Venezuela, what has developed during the last years, is a State marked, on the contrary, in part by the principle of concentration of power and constitutional authoritarism; and on the other hand, by the political centralization and effective absence of democratic participation.

IV. THE PROCESS OF CONCENTRATION OF POWER AND THE CONSTITUTIONAL AUTHORITARISM

The problem of the concentration of power, authoritarism seed in Venezuela, as it has been said, derives from the text of the proper Constitution of 1999. Thus, in occasion of its approbatory referendum held on December 15, 1999; we warned -in a document prepared to explain and justify the reasons for which we advocated for the "vote No" in said referendum- that in Venezuela, the following would be established, if the Constitution was to be approved:

> An **institutional scheme conceived for the authoritarism derived from the combination of centralism of State, aggravated presidential system, democracy of political parties, militarism and concentration of power in the Assembly** that constitutes the central element intended for the organization of the power of State. In my –added- opinion, this is not what was required in order to perfect democracy; which, on the contrary, should be based on the decentralization of power, in a controlled and moderated presidential system, the political participation to balance the power of the State and in the subjection of the military authority to the civil authority[16].

Unfortunately, our warning has become a reality, and based on the Constitution, since 1999 an alleged "participative and protagonic" democratic system has been orchestrated, but based in the concentration and centralization of power, which is a contradiction with demolishing consequences for democracy itself and the Rule of law.

1. The assault to power and its initial concentration

This process began, otherwise, with the aforementioned *Coup d'état* committed by the 1999 Constituent National Assembly itself, which, without any authority whatsoever, assaulted and concentrated all the power of the State violating the still ruling Constitution of 1961.

This produced, not only devastating results that many, inside and outside the country, did not want to see or understand, but unusual institutional sequels like the unfinished and incomplete "constitutional trasitoriness" to which the country[17] was and in many aspects still is submitted to, as it occurs for instance in the judicial matter; and what is worst, this happened with the consent of the

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[16] Document dated November 30, 1999. See Allan R. Brewer-Carias, Debate Constituyente (Aportes a la Asamblea Nacional Constituyente), Volume III, Fundación de Derecho Publico, Editorial Jurídica Venezolana, Caracas 1999, pg. 339.

[17] See Allan R. Brewer-Carias, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autonoma de Mexico, Mexico, 2003. pgs. 179 and ss.

Constitutional Chamber of the Supreme Court of Justice, that was the most questioned product of that Assembly; with this, the fundamental principles of the democratic control of power, democracy and Rule of law[18] have been undermined.

It can be said then, that the Constitution that authorized the 1999 Constituent National Assembly, formed an *authoritarian institutional frame* that impedes the development of democracy itself and the consolidation of the Rule of law. Contrary to this institutional frame and of the constitutional practice that have implemented it during the last few years, the Constitution that Venezuela needed for this beginnings of the 21st Century, had to be one that assured the improvement of democracy by means of the design and effective implementation of the principle of the organic separation of powers, as an effective antidote to Authoritarism; and this, also, consolidating the separation of powers beyond the three classical Powers of the State (Legislative, Executive and Judicial), making, the classical control institutions that have always existed in our Latin-American countries, effective participants of the exercise of the Public Power with constitutional rank; like the General Comptrollerships, Public Ministry, People's or Human Rights Defendants, and electoral institutions.

2. *The germ of power concentration. The authority of the Assembly to remove the holders of public powers.*

But regarding the ornate verbalism in the consecration of the organic separation of powers, even with five State powers (article 136: Legislative, Executive, Judicial, Citizen and Electoral), in order for said

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[18] See for example, Allan R. Brewer-Carias, *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; "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. pgs. 33-174.

separation could become effective, the independence and autonomy among them had to be consolidated to assure the limitation and control of power by power itself. This, however, was not designed, and notwithstanding the aforementioned separation of State institutions in five groups, there is an absurd distortion of said separation in the Venezuelan Constitution, when the National Assembly is given, as a political organ that exercises the Legislative Power and the control, not only the authority to assign, but to **remove** Judges of the Supreme Court of Justice, the Attorney General, the General Comptroller of the Republic, the People's Defendant and the Members of the National Electoral Council from their positions (Articles 265, 279 and 296); and in some cases, even by simple majority of votes.

One can not talk about independencies of powers, over which separation and the possibility of mutual control rests, when the proper existence of the holders (not elected democratically) of the institutions that exercise State powers depend on one of them, which also is essentially of political character. Thus, the sole fact of the prevision in the constitutional text of such removal power in the hands of the National Assembly makes futile the formal consecration of the independence of powers, when the holders are aware that they can be removed when they act effectively with independence[19].

Unfortunately this has been stated in Venezuela, in a way that when there have been minimal signs of autonomy from some holders of State institutions, who have dared to express their opinions, they have been removed. This occurred, for instance, with the People's Defendant and the Attorney General of the Republic, originally assigned in 1999 by the Constituent National Assembly, who were separated from their positions[20] in 2000 for failing to uphold to the

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[19] See "Democracia y control del poder", in Allan R. Brewer-Carias, *Constitución, democracia y control de poder*. Centro Iberoamericano de Estudios Provinciales y Locales. Universidad de Los Andes. Merida 2004.

[20] It was the case of the General Prosecutor of the Republic, assigned in December of 1999, who thought that he could initiate the (penal) impeachment proceedings against the by

dictates of power; and also, with some Judges of the Supreme Court who dared to vote decisions that could question power, which resulted in their immediate investigation and some of them were even removed from their positions, as it was the case of the First Vice-President of the Supreme Court in June of 2004; many others were duly "retired" or removed[21].

3. The abstention of control because of the risk of removal

In other cases, the consequence resulting from this factual "dependency" of the control organs before the National Assembly, has been the total abstention in which these have incurred to exercise the control that the Constitution grants them, as it has happened with the General Comptroller of the Republic, whose existence has been motive for conjecture; and of the satisfactions of the People's Defendant with power, which has provoked his perception to be not as the defendant of the people before power, but as the defendant of power before the people.

The effects of this dependency have been catastrophic regarding the Judicial Power -to which we will refer to further on- which was

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then Minister of the Interior, and the People's Defendant, who also thought that she could impugn the Special Law of the 2001 National Assembly on appointment of Judges of the Supreme Court without complying with the constitutional requirements. They were both duly substituted in 2001.

[21] It was the case of Judge Franklin Arrieche, Vice-President of the Supreme Court of Justice, who was Speaker of the decision of the Supreme Court of Justice of 08-14-2002 (which decided that the impeachment against the generals who acted on April 12, 2002), declaring that there were no grounds to judge them due to the fact that in said occasion no military coup had taken place, but that there had been a power vacuum; and that Judges Alberto Martini Urdaneta, President of the Electoral Court, and Rafael Hernandez and Orlando Gravina, Judges of the same Court who undersigned decision N° 24 of 03-15-2004 (Case: *Julio Borges, Cesar Perez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón Jose Medina and Gerardo Blyde vs. the National Electoral Council*), that suspended the effects of Resolution N° 040302-131, dated 03-02-2004 of the National Electoral Council which, in that moment, stopped the realization of the presidential recall referendum.

intervened by the Constituent National Assembly in 1999, and continues to be intervened with the unfortunate consent and complicity of the Supreme Court of Justice itself, allowing a Judicial Power Reorganization Commission –which has been legitimated- to cohabit with it, with disciplinary powers contrary to those ordered by the Constitution. In addition to this, the political control that the National Assembly has taken over the Judges of the Supreme Court, with the always "convenient" warning of their possible investigation and removal, even by absolute majority of votes, as it was unconstitutionally established in the Organic Law of the Supreme Court of Justice of 2004.

4. *The fraud to the political participation in the appointment of high governmental positions.*

It must also be emphasized, that the constitutional previsions established to assure the autonomy of the aforementioned State powers by means of participative mechanisms in the appointment of its holders, unfortunately were distorted as well. In fact, the Constitution established Postulation Committees "integrated by representatives of the diverse sectors of society" for the selection of the candidates for Judges of the Supreme Court of Justice, Attorney General of the Republic, General Comptroller of the Republic, People's Defendant and members (Directors) of the National Electoral Council. Said constitutional previsions pretended to limit the discretional power that the political-legislative organ had always posses, with its political-party agreements to appoint those high functionaries. But this could not be achieved, because the political and legislative practice developed by the National Assembly itself, during the last few years, organ that was constitutionally the one that had to be limited; in an evident constitutional fraud, provoked that said Committees had been configured as "extended parliamentary Commissions", constituted by representatives, who by definition could not be part of them for not being representatives of the "civil society", by several other persons

called their "representatives" but chosen by the National Assembly itself from strategically selected "non-governmental Organizations"[22].

5. The supremacy of the Executive and the absence of counterpoises.

But if the supremacy of the National Assembly over the Judicial, Citizen and Electoral Powers is the most characteristic sign of the implementation of the Constitution of 1999 during the last few years, the distortion of the separation of powers turning it into a power concentration system, also derives from the supremacy that, from a political-party's point of view, the Executive Power has over the National Assembly.

In the Constitution of 1999, the presidential system has been aggravated, amongst other factors, because of the extension, to six years, of the presidential term; the authorization of the immediate reelection of the President of the Republic (article 203), which attempts against the principle of republican alternability by allowing a possible long administration term of up to 12 years; due to the complexity of the government recall referendum (article 72), which makes it practically inapplicable; and for the no adoption of the principle of the Presidential election by absolute majority and two-round system (runoff voting), maintaining the election by proportional majority (article 228), creating the possibility of governments elected with a minority of votes, which can make the system ungovernable.

With this presidential model, to which the possibility of the dissolution of the National Assembly by the President of the Republic is added (article 236, 22), even though in exceptional cases when three parliamentary censorship votes are approved against the Executive

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

Vice-President (article 240), the presidential system is aggravated not even finding counterpoise in the eliminated old bicameralism.

6. The legislative power delegated in the Executive and the fraud to participation

Also, the presidential system has been reinforced with other reforms, like the prevision of the legislative delegation to authorize the President of the Republic by means of "enabling acts", to issue decree-laws not only in economic an financial matters (article 203), which constitutes an assault to the constitutional guaranty of the legal reserve, particularly regarding the regulation of constitutional rights. The truth is that the fundamental legislation that has taken place during the last few years (2002-2007) is contained in these decree-laws pronounced, even, without respecting the constitutional demand for the mandatory public consult required, in the Constitution, for draft laws.

In fact, the legislative power that can be delegated to the President of the Republic has, among other limits imposed in the Constitution, to assure the political participation, which is not only one of the fundamental values of the constitutional text, but one of the most relevant constitutional rights foreseen in it. The Constitution consecrates the right "of the people to participate in the formation, execution and control of the public service" having, as one of the obligations of the State to "enable the generation of the most favorable conditions for its practice" (article 62). Also, the Constitution assures the right to participate in political matters, among other means, thru "popular consult" (article 70).

Precisely, in order to define this constitutional right, the Constitution itself specifically states previsions where the National Assembly is imposed the obligation of **public consult** in the law creation process: *First*, with a general character, article 211 demands that the National Assembly and the Permanent Commissions **must**

consult ("will consult"), during the proceedings and approval of draft laws, **the organs of the State, citizens and the organized society to listen to their opinion** on said matters; and second, article 206 demands that the National Assembly, which **must consult the States ("will be consulted") by means of the Legislative Councils**, when legislating in matters related to them. This is the concrete way by which the Constitution assures the exercise of the political participation right in the management of public matters in the process of formation of laws, by establishing the obligation imposed to the National Assembly for the public consult on draft laws.

This constitutional obligation of the public consult regarding the Draft laws, of course, **will have to be transferred to the President of the Republic when the legislative delegation takes place**. This, like every delegation, no only must transfer powers, but also duties, and among them, the constitutional obligation of the public consult of the draft law-decrees dictated in execution of the enabling law. That is, independently of the organ dictating the draft law (National Assembly or President of the Republic in virtue of the legislative authorization), the obligation of public consult is inevitable because it is an integrating part of the constitutional procedure for the creation of laws.

In 2007, the President of the Republic, following the same steps he took in 2001, but before an Assembly in which he has no opposition what so ever because it is completely formed by his followers, he requested and obtained the sanction of an Enabling Law that allows him, for a period of eighteen (18) months, to legislate in all imaginable matters. With this, again, the President of the Republic will legislate without any transparency, without the knowledge of the draft laws, without debating them, and without the realization of the public consult that the Constitution demands him to make before the National Assembly regarding new draft laws (articles 206 and 211).

In this way, in an evident Constitutional fraud, it is intended to transfer the state authority to legislate on matters of national

competency from the organ exercised by the Legislative Power (National Assembly) to the Executive Power, notwithstanding that this absolutely controls the first, where it can not find opposition of any kind; legislation that, even, refers to matters affecting other powers of the State, particularly, in its horizontal division (Legislative, Executive, Judicial, People's and Electoral), and in its territorial distribution (States and Municipalities).

7. The Constitutional militarism

The Constitution of 1999, also within its innovations, consecrated an accentuated militarist plan, like no other known during the last century; which, if added to the presidential system as a form of government and to the concentration of powers in the National Assembly and the President of the Republic when he controls it, shows the progress of Authoritarism as a way to govern, unfortunately installed in the Republic. In the Constitution, in fact, every idea of subjection or subordination of the military authority to the civil authority was eliminated; giving, on the contrary, great autonomy to the military authority and to the Armed Forces, with the possibility even to intervene, without limits, in civil functions, under the general command of the President of the Republic. This is evidenced, for instance, both in the incorporation of some regulations as well as their absence: First, the traditional prohibition that existed in the historical constitutionalism regarding the simultaneous exercise of the civil authority with the military authority was eliminated; second, the parliamentary civil control, was eliminated, in relation to the promotion of high rank army men, and that had been designed by the administrators of the Republic at the beginning of the 19th Century. That promotion is now an exclusive attribution of the Armed Forces. Third, it was eliminated the norm establishing the apolitical character of the military institution and its non deliberating character, which opened the path for the Armed Forces to deliberate and intervene in matters being resolved by organs of the State; forth, it was eliminated from the Constitution the obligation of the Armed Forces to watch for

the stability of democratic institutions that was specifically foreseen before; fifth, and worst of all, it was eliminated the obligation of the Armed Forces to obey the Constitution and Laws, whose observance must always be above any other obligation, like that established in the prior Constitution; sixth, for the first time in the history of the country, the armed forces were granted the right to vote, which has shown to be politically incompatible with the principle of obedience; seventh, the new Constitution established the privilege that the Supreme Court of Justice must decide if there are grounds to judge high rank military men from the Armed Forces, which had always been a reserved procedural privilege of high rank civil functionaries like the President of the Republic; eighth, the use of any king of weapon in the country was subjected to the authority of the Armed Forces, this control was attributed before to the civil administration; ninth, it was established the possibility of attributing political-administrative functions to the Armed Forces; and finally, tenth, the concept of the national security doctrine was adopted, defined in a total, global and omnicomprehensive way, according to which, as it had been developed in the military regimes of Latin-America during the seventies, almost everything that occurs in the Nation it's a matter of State security, even the economic and social development[23].

All of this has created a military plan which is a constitutional novelty, and has been taking the nation to a situation in which the Armed Forces, with the support of the Head of State, has taken over the civil Administration of the State, as it has been occurring during the last few years. All of these dispositions show a militarism constitutional frame truly unique in the political and constitutional history of Latin-America, not even found in the Constitutions of prior military regimes.

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[23] See Allan Brewer-Carias on militarism in the Constitution of 1999, "Razones para el Voto NO en el referéndum sobre la Constitución", (Document dated 11-30-1999), *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*. Volume III, *cit.*, pg 325 and ss.

With these attempts to the principle of separation of powers, Venezuela, with its new Constitution filled of constitutional contradictions (a centralized Federation and without a Senate; a Legislative Power and an unlimited legislative delegation; and a penta-division of Power with an unusual concentration of power in the representative political organ), has constitutionalized the road towards Authoritarism. Thus democracy or even less the Rule of Law, can hardly be effective with this constitutional plan.

V. THE UNENDING INTERVENTION AND SUBMISSION OF THE JUDICIAL POWER TO THE AUTHORITARIAN REGIME

In Venezuela, after the unconstitutional intervention of the Judicial Power resolved by the Constituent National Assembly of 1999[24], since the sanction of the Constitution of 1999, there has been occurring a permanent and systematic demolition process of the autonomy of the judicial power, submitting it to the control of the President of the Republic.[25]

Everything began with the appointment of new Judges of the Supreme Court of Justice without complying with the constitutional requirements by means of the constitutional transitory regime, dictated by the Constituent Assembly on the margin of the Constitution in December 1999; and from there, the intervention process continued commanded by the President of the Republic, who has been politically controlling the Supreme Court of Justice and, thru it, the complete

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[24] See our reserved vote to the intervention of the Judicial Power by the Constituen Nacional Assembly in Allan R. Brewer-Carias, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*, Volume I, (August 8-Spetember -), Caracas 1999; and the critiques made to this process in Allan R. Brewer-Carias, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México. Mexico 2002.

[25] See Allan R. Brewer-Carias, "La progresiva y sistemática demolición 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. pgs. 33-174.

Venezuelan judicial system. For this, the constitutional previsions about the conditions required to become a judge and the procedures for the appointments with the participation of sectors of society, were broken since the beginning: first, as it has been said, by the National Constituent Assembly itself when removed old Judges, by means of a transitory regime on the margin of the Constitution that approved them; and then, by the recently elected National Assembly when performing the first appointments in 2000, according to a special Law sanctioned to perform them transitorily, with context completely on the margin of the constitutional demands.

For this reason, in its 2003 *Report on Venezuela,* the Inter-American Commission on Human Rights, observed that the appointment of Judges of the Supreme Court of Justice did not apply to the Constitution, so that "the constitutional reforms introduced in the form of the election of these authorities established as guaranties of independence and impartiality were not used in this case"[26].

Then, the reform made to the 2004 Organic Law of the Supreme Court of Justice took place, approved in the middle of an ample discussion and questioning regarding the qualified majority referred to by the Constitution, for dealing with an organic law. The reform, which increased the number of Judges from 20 to 32 – the new ones elected by simple majority by the National Assembly – as was emphasized by the Inter-American Commission itself, "does not take into consideration the concerns expressed by the IACHR in its report regarding the possible threats to the independence of the Judicial Power"[27].

To the latter, the destitution or "retirement" of Judges who dared not follow the governmental line[28] must be added; all of this, has

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[26] Inter-American Commission of Human Rights, 2003 *Report on Venezuela*; paragraph 186.

[27] Inter-American Commission on Human Rights, 2004 *Report on Venezuela;* paragraph 174.

[28] It was the case of Judge Franklin Arrieche, Vice-President of the Supreme Court of Justice, who was Speaker of the decision of the Supreme Court of Justice of 08-14-2002

allowed the government to assume an absolute control of the Supreme Court of Justice in general, and of every one of its Chambers, especially the Constitutional Chamber.

In any case, after the reform of 2004, the final process of selection of the new Judges was ruled by the submission to the President of the Republic, to the point that on the eve of the appointment, Mr. Pedro Carreño, at the time President of the parliamentary Commission in charge of selecting the candidates for Judges of the Supreme Court of Justice – appointed Ministry of the Interior and Justice in January 2007 – declared to the press that:

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and **his opinion was very much taken into consideration**" (Highlighting added). He added: "**Let's be clear, we are not going to score auto-goals**. In the list, there were people from the opposition who comply with all the requirements. The opposition could have used them to reach an agreement during the last sessions, be they did not want to. We are not going to do it for them. **There is now one in the group of postulates who is going to act for us** and we are going to take advantage of that, even in a 10 hour session"[29].

With good reason, the Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS corresponding to 2004 that "these regulations of the Organic Law of the Supreme Court of Justice would have made possible the

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,which decided that the impeachment against the generals who acted on April 12, 2002, declaring that there were no grounds to judge them due to the fact that in said occasion no military coup had taken place, but that there had been a power vacuum; and of Judges Alberto Martini Urdaneta, President of the Electoral Court, and Rafael Hernandez and Orlando Gravina, Judges of the same Court who undersigned decision N° 24 of 03-15-2004 (Case: *Julio Borges, Cesar Perez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón Jose Medina and Gerardo Blyde vs. the National Electoral Council*), that suspended the effects of Resolution N° 040302-131, dated 03-02-2004 of the National Electoral Council which, in that moment, stopped the realization of the presidential recall referendum.

[29] See in *El Nacional*, Caracas 12-13-2004.

manipulation, by the Executive Power, of the election process of judges that took place during 2004".[30]

It has been configured then, a Supreme Court of Justice highly politicized and subjected to the will of the President of the Republic, that has eliminated, in the practice, all the autonomy of the Judicial Power and even the basic principle of the separation of powers, as the corner stone of the Rule of Law and the force of all democratic institutions.

In every case, according to the Constitution of 1999 which eliminated the old Judicature Council, organ in charge of the administration of the Judicial Power since 1961, the Supreme Court of Justice is the institution that constitutionally domains, absolutely, the Venezuelan judicial system, particularly in regards to the appointment and removal of judges, whose instability, authorized and promoted by the Supreme Court itself, and the appointment of judges without the public concurrence stipulated in the Constitution, is another component of the political subjection of the Venezuelan courts.

Regarding the independence of the Court, according to the *Basic Principles concerning the independence of the judicature*, approved by the General Assembly of the OAS[31], the principle of job security of the judges is essential and, as it has been said by the Inter-American Court on Human Rights, congruent with "the special nature of the function of the courts, because it guaranties the independence of the judges

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[30] Inter-American Commission on Human Rights, 2004 *Report on Venezuela*; paragraph 180.

[31] *Basic Principles concerning the independence of the judicature* adopted by the Septimo Congreso de las Naciones Unidas in Milan, August 26-September 6, 1985 and confirmed by the General Assembly in its resolutions 40/32 of November, 1985 and 40/146 of December, 1985.

before all other branches of government and before the political-electoral changes"[32].

And said job security is assured in the Constitution of 1999, first, by the demand that the judges must be selected by public concurrence; and second, that their removal can only occur by means of disciplinary trials carried out by disciplinary judges. Unfortunately, none of these has occurred in Venezuela where, due to a strange discontinuance constructed with the complicity of the Supreme Court itself, those constitutional previsions are dead letter.

Since 1999, the Venezuelan Judicial Power has been plagued by provisional judges, situation on which, by 2003, the Inter-American Commission on Human Rights had pronounced itself[33] in its 2003 Special Report on Venezuela, considering as said provisional judges those who lack the stability in the position, and for that reason, are susceptible to the political manipulation[34], in the sense that they "do not have the stability assurance in the position and can be removed or suspended freely, which could suppose an analysis of the performance of these judges, in the sense that they can not feel safe before the inadequate interferences or precisions coming from inside or outside the judicial system"[35], concluding that the high percentage of these judges alters the people's right to an adequate administration of justice.[36]

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[32] IACHR, *Carranza vs. Argentina*; Case 10.087. Report No. 30/97, December 30, 1997; paragraph 41.

[33] *Informe sobre la Situación de los Derechos Humanos en Venezuela*; OAS/Ser.L/V/II.118. d.C. 4rev. 2; December 29, 2003; paragraph 11; pg. 3. It reads: "The Commission has been informed that only 250 judges have been appointed by opposition concurrence according to the constitutional text. From a total of 1772 positions of judges in Venezuela, the Supreme Court of Justice reports that only 183 are holders, 1331 are provisional and 258 are temporary".

[34] *Idem*; paragraphs 11 and 12.

[35] *Idem*; paragraph 159.

The tragic situation of the provisional status of the judges, in addition to the noticeable lack of independence affecting the judicial system in Venezuela, was also warned in 2002 by the Inter-American Commission itself in the *Preliminary Observations* expressed on May 10, 2002[37], in occasion of its visit to Venezuela, stating that: "after almost three years of reorganizing the Judicial Power, a significant number of judges have a provisional character, fluctuating from 60 to 90% according to different sources. This affects the stability, independence and autonomy that must rule the judicature[38]; adding that it had been: "informed that the problem of the provisional status of the judges had deepened and increased since the current Government began a judicial re-organization process.[39]

In the aforementioned 2003 *Special Report* on Venezuela, this same Commission also stated that "an aspect linked to the autonomy and independence of the Judicial Power is that of the provisional character of the judges in the judicial system of Venezuela. Today, the information provided by the different sources indicates that more than 80% of Venezuelan judges are "provisional".[40]

In any case, after seven years in vogue of the Constitution, the disciplinary jurisdiction of the judges is still to be established as demanded by the Constitution (articles 254 and 267) with the tendency to assure their sole removal by means of disciplinary trials, by disciplinary judges, reason for which, with the authorization of the Supreme Court, a "transitory" Reorganization Commission of the Judicial Power (created in 1999) has continued to function, removing

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[36] *Idem*.

[37] See "Comunicado de Prensa" dated 05-10-2000, in El Universal, Caracas 05-11-2002.

[38] *Idem*; paragraph 30

[39] *Idem*; paragraph 31

[40] *Informe sobre la Situación de los Derechos Humanos en Venezuela 2003*, *cit*. paragraph 161.

judges without due process, and has caused the establishment of said provisional judges.

The result has been, as mentioned by the Inter-American Commission on Human Rights in its report on the situation of human rights in Venezuela, contained in Chapter IV of the *Report* presented before the General Assembly of the OAS in 2006, that the "destitution, and substitution cases, and other kinds of measures that, because of the provisional status and reform processes, have generated difficulties for the absolute vogue of the judicial independence in Venezuela"[41]; emphasizing those "destitutions and substitutions stated as retaliations for decisions contrary to those of the Government"[42]; concluding that for 2005, according to official numbers, "18.30% of judges are holders and 81.70% are in provisional conditions"[43].

The worst of this irregular situation is that in 2006, there have been attempts to solve the problem of this provisional status by means of a "Special Program for the Regularization of Holding", addressed to accidental, temporary or provisional judges, with a term longer than three months in the exercise of the judicial function. Such program mocks the entrance system into the judicial function which constitutionally can only occur by means of public competitive exams (article 255), because it is then limited to an evaluation of the provisional judges, some without tender or concurrence, so that more than "regularize" what it does is consolidate the effects of the provisional appointments "arbitrarily", and their consequent power dependency.

VI. THE PROCESS OF DECENTRALIZATION OF POWER AND THE ABSENCE OF EFFECTIVE POLITICAL PARTICIPATION

[41] *Idem*; paragraph 291

[42] *Idem*; paragraphs 295 and ss.

[43] Idem; paragraph 292

But the new plan of authoritarian government that has set roots in Venezuela for the last few years, in the midst of an electoral origin, has not only been possible thanks to the constitutionalization of a concentration plan of the Power of the State, with the consequent submission of the Judicial Power to the Executive Power, contrary to democracy and the Rule of law; but also, for the distortion of the exercise of democracy and popular participation, covered by a false populist speech that pretends to replace the representative democracy for a "participative democracy" as it was, additionally, regarding dichotomist concepts, provoking actually the absolute destruction of democracy.

1. The centralized Federation and the illusion of participation

Political participation, that is, the possibility for citizens to participate in the decision making process of political matters, is only possible when power is available to the people in a state decentralization system of power based in the multiplication of local authorities with political autonomy[44]. On the contrary, in a scheme of centralized Federation like the one authorized by the Venezuelan Constitution of 1999, not only the political participation turns into a rhetoric illusion, but the system becomes an easy instrument of authoritarism[45].

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[44] See our proposals for the reinforcement of the decentralization of the federation and the dismantling of its centralization in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*; Volume I; Fundación de Derecho Publico. Editorial Jurídica Venezolana, Caracas 1999; pgs. 155 and ss.

[45] See the studies "La opción entre democracia y autoritarismo (Julio 2001)"; pgs. 41-59; "Democracia, descentralización política y reforma del Estado (Julio-Octubre 2001); pgs. 105-125; and "El Municipio, la descentralización política y la democracia (Octubre 2001); pgs. 127-141, in Allan R. Brewer, *Reflexiones sobre el constitucionalismo en América*; Editorial Jurídica Venezolana, Caracas 2001.

For this reason, also in occasion of the approving referendum of the Constitution of 1999, in the same explanatory document of the reasons for which, at its time, we defended the "No vote" in said referendum, we warned that:

> "The great reform of the political system, necessary and essential to perfect democracy, was to dismantle the centralism of State and distribute the Public Power in the territory; the only way to make the political participation a reality. The Constituent Assembly –we added-, in order to overcome the political crisis, had to design the transformation of the State, decentralizing power and setting the basis to make it more available to people. By not doing it, **it neither transformed the State nor did it dispose of the necessary to make participation more effective**"[46].

However, despite the centralized scheme of power clearly expressed in the Constitution, this uses, in multiple occasions, the word participation and moreover, it proclaims the so called "participative democracy" as a global value, but without allowing the effective political participation of the people in the conduction of public affairs in autonomous and decentralized political entities. Thus participation is more than the exercise of the right to vote and of the implementation of several mechanisms of direct democracy like referenda, citizen's assemblies and the recently created communal councils, which are not configured as requests of the State power nor have political autonomy, but as instruments parallel to their organization, of the exclusive use and conduction of the Head of State for the centralization of power.

2. The sense of democracy and the illusion of participative democracy

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[46] Document dated November 30, 1999. See Allan R. Brewer-Carias, Debate Constituyente (Aporte a la Asamblea Nacional Constituyente), Volume III; Fundación de Derecho Público. Editorial Jurídica Venezolana, Caracas 1999; pg. 323.

In fact, in the authoritarian speech of the "participative democracy", the later only shares the name democracy, being expertly used before the political failures faced by many of our aging democracies merely representatives and of political parties. Often, the expression is used without knowing exactly what it is about, and in general inappropriately confusing participative democracy with elements of direct democracy. But in the majority of the cases it is used as a misleading and clear strategy to end with the representative democracy itself as a political regime, aggravating the distrust in political parties and State institutions with structures and institutions far too distant from the citizen.

The confusion produced by the clamor of participation, often felt in many of our Latin American countries, which is also, by essence contrary to authoritarism, forces to reconsider true democracy in order to situate the concept of political participation where it belongs, which is precisely in the local ambit of political decentralization.

Without a doubt, the two fundamental principles of democracy in the contemporary world continue to be representation and participation. The first principle, representation, can compare to direct democracy, thus the dichotomy existing in this case is between "representative democracy" or indirect, and "direct democracy".

The second principle, participation can not, also, be compared to representation, but to political "exclusion", so the dichotomy arising from this plane is between "participative democracy" or of inclusion, and "democracy of exclusion" or exclusionist; and this is precisely what is not clear yet when talking about participative democracy, in certain cases, trying to refer to the mechanisms of direct democracy; and in others, deliberately confusing the concepts, in order to search for the elimination or minimization of representativity, and establish an alleged direct relation between a Messianic leader and the people, by means of institutional mechanisms even similar to the elected bodies of State, disposed to make the people believe that they are

participating, when in fact they are being submitted to the control of the central power.

Regarding the representative democracy or indirect democracy, this is, and will continue to be of the essence of democracy[47]. Its substitution is essentially impossible in the case of democracy, without detriment that it could fortunately have been prospering during the last decades, precisely with the introduction of mechanisms of direct democracy in our political systems that complement it, but that will never replace it.

There can never be, in the contemporary world, a democracy that is only countersigner, pertaining to the plebiscite or of permanent open municipal councils; despite the fact that almost all contemporary constitutional systems have incorporated popular consult mechanisms and of citizen's assemblies in order to complement representativity. Also, as it is the case of the Constitution of Venezuela, all imaginable types of referenda have been regulated: consulting, approving, decisive, abrogating, and authorizing and recall; as well as the popular initiatives. Without a doubt, this has contributed to the popular mobilization and the relative direct manifestation of the will of the people; but it is clear that those mechanisms can not replace democracy driven by elected representatives. The challenge in this topic, in order to contribute to the consolidation of the democratic Rule of law, is to assure that said representatives are truly representatives of societies and their communities, and that they are elected by direct, universal and secret ballot systems, where political pluralism prevails, and by means of transparent electoral processes that assure the access to power with submission to the Rule of law.

But without a doubt, the second basic principle of democracy has more contemporary interest, which is that of political participation

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[47] See our proposal on the regulation of the participative and representative democratic principle in the Constitution of 1999 in Allan R. Brewer-Carías. *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*. Volume I, *cit.*; pg 183 and *ss*.

which, as it has been said, is not more than a democratic regime of political inclusion, where the citizen is part of its politically autonomous organized community, and contributes to the concerning decision making process. To participate means to be included, for this reason the dichotomy in the case of political participation is the political exclusion, which also leads to that of social and economic order.

Unfortunately, however, as we have mentioned, in the democratic political doctrine, too often have the concepts been confused, and when we talk of participative democracy, it is often confused and reduced to the mechanisms of direct democracy, when the participative democracy is much more than that.

To participate, in fact, in the common language, is to be part of…, is to belong, incorporate, contribute, be associated or committed to…; is to have a role, be an active part, be involved in or to lend a hand…; it is then, to relate, share or to have something to do with… The participation, then, in the political language is none other than to be part of a political community which in essence must benefit from political autonomy, in which the individual has a specific role of active character according to which it contributes in the decision making process, and can not be consumed completely, for instance, in the sole exercise of the right to vote (which is undoubtedly a minimal form of participation); or in being a member of intermediate societies, even those of political character as are the political parties; or voting in referenda (which is another minimal form of participation) particularly in citizen's assemblies controlled by the central power[48].

Democratic political participation is, truly, to be included in the political process and be an active part of it, without interventions; it is

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[48] See Allan R. Brewer-Carias, "Democracia Municipal, Descentralización y Desarrollo Local" (Conferencia Inaugural del XXVI Congreso Iberoamericano de Municipios, Organización Iberoamericana de Cooperación Intermunicipal, Ayuntamiento de Valladolid; Valladolid, October 13-15, 2004); in *Revista Iberoamericana de Administración Pública*. N° 11. July-December 2003; INAP. Madrid 2003; pgs. 11-34.

then, to be able to have access to the decision making process in public matters. And that has not been accomplished permanently in any democratic society, solely with the ballots in referenda or popular consults. It is not accomplished either with manifestations, even though they are multitudinous, and even less, those that are obedient and submissive to a leader. This, which is not more than political manifestation, history has taken care of teaching it to us in all its aspects, including those proper of fascist authoritarisms of last Century, and which can not be confused with political participation.

In order for democracy to be inclusive or of inclusion, it has to allow the citizen to be an effective part of his political community which, above all, has to be autonomous; it has to allow him to develop even a conscience of his effective pertinence, that is, to belong in the political and social order, for instance, to a community, a place, a land, a field, a district, a town, a region, a city, in short, to a State, and to be elected for that, as a representative of it.

For that, the participative democracy is not something new in the political history; it has always been there, even since the days of the Revolutions of the 19th Century in the democratic political theories and practices. Even in all the countries with consolidated democracies, it is imperceptibly established in the lowest level of the territories of the States, in the autonomous political entities, like Municipalities or Communes; that is, in the base of the territorial distribution of power.

The great issue of the political participation, in democracies with a lack of participation, is to determine where and how one can really participate, and the answer points to the entities that are the result of the political decentralization of power, and which are, above all, provided with autonomy. So that, separating and without replacing the vote and instruments of direct democracy, the political participation as democracy of inclusion, in which the citizen can personally be part in a decisive process, participating in state activities and in function of the general interest, can only exist in the most

politically reduced, decentralized and autonomous territorial estates, in the local, communal or municipal level. That is to say, only in the lower autonomous territorial levels of the State organization, is that a participative organization can be structured, and that allows the incorporation of the individual citizen, groups or communities, in the public life, and particularly, in the general public decision making process or those of administrative order.

From this, results the central issue that has to be solved when talking properly about participative democracy, it is that of the determination of the territorial level required for participation as a democratic routine, and the most classical option is between the municipality, as an autonomous political entity scattered in all the remote places of a State, in every village, town and hamlet, located very close to the citizen; or the great urban or rural municipality; located far away from the citizen, and that is definitely useless.

Finally, the truth is that in most of the so called democratically developed countries prevails the existence of many municipalities, and among them, of small municipalities[49]. In contrast, in Latin-America, the municipality is extremely distant from the citizen[50]. In both

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[49] In Germany, for instance, of its 16,098 municipalities, 76% has less than 5,000 habitants; and in Spain, about 86% of its more than 8,056 municipalities, has less than 5,000 habitants, resulting only in 16% of the population, and 61% of them has less than 1,000 habitants[49]. It must also be emphasized that, since we are in Valladolid, as an example of what means to a country to territorially have many small municipalities, being precisely the case of this Community of Castilla and Leon, that shelters little more than a quarter of the total of the Municipalities in Spain, with 2,248 municipalities (2,484,603 habitants), of which 68.5%, that is, 1,540 municipalities, have less than 500 habitants. See in *Informe sobre el Gobierno Local,* Ministerio para las Administraciones Publicas. Fundacion Carles Pi i Sunyer d'Etudis Autonòmics y Locals. Madrid 1992; pg. 27.

[50] In Argentina, for 37 million habitants, there are 1,617 municipalities, with a population average of 22,882 habitants; in Bolivia, for 8 million habitants, there are 312 municipalities, with a population average of 25,642 habitants; in Brazil, for 168 million habitants, there are 5,581 municipalities with a population average of 30,102 habitants; in Chile, for 15 million habitants, there are 340 municipalities with a population average of 44,117 habitants; in Colombia, for 42 million habitants, there are 1,068 municipalities

Continents, Municipalities were tributaries of the same central postulates derived from the French Revolution, but the great difference between them was that, since the beginning of 19th Century, in Europe the Municipality was located in every hamlet, town, village and city there was, very close to the citizen; and on the other hand, in Latin-America, the colonial Municipality that exceeded the battles of the Independence, continued to be as it was created, located in the territorial level of the colonial Provinces, in the Metropolitan town councils, distant from the citizen.

In the first, the political participation is such an every day matter regarding the small issues that is imperceptible; in the second case, simply there is no participation of any kind. They have a territorial ambit so high and distant from the citizen, that makes them useless, because they are of no use to properly manage local interests nor to serve instances for the political participation of the people in the decision or management of their own communal affairs.

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with a population average of 39,326 habitants; in Cuba, for 11 million habitants, there are 169 municipalities with a population average of 65,389 habitants; in Ecuador, for 12 million habitants, there are 1,079 municipalities with a population average of 11,121 habitant; in El Salvador, for 6 million habitants, there are 262 municipalities with a population average of de 22,900 habitants; in Guatemala, for 11 million habitants, there are 324 municipalities with a population average of 33,950 habitants; in Honduras, for 6 million habitants, there are 293 municipalities with a population average of 20,478 habitants; in México, for 97 million habitants, there are 2,418 municipalities with a population average of 40,116 habitants; in Nicaragua, for 5 million habitants, there are 143 municipalities with a population average of 34,965 habitants; in Paraguay, for 5 million habitants, there are 212 municipalities with a population average of 23,585 habitants; en Peru, for 25 million habitants, there are 1,808 municipalities with a population average of 13,827 habitants; in Dominican Republic, for 8 million habitants, there are 90 municipalities with a population average of 88,889 habitants; in Uruguay, for 3 million habitants, there are 19 municipalities with a population average of 157,894 habitants; and in Venezuela, for 24 million habitants, there are 338 municipalities with a population average of 71,006 habitants. See the referentes in Allan R. Brewer-Carías, *Reflexiones sobre el constitucionalismo en América*, Editorial Jurídica Venezolana, Caracas 2001, pgs. 139 and ss

Therefore, the participative democracy is real and indissolubly linked, not to direct democracy, but to the political decentralization, and within the later, to the municipalization; and this can not materialize solely with incorporation proposals to the democratic regime of instruments like referenda, consults or popular initiatives and citizen's assemblies. The participative democracy is not consumed completely nor can it be mistaken with the direct democracy, as it often occurs in many studies, about democracy, advocating its perfection[51].

The political participation, as a democratic routine or as part of democracy as a way of life, can only occur in a local level. Thus, political participation or participative democracy is intimately related to localism and political decentralization, which are the ones that can efficiently limit power, which is consubstantial to democracy. For that reason, there can not be and have never been decentralized authoritarisms which had been able to effectively allow the political participation; on the contrary, the political centralization of power is the essence of authoritarisms and opposing to democracy.

That is to say, political centralization impedes participation, reason for which the later can only be possible in government systems where power is politically decentralized and close to the citizen; and there is no other instance in the States for the citizen to participate, that is not the local government; the rest is falsehood and deceit, or direct democracy mechanisms which, we insist, are something else. This is why the political decentralization issue, precisely, is not as noticeable in European countries with developed and consolidated democracies, where participation is a daily thing, in the little aspects that can be dealt with in those small urban and rural municipalities.

So that, without fear of being wrong, we can affirm that not only without political or territorial decentralization, that is, without the existence of a multiplicity of local and regional local powers, politically

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[51] See for instance, in Venezuela, the set of studies published in *Participación Ciudadana y Democracia*. Presidential Commission for the Reform of the State. Caracas 1998.

autonomous there can not be political participation but, definitely, there can not be a participative democracy. Political decentralization is, then, the basis for participative democracy and at the same time, the force of the control of power. Centralism, on the other hand, is the basis of political exclusion by concentrating power on those few elected and, at the same time, the motive for discrediting the representative democracy regarding how many direct or countersigning democracy additives are implanted to it[52].

This is why only authoritarisms fear and reject both the political decentralization and the democratic participation, and that is what has been taking place in Venezuela with the scam of the "participative democracy".

3. The reaction against the Federation as a form of decentralized State

The idea of the "participative and protagonic democracy" that has been sold by the Venezuelan authoritarian government, before

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[52] For this reason, during a conference we gave at the XXV Congreso de la Organización iberoamericana de Municipios, in Guadalajara, Jalisco, Mexico in 2001, we said that: "the contemporary debate in our countries, regarding democracy, has to be focused in the rescue of the political decentralization process. To perfect democracy demands making it more participative and more representative; for this, the only possible way is by bringing Power closer to the citizen, and that can only be achieved by territorially decentralizing the Power of State and to take it even to the smallest of communities; that is to say, distributing Power along the national territory". I also added that, "whichever is the political decentralization way taken; it is about projects and proposals radically compared to the centralism of State and the concentration of Power, which are essentially antidemocratic". Finally, the political proposal that we presented then, and that now we insist on emphasizing, "seeks the design in our countries, of a new political system demanded by democracy, and that can only have the objective of making it more participative, with the great presence of the civil society, and more representative of the communities. This means to spread power along the territory, to the last community, so the citizen and its intermediate societies can really participate". See the conference on "El Municipio, la descentralización política y la democracia" in *XXV Congreso Iberoamericano de Municipios, Guadalajara, Jalisco, Mexico, October 23-26, 2001*, Fundación Española de Municipios y Provincias. Madrid 2003; pgs 453 and ss.

being an instrument for the political decentralization, has served to dismantle what little was left of it, and finally, to finish with the still deficient representative democracy that we have left, disabling, at the same time, the actual political participation.

In Venezuela, the great political transformation that should have taken place during the constituent process of 1999, to perfect democracy[53], which must have been its key motivation, should consist of the effective substitution of the state form of the Centralized Federation, developed during the last Century, for an effectively decentralized Federation in two territorial levels, that of States and multiple autonomous Municipalities.

However, in spite of the efforts made, the reform did not go beyond nominalism, the words and declarations. That way, the Preamble as well as article 4 of the Constitution, declare the untrue, that "The Bolivarian republic of Venezuela is a decentralized federal State", but adding the normative, of course, that the later is true only "in the terms consecrated by this Constitution"; formula more or less similar to that of article 2 of the Constitution of 1961 which, however, modestly limited itself to declare that "The Republic of Venezuela is a federal State", which was also not true in political terms of vertical distribution of power[54]. To the Constitution of 1999, it has now been

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[53] See our proposal during the discussion of the Proyecto de Constitución in Allan R. Brewer-Carías, "Propuesta sobre la forma federal del Estado en la nueva Constitución: Nuevo Federalismo y Nuevo Municipalismo" in *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*,Volume I, (August 8-September 8); Caracas 1999; pgs 150 to 170; and "El reforzamiento de la forma federal del Estado Venezolano en la Nueva Constitución: Nuevo Federalismo y Nuevo Municipalismo"; Report presented at The International Conference on Federalism in an Era of Globalization, Québec, Canada, October 1999 (mimeographed). 13 pgs.

[54] See Allan R. Brewer-Carías, "Los problemas de la federación centralizada en Venezuela" in Revista *Ius et Praxis*, Facultad de Derecho y Ciencias Políticas, Universidad de Lima, N° 12, Peru, December 1988; pgs. 49-96; and "Problemas de la Federación centralizada (A propósito de la elección directa de Gobernadores)", in *IV Congreso Iberoamericano de Derecho Constitucional*, Universidad Nacional Autónoma de México; Mexico 1992; pgs. 85-131.

added that the Federation is supposedly "decentralized" which is, however, opposed by the actual text of the Constitution in which articles the power of the State is even more centralized[55].

In any case, "the terms consecrated by the Constitution" are the key to effectively determine the degree of political decentralization of the State and therefore, of the Federation; and the comparison between each of the "terms" reveals a greater centralism in the text of 1999.

Except for the nominalism, in the Constitution of 1999, in fact and as it has been said before, there was no much progress regarding what was contained in the text of 1961, in spite of the partial contitutionalization of aspects already established in the legislative reforms of 1989 (Organic Law of Decentralization, Delimitation and Transfer of Competencies of the Public Power). But there were not the progress and transformations needed to make the decentralization of the Federation a reality. Rather there was an institutional retrocession in the matter, when the Senate was eliminated, and with that, the beginning of the institutional equality of the States, establishing, for the first time in the constitutional history of Venezuela, a unicameral National Assembly (Article 186). Also, it was allowed the possibility to establish limitations to the autonomy of the States (Article 162) and even of the Municipalities (Article 168) by means of national law, which is configured as a negation, at first, of the idea itself of political decentralization, which on the other hand has to be based in the concept of the territorial autonomy assured by the Constitution. It was also established, a precarious ambit of the state competencies whose

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55 See Allan R. Brewer-Carias, *Federalismo y Municipalismo en la Constitución de 1999 (Alcance de una reforma insuficiente y regresiva)*, Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Público, N° 7, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas-San Cristóbal 2001, pg. 187. See also, Allan R. Brewer-Carías, "El 'Estado Federal descentralizado' y la centralización de la Federación en Venezuela. Situación y Perspectiva de una contradicción constitucional», in *Revista de Estudios de la Administración Local (REAL)*, 292-293, May-December 2003, Madrid 2003, pgs. 11-43.

exercise, additionally, was subjected to what was regulated in the national legislation; and a tributary centralization that places the States in a more accentuated financial dependency.

The declaration about "decentralized federal State" incorporated in the Constitution of 1999 to identify the form if the State, thus, did not mean an actual improvement, it was a retrocession instead, due to the aggravation of the principles of the Centralized Federation consolidated during the 19th Century.

But even all of that has been directly threatened to disappear, in honor of the organization of the Popular Power that, apparently instead of the States of the federation, will create regions and a system of "federal cities", governed by bodies integrated by apparent representatives of the communal councils, not elected by means of the universal, direct and secret vote, but appointed arbitrarily by dint of "participation". That way, Governors and representatives members of state Legislative Councils, elected until now, by means of the universal, direct and secret vote as well, are meant to disappear, drowned also by the centralizing scheme of the Communal councils of the Popular Power.

4. The reaction against Municipalism and its substitution for a centralized Popular or Communal Power

Regarding the municipal power, the great democratic reform required in the country was, essentially, to bring the autonomous local institutions closer to the citizen, municipalizing the territory; it was necessary to multiply the Municipalities instead of reducing them. None of this was done, and instead, in part, the Organic Law for the Municipal Public Power of 2005[56] prevented it, by establishing major

[56] See *Official Gazette* N° 38,204, dated June 8, 2005. the Organic Law was subject of a reform in November, 2005; *Official Gazette* N° 38,327, dated December 2, 2005; and then in April, 2006, *Official Gazette* N° 5,806 Extra, dated April 10, 2006, reprinted by material error in *Official Gazette* N° 38,421; dated April 21, 2006. See Allan R. Brewer-

limitations for the creation of autonomous local political entities; and on the other hand, instead of multiplying the Municipalities, what has been created are the communal councils to eliminate them (Law of Communal councils), when what should have happened was the reform of the Organic law in order to establish municipal entities as autonomous political units close to the communities and to establish the possibility of the participation in said (decentralized) autonomous political entities.

But as it has been said, the latter did not occurred like that, and on the contrary, based on elements of the direct democracy established in the Constitution, like "citizen's assemblies whose decisions are of binding character" (article 70), in its place, in 2006 the Law on Communal councils[57] was dictated, establishing a *centralized* institutional system, parallel to the municipal regime, in order to replace it, and for the hypothetical popular participation, identified "of the Popular Power", ignoring the proper existence of the municipal regime; and formally initiating the elimination process of the municipality as an instance of participative democracy. The later was announced by the President of the Republic in January of 2007, when the Ministers of his new cabinet of Ministries of the Popular Power were being sworn in, announcing "the revolutionary explosion of the communal power, the communal councils" stating that:

> "now we must extend the local matters, and must begin to create by law, in the first place, some sort of **regional, local and national Confederation of Communal Councils**. We have to march **towards the conformation of a communal state** and the old middle-class state that still lives, that is alive and kicking, we have to continue **to dismantle it progressively while we raise the communal state, the socialist state, the Bolivarian state**".[58]

Carías et al, Ley Orgánica del Poder Publico Municipal, Editorial Jurídica Venezolana, Caracas 2005.

[57] See in Extraordinary *Oficial Gazette* N° 5,806; dated April 10, 2006.

[58] Speech of Hugo Chavez, 01-08-2007.

Two days later, he added during his swearing in act for the new constitutional term, that the objective was "to transit towards the road of a communal city, where no mayor's office or municipal boards are needed, only the communal power".[59]

However, the great difference is that in democracy, mayors and communal councils are elected by popular vote, and instead, in the scheme of the communal power, the members of the communal councils are appointed directly by the President of the Republic or by agents of the Single Party, by means of duly controlled citizen's assemblies.

In this centralized system, Communal Councils do not have and will not have any political autonomy, because its members are not elected, as representatives of the people, by the universal, direct and secret vote; the "community" is conceived outside the municipality when, according to the Constitution, it should be the primary political unit in the national organization; and in the apparent "constitutional frame of the participative and protagonic democracy", there has also been the intention to regulate the Communal Councils as "instances for participation, articulation and integration between the different community organizations, social groups and the people", but without any autonomy or political decentralization at all. That is, as mentioned, with this non autonomous parallel structure, what has been initiated is the dismantling of representative democracy in the country.

The 2006 Law of Communal Councils, as it has been said, has established said entities without any type of relation to the Municipalities nor, then, with the democratic representation, establishing a pyramidal organization of regional and national Presidential Commissions directly governed by the President of the Republic, who controls the designation of funds. And all of that, organized in a centralized way to allegedly allow "the organized

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[59] Speech of Hugo Chavez, El Nacional 01-11-2007; pg. A2

people to directly exercise the management of public politics and projects addressed to respond to the needs and aspirations of the communities in the construction of a society of equality and social justice" (article 2). But this, as mentioned, concerns an organization conceived under a centralized hierarchic schema (without any political autonomy), completely dependent of a "Presidential Commission for the Popular Power", presided and run by the President of the Republic, with financial resources surpassing those corresponding to the Municipal Power, and that function in parallel and separated from autonomous Municipalities and their elected authorities. The Citizen's Assemblies were located in said Communal Councils as the primary instance for the exercise of power, participation and popular protagonism, whose decisions are of binding character for the respective communal council (article 4.5).

In reality, with this Law of Communal Councils, what was also initiated was the unconstitutional demunicipalization of the people's participation, replacing the Municipality, as a primary and autonomous political unit in the national organization established by the Constitution and that must be included in a political decentralization system of power (vertical distribution); by a system of entities without any political autonomy, denominated Popular Power (Communal Councils), directly linked and dependent, of a centralized schema of power, of the highest level of the National Executive Power, the President of the Republic thru a Presidential Commission of the Popular Power. Thus, Mayors and councilmen members of the Municipal Councils, elected –until now- by means of the universal, direct and secret vote, are called to disappear drowned by the centralizing schema of the Communal Councils of the Popular Power.

And within this centralist schema of the organization of the exercise of the central power, the communicating vessel that will supposedly assure participation, seems to be not other than the also announced Single Party that the Head of State would preside himself, imbricated in the state bureaucracy as it has never been seen in

Venezuela, and that as a government political system has been demolished in the world with the fall of the Berlin Wall.

VII. THE FORESEEABLE END OF THE AUTHORITARIAN PROCESS: THE "DICTATORSHIP OF DEMOCRACY" FOR THE DISMANTLING OF THE REPRESENTATIVE DEMOCRACY

In order for a democratic Rule of law to exist, the declarations contained in constitutional texts that speak of "participative and protagonic democracy" or of the decentralization of the State, are not enough; neither is enough to establish an elective system that allows the election of popular representatives, by means of the vote. Besides, of course, this system has to effectively assure representativity, political pluralism and power access according to the postulates of the Rule of law.

But also, in order for a true democratic Rule of law to exist, its is necessary and indispensable that the constitutional frame in which it is intended to function, effectively permits the proper control of power by power itself, even by the supreme power of the people. This is the only way to assure the force of the Rule of law, the democracy and the true exercise of human rights.

And the control of the State Power in a democratic Rule of law can only be achieved by dividing, separating and distributing Public Power, either horizontally by means of the guarantee of the autonomy and independence of the different powers of the State, to avoid the concentration of power; vertically, by means of its distribution or spreading in the State's territory, creating autonomous political entities with representatives elected by votes, to avoid its centralization. The concentrations of power, as well as its centralization, then, are essentially antidemocratic state structures.

It is precisely there where the problems of the declared Rule of Law and the alleged democracy in Venezuela -whose deformation lays

in the proper constitutional text of 1999-, rest; in which, unfortunately, was established the institutional schema, encouraging authoritarism and eliminating every form of power control; and which has also permitted the centralization of power, initiating the dismantling process of federalism and municipalism, reinforcing authoritarism itself twisting the possibility of the effective political participation in spite of the direct democracy mechanisms recollected. It is a constitutional example of the constitutional authoritarism with electoral origin, which, however, constitutes the negation of what a democratic Rule of law must be.

As it has been said, based over this constitutional authoritarism, in January 2007, and in occasion of the beginning of his second constitutional term, the President of the Republic has began to expose the steps needed for the definite dismantling of democracy in Venezuela, by means of the organization system of a Single Power, denominated Popular Power or Communal Power (communal state or socialist state), totally concentrated and centralized, and politically conducted by a Single Party. And both, the Popular Power and the Single Party, in order to instate "the dictatorship of democracy", lead by a single person, who will be the President of the Popular Power and the Single Party.

For this, of course, a general reform of the Constitution will be previously needed, which was also announced in January, 2007. however, previously, in fraud o the Constitution itself, during the same month of January 2007, an Enabling Law was dictated, authorizing the President to, precisely, dictate laws contrary to the Constitution "to update and **transform the legal system that regulates State institutions**" and to establish "the **mechanisms of popular participation**, by means of the social control, the social technical inspection and the practice of the voluntary enlistment of the organized community in the application of the judicial system and the economical scope of the State; also, to **adapt the organization structure of the State institutions, to permit the direct exercise of the popular**

supremacy". However, these "constitutional" laws, as it has been said, would be issued after the reform of the Constitution.[60] That is to say, during another depurated constitutional fraud, according to a Constitution that does not authorize the legislative delegation to reform the Constitution, an enabling Law is dictated with said authorization used only if during the period of force of said Law the Constitution is previously reformed.

The general lines of those reforms for the organization of the Popular Power supposedly built over the direct exercise of the supremacy by the people, are based in the elimination of democracy as a plural and representative political regime, that can allow the election by means of the universal, direct and secret ballot, of the holders of the public powers distributed in the territory (Mayors and councilmen in the Municipalities, Governors and Legislators in the States, representatives to the National Assembly and the President of the Republic).

The schema, just as it has been announce, would aim for the substitution of the direct representative democracy for an alleged indirect participative democracy, in which there would be no popular election of any kind. Its function would be based in the "neighbor assemblies" and the "communal councils" whose members would not be elected by means of the universal, direct and secret ballot, but chosen in the community, of course, with the ideological conduction of

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[60] As it was written on the newspaper on January 31, 2007-02-04: "The 18 month length period of force of he enabling Law, has the object of allowing Hugo Chavez, President of the Republic, to wait for the reform of the Constitution to be approved in order to write the norms that will base the socialist model of State he wants to instate". According to the opinions of members of parliament, during the first months the law decrees written by the Executive will be adapted to the 1999 Magna Charta, and in some of them, the omissions of the Legislative Power will be filled… After the popular consult for the approval of the reforms of the Constitution, several representatives have expressed that it could happen in September, the president would have time enough to adapt the legislation to the political model he proposes. Thus, representatives assume that every legal instrument related to the State system will be announced by the end of 2007 or the beginning of 2008". El Nacional, Caracas 01-31-2007; pg A2.

the Single Party, which would be the only one with access to the State power organizations in all their levels.

The communal councils would appoint their representatives in the regional communal councils or those of the federal cities ("regional and local confederation of communal councils"); and the later, would be who appoint their representatives in the National Assembly for the Popular Power ("national confederation of communal councils"), which will eventually replace the current National Assembly. This way, every trace of direct, universal and secret election of representatives to state and national legislative organs, as well as governors, would disappear. And finally, the National Assembly for the Popular Power, formed as such, would then appoint a national Council (of government) for the Popular Power which, of course, would unavoidable be presided by the same person who would also be the President of the Single Party.

All of these reforms that implicate the elimination of the representative democracy in the country, have began to be implemented during 2006, with the sanction of the Law of Communal Councils (Popular Power), as parallel structure established regarding the municipal organization, in an evident fraud to the Constitution, in order to definitely replace Municipalities as primary units. The difference with these is precisely, that in them, Mayors and municipal Councilmen are elected, and the Municipalities are politically autonomous; and in stead, the members of the Communal Councils are not elected, but appointed arbitrarily by alleged "citizen assemblies" controlled from the pinnacle of the Executive Power, from which they depend, and have no political autonomy.

Once the base structure of the Popular Power was built (announced in the Law of Communal Councils), and provided of enormous resources that are not given to Municipalities, managed by a Presidential Commission, the following step would be the elimination of Municipalities, as it has been announced as well, and,

simultaneously, the elimination of the States and every trace of direct election and political decentralization, and therefore the possibility of political participation. As said, what has been announced is definitely the elimination of all, municipal and regional, representative and elected bodies.[61] On a state level, due to the announcement, what would exist are certain "federal cities" or regional confederations of communal councils, whose leaders, again, would be people appointed also arbitrarily by the Communal Councils controlled by the Presidential Commission of the Popular Power.

And at any moment, as said before, there could be a proposal to eliminate even the National Assembly as national representative organ, and to establish a National Assembly of the Popular Power (national confederation of communal councils) in its place, which would be the summit of the Popular Power, formed by representatives appointed by the federal cities and Communal Council groups; all of these, of course, duly controlled, from the summit, by the mechanism of the Single Party. Everything is announced.

Lastly, it must be mentioned, that the President of the Republic, in the constitutional reforms he has announced and promised since 2006, there is the incorporation of the possibility of the indefinite presidential reelection in the Constitution. That reelection, of course, would not be built over a direct, universal and secret election system, but that it would be about an appointment made by the national confederation of the Popular Power which would be the National Assembly of the Popular Power. That is, in the summit of the Popular Power the same person who controls it would act as the President of the Popular Power, but not because he was elected repeated and unlimitedly in a direct way by the people by means of universal, direct and secret ballot, but because he would always be appointed as such by the Popular Power structures whose will finally converge in the

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[61] See the article on the declarations of the President of the Republic: "Chavez: Let's begin to eliminate mayors and governors". El Nacional, 01-29-2007; pg. A2

national Assembly of the Popular Power to preside both, the government Council of the Popular Power and the Single Party.

In order to initiate the formation of this state organization schema, in January 2007, the President of the Republic has began to change the name and sense of the organization structure of the Public Administration, renaming all the Ministries and Ministers of the national Executive as "of the Popular Power" (e.g.: Ministry of Foreign Affairs of the Popular Power, Ministry of Infrastructure of the Popular Power, etc.).

The truth is that in general, this was the system established to assure the dictatorship of the proletariat by the Soviets in the Soviet Union since 1918, and the schema of the popular power established in Cuba, where the Popular Assembly is who appoints a State or government Council, which at the same time, always elects the same person to preside it.

In conclusion, it is about a State and Power organization schema that implies the complete elimination of the representative democracy, and its replacement by an alleged direct democracy; that is to say, the direct exercise of supremacy by the people, and the indirect election of representatives including the leadership of the State.

New York, February 2007.