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General Introduction

CHAPTER 1. AN OUTLINE OF VENEZUELAN CONSTITUTIONAL HISTORY

1. The Venezuela State, located in the northern territories of South America, was created in 1811 after a General Congress of the representatives of the "United Provinces of *Caracas, Cumaná, Barinas, Margarita, Barcelona, Mérida y Trujillo*" on July 5, 1811 solemnly proclaimed the "Declaration of the Independence", establishing the "American Confederation of Venezuela in the Meridian Continent." The work of the Congress,[1] after almost one year, resulted in the sanctioning on December 21, 1812 of the "Federal Constitution for the United States of Venezuela."[2] Venezuela was, thus, the first country in modern constitutionalism to adopt the federal form of State following the principles adopted a few decades before in the United States of America.

2. These initial constituent decisions were the immediate outcome of the political rebellion initiated the previous year on April 19th 1810 in the Province of Caracas (created in 1528),[3] against the authority of the Spanish Crown. Among the facts that ignited such rebellion was the extreme political instability affecting the Spanish government since 1808, due to the absence of Ferdinand VII from Spain, who with his father, the former Carlos IV, was held captive in France by Emperor Napoleon Bonaparte; as well as to the invasion of the Peninsula by the French Army, and the appointment of Joseph Bonaparte as King of Spain by the Emperor after enacting a new Constitution for the Realm, in Bayonne. This situation and the war of independence that spread all over the Spanish Peninsula, originated a *de facto* political situation affecting the government of the Monarchy, provoking the creation of provisional provincial governments (*Juntas*) spontaneously established during the war. The Central board (*Junta Suprema*) of these provisional local governments by 1810 was forced to be concentrated in the Island of Cádiz, in the extreme south of Andalucía, and there it appointed a Regency board to govern the Realm in the absence of the Monarch, convening the elections for the *Cortes* (Parliament) in order to draft a new Constitution, which is known as the 1812 Cádiz Constitution.

This situation, and the fear to be subjected to France, originated the political rebellion in the Colonies, in particular in the Municipality of Caracas, whose councilmen

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1 See Ramón Díaz Sánchez (Editor), *Libro de Actas del Supremo Congreso de Venezuela 1811–1812,* Academia Nacional de la Historia, Caracas, 1959.

2 See Caraccciolo Parra Pérez (Editor), *La Constitución Federal de Venezuela de 1811 y Documentos afines,* Academia Nacional de la Historia ,Caracas, 1959.

3 See the relevant documents in *El 19 de Abril de 1810,* Instituto Panamericano de Geografía e Historia, Caracas, 1957.

decided to ignore the Spanish colonial authorities, and to establish in substitution of the colonial Governor and the Provincial Council (*Ayuntamiento*), a *Junta Suprema de Venezuela Conservadora de los Derechos de Fernando VII*, following the same pattern of the *Juntas* that were established in almost all the provinces of Spain during the war of independence. The example given by the Province of Caracas was immediately followed by almost all the Provinces that since 1777 were integrated for military purposes in the General Captaincy of Venezuela. These Provinces were *Cumaná* (created in 1568), *Barinas* (created in 1786), *Margarita* (created in 1525), *Barcelona* (created in 1810), *Mérida* (created in 1676) and *Trujillo* (created in 1810). All of them during 1810 and 1811 declared their independence and adopted their own provincial constitutions.[4]

The December 21, 1811 Federal Constitution, adopted by the elected representatives of these Provinces in General Congress, left opened the possibility for the other Provinces which, although having been part of the General Captaincy of Venezuela, had not participated in the independence movement, as was the case of the provinces of *Maracaibo* (created in 1676) and the city of Coro, and of *Guayana* (created in 1568), to seek their future incorporation in the new State (Article 128).

3. By the time in which this independent and constituent process began in Venezuela, the political and constitutional effects of the American (1776) and French (1789) Revolutions had begun to spread to many of the Hispanic American Colonies, directly influencing the drafting of the 1811 Constitution.[5] Consequently, modern constitutionalism principles were adopted in Venezuela before the sanctioning of the March 1812 Cádiz Constitution of the Spanish Monarchy.[6] Nonetheless, this Constitution, although not having had influence in the initial constitution making process of Venezuela, had important influence in other constitution making processes held after 1820 in other former Spanish colonies of Latin America and in Italy and Portugal.[7]

Consequently, it can be said that Venezuela was the first country in constitutional history that after the American and French Revolutions sanctioned a modern constitution, based on the principles of constitutional supremacy, sovereignty of the people, political representation and republicanism, with an extended declaration of fundamental rights of Man and Society that organized the State according to the principle of separation of power with a system of checks and balances, and the superiority of the law as expression of the general will; with a presidential system of government

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4 See Ángel F. Brice (Editor), *Las Constituciones Provinciales*, Academia Nacional de la Historia, Caracas, 1959.

5 See Pedro Grases (Compilador), *El pensamiento político de la Emancipación Venezolana*, Ediciones Congreso de la República, Caracas 1988; Tulio Chiossone, *Formación Jurídica de Venezuela en la Colonia y la República*, Universidad Central de Venezuela, Caracas, 1980.

6 See Allan R. Brewer-Carías, "El paralelismo entre el constitucionalismo venezolano y el constitucionalismo de Cádiz (o de cómo el de Cádiz no influyó en el venezolano)," in *Libro Homenaje a Tomás Polanco Alcántara*, Estudios de Derecho Público, Universidad Central de Venezuela, Caracas 2005, pp. 101-189.

7 See Allan R. Brewer-Carías, *Reflexiones sobre la Revolución Norteamericana (1776), la Revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno*, Universidad Externado de Colombia, Bogotá 2008, pp. 204 ff.

and elected representatives to the senate and the representatives chamber (*diputados*); with a federal form of government, according to which the former colonial Provinces became federated sovereign states, within which the Constitution set forth the establishment of a local government system; and a Judicial Power integrated by judges imparting justice in the name of the nation with judicial review powers.

4. Since the 1811 Constitution, and during the last two hundred years, the Venezuelan independent state has been subjected to twenty-six Constitutions sanctioned successively in 1811, 1819, 1821, 1830, 1857, 1858, 1864, 1874, 1881, 1891, 1893, 1901, 1904, 1909, 1914, 1922, 1925, 1928, 1929, 1931, 1936, 1945, 1947, 1953, 1961 and 1999. This excessive number of "constitutions" was the product of the absence of the "amendment" constitutional revision technique, so in their great majority they were mere partial and punctual reforms generally provoked by circumstantial political factors. That is, this number of constitutions does not correspond to similar number of fundamental political pacts originating new political regimes and forms of constitutional government. The fact has been, on the contrary, that in Venezuelan history, between 1811 and 2009 *four* great constitutional periods and political changes can be distinguished, each one distinct in its political characteristic, form of government, leadership and programs. Each of these periods developed according to a new leadership that assumed the government, reached exhaustion after entering into decay and inexorably arrived to a final crisis. This, in each case, needed the work of more than a generation in order to build and establish a new political project in lieu of the previous institutional collapsed framework. Since 1999, a *fifth* constitutional period is in the process of being conformed, after the approval of the current in force 1999 Constitution, a period that nonetheless, is still in the first phase of being shaped. The political crisis initiated in 1989, which provoked the collapse of the previous period, has not yet concluded.

§1. First Constitutional Period (1811-1864): The Independent, Autonomous, Semi-Decentralized State

5. The *first* of these great political constitutional periods in the history of the country is the one of the **Independent Semi-Decentralized State** established by the "Federal Constitution for the Venezuelan States" of December 21, 1811 that lasted up to 1864, which was dominated by the generation that fought for independence from Imperial Spain. The defining political project that characterized this historical period was the effort to create a brand new state on the former Spanish colonial territory,[8] organizing the government in a federal state with the former colonial Provinces integrated in 1777, for military purposes, in the General Captaincy of Venezuela. The territories of Venezuela, being very poor, had no other colonial integration and were under the general authority of two Viceroyalties (New Spain and Peru) and of two *Audiencias* (*Santo Domingo* and *Nueva Granada*) that were the most important in-

8 See Tomás Polanco, "Interpretación jurídica de la Independencia," in *El Movimiento Emancipador de Hispanoamérica, Actas y Ponencias,* Academia Nacional de la Historia, Caracas, 1961. See the relevant text in *Textos oficiales de la Primera República de Venezuela,* Academia Nacional de la Historia, Vol. I, Caracas 1959, p. 105.

struments of colonial government. Consequently, the Captaincy General created only thirty years before the Independence, was composed of highly autonomous and decentralized provincial entities developed under the Spanish Crown to govern these extremely isolated and poor provincial colonies. It was precisely because of the dispersion and autonomy of the government and the territorial organization of these former Provinces that a federal constitutional system was chosen in 1811 to create the Venezuelan state.

On the other hand, it must be borne in mind that by the time of the independence of Venezuela and the adoption of the federal form of government, the Republic had already been suppressed in France (1808), and no other form of government, different to the Monarchical regime against which the Revolution of independence was conducted, could inspire the framing of the new State except the new Republican Federal one that at that time had begun to be shaped in North America, allowing former colonies to gain independence within a new state. The "Confederation de Venezuela", was therefore based on a scheme taken from the experience of the United States in order to try to unify territories that had never before been united, except militarily during the previous thirty years through the Captaincy General. As aforementioned, in all other aspects, the Venezuelan provinces experienced no other form of integration, remaining isolated provinces, virtually without communication between one another.

6. This constitutional period developed between 1811 and 1864 through various stages marked by constitutional changes: first, with the Constitution of the primary process of constitution building of the State, the 1811 Constitution, that as aforementioned was preceded by Provincial Constitutions adopted by each Province between 1810 and 1811, configuring what was called the "First Republic"[9]; second, the constitution making process that developed since 1812 during the Independence wars against Spain, influenced by the ideas of Simón Bolívar, the Liberator and political and military leader of the country's struggle for independence;[10] third, with the 1819 Constitution, adopted after a prolonged seven years wars against an important expeditionary Spanish Army that was sent to crush the rebellion called the *Angostura* Constitution, drafted by Simón Bolívar himself;[11] fourth, with the Constitution of 1821, the first Constitution of the "Colombian" State to which the Venezuelan territories were incorporated following the proposals made by Simón Bolívar;[12] and fifth, with the 1830 Constitution that reestablished the Venezuelan State regarding the State of Colombia that the same year adopted its own Constitution. This 1830 Constitution

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9 See Caracciolo Parra Pérez, *Historia de la Primera República de Venezuela,* Academia Nacional de la Historia, Tomo I, Caracas 1959.

10 See Simón Bolívar, *Escritos Fundamentales*, Monte Ávila Editores, Caracas 1982; *Proclamas y Discursos del Libertador*, Caracas 1939; *Los Proyectos Constitucionales de Simón Bolívar, El Libertador 1813–1830,* Caracas 1999; Pedro Grases and Tomás Polanco (Editors), *Simón Bolívar y la Ordenación del Estado en 1813,* Caracas 1979.

11 See Pedro Grases (Edior), *El Libertador y la Constitución de Angostura de 1819*, Caracas 1970.

12 See See Allan R. Brewer-Carías, *Reflexiones sobre la Revolución Norteamericana (1776), la Revolución Francesa (1789) y la Revolución Hispanoamericana (1810-1830) y sus aportes al constitucionalismo moderno*, Universidad Externado de Colombia, Bogotá 2008, pp. 316 ff.

was the one with the longest period of continuous enforcement (1830-1857) with two reforms made to it in 1857 and in 1858, particularly because of the struggle between the central and provincial governments.[13]

7. The most distinguished trend of this first constitutional period was the configuration of a more or less decentralized State resulting from a "federative pact" entered by sovereign and independent provinces after having also approved their own provincial constitutions. During this first period, the dominant pattern of the government was the important local-federated power which was even designed against the ideas of Simón Bolívar, with the political power located at the Province-Cities level with a very weak central government. This feature, at the beginning of the institution building of the country, initiated its also long process of institutional disarticulation, mainly provoked by the regional *caudillos* that governed the country during all the XIX century. This pattern was only eliminated at the beginning of the XX century when the *Caudillista* federation was definitively buried.

8. Also in this period the bitter war fought since 1812 to consolidate the independence (1812 -1821), was not only a political one but a social one between the dominant Creole white population that had control over the local government and the economy, and the lower working classes including the former slaves instigated by the caudillos supporting the Royalist forces. After changing the patter of the war through extreme measures, gaining the control of the territory (*Decreto de Guerra a Muerte*), and having sanctioned the 1819 Constitution in Angostura, Simón Bolivar proposed the conformation of a great State integrating the territories of what today is Venezuela, Colombia, Panama and Ecuador. In this framework Venezuela disappeared as an independent State up to 1830, and was a Department of the so-called "Great Colombia."

9. The separation of Venezuela from that great State took place in 1830, in a secessionist process lead by José Antonio Páez, one of the distinguished military leaders of the independence, which coincided with the death of Bolívar. It was a reaction of the military *caudillos* of Venezuela against the centralized government of Bogotá, provoking the sanctioning of the 1830 Constitution of Venezuela, which was the result of a central-federal pact. The resulting "centralized federation" has been one of the main trends of the subsequent constitutional history of the country.

10. Thus, from the beginning of constitutionalism in 1811, in one way or another, the federal form of the State and the pendulum movement between centralization and decentralization have marked the entire political history of Venezuela, even in current times. With such form, the regional political *caudillismo* found its place in the Constitution, and even if in the years after 1819 the term "federal" disappeared from the constitutional texts, the same political trend of regional and local autonomy continued assuring the authority of the military *caudillos*. Thus, towards the end of the decade of the 1850's, the struggle between the central Power, which had itself been built by

13 See Eleonora Gabaldón, *La Constitución de 1830 (El debate parlamentario y la opinión de la prensa*), Instituto Biblioteca Nacional, Ed. Turnes, Caracas 1991.

the regional leaders, and regional Powers, provoked a rupture of the constitutional system culminating in the Federal Wars of 1858 to 1863, or *Guerras Federales*.[14]

11. The 1830 Constitution was reformed in 1857 in a constitutional making process that did not satisfy the regional political claims against the central government that had begun to take shape during the previous two decades. This provoked a *coup d'état*, the first in constitutional history, that led to the sanction in 1858 of a new Constitution by a Constituent Assembly with more federal elements than the previous one.[15] As has been the general pattern in Venezuelan history, these reforms were a prelude to the collapse of the constitutional order.

After these constitutional reforms of 1857 and 1858, in the midst of war, it appeared that there was no other solution to the political crisis than to bring out one of the leaders of the independence war who had been present and active in the political life of the country since Independence, and had completely dominated it after Bolívar. This was José Antonio Páez who was called in as the "savior" of the country. Although invested with dictatorial powers, the reality is that he did not last as President more than a few months. The first political period of Venezuelan constitutional history definitively concluded with the Federal Wars, which like the independence war, were also wars of social character, which left profound consequences in the political history of the country. From the political point of view it resulted in the triumph of regional and local powers regarding central government, being the federation the political form used to reaffirm the power of the regional *caudillos* and the politico-federal disintegration of the Republic. And from the social point of view, the wars gave rise to a second social revolution, in continuation of the one that took place with the war of independence, but still more anarchic that the latter, even provoking the physical disappearance of the land owner class, under popular resentment, but giving rise to social equalitarianism that was later reaffirmed by the *mestizaje*.

§2. SECOND CONSTTUTIONAL PERIOD (1864-1901: THE FEDERAL STATE AND THE UNITED STATES OF VENEZUELA

12. With the end of the independent semi-decentralized state government period, in the aftermath of the federal wars a new political cycle began with a new form of government, a new leadership, and a new political program, giving rise to the period of the **Federal State** (1864-1901). The change was a radical one, although a few years earlier the new leaders of the *Federación* were only hardly recognized as local leaders, with no national projections. Moreover, Antonio Guzmán Blanco himself, who dominated this period but was not seen at that time as the leader, called to command the second great constitutional historical period as he effectively did, defining the cast of national politics from 1863 up to the beginning of the twentieth century.[16]

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14 See José S. Rodríguez, *Contribución al Estudio de la Guerra Federal en Venezuela*, 2 Vols., Caracas 1960; Emilio Navarro, *La Revolución Federal, 1859 a 1863*, Caracas, 1963.

15 See Eleonora Gabaldón, *La Convención de Valencia (la idea federal), 1858*, Caracas 1988.

16 See Germán Carrera Damas, *Formulación definitiva del Proyecto Nacional: 1870–1900*, Cuadernos Lagoven, Caracas 1988.

In 1863 the remains of the prior state system had vanished and the new order was being built formally covered with the form of a federal state based on an extreme system of territorial distribution of public power, based on autonomous federal entities or states with their own governments elected by universal and direct suffrage, and confined the "National Power" to a Federal District, a neutral territory that was "temporarily" placed in Caracas.

13. The Constitution of April 14, 1864 established the "United States of Venezuela", "reuniting" twenty provinces that declared themselves "independent", recognizing reciprocally their "autonomy", and adopting the denomination of "States."[17] Antonio Guzmán Blanco was elected President of the Republic, acting as *primus inter pares* regarding the regional *caudillos* in a political system initially controlled by the latter. In the first years of his tenure, among other governing institutions, Guzmán Blanco made use of "Conferences of Plenipotentiaries" which were nothing more than formal meetings of the regional *caudillos* in Caracas to resolve common political problems of a national scope. He also tried to define a "bolivarian doctrine" in order to attain, through the cult of Bolivar some sort of political unity to his regime (*See Infra 17, 35, 43, 201, 276, 470*). The country continued to be very poor, with a large public debt, and increasingly subjected to the new autocracy installed in the Central Power led by Guzmán Blanco, named the "Great Civilizator."[18] He established the complete separation between the Catholic Church and the State regarding public affairs (*See Infra 70 ff.*) After twice reforming the Constitution, in 1874 and in 1881, the latter called the "Swiss Constitution" because the creation of a "Federal Council, mainly tending to accommodate it to his way of exercising power, he converted many of the traditional states (former Provinces) into "Sections" of larger new states with aggregated territories, one of them called "Great Guzman Blanco State." In 1881 he retired to France, progressively contributing to the deterioration and weakening of his own authority.

14. The last decade of the nineteenth century was also marked by constitutional reforms in 1891 and 1893, initiating a frequent historical constitutional change recurrence of seeking to extend the tenure of the President of the Republic. However, the political crisis derived from the interminable struggles between the Central Power and the regional *caudillos* could not be stemmed by just constitutional reforms, particularly because of the general degradation of the political system, which eventually provoked its collapse.

This period came to an end with the *Revolución Liberal Restauradora* (October 23, 1899) lead by Cirpiano Castro, one of the Andean *caudillos*,[19] originated in defense of the sovereignty of states and as a reaction against the decision of the Congress to give the National Executive the power to provisionally appoint its governors, once the traditional territories of the traditional States were restored.

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17 SeeJ. Gabaldón Márquez (Editor.), *Documentos Políticos y Actos Ejecutivos y Legislativos de la Revolución Federal*, Caracas, 1959.

18 See R. A. Rondón Márquez, Guzmán Blanco. *El Autócrata Civilizador o Parábola de los Partidos Políticos Tradicionales en la Historia de Venezuela*, 2 Vols., Caracas, 1944.

19 See Domingo A. Rangel, *Los Andinos en el Poder*, Caracas, 1964.

§3. THIRD CONSTITUTIONAL PERIOD (1901-1945): THE CENTRALIZED AUTOCRATIC STATE

15. This Liberal Restoration Revolution of 1899, launched in defense of federalism, ironically consolidated Cipriano Castro into power as President of the Republic, by means of the approval of a new Constitution in 1901 which reversed all of the remaining general trends of a federal state.[20] During his tenure he resisted the attempts of European Navies (Great Britain, Germany and Italy) to blockade the Venezuelan coast seeking payment of debts by the country (*See Infra 65, 268*). His Vice President, Juan Vicente Gómez, was his revolutionary companion, who at the beginning of the twentieth century led the last war against the remaining regional *caudillos*, consolidating the hegemonic presence of the Andean rulers in the central national government. He concluded with the traditional nineteen century Liberal and Conservative political parties and with the basis of the federal form of the State. Gómez also initiated the process of political integration of the country after forming, for the first time in the country's history, a National Army substituting the former traditional States' militias, and got rid of Castro, using for such purpose a ruling of the Federal and Cassation Court accusing Castro of criminal offenses.[21] He controlled State and military power from 1908 up to his death in 1935, consolidating the new political period of the **Centralized Autocratic State,** which finished in 1945.[22]

16. During this period the true integration among the regions of the nation began, and the Nation State was consolidated, a process which had occurred in many Latin American nations far earlier, towards the mid-nineteenth century. After the initial 1901 Constitution, various constitutional reforms took place in 1904, 1909, 1914 and 1922, ending this first part of the period with the 1925 Constitution, in which the Autocratic centralized state was consolidated, although without abandoning the federal framework. This latter Constitution was subsequently also reformed, due to Gómez political and military circumstantial motives, in 1928, 1929 and 1931, and after his death, in 1936 and 1945, without changing substantially the constitutional provisions regarding the progressive centralization of state powers at the national level in all its scopes: political, military, fiscal, administrative and legislative. In this task, the dictatorship of Gómez was decisive, inspired in the authoritarian idea of the "necessary guardian" (*Gendarme Necesario*),[23] fed with the new public income

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20 See Mariano Picón Salas, *Los días de Cipriano Castro*, Barquisimeto, Caracas 1955.

21 See R. J. Velásquez, *La caída del Liberalismo Amarillo. Tiempo y Drama de Antonio Paredes*, Caracas, 1973.

22 See Ramón J. Velásquez (Director), *El Pensamiento Político Venezolano en el Siglo XX* , 10 Vols., Caracas 1983; Ángel Ziemn, *El Gomecismo y la formación del Ejército Militar*, Caracas, 1979; Allan R. Brewer-Carías, "El desarrollo institucional del Estado Centralizado en Venezuela (1899-1935) y sus proyecciones contemporáneas," in *Revista de Estudios de la Vida Local y Autonómica*, Madrid, 1985, Nº 227, pp. 483-514; and Nº 228, pp. 695-726; and Naudy Suárez Figueroa (Editor), *Programas Políticos Venezolanos de la Primera Mitad del siglo XX*, Caracas, 1977.

23 See Laureano Vallenilla Lanz, *Cesarismo Democrático. Estudios sobre las bases sociológicas de la Constitución efectiva de Venezuela* Caracas 1952; *El sentido americano de la democracia. Cesarismo democrático y otros textos*, Biblioteca Ayacucho, Caracas 1991.

wealth that precisely began to pour into the public coffers due to the beginning of the oil exploitation in the country, through concessions given to foreign companies.

17. After the death of Gómez, with a constitutional reform sanctioned by Congress in 1936, his Defense Minister, Eleazar López Contreras, succeeded him in the Presidency of the Republic, and a gradual process of transition from autocracy to democracy began, which was continued within the Presidency of Isaías Medina Angarita, also Lopez's Minister of Defense. López Contreras was the other political ruler in the country's history that profited from the "Bolivarian" doctrine in order to give some basis to his policies (*See Supra 13; Infra 35, 43, 201, 276, 470).*

This period witnessed the birth of workers' and mass movements, and of political organizations that initiated the contemporary political parties which had originated in the student movements of 1928.[24] Nonetheless, after finishing centralizing power and progressively finishing with the federal vestiges, except for the use the term, eventually the Andean political leadership did not fully understood the changes that had been taking place in the Venezuelan society, and also in the world as a consequence of the World Wars, particularly regarding the general democratizing tendencies. In this regard, for instance, the two successors of Juan Vicente Gómez failed to understand that in 1945 and after the Second World War, direct elections, and secret and universal suffrage were essential elements in the consolidation of the democracy that was beginning to be born.

The Constitution was finally reformed in 1945, but despite the clamor of new political actors, who were the products of nascent syndicalism and the democratic opening, direct elections and universal suffrage were not established. Instead, the Constitution sanctioned only a limited form of "universal" suffrage in which women were excluded from all national elections and restricted to municipal voting, and the indirect system for the election of the National President was left unchanged. Such a timid democratic opening was not sufficient, so despite the extremely important legal reforms promoted by Medina to organize the mining and petroleum industries and ensure that the oil concessions were really taxed, and despite the fact that Venezuela was a country more open to the world on the eve of the wave of contemporary democratization that followed the Second World War, the *Medenista* leadership still failed to see the significance of the need for a direct and universal presidential election for the succession of Medina Angarita. Unfortunately, here again, as in so many instances in history, the incomprehension of the historical juncture blinded the leadership, which was lost in trying to impose succession by an Andean candidate through the three-tiered system of indirect Congressional elections, while being overshadowed by López Contreras who threatened them with his own candidacy.

18. In the 1945 constitutional reform the key components of the regime remained untouched, with the result that the constitutional text together with the remaining of the authoritarian political system initiated at the beginning of the twentieth century, lasted only a few more months until the October Revolution of 1945. This was led by

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24 See Vicente Magallanes, *Los Partidos Políticos en la Evolución Histórica Venezolana*, Caracas, 1973.

the social democratic party, *Acción Democratica*, beginning the democratization process not only of the State, but of society; and sweeping away the autocratic regime with its leadership and the generation that undertook its political program at the beginning of the twentieth century. As it can be clearly deduced from the Constituent Act of the Revolutionary *Junta*, the principal constitutional idea motivating the Revolution, among its other causes, was the institution of secret, direct and universal suffrage.

§4. FOURTH CONSTITUTIONAL PERIOD (1945-1999): THE DEMOCRATIC CENTRALIZED STATE OF PARTIES

19. In 1945, and as a consequence of the democratic revolution that folowed, a new political period was opened, the one of the **Democratic Centralized State of Parties** that found its foundations in the Constitution of July 5, 1947, sanctioned by a Constituent Assembly. This Constitution laid the foundations of the democratic regime that lasted until 1999, based in two fundamental pillars: the democratic regime through political parties but based in a dominant party; and a centralized constitutional structure of the State. The Constitution was only in force for one year (1947-1948), when the system was broken by a military coup, which led to one decade of dictatorship conducted by General Marcos Pérez Jimenez (1948-1958), who promoted in 1953 the sanctioning of a new Constitution[25] that eliminated the denomination itself of the state as "United States of Venezuela."

20. After trying to be reelected in 1957, Pérez Jiménez was overthrown by a new democratic revolution that took place in 1958, restoring again the democratic system. That year the leaders of the political parties signed a political pact known as "*Pacto de Punto Fijo*",[26] which formed the basis for the restoration of democracy in the country. Unfortunately, a decade of military dictatorship had to be suffered in order for the political leadership to arrive at the conclusion that a pluralistic system of parties and political compromises and consensus was needed in order to establish democracy; and for Rómulo Betancourt, [27] who was the leader of the failed October 1945 Revolution, to admit and understand that democracy could not and cannot function on the basis of the hegemony of a single party excluding all other political groups. The *Pacto de Punto Fijo* of 1958 was the profoundly distilled product of the painful experience of militarism of the nineteen-fifties, and its focused objective was precisely to implant a democracy that would amply bear fruit in the following decades.[28]

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25 See Andrés Stambouli, *Crisis Política Venezuela 1945–1958*, Caracas, 1980; José Rodríguez Iturbe, *Crónica de la Década Militar*, Caracas, 1984.

26 See Juan Carlos Rey, "El sistema de partidos venezolano" in J.C. Rey, *Problemas socio políticos de América Latina*, Caracas 1980, pp. 255 a 338

27 See R. Betancourt, *La Revolución Democrática en Venezuela*, Caracas 1968; Roberto J. Alexander, *The Venezuela Democratic Revolution. A profile of the Regime of Rómulo Betancourt*, New Jersey, 1964

28 See D. H. Blank, *Politics in Venezuela*, 1973.

21. This Pact conditioned the drafting of the 1961 Constitution, which has been the one with the longest term in force in the country from 1961 to 1999.[29] In this Constitution the main role was given to the political parties who monopolized political representation, political participation, and state power, following the principles of the electoral system of proportional representation (d'Hondt model), which remained unaltered until after the electoral reform of 1993[30]. The resulting political project conditioned the life of the generations that led the country during the four last decades of the twentieth century, based on the compromise to establish and maintain a democratic government, and to promote the democratization of the society and of the economy. During the period, the country lived under a democratic representative regime, with a succession of nine Presidents who for the first time in the Venezuelan political history were all elected by universal, direct and secret suffrage.

22. Regarding the form of the State, the federal form was kept, but covering a very centralized state in which the states were kept but lacked effective political power, due to the fact that all power; political, economic, legislative, taxing, administrative and labor, was concentrated at the national level of government. This centralism of the state was accompanied by other centralisms, that of the political parties, internally organized in a "centralized democratic" scheme, similar to the one developed in the labor unions, which became another fundamental element of the system. Nonetheless, the Constitution, due to its democratic foundations, expressly established the possibility to promote the decentralization of the Federation by empowering the National Assembly to revert the centralization framework of the country, by transferring powers and competencies from the national level to the States. At the beginning of the political crisis of the nineties, that process began through the sanctioning of the Organic Law on the Transfer, Distribution and Decentralization of competencies among public entities,[31] which began to be implemented.[32] Unfortunately since 1994 the decentralization efforts were abandoned (*See Infra 148*).

23. The 1961 Constitution, when enacted, was one of the more advanced of its time, having served as a model in many aspects to later Latin American constitutions. As aforementioned, its text was the result of a consensus attained among the various political actors, being considered as an authentic political pact of the Venezuelan society, conceived by the leaders of a generation that at the time had more than two decades of political struggle, and in an historical moment in which the spirit of unity and concord prevailed, resulting from the overthrown of the Perez Jimenez dictatorship.

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29 See *La Constitución de 1961 y la evolución constitucional de Venezuela*, Ediciones del Congreso de la República, 2 Vols., Caracas, 1972–1973; *Estudios sobre la Constitución. Libro Homenaje a Rafael Caldera,* 4 Vols., Universidad Central de Venezuela, Caracas, 1980; and Allan Brewer–Carías, *La Constitución y sus Enmiendas*, Editorual Jurídica venezolana, Caracas, 1991

30 See Allan R. Brewer-Carías, *Cambio Político y Reforma del Estado en Venezuela*, Ed. Tecnos, Madrid 1975, pp. 178 ff.

31 *Gaceta Oficial* Extra. Nº 5.805 of 22 March 2006. See Allan R. Brewer-Carías *et al*., *Leyes y reglamentos para la Descentralización Política de la Federación* 94, Caracas 1990

32 See *Informe sobre la descentralización en Venezuela 1993. Informe del Ministro de Estado para la Descentralización*, Caracas 1994.

During the last four decades of the twentieth century, the political parties dominated the political scene; so when they entered during the nineties in the profound political crisis that affected their leadership,[33] particularly because failing to understand the democratic advances they helped to complete, the political vacuum they left provoked the take over of the State and its institutions by an authoritarian and militaristic government, led by an anti-party leader that appeared in the middle of the political vacuum, Hugo Chávez Frias, a former Lieutenant-Colonel who led a military attempt of a *coup d'état* in 1992. Chávez was elected in 1998 promoting the collapse of the democratic political system designed in 1958, and tried to begin a new political system that nonetheless is still in the process of being conformed.

§5. THE BEGINNING OF A FIFTH CONSTITUTIONAL PERIOD AFTER 1999: THE CENTRALIZED, MILITARY AND AUTHORITARIAN STATE

24. The main political offer Chávez made during the 1998 presidential campaign, beside the anti party slogans and the promise of change, was the convening of a Constituent Assembly in order to "redound" the State and to sanction a new Constitution with a new democratic and participatory orde, in substitution of the 1961 Constitution and of the *Pacto de Punto Fijo* framework. For the sanctioning of the new Constitution, after bitter political and legal disputes, a National Constituent Assembly, not established in the 1961 as a constitutional review procedure, was convened and elected in 1999, exclusively promoted by the new President of the Republic. This became the main institutional tool he used to materialize a complete take-over of all the branches of government of the State, and to reinforce the centralization of the Federation. According to the then in force 1961 Constitution, the only way to elect such Assembly in 1999 was after a previous constitutional reform incorporating it in the Constitution, unless a constitutional judicial interpretation of the 1961 Constitution allows the election. The latter was what the Supreme Court of Justice precisely did in January 1999, although in a very ambiguous way,[34] trying to resolve the at the moment existing dilemma between popular sovereignty willing to be expressed, and constitutional supremacy, eventually deciding in favor of the former.[35]

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33 See Pedro Guevara, *Estado vs. Democracia*, Caracas 1997; Miriam Kornblith, *Venezuela en los 90. Crisis de la Democracia*, Caracas, 1998; and Allan R. Brewer-Carías, *El Estado, Crisis y Reforma*, Academia de Ciencias Políticas y Sociales, Caracas 1983; *El Estado Incomprendido. Reflexiones sobre el sistema político y su reforma*, Caracas, 1985; "La crisis de las instituciones: responsables y salidas *Revista de la Facultad de Ciencias Jurídicas y Políticas*, Nº 64, 1985, pp. 129-155; *Problemas del Estado de Partidos*, Editorial Jurídica Venezolana, Caracas, 1989; and "Reflexiones sobre la crisis del sistema político, sus salidas democráticas y la convocatoria a una Constituyente", in *Los Candidatos Presidenciales ante la Academia*, Academia de Ciencias Políticas y Sociales, Caracas, 1998, pp. 11 a 66.

34 See Allan R. Brewer-Carías, "La configuración judicial del proceso constituyente en Venezuela de 1999 o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción", in *Revista de Derecho Público*, Nº 77-80, Editorial Jurídica Venezolana, Caracas 1999, pp. 453-514. See the text of the Supreme Court rulings in the same *Revista.*

35 See Allan R. Brewer-Carías, "El desequilibrio entre soberanía popular y supremacía constitucional y la salida constituyente en Venezuela en 1999", in *Revista Anuario Iberoamericano de Justicia Constitucional*, Nº 3, 1999, Centro de Estudios Políticos y Constitucionales, Madrid 2000, pp. 31-56.

25. The Constituent Assembly was then elected in July 1999 after a consultative referendum that took place in April 1999, which was completely controlled by Chávez supporters with more than 95% of its seats. This mean of constitution making process was not the first of its kind in Venezuelan constitutional history. After the two initial ones creating the independent and autonomous State of Venezuela (1811 and 1830), seven other constitution making processes were carried out in 1858, 1863, 1893, 1901, 1914, 1946 and 1953 through Constituent Assemblies or Constituent Congresses, but in each case, as a consequence of a *de facto* rejection of the existing constitution, through a *coup d'état*, a revolution, or a civil war.

The constitution making process of 1999, in contrast, had a peculiarity that made it different from all the previous ones in Venezuelan history, in the sense that it was not the result of a *de facto* rejection of the 1961 Constitution, through a revolution, a war or a *coup d'état.* Rather it had its origin in a democratic process without involving a rupture of the previous political regime.[36]

However, it took place in the context of a severe political crisis that was affecting the functioning of the democratic regime's centralized political parties established in 1958, resulting from the lack of its evolution. That is why the call for the referendum consulting the people on the establishment of the Constituent National Assembly, as expressed in the February 1999 Decree issued by the President, intended to ask the people their opinion on a Constituent National Assembly "aimed at transforming the State and creating a new legal order that allows the effective functioning of a social and participative democracy." That was the formal *raison d'etre* of the constitutional process of 1999, and that is why, with few exceptions, it would have been difficult to find anyone in the country who could have disagreed with those stated purposes.

26. The Constituent Assembly, far from dedicating itself to write off the new Constitution, was the main tool the newly elected President had, in order to assault and control all the branches of government, violating the same 1961 Constitution whose interpretation helped to create it. Consequently, the elected Constituent Assembly technically gave a *coup d'État*[37], unfortunately with the consent and complicity of the former Supreme Court of Justice, which as it always happens in these illegitimate institutional complicity cases, was inexorably the first victim of the authoritarian government which it had helped to grab power. Just a few months later, in December 1999, that Supreme Court was erased from the institutional scene.

On the other hand, unfortunately, Chavez did not formally conceive the constitutional process conducted by the National Assembly as an instrument of conciliation aimed at reconstructing the democratic system and assuring good governance. That would have required the political commitment of all components of society and the participation of all sectors of society in the design of a new, functioning democracy,

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36 See Allan R. Brewer-Carías, "On the making process and the 1999 Constitution in Venezuela, en el Symposium on "Challenges to Fragile Democracies in the Americas: Legitimacy and accountability", in *Texas International Law Journal***,** University of Texas at Austin, Volume 36, Austin 2001, pp. 333-338.

37 See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico 2002; Guayaquil, 2006.

which did not occur. The constitutional process of 1999, on the contrary, served to facilitate the total takeover of State power by a new political group that crushed all the others, including the then existing political parties. As a result, almost all of the opportunities for inclusion and public participation vanished and the constitution making process became an endless *coup d'État* when the Constituent Assembly, elected in July of 1999, began violating the existing Constitution of 1961 by intervening and assuming all branches of government, over which it had no power, according to the referendum mandate that created the Assembly. The Constituent Assembly also intervened in the federated States without any legitimate authority, by eliminating the States Legislative Assemblies.

27. The general result of the 1999 constitution making process[38] was its failure as an instrument for political reconciliation, and the stated democratic purposes of the process were not accomplished. No effective reform of the State was accomplished, except for the purpose of authoritarian institution building, and for the election of a populist government that has concentrated all branches of government and crushed political pluralism. Thus, if it is true that political changes of great importance were made, some of them have contributed to the aggravation of the factors that provoked the crisis in the first place. New political actors assumed power, but far from implementing a democratic conciliation policy, they have accentuated the differences among Venezuelans, worsening political polarization, and making conciliation increasingly difficult. The seizure of power which characterized the process has opened new wounds, making social and political rivalries worse than they have been for more than a century. Despite Venezuela's extraordinary oil wealth during the first years of the 21st century, the social problems of the country have increased.

28. The violations of the 1961 Constitution that continued to be in force at the time the National Constituent assembly was elected were subsequently followed by the violation of the new 1999 Constitution voted on November 1999 by the same Constituent Assembly, and approval by referendum was held on December 15th 1999.[39] The violation began on December 22nd, 1999, a week later, when the Constituent Assembly enacted a "Transitional Constitutional Regime" Decree, which was not authorized in the new Constitution, and which was not submitted to, nor approved by, popular vote.[40] It was that extra constitutional regime which allowed the Constituent Assembly to continue the endless *coup d'etat* initiated a few month earlier, affecting the separations of powers, and allowing the new National Assembly elected in 2000 to legislate outside the constitutional framework.

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38 See Allan R. Brewer-Carías, "Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", in *Lateinamerika Analysen*, 19, 1/2008, GIGA, Germa Institute of Global and Area Studies, Institute of latin American Studies, Hamburg 2008, pp. 119-142.

39 See in *Gaceta Oficial* Nº 5.453 Extraordinaria 24 March 2000. The text was originally published in *Gaceta Oficial* Nº 36.860 of December 30, 1999. Articles 160, 162, 174, 192 and 230 of the 1999 Constitution were amended by referendum held on February 14th, 2009. See *Gaceta Oficial* Nº 5.908 Extraordinaria 19 Feb. 2009.

40 *Gaceta Oficial* N° 36.859 de 29 Dec 1999.

The final result of that 1999 constitution making process was the omission of provisions in the new Constitution to undertake the democratic changes that were most needed in Venezuela, namely, the effective separation of powers, the political decentralization of the Federation and the reinforcement of States and municipal political powers.[41]

Nonetheless, and in spite of these absence of democratic reforms, in 1999 a new constitutional period in Venezuelan history began to be configured, establishing the framework of an **Authoritarian and Centralized State,** based in populist policies of socialist trends, which have been developing during the first decade of the XXI century. This State has been erected by demolishing the rule of law principles, the separation of powers and the federation; by the weakening of the effectiveness of the protection of constitutional rights; by subjecting the judicial review system and others check and balance institutions to the Executive, and by progressively destroying representative democracy itself in the name of a supposedly "participatory democracy". Nonetheless, the Constitution formally establishes a general framework of a democratic political regime and rule of law, which in political practice has been distorted.

29. But the 1999 constitution-making process governed by the National Constituent Assembly did not finish with the final proclamation of the new Constitution on December 20, 1999, and the Constituent Assembly continued to act as a constituent power, even ignoring the new Constitution, particularly sanctioning the aforementioned constitutional transitory regime after the popular approval of the Constitution.

In effect, the text approved by the National Constituent Assembly in November of 1999, and submitted to a referendum for popular approval on December 15th, 1999, contained just twenty-eight Transitory Provisions intended to assure the immediate legal effect of the Constitution, and to regulate the legislative program to execute the Constitution. These were the provisions approved by the people, in which no solution was given with respect to the possible immediate transition of titular officials of the State organs elected a year before, under the 1961 Constitution, in relation to the new organs established under the Constitution of 1999. That is, the people when approving the Constitution did not vote for any termination of the mandate of the previous elected authorities. The consequence of this omission was that in order, for instance, to substitute the former Congress by the new National Assembly, their members needed to be elected according to the new Constitution. And after the election of the new National Assembly, then it could begin to appoint the new head of the Branches of Government, like the Supreme Tribunal or the Officers of the Citizen and Electoral power. The only transitory provision of the 1999 Constitution on these matters of appointing new public High officers was the immediate provisional appointment of

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41 See on the initial critical comments of the Constitution in Allan R. Brewer-Carías, "Reflexiones críticas sobre la Constitución de Venezuela de 1999" in Diego Valadés, Miguel Carbonell (Coordinadores), *Constitucionalismo Iberoamericano del Siglo XXI*, Cámara de Diputados. LVII Legislatura, Universidad Nacional Autónoma de México, México 2000, pp. 171-193; in *Revista Facultad de Derecho*, *Derechos y Valores*, Volumen III Nº 5, Universidad Militar Nueva Granada, Santafé de Bogotá, D.C., Colombia, Julio 2000, pp. 9-26; in the collective book, *La Constitución de 1999*, Academia de Ciencias Políticas y Sociales, Caracas 2000, pp. 63-88; and in *Revista de Derecho Público*, Nº 81, (enero-marzo), Editorial Jurídica Venezolana, Caracas, 2000, pp. 7-21.

the People's Defender, an office created by the new Constitution (Ninth Transitory Provision) until the new National Assembly to be elected makes the definitive appointment.

30. Notwithstanding, the Constituent Assembly without having any power for such purpose, as aforementioned, a week after the Constitution was approved by the people, on December 22nd, 1999 sanctioned the Decree on "The Regimen of Transition for the Public Powers", creating a constitutional vacuum by dismissing the senators and representatives to the former Congress, the representatives to the States Legislative Assemblies and intervening in the Municipal Councils, all elected in 1998; the magistrates of the former Supreme Court of Justice, the General Comptroller of the Republic, the members of the former Supreme Electoral Council and of the then existing Council of the Judiciary, and the General Prosecutor of the Republic.

The consequence of the created institutional vacuum was the "need" for the same Constituent Assembly to fill it, and without any power to do so, it "create" a new organ, not provided for in the new Constitution, in order to act as Legislative Power, the "National Legislative Commission" called the "Little Congress" (*Congresillo)*, "until representatives to the National Assembly are elected and in office" (Article 5), appointing its members in a discretionary way. The same happened at the states level, with the dismissals of the former representatives to the Legislatives Assemblies and the subsequent appointment of members of new organs not established in the Constitution, the State Legislative Commissions. Regarding the Municipal Councils, they were subjected to the supervision and control of the National Constituent Assembly or the National Legislative Commission, violating their autonomy.

The Constituent Assembly also determined the number of Magistrates of each of Chambers of the new Supreme Tribunal of Justice, appointing them, due to the vacuum that the same Assembly, without any constitutional authority created, by dismissing the Magistrates of the former Supreme Court of Justice; and created a new organ that still in 2009 continued to exist, the "Commission on the Functioning and the Restructuring of the Judicial System (Article 21) substituting the former Council of the Judiciary" (*See Infra 320*).

The result of this usurpation of the popular will by the National Constituent Assembly was the beginning of an endless constitutional transitory regime in defraudation of the new Constitution, governed by new provisional authorities designated by the Assembly, which in many cases, as is the case of the Judiciary, continues to exist one decade after the sanctioning of the Constitution.

§7. THE OUTGOING CONSTITUTIONAL PROCESS IN DEFRAUDATION OF THE CONSTITUTION AND OF DEMOCRACY (1999-2009)

31. After the sanctioning of the 1999 Constitution by the National Constituent Assembly through a constituent making process that began with the violation of the 1961 Constitution and finished with the violation of the new 1999 Constitution by the same Constituent Assembly, after its popular approval, the constitutional process in Venezuela during the first decade of the XXI century, under the Presidency of Chá-

vez, unfortunately can be globally characterized as a process developed in continuous defraudation of the Constitution and of the democratic regime.

As aforementioned, the 1999 National Constituent Assembly was the instrument used by the new elected President to dissolve and intervene in all branches of government (particularly the Judiciary) and to dismiss all the public officials that had been elected just a few months before (November 1998) with the sole exception of the President of the Republic itself. In addition, the Constitutional Assembly intervened in all the other branches of government, among them, and above all, the Judiciary, whose autonomy and independence was progressive and systematically demolished[42]. The result has been the tight Executive control over the Judiciary, particularly regarding the new appointed Supreme Tribunal of Justice, with its Constitutional Chamber the most ominous instrument for the consolidation of authoritarianism in the country (*See Infra 58, 585*).

32. After the initial defraudation of the Constitution in order to control all the State branches of government, another defraudation process began, this time of democracy, led by the authoritarian government that emerged from the 1999 constituent process, who used representative democracy for the purpose of progressively eliminating it, and supposedly substituting it by a "participative democracy," among others aspects, based on the establishment of popular councils of a new Popular Power controlled by the Head of the State (*See Infra 132, 171*).

33. But notwithstanding these purpose, the outcome has been that all the essential elements of democracy (*See Infra 41, 180*) are precisely the ones that have unfortunately been ignored or fractured in Venezuela, in the name of that supposed participative democracy. Never before, there has been more violation of human rights as can be deduced from the numerous petitions filed before the Inter-American Commission on Human Rights. The access to power has been achieved contrary to the Rule of law, by violating the separation and independence of the Judicial, Citizen and Electoral powers, and the last political reforms creating the Communal Councils, tend to substitute electoral representation by supposed citizens assemblies and councils whose members are not elected but appointed from the summit of the Popular Power controlled by the President of the Republic.[43] The plural regime of parties has been destroyed and an official single Socialist Party has been created by the State itself, completely imbricated in its apparatus and controlled by the President of the Republic.

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42 See Allan R. Brewer-Carías, "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, pp. 33-174.

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

Because everything depends on the oil rich State, only those who are part of the Single Party are able to have a political, administrative, economical and social life.

And this entire institutional distortion has been established without the existence of separation or independence between the public powers, not only in their horizontal division due to the control that the Executive Power has over them; but in their vertical distribution, where the Federation has been progressively dismantled. Consequently, the federated States and the municipalities have been minimized, by means of eliminating every trace of political decentralization, that is, of autonomous entities in the territory, preventing any real possibility for democratic participation.

34. On the other hand, the fundamental components of democracy (*See Infra 41, 180*) have also been ignored or fractured, in the sense that the governmental activity deployed by the rich and suddenly wealthy State has ceased to be transparent due to the lack of any sort of control and check and balance, it not being possible to demand any kind of accountability or responsibility from the government for the public interests management, so a rampant corruption has developed in a way never seen before. In addition, the freedom of speech and press has been systematically threatened, imposing in many cases self-censorship, as reporters and dissidents are persecuted.[44]

The consequence has been that all the essential elements and fundamental components of democracy have been progressively dismantled, particularly the separation of powers. And on the contrary, what the country is facing is an excess of concentration and centralization of power, as it occurs in any authoritarian government, despite the electoral origin they can have. In such cases, as history has shown, an inevitable tendency toward tyranny develops particularly when there are no efficient controls over those who govern, and even worse, if they have or believe to have popular support. In the case of Venezuela, the authoritarian government that has taken roots during the last decade against the principle of separation of powers, has led to the concentration of all powers in the hands of the Executive Power which at his turn controls the National Assembly, and consequently all the other branches of government (*See Infra 183 ff.*).

35. All these authoritarian trends were intended to be constitutionalized through a Constitutional Reform proposal in 2007, aimed to radically transform the Decentralized, Democratic, Pluralistic rule of law and Social State into a Socialist, Centralized, Repressive and Militaristic State, grounded in a so called "Bolivarian doctrine", identified with "XXI Century Socialism", and an economic system of State capitalism. These constitutional reforms were proposed in defraudation of the Constitution due to the fact that the proposed changes, because of their importance regarding the structure of the state, needed the convening of a national Constituent Assembly (Article 347), and not just be approved by the constitutional reform procedure. The intention was to consolidate a Communist and Socialist State based in a State capitalism or, as was announced by the then Vice President of the Republic in January 2007, the install-

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44 See as an example, the case of the shout down of *Radio Caracas Televisión*, in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como instrumento para aniquilar la libertad de expresión y para confiscar la propiedad privada: el caso RCTV" (I de III), in *Gaceta Judicial*, Santo Domingo, República Dominicana, mayo 2007, pp. 24-27.

ment of "the dictatorship of democracy"[45]; of course a contradiction in itself because in democracy no dictatorship is acceptable, whether of democracy or "of the proletariat" as was proposed ninety years ago (1918) in the old Soviet Union through the same sort of "councils" then called "soviets" of soldiers, workers and country men.

But even without succeeding in the proposed constitutional reform, the fact is that in defraudation of democracy, a new model of authoritarian State of a supposed Popular Power has taken shape in Venezuela, having its immediate origin in popular elections, providing the regime with a camouflage suit with "constitutional" and "elective" shapes, designed for the destruction of the representative democracy itself.[46]

36. In effect, in August 2007, the President of the Republic filed before the National Assembly, at his own initiative, a "Constitutional Reform" draft that after the corresponding discussions was sanctioned by the Assembly on November 2, 2007, formally approving to "Reform" the 1999 Constitution, in the following aspects: abandoning the Democratic Rule of Law State, a Centralized, Socialist and Militaristic State, based on a Socialist Bolivarian Doctrine; changing the Armed Force into a Bolivarian Armed Force, and creating a new component of it, the Bolivarian Popular Militia; dismantling the Federation and all what remained of political decentralization by giving the President and his regional authorities power over the States; dismantling the Municipal government by consolidating below them the Communal Councils for the Popular Power, controlled directly by the President of the Republic and composed by non elected members, eliminating representative democracy at the lower lever of the State; reinforcing Presidentialism, concentrating all powers in the hands of the President, establishing the possibility of his indefinite reelection, and expanding his powers in "states of exception" (emergency situations); eliminating economic freedom, establishing the preeminence of public property over private property, and consolidating the State capitalism already in place; eliminating the autonomy of the Central Bank; and limiting political participation of civil society in the appointment of High officials of the non elected branches of government and of Citizenship in the referendums, and reducing participation to institutions with socialist purposes.[47]

All these reform proposals were formulated and discussed by the National Assembly in defraudation of the Constitution, due to the fact that they seek to modify essen-

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45 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 dictatorship of democracy to be installed forever", in *El Nacional*, Caracas 02-01-2007, pg. A-2.

46 See Allan R. Brewer-Carías, "El autoritarismo establecido en fraude a la Constitución y a la democracia y su formalización en Venezuela mediante la reforma constitucional. (De cómo en un país democrático se ha utilizado el sistema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional)," in *Temas constitucionales. Planteamientos ante una Reforma,* Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74.

47 See Allan R. Brewer-Carías, "El sello socialista que se pretendía imponer al Estado", in *Revista de Derecho Público*, Nº 112, Editorial Jurídica Venezolana, Caracas 2007, pp. 71-76.

tial elements of the State and political system that could only be transformed through the constitutional review procedure of a "National Constituent Assembly" and not by means of the "constitutional reform" procedure (Articles 342, 347). (*See Infra 78 ff.*). It was an attempt, proposed by the President of the Republic and approved by the National Assembly, to introduce essential changes in the Constitution evading the procedure established in the 1999 Constitution for such fundamental changes; that is, a constitutional review proposed in defraudation of the Constitution, being sanctioned through a procedure established for other purposes, in order to deceive the people.

A change of the nature of the one that was proposed, according to Article 347 of the 1999 Constitution, required the convening and election of a National Constituent Assembly**,** and could not be undertaken by means of the "constitutional reform" procedure, which as it has been mentioned, is exclusively reserved for a "partial revision of the Constitution and a substitution of one or several of its norms without modifying the structure and fundamental principles of the Constitutional text" Consequently, by following this procedure in order to achieve substantial constitutional changes, was to act fraudulently with respect to the Constitution, in a process that can be considered as accomplished in defraudation of the Constitution. This occurs when existing institutions are used in a manner that appears to adhere to constitutional form and procedure in order to proceed towards the creation of a new political regimen, a new constitutional order, without altering the established legal system.

Fortunately, the 2007 Constitutional Reform, although sanctioned by the National Assembly, was rejected by popular vote in the referendum held on December 2, 2007,[48] but again, in a new defraudation of the Constitution, during the following six months in the first half of 2008, the President of the Republic implemented many of the popularly rejected constitutional reforms, but this time by means of decree laws issued under delegate legislation according to a January 2007 enabling law, which of course did not authorize to modify the Constitution.[49] This was, of course, completely contrary to the Constitution, but the absence of an independent Constitutional Chamber of the Supreme Tribunal made futile any judicial review action.

37. The main constitutional consequence of the popular rejection of a constitutional reform proposed at the initiative of the President of the Republic, in accordance to Article 345, is that it "cannot be submitted again before the Assembly in the same constitutional term," which in the case of the President, having been elected in 2006 endures up to 2012. Nonetheless, after the official party lost regional and local elections in the most important State and Municipal entities of the country on November 2008, the President of the Republic formally announced that he was going to seek again for the review of the Constitution, in order to establish the possibility of his indefinite reelection, first by "authorizing" his official Party to formulate a "constitutional amendment" proposal by popular initiative, and after, due to the celerity prob-

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48 Allan R. Brewer-Carías, "La reforma constitucional en Venezuela de 2007 y su rechazo por el poder constituyente originario", in *Revista Peruana de Derecho Público*, Año 8, Nº 15, Lima, Julio-Diciembre 2007, pp. 13-53.

49 See the comments on the 2008 Decree laws, in *Estudios sobre los decretos leyes Julio-Agosto 2008, Revista de Derecho Público*, Nº 115, Editorial Jurídica Venezolana, Caracas 2008.

lems of this review procedure, asking the National Assembly to take the initiative to formulate again proposal for a reform of the Constitution in order to allow his indefinite reelection.[50] The Assembly approved the "amendment" on January 2009, eliminating the limits for reelection of all elected public officials established in Articles 160, 162, 174, 192 and 230 of the Constitution, and again, in defraudation of the Constitution, an already popular rejected reform was submitted to a new referendum held on February 14th, 2009, in the same constitutional period, contrary to Article 345 of the Constitution, using fraudulently this time the constitutional "amendment" procedure.[51] (*See Infra 79*).

38. Two questions with constitutional implication resulted from this new "amendment" proposal that were the object of constitutional discussions: First, the possibility to use a "constitutional amendment" procedure through which no fundamental constitutional principle can be changed, in order to alter and change the principle of alternating government that is a fundamental republican principle formulated in Article 6 of the Constitution; and second, the possibility to use the "constitutional amendment" procedure to include the continuous election of the President of the Republic, changing the limits imposed in the Constitution (reelection only once, for the next period), which was a proposal previously submitted to referendum in December 2007, and rejected by the people. On these matters, the Constitutional Chamber of the Supreme Tribunal of Justice on February 3, 2009 issued two decisions (No. 46 and 53)[52] in which a binding interpretation of the Constitution was established: First, regarding the possibility of submitting to popular vote a modification of the Constitution via "constitutional amendment" on the same matter already rejected by the people in a "constitutional reform" procedure held during the same constitutional term. The Constitutional Chamber argued that the limit imposed in the Constitution was directed only to the National Assembly to discuss again a constitutional reform on the same subject once rejected by the people, without considering the substantive aspect of the prohibition regarding the limits to ask again and again the people, to express in an endless way their will, through referenda (*See Infra 81).* Second**,** regarding the possibility of using the "constitutional amendment" procedure in order to change the fundamental principle of alternating (*alternabilidad*) government, which means that public offices must be occupied by turns, and not continuously by the same elected person, the Constitutional Chamber said that what the principle of *alternabilidad* imposed was "for the people as sovereign to have the possibility to periodically elect

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50 See the President speeches in *El Universal*, Caracas, November 30-January 5, 2008.

51 The amendment was approved in the referendum by 54% of the votes, and was published in *Gaceta Oficial* Nº 5.908 Extraordinaria February 19, 2009.

52 See the Constitutional Chamber of the Supreme Tribunal of Justice Decision Nº 53, of February 3, 2009 (*Interpretation of Articles 340,6 and 345 of the Constitution* Case), in http:/www.tsj.gov.ve/decisions/scon/Febrero/53-3209-2009-08-1610.html. See the comments on that decision in Allan R. Brewer-Carías, *El Juez Constitucional vs. La alternabilidad republicana. Notas sobre la sentencia de la Sala Constitucional de 03-02 2009 que declara constitucional el proceso de Enmienda Constitucional 2008-2009 que altera el principio de alternabilidad del gobierno, al establecer la reelección indefinida de cargos electivos y que se someterá a referendo el 15-02-2009*, in www.allanbrewerCarías.com, Section I, 2 (Documents), 2009.

their representatives," confusing alternating government (*gobierno alternativo*) with "elected government" (*gobierno electivo*), that is, the principle that elected public offices must be occupied by turns, with the principle of election of representatives, considering that the principle of alternating (*alternabilidad*) government can only be infringed if the possibility to have elections is impeded. With these decisions, what the Supreme Tribunal made, in addition to resolving the constitutional challenges to the February 15th 2009 referendum was, through a constitutional interpretation, to modify or mutate the text of the Constitution, changing the sense of the prohibition of subsequent calling for referendum on the same matters, and also changing the sense of a constitutional principle like the principle of alternating government considering it alike to the principle of elective government, ignoring the difference established in the Constitution (Article 6) (*See Infra 52)*.

CHAPTER 2. SOME BASIC ASPECT OF THE POLITICAL SYSTEM OF GOVERNMENT ACCORDING TO THE 1999 CONSTITUTION AND ITS DISTORTIONS

39. According to the Constitution of 1999, Venezuela has been formally organized as a democratic Republic that is expressly qualified as "The Bolivarian Republic of Venezuela," conceived as an "*Etat de droit*', in the sense of the English expression "rule of law," with an elected government organized according to the principles of separation of powers, a presidential system of government, and vertical division of powers following the federal form of government; all their actions being subjected to judicial review by the Courts when unconstitutional or illegal.

§1. THE DEMOCRATIC BOLIVARIAN REPUBLIC OF VENEZUELA

40. The 1999 Constitution, following the tradition initiated in 1811 has been politically organized as a Republic, where the "sovereignty resides untransferibly in the people," who exercise it "directly" by means of referendum and other instruments established in the Constitution, "and indirectly, through suffrage, by the organs that exercise State Powers" (Article 5º). This provision consecrates the principles of popular sovereignty and the democratic regime, in particular the concept of political representation, adding in Article 62 the rights of all Citizens "to participate freely in public matters directly or by means of their representatives."

The important aspect to be stressed is the expression that sovereignty resides "untransferable" *("intransferiblemente")* in the people, it resides only and always in the people, so that no man or entity may assume it, not even a Constituent Assembly, which of course could never be "sovereign." That is why the Constitution also indicates, when regulating the "National Constituent Assembly" as a mean for constitutional review, that "the people of Venezuela are the repository of the original constituent power," (Article 347) which, for that reason, could never be transferred to an Assembly.

Of course, the consecration of the principle of popular sovereignty and its untransferability led in the modern world, to the development of the principle of representa-

tive democracy, in the sense that the people, who are the holders of sovereignty, normally exercise it through representatives. Popular sovereignty and representative democracy are then consubstantial and indivisible principles.

41. On the other hand, as it has been conceived in the Inter-American Democratic Charter *(Carta Democratica Interamericana)* adopted by the Organization of American States in 2001, after so many antidemocratic, militarist and authoritarian regimes disguised as democratic because of their electoral origin, democracy is not only a matter of electing governments, in the sense that it has many other *essential elements of the representative democracy*. That is, in addition to having periodic, fair and free elections, based on the universal and secret vote as expression of the will of the people; democracy means the respect for human rights and fundamental liberties; the access to power and its exercise with subjection to the Rule of law; the plural regime of the political parties and organizations; and the separation and independence of public powers (Article 3), that is, the possibility to control the different branches of government. In addition, democracy also has other *fundamental components*, like the transparency of governmental activities; the integrity, responsibility of governments in the public management; the respect of social rights and freedom of speech and press; 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.[53]

Without all such essential elements and fundamental components in force, it is difficult to consider that a political system is really a democratic one, notwithstanding the formal declarations in the Constitutions.

42. Consequently, even though democracy as a political system of government and social life is much more that just representative democracy, the latter is an essential part of it and cannot be substituted by a supposedly "participatory democracy," as it was intended to be drafted in the 1999 Constitution with the elimination of the word "representative" from Article 6, which in order to characterize the democratic government, only uses the expressions: "participative, elective, decentralized, alternating, pluralist, and of revocable mandates." Notwithstanding, democracy is always "representative," and in addition, it can be more or less "participative" according to the degree of direct participation of the people in public decision making.[54]

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53 See Allan R. Brewer-Carías, *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril 2002*, Ediciones El Nacional, Caracas 2002.

54 See Manuel Feo La Cruz, "La participación de la sociedad civil en el proceso de gestión pública. Retos y desafíos", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 415-429; Yusby S. Méndez-Apolinar, "La obligación ciudadana de participar en los asuntos públicos, como expresión de la cultura democrática", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 431-437; Ana P. Deniz, "La participación ciudadana en la Constitución de 1999", in *Revista de Derecho Constitucional*, Nº 7 (enero-junio). Editorial Sherwood, Caracas, 2003, pp. 115-124; Fernando Flores Jiménez, "La participación ciudadana en la Constitución venezolana de 1999", in *Revista de Derecho Constitucional*, Nº 5 (julio-diciembre). Editorial Sherwood, Caracas, 2001, pp. 75-88; Luis Salamanca, "La Constitución venezolana de 1999: de la representación a la hiper-participación ciudadana", in *Revista de Derecho*

Nonetheless, the drafters of the Constitution of 1999 pretended to install a supposedly "participative democracy," by confounding participation with direct democracy instruments like the referenda, that are established in all its forms: consultative, approbatory, abrogating, and revoking (arts. 78 ff.); and by defining a government political project based on a supposedly direct relation between a the President of the Republic and the people giving rise to an illusory "participative" mechanisms that are controlled from above. Nonetheless, the fact is that the project monopolizes power and consolidates it hegemonically, in a concentrated and authoritarian manner, completely contrary to that which is required of a democratic regime.

The fact is that participation in democratic systems is only possible in developed system of local government, with their own autonomous governments elected democratically; not in supposed "communal councils" conceived in parallel to the Municipalities, directly dependent on the President of the Republic, and directed by non elected public officials, as it has been regulated by statute[55] (*See Infra 132, 171).* That is, political participation is only effectively possible in a decentralized system of government based on local authorities; which is contrary to the concentration of Power and centralism as it has been developed in Venezuela during the past years (*See Infra 53, 147 ff.*).

43. But regarding the Republic, one of the innovations incorporated in Article 1º of the Constitution, was the re-naming of the Republic, changing the traditional expression "Republic of Venezuela", for the "Bolivarian Republic of Venezuela;" a change that can yield multiple interpretations. This new name was proposed to the National Constituent Assembly by Chávez as President of the Republic, and notwithstanding its initial rejection, in the final second round of constitutional discussions it was adopted. A "Bolivarian Republic," according to Simón Bolívar conceptions regarding his proposed ideal to unite all the Latin American countries, refers to its practical application between 1819 and 1830 when the Republic lost its name due to its integration as Bolívar proposed, in the new "Republic of Colombia," being this one, historically, the only "Bolivarian Republic" in Latin American history, one which implied the dissolution of Venezuela as an independent nation.

Another explanation of the change of name could be found in a partisan political motivation due to the initial name of the political and electoral "Movement" established by Chavez before being President of the Republic, the *"Movimiento Bolivariano 2000",* which was changed because the Organic Law of Suffrage Political Participation forbids using motherland symbols in the parties' denominations. So since it was impossible to use the Bolivarian denomination for the official party, it was used to name the Republic. Consequently, everything related to the political regime tended

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Público, Nº 82 (abril-junio). Editorial Jurídica Venezolana, Caracas, 2000, pp. 85-105; Humberto Njaim, "Las implicaciones de la democracia participativa: un tema constitucional de nuestro tiempo", in *Constitución y Constitucionalismo Hoy*. Editorial Ex Libris, Caracas, 2000, pp. 719-742; Allan R. Brewer-Carías, "Democracia participativa, descentralización política y régimen municipal", in Miguel Alejandro López Olvera y Luis Gerardo Rodríguez Lozano (Coordinadores), *Tendencias actuales del derecho público en Iberoamérica*, Editorial Porrúa, México 2006, pp. 1-23.

55 Communal Councils Law, *Gaceta Oficial* Extra N° 5.806 de 10-4-2006.

to be named as "Bolivarian", including for instance, the "Bolivarian Circles" as social organization means, or the "Bolivarian Armed Force" as has been established by the 2008 Organic Law on the Bolivarian Armed Force,[56] after being rejected by the people in the referendum on the 2007 constitutional reform. In those 2007 Constitutional Reform proposals another of the main offer was to establish the "Bolivarian doctrine" in the Constitution, as one of the basis of the State," guiding for instance the international relations, and the "Bolivarian socialism" to be applied in the internal order. In political practice, in addition, those supporters of the President are named "Bolivarian," encouraging the division of the country into "Bolivarian" and those who are not (See *supra* 13, 14); or between revolutionaries and counter-revolutionaries.

§2. THE SOCIAL AND DEMOCRATIC RULE OF LAW AND JUSTICE STATE

44. According to Article 2 of the Constitution of 1999, Venezuela is defined as an "*Estado democrático y social de derecho y de justicia*", that is, a "social democratic rule of law and justice State."

Yet, the rule of law in the Venezuelan constitutional system is not only a deduction of the constitutional framework establishing the conception of the State as submitted to the Constitution and the law in which the Citizens are not subjected to arbitrary rules. It is the result of an express provision of the Constitutions which have been included in it, following the contemporary constitutional trend as expressed in the Constitution of the Federal Republic of Germany (Article 20,1), in the Spanish Constitution (Article 1º) and in the Constitution of Colombia (Article 1º).

In this regard, the rule of law implies the subordination of the State and its officials to the authority of the law (Preamble), in the sense that all branches of government and the organs of the State are subjected to the "Constitution and laws" (Article 137) and Public Administration must act completely subjected to the law (Article 141). This principle implies the existence in the Constitution of the systems of judicial review of legislation (Articles 334 y 336) and of administrative actions *("contencioso-administrativo")* (Article 259) (*See Infra 602*).

45. But in addition, the Constitution not only declared that Venezuela is a rule of law State (*Estado de derecho*), but that it is also a democratic and social justice State, which implies three different additional qualifications: social state, democratic state and justice state.

The idea of a "social State" is that of a state with social obligations, established to procure social justice, an objective which brings the state to intervene in social and economic activity as a welfare state. That is why this Social State must seek for the application of the fundamental values of equality and solidarity, the preeminence of human rights (Preamble, Article 1º and 21º) and the achievement of "social justice" as one of the basis of the economic system (Article 299) (*See Infra 503*).

Regarding the "democratic State," the expression refers to the grounds of the political organization of the Nation according to democratic principles (Articles 2, 3, 5 and

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56 Organic Law on the Bolivarian Armed Force, *Gaceta Oficial* N° 5.891 Extra. Of July 31, 2008.

6), as a "democratic society" (Preamble), of representative and participatory character (*See Infra 115 ff.*)

Finally the "State of justice" refers to a State that must tend towards guaranteeing justice, specifically beyond procedural formalities. That is why, the value of justice is expressly proclaimed (Preamble and Article 1), for which the right of having access to justice is declared as well as the right to obtain the effective protection of persons' rights and interests (Article 26),[57] the courts being obligated to guarantee the provision of justice without cost, assuring constant accessibility, impartiality, adequacy, transparency, autonomy, independence, responsibility, equanimity and expediency, absence of dilatory practices, and unnecessary formalities or annulments (Article 26) (*See Infra 550 ff.*)

§3. SEPARATION OF POWERS

46. Article 136 of the Constitution establishes a double system of check and balances regarding State powers and the branches of government: the vertical distribution of State power on a territorial basis, between the Municipal, States and national Powers, giving form to the Federal form of Government, organized in three levels of governments: the Republic at the national level, the States at the states level and the Municipal at the local government level. The State, accordingly, is qualified in Article 4 as a Federal Decentralized State. (*See Infra 146 ff.*)

On the other hand, the same Article 136 establishes the horizontal separation of powers regarding the National Public Power, which is divided between the traditional Legislative, Executive and Judicial Powers, to which the Constitution now has added two new branches: the Citizen and the Electoral Powers, in a system of penta separation of powers (*See Infra 178 ff.*). These branches of Public Power have their own functions, but the respective organs that exercise them must collaborate between them in the prosecution of the State aims.

47. It must be mentioned that since the 1947 Constitution, as in many other Latin American countries, the Constitution began to directly create new bodies with some kind of autonomy, beyond the three traditional powers, not subjected to the Legislative, the Executive or the Judiciary, conceived to accomplish certain control functions. These have included the Comptrollers General, Peoples' or Human Rights Defenders, Public Prosecutors or General Prosecutors, Judicial Councils or Councils of the Judiciary, and special organs for the control and administration of elections. This evolution of constitutional autonomous organs was the one that formally gained

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57 See José R. Duque Corredor, "El acceso a la justicia como derecho fundamental en el contexto de la democracia y de los derechos humanos", in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 6, Caracas, 2002, pp. 379 a 389; Judith Useche, "El acceso a la justicia en el nuevo orden constitucional venezolano", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001),* Volumen II, pp. 29-76; Lourdes Cortes de Arangon, "El acceso de los administrados al sistema jurídico: ¿un derecho vivo?", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I, Imprenta Nacional, Caracas, 2001, pp. 275-305.

an important foothold in the Constitution of 1999, which not only regulates such entities, but affords them the status of a constitutional "power" or branch of government, thereby creating a penta separation of powers in which the Legislative Power is exercised by the National Assembly; the Executive Power by the President of the Republic and other officers of the government and its Administration; the Judicial Power by the Supreme Tribunal of Justice and other Courts; the Citizen Power by the Comptroller General of the Republic, the Prosecutor General (Public Prosecutor) and the Peoples' Defender; and the Electoral Power by the National Electoral Council and other organs of electoral power.

48. The essence of the principle of the separation of powers in the Constitution is that each constitutionally established organ of the State exercises its respective function with independence and autonomy, in a system of checks and balances in which no branch of government is to be or can be subject to that of another, except on matters of judicial review, audit controls or protection of human rights. Nonetheless, on the contrary, the penta division of powers under the 1999 Constitution of 1999 is deceiving because it, in fact, conceals the subjection of some of the principal branches of government to the legislator, in a very dangerous system regarding democracy and the rule of law that leaves an open door to the concentration of power in the State and to authoritarianism (*See Infra 185*).

The Constitution, in fact, contains an absurd distortion of the separation of power principle by giving to the National Assembly the authority not only to appoint, but to dismiss the Judges of the Supreme Tribunal of Justice, the Prosecutor General, the General Comptroller, the People's Defender and the Members of the National Electoral Council from their positions (Articles 265, 279 and 296); and in some cases established through legislation, even by simple majority of votes (*See Infra 340*). Even this latter solution was proposed to be formally constitutionalized in the rejected 2007 Constitutional reform proposals, which seek to eliminate the guarantee of the qualified majority of the members of the National Assembly for such dismissals, and to establish a simple majority for that purpose.

49. It is really impossible to talk about independence of separate powers, and of mutual control when the tenure of the Head officials of the institutions depends on the political will of one of the branches of government.[58] The sole fact of the provision of such possibility for the National Assembly to dismiss makes futile the formal consecration of the independence of powers, since the High officials of the State are aware that they can be removed at any time precisely when they act effectively with independence. In Venezuela, in political practice, this has conducted to a system of concentration of powers in the National Assembly, and because the political control that the President of the Republic exercises upon the Assembly, to the concentration of powers in the hands of the former (*See Infra 185 ff.*) The consequence has been the total absence of fiscal or audit control made by the General Comptroller Office over

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

the huge disposal of the oil wealth not always in accordance with Budget discipline rules; the total absence of protection assured by the People's Defender, which has been perceived more as a defender of State power than of the people; and the indiscriminate use by the Public Prosecutor of the Judiciary and of judicial procedures as a tool to persecute any political dissidence; and the absolute control exercised by the Executive over the Judiciary.

§4. PRESIDENTIAL SYSTEM OF GOVERNMENT

50. The Venezuelan system of government, following the general feature in Latin America, since the beginning of the Republic in 1811, has always been the Presidential system, which remains in the 1999 Constitution. The President of the Republic is then, at the same time, the Head of State and the Head of the Executive and of the Public Administration, and is elected by universal, direct and secret suffrage (Articles 226,228). Nonetheless, in the relationship between the National Executive and the National Assembly, the Constitution has adopted some elements of parliamentarianism already introduced since the 1961 Constitution.[59]

But in the 1999 Constitution, the presidential framework of government has been exacerbated[60] by the combination of a few factors: First, by the extension of the presidential term from five to six years, and by the possibility for the immediate reelection of the President (Article 230), which before was traditionally prohibited, now limiting the republican principle of alternately representation in government, allowing the possibility for a long period of presidential incumbency of up to twelve (12) years. The remedy for this long tenure was the provision of the possibility of a repealing referendum but conceived in such a complicated and complex way (Article 72) that it is nearly inapplicable (*See Infra 125*). Second, the loss of the checks and balances between the Executive and the Legislative branches of government, among other factors due to the elimination of the Senate, that is, the elimination of the traditional legislative bicameralism that had existed in the country since 1811. Third, the possibility for the President of the Republic to dissolve the National Assembly, even

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59 See Donato Lupidii, "El sistema presidencial y la Constitución venezolana de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 819-835; Alfredo Arismendi A., "El fortalecimiento del Poder Ejecutivo Nacional en la Constitución venezolana de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 837-865; Ricardo Combellas, "El Poder Ejecutivo en la Constitución de 1999", in *Revista UGMA Jurídica de la Facultad de Derecho de la Universidad Gran Mariscal de Ayacucho*, Nº 1 (mayo-agosto). Barcelona-Venezuela, 2002, pp. 9-24; Julio C. Fernández Toro, "El nuevo paradigma del ejercicio del Gobierno. El sistema de gobierno en la Constitución de 1999", in *Revista de Derecho Constitucional,* Nº 4 (enero-julio). Editorial Sherwood, Caracas, 2001, pp. 189-246; Miguel A. Gómez Ortiz, "El régimen presidencial en Venezuela", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001),* Volumen II, pp. 299-336.

60 See Allan R. Brewer-Carías, "El sistema presidencial de gobierno en la Constitución de Venezuela de 1999," in Allan R. Brewer-Carías, *Estudios sobre el Estado Constitucional (2005-2006),* Editorial Jurídica Venezolana, Caracas, 2007, pp. 475-624.

in exceptional cases when three votes for the parliamentary censure of the Vice President of the Republic, (Article 240) have been approved. Fourth, the possibility that through the approval of enabling laws (*leyes habilitantes*) the National Assembly can delegate the legislative power to the Executive, by means of which through Executive Decrees Laws *(Decretos-leyes*), the President without any limits can legislate (Article 203), resulting in practice that with the enabling laws of 2001, 2002, 2007 all the important statutes in the country can be sanctioned by the President of the Republic, although he completely controls the National Assembly. In the 1961 Constitution, the possibility for legislative delegation was limited to only economic and financial matters and in extraordinary circumstances (*See Infra 95 ff.*)

51. The President of the Republic has the power to dissolve the National Assembly, even in exceptional cases when three votes for the parliamentary censure of the Vice President of the Republic have been passed, (Article 240) (*See Infra 231*). On the other hand, Presidential power has been reinforced in other ways, such as the passing of enabling laws (*leyes habilitantes*) allowing the delegation of legislative power to the Executive by means of Decrees Laws, without limiting this executive "law-making" power to matters in the economic and financial spheres (Article 203), as was provided in the 1999 Constitution (*See Infra 95*).

Another element that should be mentioned with respect to the relations between the powers of the State is the attribution to decree, "the removal from office of the President of the Republic," (Article 233) to the Supreme Tribunal of Justice without significant specific delineation or definition of conditions for exercising that power.

§5. ALTERNATING GOVERNMENT

52. Since the beginning of the Republic, the general restriction for elected officials to be reelected in a continuous way, without limits, has been a tradition within the presidential system of government. The restriction to presidential reelection was first established in the 1830 Constitution, as a reaction to continuity in office (*continuísmo*), precisely in order to confront individuals' anxieties to perpetuate themselves in power, and to avoid the advantages that public officials in office could have in electoral processes.[61]

This principle of limiting the term of elected officials called as the principle of "*alternabilidad,*" (alternating),[62] means that the public offfices must be occupied by turns, and not continuously by the same elected person. It is in this same sense that the Supreme Tribunal of Justice of Venezuela in a decision of 2002 issued by its

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61 The reaction against continuity in power was clearly expressed by Simón Bolívar in his famous Angostura Speech (1819) when he said: "The continuation of the authority in the same individual has frequently been the end of democratic governments. Repeated elections are essentials in popular systems, because nothing is more dangerous than to leave for a long term the same citizen in power. The people get used to obey him, and he gets used to command them; from were usurpation and tyranny is originated….Our citizens must fear with more than enough justice that the same Official, who has governed them for a long time, could perpetually command them." See in Simón Bolívar, *Escritos Fundamentales*, Caracas, 1982.

62 From the Latin word "*alternatium*," which means "interchangeably" or "by turns."

Electoral Chamber, said that *alternabilidad* means "the successive exercise of public offices by different persons" (Decision No. 51 of March 18, 2002.)[63] The principle, consequently, is not the same as the "elective" principle or to be elected for public offices. To be elected is one thing, and another is to occupy public offices by turns. The principle has always been established as a "rock-like" or immutable constitutional clause (*Cláusula pétrea*), in the sense that it can never be changed. That is why Article 6 of the Constitution says that "The government of the Republic and of its political entities is and will always be" alternating" *(alternativo)***,** in addition to **"**democratic, participatory, elective, decentralized, responsible, plural and of repeal mandates," which mean that it cannot be changed.

The principle was included in almost all the Venezuelan Constitutions since 1830 (1830, 1858, 1864, 1874, 1881, 1891, 1893, 1901, 1904, 1909, 1936, 1845 and 1947), establishing a general prohibition for the immediate reelection of the President of the Republic for the next term. In the 1961 Constitution the prohibition for reelection was extended up to two terms (10 years), and it was in the 1999 Constitution that the provision was made more flexible, by establishing for the first time in more than a century the possibility for the immediate reelection of the President, but only once, for the next term (Article 230). This limit was proposed to be eliminated in the rejected 2007 Constitutional Reform, and was finally eliminated through a constitutional amendment approved by referendum on February 2009 (*See Infra 210*), as well as the limits established for the reelection of the representatives to the national Assembly and the States Legislative Councils, and for the reelection of the Governors of the States and the mayors of the Municipalities (Articles 160, 162, 174, 192) (*See Infra 168, 172, 210, 281*).

§6. THE CENTRALIZED FEDERATION

53. Venezuela was the first country to adopt since 1811, after the United States of America, a federal form of government politically uniting former colonial provinces (*See Supra 2*). Those provinces were progressively transformed into the 23 states in (*See Infra 145*) which the territory of the Republic is divided, adding to them, a Capital District (the former Federal District, covering parts of the city of Caracas) (*See Infra 173*), and federal dependencies that comprise almost all the islands located along the country's coast in the Caribbean Sea (*See Infra 145*).

The consequence of the federal form of the State has been the establishment in the text of the constitutions a system of vertical distribution of state power in three tier levels, as it is prescribed in the 1999 Constitution by setting forth that "The Powers of the State shall be distributed between the Municipal Powers, the State Powers and the National Powers" which must collaborate and cooperate in the pursuit of the State objectives (Article 136) *See Infra 150 ff.*).

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63 Quoted in the Dissenting Vote to the Constitutional Chamber of the Supreme Tribunal of Justice Decision Nº 53, of February 2, 2009 (*Interpretation of Articles 340,6 and 345 of the Constitution* Case), in http:/www.tsj.gov.ve/decisions/scon/Febrero/53-3209-2009-08-1610.html

54. The constitutional and political tendency since the beginning of the twentieth century has been a process of centralization of powers at the national level, so the territorial distribution of power and territorial autonomy of the states has almost disappeared (*See Infra 166 ff.*) Nonetheless, according to the provisions of the 1961 Constitution, an initial political decentralization process sparked by the democratic practice began in 1989 with the transfer of powers from the central government to the federal states, and for the first time since the nineteenth century, with the direct elections of governors of the states and mayors, which provoked for regional political life the beginning of playing an important role in the country (*See Infra 148*). But the 1999 Constitution, instead of undertaking the changes that were needed for reinforcing democracy, namely the effective political decentralization of the federation and the reinforcement of state and municipal political powers, has caused the pendulum to swing back, and to reinforce the centralization process[64] (*See Infra 150*).

§7. JUDICIAL REVIEW SYSTEM

55. Following a general Latin American feature, the judicial review system established in Venezuela since the nineteenth century has been mixed in nature, in which the concentrated method of judicial review is applied conjunctly with the diffuse method. On the one hand, all courts are entitled to decide upon the constitutionality of legislation and of its inapplicability in a particular case, with *inter partes* effects; and on the other hand, the Supreme Court or a Constitutional Court or Tribunal are empowered to declare the total nullity of statutes contrary to the Constitution (*See Infra 564*).

56. Article 7 of the 1999 Constitution declares that its text is "the supreme law" of the land and "the ground of the entire legal order." This provision assigns to all judges the duty "of guaranteeing the integrity of the Constitution" (Article 334) with the power to decide not to apply a statute that is deemed to be unconstitutional when deciding a concrete case. Article 335 of the Constitution also assigns the Supreme Tribunal of Justice the duty of guaranteeing "the supremacy and effectiveness of the constitutional rules and principles," as "the maximum and final interpreter of the Constitution," with the duty to seek for "its uniform interpretation and application."

57. Additionally, the Constitutional Chamber of the Supreme Tribunal of Justice (Articles 266,1º and 336) is the "Constitutional Jurisdiction", exclusively empowered to declare the nullity of statutes and other State acts with similar rank and effects or issued in direct execution of the Constitution. The Tribunal also is empowered to judge the unconstitutionality of the omissions of the legislative organ.

Other state acts, such as administrative acts and regulations, are also subject to judicial review by the "Administrative Jurisdiction" whose courts are empowered to

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64 See Allan R. Brewer-Carías, "El Estado federal descentralizado y la centralización de la federación en Venezuela. Situación y perspectiva de una contradicción constitucional," in Diego Valadés y José María Serna de la Garza (Coordinadores), *Federalismo y regionalismo*, Universidad Nacional Autónoma de México, Tribunal Superior de Justicia del Estado de Puebla, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica Nº 229, México 2005, pp. 717-750

annul administrative acts because of their illegality or unconstitutionality (Article 259) (*See Infra 602*).

Also, according to Article 29 of the Constitution, the courts have a duty to protect all persons in their constitutional rights and guaranties when deciding an action for protection, or "*amparo*." Such an action can be brought before the court against any illegitimate harm or threat to such Rights (*See Infra 586 ff.*).

58. Of course judicial review, above all, is an institutional tool which is essentially linked to democracy; democracy understood as a political system not just reduced to the fact of having elected governments, but where separation and control of power and the respect and enforcement of human rights is possible through an independent and autonomous judiciary. And precisely, it has been because of this process of reinforcement of democracy that judicial review of the constitutionality of legislation and other governmental actions has become an important tool in order to guarantee the supremacy of the Constitution, the rule of law, and the respect of human rights. It is in this sense that judicial review of the constitutionality of state acts has been considered as the ultimate result of the consolidation of the *rule of law*, when precisely in a democratic system the courts can serve as the ultimate guarantor of the Constitution, effectively controlling the exercise of power by the organs of the state.

On the contrary, as happens in all authoritarian regimes even having elected governments, if such control is not possible, the same power can constitute the most powerful and diabolical instrument for the consolidation of authoritarianism, the destruction of democracy, and the violation of human rights.[65] Unfortunately this is what has been happening in Venezuela, where after decades of democratic ruling through which we constructed one of the most formally complete systems of judicial review in South America, since 2000 that same system has been the instrument through which the politically controlled judiciary, and particularly the subjected Constitutional Chamber of the Supreme Tribunal, have been consolidating the authoritarian regime installed in the country.

CHAPTER 3. STATE TERRITORY

59. Venezuela is one of the largest Latin American countries located in the northern part of South America with an area of 916,445 square km. Its boundaries are with Colombia to the west; with Brazil and Colombia to the south and with Guyana to the east. To the north, it has 2,813 km of coast on the Caribbean Sea and the Atlantic Ocean.

60. The territory is defined in Article 10 of the Constitution, in similar terms as in all the previous Constitutions since 1821, by referring to the one that appertained to the General Captaincy of Venezuela (*See Supra 2, 5*) before the April 19, 1810 politi-

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65. See Allan R. Brewer-Carías, *Crónica de la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas 2007; and "Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación", in *VIII Congreso Nacional de derecho Constitucional*, Peru, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pgs. 463-489.

cal transformation (independence) began (*See Supra 2*), with the modifications resulting from the treaties and arbitral rulings not affected of nullity. The previous 1961 Constitution only referred to the modifications resulting from treaties "validly adopted by the Republic" (Article 7), a phrase that was added "in order to demonstrate in an unequivocal manner, the will of the Republic to only accept those modifications to its territorial *status* resulting from a free and valid determination".[66] These provisions were the consequence of many boundaries the country had with its neighbors.

61. Since the separation of Venezuela from the Great Colombia in 1830 (*See Supra 9*), boundary problems were always present between the two countries, up to 1881 when the disputed boundaries were settled by means of an Arbitral Treaty (September 14, 1881), in which, due to the fact that both countries "could not reach an agreement regarding their respective rights or *uti possidetis juris,* of 1810", they agreed to submit the matter to the judgment and ruling by the Spanish King, as legal arbitrator, in order to establish the territory appertaining before 1810 to the General Captaincy of Venezuela, and to the Viceroyalty of Nueva Granada. Consequently, in March 1891, an Arbitral decision was signed establishing the respective boundaries, which was executed by a pact of December 30, 1898.

62. Regarding Brazil, on May 5, 1859 Venezuela signed a Boundary and River Navigation Treaty with the then Emperor of Brazil, in which the boundaries were determined, being latter marked between 1879 and 1905.

63. Also, on August 5, 1857 an Arbitral Convention was signed between Venezuela and the Netherlands regarding the sovereignty over the Aves Island in the Caribbean, a matter that was submitted to the decision of Queen Elizabeth II of Spain, who ruled in 1865 that the island appertained to Venezuela.

64. Regarding the boundaries with the former British colony of Guyana, the aforementioned 1961 Constitution provision (Article 7) that opened the possibility for the country to formally challenge the validity of treaties or arbitral awards concerning its borders, acquired particular significance, particularly regarding the 1899 Arbitration decision that established the border with British Guiana, which Venezuela considered had ignored its territorial rights derived from the incorporation of the Province of Guyana, created in 1868, in the General Captaincy of Venezuela.

In effect, after the August 13, 1814, Anglo-Dutch Treaty, the colonial possessions of the Dutch in the Americas were returned to what they were at the beginning of the war in 1803, with the exceptions of the Cape of Good Hope and the South American settlements of Demerara, Essequibo and Berbice, which were ceded to the United Kingdom, being consolidated in 1831 as British Guiana. The Treaty did not define the western boundary of the British colony regarding the newly reestablish Venezuelan State (1830) (*See Supra 9*), and particularly with its province of Guyana, so after the British commissioned Robert Schomburgk to delineate that boundary (1835), the Venezuelan-Guyana Boundary Dispute officially began when in 1840 the Venezuelan

66 See Allan R. Brewer-Carías, "Territorio de Venezuela. Período Republicano", in *Diccionario de Historia de Venezuela*, Tomo II, Fundación Polar, Caracas 1989, pp. 867-874

Government protested British encroachment on Venezuelan territory, considering that the borders of the former Guyana Province of the General Captaincy of Venezuela extended as far east as the Essequibo River.[67]

After claims and protests, and due to the United States' threats of intervention, the United Kingdom agreed in 1897, by means of the Treaty of Washington entered into by the United Kingdom and Venezuela, to let an international tribunal arbitrate the boundary. On October 3, 1899, the Tribunal issued a decision determining the boundary-line between the Colony of British Guiana and the United States of Venezuela, and without any written opinion or explanation, awarded more than 90 percent of the disputed territory of British Guiana to the United Kingdom, with Venezuela receiving the mouth of the Orinoco River and a short strait of the Atlantic coastline just to the east.

65. The 1899 Arbitral award coincided with one of the main 19th century internal political struggles of Venezuela, in which a Revolution (the Liberal Restorative Revolution) seized State power and consolidated the authoritarian government that controlled the country for almost the entire first half of the 20th century (*See Supra 15, 16*). The newly established government was also involved in a bitter international struggle which arose because of unpaid loans; provoking Great Britain, Germany and Italy to send a joint naval expedition to the Venezuelan coast to blockade seaports and capture Venezuelan gunboats (*See Supra 15; Infra 268*).

66. In 1949 the *American Journal of International Law*,[68] published after his death, a Memorandum written by Severo Mallet-Prevost (August 11, 1944), a lawyer who had acted as a junior counsel for Venezuela at the Paris 1899 Tribunal, adducing that the Arbitral Tribunal's president had coerced several of its members into assenting to the final decision, that was the result of a political deal between Britain and Russia. Consequently, under the 1961 Constitution, Venezuela claimed that their rights to the Essequibo territory had been ignored by a tribunal which had settled the frontier based not on a judicial process, but on a political deal, filing in 1962 a formal territorial reclaim before the United Kingdom.

In 1966, an "Agreement to resolve the controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland regarding the Venezuela and British Guiana Borders" was signed in Geneva, in consideration that the independence of British Guiana was going to be proclaimed as it happened that same year. Venezuela recognized the new State of Guyana with the stipulation that it "does not imply recognition or in any way renouncement or diminishment of the territorial rights that Venezuela is claiming". Afterward, Guyana became a State party of the Geneva Agreement (Article VII), Venezuela reiterated its claim that the Paris Tribunal Arbitral decision of 1899 was "null and void," considering that the *Guayana* Essequibo territory claimed by Venezuela "has its east border with the new State of

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67 See Allan R. Brewer-Carías, "Guyana-Venezuela Border Dispute," in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008.

68 Nº 43 (3), July 1949, pp. 528-530.

Guyana, on the Essequibo river line, from its origins to its discharge on the Atlantic Ocean."

On June 18, 1970, the governments of Venezuela, Britain, and Guyana signed the Protocol of Port-of-Spain, which suspended for a period of 12 years the application of Article IV of the Geneva Agreement, providing for the parties to explore the possibility of improving their understanding and to create a more convenient environment to continue with the procedures set forth in the Geneva Agreement. The protocol was to end on July 18, 1982, but one year before, the Venezuelan Government publicly announced its decision not to extend its term, provoking the reactivation of the Geneva Agreement provisions, in the sense that the claim would be regulated by its Article IV, which refers to the peaceful settlement means set forth in Article 33 of the United Nations Charter. Accordingly, the matter was eventually referred to the election of the peaceful settlement mean to the Secretary General of the United Nations, being the dispute settlement since 1985, in his hands, through a United Nations-based Good Officer process, with the appointment of a Secretary General Special Representative.

67. Regarding the delimitation of Venezuelan territorial waters, the first Treaty on the matter in international history was the Treaty on Maritime Waters of the Paria Gulf signed by Venezuela and Great Britain on February 26, 1942, establishing the delimitation of waters between the continental territory of Venezuela and the Island of Trinidad. This Treaty was later substituted by the Treaty signed between Venezuela and Trinidad and Tobago on Maritime and Submarines Waters in November 1990.

The national statutes related to Territorial Water, Contiguous Zone, Continental Shell of 1956 and to Exclusive Economic Zone of 1978, set forth that in cases in which the limits established according to its provisions caused superposition regarding foreign waters, the matter must be resolved according to international law. Consequently Venezuela has subscribed to International Treaties for the delimitation of maritime and submarines areas with all the States with boundaries of waters, except Colombia: On March 28, 1978, with the United States of America regarding the Islands of Puerto Rico and Saint Croix (Law July 20, 1978); on March 30, 1978, with the Netherlands regarding the Netherlands Antilles (Aruba, Bonaire and Curazao) (Law July 20, 1978); on March 3, 1979, with Dominican Republic (Law July 26, 1979); on July 19,1980, with France regarding the Islands of Guadalupe and Martinique and the Island of Aves (Law July 15, 1982).

CHAPTER 4. POPULATION (DEMOGRAPHIC DATA)

68. The national population census of 2007 shows a total Venezuelan population of 27.483.200, mainly being concentrated in the coastal and mountain zones, which represents approximately20% of the territoryand more than 80% of the population. The region of the plains, with 30% of the territory has only 10,2 % of the total population, and the Guayana region with 50% of the territory of the country, only has 6 % of the population.

The density of the population is of 25,2 inhabitants per Km^2, being the highest one in the Capital District (4,240 inhabitants per Km^2), followed by the States of Cara-

bobo, Nueva Esparta, Miranda and Aragua. The lowest density is located in the southern states of Amazonas, Delta Amacuro, Apure and Bolivar, where the indigenous people population (less than 1,5 % of the total population) (*See Infra 481 ff*), is mainly concentrated.

The Venezuelan population is characterized by being an aggregation of mixed races, aproduct of the historical *mestizaje* of the country, whose origin are to be found in the colonial times with the unions of Indians and Spaniards and since the sixteenth century, with the African population. After World War II, an important process of migration took place in the country and the country received many Spanish, Portuguese and Italian migrants who were rapidly integrated in the country. During the seventies of the last century, a similar process of migration took place with people from South American countries, mainly due to the development of the Venezuelan economy compared to the recession in other counties. Currently all those processes of migration have given rise to a completed integrated population without any sort of inter racial conflicts, in spite of the recurrent efforts made by the Chávez government since 2000 to provoke social class conflicts.

69. The official language of the country is "Castilian" (Spanish). Nonetheless, according to Article 9 of the Constitution, the indigenous languages, are also of official use for the indigenous peoples and being part of national and humanity cultural heritage, must be respected in all the national territory[69] (*See Infra 483*).

CHAPTER 5. CONSTITUTIONAL RELATIONSHIP BETWEEN CHURCH AND STATE

70. The most important religion in Venezuela has always been the Roman Catholic one. Nonetheless, except in the 1811 Constitution where the Catholic, Apostolic and Roman Religion was declared the only and exclusive one of the population as well as the State's religion (Article 1), in no other Constitution has such a provision been included. In the 1857 constitutional reform, a provision establishing that the State was to protect the Catholic religion (Article 5) was in effect only for a few months (*See Supra 11*). Since the 1864 Constitution (Article 14,13), religious freedom has been expressly declared as the current situation (*See Infra 427*).

71. On the other hand, the separation between Church and State is the principle established in Venezuela since the nineteenth century, after decades in which the State had the right to be involved in Church affairs. In effect, since the Independence, the new independent State assumed the Right to *Patronato Eclesiastico* that the Spanish Crown used to have regarding the Catholic Church. Consequently, on July 25, 1824, the Congress of the Republic of Colombia passed an Ecclesiastic *Patronato* Law, conferring to the State the power to be involved in the administration and organization of the Catholic Church, and even regarding the discipline of the Church and the administration of the Church properties.

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69 Indigenous Languages Law, *G.O.* Nº 38.981 de 28-7-2008

During the presidency of Antonio Guzmán Blanco (*See Supra 13*), the traditional conflicts between the State and the Church were exacerbated, when the government suspended the Seminars imposing the laic character of the superior studies. In 1873, the civil marriage was formally decreed, and the civil registry was organized out of the reach of the Church. All these provisions were incorporated in the first Civil Code approved that same year, substituting the former ecclesiastic provisions, and since then, have been the general regime of civil law applied in the country. In 1874 all Convents and Cloisters were dissolved, and the ecclesiastic properties taken by the State.

72. Later, in 1911, a Decree was adopted on the Supreme Inspection of Cults, where references were made to the Ecclesiastic *Patronato* Law. These inspection powers were also included in the 1961 Constitution, in which after establishing the freedom of religion (Article 65), expressly regulated the Ecclesiastic *Patronato* right, establishing with the same trend as the 1947 Constitution, that nonetheless, international agreements could be signed to regulate the relations between the Church and the State (Article 130).[70]

Based on this provision, a *Modus Vivendi* was signed in 1964 between the Saint Siege and the Venezuelan State regulating the relations between the Church and the State, substituting the old provisions referred to the Ecclesiastic *Patronato.* In the 1999 Constitution, no reference at all is made to these matters, being limited to establishing the freedom of religion and cult that the State must guarantee. The Constitution also proclaimed the independence and autonomy of all churches and religions (Article 59).

CHAPTER 6. CONSTITUTIONAL PRINCIPLES REGARDING INTERNATIONAL RELATIONS

73. The Preamble of the Constitutions establishes the political, social, cultural and international goals of the State and the Society, and among the latter it defined as an essential goal of the State to pacifically cooperate with all nations, through pacific solution of controversies, rejecting war. The international cooperation must be governed by the principles of non intervention in other countries affairs, and of the self determination of peoples, according to the universal and indivisible international guaranty of human rights and the democratization of international society.

The Preamble also refers to the values that must govern the International relations of the Republic, like nuclear disarmament, environmental equilibrium as well as the healthy environment as a common and non renounceable human heritage.

Another of the main goals of the State mentioned in the Preamble that must govern the action of the State, is the promotion and and consolidation of the Latin American

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70 See José Rodríguez Iturbe, *Iglesia y Estado en Venezuela 1824–1964,* Caracas, 1968; and Jesús Leopoldo Sánchez, "El convenio Eclesiástico, las Constituciones Hispanoamericanas y los Códigos Nacionales" in *Estudios sobre la Constitución. Libro Homenaje a Rafael Caldera.* Vol. III, Universidad Central de Venezuela, Caracas, 1979, pp. 1723 y ss.

integration, which at the moment was referring to the Andean Community of Nations of which Venezuela was a member up to 2006.

74. In addition to the Preamble, Article 152 of the Constitution also refers to the international relations of the Republic pointing out that they must coincide with the goals of the State regarding the exercise of its sovereignty and the peoples' interest. Those relations must be governed by the principles of independence, equality between States, free determination and non intervention in internal matters of other states, the pacific solution of controversies, cooperation, human rights respect, solidarity among the peoples in their fight for emancipation and the welfare of human kind.[71] In addition, the same Article 152 provides that the Republic must maintain the most firm and decided defense of these principles and of the democratic practice in all international organs and institutions.

75. Regarding the Latin American integration process, the 1999 Constitution incorporated a major reform providing for constitutional basis for such process, giving foundations to the possibility of the transfer of State powers to supra national entities. The previous constitutional situation was precarious, due to the provision of Article 108 of the 1961 Constitution, which in fact impeded Venezuela's ability to decisively enter with clear constitutional solutions into the process of integration.[72] On the contrary, and with the purpose of giving specific constitutional grounding to any supranational integration process, Article 153 of the 1999 Constitution incorporated a new express clause on the subject, in which, in addition to imposing on the Republic the duty to promote and favor the Latin American and Caribbean integration in order to advance towards the creation of a Community of Nations, it established the possibility for the Republic to participate by means of treaties, in the creation of supranational organizations, to which powers may be attributed or transferred to conduct the processes of integration that the Constitution assigns to the branches of government. Accordingly, the same constitutional provision establishes that the resulting communitarian law *(derecho comunitario)*, not only have direct and immediate effect in internal law, because it is considered to be an integral part of the existing legal order, but it also has to be preferred over national laws with which they could be in conflict.[73]

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71 See in general, Juan Carlos Sainz Borgo, "Régimen internacional de la Constitución de 1999", in *Revista de la Facultad de Ciencias Jurídicas y Políticas,* Nº 121, Caracas, 2001, pp. 143-209.

72 See Allan R. Brewer–Carías, *Implicaciones constitucionales del proceso de integración económica regional,* Caracas, 1997; "Las exigencias constitucionales de los procesos de integración y la experiencia latinoamericana," in *Congreso de Academias Iberoamericanas de Derecho,* Academia Nacional de Derecho y Ciencias Sociales de Córdoba, Córdoba 1999, pp. 279-317; "Las implicaciones constitucionales de la integración económica regional" in *El Derecho Venezolano a finales del Siglo XX,* Academia de Ciencias Políticas y Sociales, Caracas 1998, pp. 407-511. .

73 See in general, Jorge L. Suárez, "La Constitución venezolana y el Derecho Comunitario", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 253-276; Marianella Zubillaga, "Los fundamentos del Derecho Comunitario y su soporte constitucional: la experiencia europea y andina", *Idem,* pp. 281-307; Jorge L. Suárez M., "La Comunidad Andina, la responsabilidad del Estado y la Constitución venezolana", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón,* Volumen II. Tribunal Supremo de Justicia, Caracas,

These provisions of the Constitution were very important regarding the only integration process in Latin America with a supranational organization, that is the Andean Community of Nations, which had its origin in the Cartagena Agreement (*Andean Pact*) of 1969, initially signed by Bolivia, Chile, Colombia, Ecuador and Perú, and to which Venezuela adhered to in 1973 as a Member State. In 1996 the Andean Pact of subregional integration was transformed into the Andean Community of Nations, conformed by supranational organs such as the Commission, the Andean Court of Justice and the Andean Parliament. [74] Unfortunately Venezuela withdrew from the Andean Community in 2006, and since then has asked to be incorporated in the Mercosur process without success.

76. Finally, it must be mentioned that according to Article 155 of the Constitution, in all international treaties, covenants and agreements signed by the Republic, a clause must be inserted according to which the parties are obliged to resolve the controversies that could arise between them, derived from their interpretation or execution, by the pacific means recognized in International law provided that it is possible in the procedure followed by the signing.

2001, pp. 489-648; Jorge L. Suárez M., "La Constitución venezolana de 1999 y la integración regional", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela*, Volumen I. Imprenta Nacional, Caracas, 2001, pp. 440-472; Nelly Herrera Bond, "El Derecho Comunitario en la nueva Constitución", in *Comentarios a la Constitución de la República Bolivariana de Venezuela"*, Vadell Hermanos Editores, Caracas, 2000, pp.7-10; Jorge Petit, "Los principios de auto-ejecutividad e inmediatez de los tratados internacionales en materia de integración a la luz de la Constitución Venezolana de 1999, en el marco de la Comunidad Andina de Naciones", in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la UCV*, Nº 122, Caracas, 2001, pp. 153-168; and Juan Carlos Sainz Borgo, "La regulación constitucional del proceso de Integración Andino", in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999*, Centro de Investigaciones Jurídicas (CEIN), Caracas, 2001, pp. 241 a 271.

74 See Allan R. Brewer-Carías, "El largo camino para la consolidación de las bases constitucionales de la integración regional andina y su abandono por el régimen autoritario de Venezuela", in André Saddy (Coordinador), *Dereito Público Econômico Supranacional*, Methoius Consultoría Jurídica Internacional, Rio de Janeiro, 2009.

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Part One. Sources of Constitutional Law

CHAPTER 1. THE CONSTITUTION

§1. SUPREMACY AND RIGIDITY

77. The principle of constitutional supremacy is expressly established in Article 7 of the 1999 Constitution setting forth that "the Constitution is the supreme norm and the foundation of the legal order", and that, "all persons and organs that exercise public power are subject to this Constitution." For such purpose, the provisions of the Constitution as superior law are always directly enforceable and applicable; and the Constitution is essentially the ground norm for the interpretation of the entire legal order.

This character of the Constitution as supreme norm and the foundation of the legal order is also accompanied by the express prescription that its provisions are obligatory for all branches of government as well as for individuals. The most important consequence of this express consecration of the principle of constitutional supremacy is the establishment of the system of judicial review and particularly the obligation of all judges to assure the integrity of the Constitution (Article 334) (*See Supra 55; Infra 560*).

On the other hand, the supreme law character of the Constitution implies that it has derogatory power regarding any other norm sanctioned prior to its enactment; and in addition, that any act approved after the enactment of the Constitution that could contradict its provisions are considered null and void.

Finally, the supreme character of the Constitution means that it is accompanied by the principle of rigidity in the sense that the constitutional text is out of the reach of the ordinary legislator and that it cannot be modified by the procedure of formation of the ordinary laws, but only by means of the specific procedures set forth in the Constitution for its revision with popular participation.[75]

§2. PROCEDURE FOR CONSTITUTIONAL REVIEW

78. In effect, the rigidity of the Constitution materialized through the provision of special procedures and institutional channels for constitutional review,[76] implies that

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75 See Allan R. Brewer-Carías, "La intervención del pueblo en la revisión constitucional en América latina", in *El derecho público a los 100 números de la Revista de Derecho Público 1980-2005*, Editorial Jurídica Venezolana, Caracas 2006, pp. 41-52

76 See Allan R. Brewer-Carías, "Los procedimientos de revisión constitucional en Venezuela," in Eduardo Rozo Acuña (Coord.), *I Procedimenti di revisione costituzionale nel Diritto Comparato,*

the National Assembly through the procedure for enacting ordinary legislation, may in no case modify the Constitution or perform constitutional review.

The Constitution of 1999 contains three institutional mechanisms for constitutional review, distinguishable according to the importance and magnitude of the changes proposed, which includes the Amendment, the Constitutional Reform, and the National Constituent Assembly.

I. Constitutional Amendment

79. The first constitutional review procedure is the "Constitutional Amendment" which has been established for the purpose of adding or of modifying one or more provisions to the Constitution without altering the text's fundamental structures (Article 340).

According to Article 341,1, this amendment procedure can be initiated by a petition signed by fifteen percent (15%) of Citizens inscribed in the civil and electoral register; by thirty percent (30%) of the members of the National Assembly; or, by the President of the Republic in a decision that must be adopted in the Council of Ministers.

When the initiative stems from the National Assembly, the amendment proposition requires the approval of a majority of its members, and the draft must be debated and approved, following the procedures constitutionally established for the passage of legislation. (Article 341,2). This means that a legislative debate of a proposed amendment only takes place when the amendment procedure is initiated by the National Assembly which, in that case, must approve it. Thus, if an Amendment is proposed by popular initiative or is initiated by the President of the Republic, that proposal is the one to be directly submitted to popular approval by referendum (Article 341,3), without any kind of debate or approval by the National Assembly. In the referendum at least twenty-five percent (25%) of registered voters must concur, and in order to approve the proposal, it must be voted for by a simple majority of those voting (Article 73).

Once approved by the people, the President of the Republic is obligated to promulgate Amendments within ten (10) days of their approval (Article 346).

The Constitution requires that Amendments once approved by referendum, be numbered consecutively, and published as a continuation of the Constitution without altering the original text. However, Articles amended are to be annotated with a footnote corresponding to the number and date of their amendments.

II. Constitutional Reforms

80. The second constitutional review procedure established in the 1999 Constitution is the "Constitutional Reforms", which in Article 342 is designed for partial

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Urbino, Italia, 1999, pp. 137-181; "Modelos de revisión constitucional en América Latina", in *Boletín de la Academia de Ciencias Políticas y Sociales*, enero-diciembre 2003, Nº 141, Caracas 2004. pp.115-156.

revisions of the Constitution and for the substitution of one or several provisions but without modifying the structure and fundamental principles of the constitutional text.

The differences between an "Amendment" and a "Reform" are thus subtle. The former enables, "the addition or modification of one or several Articles of the Constitution, without altering its fundamental structure" (Article 342), while the latter has as its objective, "the substitution of one or several of its provisions which do not modify the structure and principles of the constitutional text" (Article 340).

From these provisions, it can be said that the "Amendment" procedure is designed to "add or modify" Articles of the Constitution, while the "Reform" procedure is designed to "substitute" Articles, but in neither case the fundamental structure of the Constitution can be altered. That is why the "constitutional reform" proposed and sanctioned in 2007, which was rejected by the people by referendum held in December 2007, was formulated in defraudation of the Constitution (*See Infra 200*), because it was seeking to modify essential elements of the State through a procedure established for other purposes (*See Infra 36*).

Nonetheless, the procedure for the "Constitutional Reform" is more complicated, and requires that a proposed reform be debated and approved by the National Assembly before it can be submitted to referendum. The initiative of the "Reform" is assigned to the National Assembly when approved by a Resolution approved by a majority of its members; to the President of the Republic in a decision adopted in a Council of Ministers; or, to the people through a petition signed by no less than fifteen percent (15%) of the registered voters (Article 342). In all these cases, the initiative must be brought before the National Assembly.

81. Once the "Reform" proposal is filed before the National Assembly, according to Article 343, the draft must be submitted to debate, and have three discussions: a first discussion in the period of the Assembly corresponding to the period of the filing of the draft; a second discussion by Titles or by Chapters, depending on the draft; and a third discussion, Article by Article. The Assembly must approve the "Reform" draft in a term of no more that two years since the draft was filed and accepted. The "reform" proposal must be considered as approved if voted by two third of the members of the Assembly.

Once the Reform draft is approved, within thirty (30) days it must be submitted to referendum (Article 344), in which the people are generally required to vote on the Reform in its entirety, that is, as a whole. However, up to one third of the Reform draft could be submitted to separate vote when one third (1/3) of the National Assembly so decides, or if it is requested by the President of the Republic in his initiative of the Reform, or is requested by no less than five percent (5%) of registered voters in case of popular initiative.

A "Constitutional Reform" must be declared approved if the number of affirmative votes exceeds the number of negative votes (Article 345). The President of the Republic is required to promulgate a reform within ten (10) days of its approval. If the President fails to do so according to the provisions of Article 216 of the Constitution, the President of the Assembly must proceed to promulgate it (Article 346).

In the event that a constitutional reform fails to be approved, that is, when rejected by popular vote in the referendum, Article 345 prohibits it from being filed again before the Assembly in the remainder of the constitutional term. Nothing is established in the Constitution regarding the effects of the rejection of "constitutional amendments," and also, nothing is established regarding the possibility to file the same rejected "constitutional reform" proposal, through the procedure of a "constitutional amendment," as it is now occurring. The case is a matter of interpretation and of determining the intention of the Constituent power, which was to establish a limit regarding the possibility of repeatedly asking the direct expression of the will of the people by referenda. That is, once the people have express their popular will through a referendum, it is not possibly to asked the people again and again, without limits, on the same matters in the same constitutional term.

For instance, the matter of the continuous presidential reelection in 2007 was proposed through a "constitutional reform" draft formulated by the President of the Republic in 2007 and was rejected by the people in the Referendum held on December 2007. Nonetheless, in spite of this prohibition, in December 2008, the President of the Republic proposed again to modify the Constitution, using the "Amendment" seeking his indefinite reelection, although the same proposal was already rejected in his same constitutional term in the Constitutional reform referendum held in December 2007. The National Assembly proposed then a constitutional amendment of Articles 160, 162, 174, 192 and 230 of the Constitution, which was approved in the referendum of February 14th 2009, eliminating all the limits established for the reelection of public officials.[77] (*See Infra 168, 172, 210, 281*).

III. The National Constituent Assembly

82. The 1999 Constitution, which was a product of a National Constituent Assembly not foreseen nor regulated as an institution for constitutional review by the then in force 1961 Constitution, now precisely provides for that institution in cases when the constitutional review proposals seek for "transforming the State, creating a new legal order, and writing a new Constitution" (Articles 347 ff.). In these cases, no constitutional amendment or reform procedures can be used.

83. When establishing the National Constituent Assembly procedure, Article 347 begins by setting forth an essential principle of modern constitutionalism: that the people are the bearers of the "original constituent power;" so it is in the exercise of that power that the people can convene a National Constituent Assembly with the purpose of transforming the State, creating a new legal order, and drafting a new Constitution.

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77 The question submitted to referendum and approved by the people was the following: *"Do you approve of the amendment of Articles 160,162,174,192 and 230 of the Constitution of the Republic prepared by initiative of the National Assembly, which extends the political rights of the people in order to allow any citizen in exercise of a public office by popular election to become a candidate to the same office for the constitutionally established term, his or her election depending exclusively from the popular vote?*

This mean that in the 1999 Constitution, and contrary to the practice when the 1999 Constituent Assembly was convened, the National Constituent Assembly cannot be considered in itself as an "original constituent power," a power that is reserved to the people in an untransferable way. Thus, being the people the only titleholder of the original constituent power, it is for the people to establish the framework of action of the Constituent Assembly. If it is true that in the constitutional provision no reference is expressly made to the need for a referendum in order to approve the convening of the National Constituent Assembly, it is evident that such referendum must take place in order for the people to express its will regarding the statute of the National Constituent Assembly, that is its composition, the system of election of its members, its powers and duration, and its limits.

84. The initiative for the convening a the referendum in order to convene a National Constituent Assembly is assigned to the President of the Republic in a decision adopted in Ministers' Council; to the National Assembly by means of a resolution approved by two thirds (2/3) of its members; to two third (2/3) of the Municipal Councils of the country expressing its votes in open Town Halls (*Cabildos abiertos*); or to a petition signed by fifteen percent (15%) of registered voters (Article 348).

Once the initiative for convening the Assembly is formulated, the National Electoral Council must convene the referendum in order for the people to convene the Assembly; and once decided by the people, the election of its members must be made. According to Article 349 of the Constitution, once the Constituent Assembly is installed, the constituted powers of the State may in no way impede any of its decisions, which imply that even if it is a decision suspending the constituted powers of government, they cannot obstruct them.

On the other hand, once the new Constitution is approved by the National Constituent Assembly, the President of the Republic cannot object it and must publish it in the *Official Gazette*. The 1999 Constitution failed to subject the new Constitution to an approbatory referendum, although it is regulated in its Articles 73 and 74, and specifically is established for the approval of constitutional amendments and reforms (Articles 341, 344). On the other hand, the 1999 Constitution itself, after being sanctioned by a National Constituent Assembly, was approved through a referendum on December 15th, 1999, in order for it to enter into effect (*See Supra 28, 29*).

IV. Limits to the constitutional review powers

85. The 1999 Constitution does not establish in an express way the so-called "immutable principles" or clauses found in many of the modern constitutions when stating that some provisions cannot ever be changed.

Nonetheless, in an indirect way it is possible to identify some of those immutable clauses derived from the wording of the constitutional provisions. For instance, when Article 1 of the Constitution proclaims that the Republic is "irrevocably" free and independent, it means that in no way can the Republic lose its freedom and independence, so no constitutional review can be initiated for such purpose thus that declaration is an immutable one.

In the same sense, when the same Article 1 of the Constitution declares that independence, freedom, sovereignty, immunity, territorial integrity and national auto determination are non renounced rights of the Nation, that is, that those principles cannot be changed in any way, these declarations can be considered as immutable clauses.

Article 5 of the Constitution establish that sovereignty resides "untransferably" in the people, which mean that that character cannot be change and that the people in no way can transfer its sovereignty, so no constitutional revision can establish such transfer.

Also when Article 6 of the Constitution establishes that the government of the republic and its territorial entities will always be democratic, participatory, elective, decentralized, alternative, responsible, pluralistic and of revocable mandates, that means that in no way a constitutional review process could change or eliminate any of those characteristic of the government, because if they must always be as mentioned, they are immutable.

§3. THE SUB-NATIONAL CONSTITUTIONS

86. According to Article 164 of the 1999 Constitution, the Legislative Councils of the states have the power to enact their own Constitution in order to organize the states branches of government in accordance with what is established in the national Constitution.

This provision follows a traditional constitutional trend regarding the existence of sub-national constitutions sanctioned by each State, as has been the tradition since the 1811 initial Provincial Constitutions (*See Supra 6*). The scope and contents of these states constitution, nonetheless, is now completely limited to provide for the organization of the branches of government of the states, which are only two: the legislative branch of government corresponding to the Legislative Councils, and the Executive branch of government, assigned to the state governors. There is no judicial power at the states level, and they have no powers to incorporate in their Constitutions other matters like for instance, constitutional rights, which are of national jurisdiction.

But even in this limited scope of the sub-national constitutions, the content that can be established in the States Constitutions has being additionally reduced, by attributing to the National Assembly the power to enact a national Law on the organization and functioning of one of their main organs, the Legislative Councils (Article 162);[78] and by directly regulating the main aspects of States Executive organization, particularly their Public Administration, which has been the object of various national laws,[79] that are directly applicable to the states' executive branch of government (*See Supra 157*).

Consequently, in practice, if it is true that all the 23 states of the republic have their own Constitutions, the content is very similar, repeating what is already established in

78 Organic Law on the States Legislative Councils, *Gaceta Oficial* Nº 37.282 de 13-09-2001.

79 For Instance, the Organic Law on Public Administration, *G.O.* N° 5.890 Extraordinario de 31-7-2008

the national Constitution or in the laws enacted by the National Assembly. Nothing original is possible to find in such "constitutions".

CHAPTER 2. THE TREATIES

§1. INCORPORATION TO INTERNAL LAW

87. Article 154 of the Constitution set forth that the Treaties entered by the Republic must be approved by the National Assembly before their ratification by the President of the Republic. Thus, international Treaties and conventions must be incorporated in internal law before their ratification by means of their approval by statutes by the National Assembly, which like all statutes must be published in the *Official Gazette* in order to have effect (Article 215). This is then the general provision regarding the incorporation of Treaties to internal Law.

The legislative approval of international treaties, conventions or agreements must be made through statutes (Article 156,18) following the general procedure established in the Constitution for the "formation of laws" (Article 202 ff). After the approval, the ratification of the treaties corresponds to the Executive, and can only refer to the content of the text approved by the National Assembly. Consequently, any change or variation of the approved text in the act of ratification nullifies it.

In the case of approbatory laws of international treaties, the President has the discretion to determine the opportunity in which the said Law must be promulgated and published in the *Official Gazette* (Article 215), according to international conventions and the convenience of the Republic (Article 217).

88. Regarding this general provision on the legislative approval of international treaties, the Constitution establishes a few exceptions where Treaties do not need to be approved by the Legislator in order to be incorporated in internal law. These exceptions refers to those Treaties tending to execute or to improve preexistent obligations of the Republic; those seeking to apply principles expressly recognized by the Republic; those called to execute ordinary international relations acts; and those through which the Executive exercise powers that are expressly given to it by statute.[80]

89. In the process of incorporating Treaties to internal law, the President of the Republic, before ratifying a Treaty and even when the Treaty has been already approved by the National Assembly, is entitled to file a request before the Constitutional Chamber of the Supreme Tribunal for the verification of the constitutionality of the Treaty (Article 336,5) (*See Infra 571*).

90. Treaties, conventions, or other international agreements which can compromise national sovereignty or transfer national powers or competencies to supranational

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80 See Larys Hernández Villalobos, "Rango o jerarquía de los tratados internacionales en el ordenamiento jurídico de Venezuela (1999)", in *Revista del Tribunal Supremo de Justicia,* Nº 3, Caracas, 2001, pp. 110-131; Boris Bunimov Parra, "La entrada en vigor de los acuerdos internacionales en Venezuela", in *Libro Homenaje a Antonio Linares,* Instituto de Derecho Público. Universidad Central de Venezuela, Caracas, 1999, pp. 19-26.

entities, as for example, in the case of treaties for economic integration, may be subject to approbatory referendum (Article 73). The initiative for such referendum can be filled by the President of the Republic in a decision adopted in the Council of Ministers; by the National Assembly in a motion approved by the vote of at least two-thirds (2/3) of its members; or by popular petition signed by at least fifteen percent (15%) of registered voters.

Nonetheless, approbatory laws of international treaties cannot be submitted to referenda intended to abrogate them (Article 74).

§2. HIERARCHY

91. The general constitutional consequence of the process of incorporation of international treaties and conventions into internal law by means of statutory approval by the National Assembly is that as a matter of principles treaties have the same rank as statutes in the internal order. Nonetheless, three main exceptions can be identified regarding this hierarchical position of treaties.

The first derives from the general principle established in Article 8 of the Civil Procedure Code referred to matters of private international law regarding which courts are obliged in relation to the specific issue in question to apply first to the international treaties between Venezuela and the respective State.

The second refers to treaties or conventions on human rights, which have constitutional hierarchy; this being one of the important innovations of the 1999 Constitution on matters of human rights (Article 23) (*See Infra 367*). This means that treaties, pacts, and conventions ratified by Venezuela must be preferred over internal law (*orden interno*) if they have more favorable provisions regarding the enjoyment or exercise of rights. In addition, the same Article points out that those international treaties and conventions on human rights are immediately and directly applicable by the courts and any other organ exercising Public Powers.[81]

The third exception regarding the hierarchy of treaties refers to the treaties and norms derived from the processes of Latin American and Caribbean integration, in which is set forth that the communitarian law resulting from them must prevail over the internal laws; that is, communitarian treaties and norms have a superior hierarchy regarding statutes (*See Supra 75*).

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81 See Allan R. Brewer-Carías, "Nuevas reflexiones sobre el papel de los tribunales constitucionales en la consolidación del Estado democrático de derecho: defensa de la Constitución, control del poder y protección de los derechos humanos", in Francisco Fernández Segado (coordinador), *Dignidad de la persona, Derechos Fundamentales, Justicia Constitucional*, Dykinson, Madrid 2008, pp. 761-826.

CHAPTER 3. THE LEGISLATION

§1. TYPES OF LAWS AT THE NATIONAL LEVEL

I. Ordinary laws

92. According to Article 202 of the Constitution, "law" (statute) on the national level is that act sanctioned by the National Assembly acting as a legislative body through the procedure of laws formation, which imposes the need to have at least two sets of debates regarding the draft (Article 205) (*See Infra 299*). The statutes that systematically gather norms concerning a specific subject may be termed "codes" (*Códigos*), as is the case for example, of the Civil, Commercial and Criminal Codes (*See Infra 109*).

II. Organic laws

93. On the other hand, Article 203 identified one specific type of statutes called "organic laws" (*leyes orgánicas)*,[82] distinguishing four categories:

First, those statutes that are expressly termed in the Constitution as organic law, as is the case, for instance, of the Organic Law on Boundaries (*Fronteras*) (Article 15), the Organic Law on Territorial Division (Article 16), the Armed Force Organic Law (Article 41), the Social Security System Organic Law (Article 86), the Land Use Organic Law (*Ordenación del Territorio*) (Article 128), the Municipal Public Power Organic Law (Article 169), the Organic Law on Metropolitan Districts (arts.171, 172), the Organic Law reserving the State activities, industries and services (Article 302), the Organic Law on the Council for National Defense (Article 323), the Organic Law on Judicial Review (Article 336), the Organic Law on the States of Exception (*Estados de Excepción*) (Article 338), the Organic Law on Asylum and Refugees (Transitory Provision -T.P.-, 4,2), the Public Defense Organic Law (T.P. 4,5), the Education Organic Law (T.P. 6), the Organic Law on Indigenous Peoples (T.P. 7) or the Labor Organic Law (T.P. 4,3).

Second, the Constitution qualifies as organic laws those enacted by the National Assembly to organize the various branches of government, as is the case, for instance, of the Public Administration Organic Law (Article 236,20); the Attorney General Organic Law (Article 247), the Judiciary Organic Law and the Supreme Tribunal of Justice Organic Law (art, 262); the Electoral Power Organic Law (Article 292); the Citizen Power Organic Law, the General Comptroller Office Organic Law, the Public Prosecutor Organic Law, the Peoples' Defender Organic Law (T. P 9); the Municipal Regime Organic Law (Article 169) and the States Legislative Councils Organic Law (Article 162).

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82 See José Peña Solís, "La nueva concepción de las leyes orgánicas en la Constitución de 1999", in *Revista del Tribunal Supremo de Justicia,* Nº 1, Caracas, 2000, pp. 73-111; Milagros López Betancourt, "Una aproximación a las Leyes Orgánicas en Venezuela", in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999,* Centro de Investigaciones Jurídicas (CEIN), Caracas, 2001, pp. 109 a 157.

Third, also considered as organic laws are those enacted in order to develop the regulation of constitutional rights, which opens an enormous field of matters in the sense that all the statutes enacted to regulate any of the constitutional rights declared in Articles 19 to 129 must be organic laws.

And fourth, the Constitution also considers as organic laws those enacted for the purpose of serving as a normative framework to other laws, as is the case, for instance, of the Taxation Organic Code which serves as the framework to all the specific tax laws, or the Financial Public Administration Law, that serves as the general framework for all the specific annual budget laws of all the public debts authorizations laws.

94. Except for the first category of organic laws, in all the others cases the corresponding draft must be admitted by the National Assembly by a vote of the two third of the present members before beginning the debate of the project; a majority that also applies in cases of reforms to organic laws (Article 203)..

Also, except for the first aforementioned category, the qualification of a law, as an "organic law" by the National Assembly, must be reviewed regarding the constitutionality of such qualification by the Constitutional Chamber of the Supreme Tribunal of Justice (Article 203). For such purpose the statutes must be sent to the Constitutional Chamber before their promulgation, and if the Chamber considers that the statute is not an organic law, it will lose this character.

III. Other laws: Enabling and Cadre Laws

95. According to Article 203 of the Constitution, enabling laws (*leyes habilitantes*) are statutes of legislative delegation, that is, those sanctioned by the National Assembly by a vote of the three-fifth of its members, in order to establish the guidelines, the purposes and the framework of the matters that are delegated to the President of the Republic, in order for him to regulate them through decree-laws (decrees with rank and value of laws) during a certain period of time (Articles 203, 236,8).

This possibility for legislative delegation by means of enabling laws can be considered as an innovation of the 1999 Constitution, without precedents in modern constitutionalism regarding its scope. It substituted the previous provisions of the 1961 Constitution, which limited the authorization by enabling laws to the President, to adopt extraordinary measures exclusively on economic and financial matters (Article 190,8). In contrast, in the 1999 Constitution, the possibility of legislative delegation has been established in an extended way, without limits regarding the matters that can be regulated by the Executive, which contradicts the general constitutional guaranty of certain matters that must be reserved to the legislator (as body composed by elected representatives) (*reserva legal*), like the establishing of limits to the exercise of human rights, the approval of taxes (no taxation without representation) and the creation of criminal offenses.[83] (*See Infra 369*).

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83 See Pedro Nikken, "Constitución venezolana de 1999: La habilitación para dictar decretos ejecutivos con fuerza de ley restrictivos de los derechos humanos y su contradicción con el derecho

96. Regarding the cadre laws (*leyes de bases*) they are established in order to empower the National Assembly to regulate matters of concurrent character between the national and states level, that once enacted by the National Assembly then can be developed in each state by the corresponding State Legislative Council (Article 165).[84](*See Infra 167*).

IV. DECREE-LAWS

97. The President of the Republic is authorized in the Constitution to enact in three cases decrees-laws, that is, decrees with rank and value of statutes:[85]

First, when the National Assembly approves a legislative delegation through an enabling law authorizing the President to regulate the matters specified in it, through decree-laws, for which purpose the President must conform its legislative acts to the guidelines, the purposes and the framework established in the enabling law, and to the period established for such purpose (*See Infra 242*). These decree-laws can be the object of abrogate referendum, as it is expressly set forth in Article 74 of the Constitution, when a popular petition is filed supported by no less than the 5% of the registered electors.

Second, when in cases of state of exceptions, that is, in situations that seriously threaten the security of the Nation, its institutions and persons, the President of the Republic considers it necessary to restrict the guaranties of some constitutional rights, in which case, he must establish the rules regarding the exercise of the restricted guaranty (Article 339). In these cases these decrees, due to the content and object of their regulations referred to constitutional rights (which can only be regulated by statutes), can be considered as decree-laws (*See Infra 235*).

The third type of decree-laws refers to those enacted by the President of the Republic regarding the organization of Public Administration. In this respect, Article 236,20 of the Constitution authorizes the President to "set forth the number, organization and attributions of the Ministries and the organs of National Public Administration, as well as the organization and functioning of the Council of Ministers" (*See Infra 255*). Even though this presidential power is established in the Constitution, its exercise by the Executive, particularly when referred to the creation or suppression of Ministries,

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internacional", *Revista de Derecho Público*, Nº 83 (julio-septiembre), Editorial Jurídica Venezolana, Caracas 2000, pp. 5-19.

84 See José Peña Solís, "Dos nuevos tipos de leyes en la Constitución de 1999: leyes habilitantes y leyes de bases", in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la UCV*, Nº 119, Caracas, 2000, pp. 79-123.

85 See Eloisa Avellaneda Sisto, "El régimen de los Decretos-Leyes, con especial referencia a la Constitución de 1999", in F. Parra Aranguren y A. Rodríguez G. (Editores), *Estudios de Derecho Administrativo, Libro Homenaje a la Universidad Central de Venezuela*, Tomo I, Tribunal Supremo de Justicia, Caracas, 2001, pp. 69 a 106; Allan R. Brewer-Carías, "El régimen constitucional de los Decretos-Leyes y de los Actos de Gobierno", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001)*, Volumen I, pp. 25-74.

and to their organization and attributions, always implies the modification of some substantive legislation.

§2. EQUIVALENT LEGISLATIVE RULES: THE STATES LAWS AND THE MUNICIPAL ORDINANCES

98. As the Venezuelan State is organized according to a federal form of government, with a system of vertical division of powers, in addition to the legislative powers of the national (federal) level of government, the States and the Municipalities also have legislative powers regarding the matters attributed to them in the Constitution.

Regarding the states, Article 162 of the Constitution assigns them the attribution of "legislate" on matters assigned to the states, as well as to sanction the "Budget Law of the state." In this regard the legislative acts of the Legislative Councils are also called "laws" (statutes). The Legislative Councils, as aforementioned, are also empowered to sanction the states' Constitutions in order to organize the branches of governments (Article 164,1) (*See Supra 86; Infra 155*).

In the Municipal level, also regarding the matters attributed to the Municipalities, Article 175 assigns to the Municipal Councils the "legislative function," which is exercised through "Municipal Ordinances" that have always been considered as "local laws" (*See Infra 172*).

States laws and Municipal Ordinances can be challenged before the Constitutional Chamber of the Supreme Tribunal on grounds of their unconstitutionality (*See Infra 565*).

§3. HIERARCHY

99. The legislative function in the three levels of government (national, states, municipal) is exercised according to the federal division of power system, and according to the matters assigned to each level. Consequently, in principle, the laws passed in each level are autonomously sanctioned by each legislative body (National Assembly, States Legislative Councils, Municipal Councils) referring only to the matters assigned in the distribution of powers framed in the Constitution (*See Infra 160 ff.*). Any encroachment in the matters reserved to other levels implies usurpation of power, affecting the law as unconstitutional.

100. Because of the centralized form of the Venezuelan federation, almost all matters of public action and policy have been assigned to the national level, so the national laws have general and comprehensive scope and application in all the country. The states scarcely have exclusive matters attributed to their authority, so the states laws are very few and mainly refer to organizational matters. When the matter is assigned in a concurrent way to the national and state level of government, the states' laws on the matter must be subjected to the national legislation which can also consist in a Cadre Law (Article 165) (*See Infra 167*).

The same occurs at the Municipal level, although in this case the Constitution assigns more matters in an exclusive way to local governments. Only when matters have been assigned to different levels of government in a concurrent way must the legislation at the local level be subject to the national or states laws.

101. Any conflict between the different legislative entities, and any encroachment regarding legislative attributions of the different level of government, can be subjected to judicial review before the Constitutional Chamber of the Supreme Tribunal of Justice, which is empowered to decide conflicts between legal provisions and to declare which must prevail (Article 336,8); as well as to decide constitutional controversies between the different branches of government, not only in the horizontal sense (separation of powers) but in the vertical sense (territorial distribution of powers) (Article 336, 9) (*See Infra 576*).

CHAPTER 4. THE JURISPRUDENCE

§1. THE OBLIGATORY DECISIONS OF THE CONSTITUTIONAL JURISDICTION

102. The Constitutional Chamber of the Supreme Tribunal of Justice, as Constitutional Jurisdiction, exercising powers of judicial review of constitutionality of legislation and of all State acts with rank of statute or issued in direct application of constitutional provisions (Articles 334, 336), has the task of guaranteeing the supremacy and effectiveness of the constitutional provisions and principles. It is named as the highest and last interpreter of the Constitution, being charged with watchisng over for its uniform interpretation and application (Article 335). Accordingly, the 1999 Constitution set forth that "the interpretations established by the Constitutional Chamber regarding the content and scope of the constitutional provisions and principles are binding for the other Chambers of the Supreme Tribunal and all the courts of the Republic" (Article 335) (*See Infra 578*).

This provision regarding the effects of judicial review rulings on interpretations of the Constitution by the Constitutional Jurisdiction is an innovation introduced in the 1999 Constitution, complementing the traditional general and obligatory (*erga omnes*) effects of the judicial review rulings when annulling laws. In both cases, the jurisprudence of the Constitutional Jurisdiction is obligatory and binding (*See Infra 565*).

The Judicial Review of Administrative Action Jurisdiction decisions have the same *erga omes* effects,when annulling executive regulations and administrative acts (Article 259), being in these cases the jurisprudence obligatory and binding (*See Infra 603*).

In a similar sense it must be noted that the decisions adopted by the Civil, Criminal and Social Cassation Chambers of the Supreme Tribunal of Justice when hearing a cassation recourse (Article 266,8), have the effect of annulling the judicial decisions submitted for their review, and also have obligatory and binding effects regarding the courts that issued the reviewed decisions.

§2. THE GENERAL VALUE OF JURISPRUDENCE

103. Except in the specific aforementioned cases of obligatory and binding jurisprudence derived from judicial decisions issued on judicial review rulings on constitutional (Constitutional Jurisdiction), administrative (Judicial review of Administrative Action Jurisdiction) and judicial matters (Cassation), the value of the jurisprudence derived from judicial decisions is of an auxiliary character, as a very important tool for the correct interpretation and application of laws. Nonetheless, the courts are not subjected to precedents, except, as aforementioned, on matters of judicial review of constitutionality of legislation and constitutional interpretation, when the Constitutional Chamber gives to its decision binding effects (*See Infra 558*).

CHAPTER 5. THE UNWRITTEN LAW

§1. CONSTITUTIONAL PRINCIPLES AND VALUES

104. The 1999 Venezuelan Constitution is one of the Constitutions in the contemporary world containing not only an impressive number of Articles (350), but also a very rich and numerous declarations of values and principles.

They can be found not only in the Preamble of the Constitution but also in many of its Articles, where in a very enumerative and express way, an extensive list of constitutional values and principles are enshrined, as goals intending to guide the State, the Society and the individuals' general conduct. Consequently, in Venezuela, the global values and principles not only derive from the interpretation and application of the Constitution by the courts, but from what it is set forth in a precise and express way in the text of the Constitution[86]. By means of constitutional judicial decisions, of course, the sense, the scope and the priority character of many of these constitutional principles and values have been defined and enriched; and also, unfortunately, in other cases, they have also been distorted, originating in many cases some constitutional incongruence between what is said in the constitutional text and what is decided in the political practice of government (*See Infra 190 ff.*).

In any case, since the Constitution is a text in which the generally shared values of a society are reflected, the declarations of intent contained in it are of indubitable value, both for the State bodies, who must be guided by them, as for the judges, specially the Supreme Tribunal of Justice as its superior judicial guardian.

105. All these constitutional values expressly mentioned in the Constitution, and also those interpreted by the Constitutional Jurisdiction, refer to the State (the Republic, the Nation), its organization (distribution of State powers and branches of government) and functioning (government and Public Administration); to the legal system; to human rights; and to the content and scope of the concept of "the democratic and social rule of law and justice state regulated by the Constitution. These values have the same constitutional rank as the express provisions of the Constitution. Con-

86 See Allan R. Brewer-Carías, *Principios fundamentales del derecho público*, Editorial Jurídica Venezolana, Caracas, 2005.

sequently, those principles have been an important tool for judicial review of constitutionality exercise by the Constitutional Jurisdiction, to the point that the binding interpretations that can be establish by the Constitutional Chamber of the Supreme Tribunal, not only can be referred to the content and scope of the constitutional provisions but also to the "constitutional principles" (Article 335).

§2. General Principles of Law

106. Article 4 of the Civil Code that lays out the basic rules for the interpretation of laws, sets forth that the sense that must be attributed to the law must be the one that evidently appears from the significance of words, in accordance with their connection and to the intention of the Legislator. When no precise legal provision exists, the provisions regulating similar cases or analogous matters must be taken into account; and if doubts remain, the general principles of law must be applied.

Consequently, the general principles of law are always a source of law for the interpreter, when no express provision exists, and no similar or analogous rules can be applied.

They are also referred to in the Civil Procedure Code, on matters of international private law regarding which the courts must first apply what is established in international treaties between Venezuela and the respective State. When no treaty exists, they must apply what on the matter is provided in the laws of the Republic or what can be deducted from the mind of national legislation, and finally, they must be guided by the principles of law generally accepted (Article 8).

Chapter 6. The Executive Regulations and Administrative Acts

§1. National, States and Municipal Regulations

107. An essential part of the administrative functions is the power assigned to the Executive branch of government to enact regulations in order to develop and facilitate the application of statutes. Consequently, in each of the three levels of government: the President of the Republic in the national level (Article 156,10); the Governors in the states level, and the Mayors in the municipal level, have the power to issue regulations referring to the respective national, states or municipal laws.

In addition, the other branches of government have been empowered in the Constitution to issue regulations in order to develop specific statutes, like the National Electoral Council regarding the Electoral Laws (Article 293,1). In other cases it is in specific statutes that the regulatory powers have been established, like the case of the Comptroller General of the Republic regarding his fiscal control functions according to the Organic Law on the General Comptroller of the Republic (Article 13,1). Regulatory power has also been assigned to the Ministers by the Organic Law on Public Administration,[87] and to specific independent administrative or regulatory authorities

87 *G.O.* N° 5.890 Extraordinario de 31-7-2008.

by the corresponding statute creating them, like the Superintendence of Banks and Financial Institutions, Superintendence of Insurance, Superintendence on Free Competition protection, Stock Exchange control Commission (*See Infra 258*). Also, the Supreme Tribunal of Justice has regulatory powers regarding the organization and functioning of the Judiciary (Article 267, Constitution).

§2. LIMITS TO THE EXECUTIVE REGULATORY POWERS

108. In all cases, the principal limit to the regulatory powers are those established in Article 156,10 of the Constitution when assigning it to the President of the Republic in the sense that they must always be exercised, regarding statutes, "without altering its spirit, purpose and reason."

The consequence of this principle is that regulations are always administrative acts, although of general content, and consequently always subjected to the statutes whose contents always prevail over the regulations. Nonetheless, it is possible for administrative organs to issue "autonomous regulations", in the sense of regulations that are not intended to specifically develop a particular statute, and are generally referred to organizational matters. In these cases, the limit is always its sub legal character, and that their validity ceases if the matters is later regulated in a statute passed by the National Assembly.

Regulations, as all administrative acts, are subjected to judicial review by the Judicial Review of Administrative Action Courts (Article 259) (*See Infra 602*).

CHAPTER 7. CODIFICATION, INTERPRETATION AND PUBLICATION

§1. THE CODES

109. As defined in Article 203 of the Constitution, "codes" are the statutes that systematically gather norms concerning a specific subject, so it is for the National Assembly to sanction codes, being them a competence reserved to the national level of government. No code exists at the states or municipal levels.

The most important Codes are the Civil Code,[88] the Commercial Code,[89] the Criminal Code,[90] and the Procedural Codes: Civil Procedure Code,[91] Criminal Organic Procedure Code,[92] and the Military Justice Code.[93] As an organic law, the taxation one has been named Taxation Organic Code.[94]

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88 *Gaceta Oficial* Extra. Nº 2.990 de 26-07-1982.

89 *Gaceta Oficial* Extra. Nº 475 de 21-12-1955.

90 *Gaceta Oficial* Extra. N° 5.768 de 13-04-2005.

91 *Gaceta Oficial* Extra. Nº 3.694 de 22-01-1986.

92 *Gaceta Oficial* Nº 5.894 Extraordinario de 26-08-2008.

93 *Gaceta Oficial* Extra. Nº 5.263 de 17-09-1998.

94 *Gaceta Oficial* Nº 37.305 de 17-10-2001.

§2. INTERPRETATION

110. The main rule on law interpretation, which applies to all laws, including Codes, as aforementioned, has been set forth in Article 4 of the Civil Code that provides that the sense that must be attributed to the law must be the one that evidently appears from the significance of words, in accordance to their connection and to the intention of the Legislator. When no precise legal provision exists, the provisions regulating similar cases or analogous matters must be taken into account; and if doubts remain, the general principles of law must be applied.

Nonetheless, in addition to the literal sense of the legal provisions, in order to interpret them, according to the doctrine established by the Supreme Tribunal of Justice, summarized in decision No. 895 of the Politico Administrative Chamber of July 30, 2008, the interpretation of laws must always consider three other elements. Consequently, for the interpretation of laws, the interpreter must take into consideration the following four basic elements: first, the literal, grammatical or philological element, which is the initial point from where must depart any interpretation of laws following the provision of Article 4 of the Civil Code; second, the logical, rational or reasonable element; third, the historical element, in the sense that any legal provision must be inserted within a reality that has its origins and evolution, whose comprehension through its historical paths is important in order to give the provision an actual sense; and four, the systematic element, or the integral comprehension of law as a social life regulatory system. The Chamber has said, consequently that any law interpretation must have all four elements, in the sense that there are not four types of interpretation in order to choose one according to the interpreter's choice, but four different operations whose gathering is indispensable for the interpretation of the law, even in the event that one of such elements could have more importance. Consequently, in the interpretative task, it is not possible to rest only in the literal, grammatical or philological element. In addition there are other relevant elements that the authors have added, like the teleological element, that is, to understand that the law is sanctioned in order to attain certain social goals within the State organization; and the sociological element, that helps to understand the provision from the comprehension of the social, economical, political and cultural reality where the text is going to be applied.[95]

In the same sense, the Constitutional Chamber has also pointed out in a decision of December 9, 2002 that the interpretation of laws has to be made "*in totum*," that is, that the provision must be interpreted within the legal order as a whole[96]. That is, within the whole positive law, because otherwise it is impossible to get to the bottom of the sense and scope of the legal provision, necessary in order to determine what has been the will of the Legislator.

111. Regarding matters related to international private law, according to the Civil Procedure Code, the courts on the subject to be decided must first pay attention to

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95 See in *Revista de derecho Público*, Nº 115, Editorial Jurídica Venezolana, Caracas 2008, pp. 468 ff.

96 See File Nº 02-2154, case: *Fiscal General de la República***,** quotet in decision Nº 2152 of December 14, 2007, in *Revista de Derecho Público*, Nº 112, Editorial Jurídica Venezolana, Caracas 2007, pp. 446.

what it is established in international treaties between Venezuela and the respective State. In the absence of treaties, they must apply what on the matter is provided in the laws of the Republic or what can be deducted from the mind of national legislation. Finally, they must decide according to generally accepted principles of law (Article 8).

§3. PUBLICATION AND DEROGATORY EFFECTS

112. In order to have effects all statutes and regulations must be published in the *Official Gazette* (*Gaceta Oficial*) (Article 215).

Statutes can be total or partially reformed, and in the later case, they must be published in one single text in which the approved modifications must be incorporated.[97]

Statutes, according to Article 218 of the Constitution, can only be abrogated by other statutes or by means of referendum with exceptions established in the Constitution (Article 74). Statutes, on the other hand, have derogatory effects regarding previous statutes or regulations.

97 Official Publications Law, *Gaceta Oficial* Nº 20.546 de 22-07-1941.

Part Two. Basic Elements of the Participatory Democratic Political System

113. The 1999 Constitution proclaims that the government of the Republic of Venezuela **is and shall always be** democratic, participatory, elective, decentralized, alternating, responsible, plural and of revocable mandates (Article 6), establishing in addition, provisions regarding the need to be subject to accountability (*rendición de cuentas*), particularly of the elected officers, and establishing the possibility for all them to be subjected to repeal referendums.

In order to establish the democratic government with all such elements, that are defined in the sense of "rock-like clauses"(*cláusulas pétreas*) in the sense that they must always exists, Article 5 of the Constitutions, after setting forth that "sovereignty resides in an untransferable way in the people," declares that it can be exercised in two ways: on the one hand, in a "direct" way by means of referendum and other instruments for direct democracy established in the Constitution; and on the other hand, in an indirect way, "through suffrage, by the organs that exercise State Powers" (Article 5º). These same enunciations are contained in Article 62 of the same Constitution that sets forth the citizens' political right to freely participate in all public affairs, that is, to participate in the formation, execution, and control of public activities in order to achieve their complete collectively and individual development, being an obligation of the State and of society to facilitate and create the most favorable conditions for such participation. This political participation, being an essential characteristic of any democracy although not always accomplished, according to the same provision of the Constitution is exercised in two ways: in a direct way, through instruments of direct democracy; and in an indirect way, through elected representatives, which is one of the essential elements of representative democracy (Article 62).

114. For the purpose of guarantying this right to political participation, Article 70 of the Constitution enumerates the following political means for the citizens' rights to participate in the exercise of their sovereignty: on the one hand, regarding representative democracy, the election of representatives to public office; and on the other hand, regarding direct democracy, the vote in referenda and in the referendum for the revocation of mandates of elected officers; participation in popular consultations; the legislative or constitutional initiative; participation in open town meeting, and in Citizens' assemblies whose decisions are binding.

According to these constitutional provisions, the Venezuelan participatory democratic political system is characterized by the following elements: representative democracy and its electoral system; direct democracy instruments and its voting system;

plural political parties' regime; alternating system of government, and government accountability instruments.

CHAPTER 1. REPRESENTATIVE DEMOCRACY

115. Representative democracy, consequently, is one of the basic components of the Participatory Democratic System of Venezuela through which citizens exercise its sovereignty electing representatives to the State organs. It is an indirect mean of exercising sovereignty, precisely "through suffrage, by the organs that exercise State Powers" (Article 5º).

But suffrage and periodical, fair and free elections, based on the universal and secret vote expressing the will of the people, do not exhaust representative democracy, which in addition has the other following essential elements: respect for human rights and fundamental liberties; access to power and its exercise with subjection to the Rule of law; plural regime of the political parties and organizations; and separation and independence of public powers.

116. Regarding the exercise of sovereignty through representatives by means of elections not only is it the most common element of representative democracy, but it is an irreplaceable one, implying that all the Head Officials of the Executive Branches of Government and the members of Legislative Branches of Government, in all levels of government (*See Infra 168, 172, 210, 281*) are elected by popular, direct and secret vote. In the National level of government, the President of the Republic is elected for a term of six years by popular, universal, direct and secrete vote by all the Citizens registered in the Electoral Registry by a simple majority of votes (Articles 228, 230).

The members or representatives to the National Assembly are also elected for a term of five years (Article 192) by the Citizens registered in the Electoral Registry by popular, universal, direct, secret vote. In this case, the electoral system applied is a mixed one, combining personalized vote with proportional representation in a number fixed according to a population base of 1,1% of the total population of the country (Article 186) (*See Infra 120*). In addition, three additional national representatives in each State of the Federation must be elected. Also, the indigenous peoples have the right to elect three national representatives taking into account their traditions and customs (Article 125). Each representative must have a substitute member, also elected in the same process, who is called to act in cases of temporal or absolute absence of the principal (Article 186) (*See Infra 281*).

All the other high public officials of the other national Branches of Government (Justices of the Supreme Tribunal of Justice, General Comptroller of the Republic, General Prosecutor of the Republic, Peoples' Defender, and the members of the National Electoral Council) are not elected in popular elections, and are appointed by the National Assembly (Articles 265, 279, 296), in some cases, by a qualified majority of votes (*See Infra 333, 345*). This legislative election must be made with the participation of representatives of the various sectors of society that must integrate the Nomi-

nating Committees that must be established for such purposes.[98] (*See Infra 333, 345*). Unfortunately, these latter provisions have been distorted by the national Assembly reducing the participation scope of civil society by incorporating in such Committees members of the national Assembly (*See Infra 188*).

117. On the States level, the Governors of each of the State are also elected for a term of four years by popular, universal, direct and secrete vote of the Citizens registered in the Electoral Registry of the constituency of the respective State by a relative majority of votes, (Article 160). The members of the Legislative Councils of each State are elected each four years, in a number of not more that fifteen or less than seven, also by the Citizens registered in the Electoral Registry of the respective State. In this case, the same rules for the election of the representatives to the National Assembly must be followed (Article 162) (*See Infra 282*).

118. On the municipal level, Mayors and members of the Municipal Councils are also elected each four years by popular, universal, direct and secrete vote of the majority of Citizens registered in the Electoral Registry of the constituency of the respective Municipality (Articles 174, 175) (*See Infra 172*).

119. The 1999 Constitution established that the President of the Republic, the States' Governors and the municipal Mayors could be reelected only once for the following immediate constitutional term (Articles 160, 174, 230); and that the members of the National Assembly and the members of the States Legislative Councils could be reelected for two consecutives constitutional terms at a maximum (Article 162, 192). All these limits to the possible reelection of elected officials, established as a consequence of the principle of alternating government according to what is established in Article 6 of the Constitution, were eliminated through a constitutional amendment approved by referendum on February 14th 2009 (*See Supra 52; Infra 168, 172, 210, 281*).

CHAPTER 2. ELECTORAL SYSTEM

120. For the purpose of guarantying representative democracy, the electoral system has been established in the Constitution according to the elected officials.[99] The President of the Republic, the Governors of the States and the Mayors of the Municipalities are elected by simple majority of the voters in universal, direct and secret elections (Articles 160, 174, 228). The constitutional term of the President of the Republic is of six years (Article 230), and those of the Governors of the States and the Mayors (Article 174) are of four years (Articles 160, 174). At the end of their term, the Constitution established that they could be reelected only once for the subsequent

98 See Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas", in *Revista Iberoamericana de Derecho Público y Administrativo*, Año 5, Nº 5-2005, San José, Costa Rica 2005, pp. 76-95

99 See Allan R. Brewer-Carías, "Reforma electoral en el sistema político de Venezuela", in Daniel Zovatto y J. Jesús Orozco Henríquez (Coordinadores), *Reforma Política y Electoral en América Latina 1978-2007*, Universidad Nacional Autónoma de México-IDEA internacional, México 2008, pp. 953-1019.

constitutional term; a limit that was eliminated with the constitutional amendment approved by referendum on February 14th 2009 (*Infra 168, 172, 210, 281*).

In the case of the representatives to the National Assembly, to the Legislative Councils of the States and to the Municipal Councils, the electoral system is also based on universal, direct and secret vote (Article 63). The constitutional term of the National Assembly is of five years (Article 230), and those of the Legislative Councils of the States and the Municipal Councils are of four years (Articles 162, 174).

121. For the election of the representatives and members of the National Assembly, Legislative Councils and Municipal Councils, the electoral system traditionally applied according to the 1961 Constitution was governed by the d'Hondt proportional representation method. In 1993, the Organic Law on Suffrage and Political Participation,[100] seeking to guaranty more representativeness in the elections, introduced a combination of methods, adding to the proportional representation one a majority elections method in uninominal or plurinominal constituencies that were finally constitutionalized in the 1999 Constitution as a "personalized proportional representation method" (Article 63).[101] Up to 2009, the new Organic Law on Suffrage and Political Participation had not been sanctioned, and the elections of representatives have been made based on the 1993 Law, reformed in 1998.

This mixed system implies the need to assure that a percentage of representatives are to be elected in uninominal constituencies and another percentage is to be elected in plurinominal constituencies through blocked and closed lists. Accordingly, up to 2009, the elections of representatives were governed by the 1993 Law, reformed in 1998, although with a restriction introduced in the application of the mixed system established in the Constitution by means of an interpretation of the Constitution made by the Constitutional Chamber of the Supreme Tribunal of Justice on January 25, 2006, before the election of the members of the national Assembly that same year, through which the defrauding method applied by the parties supporting the government name as "*Las Morochas*" was legitimized.[102] The method consisted in allowing the various parties supporting official candidates to enter into agreements in order for some to only file nominations for the uninominal constituencies and others only for the plurinominal constituencies, so being formally different parties (although being part of the same coalition) no deduction of the elected candidates was to be applied.[103] In this way, the system turned to be in practice a preponderant majority sys-

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100 *Gaceta Oficial* Extra. Nº 5.233 de 28-05-1998.

101 See decision of the Constitutional Chamber of the Supreme Tribunal of Justice, Nº 74 of January 25, 2006 in *Revista de Derecho Público*, Nº 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 122-144.

102 Decision No. 74 (Case: Acción Democrática vs. National Electoral Council and other electoral authorities). See in *Revista de Derecho Público*, No. 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 122-144.

103 See Allan R. Brewer-Carías, "El juez constitucional vs. El derecho al sufragio mediante la representación proporcional", in *Crónica sobre la "In"Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas 2007, pp. 337 ss.

tem distorting proportional representation. In 2009, a new Organic Law on the Electoral Processes was sanctioned "legalizing" this electoral distorting method.[104]

CHAPTER 3. DIRECT DEMOCRACY INSTITUTIONS AND THE REFERENDA VOTING SYSTEM

122. Regarding direct democracy, the 1999 Constitution has also established various mechanisms for its exercise in order to promote direct popular participation in conducting public affairs. In this context, Article 70 of the Constitution, referring to the need for prominence participation of the people, as aforementioned, enumerates as means for direct democracy: the referendums; the popular consultation; the repealing of public mandate; the legislative, constitutional and constituent initiatives; the open town hall meetings (*cabildos abiertos)*, and the Assemblies of Citizens "whose decisions shall have a binding character."

123. In particular, regarding referenda, the Venezuelan Constitution expressly set forth for the following: consultative referendum; repeal referendum for the revocation of mandates; approbatory referendum of statutes and of constitutional revisions and referendum to abrogate statutes.[105]

124. Regarding the consultative referendum, they can be convened for questions regarding matters of preeminent national, states or municipal importance. According to Article 71 of the Constitution, at the national level the initiative for their convening belongs either to the President of the Republic in Council of Ministers; to the National Assembly by means of a Resolution approved by a majority of its members; or to the citizens by means of a petition signed by at least ten percent (10%) of registered voters. At local levels of government (Parish, Municipal, States) the consultative referendums can be convened by the Municipal Councils or by the State Legislative Councils on the initiative of two thirds (2/3) of their members, respectively; by the Mayor or the State Governor; or by the people through a petition signed by no less than ten percent (10%) of the registered voters in the specific district or jurisdiction.

125. On the other hand, regarding revocation or repeal referendums, they are the consequence of the principle established in the Constitution in the sense that all popular elected public officials are subjected to revocation of their mandate (Article 6). For such purpose, Article 72 establishes the repeal referendum or referendum of revocation, which can only take place at the mid-point of the term in office. The corresponding petition for a repeal referendum can only be one of popular initiative that must be signed be at least twenty percent (20%) of the registered voters in the corresponding jurisdiction. In order for a mandate to be repealed or revoked, the concurrence of a number of voters equal to or greater than the number that originally elected the official is needed, and the voters must total at least twenty-five percent (25%) of

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[104] *Gaceta Oficial* No. 5928 Extra. of August 12, 2009.

105 See Cosimina G. Pellegrino Pacera, "Una introducción al estudio del referendo como mecanismo de participación ciudadana en la Constitución de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 441-481.

the registered voters in the corresponding jurisdiction. If the repeal petition is approved, the substitute officer must be elected immediately according to the electoral procedures established in the Constitution and laws (*See Infra 125*). This repeal referendum has been distorted in 2004 regarding its application to the President of the Republic, and was transformed against the constitutional provision into a "ratifying" referendum.[106]

126. Another referendum established in the Constitution is the approval referendum referred to as Draft statutes which are debated before the National Assembly, which according to Article 73 of the Constitution proceeds when at least two thirds (2/3) of the members of the Assembly so decide. In such a case, if the referendum results in the approval of the statute provided that at least twenty-five percent (25%) registered voters have concurred, the corresponding bill is to be sanctioned as law. The approbatory referendum can also be proposed by popular initiative (Article 204,7) when the National Assembly fails to take up debate on bills that also were proposed by popular initiative (Article 205).

Also, according to Article 73 of the Constitution, treaties, conventions, or other international agreements that can compromise national sovereignty or transfer national powers or competencies to supranational entities, as is the case of treaties for regional economic integration (*See Supra 75*), may also be subject to approbatory referenda. In this case, the initiative corresponds to the President of the Republic in Council of Ministers, to the National Assembly when approved by a vote of at least two-thirds (2/3) of its members, or to popular initiative through a petition signed by at least fifteen percent (15%) of registered voters.

127. The Constitution also regulates the referendum for the abrogation of statutes that can be convened regarding all laws, except budgetary laws, tax laws, public debts laws, amnesty laws, human rights laws and those laws approving international treaties (Article 74). The abrogation referendums can be convened on the initiative of at least ten percent (10%) of registered voters, or on the initiative of the President of the Republic in Council of Ministers. Decrees laws issued by the President of the Republic (Article 236,8) may also be subjected to abrogation referendum, in which case the initiative to convene it can only be a popular one through a petition signed by at least five percent (5%) of registered voters.

In all cases of abrogation referendums the concurrence of at least forty percent (40%) of registered voters is necessary to approve the abrogation of a statute or decree law.

128. Regarding the popular consultation, in addition to the representatives of the different sectors of society in the Nominating Committees for the appointments of High-ranking officials of the Citizen, Judicial and Electoral Branches of Government (*See Supra 116; Infra 188 ff*), in reference to the sanctioning of statutes by the Na-

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106 See Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004", in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero-abril 2005 pp. 11-73

tional Assembly Article 211 of the Constitution imposes on the National Assembly the obligation to always submit draft legislation to public consultation, asking the opinion of Citizens and the organized society.) Also, according to Article 206, the States must be consulted by the National Assembly, through their Legislative Councils, when legislation regarding them is being considered in the National Assembly. In addition, in all the statutes that have been sanctioned under the 1999 Constitution, a chapter has always been included regarding popular participation by means of consultations on public policies.

129. The Constitution also guaranties popular initiative not only for the introduction of Draft legislation before the National Assembly by means of petitions signed by no less that the 0,1 % of the registered voters (Article 204,7), but also for the purpose of convening consultative, approbatory and abrogation referenda (*See Supra 122 ff.*). Regarding the revocation or repeal referendum, it is an exclusive right of the people to convene them by popular initiative (the Popular initiative (*See Supra 125*).

130. The Municipalities in the Constitution are conceived as the primary political unit in the national organization (Article 168), thus disposed as the main institutional channel for political participation in the matters belonging to local life, as ratified by Article 1 of the Organic Law on the Municipal Public Power.[107] This Law specifically sets forth that the Municipalities and the other local entities are the primary areas for citizens' participation in the planning, design, execution, control and evaluation of public policies. For such purposes, the Municipal entities must create the needed mechanisms in order to guaranty the participation of communities and social groups (Article 7), being obliged to promote them (Article 56). The Organic Law enumerates all the aspects of the citizens participatory rights (Articles 255, 260), and for such purposes establishes that the parishes must be the information, production and promotion centers for participatory processes, for identifying budgetary priorities, and for the promotion of citizens' participation in public affairs (Article 37).

131. Within the municipal means for political participation, Article 70 of the Constitution specifically refers to the Town Hall Meetings, also regulated in the Municipal Power Organic Law, that can be convened by the Municipal Councils, by the Parish councils and by popular initiative according to what is established in the Municipal Ordinances (Article 263). The decisions adopted in such Meetings are valid if approved by the majority of the persons present provided that they refer to matters concerning the municipal life (Article 264).

132. The other direct democracy participative means established in the Constitution are the Citizens Assembly (Article 70) conceived in the Municipal Organic Law as local entities for participation, which are of deliberative character, established in order to enforce governance, impulse planning and the decentralization of services and resources, in which all citizens have the right to participate (Article 266). Their decisions have obligatory character (Article 70, Constitution), provided, as indicated in the Municipal Organic Law, that they are not contrary to legislation and to the

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107 *Gaceta Oficial* N° 38.421 de 21-4-2006. See Allan R. Brewer-Carías *et al*., *Ley Orgánica del Poder Público Municipal*, Editorial Jurídica Venezolana,Caracas 2006.

community and State interest. The specific regulation concerning these Citizens Assemblies was left by the Municipal Organic Law to a special statute. This statute is the 2006 Communal Councils Law[108] where the Citizens' Assemblies have been developed by creating the Communal Councils at the communal level (sub municipal), but without any relation with the Municipalities, except when the latter transfer activities or services to the former. On the other hand, although being organs of the State, the members of the Communal Councils are not elected by suffrage, but only appointed by Assemblies of Citizens, which unfortunately are directly controlled by the official political party, and from the institutional and financial point of view, directly dependent on the President of the Republic through a "Presidential Commission of the Popular Power."[109] (*See Infra 171*).

CHAPTER 4. THE PLURAL POLITICAL PARTIES REGIME

133. A democratic regime cannot exist without political parties and pluralism. That is why, after a short experiment of a dominant party system in the forties (1945-1948) (*See Sura 18*) the democratic parties that in 1958 signed the *Pacto de Punto Fijo* after the Democratic Revolution which was initiated that same year against the Military dictatorship (*See Supra 20*); compromised themselves to establish a competitive and pluralistic multi party democratic system that functioned up to 1999 (*See Supra 21 ff.*).

The democratic period that according to those goals developed in the country during the second half of the XX century, was characterized from the beginning as being one with a notorious preeminence of the political parties that dominated all aspects of political life, and particularly participation and representation (Party State).[110] It was their crisis and the crisis of their leadership because of the lack of reforms and of up dating the functioning of the democratic systemthat eventually provoked the collapse of the democratic system itself in 1998 (*See Supra 24 ff.*). After forty years of controlling political power and having democratized the country, the parties underestimated the need the country had for more means of representation and political participation and failed to open the democratic system through, for instance, political decentralization to allow effective participation. At the end of the twentieth century, the fact was that all of the political ills of the Republic were attributed to the political parties, to the 1958 *Pacto de Punto Fijo* and to the Constitution of 1961, and political discussion ignited by the new authoritarian military and populist leadership that took control of the State centered on the anathema against them and on their destruction.

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108 *Gaceta Oficial* Extra N° 5.806 de 10-4-2006.

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

110 See Allan R. Brewer-Carías, *Problemas del Estado de Partidos*, Editorial Jurídica Venezolana, Caracas 1989.

134. The result was that the presidential election of that year and the election of the National Constituent Assembly the next year (1999) were characterized by an anti-party trend that was reflected in the drafting of the new 1999 Constitution, to the point that it can be said that it was conceived as an anti-party instrument, where the expression itself of "political party" was eliminated from its text, being substituted by the general expression of "organizations with political purposes" (Article 67).[111] Of course, what in 1998 and in 1999 tended to be ignored were the traditional political parties that up to then had been in control of power.

135. The constitution making process of 1999 and the sanctioning of the new Constitution unfolded in this context, and gave way to new political parties mainly constituted for electoral purposes and from the government, crushing the old and then marginalized political parties which abstained from participate in that process. During the subsequent years, these new political parties continued to act supporting the new government and its President, and eventually resulted in being more centralized that the traditional ones, with internal governing centralized structures linked to the President of the Republic. The final result of this process has been the presidential initiative, in 2006, to promote the constitution of a single United Socialist Party, using the State structures and services, which the President of the republic, Hugo Chávez presides, intending to unite in it all the various political parties that have supported his tenure. The unification has failed, because for instance the Communist Party has refused to disappear.

This official United Socialist Party was in charge of supporting the presidential Constitutional Reform Draft submitted to referendum in 2007, which nonetheless was rejected by popular vote, and was also the supporting instrument of the Government candidates to the regional and municipal elections in November 2008, in which the Government's candidates lost the elections in the most important and populated States and Municipalities of the country where opposition candidates to Governors and mayors were elected.

In any case, the result of the first decade of the political life under the 1999 Constitution, which seems to ignore political parties in its regulations, has been to increase partisanship and "party-autocracy," particularly regarding the official party that has been embodied in the State structures, in a way never before seen.

136. On the other hand, regarding the 1999 Constitution provisions related to political organizations, the traditional lack of internal democracy within the parties with their traditional pattern of leaders in perpetuity, led to a provision according to which not only the members of governing boards have to be elected by the members of each party, but also the choosing of party candidates for elections to representative offices must also be made through democratic internal elections (Article 67). To this end, the

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111 See Roberto V. Pastor; Rubén Martínez Dalmau, "La configuración de los partidos políticos en la Constitución venezolana", in *Revista de Derecho Constitucional*, Nº 4 (enero-julio), Editorial Sherwood, Caracas, 2001, pp. 375-389; Allan R. Brewer-Carías, "Regulación jurídica de los partidos políticos en Venezuela", in Daniel Zovatto (Coordinador), *Regulación jurídica de los partidos políticos en América Latina*, Universidad Nacional Autónoma de México, International IDEA, México 2006, pp, 893-937.

Constitution imposed the obligation that the National Electoral Council must organize such internal elections (Article 293,6), which in practice, due to the lack of statutory development of the constitutional provisions has not occurred during the first decade of the Constitution.

137. In addition, also as a reaction against the problems stemming from the public funding of political parties that was regulated under the 1998 Organic Law of Suffrage and Political Participation,[112] which led to a cornering and monopolizing of those funds by the traditional dominant parties, the drafters of the new 1999 Constitution simply prohibited public funding of organizations with political purposes and established new controls for their private financing (Article 67). This was a regression in addressing what is a constant problem in the democratic world: the possibility for public funding of political parties in order to avoid irregular and illegitimate funding, particularly of governing parties.[113] Nonetheless, in a 2008 decision of the Constitutional Chamber of the Supreme Tribunal interpreting such Article 67 of the Constitution, the Chamber has mutated the Constitution, concluding in a way contrary to the constitutional provision, ruling that what the Article intended was to prohibit the public financing only regarding the "internal activities" of the parties, and not their electoral activities, which consequently since 2008 has then been accepted.[114]

On the other hand, Article 67 of the Constitution refers to a statute the task of regulating the scope of private contributions to and finances of "organizations with political purposes", including mechanisms to oversee the origins and management of these funds. This statute must regulate political and elections campaigns, overseeing their duration and spending limits, and inclining them towards democratization. Up to 2009 this statute had not been sanctioned, the aforementioned 1998 Organic Law of Suffrage and Political Participation being applied instead. These matters were regulated up to 2009 by the 1998 Organic Law of Suffrage and Political Participation, now being subjected to the Organic Law on Electoral processes of 2009.

138. In the same trend of reacting against political parties, the Constitution also established the principle that the members of the National Assembly are representatives of the whole of the people and "are not to be subject to mandates or instructions other than their own conscience" (Article 200), seeking to eliminate parliamentary party groups. Nonetheless, in practice, the parliamentary factions have only changed their names and since 2000 have been called "opinion groups." In any case, and particularly regarding the governing party, its board presided by the President of the Republic itself, has had a more centralized control over the representatives to the National Assembly than the traditional parties before 1999.

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112 *Gaceta Oficial* Extra. Nº 5.233 de 28-05-1998.

113 See Allan R. Brewer-Carías, "Consideraciones sobre el financiamiento de los partidos políticos en Venezuela," in *Financiamiento y democratización interna de partidos políticos. Memora del IV Curso Anual Interamericano de Elecciones,* San José, Costa Rica, 1991, pp. 121 a 139.

114 Decision of the Constitutional Chamber of the Supreme Tribunal of Justice, Nº 780, of May 8, 2008 (Interpretaton of Article 67 of the Constitucion), in *Revista de Derecho Público*, Nº 114, Editorial Jurídica Venezolana, Caracas 2008, pp 126 ff.

The result of all these provisions, constitutional distortions, and absence of legislation has been that in political practice, under the new Constitution, the parties have greater presence than they ever had, to the point that as aforementioned, since 1999 the President of the Republic is the President of the governing Party, which since 2007 has been the Venezuelan Unique Socialist Party, and almost all the Ministers are also members of the party's National Coordination Board. As never before, the symbiosis between the governing political party and the State and its Public Administration has been organically sealed in Venezuela, opening lines of communication and financial channels as could not have been seen in the golden age of "party-autocracy" of the 1980's. The result has been that the same "Party State" has continued, with the same vices of clientism, and the same control by officials sitting in governing boards at the helm of the parties who have not been chosen in free and democratic internal elections.

139. Finally, it should be emphasized that the Constitution conferred to one of the national braches of government, the Public Electoral Power through the National Electoral Council, the duty not only to organize all electoral processes but also to "organize elections in the organizations with political purposes" (Article 293,6), establishing an intolerable principle of State intervention in the internal functioning of political parties (*See Infra 357*).

CHAPTER 5. INSTITUTIONS FOR GOVERNMENTAL ACCOUNTABILITY

140. As aforementioned, the 1999 Constitution, in addition to qualifying the government of the Republic as democratic, participatory, elective, decentralized, alternating, responsible, plural and of revocable mandates (Article 6), has established that the officials are subject to accountability (*rendición de cuentas*), which in particular applies to elected officers, which can be subjected to repeal referendums.

Regarding the President of the Republic, the Constitution imposes on him the duty to formulate before the National Assembly in ordinary sessions of the National Assembly, each year during the first ten days of its installment, a State of the Republic message giving account of the political, economic, social and administrative aspect of his actions during the previous year (Article 237). Regarding the Governors of States, they must give account of their actions, not before the Legislative Councils, but only before the Comptroller General of each State, having only to formulate before the Councils a report (Article 161). Regarding the representatives to the National Assembly, the Constitution imposes on them the duty to give an annual account of their actions to their electors, being subjected to repeal referendum (Article 197).

141. Within the institutions of accountability, the most distinguishing feature of the Venezuelan constitutional system is the express establishment of the repeal referendum as an institution of direct democracy (*See Supra 125*) referred to all elective officials, in the sense that the mandates of all elected officers are essentially revocable (Article 72). In this regard, the popular revocation of mandates is one of the means for direct political participation of the people in exercise of its sovereignty (Article 70). The revocation of mandates, consequently, can only take place by means

of the revocation referendum, which according to Article 72 of the Constitution must be made according to the following rules:

First, the repeal referendum can only be convened once half of the term of the elected officer has been elapsed.

Second, the request for convening a repeal referendum can only be made by popular initiative, signed by no less than the 25% of the registered electors in the corresponding constituency and filed before the National Electoral Council (Article 293,5). There cannot be more that one request for repeal referendum during the same constitutional term of the elected official.

Third, in the convened repeal referendum, a number equal or superior than the equivalent to the 25% of the registered electors must concur as voting persons.

Fourth, in order for a repeal of a mandate to be approved, it is sufficient that a number of voters equal or superior to those that have elected the officer must have voted in the referendum for the revocation of the mandate. In this case, the mandate of the officer must be considered as revoked, and a new election must take place immediately in order to fill the absolute absence according to the Constitution (Article 72, 233).

142. Regarding the President of the Republic, since the revocation of his mandate has the effect of an absolute absence, in case a revocation occurs, his replacement must be done as follows: If the revocation takes place during the first four years of his mandate, a new election must be made in order for the newly elected to complete the revoked President's term. If the revocation takes place during the last two years of the presidential term, the Executive Vice President must assume the position up to the end of the term (Article 233).

On the other hand, the Constitution only provided for the effects of the mandate revocation regarding the revoked official in the cases of the representatives to the National Assembly, in which case, the revoked representatives cannot seek a new election in the next constitutional term (Article 198). Nothing in this regard was established regarding the mandate revoking the other public elected officers.

143. On these matters of repeal referendums, the only experience the country had during the first decade of the 1999 Constitution has been the repeal referendum of the President of the Republic (who was elected in 2000 by 3.757.774) votes, convened in 2004 by popular initiative signed by more that three millions and a half signatures, which was held in August 2004.[115] In it, 3.989.008 voters voted YES for the repeal of

115 See Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004", in *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*, Vol., V, Instituto Costarricense de Derecho Constitucional, Editorial Investigaciones Jurídicas S.A., San José 2004, pgs. 167-312; "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

its mandate, that is, a number of votes superior to the ones that elected him in 2000. The consequence of that voting result, according to express provision of the Constitution, was to consider the mandate of the President revoked and to call for a new election. Nonetheless, the National Electoral Council, following a phrase in a Constitutional Chamber of the Supreme Tribunal decision, converted the repeal referendum of the President into a "ratification referendum" [116] that does not exist in the Constitution, just because a superior number of voters cast a NO vote, a condition or situation not established in the Constitution.

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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.

116 See Allan R. Brewer-Carías, "La Sala Constitucional vs. el derecho ciudadano a la revocatoria de mandatos populares: de cómo un referendo revocatorio fue inconstitucionalmente convertido en un "referendo ratificatorio", in Allan R. Brewer-Carías, *Crónica sobre la "in" justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, Nº 2, Caracas 2007, pp. 349-378.

Part Three. The Federation and the Territorial distribution of State Powers

144. The Venezuelan State has always been organized as a Federation. The federal form of Government was adopted in 1811 (*See Supra 2*) when an elected General Congress adopted on December 21, 1811, the first Constitution of any Latin American country, the "*Federal Constitution for the States of Venezuela*," which declared the former colonial provinces as sovereign states, all of which in 1810-1811 had declared independence from Spain and adopted their own provincial constitutions or forms of government. By means of this 1811 Constitution, the country adopted a federal form of government, following the influence of the United States' Constitution, at a time when the Federation was the only new constitutional instrument recently invented, different to the centralized monarchical states. That invention was followed by the Venezuelan framers of the new state in order to unite the former Spanish Colonial Provinces that formed the Venezuelan State, which had never been previously united. In those territories there were no Viceroyalties or *Audiencias* (until 1786), and a General Captaincy exclusively for military purposes integrating the Provinces was only established in 1777. Thus, it can be said that Venezuela was the second country in constitutional history to adopt federalism.[117]

145. The federation was later reaffirmed in the 1864 Constitution organizing the Republic as the United States of Venezuela (*See Supra 12*). Even though this latter denomination was eliminated in the 1953 Constitution, the federal form of the State was kept in the following 1961 and 1999 Constitutions.

For such purposes, the national Territory is divided into 23 States, which are the following: Amazonas, Anzoátegui, Apure, Aragua, Barinas, Bolívar, Carabobo, Cojedes, Delta Amacuro, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Nueva Esparta, Portuguesa, Sucre, Táchira, Trujillo, Vargas, Yaracuy and Zulia. In addition, a Capital District exists, which in 2000 substituted the former traditional Federal District founded in 1863, comprising part of the City of Caracas, which is the Capital of the Republic. The Constitution also establishes Federal Dependencies, which comprise the Venezuelan islands in the Caribbean Sea, except those integrating the State of Nueva Esparta (Islands of Margarita, Coche and Cubagua). Following a tradition also initiated in 1864, the Constitution also provided for the Federal Territories (Article 16), which nonetheless are currently inexistent. The last two Federal Territories were the Delta Amacuro Federal territory in the Orinoco Delta and the Amazonas

117 After the North American independence (1776) and Federation (1777), the first Latin American Country to declare independence and adopt a Constitution was Venezuela in 1811, adopting the federal form of State.

Federal territory in the south of the country, which were transformed into States in 1991 and 1992.[118]

146. But in practice, with all this territorial division and the State named in the Constitution as a "Federal Decentralized State" (Article 4), Federalism in Venezuela reveals a very contradictory form of government. In effect, a Federation is a politically decentralized State organization based on the distribution of State power in a two or three level of territorial political entities functioning with some sort of autonomy. Nonetheless, in Venezuela, with a Federation organized in a three level of government (national, states and municipal), the competences of the states and municipal level are scarce, and the autonomy of them very weak, lacking effective public policies and even of substantive sub-national constitutions. Consequently, in contrast to many Federations, what has been established in Venezuela in a very contradictory way is a Centralized Federation. Nonetheless, this situation has not always been like it is now. The process of centralization really began and developed during the 20th Century ((*See Supra 54*), being particularly more accentuated precisely during the first decade after the approval of the 1999 Constitution.[119]

CHAPTER 1. THE CENTRALIZATION PROCESS OF THE FEDERATION

147. In effect, the centralization process of the Federation began with the installment of the authoritarian government resulting from the 1899 Liberal Restorative Revolution, and particularly under the almost three decades of Juan Vicente Gómez dictatorship, spanning the first half of the 20th century. During these years no democratic institutions were developed (*See Supra 16*). So it was after the endless civil conflict that marked the history of Venezuela during the 19th century that the federal form of government began to be limited. The conflict stemmed from the permanent struggles between the regional *Caudillos* and the weak central power that had been formed, giving rise to the centralizing tendencies derived from the consolidation of the Nation State, a process that was particularly reinforced during the first half of the 20th century.

During these decades, the autocratic regimes of the country, aided by the income derived from the new exploitation of oil by the national State (oil and the subsoil always has been the public property of the State), contributed to the consolidation of the Nation State in all aspects, based on the creation of a national army, a centralized public administration, a central taxation system, and national legislation. These cen-

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118 See Allan R. Brewer-Carías, "El régimen de los Territorios y Dependencias Federales", in *Revista de Derecho Público*, Nº 18, Editorial Jurídica Venezolana, Caracas, abril-junio 1984, pp. 85-98.

119 See 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, mayo-diciembre 2003, Madrid 2003, pp. 11-43; "La descentralización política en la Constitución de 1999: Federalismo y Municipalismo (una reforma insuficiente y regresiva)" in *Boletín de la Academia de Ciencias Políticas y Sociales*, Nº 138, Año LXVIII, enero-diciembre 2001, Caracas 2002, pp. 313-359, and in *Provincia. Revista Venezolana de Estudios Territoriales*, Nº 7, julio-diciembre 2001, II Etapa, Centro Iberoamericano de Estudios Provinciales y Locales (CIEPROL), Universidad de los Andes, Mérida, 2001, pp. 7-92.

tralizing tendencies almost provoked the disappearance of the Federation, the territorial distribution of power, and the effective autonomy of the 23 States and of the Federal District.

148. The transition from autocracy to democracy began with the death of Gómez, and later, between 1945 and 1958, when a democratic regime, in accordance with the democratic Constitution of 1961, was progressively developed in which the Federal form of the State was kept, but with a highly centralized national organization. This democratic Constitution was the longest Constitution in force in all Venezuelan history, assuring the dominance of a very centralized political party system. During its 40 years of functioning, this democratic centralized political party system, without doubts, restrained the development of effective federal institutions. Nonetheless, due to the democratization process of the country and according to express constitutional provisions, a political decentralization process was forced to be applied in order to politically decentralize the federation with the transfer of powers and services from the national level of government to the States level. The process began in 1989 when the party system crisis exploded, and was forced by the democratic pressure exercised against the political parties, all of which were in the middle of a severe leadership crisis. One of the most important reforms then adopted was the provision of the direct election of the States' Governors which until that year were just public officials appointed by the President of the Republic.[120] In December 1989, for the first time since the 19th Century, States' Governors were elected by universal, direct and secret suffrage,[121] and regional political life began to play an important role in the country, initializing the increasing appearance of regional and local political leaders, many of whom were from outside the traditional political parties.

Nonetheless, after important efforts in 1993, the process to politically decentralize the federation was later abandoned, mainly due to the crisis of the centralized party system, and to the consequential political void it produced in the country.

149. Ultimately, it was this crisis in the centralized party system that gave rise to the covenant of a National Constituent Assembly not regulated in the 1961 Constitution, resulting in the sanctioning of a new Constitution, the 1999 Constitution of the "Bolivarian Republic of Venezuela" approved by referendum (Dec. 15, 1999). This new Constitution, if it is true that it provoked a radical change in the political players nationwide, also started the reversal of the decentralizing political efforts that were being made. The new Constitution continued with the same centralizing foundation embodied in the previous Constitution and, in some cases, centralizing even more aspects. For instance, although defining the decentralization process as a "national

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120 See Allan R. Brewer-Carías, "Problemas de la Federación centralizada (A propósito de la elección directa de Gobernadores)", *IV Congreso Iberoamericano de Derecho Constitucional*, Universidad Nacional Autónoma de México, México 1992, pp. 85-131.

121 Election and Remotion of States' Governors Law, *Gaceta Oficial* Extra Nº 4.086 de 14-04-1989. See the comments in Allan R. Brewer-Carías, "Los problemas de la federación centralizada en Venezuela", in *Revista Ius et Praxis*, Universidad de Lima, Nº 12, 1988, pp. 49 a 96; and "Bases legislativas para la descentralización política de la federación centralizada (1990: El inicio de una reforma", in Allan R. Brewer-Carías et al., *Leyes y reglamentos para la descentrlización política de la Federación*, Editorial Jurídica Venezolana, Caracas 1994, pp. 7-53.

policy devoted to strengthened democracy" (Article 158), in contrast the national public policy executed during the past decade can be characterized as a progressive centralization of government, without any real development of local and regional authorities.

Consequently, in Venezuela, federalism has been postponed and democracy has been progressively weakened; and the Constitution covers with a democratic veil an authoritarian regime, regulating a very centralized system of governmentwhere all powers of the State can be concentrated, as they now are. The Constitution has excellent declarations, including the one referring to the "Decentralized Federal State," the enumeration of human rights, and the "penta separation" of State branches of government. However, each of these declarations is contradicted by other regulations in the same Constitution, which allow a contrary result.

CHAPTER 2. THE CONTRADICTORY "DECENTRALIZED FEDERATION" IN THE 1999 CONSTITUTION

§1. CONSTITUTIONAL PROVISIONS RELATING TO FEDERALISM IN THE 1999 CONSTITUTION

150. A Federation, above all, is a form of government in which public power is territorially distributed among various levels of government each of them with autonomous democratic political institutions. That is why in principle, federalism and political decentralization are intimately related concepts. Specifically, decentralization is the most effective instrument not only for the guarantying of civil and social rights, but to allow effective participation of the citizens in the political process. In this context, the relation between local government and the population is essential. That is why all consolidated democracies in the world today are embodied in clearly decentralized forms of governments, such as Federations, or like the new Regional States, as is the case of countries like Spain, Italy and France. That is why it can be said that the strong centralizing tendencies developing in Venezuela in recent years are contrary to democratic governance and political participation.

151. According to Article 4 of the 1999 Constitution, the Republic of Venezuela is formally defined "as a decentralized Federal State under the terms set out in the Constitution" governed by the principles of "territorial integrity, solidarity, concurrence and co-responsibility." Nonetheless, "the terms set out in the Constitution," are without a doubt centralizing, and Venezuela continues to be a contradictory "Centralized Federation."[122]

Article 136 of the 1999 Constitution states that "public power is distributed among the municipal, state and national entities," establishing a Federation with three levels of political governments and autonomy: *a national level* exercised by the Republic

122 See Allan R. Brewer-Carías, *Federalismo y Municipalismo en la Constitución de 1999,* Universidad Católica del Táchira-Editorial Jurídica Venezolana, Caracas, 2001; "Centralized Federalism in Venezuela", in *Duquesne Law Review*, Volume 43, Number 4, Summer 2005. Duquesne University, Pittsburgh, Pennsylvania, 2005, pp. 629-643.

(federal level); the *States level*, exercised by the 23 States and a Capital District; and the *municipal level*, exercised by the 338 existing Municipalities. On each of these three levels, the Constitution requires "democratic, participatory, elected, decentralized, alternating, responsible, plural and with revocable mandates" governments (Article 6). Regarding the Capital District, it has substituted the former Federal District which was established in 1863, with the elimination of traditional federal interventions that existed regarding the authorities of the latter.

152. The organization of the political institutions in each of the territorial level is formally guided by the principle of the organic separation of powers, but with different scope. On the *national level*, with a presidential system of government, the national public power is separated among five branches of government, including: the "Legislative, Executive, Judicial, Citizen and Electoral" (Article 136). Thus, the 1999 Constitution has surpassed the classic tripartite division of power by adding to the traditional Legislative, Executive and Judicial branches, the Citizen branch, which includes the Public Prosecutor Office, the General Comptrollership Office, and the People's Rights Defender Office, as well as an Electoral branch of government controlled by the National Electoral Council (*See Infra 184*).

The new Citizen and Electoral branches, as well as the Judiciary, are reserved only to the national or federal level of government. Therefore, Venezuela does not have a Judiciary at the State level. In fact, since 1945, the Judicial branch has been reserved to the national level of government, basically due to the national character of all major legislation and Codes (Civil, Commercial, Criminal, Labor and Procedural Codes) (*See Supra 109*). Consequently, since Courts are national (federal), there is no room for State Constitution regulations on these matters. Regarding judicial review, the Constitutional Chamber of the Supreme Tribunal of Justice is the constitutional organ with power to review and annul with *erga omnes* effects (Article 336) all laws (national, state and municipal) including state constitutions when contrary to the national Constitution (*See Infra 564 ff.*), so there are no state courts or judicial organization.

153. Pertaining to the Legislative branch, it must be noted that the Constitution of 1999 established a one-chamber National Assembly, thus ending the country's federalist tradition of bicameralism by eliminating the Senate. As a result, Venezuela has also become a rare federal state without a federal chamber or Senate where the States, through its representatives, can be equal in the sense of equal vote. In the National Assembly there are no representatives of the States, and its members are global representatives of the Citizens and of all the States collectively. Theoretically, these global representatives are not subject to mandates, or instructions, but only subject to the "dictates of their conscience" (Article 201). This has effectively eliminated all vestiges of territorial representation.

154. Regarding the States branch of government, the 1999 Constitution established that each State has a Governor who must be elected by a universal, direct and secret vote (Article 160). Each State must also have a Legislative Council comprised of representatives elected according to the principle of proportional representation (Article 162). According to the Constitution, it is the responsibility of each states' Legislative Council to enact their own Constitution in order "to organize their branches of

government" along the guidelines of the national Constitution, which in principle guarantees the autonomy of the States (Article 159).

§2. LIMITS TO THE CONTENTS OF THE SUB-NATIONAL CONSTITUTIONS

155. Consequently, each State has constitutional power to enact its own sub-national constitution in order to organize the state's Legislative and Executive branches of government, and to regulate the state'sown organ for audit control. But in spite of these regulations on the organization and functioning of the State branches of government, the scope of States' powers has also been seriously limited by the 1999 Constitution, particularly due to the fact that for the first time in federal history, the Constitution refers to a national legislation for the establishment of the general regulation on this matter.

156. In effect, and in relation to the States' Legislative branch of government, the 1999 Constitution states that the organization and functioning of the States' Legislative Councils must be regulated by a *national statute* (Article 162), a manifestation of centralism never before envisioned, according to which the national Legislative power has the power to enact legislation in order to determine the organization and functioning of all of the State legislatures.

According to this power, the National Assembly has sanctioned an *Organic Law for the State Legislative Councils* (2001)[123] in which detailed regulations are established regarding their organization and functioning, and in addition, even without constitutional authorization, regarding the statutes and attributions of the Legislative Council members, as well as regarding the general rules for the exercise of the legislative functions, or the law enacting procedure itself. With this national regulation, the effective contents of the State Constitutions regarding their Legislative branch have been voided, and are limited to repeat what is established in the said national organic law or statute.

157. Additionally, the possibility of organizing the Executive branch of government of each state was also limited by the 1999 Constitution, which has established the basic rules concerning the Governors as head of the executive branch. The Constitution has additional regulations referring to the public administration (national, states and municipal), public employees (civil service), and the administrative procedures and public contracts in all of the three levels of government. All of these rules have also been developed in two 2001 national *Organic Laws on Public Administration*[124] *and on Civil Service*.[125] Therefore, state constitutions have also been voided of real content in these matters, have limited scope, and their norms tend to just repeat what has been established in the national organic laws or statutes.

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123 *Gaceta Oficial* Nº 37.282 de 13-09-2001.

124 *G.O.* N° 5.890 Extraordinario de 31-7-2008.

125 *Gaceta Oficial* Nº 37.522 de 06-09-2002.

158. Finally, regarding other states organs, in 2001, the National Assembly also sanctioned a *Law on the appointment of the States' Controller*,[126] which limits the powers of the State Legislative Councils on the matter without constitutional authorization. In addition, the national intervention regarding the various state Constitutions and their respective regulations in relation to their own state organizations, has been completed by the Constitutional Chamber of the Supreme Tribunal of Justice. Specifically, the Constitutional Chamber of the Supreme Tribunal of Justice's rulings during the past years (2001-2002) included the annulment of the Articles of three state constitutions creating an Office of the Peoples' Defender, on the grounds that Citizens rights is a matter reserved to the national (federal) level of government.[127]

159. As mentioned, the National Constitution establishes three levels of territorial autonomy and regulates the distribution of state powers, directly regulating the local or municipal government in an extensive manner. Therefore, the states' constitutions and legislations can regulate municipal or local government only according to what is established in the national Constitution, and in the *National Organic Law on Municipal Power*,[128] which leaves very little room for the state regulation.

Thus, without any possibility for the state legislatures to regulate anything related to civil, economic, social, cultural, environmental or political rights; and with the limited powers to regulate their own branches of government, as well as other state organizations including the General Comptroller and Peoples' Defender, very little scope has been left for the contents of sub-national constitutions.

§3. THE CONSTITUTIONAL SYSTEM OF DISTRIBUTION OF POWERS WITHIN THE NATIONAL, STATE AND MUNICIPAL LEVELS OF GOVERNMENT

160. Federalism is based on an effective distribution of powers within the various levels of government, and in Venezuela, between the national, states and municipal levels. Accordingly, the National Constitution enumerates the competencies attributed in an exclusive way to the national (Article 156), state (Article 154), and municipal (Article 178) levels of government, but in fact, under these regulations, these exclusive matters are almost all reserved to the national level of government, an important portion attributed to the municipalities, and very few of the exclusive matters are attributed to the States.[129]

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126 *Gaceta Oficial* Nº 37.304 de 16-10-2001.

127 See decisions Nº 1182 of October 11, 2000, Nº 1395 of August 7, 2001 and Nº 111 of February 12, 2004 (States of Mérida, Aragua and Lara), in *Revista de Derecho Público*, Nº 84, Editorial Jurídica Venezolana, Caracas, 2000, pp. 177 ff; and in *Revista de Derecho Público* Nº 85-88, Editorial Jurídica Venezuela, Caracas, 2001.

128 *Gaceta Oficial* N° 38.421 de 21-4-2006.

129 See Gustavo J. Linares Benzo, "El sistema venezolano de repartición de competencias", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 702-713; Manuel Rachadell, "La distribución del poder tributario entre los diversos niveles del Poder Público según la Constitución de 1999", in *Revista de Derecho Administrativo*, Nº 8 (enero-abril). Editorial Sherwood, Caracas, 2000, pp. 179-205; and Allan R. Brewer Carías, "Consideraciones sobre el régimen de distribución de Competencias del Poder Público en la Constitución de 1999", in *Estudios*

161. According to Article 156, the National Power has exclusive competencies in the following matters: international relations; security and defense, nationality and alien status; national police; economic regulations; mining and oil industries; national policies and regulations on education, health, the environment, land use, transportation, industrial, and agricultural production; post, and telecommunications; and legislation concerning constitutional rights; civil law, commercial law, criminal law, the penal system, procedural law and private international law; electoral law; expropriations for the sake of public or social interests; public credit; intellectual, artistic, and industrial property; cultural and archeological treasures; agriculture; immigration and colonization; indigenous people and the territories occupied by them; labor and social security and welfare; veterinary and phytosanitary hygiene; notaries and public registers; banks and insurances; lotteries, horse racing, and bets in general; and the organization and functioning of the organs of the central authority and the other organs and institutions of the State. The administration of justice, as mentioned, also falls within the exclusive jurisdiction of the national government (Article 156.31).

Article 156,32 of the Constitution also specifies that the national level of government also has legislative attributions on all matter of "national competence", which explicitly attributes to the National Assembly power to legislate regarding the following matters: armed forces and civil protection; monetary policies; the coordination and harmonization of the different taxation authorities; the definition of principles, parameters, and restrictions, and in particular the types of tributes or rates of the taxes of the states and municipalities; as well as the creation of special funds that assure the inter-territorial solidarity; foreign commerce and customs; mining and natural energy resources like hydrocarbon, fallow and waste land; and the conservation, development and exploitation of the woods, grounds, waters, and other natural resources of the country; standards of measurement and quality control; the establishment, coordination, and unification of technical norms and procedures for construction, architecture, and urbanism, as well as the legislation on urbanism; public health, housing, food safety, environment, water, tourism, and the territorial organization; navigation and air transport, ground transport, maritime and inland waterway transport; post and telecommunication services and radio frequencies; public utilities such as electricity, potable water, and gas. Furthermore, the Constitution attributes to the national power the powers to conclude, approve, and ratify international treaties (Article 154); and legislate on antitrust and the abuse of market power (Articles 113 and 114).

162. Regarding local governments, Article 178 assigns the municipalities power to govern and administrate the matters attributed to it in the Constitution and the national laws with respect to local life, and within them, the ones related to urban land use, historic monuments, social housing, local tourism, public space for recreation, con-

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de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela, Volumen I. Imprenta Nacional, Caracas, 2001, pp. 107-138, and "La distribución territorial de competencias en la Federación venezolana", in *Revista de Estudios de la Administración Local, Homenaje a Sebastián Martín Retortillo*, Nº 291, enero-abril 2003, Instituto Nacional de Administración Pública, Madrid, 2003, pp. 163-200; and "Consideraciones sobre el régimen constitucional de la organización y funcionamiento de los Poderes Públicos", in *Revista Derecho y Sociedad de la Universidad Monteávila*, Nº 2 (abril), Caracas, 2001, pp. 135-150.

struction, urban roads and transport, public entertainment, local environmental protection and hygiene, advertising regulations, urban utilities, electricity, water supply, garbage collection and disposal, basic health and education services, municipal police, funerals services, child care and other community matters. Only the matters related to local public events and funerals can be regarded as exclusive powers of the municipalities, and the rest are concurrent with the national government. Nonetheless, these maters can always be regulated by national legislation, as the municipal autonomy is essentially limited (Article 168).

163. Regarding state competencies, the National Constitution fails to enumerate substantive matters within exclusive state jurisdiction, and only assigns as matters corresponding to them, generally in a concurrent way, the municipal organizations, the non-metallic mineral exploitation, the police, the state roads, the administration of national roads, and the commercial airports and ports (Article 164). Nonetheless, for instance, in the Constitution, the possibility for the state legislature to regulate its own local government is also very limited, being subjected to what is established in the national Organic Municipal Law.

According to the Constitution, State Legislative Councils can enact legislation on matters that are in the States' scope of powers (Article 162). However, these powers are referred to concurrent matters, and according to the National Constitution their exercise depends on the previous enactment of national statutes and regulations (framework laws) (*See Supra 96, 100*). As a result, the legislative powers of the States are also very limited, and in any event, the resulting states legislation on concurrent matters must always adhere to the principles of "interdependence, coordination, cooperation, co-responsibility and subsidiary" (Article 165).

164. On the other hand, regarding residual competencies, the principle of favoring the states as in all federations, although being a constitutional tradition in Venezuela, in the 1999 Constitution has also been limited by expressly assigning the national level of government a parallel and prevalent residual taxation power in matters not expressly attributed to the states or municipalities (Article 156.12). Furthermore, Article 156,33 provides for the jurisdiction of the national power "in all other matters that correspond to it due to their nature or kind," establishing an implicit powers clause in favor of the federal government[130] that has been strengthened by the Constitutional Chamber jurisprudence.[131] In summary, the general residual power allocated to the states is a rather theoretical one, and in practice, in case of doubt, the presumption in favor of federal powers will virtually always prevail.

165. Another aspect that must be mentioned regarding the distribution of competencies between the national and states level is the provision in the 1999 Constitution, following the same provision of the 1961 Constitution, allowing the possibility of

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130 See. C. Ayala Corao, "Naturaleza y Alcance de la Descentralización Estadal", in Allan R. Brewer-Carías *et al*., *Leyes y reglamentos para la Descentralización Política de la Federación* 94 (Caracas 1990), referring to the *Exposición de Motivos* of the 1961 Constitution.

131 See decision of the Constitutional Chamber of the Supreme Tribunal of 15 April, 2008, in Revista de Derecho Público, Nº 114, Caracas 2008.

decentralizing competencies via their transfer from the national level to the states.[132] This process was regulated in the 1989 Law on Delimitation, Transfer and Decentralization Competencies between public entities, and even though important efforts for decentralization were made between 1990 and 1994 in order to revert the centralizing tendencies,[133] the process, unfortunately was later abandoned. Since 2003, the transfers of competencies that were made, including health services, started the reversion process, which has been completed in 2008,[134] in particular with the reform of the aforementioned 1989 Decetralization Law, sanctioned by the National Assembly on Mars 17, 2009, reverting to the national level the "exclusive" competence of the States for the management and making use of national highways, bridges and commercial ports located in the States, established in article 164,10 of the Constitution.[135] This reform was also proposed by the President of the Republic in the rejected 2007 Constitutional Reform.

CHAPTER 3. THE ORGANIZATION OF PUBLIC POWER IN THE TERRITORY

§1. THE STATES

I. The Limited States Autonomy

166. The territorial distribution of State Power within the framework of a federation implies a decentralized structure of political entities that must be essentially autonomous. For this reason, Article 159 of the Constitution establishes that the twenty-three States (*See Supra 145*) are "politically autonomous and equal" entities with full legal personality. The states are required to uphold the independence, sovereignty, and integrity, as well as the Constitution and laws of the Republic, and to ensure that these are obeyed within their territory.

This States' autonomy is, of course, political (in the election of its authorities), organizational (in drafting of their own Constitutions), administrative (in the investment of their revenue), legal (in the non reviewing of state actions except through the

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132 See José Peña Solís, "Aproximación al proceso de descentralización delineado en la Constitución de 1999", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón,* Volumen II. Tribunal Supremo de Justicia, Caracas, 2001, pp. 217-282.

133 See Allan R. Brewer-Carías *et al*., *Leyes y reglamentos para la Descentralización Política de la Federación,* Editorial Jurídica Venezolana, Caraca 1990; *Informe sobre la descentralización en Venezuela 1993. Informe del Ministro de Estado para la Descentralización*, Caracas 1994.

134 See Decree N° 6.543, on the renationalization of the Health Care services in Miranda State, *Gaceta Oficial* Nº 39.072 of December 3, 2008.

135 *Gaceta Oficial* N° 39.140 of Mars 17, 2009. For the purpose of this reform, the Constitutional Chamber previously issued decision No No. 565 of April 15, 2008 "interpreted" the Constitution changing the character of such "exclusive" competency into a "concurrent " one. See in http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm . See Allan R. Brewer-Carías, "La Sala Constitucional como poder constituyente: la modificación de la forma federal del estado y del sistema constitucional de división territorial del poder público, in *Revista de Derecho Público*, No. 114, (AprilJune 2008), Editorial Jurídica Venezolana, Caracas 2008, pp. 247-262.

courts of law) and taxing (in the creation of state taxes); aspects that in principle must not be regulated by national legislation, but only in the national Constitution.

167. Nonetheless, as aforementioned, state autonomy is limited in the Constitution corresponding, for instance, to a national statute to establish the organic and functional regime of states' Legislative Councils (Article 162), which should be the exclusive competence of states, and be regulated according to the state drafted Constitutions (Article 164,1).

Similar limitations are established by the 1999 Constitution with respect to the exercise of other states competencies. For example, in the area of taxation, not only has the Constitution left the matter to future *national* legislation, but it has also definitively established that it is to be the National Power that will coordinate state and municipal taxing authority (Article 156,13).

In regards to concurrent powers between State and National governments, these, according to the Constitution of 1999, are to be exercised by the states only in conformity to "framework laws" *("leyes de base")* pre-enacted on the national level (Article 165). In some cases, as in the area of police, the functioning of state police may only be exercised in accord with applicable national legislation (Article 164, ord. 6).

II. The States' Executive and Legislative Powers

168. According to Article 160, the government and administration of each state is the responsibility of a Governor who is elected for a term of four (4) years by a majority of the voters. According to the Constitution the Governor could be reelected for a consecutive second term; a limit that was eliminated with the constitutional amendment approved by referendum on February 14th 2009 (*See Supra 37*).

Legislative powers are exercised in each state by a Legislative Council constituted by no more than fifteen (15) and no less than seven (7) members who proportionally represent the population of the States as well as Municipalities (Article 162).

As mentioned, the Constitution undermines the autonomy of the States by attributing to the national Assembly the power to establish the organization and functions of states' Legislative Councils (Article 162) when this ought to correspond to State Constitutions drafted by State Legislative Councils under Article 164. In all events, with respect to competency, State Legislative Councils have been attributed the powers to legislate on matters within State competence; to approve the State budget; and to exercise the other powers conferred to the states by the Constitution and the statutes (Article 162).

§2. THE MUNICIPALITIES

I. The Municipal Autonomy

169. According to Article 168 of the Constitution, Municipalities are the primary political units in the organization of the nation, having legal personality and autonomy within constitutional and legal limits. Municipal organization is to be, in all

events, democratic and possess the characteristics of local government (Article 169).[136]

Municipal autonomy entails the following under Article 168: the election of municipal authorities; the administration and governance of matters falling within municipal jurisdiction; and the creation, collection, and investment of municipal taxes. In addition, except through designated courts of law, Municipal actions may not be impugned or otherwise reviewed on the national and state levels.[137] The organizational regime of municipalities and other local entities is to be governed by the legislation enacted according to the principles laid down in the Constitution, by national organic legislation, and by laws sanctioned by the State Legislative Councils (Article 169).

As aforementioned, Article 168 of the Constitution establishes the principle of participation providing that actions carried out by Municipalities within their jurisdiction are to be undertaken while incorporating citizens' participation in the definition, execution, regulation and evaluation of the results of public business, according to law, in an adequate, effective and opportune manner.

170. One of the most important problems of the system of municipal government in Venezuela has been the excessive uniformity in the organization of municipal governments, provoking the almost inapplicability of the Organic Law of Municipal Power[138] particularly in many small municipal entities. To avoid this situation, Article 169 of the Constitution establishes the principle that the legislation passed to develop and apply constitutional principles regarding Municipalities and other local entities must create diverse organizational regimes for their administration and government, taking into account such local factors as population, economic development, capacity for generating revenue, geographic situation, and other historic and cultural factors that may have relevance to government. In particular, such legislation is to establish options for the organization of local government and administration suitable to Municipalities containing indigenous populations. Unfortunately none of these aspects have been regulated in the Organic Law.

171. On the other hand, it must be pointed out that Municipalities, according to Article 168 of the Constitution, are the "primary political unit of the national organization," and the basis for political participation. Nonetheless, this has been virtually rendered moot by the creation, in 2006, of the parallel structure of the Communal Councils,[139] which are designated by local "assemblies of the Citizens" (Article 70),

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136 See Argenis Urdaneta, "El Poder Público Municipal en el Estado federal descentralizado", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I. Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 731-744.

137 See José L. Villegas Moreno, "La autonomía local y su configuración en la Constitución venezolana de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 715-729.

138 *Gaceta Oficial* N° 38.421 de 21-4-2006. See Allan R. Brewer-Carías *et al*., *Ley Orgánica del Poder Público Municipal*, Editorial Jurídica venezolana, Caracas 2006.

139 *G.O.* Nº 5.806, Extra. of 10 April 2006. See Allan R. Brewer-Carías, "El inicio de la desmunicipalización en Venezuela: La organización del Poder Popular para eliminar la

which can be formed by interested Citizens. These Assemblies have been attributed jurisdiction to "approve the rules of the communal living of the community" (Article 6,1), being the "Community" defined as "the social conglomerate of families and citizen which live in a specific geographic area, which share a common history and interests, which now each other and have relations with each other, use the same public utilities and share similar economic, social, urban, and other necessities and potentials" (Article 4,1). Although these structures are supposed to allow self-governance of local communities, this can be doubted due to the high degree of centralization set forth by their organization being directly coordinated, supervised, and financed by a Presidential Commission of the Popular Power appointed directly by the President (Articles 28 to 32) without the participation of the states or the municipalities. In addition, the Communal Councils have been created outside the municipal organization of the country.

II. The Municipal Executive and Legislative Powers

172. Municipal government and administration corresponds to the Mayors, who according to the terms of the Civil Code (Article 446, ff.*)* are the primary civil authority (Article 174). The Mayors are elected for a term of four (4) years, by a majority of those who vote in an election, and the Constitution established that they could be re-elected for a single second consecutive term; a limit that was eliminated with the constitutional amendment approved by referendum on February 14th 2009 (*See Supra 37*).

Article 175 of the Constitution confers the legislative functions of municipalities to the Municipal Councils composed of members elected by universal, secret and direct suffrage in a number, and according to conditions, established in the national legislation based on the system of proportional representation and personalized vote (*See Supra 121*). These Municipal Councils are empowered to enact Municipal Ordinances that are "local laws" related to the matters assigned to the Municipalities (*See Supra 162*).

§3. THE CAPITAL DISTRICT AND THE METROPOLITAN MUNICIPAL GOVERNMENT OF CARACAS

173. According to Article 16 of the Constitution, in addition to the 23 States, the national territory has also a Capital District and Federal Dependencies that are the Venezuelan Islands in the Caribbean Sea. Since 1992 there have been no Federal Territories.

The Capital District was established in the 1999 Constitution in substitution of the Federal District that existed since 1863 with a very dependent configuration regarding the President of the Republic, who used to be the highest authority in the District. He exercised his powers through an appointed Governor (Article 190,17, 1961 Constitu-

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descentralización, la democracia representativa y la participación a nivel local", in *Revista de la Asociación Internacional de Derecho Administrativo,* Mexico 2007, pp. 49-67.

tion). With the 1999 Constitution, the Capital District was conceived as an additional political entity in the territory, independent from the National Executive that needs to have a democratic government of its own. Nonetheless, and in spite of such new democratic configuration, the National Assembly passed on April 2009 a Special Law on the Organization and regime of the Capital District,[140] establishing just an administrative entity dependent upon the national level of government, so the Chif Executive of the capital District is freely appointed and dismiss by the President of the republic, and the legislative functons in the District corresponds to the National Assembly (article 7). In the rejected 2007 Constitutional Reform, the President of the Republic proposed this same configuration of the Capital District with the paterns of the former Federal District established in 1863.

174. The Municipal government in the territory of the Capital District, where part of the City of Caracas as the capital of the Republic is located, has been organized in the Constitution with a two levels of local government organization: at the metropolitan level, the Metropolitan Government of Caracas (Article 18), with a Head Mayor (*Alcalde Mayor*) and a Metropolitan Council, both elected by popular vote; and at the municipal level, with their corresponding Mayors and Municipal Councils in the various Municipalities of the city (Libertador, Baruta, Chacao, Sucre, El Hatillo) elected by the people. This metropolitan organization was established according to the Special Law on the Metropolitan District Regime sanctioned by the National Constituent Assembly in March 2000.[141]

CHAPTER 4. THE FINANCING SYSTEM OF THE FEDERATION

175. Regarding the financing of the federation, virtually everything in the 1999 Constitution concerning the taxation system is more centralized than in the previous 1961 Constitution, and the powers of the states in tax matters are essentially eliminated.

The National Constitution lists the national government competencies with respect to basic taxes, including income tax; inheritance and donation taxes; taxes on capital and production; value added tax; taxes on hydrocarbon resources and mines; taxes on the import and export of goods and services, taxes on the consumption of liquor,

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140 *Gaceta Oficial* Nº 39.156 of April 13, 2009. See Allan R. Brewer-Carías et al., Leyes sobre el Distrito Capital y el Área metropolitána de Caracas, Editorial Jurídica Venezolana, Caracas 2009.

141 *Gaceta Oficial* Nº 36.906 de 8-3-2000. See Manuel Rachadell, "¿Distrito Capital o Distrito Metropolitano?", in *El Derecho Público a comienzos del siglo XXI. Estudios en homenaje al Profesor Allan R. Brewer-Carías*, Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 3271 a 3311; Alfredo De Stefano Pérez, "Aproximación al estudio del Distrito Metropolitano de Caracas", in *Temas de Derecho Administrativo: Libro Homenaje a Gonzalo Pérez Luciani*, Volumen II, Editorial Torino, Caracas 2002, pp. 553-592; Allan R. Brewer-Carías, "Consideraciones sobre el régimen constitucional del Distrito Capital y del sistema de gobierno municipal de Caracas", in *Revista de Derecho Público*, Nº 82 (abril-junio), Editorial Jurídica Venezolana, Caracas, 2000, pp. 5-17; and in *Revista Iberoamericana de Administración Pública (RIAP)*, Ministerio de Administraciones Públicas, Nº 5, julio-diciembre 2000, Madrid 2000, pp. 17-39.

alcohol, cigarettes and tobacco (Article 156.12). The National Constitution also expressly allocates local taxation powers to the municipalities including property, commercial, and industrial activities taxes (Article 179). The National Constitution gives the national government residual competencies in tax matters (Article 156.12).

In contrast, the Constitution does not grant the states competencies in matters of taxation, except with respect to official stationery and revenue stamps (Article 164.7). Thus, the states can only collect taxes when the National Assembly expressly transfers the power to them by a statute, which contains specific taxation powers (Article 167.5). No such statute has yet been approved (*See Infra 527*).

176. Lacking their own resources from taxation, state financing is accomplished by the transfer of national financial resources through three different channels, which are all politically controlled by the national government. The first channel is by means of the "Constitutional Contribution" (*Situado Constitucional*) which is an annual amount established in the National Budget Law (*See Infra 533*) equivalent to a minimum of 15% and a maximum of 20% of total ordinary national income, estimated annually (Article 167.4), which must be distributed among the states according to their population. The second channel is through a nationally established system of special economic allotments for the benefit of those States in the territories of which mining and hydrocarbon projects are being developed. The benefits that accompany this statute have also been extended to include other non-mining states (Article 156.16). The third channel of financing for states and municipalities also comes from national funds, such as the *Intergovernmental Fund for Decentralization*, created by statute in 1993[142] as a consequence of the national regulation of VAT, or the Interstate Compensation Fund, which is foreseen in the National Constitution (Article 167.6).

On the other hand, following a long tradition, the states and municipalities cannot borrow nor have public debt due to the requirement of a special national statute to approve state borrowing.

177. As it can be deduced from what has been said, the declaration of Article 4 of the 1999 Constitution regarding the "Federal Decentralized" form of the Venezuelan government is mere wording, being a formula that is contradicted by all the other regulations regarding the federalism contained in the Constitution, which, on the contrary, shows that the Federation in Venezuela is a very Centralized Federation. This situation, of course, affects the democratic regime and governance deeply.

Federalism and decentralization in the contemporary world are matters of democracy. There are no decentralized autocracies, and there have never been decentralized authoritarian governments, only democracies can be decentralized. Autocracies and authoritarian governments have been, and will remain, centralized. Thus, the reality of the political situation in Venezuela is that democracy is very weak. Although democracy is based on elections, it cannot be consolidated without a real separation of powers, and without the real possibility of political participation due to the lack of decentralization.

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142 *Gaceta Oficial* Extra. Nº 5.805 de 22-3-2006.

Part Four. The Constitutional System of Separation of Powers

CHAPTER 1. THE PRINCIPLE OF SEPARATION OF POWERS

§1. THE VENEZUELAN CONSTITUTIONAL TRADITION

178. The principle of separation of powers, following the provisions of the Constitution of Virginia of 1776 (Section 3,1), and of the French Declaration of Rights of Man and Citizens of 1789, (Article 16), was incorporated in the first modern Constitution adopted in all Latin America, which as aforementioned, was the 1811 Federal Constitution of the States of Venezuela, setting forth in its Preamble that:

> "The exercise of authority conferred upon the Confederation could never be reunited in its respective functions. The Supreme Power must be divided in the Legislative, the Executive and the Judicial, and conferred to different bodies independent between them and regarding its respective powers."

To this proposition, Article 189 of the Constitution added that:

> "The three essential Departments of government, that is, the legislative, the Executive and the Judicial, must always be kept separated and independent one from the other according to the nature of a free government, which is convenient in the connection chain that unites all the fabric of the Constitution in an indissoluble way of Friendship and Union".

Consequently, since the beginning of modern constitutionalism, the principle of separation of constitutional power was also adopted in Venezuela, in particular, according to the trends of the presidential system of government within a check and balance conception, granting the Judiciary specific powers of judicial review. The latter, according to the objective guaranty of the Constitution established in Article 227 of the same 1811 Constitution, in the sense that "The laws sanctioned against the Constitution will have no value except when fulfilling the conditions for a just and legitimate revision and sanction [of the Constitution];" and in Article 199, in the sense that any law sanctioned by the federal legislature or by the provinces contrary to the fundamental rights enumerated in the Constitution "will be absolutely null and void."

179. Since 1811, all the Constitutions in Venezuelan history have established and guarantied the principle of separation of powers, particularly between the three classical Legislative, Executive and Judicial branches of government (powers) in a sys-

tem of check and balance, and always giving the Judiciary, judicial review power. For such purpose, the independence and autonomy of the branches of government have been the most important aspects regulated in the Constitutions, particularly during democratic regimes, due to the fact that the principle of separation of powers in contemporary constitutionalism has become one of the basic conditions for its existence, and for the possibility of guarantying the enjoyment and protection of fundamental rights. On the contrary, without separation of powers, and without autonomy and independence between the branches of government, no democratic regime can be developed and no guaranty of fundamental rights can exist.

§2. SEPARATION OF POWERS AND DEMOCRACY

180. In effect, the essential components of democracy are much more than the sole popular or circumstantial election of government officials, as is now formally recognized in the Inter American Democratic Charter *(Carta Democratica Interamericana)* adopted by the Organization of American States in 2001, [143] after so many antidemocratic, militarist and authoritarian regimes disguised as democratic because of their electoral origin that Latin American countries have suffered.

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

The principle of separation and independence of powers is so important, as one of the "essential elements of democracy", that it is the one that can allow all the other "fundamental components of democracy" to be politically possible. 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, check and balance based on the separation of powers with their independence and autonomy guaranteed, so that power can be stopped by power itself.

181. Consequently, without separation of powers and the possibility of control of power, any of the other essential factors of democracy cannot be guaranteed, because

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

only by controlling Power, can free and fair elections and political pluralism exist; only by controlling Power, can effective democratic participation be possible, and effective transparency in the exercise of government be assured; only by controlling Power can there be a government submitted to the Constitution and the laws, that is, the Rule of law; only by controlling Power can there be an effective access to justice functioning with autonomy and independence; and only by controlling Power can there be a true and effective guaranty for the respect of human rights.[144]

182. The constitutional situation in Venezuela since the Constitution making process that took place in 1999, which resulted in the complete takeover of all powers of the State and the sanctioning of the current 1999 Constitution, unfortunately has been of a very weak democracy, precisely because of the progressive demolishing of the principle of separation of powers. In it, a process of concentration of powers has taken place, first with the 1999 Constitution making process itself, which intervened in all branches of government before sanctioning the new Constitution (*See Supra 25*); and after, due to the provisions of the 1999 Constitution, which do not guaranty the effective independence and autonomy of the branches of government.

CHAPTER 2. CONCENTRATION OF POWERS AND AUTHORITARIANISM IN DEFRAUDATION OF THE CONSTITUTION

183. The result has been that currently (2009), Venezuela has an authoritarian government which is not the result of a classical Latin American military *coup d'état*, but of a systematic process of destruction of all the basic principles of democracy and of the Constitution. This process, as aforementioned, began with the 1998 election of Hugo Chávez Frías as President of the Republic, a position that a decade later he still holds, being in 2009 the President with the longest continued tenure in all the Venezuelan constitutional history.

184. The 1999 Constitution, if it is read in a vacuum, ignoring the political reality of the country, can mislead any lector. As aforementioned, it is the only Constitution in contemporary world that has established, not only a tripartite separation of powers between the traditional Legislative, Executive and Judicial branches of government, but a *penta* separation of powers, adding to the latter two more branches of government: the Electoral Power, attributed to the National Electoral Council, in charge of the organization and conduction of the elections; and the Citizen Power, attributed to three different State entities: the General Prosecutor Office (Public Prosecutor) (*Fiscalía General de la República*), the General Comptroller Office (*Contraloría General de la República*), and the Peoples' Defender (*Defensor del Pueblo*) (Article 136) (*See Infra 341 ff.*).[145] This *penta* separation of powers, in any case, was the culmination of

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

145 See Cecilia Sosa Gómez, "La organización política del estado venezolano: El Poder Público Nacional", in *Revista de Derecho Ppúblico,* Nº 82 (abril-junio), Editorial Jurídica Venezolana, Caracas, 2000, pp. 71-83; C. Kiriadis Iongui, "Notas sobre la estructura orgánica del Estado

a previous constitutional process and tendency initiated in the 1961 Constitution that consolidated the existence of State organs with constitutional rank not dependent on the classical powers, as was for instance the case of the Public Prosecutor Office, the Council of the Judiciary, and the Comptroller General Office.

But as mentioned, in spite of this *penta* division of powers, the fact is that the autonomy and independence of the branches of government is not completely and consistently assured in the Constitution, its application leading, on the contrary, to a concentration of State powers in the National Assembly, and through it, in the Executive power.

§1. THE CONSTITUTIONAL SUPREMACY OF THE NATIONAL ASSEMBLY

185. In effect, in any system of separation of powers, even with five separate branches of government (Legislative, Executive, Judicial, Citizen and Electoral), in order for such separation to become effective, the independence and autonomy among them has to be assured in order to allow check and balance, that is, the limitation and control of power by power itself. This was the aspect that was not designed as such in the 1999 Constitution, and notwithstanding the aforementioned penta separation of powers, an absurd distortion of the principle was introduced by giving the National Assembly the authority not only to appoint, but to dismiss the Magistrates of the Supreme Tribunal of Justice, the Prosecutor General, the General Comptroller, the People's Defender and the Members of the National Electoral Council (Articles 265, 279 and 296); and in some cases, even by simple majority of votes. This latter solution was even proposed to be formally introduced in the rejected 2007 Constitutional reform proposals, seeking to eliminate the guarantee of the qualified majority of the members for the approval of the National Assembly for such dismissals.

186. It is simply impossible to understand how the autonomy and independence of separate powers can function and how they can exercise mutual control, when the tenure of the Head officials of the branches of government (except the President of the Republic) depend on the political will of one of the branches of government, that is, the National Assembly. The sole fact of the possibility for the National Assembly to dismiss the head of the other branches makes futile the formal consecration of the autonomy and independence of powers since the High officials of the State are aware that they can be removed from office at any time precisely if they effectively act with independence[146].

And unfortunately, this has happened in Venezuela during the past decade, so when there have been minimal signs of autonomy from some holders of State institutions who have dared to adopt their own decisions distancing themselves from the Executive will, they have been dismissed. This occurred, for instance, in 2001 with the

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venezolano en la Constitución de 1999", in *Temas de Derecho Administrativo: Libro Homenaje a Gonzalo Pérez Luciani*, Volumen I, Editorial Torino, Caracas, 2002, pp. 1031-1082.

146 See "Democracia y control del poder", in Allan R. Brewer-Carías, *Constitución, democracia y control de poder*, Centro Iberoamericano de Estudios Provinciales y Locales. Universidad de Los Andes, Mérida 2004.

People's Defender and with the Prosecutor General of the Republic, originally appointed in 1999 by the Constituent National Assembly, who were separated from their positions[147] for failing to follow the dictates of the Executive power; and this also happened with some Judges of the Supreme Tribunal who dared to vote on decisions that could question the Executive action, who were immediately subjected to investigation and some of them were removed or duly "retired" from their positions[148].

187. The consequence resulting from this factual "dependency" of the State organs regarding the National Assembly has been the total absence of fiscal or audit control regarding all the State entities. The General Comptroller Office has ignored the results of the huge and undisciplined disposal of the oil wealth that has occurred in Venezuela, not always in accordance with Budget discipline rules. But on the contrary, the most important decisions taken by the Comptroller General have been those directed to disqualify many opposition candidates from the November 2008 regional and municipal elections, based on "administrative irregularities," although the Constitution establishes that the constitutional right to run for office can only be suspended when a judicial criminal decision is adopted (Articles 39, 42);[149] which the Constitutional Chamber of the Supreme Tribunal has upheld in defraudation of the Constitution.[150]

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147 It the case of the General Prosecutor of the Republic, appointed in December of 1999, he thought he could initiate a criminal impeachment proceedings against the then Minister of the Interior; and the People's Defendant, she also thought that she could challenge the Special Law of the 2001 National Assembly on appointment of Judges of the Supreme Tribunal without complying with the constitutional requirements. They were both duly dismissed in 2001.

148 It was the case of Franklin Arrieche, Vice-President of the Supreme Tribunal of Justice, who delivered the decision of the Supreme Tribunal of 08-14-2002 regarding the criminal process 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 took place; and that of 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.

149 In October 2008, the European Parliament approved a Resolution asking the Venezuelan government to end with these practices (political incapacitation in order to imped the presence of opposition leaders in the regional and local elections) and to promote a more global democracy with complete respect of the principles established in the 1999 Constitution. See http://venezuelanoticia.com/archives/8298.

150 Teodoro Petkoff has pointed out that with this decision "the authoritarian and autocratic government of Hugo Chávez has clearly shown its true colors in this episode", explaining that "The political rights to run for office is only lost when a candidate has received a judicial sentence that has been upheld in a higher court. The recent sentence by the Venezuelan Supreme Court, upholding the disqualifications, as well as the constitutionality of Article 105 [of the Organic Law of the Comptroller General Office], constitute a defraudation of the Constitution and the way in which the decision was handed down was an obvious accommodation to the president's desire to eliminate four significant opposition candidates from the electoral field". See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition," in *Revista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp. 11.

Regarding the People's Defender, it has been perceived more as a defender of State powers than of the peoples' rights, even if the Venezuelan State never before has been denounced so many times as has happened during the past years before the Inter American Commission on Human Rights. And finally, the Public Prosecutor has been characterized by using its powers to prosecute using, in an indiscriminate way, the controlled Judiciary as a tool to persecute any political dissidence.

§2. THE DEFRAUDATION OF POLITICAL PARTICIPATION IN THE APPOINTMENT OF HIGH GOVERNMENTAL OFFICERS

188. But the process of concentration of powers that Venezuela has experienced during the past decade has also been the result of a process of defraudation of the Constitution, particularly ignoring the limits the Constitution has established to reduce the discretional power of the National Assembly in the process of appointing the Heads of the different branches of government.

In effect, independently of the constitutional provisions regarding the possible dismissal by the National Assembly of the Heads of the non elected branches of government, and its distortions, one of the mechanism established in the Constitution in order to assure their independence was the provision of a system to assure that their appointment by the National Assembly was to be limited by the necessary participation of special collective bodies called Nominating Committees that must be integrated with representatives of the different sectors of society (arts. 264, 279, 295). Those Nominating Committees are in charge of selecting and nominating the candidates, guaranteeing the political participation of the Citizens in the process.

Consequently, the appointment of the Justices of the Supreme Tribunal, of the Members of the National Electoral Council, of the Prosecutor General of the Republic, of the People's Defender and of the Comptroller General of the Republic can only be made among the candidates proposed by the corresponding "Nominating Committees," which are the ones in charge of selecting and nominating the candidates before the Assembly. These constitutional previsions, as mentioned, were designed in order to limit the discretional power the political legislative organ traditionally had to appoint those high officials through political party agreements, by assuring political Citizenship participation. [151]

189. Unfortunately, these exceptional constitutional provisions have not been applied, due to the fact that the National Assembly during the past years, also defrauding the Constitution, has deliberately "transformed" the said Committees into simple "parliamentary Commissions" reducing the civil society's right to political participation. The Assembly in all the statutes sanctioned regarding such Committees and the appointment process, has established the composition of all the Nominating Committees with a majority of parliamentary representatives (whom by definition cannot be

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

representatives of the "civil society"), although providing, in addition, for the incorporation of some other members chosen by the National Assembly itself from strategically selected "non-governmental Organizations."[152]

The result has been the complete political control of the Nominating Committees, and the persistence of the discretional political and partisan way of appointing the official heads of the non elected branches of government, which the provisions of the 1999 Constitution intended to limit, by a National Assembly that since 2000 has been completely controlled by the Executive.

This practice even pretended to be constitutionalized through the rejected Constitutional Reform of 2007 with the proposal to formally establish exclusively parliamentary Nomination Committees, instead of being composed of representatives of the various sectors of civil society.

§3. THE CATASTROPHIC DEPENDENCE AND SUBJECTION OF THE JUDICIARY

190. The effects of the dependency of the branches of government subjected to the Legislative Power and through it to the Executive, have been particularly catastrophic regarding the Judiciary, which after being initially intervened by the Constituent National Assembly in 1999 (*See Supra 31*), continued to be intervened with the unfortunate consent of the Supreme Tribunal of Justice itself. In this matter, in the past decade the country has witnessed a permanent and systematic demolition process of the autonomy and independence of the judicial power, aggravated by the fact that according to the 1999 Constitution, the Supreme Tribunal that is completely controlled by the Executive is in charge of administering all the Venezuelan judicial system, particularly, by appointing and dismissing judges.[153]

191. The process began with the appointment, in 1999, of new Magistrates of the Supreme Tribunal of Justice without complying with the constitutional conditions, made by the National Constituent Assembly itself, by means of a Constitutional Transitory regime sanctioned after the Constitution was approved by referendum (*See Supra 29*). From there on, the intervention process of the Judiciary continued up to

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

153 See Allan R. Brewer-Carías, "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; and "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007*, Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57.

the point that the President of the Republic has politically controlled the Supreme Tribunal of Justice and, through it, the complete Venezuelan judicial system.

192. For that purpose, the constitutional conditions needed to be elected Magistrate of the Supreme Tribunal and the procedures for their nomination with the participation of representatives of the different sectors of civil society, were violated since the beginning. First, as aforementioned, in 1999 by the National Constituent Assembly itself once it dismissed the previous Justices, appointing new ones without receiving any nominations from any Nominating Committee, and many of them without compliance with the conditions set forth in the Constitution to be Magistrate. Second, in 2000, by the newly elected National Assembly by sanctioning a Special Law in order to appoint the Magistrates, in a transitory way, without compliance with those constitutional conditions.[154] And third, in 2004, again by the National Assembly by sanctioning the Organic Law of the Supreme Tribunal of Justice, increasing the number of Justices from 20 to 32, and distorting the constitutional conditions for their appointment and dismissal, allowing the government to assume an absolute control of the Supreme Tribunal, and in particular, of its Constitutional Chamber.[155]

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

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score auto-goals. In the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is no one in the group of postulates that could act against us…"[156]

This configuration of the Supreme Tribunal, as highly politicized and subjected to the will of the President of the Republic has eliminated all autonomy of the Judicial Power and even the basic principle of the separation of power, as the corner stone of the Rule of Law and the base of all democratic institutions.

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

155 *Gaceta Oficial* Nº 37.942 de 20-5-2004.

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

194. On the other hand, as aforementioned, according to Article 265 of the 1999 Constitution, the Magistrates can be dismissed by the vote of a qualified majority of the National Assembly, when grave faults are committed, following a prior qualification by the Citizen Power (*See Infra 340*). This qualified two-thirds majority was established to avoid leaving the existence of the heads of the judiciary in the hands of a simple majority of legislators. Unfortunately, this provision was also distorted by the 2004 Organic Law of the Supreme Tribunal of Justice, in which it was established in an unconstitutional way that the Magistrates could be dismissed by simple majority when the "administrative act of their appointment" is revoked (Article 23,4).[157] This distortion, contrary to the independence of the Judiciary, also pretended to be constitutionalized with the rejected 2007 Constitutional reform, which proposed to establish that the Magistrates of the Supreme Tribunal could be dismissed in case of grave faults, but just by the vote of the majority of the members of the National Assembly.

195. The consequence of this political subjection is that all the principles tending to assure the independence of judges at any level of the Judiciary have been postponed. In particular, the Constitution establishes that all judges must be selected by public competition for the tenure; and that the dismissal of judges can only be made through disciplinary trials carried out by disciplinary judges (Articles 254 and 267). Unfortunately, none of these provisions have been implemented, and on the contrary, since 1999, the Venezuelan Judiciary has been composed by temporal and provisional judges,[158] lacking stability and being subjected to the political manipulation, altering the people's right to an adequate administration of justice. And regarding the disciplinary jurisdiction of the judges, in 2009 it has not yet been established, and with the authorization of the Supreme Tribunal, a "transitory" Reorganization Commission of the Judicial Power created since 1999, has continued to function, removing judges without due process.[159]

The worst of this irregular situation is that in 2006 there were attempts to solve the problem of the provisional status of judges by means of a "Special Program for the Regularization of Tenures", addressed to accidental, temporary or provisional judges, bypassing the entrance system constitutionally established by means of public com-

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157 See the comments to this statute in Allan R. Brewer-Carías, *Ley del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004.

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

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

petitive exams (Article 255), by consolidating the effects of the provisional appointments and their consequent power dependency.

§4. THE FACTUAL POLITICAL SUPREMACY OF THE EXECUTIVE AND THE ABSENCE OF CHECK AND BALANCE

196. 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 decade, the distortion of the separation of powers principle transformed into a power concentration system, also derives from the supremacy that, from a politicalparty's point of view, the Executive Power has over the National Assembly.

197. In the Constitution of 1999, the presidential system has been reinforced, among other factors, because of the extension to six years of the presidential term; the authorization of the immediate reelection for an immediate following period of the President of the Republic (Article 203), and the maintaining of it in election by simple majority (Article 228) (*See Infra 210*). In the rejected Constitutional Reform of 2007, the term of the President was even proposed to be extended up to seven years, and the indefinite reelection of the President of the Republic was one of the main proposals contained in it. In 2008, again, and by-passing the prohibition established in the Constitution to propose again within the same constitutional term a reform already rejected by the people, the National Assembly approved the proposal for a "constitutional amendment" allowing the indefinite and continuous reelection of all elected public officials, that was submitted to referendum and approved by the people in February 2009 (*See Supra 37*).

With this presidential model, to which the possibility of the dissolution of the National Assembly by the President of the Republic is added, although in exceptional cases (Articles 236,22 and 240), the presidential system has been reinforced. No check and balance possibility exists, for instance, from the Senate, which wwas eliminated in 1999.[160]

198. Also, the presidential system has been reinforced with other reforms, like the provision for legislative delegation to authorize the President of the Republic by means of "delegating statutes" (enabling laws), to issue decree-laws and not only in economic and financial matters (Article 203). According to this provision, the fact is that the fundamental legislation of the country sanctioned during the past decade has been contained in these decree-laws, which have been approved without assuring the mandatory constitutional provision for public hearings, established in the Constitution (Article 211) to take place before the sanctioning of all statutes (*See Supra 95*).

199. In order to enforce this constitutional right of the Citizens to participation (*See Infra 488*), the Constitution specifically set forth that the National Assembly is com-

160 See María M. Matheus Inciarte y María Elena Romero Ríos, "Estado Federal y unicameralidad en el nuevo orden constitucional de la República Bolivariana de Venezuela," in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón*, Volumen I. Tribunal Supremo de Justicia, Caracas, 2001, pp. 637-676.

pelled to submit draft legislation to public consultation, asking the opinion of Citizens and the organized society (Article 211). This is the concrete way by which the Constitution tends to assure the exercise of the political participation right in the process of drafting legislation. This constitutional obligation, of course, must also be complied by the President of the Republic when a legislative delegation takes place. But nonetheless, in 2007 and in 2008, the President of the Republic, following the same steps he took in 2001,[161] has extensively legislated without any public hearing or consultation. In this way, in defraudation of the Constitution, by means of legislative delegation, the President has enacted decree-laws without complying with the obligatory public hearings, violating the Citizens' right to political participation.

CHAPTER 3. THE RUPTURE OF THE RULE OF LAW AND THE REJECTED 2007 CONSTITUTIONAL REFORM

200. As it can be deducted from the aforementioned, in order for a democratic rule of law State to exist, the declarations contained in constitutional texts on separation of power are not enough, being indispensable an effective check and balance system between the State powers. This is the only way to assure the enforcement of the rule of law and democracy, and the effective enjoyment of human rights.

And check and balance and control of State Powers in a democratic rule of law State 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 branches of government to avoid the concentration of power; or vertically, by means of its distribution or spreading in the 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.

201. It is precisely there where the problems of the formally declared rule of law and of democracy in Venezuela begin, due to the fact that its deformation lays in the same constitutional text of 1999, whose institutional framework unfortunately was established to encourage authoritarianism, affecting the possibility of controlling power. This has permitted the centralization of power, provoking the dismantling process of federalism and municipalism (*See Supra 147*) and twisting the possibility of the effective political participation in spite of the direct democracy mechanisms established.

This process of centralization of powers was also proposed to be constitutionalized in 2007 by means of the rejected constitutional reform submitted by President Hugo Chávez, and sanctioned by the National Assembly, in which the intention was to transform the Democratic Rule of Law and Decentralized Social State established in the 1999 Constitution, into a Socialist, Centralized, Repressive and Militaristic State,

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161 See the comments in Allan R. Brewer-Carías, "Apreciación general sobre los vicios de inconstitucionalidad que afectan los Decretos Leyes Habilitados" in *Ley Habilitante del 13-11-2000 y sus Decretos Leyes***,** Academia de Ciencias Políticas y Sociales, Serie Eventos Nº 17, Caracas 2002, pp. 63-103.

grounded in a so called "Bolivarian doctrine", which was identified with "XXI Century Socialism" , and an economic system of State capitalism (*See Supra 35, 43*).

202. In spite of its refusal by the people through referendum held in December 2007, one important aspect to be stressed regarding this constitutional reform proposal is that it was submitted by the President of the Republic and sanctioned by the National Assembly, evading the procedure established in the 1999 Constitution for such fundamental changes. That is, it was a reform also proposed in defraudation of the Constitution, being sanctioned through a procedure established for other purposes.[162]

A change of the nature of the one that was proposed, according to Article 347 of the 1999 Constitution, required the convening and election of a National Constituent Assembly**,** and could not be undertaken by means of a mere "constitutional reform" procedure, which is exclusively reserved for "a partial revision of the Constitution and a substitution of one or several of its norms without modifying the structure and fundamental principles of the Constitutional text" (*See Supra 82*). Consequently, following this procedure in order to achieve substantial constitutional changes, the President of the Republic and the National Assembly in 2007 tried to repeat the political tactic that has been a common denominator in the actions of the authoritarian regimen installed since 1999, of acting fraudulently with respect to the Constitution**.**

As was ruled in other matters by the Constitutional Chamber of the Supreme Tribunal of Justice in a decision Nº 74 of 25 January 2006, a defraudation of the Constitution (*fraude a la Constitución)* occurs when democratic principles are destroyed "through the process of making changes within existing institutions while appearing to respect constitutional procedures and forms". The Chamber also ruled that a "falsification of the Constitution" (*falseamiento de la Constitución)* occurs when "constitutional norms are given an interpretation and a sense different from those that they really possess: this is in reality an informal modification of the Constitution itself". The Chamber concluded by affirming that "A Constitutional reform not subject to any type of limitations would constitute a defraudation of the constitution."[163] This is to say, a defraudation of the Constitution occurs when the existing institutions are used in a manner that appears to adhere to constitutional forms and procedures in order to proceed, as the Supreme Tribunal warned, "towards the creation of a new political regimen, a new constitutional order, without altering the established legal system."[164]

203. As aforementioned, this was precisely what occurred in February of 1999, in the convening of a consultative referendum on whether to convene a Constituent Assembly when that institution was not prefigured in the then existing Constitution of 1961 (*See Supra 25*); it occurred with the December 1999 "Decree on the Transitory

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162 See Allan R. Brewer-Carías, "Estudio sobre la propuesta de Reforma Constitucional para establecer un Estado Socialista, Centralizado y Militarista (Análisis del Anteproyecto Presidencial, Agosto de 2007)", *Cadernos da Escola de Direito e Relações Internacionais da UniBrasil,* nº 07, Curitiba, 2007, pp. 265-308

163 See in *Revista de Derecho Público,* Editorial Jurídica Venezolana, Nº 105, Caracas 2006, pp. 76 ff.).

164 *Idem.*

Regimen of the Public Powers" with respect to the Constitution of 1999, issued by the then Constituent Assembly which was never the subject of an approbatory referendum (*See Supra 28*); and it continued to occur in the subsequent years with the progressive destruction of democracy through the exercise of power and the sequestering of successive constitutional rights and liberties, all supposedly done on the basis of legal and constitutional provisions[165].

204. In the case of the 2007 Constitutional Reform attempt once again, constitutional provisions were fraudulently used for ends other than those for which they were established, that is, to try to introduce a radical transformation of the State, disrupting the civil order of the Social Democratic State under the Rule of Law and Justice through the procedure for "constitutional reform", to convert it into a Socialist, Centralized, Repressive and Militarist State in which representative democracy, republican changes of government, and the concept of decentralized power was to disappear, and in which all power was to be concentrated in the decisions of the Chief of State.

This was constitutionally proscribed, and as the Constitutional Chamber of the Supreme Tribunal of Justice summarized it, in its aforementioned decision No. 74 of 25 January 2006, referring to a symbolic case, it occurred "with the fraudulent use of powers conferred by martial law in Germany under the *Weimar* Constitution, forcing the Parliament to concede to the fascist leaders, on the basis of terms of doubtful legitimacy, plenary constituent powers by conferring an unlimited legislative power"[166]. Nonetheless, in the case of the constitutional reform of 2007, the Supreme Tribunal deliberately refused to take any decision on judicial review regarding the unconstitutional procedure that was followed by the President of the Republic, the National Assembly and the National Electoral Council.[167]

205. In any case, although the popular rejection of the 2007 constitutional reform was a very important step back to the authoritarian government of President Chávez, and although according to the Constitution itself, the proposed reform cannot be formulated again in the same constitutional term of government, the President of the Republic in 2008 announced his intention to seek for the imposition of the rejected

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165 See Allan R. Brewer-Carías, "Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", in *Lateinamerika Analysen*, 19, 1/2008, GIGA, Germa Institute of Global and Area Studies, Institute of latin American Studies, Hamburg 2008, pp. 119-142, and "El autoritarismo establecido en fraude a la Constitución y a la democracia y su formalización en Venezuela mediante la reforma constitucional. (De cómo en un país democrático se ha utilizado el sistema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional)", in *Temas constitucionales. Planteamientos ante una Reforma,* Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74.

166 See in *Revista de Derecho Público*, Editorial Jurídica Venezolana, Nº 105, Caracas 2006, pp. 76 ff.

167 See Allan R. Brewer-Carías, "El juez constitucional vs. la supremacía constitucional. O de cómo la Jurisdicción Constitucional en Venezuela renunció a controlar la constitucionalidad del procedimiento seguido para la "reforma constitucional" sancionada por la Asamblea Nacional el 2 de noviembre de 2007, antes de que fuera rechazada por el pueblo en el referendo del 2 de diciembre de 2007", in *Revista de Derecho Público*, Nº 112, Editorial Jurídica venezolana, Caracas 2007, pp. 661 ff.

constitutional reform, again, in defraudation of the Constitution. First, in January 2008 he suggested that in order to assure the possibility for his indefinite reelection, he was willing to propose a recall referendum of himself, seeking to convert the eventual rejection of such referendum into a plebiscite for his reelection;[168] and second, as mentioned in December 2008 he formally asked the National Assembly to approve a constitutional amendment in order to establish the possibility of the indefinite reelection of the President of the Republic which was submitted and approved by referendum in February 14th 2009 (*See Supra 37*), in spite of the constitutional prohibition to ask the people to vote about the same constitutional reform already rejected by popular vote (*See Supra 81*).

206. On the other hand, during July and August 2007, the President of the Republic, exercising the powers to legislate by decree that were delegated upon him by his completely controlled National Assembly in January 2007, sanctioned 26 very important new Statutes with the intention of implementing, once again, in a fraudulent way, all the constitutional reform proposals that were rejected by the people in the 2007 December referendum.[169]

Unfortunately, even though all were unconstitutional, those Decree Laws have been enacted and will be applied without any possibility of control or judicial review. The President is sure that no Constitutional Chamber judicial review decision will be issued, being such Chamber a wholly controlled entity that has proved to be his most effective tool for the consolidation of his authoritarian government. This dependence of the Supreme Tribunal regarding the President of the Republic was admitted by himself in 2007, when he publicly complained the fact that the Supreme Tribunal had issued an important ruling in which it "modified" the Income Tax Law, without previously consulting the "leader of the Revolution".[170]

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168 See *El Universal*, Caracas January 27, 2008.

169 Regarding these 2008 Decree Laws, see *Revista de Derecho Público*, Nº 115, *Estudios sobre los Decretos leyes Julio-Agosto*, 2008, Editorial Jurídica venezolana, caracas 2008. Referring to these Decree Laws, Teodoro Petkoff has pointed out that: "In absolute contradiction to the results of the December 2, 2007 referendum in which voters rejected constitutional reforms, in several of the laws promulgated the president presents several of the aspects of the rejected reforms almost in the same terms. The proposition of changing the name of the Venezuelan Armed Forces to create the Bolivarian National Militia was contained in the proposed reforms; the power given to the President to appoint national government officials over the governors and mayors to, obviously, weaken those offices and to eliminate the last vestiges of counterweight to the executive in general and the presidency in particular, was also contained in the reforms; the recentralization of the national executive branch of powers that today belong to the states and decentralized autonomous institutes was also part of the reforms: the enlargement of government powers to intervene in economic affairs was also contained in the reform. To ignore the popular decision about the 2007 proposal to reform the constitution in conformity with the will and designs of an autocrat, without heed to legal or constitutional norms, is, *stricto sensu*, a tyrannic act". See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition", in *Revista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp. 12.

170 The case was a very polemic and discussed one, decided by the Constitutional Chamber of the Supreme Tribunal in decision Nº 301 of February 27, 2007, regarding which the President of the Republic said: "Many cases arrive when the Revolutionary Government wants to take a decision against something that for instance, deals with or has to pass through judicial decisions, and then they begin to move themselves in contrary sense in the shadow, and in many cases they attain to

207. All this situation is the only explanation a constitutional lawyer can find to understand why a Head of State of our times, as is the case of President Chávez in Venezuela, can say, challenging his opponents in a political rally held on August 28, 2008, "I am the Law" and "I am the State."[171] Anyway, this was not the first time that the President of the Republic used this expression. In 2001, when he approved more than 48 Decree laws, also via delegate legislation, he also said, although in a different way: "The law is me. The State is me."[172] This phrase, which although attributed to Luis XIV was never delivered by him,[173] expressed by a Head of State of our times, is enough to realize and understand the tragic institutional situation of Venezuela in the period 1999-2009, precisely characterized by a complete absence of separation of powers and consequently, of a democratic government.[174]

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neutralize the decisions of the Revolution yon by means of a judge, or a court, and even through the own Supreme Tribunal of Justice, behind the *backs of the Leader of the Revolution,* acting from inside, against the Revolution. This is, I insist, treason to the people, treason to the Revolution." (emphasis added). *Discurso en el Primer Evento con propulsores del Partido Socialista Unido de Venezuela desde el teatro Teresa Carreño, 24 marzo 2007.*

171 "He said: "I warn you, group of Stateless, putrid opposition. Whatever you do, the 26 Laws will go ahead! And the other 16 Laws,… also. And if you go out in the streets, like on April 11 (2002)… we will sweep you in the streets, in the barracks, in the universities. I will close the golpista media; I will have no compassion whatsoever … This Revolution came to stay, forever ! You can continue talking stupidities … I am going to intervene all communications and I will close all the enterprises I consider that are of public usefulness or of social interest! Out [of the country] Contractors and Forth Republic corrupt people ! **I am the Law … I am the State**" (*Yo soy la Ley…, Yo soy el Estado!!).* See in Gustavo Coronel, *Las Armas de Coronel*, 15 de octubre de 2008: http://lasarmasdecoronel.blogspot.com/2008/10/yo-soy-la-leyyo-soy-el-estado.html

172 "*La ley soy yo. El Estado soy yo*". See in *El Universal*, Caracas 4-12-01, pp. 1,1 and 2,1.

173 This famous phrase was attributed to Louis XIV, when in 1661 he decided to govern alone after the death of Cardinal Mazarin, but was never pronounced by him. See Yves Giuchet, *Histoire Constitutionnelle Française (1789–1958)*, Ed. Erasme, Paris 1990, p. 8.

174 This situation was summarized by Teodoro Petkoff, editor and founder of *Tal Cual*, one of the important newspapers in Caracas, as follows: "Chavez controls all the political powers. More that 90% of the Parliament obey his commands; the Venezuelan Supreme Court, whose number were raised from 20 to 32 by the parliament to ensure an overwhelming officialist majority, has become an extension of the legal office of the Presidency… The Prosecutor General's Office, the Comptroller's Office and the Public Defender are all offices held by "yes persons," absolutely obedient to the orders of the autocrat. In the National Electoral Council, four of five members are identified with the government. The Venezuelan Armed Forces are tightly controlled by Chávez. Therefore, from a conceptual point of view, the Venezuelan political system is autocratic. All political power is concentrated in the hands of the President. There is no real separation of Powers." See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition", in *ReVista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp. 12.

Part Five. The Government

208. Within the presidential system of government (*See Supra 50*), according to Article 255 of the Constitution, the Executive Power is exercised by the President of the Republic, the Executive Vice President, the Ministers, and the other officials as determined by the Constitution and by statutes.

CHAPTER 1. THE NATIONAL EXECUTIVE

§1. THE PRESIDENT OF THE REPUBLIC

I. Head of State and of the Government

209. Article 226 of the Constitution provides that the President of the Republic is both the Chief of State, and the Chief of the National Executive branch, and in which capacity he directs the government.

The President of the Republic is elected through direct, secret and universal suffrage, by relative majority of votes (Article 228). To be elected President, the candidate must be Venezuelan by birth, possess no other nationality, be older than thirty years of age, and not be convicted of a crime (Article 227). Those that on the day of the nomination for President or on any date between that date and the day of the election, are or have been acting as Executive Vice President, Governor of a State or municipal Mayor, may not lawfully be elected to the Presidency of the Republic (Article 229).

210. The President's constitutional term is of six (6) years. For the first time since the XIX century, after forbidding presidential elections, the 1999 Constitution provided that the President could be reelected for the consecutive term, although only once (Article 230). This limit was eliminated through a constitutional amendment approved by referendum on February 14th 2009 (*See Supra 37*). The current (2009) President, Hugo Chávez Frias, after being elected in 1998 and subsequently in 2000 once the new Constitution was approved, was re-elected in 2006. In 2007 he proposed a Constitutional Reform Draft seeking for the establishment in the Constitution of the possibility for the indefinite re-election of the President of the Republic, which was rejected by the people in the referendum held on December 2007. Nonetheless, as aforementioned, in January 2008, he announced that he was going to seek for a constitutional amendment, and in December 2008 after important defeats in the regional and municipal elections, he asked the National Assembly to approve a constitutional amendment draft on the same matter of indefinite presidential election, which was approved by referendum on February 2009.

211. It must also be mentioned that the Constitution has established the possibility for the Supreme Tribunal of Justice to decide "the removal from office of the President of the Republic" (Article 233) without any other significant specific delineation or definition of the conditions for exercising that power.

II. The absences of the President of the Republic and its substitutions

212. The Constitution distinguishes two kinds of absences of the President from his tenure: absolute and temporal, and the ways to replace him.

According to Article 233, absolute absence of the President of the Republic is produced in cases of death; resignation; dismissal by the Supreme Tribunal; physical or mental incapacity certified by a medical panel appointed by the Supreme Tribunal with the approval of the National Assembly; the abandonment of the office declared by the National Assembly, and the repeal of his mandate by referendum.

In such cases, if the absolute absence is produced before his inauguration, a new universal, direct and secret election must be convened within the following 30 days. In this case, in the mean time, the President of the National Assembly must take charge of the Presidency of the Republic. If the absolute absence takes place within the first four years of the constitutional term, a new universal and direct election must be convened within the following 30 days. In this case, in the mean time, the Executive Vice President must take charge of the Presidency of the Republic. In all these situations, the new President must finish the constitutional term of the absent President.

If the absolute absence is produced during the last two years of the constitutional term of the President, the Executive Vice President must assume the Presidency of the Republic up to the end of the term.

213. Regarding the temporal absences of the President, Article 234 establishes that in such cases, he must be replaced by the Executive Vice President up to 90 days, which can be extended by the National Assembly for another 90 days. If the temporal absence exceeds the latter 90 days, the National Assembly can decide by a majority vote of its members to consider it as an absolute absence of the President.

Regarding travels of the President outside the national territory, only trips abroad for more than five days require the authorization of the National Assembly (Article 235).

§2. THE EXECUTIVE VICE PRESIDENT

214. One of the innovations in the Constitution of 1999 was the creation of the office of the Executive Vice President, which is a non elected organ directly tied to the office of the President, which has the power to freely appoint or dismiss him. The Executive Vice President must meet the same qualifications for office as the President, and must have no blood or marriage relation with the President.

The Executive Vice President is thus an immediate collaborator of the President in his capacity as Chief Executive (Article 238). Consequently, its creation in the Con-

stitution does not alter the nature of the presidential system of government[175]. Its main attributions are the following (Article 239): to collaborate with the President in the direction of Government action; to coordinate National Public Administration according to the President's instructions; to propose to the President the appointment and dismissal of Ministers; to preside over the Council of Ministers, with prior authorization of the President (Article 242); to coordinate the relations of the National Executive with the National Assembly; and to fill the temporal absences of the President (Article 234).

215. As mentioned, the Executive Vice President is appointed and dismissed by the President of the Republic. Nonetheless, according to Article 240 of the Constitution, a motion to censure the Vice President, arising from a vote of at least three-fifths (3/5) of the members of the National Assembly, will result in his removal from office. In such a case the Executive Vice President may not occupy that office or that of a Minister for the remainder of the President's term in office. On the other hand, three (3) removals of Executive Vice Presidents due to legislative motion to censure approved during the same constitutional term of the Legislature, authorizes the President of the Republic to dissolve the National Assembly.

This is the only occasion in which the President is entitled to dissolve the National Assembly, being difficult to conceive the situation, unless the Assembly itself provoked its own dissolution by voting to approve a third motion to censure. In such case, the Executive Decree dissolving the Assembly implies the need to convene new elections for the National Assembly that must take place within sixty (60) days of its dissolution. In no case can the Assembly be dissolved during the last year of its constitutional term.

§3. THE MINISTERS

216. The Ministers' offices are also directly linked to the President of the Republic, being directly under his control. The Ministers, sitting together with the President and the Executive Vice President, constitute the Council of Ministers (Article 242).

The Ministers are usually the head of the Ministries, which are the most important executive organs of the Government. They are freely appointed and dismissed by the President (Article 236,3). Nonetheless, Article 246 of the Constitution establishes the possibility for the National Assembly to approve motions to censure the Minister, and when the motion arises from a vote of not less than three-fifth (3/5) of the members present in the National Assembly, the decision will result in the Minister's removal. The Minister may not then occupy any other office of Minister or of Executive Vice President for the remainder of the Presidential term.

217. The number, organization and functions of the Ministries are establish by the President of the Republic, by Executive Decree (Article 236,20) according to the general provisions established in the Organic Law of Public Administration.[176] In

175 See Carlos Ayala Corao, *El Régimen Presidencial en América Latina y los planteamientos para su Reforma,*, Caracas, 1992.

176 *G.O.* N° 5.890 Extraordinario de 31-7-2008.

accordance with Article 243 of the Constitution, the President of the Republic may also name Ministers of State, who, in addition to forming part of the Council of Ministers and without a Ministerial Office, assist the President and Vice President in certain functions.

218. The Ministers have the right to speak before the National Assembly (Article 211); and they can take part in its debates, although without vote (Article 245). On the other hand, the National Assembly can convoke the Ministers to its sessions, having the Assembly the right to question them. The Ministers, as well as any public official, are also obliged to appear before the Assembly and to give them all the information and documents it requires for its legislative and control functions (Article 223). The National Assembly has the power to declare political responsibility of the Ministers, and can ask the Citizen Power to prosecute them.. As already mentioned, the Assembly can also approve motions of censure of the Ministers (Article 246).

Finally, the Ministers must deliver before the National Assembly, within the first 60 days of each year, a motivated sufficient memoir referring to their activities in the previous year (Article 224).

§4. THE COUNCIL OF MINISTERS

219. As indicated, when sitting together with the President and the Executive Vice President, the Ministers constitute the Council of Ministers (Article 242). According to Article 236 of the Constitution, the President of the Republic, sitting in Ministers' Council, is required to exercise a set of functions designated in sections 7, 8, 9, 10, 12, 13, 14, 18, 20, 21, 22 of that Article, as well as those imposed by satutes. Within these attributions that the President must always exercise in Council of Ministers are the following: declaration of states of exception and the suspension of constitutional guaranties; issuing of decrees laws according to the legislative delegation made by the National Assembly; convening of the National Assembly to extraordinary sessions; issuing of regulations to statutes; approval of the National Plan for Development; the fixation of the number and organization of the Ministries; ordering the dissolution of the National Assembly, and covening referendums.

The Council of Ministers is presided over by the President of the Republic, although the President may authorize the Executive Vice President to preside when unable to attend. In all events, decisions of the Ministers' Council must always be ratified by the President.

§5. OTHER CONSTITUTIONAL EXECUTIVE ORGANS

220. The Attorney General of the Republic is also an Executive organ of the Government and is required to attend the Council of Ministers but only with the right to speak, without the vote (Article 250). It is defined in the Constitution as an organ of the National Executive Branch that assists, defends, and represents the interests of the Republic in judicial and non-judicial matters (Article 247). In particular, the Constitution requires the advice of the Attorney General with respect to the approval of contracts of national public interest to be signed by the executive (Article 247).

221. One of the innovations of the Constitution of 1999 was the creation of the Council of State as a superior advisory organ of the Government and of the National Public Administration (Article 251). The Council of State is formally charged with making policy recommendations regarding matters of national interest that the President of the Republic recognizes as being of special importance, requiring the Council's point of view.

The Council of State's specific functions and attributes must be determined by law, which up to 2009 had not been sanctioned. Anyway, regarding the constitutional provisions, the Executive Vice President must preside over the Council of State, which must be integrated, in addition, by five (5) individuals named by the President of the Republic, a representative designated by the National Assembly, a representative designated by the Supreme Tribunal of Justice, and a Governor collectively designated by the chief executives of the States (Article 252). In practice, during the first decade of the 1999 Constitution, the Council of State has not been integrated and has not functioned.

222. Another innovation in the 1999 Constitution was the creation of the Federal Council of Government in charge of planning and coordinating the policies and actions for the process of decentralization and transfer of competencies from the national level of government to the States and Municipalities. This Council was to be presided over by the Executive Vice President, and integrated by the Ministers, the States Governors, one mayorfrom each State and by representatives of the organized society. An Inter territorial Compensatory Fond established in the Constitution was to be dependent on this Council (Article 185), in order to finance the public investments to promote the equitable development of the regions, the cooperation and complementation of development policies and initiatives of the public territorial entities.[177]

Nonetheless, due to the centralistic character of the Government that has developed during the first decade of the Constitution (*See Supra 53*), up to 2009 this Federal Council of Government has never functioned and the Inter territorial Compensatory Fund has not been created.

223. Finally, Article 323 of the Constitution has also created the Council of Nation's Defense, presided over by the President of the Republic, as the country's highest authority for defense planning, advice, and consultation regarding all public entities (Public Powers) on all matters related to the defense and security of the Nation's sovereignty, territorial integrity, and strategic thinking (*See Supra 275*).

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177 See Manuel Rachadell, "El Consejo Federal de Gobierno y el Fondo de Compensación", in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 7, Caracas, 2002, pp. 417 a 457; Emilio Spósito Contreras, "Reflexiones sobre el Consejo Federal de Gobierno como máxima instancia de Participación administrativa", in *Temas de derecho administrativo, Libro Homenaje a Gonzalo Pérez Luciani,* Vol. II, Tribunal Supremo de Justicia, Colección Libros Homenaje, Nº 7, Caracas, 2002, pp. 827 a 863,; and José V. Haro, "Aproximación a la noción del Consejo Federal de Gobierno prrevisto en la Constitución de 1999", in *Revista de Derecho Constitucional,* Nº 7 (enero-junio), Editorial Sherwood, Caracas, 2003, pp. 161-166.

CHAPTER 2. CONSTITUTIONAL POWERS OF THE NATIONAL EXECUTIVE

224. The President of the Republic is at the same time the Head of the State and the Head of Government and of Public Administration, and as such, directs the Government actions (Article 226). Thus, two are the basic functions of the National Executive, political and administrative, being subjected in both cases to the control of the National Assembly.

§1. THE POLITICAL FUNCTIONS OF GOVERNMENT IN THE CONSTITUTION AND THE PARLIAMENTARY CONTROL

225. As aforementioned, the President of the Republic directs the Government actions (Arts. 226; 236,2), and for such purpose, the Constitution directly assign him a series of political attributions. Among these, for instance, are the direction of foreign relations, the convening of extraordinary sessions of the National Assembly, and the declaration of states of exception, or the restriction of constitutional guaranties, in the latter case according to the corresponding Organic Law (Article 338).

In all these cases of political acts enumerated in Article 236 of the Constitution, the Executive decisions must be counter signed by the Vice President and by the corresponding Ministers, except the acts of the appointment of the Vice President and of the Ministers, and the decrees of pardon.

226. In these matters, the National Assembly "exercises its control functions over the Government" (Article 187,3); according to which it can approve motions to censure the Vice President and the Ministers, which can lead to their removal when approved by the three fifth of the representatives (Articles 187,10; 240). As already mentioned, the National Assembly must also decide certain cases of absolute absence of the President because of physical or mental incapacity or abandonment of the Office, or the conversion of a temporal absence into an absolute one (Articles 233, 234) (*See Supra 212*). The National Assembly can also authorize criminal processes against the President (Article 266,2) and must always review the Decrees of State of Exception (Articles 338, 339).

227.The National Assembly also has important attributions in political matters like the appointment of the Magistrates of the Supreme Tribunal of Justice and the High officials of the Citizen and Electoral branches of government, (Prosecutor General, Peoples' Defender, Comptroller General, and Members of the National Electoral Council) and their removal or dismissal (Articles 265, 279, 296) (*See Infra 295*).

I. The direction of foreign relations

228. The President of the Republic has within his attributions "to direct the foreign relations of the Republic and to sign and ratify international treaties, covenants and agreements" (Article 236,4). Regarding the latter, they must be approved by special statute (Article 187,18), before their ratification by the President, except when they execute or perfect pre existent obligations of the Republic; they apply principles expressly recognized by it; they execute international relations ordinary acts; or they

exercise attributions expressly assigned by statute to the President (Article 154) (*See Supra 87*).

On the other hand, as mentioned before, the National Assembly must authorize the President's trips abroad when they exceed more than five days (Article 187,17).

II. The Executive initiatives on matters of constitutional review and of referendum

229. The President of the Republic in Council of Ministers has the initiative to propose amendments (Article 341) and reforms (Article 342) to the Constitution, as well as to convene a National Constituent Assembly for major constitutional changes to it (Article 348). The National Assembly also has initiative rights regarding constitutional review (Articles 341, 342, 348), and in the case of constitutional reforms, the draft must always be debated before it (Article 343) (*See Supra 80*).

The President of the Republic, also in Council of Ministers (Article 236,22) has the initiative to submit to consultative referendum matters he considers as of special national interest (Article 71); to submit to approbatory referendum, international treaties, covenants or agreements that could compromise the national sovereignty or that could imply the transfer of State attributions to supra national organs (Article 73); and to submit statutes to total or partial abrogate referendum (Article 74). On the other hand, the National Assembly has the initiative for the approbatory referendums of statutes (Article 73).

III. The military powers of the President of the Republic

230. According to Article 236 of the Constitution, the President of the Republic in his position of Commander in Chief, has the attribution of directing the National Armed Force, to exercise the supreme authority upon it and to fix its contingent (Article 236,5). In such position, the President exercises the supreme command of the National Armed Force, and has the power to promote its officers from the rank of colonel or navy captain, and to appoint them for their corresponding positions (Article 236,6). In case of use of military missions abroad, or in case of foreign military missions in the country, the National Assembly must always give the corresponding authorization (Article 187,11).

IV. Executive powers regarding the National Assembly

231. The President of the Republic has legislative initiative and can send to the National Assembly Draft statutes for its discussion (Article 304,1). He also has, in Council of Ministers, the power to convene the National Assembly to extraordinary sessions, and to dissolve the Assembly in case of its approval of three motions of censure against the Executive Vice President (Articles 236,21; 240) (*See Infra 281*). The President of the Republic can personally or through the Executive Vice President, direct reports or special messages to the National Assembly (Article236,17).

V. Executive powers in situations of exception

232. Chapter II of the Constitution, titled "Protection of the Constitution" regulates cases of exceptional circumstances provoking "situation of exception" that can seriously threaten the security of the Nation, and of its institutions and persons, in which the adoption of special political-constitutional measures to confront them are necessary.

Article 337 of the Constitution defines these "states of exception"[178] as the circumstances affecting the social, economic, political or natural order regarding which ordinary powers of government are considered insufficient to confront; as well as those gravely affecting the security of the Nation, and its institutions and Citizens. These are exceptional circumstances whose characteristics exceed the possibility of being attended to by the State through the institutional mechanisms established for normal situations. In these cases, the President of the Republic, in Council of Ministers, can decree the state of exceptions and also restrict some constitutional guarantees (Article 236,7).

233. According to the Organic Law on the States of Exception, which was sanctioned according to Article 338 of the Constitution,[179] the following states of exception can be decreed: The "state of alarm" that can be decreed in cases of "catastrophes, public calamities or similar events" exposing the Nation or its Citizens to serious danger. This state of exception is to have a duration of thirty (30) days, which may be extended for an additional period of equal length. The "state of economic emergency" that can be decreed when "extraordinary economic circumstances arise" that "gravely affect the Nation's economic life." The permitted duration of this exception situation is sixty (60) days, a term that may again be extended for an equal period. The "state of interior or exterior commotion" that can be decreed in cases of "interior or exterior conflict that seriously endangers the security of the Nation, its Citizens or institutions." Here, the state of exception can lasts up to ninety (90) days, and may be extended for an equal period.

234. In the above exceptional circumstances, the President of the Republic, sitting in Council of Ministers, is the one that has the prerogative and responsibility to decree these States of Exception (Article 337). Article 339 of the Constitution requires that within eight (8) days of being issued, the decree must be sent to the consideration and approval by the National Assembly or to its Delegated Commission, and to the Constitutional Chamber of the Supreme Tribunal of Justice which must decide whether the decree is constitutional (Article 336,6)) (*See Supra 568*). The decree must be in compliance with the requirements, principles and guaranties of the Interna-

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178 See in general Jesús M. Casal H., "Los estados de excepción en la Constitución de 1999", in *Revista de Derecho Constitucional*, Nº 1 (septiembre-diciembre), Editorial Sherwood, Caracas, 1999, pp. 45-54; Salvador Leal W., "Los estados de excepción en la Constitución", in *Revista del Tribunal Supremo de Justicia*, Nº 8, Caracas, 2003, pp. 335-359; María de los Ángeles Delfino, "El desarrollo de los Estados de Excepción en las Constituciones de América Latina", in *Constitución y Constitucionalismo Hoy*. Editorial Ex Libris, Caracas, 2000, pp. 507-532.

179 See the Organic Law on States of Exception, *Gaceta Oficial* Nº 37.261 de 15-08-01.

tional Covenant on Civil and Political Rights[180] and the American Convention on Human Rights.[181]

The President of the Republic may also request the National Assembly to extend the duration of a decree for a term equal to its original constitutional one. The decree may be revoked by the National Executive, the National Assembly or its Delegated Commission before the completion of the decree's term should the causes that motivated its declaration cease. In all cases, however, the National Assembly must approve any extension of the duration of a decree (Article 338).

235. In addition, when a state of exception is decreed, the President of the Republic, sitting in Council of Ministers, is authorized in the Constitution to temporarily restrict constitutional guaranties, with the exception of those referring to the right to life, the right against *incomunicado* detentions and torture, the right to due process of law, the right to information, and those considered untouchable (intangibles) human rights (Article 377). In the latter category can be identified those human rights provided in the International Covenant on Civil and Political Rights (Article 4), and in the American Convention on Human Rights (Article 27), like the guarantee of equality before the law and non-discrimination; the guarantee against being imprisoned for contract obligations; the guarantee against retroactive or *ex post facto* laws; the right to individual personality; religious liberty; the guarantee to be free of slavery or involuntary servitude; the right to physical integrity of the person; the principle of legality; the protection of the family; the rights of children; the guarantee against arbitrary deprivation of nationality and the political rights to suffrage, and the guarantee of public access in government affairs.

The consequence of these provisions is that *in the first place*, the Constitution has here eliminated the possibility of "suspending" individual constitutional rights or guarantees, which on the contrary was authorized by the Constitution of 1961 (Articles 241; 190,6), contributing to innumerable institutional abuses. By contrast, in the 1999 Constitution the President is left with only the power to "restrict" (Article 236,7) constitutional guarantees. In the second place, the Constitution now expressly requires that an Executive Decree declaring a state of emergency that "restricts" a constitutional guarantee must "regulate the exercise of the right whose guarantee is restricted" (Article 339). Thus, it is no longer constitutionally possible for the President to simply "restrict" a constitutional guaranty, but it is now indispensable that the text of the decree itself expressly sets forth the specific normative regulation and concrete limitations of the exercise of the right.

236. Finally, it must be mentioned that the declaration of a state of exception cannot in any event interrupt the functioning of the branches of governments and other organs of the State (Article 339). Moreover, the declaration of a state of emergency does not alter the liability of the President of the Republic, those of the Executive Vice President, nor of the Ministers, in conformity with the Constitution and laws (Article 232).

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180 International Covenant on Civil and Political Rights, Dec. 16, 1966.

181 American Convention on Human Rights, San José, Costa Rica, 22 November 1969.

VI. Executive Pardon powers

237. The President of the Republic has the power to give pardons (*indultos*) (Article 236, 19); although the National Assembly is the one empowered to decree amnesties (Article 187,5).

VII. The Legislation veto powers of the President of the Republic and the Delegate legislation

238. The President of the Republic must promulgate all statutes sanctioned by the National Assembly within ten (10) days of having received the statute's approval (Article 214); and legislation is considered promulgated and producing effects once published in the *Gaceta Oficial de la República* (Article 215) with the corresponding order that it be put into effect.

The President may, however, within the ten (10) day period, in a decision adopted in Council of Ministers, and on the basis of a reasoned exposition, request that the National Assembly modify some aspect of the legislation or reverse the approval of all or a part of it.

The National Assembly must decide on the President's proposal through a vote by an absolute majority of representatives present, and must then send the statute for promulgation. The President must then promulgate the law within five (5) days of receiving it, and may not propose new changes.

239. However, when the President of the Republic considers that a statute or certain of its Articles are unconstitutional, he must request a declaration on the matter from the Constitutional Chamber of the Supreme Tribunal of Justice during the ten (10) day period in which the law must be promulgated or returned to the Assembly) (*See Supra 573*). The Constitutional Chamber must then issue its decision within fifteen (15) days of receiving the communication from the President. If the Tribunal denies the unconstitutionality of the law or fails to decide within the allotted time period, the President must promulgate the law within five (5) days (Article 214).

240. If the President of the Republic fails to promulgate statutes according to the abovementioned rules, the President and the two Vice Presidents of the National Assembly must proceed to promulgate the statute as indicated, without prejudice to the responsibility incurred by the President of the Republic for his omission (Article 216).

241. In the case of statutes approving international treaties, agreements or conventions, they may be promulgated at the moment determined at the discretion of the National Executive, according to international custom and the national interest (Article 217).

242. On the other hand, as aforementioned, the President of the Republic can be authorized by the National Assembly, by means of an "enabling law" approved by the vote of three fifth of its members, to enact legislation by means of delegate legislation. In these cases, the enabling law must fix the guidelines, purpose and framework

of the matters that are delegated to the President's legislative powers, and the term for the issuing of the corresponding Decrees Laws (Articles 203; 236,8) (*See Supra 95*).

§2. THE ADMINISTRATIVE FUNCTIONS OF GOVERNMENT IN THE CONSTITUTION AND THE PARLIAMENTARY CONTROL

I. The President of the Republic as Head of Public Administration

243. According to Article 236,11 of the Constitution, the President is the head of the Public Administration, which he administers. In all his acts in these matters the Ministers must always countersign the corresponding executive acts. In particular, the President is empowered in Article 236,20 of the Constitution to determine the numbers, competencies and organization of the Ministries and other organs of Public Administration.

In all these administrative matters the National Assembly also exercises its control over Public Administration (Article 187,3), being competent to discuss and approve the national budget and all public debt statutes (Articles 187, 6; 314; 317).

244. In his position of Head of Public Administration, Article 236 of the Constitution assigns the President with the following attributions: to appoint and dismiss the Executive Vice President and the Ministers (Article 236,3); to appoint, after parliamentary approval, the Attorney General of the Republic as well as the ambassadors and head of permanent diplomatic missions (Article 236,15; Article 187,14); and in general, to appoint all other public officials when attributed in the Constitution by statutes (Article 236,16).

245. On matters of public contracts, the same Article 236 of the Constitution assigns the President of the Republic in Council of Ministers, the power to negotiate public national debt (Article 236,12); and to sign national interest contracts according to the Constitution (Article 236,14). For the signing of these contracts, the National Assembly must approve them only when it is expressly required by a statute (Article 150), except in cases of contracts to be signed with foreign States of official foreign entities, or enterprises not domiciled in the country, in which cases the parliamentary approval is necessary (Article 187.9). Also a parliamentary authorization is required in cases of public contracts selling public immoveable property (Article 187.12).

II. The formulation of the National Development Plan

246. Article 236.18 of the Constitution assigns the President of the Republic in Council of Ministers the attribution to formulate the national Development Plan and direct its execution. The National Assembly must approve the general guidelines of the economic and social development plan, which the National Executive must file before the Assembly within the first trimester of the first year of the constitutional term (Article 236.18).

III. The regulatory powers of the President of the Republic

247. According to Article 236.10 of the Constitution, the President of the Republic in Council of Ministers has extensive powers to issue regulations to totally or partially develop statutory provisions, "without altering the spirit, purpose and ratio" of the statute) (*See Supra 108*).

§3. LIABILITIES

248. The President of the Republic is responsible for his acts and for the accomplishment of his duties. He is specifically obliged to seek for the guaranty of the Citizens' rights and liberties, as well as for the independence, integrity, sovereignty of the territory and the defense of the Republic (Article 232). The declaration of states of exception does not modify the liability principles regarding the President, or the Executive Vice President and the Ministers (Article 232).

249. On the other hand, the Executive Vice President and the Ministers are also individually, civily, criminally and administratively responsible for their actions (Article 241, 244). They are also politically responsible before the President of the Republic, as head of Government, and before the National Assembly that can censure them.

250. According to Article 242 of the Constitution, the Executive Vice President and all the Ministers that have concurred in a decision of the Council of Ministers are jointly liable for their decisions. Only those that have formally expressed a dissenting or negative vote are excluded from this liability. The President of the Republic is, of course, also subject to joint liability for the Council's decisions, when he presides over it.

CHAPTER 3. PUBLIC ADMINISTRATION

§1. THE CONSTITUTIONAL PRINCIPLES RELATED TO PUBLIC ADMINISTRATION AND ADMINISTRATIVE ACTIVITIES

251. In the title referred to as the "Public Power", the 1999 Constitution includes a section related to "Public Administration,"[182] whose provisions have been developed by the Organic Law on Public Administration of 2001, reformed in 2008.[183] These provisions are applicable to all the organs and entities of all branches of government

182 See Antonieta Garrido de Cárdenas, "La Administración Pública Nacional y su organización administrativa en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I, Imprenta Nacional, Caracas, 2001, pp. 427-471.

183 See *G.O.* N° 5.890 Extraordinario de 31-7-2008. See Allan R. Brewer-Carías *et al*, *Ley Orgánica de la Administración Pública*, Caracas, 2002; Gustavo Briceño Vivas, "Principios constitucionales que rigen la Administración en la nueva Ley Orgánica de la Administración Pública", in *Temas de derecho administrativo, Libro Homenaje a Gonzalo Pérez Luciani,* Vol. I, Tribunal Supremo de Justicia, Colección Libros Homenaje, Nº 7, Caracas, 2002, pp. 351 a 372.

exercising administrative functions, and not only of the Executive branch, and to the national, states and municipal public administrations.[184]

The Constitution sets forth a series of principles related to Public Administration, and within them, those that are common to all of the organs of the branches of government: principle of legality, principle of liability of the State and of its officials, and principle of finality.

252. The *first* principle related to Public Administration and to all State organs is the principle of legality enunciated in Article 137 of the Constitution when establishing that "The Constitution and the law would define the attributions of the organs exercising Public Power, to which they must subject all the activities they perform." This provision imposes the necessary submission of Public Administration to the law, being the consequence of it, that all administrative activities contrary to it can be reviewed by the Constitutional Jurisdiction (Article 334) and by the Administrative Jurisdiction (Article 259), whose courts have the power to annul illegal acts) (*See Infra 602*).

The principle of legality is also declared in the Constitution as one of the foundations of Public Administration, defined as the "complete subjection to the law" (Article 141), being one of the basic missions of the organs of the Citizen Power, to assure "the complete subjection of the administrative activities of the State to the law" (Article 274).

253. The *second* general principle of Public administration is the principle of State liability, incorporated in an express way in the 1999 Constitution (Article 140), setting forth that "The State is liable for the damages suffered by individuals in their goods and rights, provided that the injury be imputable to the functioning of Public Administration," being possible to comprise in the expression "functioning of Public Administration", its normal or abnormal functioning.[185] Although doubts can result from the wording of the Article regarding the liability of the State caused by legislative actions that nonetheless are derived from the general principles of public law,[186]

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184 See Allan R. Brewer-Carías, *Principios del Régimen Jurídico de la Organización Administrativa Venezolana*, Caracas 1994, pp. 11 y 53.

185 See Jesús Caballero Ortiz, "Consideraciones fundamentales sobre la responsabilidad administrativa en Francia y en España y su recepción en la Constitución venezolana de 1999", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón*, Volumen II. Tribunal Supremo de Justicia, Caracas, 2001, pp. 255-271; Luis A. Ortiz-Álvarez, "La responsabilidad patrimonial del Estado y de los funcionarios públicos en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela*, Volumen II. Imprenta Nacional, Caracas, 2001, pp. 149-208, and in *Revista de Derecho Constitucional*, Nº 1 (septiembre-diciembre), Editorial Sherwood, Caracas, 1999, pp. 267-312; María E. Soto, "Régimen constitucional de la responsabilidad extracontractual de la Administración Pública", in *Revista LEX NOVA del Colegio de Abogados del Estado Zulia*, Nº 239, Maracaibo, 2001, pp. 49-72; Ana C. Núñez Machado, "La nueva Constitución y la responsabilidad patrimonial del Estado", in *Comentarios a la Constitución de la República Bolivariana de Venezuela",* Vadell Hermanos Editores, Caracas, 2000, pp. 35-64; and "Reflexiones sobre la interpretación constitucional y el artículo 140 de la Constitución sobre responsabilidad patrimonial del Estado", in *Revista de Derecho Administrativo*, Nº 15 (mayo-diciembre), Editorial Sherwood, Caracas, 2002, pp. 207-222.

186 See Carlos A. Urdaneta Sandoval, "El Estado venezolano y el fundamento de su responsabilidad patrimonial extracontractual por el ejercicio de la función legislativa a la luz de la Constitución de

regarding the liability caused by judicial acts, it is clarified by the express provisions of Articles 49,8 and 255 of the Constitution, in which it is established, in addition, the State liability caused because of "judicial errors or delay."[187]

254. The *third* general constitutional principle regarding Public Administration is the principle of liability of public officials in the exercise of public functions established in Article 139 of the Constitution, based on the "abuse or deviation of powers or the violation of the Constitution or of the law'. In addition, Article 25 of the Constitution, following a long constitutional tradition, expressly establishes the specific civil, criminal and administrative liability of any public officials when issuing or executing acts violating human rights guaranties in the Constitution and the statutes, not being acceptable any excuse due to superior orders.

255. The *fourth* principle of Public Administration incorporated in the 1999 Constitution is the principle of finality (Article 141), emphasizing that "Public Administration is at the service of Citizens," and as an organ of the State, it must also "guaranty the inalienable, indivisible and interdependent enjoyment and exercise of human rights to all persons, according to the principle of progressiveness and without discrimination."

256. And *fifth*, Article 141 of the Constitution also enumerates in an express way the general principles concerning administrative activities, providing that all activities of Public Administration are founded in the principles of "honesty, participation, celerity, efficacy, efficiency, transparency, accountability and liability in the exercise of public functions, with complete subjection to the law."

All these principle have been developed in the Organic Law on Public Administration (Article 12), adding to them, the principles of economy, simplicity, objectivity, impartiality, good faith and confidence (Article 12), and in the Administrative Procedure Organic Law.[188]

§2. CONSTITUTIONAL PROVISIONS RELATED TO THE ORGANIZATION OF PUBLIC ADMINISTRATION: CENTRALIZED AND DECENTRALIZED PUBLIC ADMINISTRATION

257. The Constitution establishes the basic principles for the organization of Public Administration, distinguishing between the Central Public Administration and the Decentralized Public Administration.

Regarding Central Public Administration, it is conformed in each of the three levels of government, according to the federal form of the State by the Executive organs of

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1999", in *Revista de Derecho Constitucional*, Nº 5 (julio-diciembre), Editorial Sherwood, Caracas, 2001, pp. 247-301.

187 See Abdón Sánchez Noguera, "La responsabilidad del Estado por el ejercicio de la función jurisdiccional en la Constitución venezolana de 1999", in *Revista Tachirense de Derecho*, Nº 12 (enero-diciembre). Universidad Católica del Táchira, San Cristóbal, 2000, pp. 55-74.

188 *Gaceta Oficial* Nº 2818 *Extraordinaria* de 1-7-81. See Allan R. Brewer-Carías *et al., Ley Orgánica de Procedimientos Administrativos*, Editorial Jurídica Venezolana, 12 edición, Caracas 2001, pp. 175 y ss.

the State: at the national level, the President of the Republic is the head of National Public Administration; at the States level, the Governors of the States are the head of their States Public Administrations (Article 160); and at the municipal level, the Mayors are the Heads of the Municipal Public Administrations (Article 174).

Regarding the Central National Public Administration, as aforementioned, it is basically organized around the Ministries, being the President of the Republic the competent organ, following the general principles established in the Organic Law on Public Administration, to determine their number, attributions and organization as well as of the other entities of Central Public Administration (Article 236,20). [189]

258. Regarding the National Decentralized Public Administration, the Constitution basically refers to the creation of autonomous institutions (public corporations), which is a power reserved to statutes (Article 142), and such institutions are always subjected to State control. Other forms of administrative functional decentralization, like public enterprises or public foundations, are regulated in the Organic Law on Public Administration, except for Petróleos de Venezuela S.A., the State own oil company, which is regulated in Article 302 of the Constitution as a nationalized entity.

Regarding independent Regulatory Administrations, they are all regulated by statutes (Banking Superintendence, Insurance Superintendence, Free competition Superintendence, Stock Exchange Commission), except for the Central Bank that is also regulated as an autonomous entity in the Constitution (Article 320).

§3. CONSTITUTIONAL PRINCIPLES REGARDING ADMINISTRATIVE INFORMATION

259. Finally, Article 143 of the Constitution is also innovative regarding Citizens Rights to be informed and to have access to administrative information. In the first place, it provides for the right of Citizens to be promptly and truly informed by Public Administration regarding the situation of the procedures in which they have direct interest, and to know about the definitive resolutions therein adopted, to be notified of administrative acts and to be informed on the courses of the administrative procedure.

The constitutional Article also establishes for the individual right everybody has to have access to administrative archives and registries, without prejudice of the acceptable limits imposed in a democratic society related to the national or foreign security, to criminal investigation, to the intimacy of private life, all according to the statutes regulating the matter of secret or confidential documents classification. The same Article provides for the principle of prohibition of any previous censorship

189 See Daniel Leza Betz, "La organización y funcionamiento de la administración pública nacional y las nuevas competencias normativas del Presidente de la República previstas en la Constitución de 1999. Al traste con la reserva legal formal ordinaria en el Derecho Constitucional venezolano", in *Revista de Derecho Público*, Nº 82 (abril-junio), Editorial Jurídica Venezolana, Caracas, 2000, pp. 18-55.

referring to public officials regarding the information they could give referring to matters under their responsibility. [190]

§4. CONSTITUTIONAL PRINCIPLES REGARDING CIVIL SERVICE

260. In the 1999 Constitution, also in an innovative way, the general principles of the organization of civil service are established (Article 144 ff.), which have been developed by the Statute on the Civil Service.[191] In the first place, Article 145 establishes the general principle that all public officials are at the State service, and that they cannot serve any political group, providing also that their appointment and dismissal cannot be determined by political affiliation or orientation. Unfortunately, this constitutional principle has not been respected, due to the authoritarian government that has developed during the last decade (1999-2009) in the country, characterized by political discrimination in Public Administration regarding those citizens that signed petitions for presidential repeal referendums in 2003-2004) (*See Supra 125*), the absence of pluralism, and the interrelation between the official party and Public Administration) (*See Supra 136*).

261. In the second place, the Constitution distinguishes between two sorts of public officials: those following career position and those in positions of free appointment and dismissals (Article 146), establishing in an express way that all career positions in the Public Administration must always be filed through public competition (*concurso público*), based on honesty, competence and efficiency considerations. Also the promotions must be subjected to scientific methods based on a merit system, and the transfer, suspension and dismissals must be decided according to their performance. Unfortunately, due to the strict political control of all the bureaucracy, neither of these constitutional provisions factually are in force.

262. In the third place, the Constitution also establishes the general principle of discipline in public spending regarding the provisions of public official positions, in the sense that being remunerated, they can only be provided when there are enough budget provisions for funds (Article 147). The scale of remunerations for public officials must be established by statute, and the National Assembly has been empowered

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190 See Orlando Cárdenas Perdomo, "El derecho de acceso a los archivos y registros administrativos en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I. Imprenta Nacional, Caracas, 2001, pp. 177-217; Manuel Rodríguez Costa, "Derecho de acceso a los archivos y registros de la Administración Pública", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo II, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid 2003, pp. 1483-1505; Javier T. Sánchez Rodríguez, "La libertad de acceso a la información en materia del medio ambiente", in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 7, Caracas, 2002, pp. 459 a 495.

191 *Gaceta Oficial* N° 37.522 of September 6, 2002. See Jesús Caballero Ortíz, "Bases constitucionales del derecho de la función pública", in *Revista de Derecho Constitucional,* Nº 5, julio-diciembre-2001, Editorial Sherwood, Caracas, 2002, pp. 21 a 46; Antonio de Pedro Fernández, "Algunas consideraciones sobre la función pública en la Constitución de la República Bolivariana de Venezuela", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I, Imprenta Nacional, Caracas, 2001, pp. 307-342.

to establish limits to municipal, states and national public officers (Article 229)[192]. The regime for pensions and retirements are also attributed in the Constitution to be established by the National Assembly.[193]

263. In addition, other constitutional provisions are established regarding public officers. For instance, the principle of incompatibility to occupy more than one remunerated position (Article 148), except in cases of academic, transitory, assistant, or teaching positions. In any case of acceptance of a new position, it implies the renunciation of the first, except in cases of deputies, up to the definitive replacement of the principal. In addition, the Constitution provides that public officer cannot benefit from more than one pension (Article 148).

The Constitution also establishes the prohibition for public officers to sign contracts with the Municipalities, the States, the Republic and with any other public law or state owned entity (Article 145).

§5. CONSTITUTIONAL PRINCIPLES REGARDING PUBLIC CONTRACTS

I. The public interest contracts

264. The 1999 Constitution, following a previous constitutional tradition, identifies as public interest contracts those signed by all the State entities (national, states or municipalities), which can then be national public interest contracts, states public interest contracts or municipal public interest contracts (Article 150).[194]

In this matter, the 1999 Constitution has completed the traditional constitutionalization of public contracts regime,[195] also regulating some inter administrative public contracts, that is, those signed between public entities. This is the case of the inter governmental contracts entered by the Republic and the States or between the States, or entered by the States and the Municipalities, particularly as consequence of the process of transfer of competencies derived from the decentralization process (Article 170).[196] The 1999 Constitution provides, in this regards, for contracts to be entered

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192 Organic Law fixing the remuneration of High States and Municipal public servants, *Gaceta Oficial* Nº 37.412 del 26 de marzo de 2002.

193 Law on the Retrat and Pension Regime rearding National, States and Municipal Public Administration employees, *Gaceta Oficial* N° 38.501 of August 16, 2006.

194 See Jesús Caballero Ortiz, "Los contratos administrativos, los contratos de interés público y los contratos de interés nacional en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I, Imprenta Nacional, Caracas, 2001, pp. 139-154, and "¡Deben subsistir los contratos administrativos en una futura legislación", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo II, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 1765-1777.

195 See Allan R. Brewer-Carías, "Algunos aspectos del proceso de constitucionalización del Derecho administrativo en Venezuela", in *V Jornadas internacionales de Derecho Administrativo Allan Randolph Brewer Carías, Los requisitos y vicios de los actos administrativos,* (FUNEDA), Caracas 2000, pp 21 a 37.

196 Organic Law on Decentralization, Delimitation and Transfer of attributions among public entities. *G.O.* Nº 37.753 del 14-08-2003.

between the States and the Municipalities, for the transfer of services and competencies to them (Article 165); and for contracts that can be signed by the Municipalities (*mancomunidades*) in order to develop activities together (Article 170). The Constitution also has provisions regarding contracts signed between the States and the Municipalities with the organized community for the transfer of services to them (Article 184).

265. The Constitution also establishes some prohibitions regarding public contracts, for instance, on territorial matters, due to the constitutional principle that "the national territory could never be ceded, trespassed, leased or in any way sold, even temporally or partially to Foreign States or international law entities" (Article 13). The only constitutional exception on this regard refers to the land needed for foreign embassies (Article 13).

These prohibitions also refer to all the cases of public domain declared in the Constitution, regarding which the State cannot sign any contracts that could signify the loss of such character. It occurs with the subsoil, mines and hydrocarbons (Article 12); with the maritime coast (Article 12); with all waters (Article 304); with war weapons (Article 324); and with the shares of Petroleos de Venezuela S.A., the State own oil company (Article 303). Nonetheless, regarding natural resources and their exploitation, the Constitution establishes the possibility for the State to subscribe temporal concession contracts with private parties (Article 113), with the express prohibition to sign for mines concessions for indefinite term (Article 156,16).

Regarding private law immoveable property of public entities, some of those lands have also a constitutional prohibition to be sold, as is the case of national land located on islands (Article 13) and municipal lands in urban areas that can only be sold for urban development (Article 181).

The same restriction regarding public contracts exists in all the cases in which the State has reserved by statute some services, exploitations or industries for national interest motives (Article 302), as is the case of the oil industry, the iron mining industry, and the natural gas industry all nationalized since 1975.[197] This imples, for instance, regarding the oil industry, that since the sanctioning of the 2001 Organic Law on Hydrocarbons,[198] the only way in which the private companies can participate in the exploitation of the oil industry is through their participation in mixed public enterprises, with state own majority of shares) (*See Infra 594*).

II. Obligatory constitutional clauses in public interest contracts

266. Following the trends of the 1961 Constitution, the 1999 Constitution has also established in its norms, a series of contractual clauses that must always be incorpo-

197 Organic Law reserving the State the Industry and Commerce of Hydrocarbon, *Gaceta Oficial* nº 35.754 de 17-07-75. See *Régimen jurídico de las Nacionalizaciones en Venezuela*, *Homenaje del Instituto de Derecho Público al Profesor Antonio Moles Caubet*, Archivo de Derecho Público y Ciencias de la Administración, Vol. VIII (1972-1979), Instituto de Derecho Público, Universidad Central de Venezuela, Caracas, 1981.

198 *Gaceta Oficial* Nº 38.493 de 4-8-2006.

rated in all public contracts, particularly, the jurisdiction immunity clause, the "Calvo" clause; and the environmental protection clause.

A. The jurisdiction immunity clause

267. Article 151 of the Constitution establishes that in all public interest contracts, if it were not unsuitable according to their nature, a clause must be considered as incorporated even if not expressly provided, according to which all doubts and controversies that could arise from such contracts and that could not be amicably resolved by the contracting parties, must be decided by the competent courts of the Republic according to its laws.

It is thus, an obligatory constitutional clause that follows the relative jurisdiction immunity system,[199] according to which, for example, in contracts with commercial purposes, for example (*ius gestionis*), the Venezuelan State can accept to submit contractual controversies to be resolved by arbitration and even subjected to foreign law.[200]

B. The "Calvo" Clause

268. The second obligatory clause that is considered incorporated in all public interest contracts according to the Constitution is the so called Calvo Clause which implies that their execution in any case can originate foreign claims (Article 151).[201] The origin of this clause is to be found in the 1893 Constitution as a consequence of the international diplomatic claims the European countries initiated by force against Venezuela as a consequence of contracts signed by the country and foreign citizens; being its conception the work of Carlos Calvo in his book *Tratado de Derecho Internacional*, initially edited in 1868, after studying the Franco-British intervention in Rio de la Plata and the French intervention in Mexico.[202] This Calvo clause also helps the adoption of the so called *Drago Doctrine* conceived in 1902 by the then Argentinean

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199 See Beatrice Sansó de Ramírez, "La inmunidad de jurisdicción en el Artículo 151 de la Constitución de 1999", in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999,* Centro de Investigaciones Jurídicas (CEIN), Caracas, 2001, pp. 333 a 368; Allan R. Brewer-Carías, "Comentarios sobre la doctrina del acto de gobierno, del acto político, del acto de Estado y de las cuestiones políticas como motivo de inmunidad jurisdiccional de los Estados en sus Tribunales nacionales", in *Revista de Derecho Público*, Nº 26, Editorial Jurídica Venezolana, Caracas, abril-junio 1986, pp. 65-68.

200 See Allan R. Brewer-Carías, "Algunos comentarios a la Ley de Promoción y Protección de Inversiones: contratos públicos y jurisdicción" in *Arbitraje comercial interno e internacional. Reflexiones teóricas y experiencias prácticas***,** Academia de Ciencias Políticas y Sociales, Caracas 2005, pp. 279-288; «El arbitraje y los contratos de interés nacional" in ***Seminario sobre la Ley de Arbitraje Comercial***, Biblioteca de la Academia de Ciencias Políticas y Sociales, Serie Eventos, N° 13, Caracas 1999, pp. 169-204.

201 See Allan R. Brewer-Carías,"Algunos aspectos de la inmunidad jurisdiccional de los Estados y la cuestión de los actos de Estado (*act of state*) en la jurisprudencia norteamericana" in *Revista de Derecho Público*, Nº 24, Editorial Jurídica Venezolana, Caracas, octubre-diciembre 1985, pp. 29-42.

202 See Carlos Calvo, *Tratado de Derecho Internacional,* Vol. I, paragraph 205, *cit.*, by L.A. Podestá Costa, *Derecho Internacional Público,* Vol. I, Buenos Aires, 1955, pp. 445-446.

Minister of Foreign Relations, Luis María Drago, who regarding the threats of using force made by Germany, Great Britain and Italy against Venezuela, formulated its thesis condemning the compulsory collection of public debts by the States.[203]

C. The environmental protection clause

269. Article 129 of the Constitution also imposes the obligation for Public Administration to include an environment protection clause in any national public contract whose execution could affect natural resources,[204] providing for the obligation of the private party to the contract to preserve the ecological equilibrium, to allow the access and transfer of environmental protection technology, and to restore the environment to its natural state if altered.

III. The parliamentary approval of public interest contracts

270. The constitutional system of Venezuela, has traditionally provided for the intervention of the Legislature regarding the approval of public interest contracts. In the 1961 Constitution this legislative approval was established in a general way as a condition for their validity (Article 126), having raised many discussions and interpretation. This provision was radically changed in Article 150 of the 1999 Constitution, by providing that the approval of a national public interest contract is only required when a specific statute so establishes) (*See Infra 296*).

Consequently, only when a statute expressly determines that a national public contract must be submitted to the approval of the National Assembly, such condition is considered as a efficacy condition regarding the contract (Article 182,9). Nonetheless, the Constitution, in the same Articles 150 and 182,9, directly imposes the need for legislative approval regarding public interest contracts when signed with foreign States, foreign official entities or societies not domiciled in Venezuela, as well as the transfer of public interest contracts to such entities.

IV. Principles related to the State's contractual liabilities

271. In parallel to the provision of the general regime of State liability (Article 140) (*See Supra 253*), the 1999 Constitution also establishes the general basis and conditions for the contractual liability of the State, providing that it will only recognize as contracted obligations those entered by legitimate organs of the State; a constitutional provision that had its origin in the XIX century when the State was sued because of damages caused in civil wars by rebels who claimed to be acting as the legitimate government.

In any case, the legitimacy for contracting obligations is related to the competency of the respective public officer to sign the contract, for which purpose the Constitu-

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203 See Victorino Jiménez y Núñez, *La Doctrina Drago y la Política Internacional*, Madrid, 1927.

204 See Alberto Blanco-Uribe Quintero, "La tutela ambiental como derecho-deber del Constituyente. Base constitucional y principios rectores del derecho ambiental", in *Revista de Derecho Constitucional*, Nº 6 (enero-diciembre), Editorial Sherwood, Caracas, 2002, pp. 31-64.

tion assigns, for instance, the President of the Republic power to enter into national public contracts (Article 236,14) and to negotiate national public debt (Article 236,12); powers that of course are not exclusive, because such attributions can and are assigned to the corresponding Ministries as its direct organs (Article 242).

On the other hand, the Constitution imposes some budget restrictions in the execution of contracts by providing that no spending can be made if not established in the budget's annual statute (Article 314).

§6. PREROGATIVES OF THE ADMINISTRATION

272. The Constitution does not provide for prerogative or privilege of the Republic regarding other legal persons, having then the same rights and obligation as them in their legal relations, which as aforementioned is particularly important on matters of State responsibility and liability (*See Supra 253*).

Nonetheless, on procedural matters regarding the position of public entities in judicial processes, the Organic Law of the Attorney General,[205] provide specific procedural prerogatives for public entities, related to the time set for them to be considered notified or summoned, to the effects of their failure to appear in court to answer a claim, to the exception established for public entities not to impose any bail of guaranty for procedural purposes, or to the privilege for public property not to be the object of procedural preventive or executive seizure measures.

CHAPTER 4. THE MILITARY AND THE NATIONAL SECURITY SYSTEM

273. The 1999 Constitution made substantial departures from the provisions of the 1961 Constitution regarding the National Security and Defense system and the Military. The latter Constitution contained only three provisions on the subject: Article 133, establishing restrictions regarding the possession of arms; Article 131 prohibiting the simultaneous exercise of civilian and military authority by any public official other than the President of the Republic as Commander in Chief of the Armed Forces; and, Article 132, referring to the general regulation of the Armed Forces.

274. In the 1999 Constitution, on the contrary, a marked militarist shape was given to the State, with board provisions regarding not only the Military but the security and defense system, without precedent in Venezuelan constitutionalism.

Article 322 of the Constitution of 1999 begins by stating that the security of the Nation falls within the essential competence and responsibility of the State, founded upon the State's "integral development;" the defense of the State being the responsibility of Venezuelans, and of all natural and legal persons, whether of public or private law, founded within the geographic territory of the State.

In addition, Article 326 sets forth the general principles of National Security declaring that its preservation in "economic, social, political, cultural, geographic, environmental and military areas," mutually corresponds ("co-responsibility") *to* the State

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205 *G.O.* N° 5.892 Extraordinario de 31-7-2008.

and to Civil Society, in order to fulfill the principles of "independence, democracy, equality, peace, liberty, justice, solidarity, promotion and conservation of the environment, the affirmation of human rights, and, the progressive satisfaction of the individual and collective needs of Venezuelans on the basis of sustainable and productive development fully covering the national community." All of these principles are also those enumerated in the opening Articles 1, 2, and 3 of the Constitution of 1999. For the purposes of implementing these principles of National security in the country's territorial border regions, Article 327 provides for the establishment of a special regime.

275. Also for such purposes, the Constitution created a new council, the "National Council of Defense" (Article 323), as the nation's highest authority for defense planning, advice, and consultation to the State (Public Powers) on all matters related to the defense and security of the Nation's sovereignty, territorial integrity, and strategic thinking.. This Council is presided over by the President of the Republic, and integrated by the Executive Vice President, the President of the National Assembly, the President of Supreme Tribunal of Justice, the President of the Moral Republican Council (Citizen Branch of government, Article 237), the Ministers of the defense sectors: interior security, foreign relations, and planning, and others whose participation is considered pertinent.

276. According to the Constitution, the traditional National Armed Forces (which is comprised of the Army, the Navy, the Air Force, and the National Guard) have become integrated into a single institution, named the "National Armed Force," which nonetheless, according to Article 328, is comprised of the Army, the Navy, the Air Force, and the National Guard, each working within its area of competence to fulfill its mission, and with its own system of social security, as established by its respective organic legislation.

It must be mentioned that the 2007 constitutional reform project that was rejected by popular referendum, the proposal of the President of the Republic was to change the name of the National Armed Force to the "Bolivarian Armed Force," to create a "Bolivarian Military Doctrine;" to create the "Bolivarian Popular Militia," as a new component of the Armed Force, and to eliminate the character of the Armed Force as an "essential professional institution, without political militancy", converting it into "an essentially patriotic, popular and anti-imperialist corp." As mentioned, the people, through referendum rejected all such Constitutional Reforms, but nonetheless, the President of the Republic approved them all, six months after the popular rejection, in July 2008, through delegate legislation.[206]

277. According to Article 329, the Army, Navy, Air Force, and National Guard each has essential responsibilities for planning, execution and control of military operations necessary to ensure the defense of the Nation. The National Guard, however, only has a cooperative role in these functions and basic responsibility to carry out operations necessary for the maintenance of internal order in the country. The Constitu-

206 See Organic Law on the Bolivarian Armed Force, *Gaceta Oficial* N° 5.891 Extra. of July 31, 2008.

tion also establishes that the National Armed Force can carry out police administrative activities and criminal investigation as authorized by law.

278. Article 328 defines the character of the Armed Forces as an essentially professional institution, without a militant political function, organized by the State to guarantee the independence and sovereignty of the Nation, and to ensure the integrity of the Nation's geographic space by means of military defense and cooperation in the maintenance of internal order, as well as active participation in national development. According to the wording of this Article, in order to fulfill these functions, the Armed Force is at the exclusive service of the Nation and in no case may be at the service of any particular person or political partiality. The foundations of the Armed Forces are discipline, obedience and subordination.

Nonetheless, the 1999 Constitution failed to provide for the "apolitical and non-deliberative" character of the Armed Force that was established in Article 132 of the Constitution of 1961; and it has no provision establishing the essential obligation of the Armed Force to ensure "the stability of the democratic institutions" and to "respect the Constitution and laws, the adherence which is above any other obligation," as was declared in Article 132 of the 1961 Constitution. What the 1999 Constitution was innovative on these matters was in giving the military the right to vote (Article 325).

In addition, the Constitution established the general regime applicable to military promotions, providing that they are to be based on merit, seniority and the availability of vacancies, and are the exclusively competence of the National Armed Forces (Article 331). Consequently, the traditional intervention of the Legislature to approve the promotions of high ranking military officials (Article 150,5, 1961 Constitution) was eliminated.

279. All these constitutional provisions conform a normative framework with clear marks of a militarist structure, which when combined with the centralization tendency of State Power and the concentration of State power in the President of the Republic by his control over the National Assembly, the result is a system that unfortunately has led to authoritarianism. In particular, in the 1999 Constitution's provisions on military matters, the idea of the subjection or subordination of military authority to civilian authority has disappeared; and instead what has been consecrated is a greater autonomy of the National Armed Force, whose four branches (and since 2008, five branches) have been unified into one institution with the possibility of intervention in civilian functions. This militaristic tendency is evidenced by the following constitutional rules, as already indicated: *first*, the elimination of the traditional prohibition that military and civilian authority be exercised simultaneously, as was established by the Article 131 of the 1961 Constitution; *second*, the elimination of control by the National Assembly of military promotions in the top brass, as provided in Article 331 of the 1961 Constitution and throughout the country's traditional constitutionalism; *third*, the elimination of the constitutionally "non-deliberative and apolitical" character of the military institution, as established in Article 132 of the 1961 Constitution, which has opened the way for the Armed Force, as a military institution, to deliberate politically, intervene, and give its opinion on matters under resolution within the civil

organs of the State; *fourth*, the elimination of the obligation of the Armed Force to ensure the stability of democratic institutions required by Article 132 of the 1961 Constitution; *fifth*, the elimination of the obligation of the Armed Force to respect the Constitution and laws "the adherence to which will always be above any other obligation" as was set forth in Article 132 of the 1961 Constitution; *sixth*, the express right of suffrage granted to members of the military in Article 330 of the 1999 Constitution, which in many cases has been politically incompatible with the principle of obedience; *seventh*, the submission of authority over the use of all weapons, for war or otherwise, to the Armed Force, while removing this authority from the civil Administration of the State (Article 324); *eighth*, the general attribution of police administrative functions to the Armed Force (Article 329); *ninth*, the establishment of procedural privilege for generals and admirals in the sense that in order for them to be tried, the Supreme Tribunal of Justice must declare in advance of trial whether or not the proceeding has merit (Article 266,3); and *tenth*, the adoption in the Constitution of the concept of the "doctrine of national security," as a global, totalistic, and omnicomprehensive doctrine in the sense that everything that happens in the State and in the Nation concerns the security of the State, including economic and social development (Article 326); with the duty for the Armed Force to have an "active participation in national development" (Article 328). All these provisions, sets forth a picture of militarism, unique in Venezuelan constitutional history, not even found in former military regimes.

Part Six. The Legislature

CHAPTER 1 THE NATIONAL ASSEMBLY

§1. THE UNICAMERAL PARLIAMENTARY SYSTEM

280. In 1999, and contrary to the previous two hundred years parliamentary bicameral tradition, the new Constitution eliminated the Senate and established a National Assembly following the unicameral parliamentary trend, exercising the National Legislative Power. The consequencebeing that although the State is configured as a federation, no federal chamber exists representing the States in which they could really be equals, in the sense of having equal vote. Consequently, the clause contained in Article 159 of the Constitution pointing out that States of the federation are *equal* political entities cannot effectively materialize. On the other hand, and in spite of this wording, from the point of view of their territory, population and economic and social development, the States are very different.

281. According to Article 186 of the Constitution, the National Assembly is composed of representatives (*diputados*) elected within each State and the Capital District (the former Federal District) by universal, direct, and secret vote according to a mixed system combining personalized nomination and proportional representation scrutiny. The number of representatives is based on national population, calculating one representative per 1.1% of the total population of the country. Each representative must have a substitute member, also elected in the same process, who is called to act in cases of temporal or absolute absence of the principal (Article 186).

Each of the 23 States and the Capital District, in addition, has the right to elect three (3) additional representatives to the National Assembly. The indigenous people's communities in the Republic have the right to elect three (3) representatives according to the prescriptions of the electoral law, observing their traditions and customs (Article 125) (*See Infra 487*). In all cases, each representative must have an alternate representative also elected through the same process.

The constitutional term of office for representatives is five (5) years, according to Article 193, with the possibility of consecutive re-election for a maximum of two (2) additional terms. Nonetheless, this limit was eliminated through a constitutional amendment approved by referendum on February 2009, providing for the possibility of the continous election of the reprsentatives (*See Infra 210*). On the other hand, the President of the Republic has, in Council of Ministers, the power to to dissolve the Assembly in case of its approval of three motions of censure against the Executive Vice President (Articles 236,21; 240).

§2. THE REPRESENTATIVES

I. Eligibility Conditions

282. Article 188 of the Constitutions establishes the following conditions of eligibility for the representatives to the National Assembly: to be a Venezuelan citizen, and in case of naturalized citizens, with 15 years of residence in the Venezuelan territory; to be at least 21 years of age; and to have resided for at least four consecutive years in the territory of the State where the election will take place.

In addition, Article 189 establishes the cases of ineligibility for representatives, excluding the President of the Republic, the Executive Vice President, the Ministries, the Secretary of the President Office, the Presidents of Public Corporations and public enterprises, the Governors and Secretaries of government of the States from the possibility of running for such position up to three month after their separation from office. Also, all the national, states or municipal public officers, as well as those serving in public corporations of public enterprises, cannot be elected representatives if the election take place in their respective jurisdictions, except in cases of provisional, health, teaching or academic positions. Other situations of ineligibility can also be established by statutes.

II. Tenure, incompatibilities, accountability and revocation of mandate

283. The tenure of the representatives, as provided in Article 197 of the Constitution, is a full time job that must be accomplished in benefit of the people. That is why the same Article imposes upon them the duty to maintain permanent relations with their electors, paying attention to their opinions and informing them of their accomplishment and of the work of the Assembly (Article 197).

In addition, representatives must annually inform their electors about their activities[207] and can be subjected to repeal referendum (Article 72). In such cases, the representative whose mandate is repealed cannot be re-elected as representative for the next term (Article 198).

284. On the other hand, the Constitution forbids the representatives the possibility of being owners, administrators or directors of enterprises that have entered in contracts with public entities, and cannot develop private activities with lucrative interest. On matters that are discussed before the Assembly, in which economic interest conflicts could exist, the involved representative must abstain from participating (Article 190).

285. Regarding public sector activities, the representatives cannot accept or exercise public offices without losing their tenure, except in cases of teaching, academic, provisional or helath activities, provided that they do not imply a full time job (Article 191). Consequently, with the 1999 Constitution, the possibility for the representa-

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207 See María E. León Álvarez, "La rendición de cuentas en la gestión de los asuntos públicos en el nuevo orden constitucional venezolano", in *Revista de Derecho Público*, Nº 84 (octubre-diciembre), Editorial Jurídica Venezolana, Caracas, 2000, pp. 70-81.

tives to be appointed Ministers in the executive without losing their legislative tenure, as established by the 1961 Constitution (Article 141) was expressly eliminated.

III. Liability and immunity

286. The members of the National Assembly represent the people as a whole and also represent the States where they were elected. In their legislative activities they are not bound to the instructions of any other than their own conscience, being their vote a personal one (Article 201). This provision is another of the series established in the Constitution, based on the anti partisan spirit inspiring it, for the purpose of supposedly protecting the votes in the Assembly against the formation of partisan and other parliamentary factions (*See Supra 33*). Nonetheless, the fact is that never before has the country witnessed an official party controlling its representatives in the Legislature in a stricter way than the way experienced during the years of enforcement of the 1999 Constitution (1999-2009).

287. Regarding responsibility, representatives to the National Assembly are not liable for their votes and opinions given in the exercise of their functions. They are only responsible before their electors and before the National Assembly according to the Constitution and the Assembly's internal regulations (Article 199).

288. On criminal matters, during their tenure, representatives have immunity from their inauguration up to the end of their tenure or their resignation (Article 200); and all public officers that violate parliamentary immunity, are criminally liable and must be punished accordingly. Only in cases of flagrant crime committed by a representative can the corresponding authority put him in custody in his residence and must immediately inform the facts to the Supreme Tribunal of Justice, which is the competent court to order, with the authorization of the National Assembly, their detention and to continue their judicial prosecution. .

§3. ORGANIZATION AND COMMISSIONS

288. The National Assembly has a Board of Directors integrated by its President and two Vice Presidents elected within the representatives, and a Secretary and a Deputy secretary designated from outside the members of the Assembly; all appointed for a one year term (Article 194). The President and the two Vice Presidents of the Assembly must be Venezuelan by birth and without other nationality (Article 41).

289. The Assembly has ordinary and special Permanent Commissions. The latter can be created in the various activities sectors, by the favorable vote of two third of the representatives, composed by no more that fifteen representatives each. The Assembly can also create temporal commissions for the investigation or study of determined matters (Article 193).

§4. SESSIONS OF THE NATIONAL ASSEMBLY AND ITS DELEGATE COMMISSION

290. The Assembly has two periods of ordinary sessions, from January to August and from September to December. The first session must begin without any previous

notification on January 5th of each year or the following immediate and possible day enduring up to August 15th; and the second, on September 15th or the following immediate and possible day enduring up to December 15th (Article 219). The National Assembly can also have extraordinary sessions in order to consider the matters expressed in the convening and the related ones. It can also consider those matters declared urgent by its members (Article 220).

291. The conditions for the installment of the Assembly and for its sessions, as well as for the functioning of its Commissions, must be established in the internal parliamentary regulation, except the quorum conditions that are provided in the Constitution establishing that in all cases it cannot be less than the absolute majority of the representatives composing the Assembly (Article 221).

292. During the periods of when the National Assembly is not in session (December 15th to January 5th, and August 15th to September 15th, a Delegate Commission must function, integrated by the President, the Vice Presidents and the Presidents of the Permanent Commissions (Article 195). This Commission, which exists in almost all Latin American countries, has the following attributions: to convene the National Assembly for extraordinary sessions, when needed; to authorize the trips of the President abroad; to authorize the National Executive to decree additional credits to the budget; to designate temporal Commissions of the Assembly; to exercise the investigative functions of the Assembly; and to authorize the National Executive, by a vote of two thirds of the representatives, to create, modify and suspend public services in cases of confirmed urgency (Article 196).

§5. THE ATTRIBUTIONS OF THE NATIONAL ASSEMBLY

293. The National Assembly, as the Legislature, has the power to legislate on matters of national character (Article 187,1) (*See Supra 161*) and, in particular, to discuss and approve the Budget Law and all taxation and public debt laws (Articles 187,6; 314, 317, 312); and to sanctioned laws for the approval of international treaties and conventions (Article 187, 19; 154).

In addition to these legislative functions, according to Article 187, the Assembly has another series of powers on constitutional, political and administrative matters that gives it, its preeminent character in the political system of separation of powers (*See Supra 185*).

294. On constitutional matters, the Assembly can propose amendments and reforms to the Constitution, and must discuss and approve all constitutional reforms drafts (Article 341, 343, 344).

295. On political matters, the Assembly is empowered to decree amnesties (Article 187,5); to approve censure vote to the Executive Vice President and to the Ministers (Article 187,10); to authorize the use of Venezuelan military missions abroad and foreign military missions in the country (Article 187,11); to watch over the interests and autonomy of the States of the federation (Article 187,16); to authorize the trips abroad of the President of the Republic for more than five days (Article 235); to decide cases of absolute and temporal absence of the President (Articles 233, 234) (*See*

Supra 212); to authorize the criminal processing of the President of the Republic (Article 266,2) and to debate on the Decrees of States of Exception (Articles 338, 339) (*See Supra 234*).

Also on political matters, the Assembly is empowered to appoint and remove the head of the Judicial, Citizen and Electoral Branches of Government (*See Infra 253*), that is, to appoint and remove from office the Magistrates of the Supreme Tribunal of Justice (Article 265), the Comptroller General of the Republic, the Prosecutor General of the Republic, the Peoples' Defender (Article 279), and the members of the National Electoral Council (Article 296). These are powers that give preeminence to the Legislature, which, as aforementioned, basically contradict the principle of the independence of the Judicial, Citizen and Electoral powers, respectively (*See Supra 185*).

296. On administrative matters, the Assembly must authorize the appointment of the Attorney General of the Republic (*See Supra 220*) and the Head of diplomatic missions (Article 187,14); and most importantly, exercise control powers regarding the Government and the National Public Administration (Article 187,3), being competent to authorize additional credits to the budget (Article 187,7), to approve the general guidelines of the Economic and Social Development Plan formulated by the President of the Republic within the first year of each constitutional term (Articles 187,8; 236,18); to authorize the National Executive to sign national public interest contracts when required by statute, and in any case, public interest contracts when signed with foreign State or foreign public entities with enterprises non domiciled in Venezuela (187,9; 150); and authorize the national executive to sell immovable State properties (Article 187,12).

297. On internal parliamentary matters, the National Assembly has its own powers to organize and promote Citizens participation in legislative matters (Article 187,4); to approve its own internal regulations, to organize its own internal security services, to establish and execute its own budget and to regulate its own civil service[208] (Article 187,19,21,22). The Assembly is also empowered to qualify its own members and to receive their resignations (Article 187,20).

CHAPTER 2. LEGISLATIVE PROCEDURE

298. The initiative to introduce draft legislation (Codes, Organic Laws, ordinary laws) (*See Supra 92 ff.*) before the National Assembly was expanded in Article 204 of the 1999 Constitution, conferring that power to: the National Executive, the Commissions of the National Assembly; three or more members of the National Assembly; the Supreme Tribunal of Justice in the case of legislation relating to the Judiciary and to procedural matters; the Citizen' Power with respect to legislation relating to the Comptroller General, the Prosecutor General or the Peoples Defender; to the Electoral Power in electoral matters; the State Legislative Councils in matters relating to the states; and to the citizens by means of a petition supported by no less than 0.1% of

208 Estatute of National Assembly Public emporyees, *Gaceta Oficial* Nº 37.598 of December 26, 2002.

the registered voters. In this latter case, the debate in the Assembly must begin no later than in the legislative session following the session in which the proposed legislation was introduced. If debate does not begin within this time, the popular proposed legislation must be submitted to an approbatory referendum (Article 205) (*See Supra 126*).

299. All draft legislation in order to acquire the status of a statute must be submitted to two discussions (Article 205), on different days, according to the rules established in the Assembly's internal regulation. Once the draft is approved, the President of the Assembly must declare the statute sanctioned (Article 207).

The first discussion, according to Article 208, must refer to the motives of the proposed legislation and its purpose, scope and viability, in order to determine its pertinence. In addition, a global discussion on its Articles must take place. Once approved in first discussion, the draft must be sent directly to the Commission related with its content, in order for it to study the draft and to prepare a report that must be completed within a period of 30 days.

The second discussion must be held once the Commission's Report is received by the Assembly. In this case, discussion then must be made Article by Article. If the draft is approved without modification, the statute will be sanctioned. If modifications are introduced, the draft must be returned to the corresponding Commission, who must prepare a new report. This report must be read in plenary session of the Assembly, which must decide by majority of votes. If approved, the President of the Assembly must declare the statute sanctioned.

300. In order to allow peoples' participation, the 1999 Constitution establishes the obligation for the National Assembly or its Commissions during the debate of the legislative draft, to consult with other entities of government, with the citizens, and with organizations of society in order to hear their point of view with respect to such legislation (Article 211). Also, according to Article 206, the States must be consulted by the National Assembly, through their Legislative Councils, when legislation regarding them is being considered in the Assembly. Nonetheless, all these provisions regarding popular participation have been by-passed in cases of legislative delegations to the Executive, and decree-laws have been enacted without any sort of consultation, as happened from 2000 to 2008, a period in which the most important legislation of the country was enacted through decree laws (*See Supra 97*).

301. During the discussions of the drafts' legislation, and according to the regulations established by the National Assembly, the Ministers of the Executive branch have the right to express their views in the legislative debate (*See Supra 218*), as do the Magistrates of the Supreme Tribunal of Justice, the representatives of the Citizen Power; the members of the Electoral Power; the States, through a representative designated by the Legislative Council of each, and representatives of social organizations (Article 211).

302. Once a statute is sanctioned by the National Assembly, it must be promulgated by the President of the Republic within ten (10) days of having received it from the National Assembly (Article 214). Legislation is considered promulgated once published in the *Official Gazette* of the Republic (Article 215) with the corresponding

presidential order that it be put into effect. The President may, however, within the said period, in a decision taken in Council of Ministers, and on the basis of a reasoned report, request the National Assembly to modify some aspect of the sanctioned legislation or reverse its approval of all or a part of it (presidential veto).

The National Assembly must decide on the President's arguments by absolute majority of members present, and must send the law for promulgation. In these cases, the President must promulgate the law within five (5) days of receiving it, without proposing new changes.

303. However, when the President of the Republic considers that legislation or certain Articles of a statute are unconstitutional, during the ten (10) day period in which the law must be promulgated, he can request the matter to be reviewed by the Constitutional Chamber of the Supreme Tribunal of Justice. This is one of the *a priori* judicial review means provided in the Constitution (*See Infra 573*). The Constitutional Chamber must decide within fifteen (15) days of receiving the request from the President.

If the Tribunal denies the unconstitutionality presidential argument, or fails to decide within the allotted time period, the President must promulgate the law within five (5) days.

304. If the President of the Republic fails to promulgate a statute according to all these rules, the President and the two Vice Presidents of the National Assembly must proceed to promulgate the law as indicated, without prejudice of the President of the Republic's liability for his omission (Article 216).

Only legislation approving international treaties, accords or conventions may be promulgated at the opportune time determined within the discretion of the National Executive, according to international custom and the national interest (Article 217).

CHAPTER 3. POLITICAL AND ADMINISTRATIVE LEGISLATIVE CONTROL PROCEDURES

305. As set forth in Article 222 of the Constitution, the National Assembly may exercise its powers of control in political and administrative matters through the questioning (*interpelación*) procedure, in which a Minister or other official is summoned to the Assembly to answer specific questions with respect to his actions. In addition the Assembly and its Commissions can also make investigations or inquiries (Article 223).

306. In exercising parliamentary control, the Assembly can declare the political responsibility of government officials[209] and request the Citizen Power to initiate the necessary legal actions to enforce such responsibility.

All public officials are obligated, subjected to sanctions, to appear before the Assembly's Commissions, and to furnish them with any information and documentation

209 On this subject, see Allan R Brewer-Carías "Aspectos del control político sobre la Administración Pública, in *Revista de Control Fiscal,* Nº 101, Contraloría General de la República, Caracas 1981, pp. 107-130.

they may require to fulfill their functions. This obligation is also imposed upon private individuals, but cannot refer to those matters protected by Constitutional guarantees.[210]

In no case could the exercise of the Assembly's investigatory power affect the powers of the other branches of government. Nonetheless, judges are required to provide evidence to the Assembly and its Committees when ordered to do so (Article 224).

210 See Allan R. Brewer-Carías, "Los poderes de investigación de los cuerpos legislativos y sus limitaciones, con particular referencia a los asuntos secretos," in *Revista de Derecho Público,* Nº 10, Caracas 1982, pp. 25-42.

Part Seven. The Judiciary

CHAPTER 1. GENERAL CONSTITUTIONAL REGIME REFERRED TO THE JUDICIARY

§1. JUSTICE AND THE JUDICIAL SYSTEM

I. Justice and the components of the judicial system

307. The power to render or administer justice according to Article 253 of the Constitution emanates from the citizenry and is imparted in the name of the Republic and by the authority of the law. For such purposes, Article 26 of the Constitution provides that the State must guaranty a "cost-free, accessible, impartial, adequate, transparent, autonomous, independent, accountable, equitable, and expeditious justice, without undue or dilatory delay, formalism, or unnecessary replication of procedures."[211]

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

II. Independence and autonomy of the Judicial Branch

308. The principle of the independence of the Judicial Power is set forth expressly in Article 254 of the Constitution, which, in addition, establishes its financial autonomy,[212] and assigns "functional, financial, and administrative autonomy" to the Supreme Tribunal.

To this effect, within the National general annual budget, an appropriation of at least two percent (2%) of the ordinary national budget is established for the judiciary, a percentage amount that cannot be changed without prior approval by the National Assembly.

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

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

Article 26 of the Constitution guarantees "cost-free justice;" consequently, the Constitution denies the Judiciary the power to establish court costs or fees, or to require payment for services (Article 254).

309. With the purpose of guaranteeing the impartiality and independence of judges in the exercise of their duties, Article 256 of the Constitution requires that magistrates, judges and prosecutors of the Public Prosecutor and the Public Defenders' offices may not, from the time of entering their respective jobs until they step down, engage in partisan political activity other than voting. This includes political party activism, union, guild and similar activities. Magistrates, judges and prosecutors are also prohibited from engaging in private or business activities that are incompatible with their judicial functions, on their own behalf or on the behalf of others, and they may not undertake any other public functions other than educational activities.

> Judges are prohibited from associating with one another (Article 256), which is a limit regarding the constitutional right of association set forth in Article 52 of the Constitution.

III. Judicial process as the instrument for justice

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

IV. Judicial liability

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

§2. JUDICIAL JURISDICTIONS IN THE CONSTITUTION

312. In addition to the basic civil, commercial, labor, agrarian and criminal Jurisdictions established in the legal order to fulfill the realization of justice through the judicial processes, the 1999 Constitution has specifically included express provisions regarding jurisdictions in constitutional matters (Article 334), matters related to discipline in the judiciary (Article 267), judicial review of administrative actions matters (Article 259), electoral matters (Article 297), criminal military matters (Article 261),

justices of the peace (Article 258), and justice within the Indigenous Peoples (Article 260)[213].

313. In particular, Article 334 of the Constitution has created the Constitutional Chamber of the Supreme Tribunal of Justice with the exclusive power to exercise jurisdiction on constitutional matters (Constitutional Jurisdiction), including the power to declare the nullity of legislation or other acts of State organs issued in direct and immediate execution of the Constitution or that have the same rank of Statutes (Article 334) (*See Infra 557*).

314. Concerning the Judicial review of administrative action jurisdiction, Article 259 of the Constitution attributed it to the Supreme Tribunal of Justice and to all the other courts established by law; assigning them the power to annul general and individual administrative acts contrary to the legal order, including those issued with abuse of public power (*desviación de poder*). These courts are also competent to condemn the State to pay sums of money, and to repair injuries or damages caused by the Administration, to hear claims concerning the rendering of public services, and to rule as necessary to re-establish subjective legal rights affected by administrative acts. This Contentious Administrative Jurisdiction is regulated in the 2004 Supreme Tribunal of Justice Organic Law (*See Infra 602*).

In addition, on contentious administrative matters, Article 297 of the Constitution has established a specific Jurisdiction on electoral matters attributed to the Electoral Chamber of the Supreme Tribunal and all the other courts determined by law.[214] (*See Infra 602*).

315. Regarding the disciplinary regime of the judges, Article 276 of the Constitution establishes the Judicial Disciplinary Jurisdiction, which implies the need to create disciplinary tribunals to judge the judges. In 2009 these tribunals had not yet been created (*See Supra 195*).

316. Article 261 of the Constitution establishes the rules for a criminal military jurisdiction as an integral part of the Judicial Branch, whose judges are to be selected competitively. Its sphere of competence, organization and forms of functioning is governed by the accusatory (adversarial) system of criminal procedure, as provided in the Organic Code of Military Justice.[215] In all events, the Constitution expressly provides that ordinary civil crimes, human rights violations, and crimes against humanity by military personnel are to be adjudicated in the ordinary courts, while the competence of military tribunals is limited to military crimes.

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213 See María E. León Álvarez, "El sistema de justicia en la Constitución de Venezuela de 1999. Estudio crítico acerca de la jurisdicción especial indígena", in *Revista del Tribunal Supremo de Justicia,* Nº 4, Caracas, 2002, pp. 369-377.

214 See Miguel A. Torrealba Sánchez, "Notas sobre la jurisdicción contencioso electoral en la Constitución de 1999", in *Revista de Derecho Administrativo,* Nº 12 (mayo-agosto). Editorial Sherwood, Caracas, 2001, pp. 165-192.

215 *Gaceta Oficial* Extra. Nº 5.263 de 17-09-1998.

317. Following the orientation of the Organic Law of Justice of the Peace,[216] Article 258 refers to the election of the Judges of the Peace by universal, direct, and secret vote, being the only elected judges in the country (Article 261).

318. Article 260 of the Constitution also authorizes the legitimate authorities of indigenous communities to apply their own jurisdiction, laws, and procedure based upon their ancestral traditions within their territory and with effect only with respect to their members. Indigenous law must not, however, be in violation of the Constitution or laws of the country and the means of coordination of this special jurisdiction with the national legal system is to be established by national law.

319. All the other jurisdiction within the Judiciary are established by statute, as is the case of the Civil and Commercial Jurisdiction, the Criminal Jurisdiction, the Labor Jurisdiction, the Juvenile Jurisdiction, and the Agrarian Jurisdiction.[217]

§3. GOVERNANCE AND ADMINISTRATION OF THE JUDICIAL BRANCH

320. One of the innovations of the 1999 Constitution was to confer to the Supreme Tribunal of Justice "the Governance and Administration of the Judicial Branch," while eliminating the former Council of the Judiciary (*Consejo de la Judicatura*) which exercised these functions under Article 217 of the Constitution of 1961, as one of the organ with functional autonomy separate and independent from all the branches of government, including the former Supreme Court of Justice.

Consequently, since 2000, as provided in Article 267 of the Constitution, the Supreme Tribunal of Justice is charged with the direction, governance and administration of the Judicial Branch, including inspection and oversight of the other courts of the Republic as well as the offices of the Public Defenders.[218] For such purposes the Supreme Tribunal is in charge of drafting and putting into effect its own budget and the budget of the Judicial Branch in general, according to principles set out in Article 254.

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

322. As mentioned, jurisdiction for judicial discipline is to be carried out by disciplinary tribunals as determined by law (Article 267), which up to 2009 has not been sanctioned. Discipline rules for magistrates and judges are to be established in the

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216 *Gaceta Oficial* Extra. Nº 4.817 de 21-12-1994.

217 Organic Law on the Judiciary, *Gaceta Oficial* Extra. Nº 5.262 de 11-09-1998.

218 See Nélida Peña Colmenares, "El Tribunal Supremo de Justicia como órgano de dirección, gobierno, administración, inspección y vigilancia del Poder Judicial venezolano", in *Revista de derecho del Tribunal Supremo de Justicia*, Nº 8, Caracas, 2003, pp. 391 a 434; and Olga Dos Santos, "Comisión Judicial del Tribunal Supremo de Justicia", in *Revista de derecho del Tribunal Supremo de Justicia*, Nº 6, Caracas, 2002, pp. 373 a 378.

Code of Ethics of the Venezuelan Judge which is to be enacted by the National Assembly, which up to 2009 has failed to sanction. Disciplinary proceedings are to be public, oral, and brief, in conformity with due process of law, and according to the terms and conditions determined by law. Nonetheless, up to 2009 this provision has not been applied because of a lack of a statute to enforce it.

§4. REGIMEN GOVERNING THE JUDICIAL CAREER AND THE STABILITY OF JUDGES

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

324. In this regard, the judicial tenure is considered as a judicial career, in which the admission as well as the promotion of judges within it must be the result of a public competition or examinations to assure the excellence and adequacy of qualifications of the participants, who are to be chosen by panels from the judicial circuits (Article 255). The naming and swearing-in of judges is to be done by the Supreme Tribunal of Justice, and the citizens' participation in the selection procedure and designation of judges are to be guarantied by law. Unfortunately, up to 2009, all these provisions have not been applicable because of a lack of legislation implementing them.

325. The Constitution also creates a Judicial Nominations Committee (Article 270) as an organ for the assistance of the Judicial Branch in selecting not only the Magistrates for the Supreme Tribunal of Justice (Article 264) (*See Supra 188 ff.*), but also to assist judicial colleges in selecting judges for the courts including those of the jurisdiction in Judicial Discipline. This Judicial Nominations Committee is to be composed of representatives from different sectors of society, as determined by law. The law is required to promote the professional development of judges, to which end universities are to collaborate with the judiciary by developing training in judicial specialization in law school curricula.

As aforementioned, none of these provisions have been implemented, and on the contrary, since 1999, the Venezuelan Judiciary has been almost completely composed by temporal and provisional judges,[219] lacking stability and being subjected to political manipulation, altering the people's right to an adequate administration of justice. In 2006 there were attempts to solve the problem of the provisional status of judges by means of a "Special Program for the Regularization of Tenures", addressed to

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

accidental, temporary or provisional judges, by-passing the entrance system constitutionally established by means of public competitive exams (Article 255), by consolidating the effects of the provisional appointments and their consequent power dependency.

326. On the other hand, in order to guaranty the stability of judges according to the express provision of the Constitution, they can only be removed or suspended from office through judicial procedures or trails expressly established by statutes, led by Judicial Disciplinary Judges (Article 255). Nonetheless, up to 2009, this Jurisdiction has not been created, and since 1999 what has existed with the authorization of the Supreme Tribunal is a "transitory" Reorganization Commission of the Judicial Power in charge of the disciplinary procedures, with powers to remove judges without due process guaranties[220] (*See Supra 195*).

CHAPTER 2. THE SUPREME TRIBUNAL OF JUSTICE

§1. COMPOSITION

327. The Constitution of 1999 created the Supreme Tribunal of Justice in substitution of the former Supreme Court of Justice established in the 1961 Constitution. The Supreme Tribunal is composed of six Chambers: Constitutional, Politico Administrative, Electoral, Civil Cassation, Criminal Cassation and Social Chambers. The Supreme Tribunal can also seat and function in Plenary Session (*Sala Plena*).[221]

The Constitution did not expressly provide for the number of Justices integrating the Supreme Tribunal of Justice or each of its Chambers, a matter that was left to the provisions of the Organic Law of the Supreme Tribunal which was only sanctioned in 2004[222] (*See Supra 191*).

§2. JURISDICTION

328. According to the express provision of Article 266 of the Constitution, the Supreme Tribunal of Justice exercises in an exclusive way the Constitutional Jurisdiction (Article 334) (*See Infra 564*); is the highest court within the Administrative Jurisdiction (judicial review of administrative actions (Article 295) (*See Infra 602*); and exercises the Electoral Jurisdiction (judicial review of electoral acts, Article 297). The Tribunal also has competence to decide conflicts between superior courts of justice; has the exclusive power to interpret statutes by means of recourses of interpretation

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

221 See Laura Louza, "El Tribunal Supremo de Justicia en la Constitución de la República Bolivariana de Venezuela", in *Revista del Tribunal Supremo de Justicia,* Nº 4. Caracas, 2002, pp. 379-437.

222 *Gaceta Oficial* Nº 37.942 de 20-5-2004. See Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia. Procesos y procedimientos constitucionales y contencioso-administrativos,* Caracas, 2004.

(*See Infra 578*); decides in an exclusive way recourses of cassation; has competence to declare that there are merits for the prosecution of High officials of the State; has attributions to decide on the dismissal of the President of the Republic (A233), and to express its opinion on the dismissal of the Comptroller General, the Prosecutor General, the Peoples' Defender and the members of the National Electoral Council (Articles 296, 297).

329. In addition, the Constitution establishes some provisions related to attributions of the Constitutional, Politico-Administrative and Electoral Chambers, as well as of the Social Chamber particularly in agrarian, labor, and juvenile matters (Article 262). According to these provisions, the Supreme Tribunal of Justice exercises jurisdiction on constitutional matters (judicial review) exclusively through its Constitutional Chamber (Article 334); through the Politico Administrative Chamber is the highest judicial court on judicial review of administrative action proceedings (contentious-administrative jurisdiction) (Article 259); and through the Social and Cassation Chambers hears cases in cassation. The Supreme Tribunal, through the two first Chambers, is also competent to decide constitutional and administrative conflicts between territorial entities; and through all the Chambers decide recourses of interpretation regarding the content and scope of statutes. In Plenary Session, the Supreme Tribunal is in charge of deciding whether there are or not grounds to prosecute high government officials (Article 266).

330. In addition to its jurisdictional attributions, as aforementioned, the Supreme Tribunal of Justice, according to the Constitution of 1999, is in charge of the "governance and administration of the Judiciary" (Article 267), through the Executive Board of the Judiciary (*See Supra 320*).

§3. STATUS OF THE SUPREME TRIBUNAL MAGISTRATES

I. Conditions to be Magistrate of the Supreme Tribunal Justice

331. Article 263 of the Constitution is very precise in establishing in detail the conditions for being elected Magistrate to the Supreme Tribunal of Justice, leaving the procedures for election of Magistrates on the Tribunal to be determined by law (Article 264).

The conditions to be Magistrate are the following: to be a Venezuelan national by birth, without any other nationality (Article 41); a citizen of recognized honorability; a recognized jurist, with professional practice of at least 15 years, having university postgraduate degree; or with university teaching career of at least 15 years; or with judicial positions in courts of appeal in jurisdictions related with the attributions of the corresponding Chamber, for at least 15 years; and having recognized prestige in his functions.

332. These strict conditions to be Magistrates of the Supreme Tribunal were bypassed in 1999, when the first provisional appointment of Magistrates was made by the Constituent Assembly (*See Supra 190*), and again in 2000 when the then newly elected National Assembly also made appointments of Magistrates without sanctioning the Organic Law of the Tribunal, and without complying with the constitutional

conditions, in execution of a Special Law sanctioned specifically for such appointment purposes.[223]

This statute was challenged for judicial review by means of an action of unconstitutionality filed by the then Peoples' Defender, that has never been decided. Nonetheless, when deciding on the admissibility of the action, and particularly of a petition for protection of constitutional rights (amparo),[224] the Constitutional Chamber explaining that since 2000 two constitutional regimes were in effect: the one established in the 1999 Constitution and the one established in the Transitory Constitutional Regime Decree of the same year 1999 (*See Supra 30*), decided to ask the Peoples' Defender to clarify its petition, although incidentally ruling that the conditions established in the Constitution to be magistrated were not applicable to themselves, those that were deciding the case, because they were not to be appointed but to be ratified (*See Infra 336*).

II. The nomination and election procedure

333. The Constitution attributed the election of Magistrates for a single term of 12 years to the National Assembly (Article 264), specifically limiting the discretionary power that the former Congress had in this regard. For such purpose, the Constitution provides that the Assembly can only elect magistrates that are nominated by a specific Judicial Nominations Committee, which is the organ to receive the nominations presented whether by own initiative of the candidate or by organizations related to the judicial activities. This Judicial Nominations Committee, according to express constitutional provision, is to be integrated only by "representatives of the different sectors of society" (Article 270).

According to the same Article 264 of the Constitution, for the purpose of proposing candidates before the National Assembly, the Committee, having heard the opinion of the community, must pre-select a group of nominees that must be presented before the Citizen Power (Prosecutor General, Comptroller General, Peoples' Defender), which must make a second pre-selection of nominees that is the one to be submitted to the National Assembly. Finally, the Constitution also provides for the rights of any Citizens to file well founded objections to any of the nominees before the Judicial Nominations Committee or before the National Assembly. As mentioned, the main purpose of this constitutional procedure was to limit the discretional power the former Congress had in the appointment of Magistrates to the Supreme Court, based on political agreements and without any sort of Citizens or society control.

334. But as aforementioned, ignoring all these provisions, and of course, without the previous sanctioning of the Supreme Tribunal Organic Law, the 1999 National

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223 *Gaceta Oficial* Nº 37.077 of November 14, 2000. See Carlos Luis Carrillo Artiles, "El desplazamiento del principio de supremacía constitucional por la vigencia de los interregnos temporales", *Revista de Derecho Constitucional*, Nº 3, Caracas, 2000, pp. 86 y ss.

224 Decision of 12 de diciembre de 2000, in *Revista de Derecho Público*, Nº 84, (octubre-diciembre), Editorial Jurídica Venezolana, Caracas, 2000, pp. 108 y ss. See Allan R. Brewer-Carías, *Golpe de Estado y Proceso Constituyente en Venezuela*, UNAM, México, 2002, pp. 395 y ss

Constituent Assembly, in a "Decree on the Regimen for the Transition of Public Powers*,"* issued on December 22, 1999, one week after the Constitution was already approved by popular vote (December 15th 1999) (*See Supra 30*), dismissed the then existing fifteen Justices of the former Supreme Court of Justice that were still in their tenure. It appointed in substitution twenty new Justices for the new Supreme Tribunal of Justice, although in a transitory way. In the absence of constitutional or legal provisions regarding the number of Magistrates, the Constituent Assembly provided for the appointment of three (3) Justices for each of the five: Political-Administrative, Electoral, Civil Cassation, Criminal Cassation and Social Chambers, and five (5) Justices for the Constitutional Chamber. These appointments, as mentioned, had no constitutional or legal basis due to the fact that the Constitution or the Law did not specify the number of Justices of each Chamber of the Supreme Tribunal. In addition, the National Constituent Assembly had no power to enact constitutional provisions without popular approval by referendum, and the Constitutional Transitory Constitutional Regime Decree was enacted after the Constitution approbatory referendum of December 15th 1999; thus without popular approval. The appointments made on December 1999, on the other hand, were made by the Constituent Assembly without complying with the provisions regarding the ineludible need for a Judicial Nomination Committee integrated by representatives of the different sectors of the society, to select and propose the candidates in order to guaranty the Citizens' participation.[225]

335. After the election of the new National Assembly in 2000 and according to the provisions of the new Constitution, it was suppose to enact the Organic Law of the Supreme Tribunal of Justice in order to determine the number of Magistrates of each of its Chambers, and to provide for the integration, organization and functioning of the Judicial Nominating Committee so as to elect in a definitive way the Justices of the Supreme Tribunal. But the Assembly, as aforementioned, instead of passing such Organic Law, on November 14th, 2000 sanctioned a "Special Law for the ratification or election of the High Officials of the Citizen Power and of the Magistrates of the Supreme Tribunal of Justice for the first constitutional term,"[226] creating a Parliamentary Commission integrated by a majority of representatives as "Nominating Committee" to select the Magistrates, bypassing the constitutional provision and imposing the need to create and regulate the Judicial Nominating Committee integrated exclusively with representatives of different sectors of society. The Assembly, in fact, appointed "a Commission integrated by 15 deputies, that shall act as the Committee for the Evaluation of Nominations" (Article 3), that was to select "a list of twelve (12) representatives of the different sectors of the society by means of mechanisms of consultation," and present the list to the National Assembly so that it may choose, by an absolute majority, six (6) persons to sit on the Commission (Article 4).

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

226 *Gaceta Oficial* Nº 37.077 de 14-11-00.

336. The Peoples' Defender at the time (who had been provisionally appointed in December 1999), filed an action of unconstitutionality with an *amparo* petition against this Special Law, in order to protect the rights of political participation,[227] a process that the Supreme Tribunal up to 2009 has never decided. The response to that sign of independence was the Legislator's decision not to ratify the titleholder of that position, and in a preliminary ruling in the case, the Constitutional Chamber deciding the *amparo* petition, ruled that the eligibility conditions for the appointment of the Magistrates of the Tribunal set forth in a very precise way in Article 263 of the Constitution, were not applicable those Magistrates sitting in the Supreme Tribunal that were precisely deciding the matter. The Magistrates considered that according to the Special Law they could be "ratified" in their positions by the National Assembly even without compliance with the constitutional conditions to be Magistrates, arguing that the "ratification" was a concept not foreseen in the Constitution (that only provided for the nomination). Therefore, Article 263 was to be applied only to *ex novo* appointments of Magistrates but not to those that were already in the position that were going to be "ratified."[228] In this way, the Constitutional Chamber simply decided that the Constitution was inapplicable precisely with respect to its own Magistrates and particularly to those of the Constitutional Chamber that were the deciding judges in this case itself. The Magistrates eventually decided in their own case.[229]

337. The result of this process was that civil society was marginalized, and the Magistrates, as well as the High officials of the Citizen Power and of the Electoral Power were elected by the National Assembly in a discretionary way, as before, even without complying in all cases with the constitutional conditions required to be a magistrate. Through the Special Law the political control of the Branches of government was consolidated[230], a situation that has persisted, particularly regarding the appointment of the Magistrates of the Supreme Tribunal.

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227 See, *El Universal*, Caracas 13-12-00, p. 1-2.

228 The Tribunal ruled: "The consequence of the Regimen for the Transition of the Public Powers -of constitutional rank as this Chamber has pointed out- is that the concept of ratification is applied only to Magistrates of the Supreme Tribunal of Justice, since the concept is not foreseen by the Constitution itself. Because of this, the phrase in *Article 21 of the Regimen for the Transition of Public Powers* that states that definitive ratifications or appointments *shall be done according to the Constitution,* is inapplicable, since as this Chamber stated out previously, the current Constitution did not provide for ratification of Magistrates to the Supreme Tribunal of Justice." See decision of December 12, 2000 in *Revista de Derecho Público*, Nº 84, Editorial Jurídica Venezolana, Caracas 2000, pp. 108 ff.

229 That is why the Peoples' Defendant announced that she was going to ask for the inhibition of the Magistrates of the Constitutional Chamber in the case. See *El Universal*, Caracas December 16, 2000, p. 1-4.

230 This constitutional problem was pointed out by the Secretary General of the Organization of American States, in its Report to the General Assembly of April 18, 2002, and was highlighted with emphasis by the Inter American Commission of Human Rights in a press Communiqué Nº 23/02 of May 10, 2002, which referred to the questioning it has received "related to the legitimacy of the process of selecting of the Highest Titleholders of the Judiciary …, [by means of] proceedings not stipulated in the Venezuelan Constitution. The received information pointed out that those officials were not nominated by the Committees provided in the Constitution but instead based on a statute sanctioned by the National Assembly after the approval of the Constitution…" (Nº 7). The matter was more precisely referred to by the same Inter American Commission in the Preliminary Remarks

338. The subsequent step in this regard, was made in 2004, with the enactment of the Organic Law of the Supreme Tribunal of Justice, in which the Judicial Nominating Committee was regulated, but instead of being integrated by representatives of the different sectors of society as imposed by the Constitution, it was established that it was to be integrated by "eleven (11) members, from which five (5) must be elected from the National Assembly, and the other six (6) from the other sectors of society elected in a public proceeding (Article 13, paragraph 2º). In practice, this Committee has been a Parliamentary Commission with additional non parliamentary membersthat functions within the Assembly (Article 13).

339. The 2004 Organic Law, in addition, for the first time since the approval of the Constitution (1999), established the number of the Magistrates of the Chambers of the Supreme Tribunal, extending it to a total of 32 Justices, whose nomination and appointment by means of the new Nominating Committee was completely controlled by the government. This was publicly announced by the President of the Parliamentary Nominating Commission in charge of selecting the candidates for Magistrates of the Supreme Tribunal Court of Justice (who a few months later was appointed Minister of the Interior and Justice), when he publicly declared on December 2004 that none of the elected Magistrates were to decide against the government interests.[231]

III. THE REMOVAL AND DISMISSAL OF THE MAGISTRATES

340. On the other hand, according to Article 265 of the Constitution, the Magistrates of the Supreme Tribunal of Justice although appointed for a 12 years tenure, can be dismissed by the National Assembly by a vote of two thirds (2/3) of its members following a hearing in cases of serious or major offenses as determined by the Citizen Power. This sole possibility for the Legislative Power to dismiss the Head of the Judiciary contradicts the principle of separation of powers and the independence of the Judiciary.[232] Nonetheless, the qualified two-thirds majority vote was estab-

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of May 10, 2002, in which it said that: "The constitutional reforms established regarding the way to appoint those authorities were not used in this case. Those provisions precisely seek to limit the undue interventions, assuring more independenence and impartiality, allowing diversesociety opinions to be heard in the election of such high authorities" (Nº 26).

231 This is what the representative said: "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score auto-goals. In the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, be they did not want to. We are not going to do it for them. There is no one in the group of postulates that could act against us…" See in *El Nacional*, Caracas 12-13-2004. That is why the Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS corresponding to 2004 that "these regulations of the Organic Law of the Supreme Court of Justice would have made possible the manipulation, by the Executive Power, of the election process of judges that took place during 2004". See Inter-American Commission on Human Rights, 2004 *Report on Venezuela*; paragraph 180.

232 See Allan R. Brewer-Carías, *Separation of Powers and Authoritarian Government in Venezuela*, Lecture given in the Seminar on Separation of Powers in the Americas and Beyond, Duquesne University, School of Law, Pittsburgh, November 7 and 8, 2008, in www.allanbrewercarías.com (I,1,982,2008); "La justicia sometida al poder y la interminable emergencia del poder judicial (1999-

lished to avoid leaving the existence of the Heads of the Judiciary in the hands of a simple majority of Legislators.

Fur such purpose, Article 12, paragraph 1 of the 2004 Organic Law of the Supreme Tribunal of Justice defines as grave faults of a magistrate, among others, not to be impartial or independent in the exercise of his functions; to have political activism on party or trade union matters; to exercise private activities or activities incompatibles with their functions; not to accomplish their functions of being manifestly negligent of it; to publicly act against the respectability of the Judiciary and its organs; to endanger the credibility and impartiality of their position, compromising the dignity of the office; to act with abuse or excess of power; or to commit grave and inexcusable errors, prevarication, or denials of justice.

But the 2004 Organic Law of the Supreme Tribunal, in an evident fraud to the Constitution, has established another way to dismiss Magistrates of the Supreme Court, bypassing the qualified majority required in the Constitution, by adding the possibility for the National Assembly to approve by just a simple majority of votes, to "annul the administrative act of appointment of the Magistrate, in cases of them have given false information when nominated; of public attitude that could harm the prestige of the Supreme Tribunal, its Chambers and Magistrates; of actions against the functioning of the Tribunal (Article 234).

In any case, the National Assembly has already used its powers to dismiss Magistrates when they have decided on some particular sensible questions not according with the government's willingness[233].

2006)", in *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, Nº 11, Caracas, septiembre 2007, pp. 122-138.

233 It was the case of the Vice-President of the Supreme Tribunal of Justice, who delivered the decision of the Supreme Tribunal of August 14, 2002 regarding the criminal process 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 took place; and that of 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.

Part Eight. Other Branches of Government

341. Another innovation in the Constitution of 1999 (*See Supra 46*) was to formally declare that the distribution of the Powers of the State, at the national level, that is the National Branches of government, are not only between the National Legislative Power, the National Executive Power, and the Judicial Power, but also between two new additional branches: the Citizen Power and the Electoral Power (Article 136).[234]

CHAPTER 1. THE CITIZEN POWER

342. The Citizen Power is exercised by three traditional constitutional organs of the State: two established in the Constitutions since the forties, the Office of the Comptroller General of the Republic (General Audit Office) and the Office of the Public Prosecutor; and another one created by the 1999 Constitution, the Office of the Peoples' Defender, following the general trend of similar institutions existing in many Latin American countries for the purpose of protecting human rights.[235]

The Citizen Power, as a branch of government, is to be independent, and its organs are conferred functional, financial and administrative autonomy, having a variable assignation within the annual budget (Article 273).

§1. THE REPUBLICAN MORAL COUNCIL

343. According to Article 273 of the Constitution, the Head Officials of the three organs of the Citizen Power, sitting together, conform the Republican Moral Council (Article 274), which has the following attributions: to prevent, investigate, and sanction facts against the public ethics or the administrative morals; to seek for the maintenance of good business practices by the State, and assure that the use of public

234 See Roxana Orihuela Gonzatti, "El nuevo Poder Ciudadano", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 933-980; María A. Correa de Baumeister, "El Poder Ciudadano y el Poder Electoral en la Constitución de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 982-995; José L. Morantes Mago, "El Poder Ciudadano y sus órganos en la Constitución de 1999", in *Revista de Control Fiscal*, Nº 142 (enero-abril). Contraloría General de la República, Caracas, 2000, pp. 15-51; Celia Poleo de Ortega, "El Poder Ciudadano en la Constitución venezolana de 1999", in *Revista de Control Fiscal,* Nº 143 (mayo-agosto*)*. Contraloría General de la República, Caracas, 2000, pp. 15-46.

235 Organic Law on the Citizen Power, *Gaceta Oficial* Nº 37.310 de 25-10-2001. See Allan R. Brewer-Carías *et al*., *Leyes Orgánicas del poder ciudadano (Ley Orgánica del Poder Ciudadano, Ley Orgánica de la Defensoría del Pueblo, Ley Orgánica del Ministerio Público, Ley Orgánica de la Contraloría General de la República)*, Editorial Jurídica Venezolana, Caracas 2005.

property is made in adherence to legality, and to seek for the respect of the principle of legality in any administrative activity of the State. The Council is also empowered to promote education as a means to develop citizenship, solidarity, liberty, democracy, social responsibility and work (Article 274).

344. The members of the Republican Moral Council are required to inform the authorities and officials of the Public Administration of any breaches in the fulfillment of their legal duties. In a case of a continuous failure to conform to the Moral Council's admonition, the President of the Republican Moral Council is to send information to the organ or government agency in which the offending official is assigned or employed, so that those corrective measures may be taken by that entity (Article 275).

In conformity with Article 278, the Moral Republican Council must also promote pedagogical activities directed towards developing knowledge and study of the Constitution, love of one's country, civic and democratic virtues, the most important values of the Republic, and the observance and respect for human rights.

§2. APPOINTMENT OF THE HEAD OF THE ORGANS OF THE CITIZEN POWER

345. The appointment of the Comptroller General of the Republic, the Prosecutor General, and the Peoples' Defender is assigned to the National Assembly, which nonetheless, has no discretion for the appointments, because they can only be made from candidates nominated by a "Committee for Evaluation of Nominations to the Citizen Power." This Committee is to be convened by the Republican Moral Council, and according to the Constitution must be exclusively composed by "representatives from different sectors of society" (Article 279).

For the purpose of making the nominations, the Committee must initiate and lead a public process to select three (3) names for each of the organs of the Citizen Power, to be proposed to the National Assembly. The Assembly, through a favorable vote of at least two-thirds (2/3) of its members, must then chose one of each triad of nominees within a period of no more than thirty (30) consecutive days. If this period elapses with no agreement reached by the Assembly, the Electoral Power will submit the triads to a popular vote for selection (Article 279).

Article 279 of the Constitution states, nonetheless, that in a case when the Committee for Evaluation of Nominations has not been convened, the National Assembly must proceed to designate the heads of the organs of the Citizen Power.

346. Regarding the Nominating Committee for the appointment of the head of the organs of the Citizen Power, the same as occurred regarding the Judicial Nominating Committee for the appointment of the Magistrates of the Supreme Tribunal (*See Supra 188*) has happened, in the sense that its composition has been distorted by the 2001 Organic Law of the Citizen Power, and contrary to the participatory sense of the Constitution, has been composed with a majority of representatives of the National Assembly and not exclusively by representatives of the various sectors of society, as provided in the Constitution. In this case, the Committee has also resulted in just a

parliamentary commission with some additional members designated by the same Assembly from non governmental entities.[236]

347. On the other hand, as happens with all the non elected heads of the branches of government, the Constitution states that following a declaration of the Supreme Tribunal of Justice, members of the Citizen Power may be removed from their positions by the National Assembly in cases of grave faults (Article 279). In the 2007 rejected constitutional reform, it was proposed to allow the National Assembly to approve such dismissals with only a majority of votes.

§3. THE PEOPLES' DEFENDER

348. The Office of the Peoples' Defender is in charge of promoting, defending and maintaining human rights and guarantees declared in the Constitution and international treaties, as well as over "legitimate collective and diffuse interests of Citizens" (Article 280).[237] The activities of the Office of the Peoples' Defense are to be executed in accordance with the principles of cost-free service, public accessibility, celerity, informality and of officio initiative (Article 283).[238]

349. The Head of the Office is the People's Defender, who is designated by the National Assembly for a term of seven (7) years (Article 280), and cannot be re-elected. The appointed must be Venezuelan by birth without any other nationality (Article 41, 280), with manifest and demonstrated skill in human rights matters. Its functions have been regulated in the 2004 Organic Law on the Peoples' Defender.[239]

350. Within its attributions, the Peoples' Defender has powers to watch over the effective guaranty of human rights, investigating *ex officio* or at party request, the complaints filed before his office; to seek for the good functioning of public services, and protect the people's rights and legitimate interest, collective or diffuse, against arbitrariness, abuse of power or errors in their rendering, filing the necessary actions, if needed, in order to ask the State to pay the citizens damages caused by the function-

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236 See Allan R. Brewer-Carías, "Sobre el nombramiento irregular por la Asamblea Nacional de los titulares de los órganos del poder ciudadano en 2007", in Revista *de Derecho Público***,** Nº 113, Editorial Jurídica Venezolana, Caracas 2008, pp. 85-88.

237 See José L. Villegas Moreno, "Los intereses difusos y colectivos en la Constitución de 1999", in *Revista de Derecho Constitucional*, Nº 2 (enero-junio). Editorial Sherwood, Caracas, 2000, pp. 253-269; Ana E. Araujo García, "El principio de la tutela judicial efectiva y los intereses colectivos y difusos", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, Editorial ThompsonCivitas, madrid 2003, pp. 2703-2717, and in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 4, Caracas, 2002, pp. 1 a 29; Mariolga Quintero Tirado, "Aspectos de una tutela judicial ambiental efectiva", in *Nuevos estudios de derecho procesal, Libro Homenaje a José Andrés Fuenmayor,* Vol. II, Tribunal Supremo de Justicia, Colección Libros Homenaje, Nº 8, Caracas, 2002 pp. 189 a 236; Flor M. Ávila Hernández, "La tutela de los intereses colectivos y difusos en la Constitución venezolana de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, *op. cit.*, pp. 2719-2742.

238 See Gustavo Briceño Vivas, "El Defensor del Pueblo en la nueva Constitución. Análisis y crítica", in *Revista de Derecho Público,* Nº 82 (abril-junio). Editorial Jurídica Venezolana, Caracas, 2000, pp. 57-69; Jesús M. Casal H., "La Defensoría del Pueblo en Venezuela", in *Revista de Derecho Constitucional,* Nº 3 (julio-diciembre). Editorial Sherwood, Caracas, 2000, pp. 345-358.

239 Organic Law on the Public Defendant Office, *Gaceta Oficial* N° 37.995 de 5-8-2004.

ing of public services; to fill actions of unconstitutionality, of *amparo*, of habeas corpus, of habeas data regarding the aforementioned attributions; to request the Public Prosecutor to file actions against public officials responsible for the violations of human rights; to request from the Republican Moral Council to adopt the needed measures regarding public officials responsible for the violations of human rights; and to watch over the rights of the indigenous peoples and exercise the necessary actions for their guaranty and effective protection (Article 281).

351. The Peoples' Defender, according to Article 282 of the Constitution, is immune in the exercise of its functions, and cannot be persecuted, detained or prosecuted because of actions taken in the exercise of its functions. The Supreme Tribunal of Justice is in charge of deciding over the prosecution of the Peoples' Defender.

§4. THE PROSECUTOR GENERAL OF THE REPUBLIC

352. The Public Prosecutor is under the guidance of the Prosecutor General of the Republic (Article 284), who is elected for a term of six years by the National Assembly and must comply with the same conditions established in order to be appointed Magistrate of the Supreme Tribunal (*See Supra 331*). Its functions have been regulated in the 2007 Organic Law on the Public Prosecutor.[240]

353. Within the attributions of the Prosecutor General, the following must be mentioned: to guaranty in the judicial process the respect of human rights and guaranties; to guaranty celerity and good development of justice and the respect of due process of law rules; to order and direct criminal investigations for crimes committed, in order to register the facts, circumstances and authors; to file in the name of the State the corresponding criminal actions and persecutions; and to file the necessary actions to make effective the civil, labor, military, criminal, administrative or disciplinary liability of public officials, because of the exercise of their functions (Article 285).

§5. THE COMPTROLLER GENERAL OF THE REPUBLIC

354. The Office of the Comptroller General of the Republic (Audit Office) is the auditing State organ responsible for the control, oversight and investigation of public revenue and disbursements, national public assets and property, and all transactions referred to them. The Comptroller General Office has functional, administrative and organizational autonomy, and is oriented towards the inspection of entities and organs subjected to control (Article 287).[241]

The Office of the Comptroller General of the Republic is under the direction, and is the responsibility of the Comptroller General of the Republic, who is also appointed by the National Assembly for a term of seven years, and must be Venezuelan by birth

240 *Gaceta Oficial* n° 38.647 de 19-03-2007.

241 See José Ignacio, Hernández G., "La Contraloría General de la República", in *Revista de Derecho Público*, Nº 83 (julio-septiembre), Editorial Jurídica Venezolana, Caracas 2000, pp. 21-38.

without any other nationality (Articles 43, 288). Its functions have been regulated in the 2001 Organic Law on the Office of the Comptroller General of the Republic.[242]

355. Within the attributions of the Comptroller General Office, are the following: to exercise control, to watch and to supervise public revenues, expenses and property, as well as the operation related with them; to control public debt; to inspect and supervise the public sector entities subjected to control, to execute the inspections, and to impose the corresponding administrative sanctions in cases of corruption; to request the Public Prosecutor to initiate the corresponding judicial actions regarding the faults and crimes against the public assets; to control public management and to evaluate the accomplishment of the public policies and decisions (Article 289); and to direct the national system of fiscal control (Article 290).

CHAPTER 2. THE ELECTORAL POWER

356. Another innovation of the 1999 Constitution was the creation of the Electoral Power as another branch of government, by giving constitutional hierarchy to the organ assigned to oversight and control over electoral matters.[243] For such purpose, Article 292 of the Constitution provides that the Electoral Power will be exercised by the National Electoral Council, as the governing entity of this branch of government, as well as by the National Electoral Board, the Commission for Civil and Electoral Registry, and the Commission for Political Participation and Financing. Its functions have been regulated in the 2002 Organic Law on the Electoral Power.[244]

357. The functions of the Electoral Power under Article 293, in addition to the organization, administration, direction and oversight of all activities concerning elections for State public offices, include the power to organize labor union elections, as well as the elections held in professional guilds and associations, and organizations with political purposes. In the same way, the Electoral Power may organize elections for civil society organizations that so request it, or, upon the order of the Electoral Chamber of the Supreme Tribunal of Justice. This constitutes an inconvenient interference by organizations of the State into intermediary organizations of society.

358. Article 296 establishes that the National Electoral Council is to be composed of five (5) persons with no ties to political organizations, appointed by the National Assembly for a seven year term, by a vote of two-thirds (2/3) of its members. Three (3) of them must be nominated by civil society, one by Law and Political Science Divisions of national universities, and one by the Citizen Power. The three (3) mem-

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242 *Gaceta Oficial* N° 37.347 del 17 de Diciembre de 2001.

243 See María A. Correa de Baumeister, "El Poder Ciudadano y el Poder Electoral en la Constitución de 1999", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo I, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 982-995; Rafael Méndez García, "Estudio del Poder Electoral (controles)", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001),* Volumen II, pp. 355-383; Alfonso Rivas Quintero, *Derecho Constitucional,* Paredes Editores, Valencia-Venezuela, 2002, pp. 517 ff.

244 *Gaceta Oficial* Nº 37.573 de 19-11-2002.

bers nominated by civil society are to have six (6) alternates sequentially ordered, and each member designated by the Universities and Citizen Power are to have two alternates respectively.

For the purpose of nominating before the Assembly the candidates to the Electoral Council, Article 295 of the Constitution also creates, in this case a Committee for Electoral Nominations that must also be constituted of representatives from different sectors of society. Also in this case, as happened with the Judicial Nominating Committee and with the Nominating Committee for the Members of the Citizen Power, the Committee for Electoral Nominations has been distorted in the Organic Law of the Electoral Power, regulating it without compliance with the constitutional provision tending to guaranty political participation of civil society, converting the Committee into a parliamentary commission, with some additional members appointed by the same Assembly.

359. In any case, in 2002, after the sanctioning of the Organic Law of the Electoral Power, the National Assembly was due to appoint the members of the National Electoral Council, but failed in such duty basically because the representatives supporting the government could not achieve the majority required and did not want to agree on the matter with the opposition. The consequence of this omission was that the Constitutional Chamber of the Supreme Tribunal of Justice, when deciding an action filed against such unconstitutional legislative omission, directly appointed the Members of the Electoral Council, substituting the National Assembly in its duty, but without complying with the conditions established in the Constitution. Since then the complete control by the government of such an important State organ has been assured.[245]

360. Finally, also in this case, the Members of the National Electoral Council can be removed from office by the National Assembly following a declaration by the Supreme Tribunal of Justice (Article 296). In the 2007 rejected constitutional reform, it was also proposed to allow the National Assembly to approve such dismissals with only a majority of votes.

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245 *See* decisions Nº 2073 of Aug. 4, 2003 (Caso: *Hermánn Escarrá Malaver y oros*) and Nº 2341 of August 25, 2003 (Caso: *Hermánn Escarrá M. y otros*) in Allan R. Brewer-Carías, *La Sala Constitucional versus el Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Ares, Caracas 2004, p. 172; "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004," in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero-abril 2005 pp. 11-73, and in Rafael Chavero G. *et al.*, *La Guerra de las Salas del TSJ frente al Referéndum Revocatorio*, Editorial Aequitas, Caracas 2004, C.A., pp. 13-58.

Part Nine. The Constitutional System of Human Rights and Guaranties

361. After a long tradition on matters of human rights,[246] the Venezuelan 1999 Constitution, as in all recent Latin American Constitutions, introduced notable innovations not only by expanding the list of constitutional rights, adding to the more traditional civil and political rights, the social, economic (*See Infra 430 ff.*), cultural, environmental and indigenous peoples' rights as fundamental ones, but also by establishing general principles to assure the guaranty of all such rights.[247] The Constitution also provides for constitutional duties.

CHAPTER 1. GENERAL PRINCIPLES REGARDING HUMAN RIGHTS AND CONSTITUTIONAL GUARANTIES

§1. THE BASIC PRINCIPLES REGARDING HUMAN RIGHTS

362. Among the innovations of the Constitution on matters of human rights, it is important to highlight the inclusion in the constitutional text of express provisions regarding the principle of progressive interpretation of the constitutional rights; the open clause of rights and freedoms; the constitutional hierarchy given to international treaties on human rights; the principle of personal liberty and the principle of equality and non discrimination.

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246 Which was initiated in 1811, with the "Declaration of the Rights of the People" approved by the general Congress of the Independent provinces. See Allan R. Brewer-Carías, *Los Derechos Humanos en Venezuela: Casi 200 Años de Historia*, Academia de Ciencias Políticas y Sociales, Serie Estudios, N° 38, Caracas 1990.

247 See Josefina Calcaño de Temeltas, "Notas sobre la constitucionalización de los Derechos Fundamentales en Venezuela", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo I. Civitas Ediciones, Madrid, 2003, pp. 2489-2535; Rafael Ortiz-Ortiz, "Los Derechos Humanos en la República Bolivariana de Venezuela. Apreciaciones generales y principios orientadores de su ejercicio", in *Revista de la Facultad de Derecho de la Universidad de Carabobo*, Nº 1, Valencia, 2002, pp. 339-369; Agustina Y. Martínez, "Los Derechos Humanos en la Constitución Venezolana: consenso y disenso", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón*, Volumen I. Tribunal Supremo de Justicia, Caracas, 2001, pp. 549-572; Élida Aponte Sánchez, "Los Derechos Humanos: fundamentación, naturaleza y universalidad", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón*, Volumen I. Tribunal Supremo de Justicia, Caracas, 2001, pp. 85-108.

I. Principle of progressive interpretation of constitutional rights

363. The first of the Articles of the 1999 Constitution contained in the title devoted to "Constitutional Duties, Rights and Guarantees," which is Article 19, proclaims as a duty of the State to "guarantee to every individual, in accordance with the progressiveness principle, and without discrimination of any kind, the not renounceable, indivisible and interdependent enjoyment and exercise of human rights. Their respect and guaranty are obligatory for the organs of Public Power, in accordance with the Constitution, the human rights treaties signed and ratified by the Republic and any laws developing the same."

This principle of progressiveness mean that no interpretation of statutes related to human rights can be admitted if the result of the interpretation is to diminish the effective enjoyment, exercise or guarantee of constitutional rights; and also that in cases involving various provisions, the one that should prevail is the one that contains the more favorable regulation. This principle of progressiveness has also been called as the *pro homines* principle of interpretation, which implies that in resolving a case, 'the courts must always prefer the provisions that are in favor of man (*pro homine*).'[248]

The principle also implies that if a constitutional right is regulated with different contexts in the Constitution and in international treaties, then the most favorable provision must prevail and be applicable to the interested party.[249]

II. The declarative nature of the constitutional declarations of rights and freedoms and the open constitutional clauses

364. The second general principle that must be highlighted is the express provision in the Constitution that human rights protected and guaranteed are not limited to those listed or enumerated in its text, and in the international instruments on human rights, but also includes other rights that are "inherent" to human being (persons) not expressly mentioned in them.[250]

This principle, which was contained in Article 50 of the 1961 Constitution, allowed the incorporation in it, by means of judicial decisions, of many rights non enumerated in the Constitution, assigning them constitutional rank. This clause has also been incorporated and broadened in Article 22 of the 1999 Constitution.

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248 See Pedro Nikken, *La protección internacional de los derechos humanos: su desarrollo progresivo*, Madrid 1987.

249 See for instance regarding the protection of rights of a pregnant public employee not to be unjustifiably dismissed of her job during pregnancy, the former Supreme Court of Justice of Venezuela on December 3, 1990, in *Revista de Derecho Público*, nº 45, Editorial Jurídica venezolana, Caracas, 1991, pp. 84-85 and in *Revista de Derecho Público*, nº 97-98, Editorial Jurídica Venezolana, Caracas, 1996, p. 170.

250 See Agustina Yadira Martínez e Innes Faría Villarreal, "La Cláusula Enunciativa de los Derechos Humanos en la Constitución venezolana", in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 3, Caracas, 2001, pp. 133 a 151.

365. These rights inherent to human persons, for instance, have been defined by the former Supreme Court of Justice of Venezuela in 1991, as: "natural, universal rights which find their origin and are a direct consequence of the relationships of solidarity among men, of the need for the individual development of mankind and for the protection of the environment." The same Court concluded by stating that "...such rights are commonly enshrined in universal declarations and in national and supranational texts, and their nature and content as human rights shall leave no room for doubt since they are the very essence of a human person and shall therefore be necessarily respected and protected."[251]

In the case of Venezuela, the open clause allows for the identification of rights inherent to human persons, not only regarding those not listed in the Constitution, but also not listed in international human rights instruments, thus considerably broadening their scope. According to this open clause, for instance, the former Supreme Court of Justice of Venezuela, on judicial review annulled statutes founding its rulings on rights not listed in the Constitution but listed in the American Convention on Human Rights, considering them as rights inherent to human beings.[252]

366. In addition, because of the incorporation of this open clause in the Constitution regarding human rights, the absence of statutory regulation of such rights cannot be invoked to deny or undermine its exercise by the people.

III. The Constitutional Rank of International Human Rights Treaties

367. The third important principle on the progressive protection of fundamental rights and freedom has been the process of constitutionalization of international law in matters of human rights. In this sense the 1991 Constitution has expressly established the value and rank of international instruments on human rights, regarding the same Constitution as well as regarding statutes, even determining which shall prevail in the event of there being a conflict among them.[253]

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251 See decision of January 31, 1991, Case: *Anselmo Natale,* in Carlos Ayala Corao, "La jerarquía de los instrumentos internacionales sobre derechos)humanos", in *El nuevo derecho constitucional latinoamericano, IV Congreso venezolano de Derecho constitucional*, Vol. II, Caracas, 1996, and in *La jerarquía constitucional de los tratados sobre derechos humanos y sus consecuencias*, México, 2003.

252 In this sense in 1996, the Supreme Court annulled an Amazon State Act regarding territorial divisions sanctioned without the participation and consultation of the indigenous peoples organization, considering that it violated the American Convention on Human Rights, Decision of December 5, 1996, Case: *Antonio Guzmán, Lucas Omashi ey al.,* in *Revista de Derecho Público*, nº 67-68, Editorial Jurídica Venezolana, Caracas, 1996, pp. 176 ff. Other cases regarding discrimination and the application of the International Covenant on Civil and Political Rights, in *Revista de Derecho Público* Nº 71-72, Editorial Jurídica Venezolana, Caracas, 1997, pp. 177 ff; and on political participation as a non enumerated right inherent in the human person, in *Revista de Derecho Público*, Nº 77-80, Editorial Jurídica Venezolana, Caracas, 1999, p. 67.

253 See Carlos M. Ayala Corao, "La jerarquía constitucional de los tratados relativos a Derechos Humanos y sus consecuencias", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001),* Volumen I, pp. 167-240, and Lorena Rincón Eizaga, "La incorporación de los tratados sobre derechos humanos en el derecho interno a la luz de la

This process has resulted in the incorporation in the Constitutions of a provision giving the international instruments on human rights regarding internal law, not only the traditional statutory rank or a supra-legal rank, but most importantly, constitutional rank and even supra-constitutional rank.[254] For such purposes Article 23 of the Constitution, as one of the 1999 constitution-making process innovations, provides that

> Treaties, covenants and conventions referring to human rights, signed and ratified by Venezuela, shall have constitutional hierarchy and will prevail over internal legal order, when they contain more favorable regulations regarding their enjoyment and exercise, than those established in this Constitution and in the statutes of the Republic.

According to this provision, constitutional rank has been given to treaties, pacts, and conventions on human rights, having preference over the national Constitution and statutes if they should establish more favorable provisions. In addition, they have immediate and direct application by all courts and authorities of the country. [255]

368. This supra constitutional rank given to international treaties, for instance, has allowed the Supreme Tribunal of Justice through its Constitutional Chamber to decide cases by directly applying the American Convention. In this regard, for instance, the Constitutional Chamber, in 2000, gave prevalence to the American Convention regulations referring to the "the right to appeal judgments before a higher court" (Article 8,2,h), considered as forming part of internal constitutional law of the country, regarding the provision of the Supreme Court of Justice 1976 Statute, which excluded the appeal in certain cases on Administrative Jurisdiction courts' decisions, interpreting "that the latter is incompatible with the former, because it denies in absolute terms, the right that the Convention guarantees."[256] Based on the aforementioned, the Constitutional Chamber concluded its ruling by stating that the right to appeal recognized in Article 8,1 and 2,h of the American Convention on Human Rights, which is "part of the Venezuelan constitutional order", is more favorable regarding the exercise of such right in relation to what is set forth in Article 49,1 of the Constitution; and that such provisions are of 'direct and immediate application by courts and authorities."

369. But in spite of the constitutional provision, and of its application by the Constitutional Chamber of the Supreme Tribunal, in a decision Nº 1.939 issued in De-

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Constitución de 1999", in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la UCV,* Nº 119, Caracas, 2000, pp. 87-108.

254 On this classification, see Allan R. Brewer-Carías, *Mecanismos nacionales de protección de los derechos humanos, Instituto Internacional de Derechos Humanos*, San José, 2004, pp. 62 ff.

255 See Larys Hernández Villalobos, "Rango o jerarquía de los tratados internacionales en el ordenamiento jurídico de Venezuela (1999)", in *Revista del Tribunal Supremo de Justicia,* Nº 3, Caracas, 2001, pp. 110-131.

256 See eecision Nº 87 of March 13, 2000. Case*: C.A. Electricidad del Centro (Elecentro) y otra vs. Superintendencia para la Promoción y Protección de la Libre Competencia. (Procompetencia),* in *Revista de Derecho Público*, Nº 81, Editorial Jurídica Venezolana, Caracas, 2000, pp. 157 ff.

cember 18, 2008 (Case *Gustavo Álvarez Arias y otros*),[257] the same Constitutional Chamber after declaring as "non enforceable" in Venezuela the decision of the Inter American Court on Human Rights of August 5, 2008[258] in which the Venezuelan State was condemned for violations of the judicial guaranties of various magistrates of the First Court of the Contentious Administrative Jurisdiction, has declared that the aforementioned "Article 23 of the Constitution does not assign supraconstitutional rank to international treaties on human rights, so that in case of contradiction between a constitutional provision and a provision of an international covenant, it is the competence of the Judicial Power to determine which is the applicable provision."

IV. The Principle of Liberty

370. Article 20 of the Constitution establishes the general principle of liberty as the basis of the whole system in matters of human rights, by stating that "each person has the right to the free development of his personality, without limitation other than those deriving from the rights of others and from social and public order."[259] This enunciation, as indicated in the explaining document of the 1961 Constitution, which contained the same provision, substituted the traditional norm contained in previous constitutions setting forth that everyone may do anything that does not harm others and no one is obliged to do anything that the law does not require, nor can be impeded from doing what the law does not prohibit.

V. The Principle of Equality and non discrimination

371. The principle of equality is another of the main principles regarding human rights in the 1999 Constitution, which has been included in a very explicit way[260] in Article 21, stating that all persons are equal before the law, and consequently, no discrimination could be permitted based on race, sex, religion, social condition, or any other motive that in general terms could have the objective or the consequence of annulling or harming the recognition, enjoyment and exercise by everybody of the rights and liberties in conditions of equality.

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257 See in http://www.tsj.gov.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html

258 See Case(*Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela*), in See in www.corteidh.or.cr. Excepción Preliminar, Fondo, Reparaciones y Costas, Serie C Nº 182

259 See Rafael Ortiz-Ortiz, "Los derechos de la personalidad como derechos fundamentales en el nuevo orden constitucional venezolano", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón,* Volumen I. Tribunal Supremo de Justicia, Caracas, 2001, pp. 39-82; María C. Domínguez Guillén, "Innovaciones de la Constitución de 1999 en materia de derechos de la personalidad", in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la UCV,* Nº 119. Caracas, 2000, pp. 17-44; María Candelaria Domínguez Guillén, "Aproximación al estudio de los derechos de la personalidad", *Revista de derecho del Tribunal Supremo de Justicia,* Nº 7, Caracas, 2002, pp. 49 a 311.

260 See Luis Beltrán Guerra, "Algunas consideraciones respecto a la igualdad y a la libertad como valores protegidos en el régimen de los derechos fundamentales", in *Temas de Derecho Administrativo: Libro Homenaje a Gonzalo Pérez Luciani*, Volumen I, Editorial Torino, Caracas, 2002, pp. 815-876.

372. For such purpose, the same Article 21 of the Constitution provides that the law must guaranty the juridical and administrative conditions in order to guaranty that equality before the law could be real and effective, and must provide for positive measures in favor of persons or groups that could be discriminated, marginalized or vulnerable; must specially protect those persons that due to any of the abovementioned conditions could be in a circumstance of manifest weakness and must sanction the abuses and harms inflicted against them. In addition, the Constitution prescribes that no nobility titles and hereditary distinctions are recognized in Venezuela.

§2. GENERAL PRINCIPLES REGARDING CONSTITUTIONAL GUARANTEES

373. The 1999 Constitution has also incorporated a very important set of norms concerning the constitutional guarantee of human rights, that is, the legal instruments that are designed to implement and permit the effective exercise of these protected rights.

I. Prohibition of the retroactive effects of law

374. The Constitution expressly establishes the prohibition for legislative provisions of having retroactive effects, except when they impose a lesser penalty. In the case of procedural laws, they shall apply from the moment they go into effect, even to proceedings already in progress; however, in criminal proceedings, evidence already admitted shall be weighed in accordance with the laws that were in effect when the evidence was admitted, insofar as this benefits the defendant. When there are doubts as to the statute that is to be applied, the most beneficial to the defendant will prevail (Article 24).

II. Nullity of acts contrary to the Constitution

375. On the other hand, the 1999 Constitution, also following a long constitutional tradition, has established the objective guaranty of the Constitution by providing that any State act that violates or encroaches upon the rights guaranteed by the Constitution and by law is null and void, and the public officials ordering or implementing the same shall incur criminal, civil and administrative liability, as applicable in each case, with no defense on grounds of having followed superior orders (Article 25).

III. Due process of law rules and the right to have access to justice

376. The Constitution has also expressly enumerated the rules of the due process of law guaranties, and the right to have access to the system of justice. For such purposes, Article 26 of the Constitution establishes the general right of everyone to access the organs comprising the justice system for the purpose of enforcing his rights and interests, including those of a collective or diffuse nature to the effective protection of the aforementioned and to obtain the corresponding prompt decision. In this regard, the State must guaranty a free of charge justice, which in addition must be accessible,

impartial, suitable, transparent, autonomous, independent, responsible, equitable and expeditious, without undue delays and superfluous formalities.

377. Regarding due process of law rules, requiring justice to be imparted according to the norms established within the Constitution and laws, Article 49 of the Constitution requires that "due process shall be applied in all judicial and administrative acts," and consequently, declares legal assistance and defense as inviolable rights at all stages and levels during the investigation and process. Consequently, the same Article establishes that every person has the right to be notified of the charges for which he or she is being investigated, to have access to the evidence and to be afforded the necessary time and means to conduct his or her defense. Any evidence obtained in violation of due process shall be null and void. Any person declared guilty shall have the right to appeal, except in the cases established by the Constitution and by the law (Article 49,1).

378. In addition, the same Article 49 of the Constitution enumerates the following other rules of due process of law rights: Any person shall be presumed innocent until proven otherwise. Every person has the right to be heard in proceedings of any kind, with all due guarantees and within such reasonable time limit as may be legally detained, by a competent, independent and impartial court established in advance. Anyone who does not speak Spanish or is unable to communicate verbally is entitled to an interpreter. Every person has the right to be judged by his or her natural judges of ordinary or special competence, with the guarantees established in the Constitution and by law. No person shall be put on trial without knowing the identity of the party judging him or her, nor be adjudged by exceptional courts or commissions created for such purpose. No person shall be required to confess guilt or testify against himself or herself or his or her spouse or partner, or any other relative within the fourth degree of consanguinity or the second degree of affinity. A confession shall be valid only if given without coercion of any kind. No person shall be punished for acts or omissions not defined under preexisting laws as a crime, offense or infraction (*Nullum crimen nulla poena sine lege)*. No person shall be placed on trial based on the same facts for which such person has been judged previously (*Non bis in idem)*. Every person shall request from the State the restoration or reestablishment of the legal situation adversely affected by unwarranted judicial errors, and unjustified delay or omissions. This right is established without prejudice to the right of the individual to seek to hold the magistrate or judge personally liable, and that of the State to take action against the same.[261]

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261 See Antonieta Garrido de Cárdenas, "La naturaleza del debido proceso en la Constitución de la República Bolivariana de Venezuela de 1999," in *Revista de Derecho Constitucional*, Nº 5 (julio-diciembre), Editorial Sherwood, Caracas, 2001, pp. 89-116; Antonieta Garrido de Cárdenas, "El debido proceso como derecho fundamental en la Constitución de 1999 y sus medios de protección", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001),* Volumen I, pp. 127-144.

IV. Guaranty for rights to only be limited or restricted by statutes

379. Among all of the constitutional guarantees of human rights, without a doubt, one of the most important is the guarantee imposing the need for a statute to establish limitations and restrictions upon these rights;[262] that is, that only through formal legislation can limitations be established regarding the enjoyment of human rights. And "legislation" in the terms of this constitutional guarantee can only be an act emanating from the National Assembly acting in its capacity as the Legislative Body (Article 202). Thus, statutes are the only form of government action which can restrict or limit constitutional guarantees under Article 30 of the American Convention on Human Rights.

Nonetheless, this guarantee has been contradicted in the same 1999 Constitution, due to the broad provision it contains regarding the possibility for the National Assembly to delegate legislative power to the President of the Republic through the so-called "enabling laws" (Article 203), authorizing it to dictate "decree-laws" with the same legal rank and effect of national legislation in any subject area (Article 236,8)[263] (*See Supra 95*).

V. State obligations to investigate

380. Among the constitutional guarantees of human rights, Article 29 obliges the State to investigate and legally punish offenses against human rights committed by its authorities. In cases of actions to punish the offense against humanity, serious violations of human rights and war crimes shall not be subject to statute of limitation.

Human rights violations and the offense of violating humanity rights shall be investigated and adjudicated by the courts of ordinary competence. These offenses are excluded from any benefit that might render the offenders immune from punishment, including pardons and amnesty.

381. Article 30 of the Constitution sets forth the obligation of the State to make full reparations to the victims of human rights violations for which it may be held responsible and to the legal successors to such victims, including payment of damages. The State is also obliged to adopt the necessary legislative measures and measures of other nature to implement the aforementioned reparations and damage compensation. In any case, the State shall protect the victims of ordinary crimes and endeavor to make the guilty parties provide reparations for the inflicted damages.

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262 See Allan R Brewer-Carías, "Consideraciones sobre la suspensión o restricción de las garantías constitucionales", *Revista de Derecho Público,* Nº 37, Caracas 1989, pp. 6-7.

263 See Pedro Nikken, "Constitución venezolana de 1999: La habilitación para dictar decretos ejecutivos con fuerza de ley restrictivas de los derechos humanos y su contradicción con el derecho internacional", *Revista de Derecho Público,* Nº 83 (julio-septiembre), Editorial Jurídica Venezolana, Caracas 2000, pp. 5-19.

VI. The regime of restricting constitutional guaranties in States of Exception

382. As aforementioned, another important guaranty of human rights set forth in the 1999 Constitution is the impossibility to "suspend" fundamental rights and their guaranties in cases of States of Exception, the President of the Republic being authorized ,in such cases, only to temporarily restrict them, with the exception of those relating to the right to life, prohibition of incommunicative detention or torture, the right to due process, the right to information and other intangible human rights. In any case of restriction, the President is obliged to enact the corresponding regulation of the restricted guaranty[264] (*See Supra 232*).

VII. Judicial guaranties of human rights

383. Finally, the Constitution also regulates the judicial guaranties for the protection of constitutional rights by means of the actions of *amparo,* and habeas corpus (Article 27), which have been developed in the Organic Law of Amparo of Constitutional Rights and Guarantees.[265] (*See Infra 587*). The Constitution also guarantees the action of habeas data, in order to guaranty the peoples' right to have access to the information and data concerning the claimant contained in official or private registries or data banks, as well as to know about the use made of the information and about its purpose, and to petition before the competent court for the updating, rectification or destruction in cases of erroneous records and those that unlawfully affect the petitioner's rights (Article 28).

VIII. International guaranties of human rights

384. The international scope of the constitutional guarantees is established in Article 31 of the Constitution which provides for everybody, on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, the right to address petitions and complaints to the international organs created for such purpose, in order to ask for protection of his human rights. [266] This is the case of the Inter American Court on Human Rights created by the American Convention on Human Rights (1969), whose jurisdiction has been recognized by the Venezuelan State.

The Constitution also obliges the State, in accordance with the procedures established under the Constitution and by the law, to adopt such measures as may be necessary to enforce the decisions emanating from the corresponding international organs. Nonetheless, in 2008, the Constitutional Chamber rejected a decision of the

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264 See Jesús M. Casal H., "Condiciones para la limitación o restricción de derechos fundamentales", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo III, Editorial Thomson-Civitas, Madrid 2003, pp. 2515-2534.

265 *Gaceta Oficial* Nº 34.060 de 27-9-1988. See Allan R. Brewer-Carías y Carlos M. Ayala Corao, *Ley Orgánica de Amparo sobre derechos y garantías constitucionales*, Editorial Jurídica Venezolana, Caracas 1988.

266 See Carlos M. Ayala Corao, *Del amparo constitucional al amparo Interamericano como Institutos para la protección de los Derechos Humanos*, Editorial Jurídica Venezolana, Caracas 1998.

Inter American Court on Human Rights considering it as non executable in Venezuela.[267]

CHAPTER 2. THE STATUS OF PERSONS AND CITIZENS

385. The rights and guaranties declared in the Constitution in general terms correspond to every person. Nonetheless, there are some rights that only correspond to Venezuelans, or nationals. For such purpose, the Constitution has established the general status of persons distinguishing between Venezuelans or nationals and foreigners, and within the former, those that are considered citizens and therefore, able to exercise political rights. In this regard, Citizenship and Nationality is one of the fundamental elements of the political organization of the State, regulated in the Constitution,

In this context, Venezuelan or nationals are the persons that have a fundamental legal bond to the State and the country allowing them to be part of its political life. Consequently, in spite of the equality general principle established in the Constitution (*See Supra 371*), foreigners do not have all the rights that Venezuelan have, particularly regarding political rights. That is why that although the provision of Article 45 of the 1961 Constitution that established that "Foreigners have the same duties and rights as Venezuelans, subject to the limitations and exceptions established by this Constitution and the laws," was not included in the 1999 Constitution, the same principle subsists within the provisions related to Nationality, Citizenship and Foreigners.

§1. THE CONSTITUTIONAL RULES ON THE VENEZUELAN NATIONALITY

386. The 1999 Constitution distinguishes two sorts of nationals: nationals by birth and national by naturalization (acquisition of the Venezuelan nationality);[268] and regarding the former the Constitution also distinguishes the two classical ways of

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267 The case decided by the Inter-American Court of Human Rights (Decision of August 5th, 2008, *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela* Case; Excepción Preliminar, Fondo, Reparaciones y Costas, Serie C Nº 182, in www.corteidh.or.cr) was filed by a group of judges of the First Court of the Judicial Review of Administrative Action Jurisdiction before the Inter-American Commission of Human Rights for violations of their judicial guaranties because they hadbeen dismissed in violation to the due process rules. After the Commission filed the complaint before the Inter American Court, in which it ruled that the Venezuelan State had effectively violated in the case the judicial guaranties of the dismissed judges established in the American Convention of Human Rights, condemned the State to pay them due compensation, to reinstate them to a similar position in the Judiciary, and to publish part of the decision in Venezuelan newspapers. Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal of Venezuela issued decision Nº 1939 (Expediente : 08-1572), Case: *Abogados Gustavo Álvarez Arias y otros*, declaring the Inter American Court on Human Rights decision of August 5, 2008, as non enforceable (*inejecutable*) in Venezuela, and asked the Executive to denounce the American Convention of Human Rights, accusing the Inter American Court of having usurped powers of the Supreme Tribunal.

268 See Allan R. Brewer-Carías, *El régimen jurídico administrativo de la Nacionalidad y Ciudadanía venezolana*,Caracas, 1965.

acquiring the Venezuelan nationality by birth, according to the principles of *jus soli* and of *jus sanguinis*.[269]

I. Venezuelan by birth

387. In this regard, Article 32 of the Constitution declares that people who are Venezuelan by birth are, any person born within the territory of the Republic; any person born in a foreign territory, and is the child of a father *and* a mother who are both Venezuelans by birth; any person born in a foreign territory, and is the child of a father *or* a mother, who is Venezuelan by birth, provided they have established residence within the territory of the Republic or declared their intention to obtain the Venezuelan nationality; and any person who was born in a foreign territory, and is the child of a father or a mother who is Venezuelan by naturalization, provided that prior to reaching the age of 18, they establish their residence within the territory of the Republic, and before reaching the age of 25 declare their intention to obtain the Venezuelan nationality.

388. According to this provision, the *jus soli* principle remains in an absolute way, in the sense of being born on Venezuelan soil enough for having the Venezuelan nationality by birth, even if it is accidental, and no relation in the future is establish regarding the country. According to this same provision, the *jus sanguinis* principle also remains in an absolute way, in the sense that the Venezuelan nationality by birth corresponds to those born in foreign countries from father and mother who are Venezuelan by birth, even if they do not establish any subsequent relation with the country.

II. Venezuelan by naturalization

389. With respect to the regime of the nationality by acquisition (naturalization), the regimen of the 1999 Constitution also follows the previous tradition, establishing that foreigners can acquire the Venezuelan nationality by obtaining a "naturalization letter," providing they have at least ten years of uninterrupted residence immediately preceding the application date. Nonetheless, the Constitution provides that this period of residence shall be reduced to five years in the case of foreign nationals whose original nationality is that of Spain, Portugal, Italy, or a Latin American or Caribbean country.

390. The 1999 Constitution also expanded the cases of naturalization based on marriage, in the sense that it benefits not only women married to Venezuelan men as established in the 1961 Constitution, but also men married to Venezuelan women, upon declaring their wish to adopt the Venezuelan nationality, which may be done at least five years after the date of marriage. Also minors of foreign nationality, on the

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269 See Eugenio Hernández Bretón, "Nacionalidad, ciudadanía y extranjería en la Constitución de 1999", in *Revista de Derecho Público,* Nº 81 (enero-marzo). Editorial Jurídica Venezolana, Caracas, 2000, pp. 47-59; Juan De Stefano, "El principio de la nacionalidad", in *Temas de Derecho Administrativo: Libro Homenaje a Gonzalo Pérez Luciani*, Volumen I. Editorial Torino, Caracas, 2002, pp. 593-608.

date of the naturalization of one of his/her parent who exercises parental authority, provided that such minor declares his or her intention of adopting the Venezuelan nationality before reaching the age of 21, and has resided in Venezuela without interruption throughout the five-year period preceding such declaration.

III. Double nationality

391. The most important constitutional innovation in these matters has been the acceptance of the possibility for Venezuelans to have dual nationality, in the sense that Venezuelans by birth and naturalization may now have another nationality without losing their Venezuelan nationality. This principle, established in Article 34, prescribes that "Venezuelan nationality is not lost upon choosing or acquiring another nationality" and radically changes the preceding rule, under which according to Article 39 of the 1961 Constitution, Venezuelan nationality was lost upon voluntarily choosing or acquiring another nationality. In accord with the spirit and purpose of the new regimen, which was of course, that if Venezuelan nationality was made available through naturalization, there ought not be a requirement that the interested party renounce his or her nationality of origin, in so far as Venezuela is concerned in such cases, the nationality of origin is retained in conformity with the requirements of that country.

392. The constitutional progress of permitting Venezuelans to have dual nationality is nonetheless limited with respect to the holding of certain high public offices, for which not only Venezuelan nationality by birth is required, but not having another nationality is also required. It is the case, according to Article 41, of the offices of President of the Republic, Executive Vice President, President and Vice Presidents of the National Assembly, Magistrates of the Supreme Tribunal of Justice, President of the National Electoral Council, the Attorney-General of the Republic, Comptroller General of the Republic, Prosecutor General of the Republic (Public Prosecutor), the Peoples' Defender, Ministers in matters of National Security, Finances, Energy and Mining, Education; Governors and Mayors of frontier states and Municipalities, and those regarding military positions established in the Organic Law of the Armed Forces.

IV. Lost and recuperation of Venezuelan nationality

393. As aforementioned, Article 34 of the Constitution sets forth that the Venezuelan nationality is not lost upon electing or acquiring another nationality; and Article 35 establishes that Venezuelans by birth cannot be deprived of their nationality. Nonetheless, the Venezuelan nationality by naturalization can be revoked only by a judgment handed down by a court in accordance with law.

394. On the other hand, Venezuelan nationality may be renounced; but the person who renounces it when by birth, may regain such nationality if he or she establishes a residence within the territory of the Republic for a period of at least two years, and expresses the intention of regaining the Venezuelan nationality. Naturalized Venezue-

lans who renounce the Venezuelan nationality may regain it by again meeting the requirements prescribed under Article 33 of this Constitution (Article 36).

§2. THE CONSTITUTIONAL RULES ON CITIZENSHIP

I. Citizenship and political rights

395. Citizenship is the political bond established between the person and the State that allows that person to participate in the political system. For this reason, according to the Constitution, a citizen is essentially a Venezuelan national. On this basis, Article 39 of the Constitution states that Venezuelans with the required age who are not subject to political impediment or civil interdiction, can exercise citizenship and therefore are entitled to political rights and duties in accordance to the Constitution.[270]

396. The age conditions for exercising citizeship differ regarding the corresponding political right to be exercised. For example, to vote, it is enough to have reached the age of 18 (Article 64), but to be elected Governor of a State of the federation, it is necesary to be over the age of 25 (Article 160); to be Congressmen to the National Assembly and to a State Legislative Council, it is necesary to be over the age of 21 (Articles 188 and 162); to be Mayor of any Municipality, it is necesary to be over the age of 25 (Article 174); to be President and Vice President of the Republic, it is necesary to be over the age of 30 (Arts. 227 and 238); as well as to be People's Defender (Article 280) and General Controller of the Republic (Article 288); and to be Minister, it is necesary to be over the age of 25 (Article 244). Furthermore, as regards the Justices to the Supreme Tribunal of Justice (Article 263), the Attorney General (Article 249) and the Prosecutor General of the Republic (Public Prosecutor) (Article 284), the Constitution requires to be over the age of 35, which is set forth in the conditions to exercise such positions.

397. The condition of Citizenship implies the exercise of political rights, like the right to vote, the right to be elected, the right to exercise public functions, which are reserved to Venezuelans. The only exception to this rule, according to Article 64 of the Constitution is the right to vote given to foreigners in State, municipal and parish elections, who have reached the age of 18 and have resided in Venezuela for more than ten years, subject to the limitations established in the Constitution and by law, and provided they are not subject to political disablement or civil interdiction.

398. According to Article 42, anyone who loses or renounces Venezuelannationality loses citizenship. In addition, the Constitution establishes the guaranty that the exercise of citizenship or any political rights can be suspended only by final judicial decision in the cases provided by law.

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270 This provision has been repeated in Article 50 of the 2004 Nationality and Citizenhip Law specifying that "Citizen are those Venezuelans not subject to political impedment or to civil interdiction and fulfill the age requirements foreseen in the Constitution and in the statutes." See *Official Gazette*, Nº 37971 of July 1st, 2004. See Allan R. Brewer-Carías, *Régimen Legal de la Nacionalidad, Ciudadanía y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Editorial Jurídica Venezolana, Caracas 2005.

II. Equality between Venezuelans by birth and by naturalization

399. With respect to the exercise of political rights, the constitutional principle of equality between those who are Venezuelan by birth and those who are naturalized is derived from Article 40 of the Constitution, with the exceptions established in the aforementioned Article 41 of the Constitution, which requires in order to be elected or to be appointed for some public offices, to be Venezuelan by birth without having any other nationality. Also, in order to be elected representative to the National Assembly, or to be appointed Minister, Governors and Mayors of non-frontier states and municipalities, naturalized citizens must have been domiciled in Venezuela with uninterrupted residency not less than fifteen 15 years (Article 41).

400. Nonetheless, all these exceptions establishing some distinction between Venezuelan by birth and naturalized Venezuelans disappear in the cases of Naturalized Venezuelans who have entered the country prior to reaching the age of seven years and have resided permanently in Venezuela until reaching legal age shall enjoy the same rights as Venezuelans by birth (Article 40).

§3. CONSTITUTIONAL CONDITION OF FOREIGNERS

401. All other persons in Venezuela not being Venezuelans are legally considered aliens or foreigners, as is expressly set forth in Article 3 of the 2004 Aliens and Migration Statute,[271] which provides that all those who are not considered to be Venezuelans, are legally considered to be foreigners or aliens.

I. Migrant and non migrant aliens

402. Aliens, according to this same Statute, and regarding their access and permanency in the territory of the Republic, can be admitted in two categories: as non migrants or as migrants. Non migrant aliens are the people who enter the territory of the Republic to remain in it for a limited period of 90 days, without having the intention to establish with their family permanent residence in it. These non migrant aliens can not perform activities that involve remuneration or profit.

403. Migrants aliens are those who enter the territory of the Republic to reside in it, temporal or permanently (Article 3), being classified in two categories: temporary migrants and permanent migrants (Article 6). Temporary migrants are those entering the territory of the Republic with the intention of residing in it temporarily while the activities that have originated their admission last ("migrant workers," "border migrants"). Permanent migrants are those who have authorization to remain indefinitely in the territory of the Republic.

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271 See in *Official Gazette* Nº 37.944 of May 24, 2004. See in Allan R. Brewer-Carías, *Régimen Legal De La Nacionalidad, Ciudadanía Y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Editorial Jurídica Venezolana, Caracas 2005, pp. 101 ff.

II. Asylum and refugee aliens

404. In addition to the status of migrant and non migrant aliens, Article 69 of the Constitution sets forth in the section related to political rights, "that the Bolivarian Republic of Venezuela acknowledges and guarantees the right of asylum and of refuge." Therefore, in addition to the non migrant and migrant aliens, two other categories of aliens can be identified: refugees and asylees aliens, with a status that according to Article 2 of the 2001 Organic Statute on Refugees and Asylees,[272] is governed by the following rules:

1. Every person is able to file a refugee protection claim in the Republic, based on a well-founded fear to be persecuted by the reasons and the conditions set forth in the 1967 Protocol on the Refugee Statutes.

2. Every person is able to make a refugee protection claim in the Republic as well as in its diplomatic missions, war ships and military aircrafts abroad, when persecuted for political reasons or crimes in the conditions set forth in that Law.

3. No person claiming asylum or refugee protection shall be neglected or subjected to any measure that force him or her to be repatriated to the territory where his or her life, physical integrity or freedom is jeopardized due to the reasons set forth in that Law.

4. Authorities shall impose no punishment due to the irregular entrance or stay in the territory of the Republic on persons that claim refugee protection or asylum, pursuant to the terms set forth in the Constitution.

5. Discrimination based on race, gender, religion, political opinions, social condition, country of origin or those that in general lessen or annull the acknowledgement, enjoyment or excercise in equal situation of the refugee's or asylee's condition of every person shall not be permitted.

6. The unity of a refugee's or asylee family shall be guaranteed, and specially, the protection of child refugees and teenagers without company or separated from the family, in the terms set forth in the Law.

405. Consequently, pursuant to Article 38 of this Statute, the asylum status is granted to aliens the State considers to be persecuted due to their beliefs, opinions, or political affinities, or due to acts that might be considered as political crimes, or to common crimes but committed with political purposes. Asylum cannot be granted to a person accussed, processed or convicted before ordinary competent Courts due to common crimes, or having committed crimes against peace, war crimes, or crimes against mankind, as defined in international treaties (Article 41 of the Organic Law).

406. Asylum can be granted within the territory of the Republic, once the nature of such is qualified (Article 39) (territorial asylum); or can be granted to persons seeking it before diplomatic missions, Venezuelan war ships, or military aircrafts according to

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272 See in *Official Gazette* Nº 37.296 of October 3, 2001. See Allan R. Brewer-Carías, *Régimen Legal de la Nacionalidad, Ciudadanía y Extranjería. Ley de Nacionalidad y Ciudadanía, Ley de Extranjería y Migración, Ley Orgánica sobre Refugiados y Asilados*, Editorial Jurídica Venezolana, Caracas 2005, pp. 117 ff.

the applicable international treaties and conventions on the matter (Article 40) (Diplomatic asylum). All these provisions related to asylum, according to Article 24 of the Organic Law, shall be construed pursuant to the 1948 Universal Declaration of Human Rights, and the 1954 Caracas Convention on Territorial Asylum and other provisions of international treaties on human rights, duly executed and ratified by the Government of Venezuela.

407. The same Organic Statute on Refugees and Asylees establishes, regarding the regugee status, that the Venezuelan State shall grant it "to every person recognized as such by the competent authority, in virtue of having entered in the national territory due to persecution because of his or her race, gender, religion, nationality, membership in a social group or political opinion, and is outside his or her home country and shall not or does not want to be protected by that country, or that, having no nationality, shall not or does not want to return to the country where he or she has his residence" (Article 5). The main legal trend regarding the refugee status is that according to the Law, no person asking refugee protection shall be punished due to illegal entrance or stay in the national territory, provided that he or she appears without delay before the national authorities, and plea just cause (Article 6). Additionally, a person making a refugee protection claim shall not be denied admission or be subject to a measure forcing him or her to return to the country where his or her life, physical integrity or personal freedom is jeopardized. However, these benefits shall not be granted to aliens considered, due to well-founded reasons, a danger for the Republic's security or that having been convicted of a serious crime, he or she represents a threat to the community (Article 7).

408. According to the same Statute, every alien claiming Venezuelan State protection as refugee, shall be admitted in the national territory and shall be authorized to stay in it until his or her claim is decided, including a reconsideration period. However, an alien considered due to well-founded reasons, a danger for the Republic's safety or a threat to the community because convicted of a serious crimes, cannot claim these benefits (Article 2).

409. The refugee protection shall not be granted to aliens in the following cases: When the alien comitted a crime against peace, war crimes or crimes against mankind, as defined in international treaties; when the alien committed common crimes outside the country granting refugee protection that are not compatible with the refugee status; and when the alien commited acts against the principles of the United Nations Organization (Article 9). All these internal provisions related to the refugee status, according to Article 4 of the Organic Law, shall be construed pursuant to the 1948 Universal Declaration of Human Rights, 1967 Protocol on the Status of Refugees, the 1969 American Convention on Human Rights, and other provisions of international treaties on human rights, duly executed and ratified by the Government of Venezuela.

CHAPTER 3. CIVIL RIGHTS

§1. RIGHT TO LIFE

410. Chapter IV, Title III of the Constitution enumerates the "civil rights" of all persons, also called "individual rights.

The first of all civil rights according to the Venezuelan Constitution is the right to life, which is set forth in Article 43, as "inviolable," and therefore, the prohibition of the death penalty is expressly declared, in the sense that "no law shall provide for the death penalty and no authority shall apply the same." In addition, the Article obliges the State to "protect the life of persons who are deprived of liberty, are in military or civil services, or are subject to its authority in any other manner."

§2. RIGHT TO OWN NAME AND TO BE IDENTIFIED

411. Article 56 establishes the right of every person to have his own name, to have the name of his father and of his mother, and to know their identity. For this purpose, the State guarantees the right of everyone to investigate maternity and paternity situations. All persons have the right to be registered free of charge with the Civil Registry Office after birth, and to obtain public documents constituting evidence of their biological identity, in accordance with law. Such documents shall not contain any mention classifying the parental relationship.

§3. PERSONAL LIBERTY

412. Personal liberty is declared in Article 44 as inviolable, and in order to guaranty such inviolability, the following rights of everyone are enumerated: No person shall be arrested or detained except by virtue of a court order, unless such person is caught *in fraganti*. In the latter case, such person must be brought before a judge within forty-eight hours of his or her arrest. He or she shall remain free during trial, except for reasons determined by law and assessed by the judge on a case-by-case basis. Any officer taking measures involving the deprivation of liberty must identify himself. The bail as required by law for the release of a detainee shall not be subject to tax of any kind. Any person under arrest has the right to communicate immediately with members of his or her family, an attorney or any other person in whom he or she reposes trust, and such persons in turn have the right to be informed where the detainee is being held, to be notified immediately of the reasons for the arrest and to have a written record inserted into the case file concerning the physical or mental condition of the detainee, either by himself or herself, or with the aid of specialists. The competent authorities shall keep a public record of every arrest made, including the identity of the person arrested, the place, time, circumstances and the officers who made the arrest. In the case of the arrest of foreign nationals, applicable provisions of international treaties concerning consular notification shall also be observed. The penalty shall not extend beyond the person of the convicted individual. No one shall be sen-

tenced to perpetual or humiliating penalties. Penalties consisting of deprivation of liberty shall not exceed 30 years. (7) No person shall remain under arrest after a release order has been issued by the competent authority or such person's sentence has been served.

413. In this same regard related to personal liberty, Article 45 expressly prohibits public authorities, whether military, civilian or of any other kind, even during a state of emergency, exception or restriction or guarantees, from effecting, permitting or tolerating the forced disappearance of persons. An officer receiving an order or instruction to carry it out, has the obligation not to obey, and to report the order or instruction to the competent authorities. The intellectual and physical perpetrators accomplices and those covering up the crimes of forced disappearance of a person, as well as any attempt to commit such offense, shall be punished in accordance with law.

§4. PERSONAL INTEGRITY

414. The right to personal integrity is established in Article 46, as the right everyone is entitled to respect for his or her physical, mental and moral integrity. Therefore, according to the same provision, no person shall be subjected to cruel, inhuman or degrading penalties, tortures or treatment. Every victim of torture or cruel, inhumane or degrading treatment effected or tolerated by agents of the State has the right to rehabilitation. Any person deprived of liberty shall be treated with respect due to the inherent dignity of the human being. No person shall be subjected without his or her freely given consent to scientific experiments or medical or laboratory examinations, except when such person's life is in danger, or in any other circumstances as may be detained by law. Any public official who, by reason of his official position, inflicts mistreatment or physical or mental suffering on any person or instigates or tolerates such treatment, shall be punished in accordance with law.

415. Article 54 of the Constitution establishes the guaranty of everyone not to be subjected to slavery or servitude. Traffic of persons, in particular women, children and adolescents, in any form, shall be subject to the penalties prescribed by law.

§5. INVIOLABILITY OF PERSON'S HOME

416. Article 47 of the Constitution, also following the tradition of prior constitutions, guaranties the inviolability of a person's home and any of his private premises. They may not be forcibly entered except by court order, and only to prevent the commission of a crime or carry out the decisions handed down by the courts in accordance with law, always respecting human dignity in all cases. Any health inspections carried out in accordance with law shall be performed only after notice from the officials ordering or carrying it out.

§6. INVIOLABILITY OF PRIVATE COMMUNICATIONS

417. The Constitution also guaranties the secrecy and inviolability of private communications in all forms. The same may not be interfered with except by order of a

competent court, with observance of applicable provisions of law and preserving the secrecy of the private issues unrelated to the pertinent proceedings (Article 48).

§7. RIGHT TO PETITION BEFORE PUBLIC AUTHORITIES AND TO OBTAIN DUE ANSWER

418. Article 51 of the Constitution sets forth the right of everyone to petition or make representations before any authority or public official concerning matters within their competence, and to obtain a timely and adequate response. Whoever violates this right shall be punished in accordance with law, including the possibility of dismissal from office.[273]

§8. RIGHT OF ASSOCIATION

419. The right of everyone to assemble or associate with others for lawful purposes is also provided in the Constitution (Article 52), being the State obliged to facilitate its exercise. The right is, however, limited in Article 256 of the Constitution that prohibits judges from associating with one another, and in Article 294 that establishes the intervention of the State (National Electoral Council) in the internal elections of professional associations (guilds).

§9. RIGHT OF MEETING

420. Article 53 of the Constitution establishes the right of everyone to meet publicly or privately, without obtaining permission in advance, for lawful purposes and without weapons. Meetings in public places may be regulated by law.

§10. FREEDOM OF MOVEMENT

421. Article 50 of the Constitution establishes the right of everyone to freely transit by any means throughout the national territory, to change his domicile and residence, to leave and return to the Republic, to move his goods or belongings within the country and to bring his goods into or remove them from the country, subject only to such limitations as may be prescribed by law. In addition, Venezuelans shall enter the country without need for authorization of any kind and no act of the State may establish against Venezuelans the penalty of banishment from the national territory. According to Article 69, extradition of Venezuelans is prohibited.

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273 See Carlos L. Carrillo Artiles, "El derecho de petición y la oportuna y adecuada respuesta en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela*, Volumen I, Imprenta Nacional, Caracas, 2001, pp. 219-251; and Lubín Aguirre, "Garantías procesales frente a la inacción administrativa" in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela*, Volumen I, Imprenta Nacional, Caracas, 2001, pp. 35-41.

§11. FREEDOM OF EXPRESSION AND OF INFORMATION

422. The right to free expression without censorship is guarantied in Article 57 of the Constitution, which states that "Everyone has the right to express freely his or her thoughts, ideas or opinions orally, in writing or by any other form of expression, and to use for such purpose any means of communication and diffusion, and no censorship shall be established." Anyone making use of this right assumes full responsibility for everything expressed. Anonymity, war propaganda, discriminatory messages or those promoting religious intolerance are not permitted. Also, the same Article 57 of the Constitution provides that censorship restricting the ability of 'public officials' (*funcionarios públicos*) to report on matters for which they are responsible is prohibited; a provision that is not applicable to judges.

For such purposes, Article 58 of the Constitution guaranties that communications are free and plural, and involve the duties and responsibilities indicated by law.

§12. RIGHT TO BE INFORMED AND TO REPLY AND RECTIFICATION

423. Article 58 of the Constitution also establishes the right of everybody to be "timely, truthful and impartially" informed, without censorship, in accordance with the principles of the Constitution. In this regard, the use of these adjectives were widely debated in the 1999 National Constituent Assembly due to the dangers they could raise regarding the State's temptation to control or monopolize what "truthful, opportune and impartial" is, and with this, the possible creation of some "official truth."[274] This matter has been regulated in the 2005 Radio and Television Social Responsibility Law.[275]

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274 See Allan R. Brewer-Carías, "La libre expresión del pensamiento y el derecho a la información en la Constitución venezolana de 1999", in *Anuario de Derecho Constitucional Latinoamericano,* Edición 2002, Konrad Adenauer Stiftung, Montevideo, 2002, pp. 267 a 276; Fernando Flores Gimenez, "Las libertades de expresión e información en la Constitución de Venezuela: Análisis de una confusión", in *Revista de Derecho Constitucional,* Nº 7, enero-junio 2003, Editorial Sherwood, Caracas, 2003, pp. 125 a 135; Jesús A. Davila Ortega, "El Derecho de la información y la libertad de expresión en Venezuela (Un estudio de la sentencia 1.013/2001 de la Sala Constitucional del Tribunal Supremo de Justicia)", in *Revista de Derecho Constitucional,* Nº 5, julio-diciembre-2001, Editorial Sherwood, Caracas, 2002, pp. 305 a 325; María Candelaria Domínguez Guillén, "Las libertades de expresión e información", in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 5, Caracas, 2002, pp. 19 a 72; Héctor Faúndez Ledesma, "Las condiciones de las restricciones a la libertad de expresión", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 2598-2664; Rafael Ortiz-Ortiz, "Las implicaciones jurídico positivas del derecho a la información y a la libertad de expresión en el nuevo orden constitucional", in *Revista de la Facultad de Derecho de la Universidad de Carabobo,* Nº 1, Valencia, 2002, pp. 163-246.

275 *Gaceta Oficial* Nº 38.333 de 12-12-2005. See Allan R. Brewer-Carías *et al., Ley de Responsabilidad Social de Radio y Televisión (Ley Resorte***),** Ediáltorial Jurídica Venezolana. Caracas 2006. and Carolina Puppio, "Libertad de Expresión vs. Ley de Contenidos. Reflexiones de cara a la aprobación de una Ley de Contenido en Venezuela", in *Revista de Derecho Constitucional,* Nº 6, enero-diciembre-2002, Editorial Sherwood, Caracas, 2003, pp. 165 a 190.

The same Article 58 also guaranties the right of everyone to reply and to ask for rectification when they are directly affected by inaccurate or offensive information.[276] Children and adolescents have the right to receive adequate information for purposes of their overall development.

§13. RIGHT TO HAVE ACCESS TO PERSONAL INFORMATION

424. Article 28 of the Constitution guaranties the right of anyone to have access to the information and data concerning him or her or his or her goods which are contained in official or private records, with the exceptions only established by law, as well as the right to know what use is being made of the same and the purpose thereof. This right implies in particular, the right to petition (habeas data recourse) (*See Supra 383*) before the competent courts for the updating, correction or destruction of any records that are erroneous or that can unlawfully affect the petitioner's right.

425. According to the same provision of the Constitution, everybody also has the right to have access to documents of any nature containing information of interest to communities or groups of persons. The foregoing right is without prejudice to the confidentiality of sources from which information is received by journalists, or secrecy in other professions as may be determined by law.

§14. RIGHT TO THE PROTECTION OF HONOR AND PRIVATE LIFE

426. According to Article 60 of the Constitution, every person is entitled to protection of his or her honor, private life, intimacy, self-image, confidentiality and reputation. The use of electronic information shall be restricted by law in order to guarantee the personal and family intimacy and honor of citizens and the full exercise of their rights. [277]

§15. FREEDOM OF RELIGION AND CULT

427. The Constitution expressly declares in Article 59 that the State guaranties the freedom of cult and religion. Consequently, all persons have the right to profess their religious faith and cults, and express their beliefs in private or in public by teaching and other practices, provided such beliefs are not contrary to moral, good customs and public order. Nonetheless, no one shall invoke religious beliefs or discipline as a means of evading compliance with law or preventing another person from exercising his or her rights.

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276 See Allan R. Brewer-Carías *et al*., *La libertad de expresión amenazada (sentencia 1.013)*, Editorial Jurídica Venezolana, Caracas 2001.

277 See Rafael Ortiz Ortiz, "Configuración del derecho a la intimidad como derecho civil fundamental", in *Revista del Tribunal Supremo de Justicia,* Nº 5, Caracas, 2002, pp. 87-149; Cosimina Pellegrino Pacera, "El derecho a la intimidad en la nueva era informática, el derecho a la autodeterminación informativa y el hábeas data a la luz de la Constitución venezolana de 1999", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón,* Volumen I. Tribunal Supremo de Justicia, Caracas, 2001, pp. 143-216.

The autonomy and independence of religious confessions and churches is likewise guaranteed in the Constitution, subject only to such limitations as may derive from this Constitution and the law.

Fathers and mothers are entitled to have their sons and daughters receive religious education in accordance with their convictions.

§16. FREEDOM OF CONSCIENCE

428. All persons have the right to freedom of conscience, and to express the same, provided that its practice does not affect his personality or constitute criminal offense. Objections of conscience may not be invoked in order to evade compliance with law or prevent others from complying with law or exercising their rights.

§17. RIGHT TO PERSONAL SECURITY AND TO BE PROTECTED BY THE STATE

429. Finally, according to Article 55 of the Constitution, every person has the right to be protected by the State, through the entities established by law for the protection of citizens, from situations that constitute a threat, vulnerability or risk to the physical integrity of individuals, their properties, the enjoyment of rights or the fulfillment of their duties. The citizens' participation in programs for purposes of prevention, citizen safety and emergency management shall be regulated by a special law.

The Constitution guaranties that the State's security corps shall respect the human dignity and rights of all persons; and set forth in an express way that the use of weapons or toxic substances by police and security officers shall be limited by the principles of necessity, convenience, opportunity and proportionality in accordance with law.

CHAPTER 4. SOCIAL AND CULTURAL RIGHTS

430. The 1999 Constitution contains very extensive declarations of social rights,[278] including family and social protection rights, right to health and social security, labor rights, educational and cultural rights, environmental rights and the indigenous peoples' rights; although in many cases, the declarations are more of aims or public policy regarding social welfare than specific justiciable rights.

278 See Mercedes Pulido de Briceño, "La Constitución de 1999 y los derechos sociales," in *La cuestión social en la Constitución Bolivariana de Venezuela*, Editorial Torino, Caracas, 2000, pp. 15-28; Carlos Aponte Blank, "Los derechos sociales y la Constitución de 1999," *Idem*, pp. 113-134; and Emilio Spósito Contreras, "Aproximación a los derechos sociales en la Constitución de la República Bolivariana de Venezuela", in *Revista de derecho del Tribunal Supremo de Justicia*, Nº 9, Caracas, 2003, pp. 381 a 398.

§1. FAMILY RIGHTS AND RIGHTS TO SOCIAL PROTECTION

I. Right to Family Protection

431. The Constitution has established a series of social rights as people's "rights to protection" or to be protected by the State, beginning by the protection of families. In this regard, Article 75 imposes on the State the obligation to protect families as a natural association in society, and as the fundamental space for the overall development of persons. According to the same constitutional provision, family relationships must be based on equality of rights and duties, solidarity, common effort, mutual understanding and reciprocal respect among family members. In order to protect families, the State must guarantee protection to the mother, father or other person acting as head of a household.

432. Children and adolescents have the right to live, be raised and develop in the bosom of their original family. When this is impossible or contrary to their best interests, they shall have the right to a substitute family, in accordance with law. Adoption has effects similar to those of parenthood, and is established in all cases for the benefit of the adoptee, in accordance with law. International adoption shall be subordinated to domestic adoption.

II. Right to Motherhood and Fatherhood Protection

433. Article 76 of the Constitution provides for the ful protection of motherhood and fatherhood, whatever the marital status of the mother or father. Couples have the right to decide freely and responsibly how many children they wish to conceive, and are entitled to access to the information and means necessary to guarantee the exercise of this right. The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception, throughout pregnancy, delivery and the puerperal period, and guarantees full family planning services based on ethical and scientific values. This provision, particularly when protecting maternity from the moment of conception, implies limits to configured abortion as a right.

III. Right to Marriage Protection

434. Article 77 of the Constitution also expressly "protects marriage between a man and a woman, based on free consent and absolute equality of rights and obligations of the spouses." Also, a stable de facto union between a man and a woman that meets the requirements established by law shall have the same effects as marriage. From this provision, according to the Venezuelan constitutional system, no same sex "marriage" is admissible.

IV. Rights of children and adolescents

435. Regarding children and adolescents, Article 78 of the Constitution considers them as full legal persons that shall be protected by specialized courts, organs and legislation, which shall respect, guarantee and develop the contents of the Constitution, the law, the Convention on Children's Rights and any other international treaty

that may have been executed and ratified by the Republic in this field. The State, families and society shall guarantee their full protection as an absolute priority, taking into account their best interest in actions and decisions concerning them. The State shall promote their progressive incorporation into active citizenship, and shall create a national guidance system for the overall protection of children and adolescents.

436. On the other hand, Article 79 of the Constitution guaranties the right and duty of young people to be active participants in the development process. For such purpose, the State, with the joint participation of families and society, shall create opportunities to stimulate their productive transition into adult life, including in particular training for and access to their first employment, in accordance with law.

V. Rights of Elderly Protection

437. Regarding senior citizens, Article 80 of the Constitution imposes on the State the duty to guarantee the full exercise of their rights and guarantees; providing that the State, with the participation of families and society, is obligated to respect their human dignity, autonomy and to guarantee them full care and social security benefits to improve and guarantee their quality of life. Pension and retirement benefits granted through the social security system shall not be less than the urban minimum salary. Senior citizens shall be guaranteed to have the right to a proper work, if they indicate a desire to work and are capable to.

VI. Rights of Disabled Protection

438. Article 81 of the Constitution sets forth that any person with disability or special needs has the right to the full and autonomous exercise of his abilities and to its integration into the family and community. The State, with the participation of families and society, must guarantee them respect for their human dignity, equality of opportunity and satisfactory working conditions, and shall promote their training, education and access to employment appropriate to their condition, in accordance with law. It is recognized that deaf persons have the right to express themselves and communicate through the Venezuelan sign language,[279] and the televised media must carry sub-titles and sign language translations for persons with hearing impairments (Article 101).

§2. RIGHT TO DWELLING

439. Article 82 of the Constitution also establishes the right of every person to adequate, safe and comfortable, hygienic housing, with appropriate essential basic services, including a habitat such as to humanize family, neighborhood and community relations. The progressive meeting of this requirement is the shared responsibility of citizens and the State in all areas. The State shall give priority to families, and shall

279 See María C. Domínguez Guillén, "La protección constitucional de los incapaces", in *Temas de Derecho Administrativo: Libro Homenaje a Gonzalo Pérez Luciani*, Vol. I, Tribunal Supremo de Justicia, Colección Libros Homenaje, Nº 7, Caracas, 2002, pp. 609 a 658.

guarantee them, especially those with meager resources, the possibility of access to social policies and credit for the construction, purchase or enlargement of dwellings.

§3. RIGHT TO HEALTH

440. The Constitution also provides expressly for the right to health, as a fundamental social right, being an obligation of the State to guarantee it as part of the right to life (Article 83).[280] Consequently, the State shall promote and develop policies oriented toward improving the quality of life, common welfare and access to services; and all persons have the right to protection of health, as well as the duty to participate actively in the furtherance and protection of the same, and to comply with such health and hygiene measures as may be established by law, and in accordance with international conventions and treaties signed and ratified by the Republic.

441. In order to guarantee the right to health, Article 84 sets forth that the State must create, exercise guidance over and administer a national public health system that crosses sector boundaries, and is decentralized and participatory in nature, integrated with the social security system and governed by the principles of gratuity, universality, completeness, fairness, social integration and solidarity. The public health system gives priority to promoting health and preventing disease, guaranteeing prompt treatment and quality rehabilitation. Public health assets and services are the property of the State and shall not be privatized. The organized community has the right and duty to participate in the making of decisions concerning policy planning, implementation and control at public health institutions. This is to say the health service is constitutionally conceived as being integrated to the system of social security, as a sub-system of it, and is conceived as being cost-free for its users and universally available. Moreover, the Constitution itself establishes that public health related property and services cannot be privatized

442. Accordingly, the financing of the public health system is the responsibility of the State, which shall integrate the revenue resources, mandatory Social Security contributions and any other sources of financing provided for by law. The State guarantees a health budget such as to make possible the attainment of health policy objectives. In coordination with universities and research centers, a national professional and technical training policy and a national industry to produce health care supplies shall be promoted and developed. Finally, Article 85 concludes its regulation in the area by stating that, the State must "regulate public and private institutions of health." This is the only place in which private health institutions are mentioned, but for the purpose of regulating them

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280 See Jesús Ollarves Irazábal, "La vigencia del derecho a la salud", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 2867-2886; Oscar Feo, "La salud en la nueva Constitución", in *La cuestión social en la Constitución Bolivariana de Venezuela*. Editorial Torino, Caracas, 2000, pp. 29-46; Belén Anasagasti, "Caracterización de los principales rasgos del derecho a la salud dentro del marco constitucional de los derechos sociales del texto de 1961 y de 1999", in *La cuestión social en la Constitución Bolivariana de Venezuela*. Editorial Torino, Caracas, 2000, pp 135-152.

§4. RIGHT TO SOCIAL SECURITY

443. Regarding social security, it is also considered in Article 86 of the Constitution as a constitutional right,[281] providing for it as a nonprofit public service to guarantee health and protection in contingencies of maternity, fatherhood, illness, invalidity, catastrophic illness, disability, special needs, occupational risks, loss of employment, unemployment, old age, widowhood, loss of parents, housing, burdens deriving from family life, and any other social welfare circumstances. The Constitution imposes upon the State the obligation and responsibility of ensuring the efficacy of this constitutional right, creating a universal and complete Social Security system, with joint, unitary, efficient and participatory financing from direct and indirect contributions. Nonetheless, the lack of ability to contribute shall not be ground for excluding persons from protection by the system.

444. The Constitution also establishes that Social Security financial resources shall not be used for other purposes. The mandatory assessments paid by employees to cover medical and health care services and other Social Security benefits shall be administered only for social purposes, under the guidance of the State. Any net remaining balances of capital allocated to health, education and Social Security shall be accumulated for distribution and contribution to those services. The Social Security system is ruled by a special organic law.[282]

§5. LABOR RIGHTS

I. Right to work and State's obligations

445. The Chapter of the Constitution of 1999 containing social and family rights also incorporated a set of labor rights, following the orientation of the 1961 Constitution, but amplifying and making them even more rigid, by constitutionalizing many rights which by nature could exist at the level of ordinary law. Thus, the right and duty to work is expressly set forth (Article 87); work is considered as a social fact and shall enjoy the protection of the State (Article 89), and freedom to work shall be subject only to the restrictions established by statutes. [283]

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281 See Allan R. Brewer-Carías, "Consideraciones sobre el régimen constitucional del derecho a la seguridad social, el Sistema de Seguridad Social y la Administración Privada de Fondos de Pensiones," in *Libro Homenaje a Fernando Parra Aranguren*, Tomo I, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas 2001, pp. 73-85.

282 See Organic Law on the Social Security System, *Gaceta Oficial* N° 5.891 Extra, July 31, 2008; Social Security Law, *Gaceta Oficial* N° 5.891 Extra., July 31, 2008.

283 See Napoleón Goizueta H., "Aspectos laborales en la Constitución Bolivariana de Venezuela y normas concordantes con la legislación del trabajo", in *Revista Gaceta Laboral*, Vol. 8, Nº 2 (mayo-agosto). Ediciones Astro Data, Maracaibo, 2002, pp. 251-282; Héctor A. Jaime Martínez, "La nueva Constitución venezolana y su influencia en la Ley Orgánica del Trabajo", in *Revista Tachirense de Derecho*, Nº 12, Universidad Católica del Táchira, San Cristóbal, 2000, pp. 151-178; Gabriela Santana González, "Normas constitucionales en materia laboral. De moribundas a bolivarianas", in *Revista Syllabus*, Escuela de Derecho, Facultad de Ciencias Jurídicas y Políticas. Universidad Central de Venezuela, Nº 1 (noviembre), Caracas, 2000, pp. 39-55; María C. Torres Seoane, "Las

446. The State must guaranty the adoption of the necessary measures so that every person shall be able to obtain productive work providing them with a dignified and decorous living and guarantee him or her the full exercise of the right to work, being employment . The State must also promote employment, and measures tending to guarantee the exercise of the labor rights of self-employed persons must be adopted by statutes.

447. On the other hand, every employer shall guarantee employees adequate safety, hygienic and environmental conditions on the job, and the State shall adopt measures and create institutions such as to make it possible to control and promote these conditions.

448. Article 88 of the Constitution guarantees the equality and equitable treatment of men and women in the exercise of the right to work. The same provision recognizes work at home as an economic activity that creates added value and produces social welfare and wealth; and declares that housewives are entitled to Social Security in accordance with law.

II. Rights to have work protected

449. The Constitution establishes that by statute the necessary provisions must be established for improving the material, moral and intellectual conditions of workers. In order to fulfill this duty of the State, Article 89 of the Constitution enumerates the following principles: 1. No law shall establish provisions that affect the intactness and progressive nature of labor rights and benefits. In labor relations, reality shall prevail over forms or appearances. 2. Labor rights are not renounceable; consequently, any action, agreement or convention involving a waiver of or encroachment upon these rights is null and void. Concessions and settlements are possible only at the end of the employment relationship, in accordance with the requirements established by law. 3. When there are doubts concerning application or conflicts among several rules or in the interpretation of a particular rule, that most favorable to the worker shall be applied. The rule applied must be applied in its entirety. 4. Any measure or act on the part of an employer in violation of this Constitution is null and void, and of no effect. 5. All types of discrimination because of political reasons, age, race, creed, sex or any other characteristic is prohibited. 6. Work by adolescents at tasks that may affect their overall development is prohibited. The State shall protect them against any economic and social exploitation.

III. Working hours

450. On the other hand, the Constitution (Article 90) has also established provisions regarding working hours that shall not exceed eight hours per day or 44 hours per week. Where permitted by law, night work shall not exceed seven hours per day or 35 hours per week. No employer shall have the right to require employees to work overtime. An effort shall be made to reduce working hours progressively in the interest of

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normas laborales en la Constitución", in *Comentarios a la Constitución de la República Bolivariana de Venezuela",* Vadell Hermanos Editores, Caracas, 2000, pp. 149-176.

society and in such sphere as may be determined, and appropriate provisions shall be adopted to make better use of free time for the benefit of the physical, spiritual and cultural development of workers. Workers are entitled to weekly time off and paid vacations on the same terms as for days actually worked.

IV. Right to salary and other benefits

451. Regarding salary, Article 91 of the Constitution establishes that every worker has the right to a salary sufficient to enable him or her to live with dignity and cover basic material, social and intellectual needs for himself or herself and his or her family. The payment of equal salary for equal work is guaranteed, and the share of the profits of a business enterprise to which workers are entitled shall be determined. Salary is not subject to seizure, and shall be paid periodically and promptly in legal tender, with the exception of the food allowance, in accordance with law.

452. The State guarantees workers in both the public and the private sector a vital minimum salary which shall be adjusted each year, taking as one of the references the cost of a basic market basket. The form and procedure to be followed shall be established by law.

453. Article 92 of the Constitution declares that all workers have the right to benefits to compensate them for length of service and protect them in the event of dismissal.

454. Salary and benefits are labor obligations due and payable immediately upon accrual. Any delay in payment of the same shall bear interest, which also constitutes a debt and shall enjoy the same privileges and guarantees as the principal debt.

455. The liability of the natural or juridical person for whose benefit services are provided through an intermediary or contractor shall be determined by law, without prejudice to the job and severance liability of the latter. The State shall establish, through the competent organ, the liability to which employers in general are subject in the event of simulation or fraud for the purpose of distorting, disregarding or impeding the application of labor legislation (Article 94).

V. Stability rights

456. The stability of employment is regulated in Article 93 of the Constitution, setting forth that it shall be guaranteed by law, with provisions as appropriate to restrict any form of unjustified dismissal. Dismissals contrary to this Constitution are null and void.

VI. Trade-Unions rights

457. Article 95 of the Constitution guaranties workers, without distinction of any kind and without need for authorization in advance, the right to freely establish such union organizations as they may deem appropriate for the optimum protection of their rights and interests, as well as the right to join or not to join the same, in accordance with law. These organizations are not subject to administrative dissolution, suspen-

sion or intervention. Workers are protected against any act of discrimination or interference contrary to the exercise of this right. The promoters and the members of the board of directors of the union enjoy immunity from dismissal from their employment for the period and on the terms required to enable them to carry out their functions. For purposes of the exercise of union democracy, the bylaws and regulations of union organizations shall provide for the replacement of boards of directors and representatives by universal, direct and secret suffrage. Any union leaders and representatives who abuse the benefits deriving from union freedom for their personal gain or benefit shall be punished in accordance with law. Boards of directors of union organizations shall be required to file a sworn statement of assets.

458. With respect to this right to unionize, the intervention of the State into labor union functions must be mentioned, through the provision in Article 294,6 of the Constitution of the jurisdiction of the National Electoral Council, an organ of the State (Electoral Power), to "organize elections in unions and professional associations". As a result, in Venezuela, unions are not free to organize their own elections of representatives and authorities, since these elections now are organized by the State.

VII. Right to collective bargaining agreements

459. Article 96 of the Constitution guaranties all employees in both public and the private sector to have the right to voluntary collective bargaining and to enter into collective bargaining agreements, subject only to such restrictions as may be established by law. The State guarantees this process, and shall establish appropriate provisions to encourage collective relations and the resolution of labor conflicts. Collective bargaining agreements cover all workers who are active as of the time they are signed, and those hired thereafter.

VIII. Right to strike

460. Finally, regarding the right to strike, Article 97 of the Constitution guaranties it to all workers in the public and private sector, subject to such conditions as may be established by law.

§6. CULTURAL RIGHTS

461. Cultural creation is considered in the Constitution as a free action, including as provided in Article 98 of the Constitution, the right to invest in, produce and disseminate the creative, scientific, technical and humanistic work, as well as legal protection of the author's rights in his works. The State recognizes and protects intellectual property rights in scientific, literary and artistic works, inventions, innovations, trade names, patents, trademarks and slogans, in accordance with the conditions and exceptions established by law and the international treaties executed and ratified by the Republic in this field.

462. In addition, Article 99 of the Constitution declares cultural values as the unrenounceable property of the Venezuelan people and a fundamental right to be en-

couraged and guaranteed by the State, efforts being made to provide the necessary conditions, legal instruments, means and funding. The autonomy of the public administration of culture is recognized, on such terms as may be established by law.

463. The State must guarantee the protection and preservation, enrichment, conservation and restoration of the cultural tangible and intangible heritage and the historic memories of the nation. The assets constituting the cultural heritage of the nation are inalienable, not subject to seizure or to statute of limitations. Penalties and sanctions for damage caused to these assets shall be provided for by law.

464. The folk cultures comprising the national identity of Venezuela enjoy special attention, with recognition of and respect for intercultural relations under the principle of equality of cultures. Incentives and inducements shall be provided for by law for persons, institutions and communities which promote, support, develop or finance cultural plans, programs and activities within the country and Venezuelan culture abroad. The State guarantees cultural workers inclusion in the Social security system to provide them with a dignified life, recognizing the idiosyncrasies of cultural work, in accordance with law (Article 100).

465. Regarding cultural information, the State must guaranty its issuance, reception and circulation; the communications media having the duty of assisting in the dissemination of the values of folk traditions and the work of artists, writers , composers, motion-picture directors, scientists and other creators of culture of the country. The television media shall include subtitles and translation into Venezuelan sign language for persons with hearing problems. The terms and modalities of these obligations shall be established by law. (Article 101)

§7. EDUCATIONAL RIGHTS

I. Right to education

466. With respect to the right to education, Article 102 of the Constitution begins by establishing, as a general matter, that "education is a human right and a fundamental social duty, it is democratic, cost-free, and mandatory."[284] The consequence of the foregoing is that Article 102 itself imposes upon the State the obligation to assume responsibility as an irrevocable function of the greatest interest, at all levels and in all modes, as an instrument of scientific, humanistic and technical knowledge at the service of society.

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284 See Gustavo J. Linares Benzo, "Bases constitucionales de la educación", in *Revista Derecho y Sociedad de la Universidad Monteávila,* Nº 2 (abril), Caracas, 2001, pp. 217-252; Gustavo J. Linares Benzo, "La educación en el texto constitucional", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen II. Imprenta Nacional, Caracas. 2001 pp. 91-120 and in *Revista de Derecho Público,* Nº 84 (octubre-diciembre), Editorial Jurídica Venezolana, Caracas, 2000, pp. 5-25; and Mabel Mundó, "El derecho a la educación en las Constituciones de 1999 y 1961: reflexiones sobre principios, recursos y aprendizajes para la elaboración de la política educativa", in *La cuestión social en la Constitución Bolivariana de Venezuela,* Editorial Torino, Caracas, 2000, pp. 47-74.

Accordingly, every person has the right to a full, high-quality, ongoing education under conditions and circumstances of equality, subject only to such limitations as derive from such persons own aptitudes, vocation and aspirations. Education is obligatory at all levels from maternal to the diversified secondary level.

II. Education as a public service

467. Education is constitutionally declared to be a public service (Article 102), although the Constitution also states that, "the State will stimulate and protect private education that is imparted according with the principles established in this Constitution and the Laws." As a public service, education is grounded on the respect for all currents of thought, to the end of developing the creative potential of every human being and the full exercise of his or her personality in a democratic society based on the work ethic value and on active, conscious and joint participation in the processes of social transformation embodied in the values which are part of the national identity, and with a Latin American and universal vision. The State, with the participation of families and society, must promote the process of civic education in accordance with the principles contained in this Constitution and in the laws.

468. Education offered at State institutions is free of charge up to the undergraduate university level. To this end, the State shall make a priority investment in accordance with United Nations recommendations. The State shall create and sustain institutions and services sufficiently equipped to ensure the admission process, ongoing education and program completion in the education system (Article 103).

469. The law shall guarantee equal attention to persons with special needs or disabilities, and to those who have been deprived of liberty or do not meet the basic conditions for admission to and continuing enrollment in the education system. The contributions of private individuals to public education programs at the secondary and university levels shall be tax deductible in accordance with the pertinent law (Article 103).

470. Regarding the content of education, Article 106 of the Constitution sets forth that environmental education is obligatory in the various levels and modes of the education system, as well as in informal civil education. Spanish, Venezuelan geography and history and the principles of the Bolivarian thought shall be compulsory courses at public and private institutions up to the education diversified level.

On the other hand, the Constitution also declares that physical education and sports play a fundamental role in the overall education of childhood and adolescents. Instruction in the same is obligatory at all levels of public and private education up to the education diversified level, with such exceptions as may be established by law (Article 111).

471. The communications media, public and private, shall contribute to civil education. The State guarantees public radio and television services and library and computer networks, with a view to permitting universal access to information. Education centers are to incorporate knowledge and application of new technologies and the

resulting innovations, in accordance with such requirements as may be established by law to this end (Article 108).

III. Right to educate

472. Article 106 of the Constitution guaranties every natural or juridical person subject to demonstration of its ability and provided it meets at all times the ethical, academic, scientific, financial, infrastructure and any other requirements that may be established by law, to be permitted to fund and maintain private educational institutions under the strict inspection and vigilance of the State, with the prior approval of the latter.

473. For such purposes, only persons of recognized good moral character and proven academic qualifications shall be placed in charge of education (Article 104). The State shall encourage them to remain continuously up to date, and shall guarantee stability in the practice of the teaching profession, whether in public or private institutions, in accordance with this Constitution and the law, with working conditions and a standard of living commensurate with the importance of their mission. Admissions, promotion and continued enrollment in the education system shall be provided for by law, and shall be responsive to evaluation criteria based on merit, to the exclusion of any partisan or other nonacademic interference.

IV. Principle of the university autonomy

474. The Constitution establishes and recognizes the principle of the autonomy of universities, as a principle and status that allows teachers, students and graduates from its community, to devote themselves to the search for knowledge through research in the fields of science, humanities and technology, for the spiritual and material benefit of the Nation (Article 109).

475. Autonomous universities shall adopt their own rules for their governance and operation and the efficient management of their property, under such control and vigilance as may be established by law to this end. Autonomy of universities is established in the planning, organization, preparation and updating of research, teaching and extension programs. The inviolability of the university campus is established. Experimental national universities shall attain their autonomy in accordance with law (Article 109).

V. Science and technology system

476. Article 110 of the Constitution recognizes as being in the public interest science, technology, knowledge, innovation and the resulting applications, and the necessary information services, the same being fundamental instruments for the country's economic, social and political development, as well as for national sovereignty and security.

In order to promote and develop these activities, the State shall allocate sufficient resources and shall create a national science and technology system in accordance

with law. The private sector shall contribute with resources as well.[285] The State shall guarantee the enforcement of the ethical and legal principles that are to govern research activities in science, humanism and technology. The manners and means of fulfilling this guarantee shall be determined by law.

VI. Right to sport

477. The right to sport and the right to recreation are also declared in the Constitution, as well as the right to recreation as activities beneficial to individual and collective quality of life. For such purpose, the State assumes responsibility for sports and recreation as an education and public health policy, and guarantees the resources for the furtherance thereof (Article 111).

The State guarantees full attention to athletes without discrimination of any kind, as well as support for high-level competitive sports and evaluation and regulation of sports organizations in both the public and the private sector, in accordance with law. Incentives and inducements shall be established for the persons, institutions and communities that promote athletes and develop or finance sports activities, plans and programs in the country.

§8. ENVIRONMENTAL RIGHTS

I. Right to the protection of environment

478. The Constitution of 1999 is also innovative with respect to its regulation of constitutional rights concerning the environment,[286] declaring that each generation has the right and duty to protect and maintain the environment for its own benefit and that of the world of the future; and that everyone has the right, individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment.

The State shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance. The genome of a living being shall not be patentable, and the field shall be regulated by the law relating to the principles of bioethics.

It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water,

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285 Organic law on Science, Technology and Innovation, *Gaceta Oficial* Nº 38.242, August 3, 2005.

286 See Fortunato González Cruz, "El ambiente en la nueva Constitución venezolana", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 2917-2923; Germán Acedo Payarez, "La Constitución de la República Bolivariana de Venezuela de 1999 y los denominados 'Derechos Ambientales", *Idem*, Tomo III, pp. 2925-2978; Alberto Blanco-Uribe Quintero, "La tutela ambiental como derecho-deber del Constituyente. Base constitucional y principios rectores del derecho ambiental", in *Revista de Derecho Constitucional*, Nº 6 (enero-diciembre). Editorial Sherwood, Caracas, 2002, pp. 31-64, and "El ciudadano frente a la defensa jurídica del ambiente en Venezuela", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 2995-3008.

soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law (Article 127).

479. In order to guaranty the protection of environment, Article 129 of the Constitution prescribes that any activities capable of generating damage to ecosystems must be preceded by environmental and sociocultural impact studies. The State shall prevent toxic and hazardous waste from entering the country, as well as preventing the manufacture and use of nuclear, chemical and biological weapons. A special law shall regulate the use, handling, transportation and storage of toxic and hazardous substances.

II. The land use planning

480. As a matter of public policy, Article 128 of the Constitution imposes on the State the duty to develop a land use policy taking into account ecological, geographic, demographic, social, cultural, economic and political realities, in accordance with the premises of sustainable development, including information, consultation and male/female participation by citizens. An organic law shall develop the principles and criteria for this zoning.

§9. THE RIGHTS OF INDIGENOUS PEOPLES

481. Another innovation in the 1999 Constitution, was the incorporationin its text of a set of provisions concerning the rights of indigenous peoples,[287] which constitutes an ethnic group not exceeding 1.5% of the population.

The Chapter begins with a declaration that the State shall recognize the existence of indigenous peoples and communities, their social, political and economic organization, their cultures, habits and customs, languages and religions, their habitat and original rights to the territories they ancestrally and historically occupy and that are necessary to develop and guaranty their ways of life. It is incumbent upon the National Executive, with the participation of the indigenous peoples, to mark the boundaries of and guaranty the property collective rights of their territories, which will be inalienable, imprescriptibly, unseizable, and untransferable in accord with the Constitution and laws (Article 119).

This declaration is a recognition of the existence of political communities within the State, in the sense of recognizing that there can be *a people* in the country, with its own *political organization* and its own geographic *territory*, being these elements (people, government, and territory) the essential components of every State. Nonetheless, in order to avoid problems with respect to the integrity of national territory, Article 126 of the Constitution states that the indigenous peoples, as cultures with ancestral roots, form a part of the Nation, the State and the Venezuelan people, which is unique, sovereign and indivisible. Consequently, the indigenous peoples have the

287 See Ricardo Colmenares Olívar, "Constitucionalismo y derechos de los pueblos indígenas en Venezuela", in *Revista LEX NOVA del Colegio de Abogados del Estado Zulia*, Nº 237, Maracaibo, 2000, pp. 13-46.

duty to protect national integrity and sovereignty, and in no case, the term "people" shall be interpreted in the sense that it has in international law.

482. According to Article 120, the State's use of natural resources within indigenous peoples' territories must be undertaken without violating the integrity of the inhabitants' culture, social and economic life. The use of natural resources within indigenous peoples' territories requires prior information and consulting with the relevant indigenous population.

483. Article 121 of the Constitution declares the right of indigenous peoples to maintain and develop their ethnic and cultural identities, their cosmology, values, spirituality, sacred locations, and religion. To this end, the State is obliged to promote the value and distribution of indigenous cultural manifestations. In addition, indigenous people have the right to their own form of education as well as to an intercultural and bilingual education, giving specific attention to their particular sociocultural characteristics, values and traditions..

484. Similarly, Article 122 establishes the right of indigenous peoples to comprehensive health, while taking into account their own practices and culture. As a consequence, the State is obliged to recognize their traditional medicine and therapies, subject to principles of medical ethics.

485. With respect to economic activities, Article 123 of the Constitution establishes the right of indigenous peoples to maintain and promote their own economic practices based upon reciprocity, solidarity, and trade, their traditional productive activities, and in addition their participation in the national economy, while defining their priorities for themselves. On the other hand, the State is also obliged to guarantee the enjoyment of rights conferred by labor law to indigenous workers.

486. Article 124 of the Constitution guarantees and protects the collective intellectual property of the knowledge, technologies and innovations produced by indigenous peoples and requires that all activities related to their genetic resources and the associated knowledge be linked to the collective benefit of the indigenous people who produce it. The Constitution prohibits the registration of patents on such ancestral resources and knowledge.

487. Finally, Article 125 of the Constitution consecrates the right of indigenous peoples to political participation, which in particular is established in Article 182 guarantying, "indigenous representation in the National Assembly and deliberating bodies of federal entities and of local entities where indigenous populations exist, in accordance with law" [288] (*See Supra 281*).

288 See Ricardo Colmenares Olívar, "El derecho de participación y consulta de los pueblos indígenas en Venezuela", in *Revista del Tribunal Supremo de Justicia,* Nº 8, Caracas, 2003, pp. 21-48.

CHAPTER 5. POLITICAL RIGHTS

§1. RIGHT TO POLITICAL PARTICIPATION

488. The 1999 Constitution also declares a series of political rights that in principle are reserved to Citizens (*See Supra 395*), beginning with the right to free political participation in all public affairs, either directly or by means of their elected representatives (Article 62), considering such participation in the formation, execution, and control of public affairs as necessary to achieve their complete development, collectively and individually, being an obligation of both the State and society to facilitate the creation of conditions most favorable for the practice of this participation.

489. Article 70 of the Constitution enumerates the means of the people's participation in the exercise of their sovereignty, as follows: *In political matters*, election of representatives to public office, vote in referenda, popular consultations, revocation of the mandate of elected officials, legislative or constitutional initiative, open town meeting, and Citizens' assemblies whose decisions are binding; in *social and economic matters*, people's complaints means, workers participation in the management of enterprises, all forms of cooperatives, including financial cooperatives, cooperative savings banks, communitarian businesses, and other "forms of associations guided by values of mutual cooperation and solidarity."

§2. RIGHT TO VOTE AND ELECTORAL PRINCIPLES

490. The right to vote is declared in Article 63, but without qualifying it as a duty as was conceived in the 1961 Constitution (Article 110). This right to vote belongs to all Venezuelans who have reached the age of 18, and not subject to civil interdiction or political incapacity are eligible to vote (Article 64). The Constitution has also specifically conferred the right to vote to members of the armed forces in active duty, although military personnel my not participate in propaganda, political militancy or proselytizing (Article 330). This was an innovation in the Venezuelan political process, in which the military traditionally did not have the right to vote.

491. The election of representatives most always be done by means of free, universal, direct and secret voting, combining the principles of the "personalization of suffrage" and proportional representation (*See Supra 121*). Citizens, on their own initiative, and associations for political purposes, shall be entitled to participate in the electoral process, putting forward candidates (Article 67).

In this regard, Article 63 establishes two elements for the configuration of the electoral system of representatives: on the one hand, the "personalization of suffrage," which requires nominal voting, that is, the voting for a named person, whether votes are counted from single constituency districts, in which case there is no possibility other than voting in nominal or personified way; or whether votes are cast in plurinominal constituencies, by means of lists, where voters cast nominal ballots for multiple persons to represent a single district. At the same time, the Article also guarantees proportional representation, as a system that absolutely requires a plurinominal constituency in which ballots are cast for more than one candidate per electoral district. Proportional representation *excludes* the possibility of single district representa-

tion for representative assemblies, implying the need of an electoral system where elections are carried out through lists, where multiple candidates are selected for each district, in a nominal form (*See Supra 121*).

492. Being the political rights of Citizens, and thus, of the Venezuelan nationals, foreigners in principle do not have such right. Nonetheless, Article 64 of the Constitution extends an exception to the rule, providing that foreigners who have reached the age of eighteen (18), and are not subject to civil interdiction or political incapacity, and who have lived in the country for more than ten (10) years, can vote in the states in municipal elections.

§3. RIGHT TO BE ELECTED AND TO EXERCISE PUBLIC OFFICES

493. The text of the 1999 Constitution contains no equivalent provision to Article 112 of the 1961 Constitution that established the right of the citizen to be elected and perform duties of public office, that is, to hold public office. On these matters, the Constitution only establishes restrictions and prohibitions. Article 65 of the Constitution establishes that a person who has been convicted of an offence while exercising public office, or convicted of an offense involving public funds, may not be a candidate to any popular election, during a time period based upon the gravity of the offence. Also, Members of the armed forces in active duty are not permitted to run in popular elections (Article 330).

494. Regarding the right to be elected, according to Article 67 of the Constitution, nominations for all elective offices may be made by own initiative (self-initiated) or at proposals made by political associations. In this way, all Citizens have the right to participate in electoral processes nominating candidates.

On the other hand, Article 66 of the Constitution consecrates the citizens' right to have their representatives to render periodic and transparent accounts for their work in office "according to the program submitted in the election" (Article 66). This implies that all candidates to elections must present to the electors their corresponding program.

§4. RIGHT TO BE ASSOCIATED TO POLITICAL PARTIES

495. All Citizens have the right to be associated for political purposes, in political associations that must be governed by democratic means of organization, functioning and direction (Article 67) (*See Supra 133 ff.*).

§5. RIGHT TO DEMONSTRATE

496. Citizens have also the right to participate in demonstrations, peacefully without weapons, subject only to such requirements as may be established by law (Article 68). The same provision establishes limits to police interventions regarding demonstration, in the sense that they cannot use firearms or toxic substance to control peaceful demonstrations. The activity of police and security corps in maintaining public order shall be regulated by law.

CHAPTER 6. CONSTITUTIONAL DUTIES

497. In addition to the enunciation of rights, the Constitution also enumerates constitutional duties, in some cases of Venezuelans, and in general of all persons. In this sense, Venezuelans have the duty to honor and defend their native land symbols and cultural values and to guard and protect the sovereignty, nationhood, territorial integrity, self-determination and interests of the nation (Article 130); but everyone has the duty to comply with and obey the Constitution and the laws and other official acts of the public entities (Article 131); to fulfill his or her social responsibilities and participate together in the political, civic and community life of the country, promoting and protecting human rights as the foundation of democratic coexistence and social peace (Article 132); to contribute with public expenditures by paying such taxes, assessments and contributions as may be established by law (Article 133); of rendering its services in the electoral functions assigned to them by law; and to perform such civilian or military service as may be necessary for the defense, preservation and development of the country, or to deal with situations involving a public calamity. Nonetheless, a guaranty is established in the sense that no one shall be subjected to forcible recruitment (Article 134).

498. In addition, the Constitution declares education as a fundamental social duty; therefore, it is free of charge and obligatory. For such purpose, the State must assume the responsibility for it as an irrevocable function of the greatest interest, at all levels and in all modes, as an instrument of scientific, humanistic and technical knowledge at the service of society (Article 102). In Article 87 of the Constitution, work is also considered as a duty of all persons, imposing upon the State the need to adopt the necessary measures so that every person could be able to obtain productive work providing a dignified and decorous living (Article 87).

499. Finally, Article 76 of the Constitution also imposes duties related to family; providing that the father and mother have the shared and inescapable obligation of raising, training, educating, maintaining and caring for their children; and also that the latter has the duty to provide care when the former is unable to do so by themselves. The necessary and proper measures to guarantee the enforceability of the obligation to provide alimony shall be established by law.

500. In all cases of obligations imposed upon the State according to the general social welfare objectives, according to Article 135, these obligations do not preclude the ones which, by virtue of solidarity, social responsibility and humanitarian assistance, corresponds to private individuals according to their abilities. Appropriate provisions shall be enacted by law to compel the fulfillment of these obligations when necessary. Those aspiring to practice any profession have a duty to perform community service for such period, in such place and on such terms as may be provided for by law.

Part Ten. The Constitutional Regime of the Economy

501. The 1999 Constitution, also following the general trend of the 1961 Constitution,[289] in addition to the political and social constitutions, contains an economic constitution in which are established the principles governing the economy, including the respective roles played by private initiative and the State in this field. According to these provisions, since the beginning of the oil exploitation, and particularly during the second half of the 20th century, the economic system that has been developed in Venezuela is one of mixed economy or of "social market economy,"[290] which combines economic freedom, private initiative and a free market economic model (as opposed to the model of a state directed economy), and the possibility of State intervention in the economy in order to uphold principles of social justice. This has been possible, particularly because of the special position of the State as owner of the subsoil and of the oil industry which since 1975 was nationalized[291] (*See Infra 549*). This has made the State the most powerful economic entity in the nation, leading it to intervene in the country's economic activity in important ways.

CHAPTER 1. PRINCIPLES OF THE ECONOMIC SYSTEM

502. It is precisely within this context that Article 299 of the 1999 Constitution sets forth that the social-economic regime of the Republic shall be based on the principles of social justice, democratization, efficiency, free competition, protection of the environment, productivity and solidarity, with a view to ensuring overall human devel-

289 See Allan R. Brewer-Carías, "Reflexiones sobre la Constitución Económica," in *Estudios sobre la Constitución Española. Homenaje al Profesor Eduardo García de Enterría*, Madrid 1991, pp. 3839 - 3853.

290 See Henrique Meier, "La Constitución económica," in *Revista de Derecho Corporativo*, Vol. 1, Nº 1. Caracas, 2001, pp. 9-74; Ana C. Nuñez Machado, "Los principios económicos de la Constitución de 1999," in *Revista de Derecho Constitucional*, Nº 6 (enero-diciembre), Editorial Sherwood, Caracas, 2002, pp. 129-140; Claudia Briceño Aranguren y Ana C. Núñez Machado, "Aspectos económicos de la nueva Constitución," in *Comentarios a la Constitución de la República Bolivariana de Venezuela*, Vadell Hermanos, Editores, Caracas, 2000, pp. 177 y ss.; Jesús Ollarves Irazábal, "La vigencia constitucional de los Derechos Ecónomicos y Sociales en Venezuela," in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999*, Centro de Investigaciones Jurídicas (CEIN), Caracas, 2001, pp. 159 a 192.

291 See Organic Law that reserves to the State the Industry and Commerce of Hydrocarbons, *Gaceta Oficial* Extra, Nº 1.769 of August 29, 1975. See Allan R. Brewer-Carías, "Introducción al Régimen Jurídico de las Nacionalizaciones en Venezuela", in *Archivo de Derecho Público y Ciencias de la Administración*, Vol. III, 1972-1979, Tomo I, Instituto de Derecho Público, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas 1981, pp. 23-44.

opment and a dignified and useful existence for the community. For these purposes, this very Article of the Constitution expressly sets forth that the State must, "jointly with private initiative", promote "the harmonious development of the national economy for the purpose of generating sources of employment, a high national level of added value, in order to elevate the standard of living of the population and strengthen the nation's economic sovereignty, guaranteeing legal certainty, solidity, dynamism, sustainability, permanence, and economic growth with equity, in order to guarantee a just distribution of wealth by means of strategic democratic, participative and open planning".

503. The economic system is therefore based upon economic freedom, private initiative and free competition, although in combination with the participation of the State as a promoter of economic development, a regulator of economic activity, and a planner, together with civil society. As the Constitutional Chamber of the Supreme Tribunal of Justice stated in its decision N° 117 of 6 February 2001[292] this is "a socioeconomic system that is in between a free market (in which the State acts as a simple programmer (*programador*) for an economy that is dependent upon the supply and demand of goods and services) and an interventionist economy (in which the State actively intervenes as the 'primary entrepreneur')". The Constitution promotes, "joint economic activity between the State and private initiative in the pursuit of, and in order to concretely realize the supreme values consecrated in the Constitution", and in order to pursue "the equilibrium of all the forces of the market, and, joint activity between the State and private initiative". In accord with this system, the Courts ruled, the Constitution "advocates a series of superior normative values with respect to the economic regimen, consecrating free enterprise within the framework of a market economy and, fundamentally, within the framework of the Social State under the Rule of Law (the *Welfare State*, the State of Well-being or the Social Democratic State). This is a social State that is opposed to authoritarianism**."**[293] Nonetheless, in practice, particularly during the past decade (1999-2009), this framework has been changed, due to the authoritarian government that has been developed, inclining the balance toward the State participation in the economy, through a process of progressively "statization" of the economy, reducing economic freedom and increasing the dependency of the country on oil exploitation.[294]

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292 See in *Revista de Derecho Público,* N° 85-88, Editorial Jurídica Venezolana, Caracas, 2001, pp. 212-218.

293 The values that are alluded to, according to the doctrine of the Constitutional Chamber, "are developed through the concept of free enterprise" (*libertad de empresa*) which encompasses both the notion of a subjective right "to dedicate oneself to the economic activity of one's choice", and a principle of economic regulation according to which the will of the business (*voluntad de la empresa*) to make its own decisions is manifest. The State fulfills its role of intervention in this context. Intervention can be direct (through businesses) or indirect (as an entity regulating the market)". *Idem.*

294 As reported by Simón Romero in "Chávez Reopens Oil Bids to West as Prices Plunge," published in The New York Times on January 12, 2009, p. 1, in 2009 Venezuela "reliant on oil for about 93 percent of its export revenue in 2008, up from 69 percent in 1998."

§1. PRIVATE ECONOMIC RIGHTS

I. Right to exercise economic activities

504. Title III of the 1999 Constitution on constitutional rights and guarantees also contains a declaration of the economic rights (Chapter VII, Articles 112-118), including, economic freedom, and the right to private property.

Regarding economic freedom, Article 112 of the Constitution declares the right of all persons to develop the economic activity of his choice, without other limits than those established by statute for reasons of human development, security, sanitation, environment protection and others of social interest. In any case, the State must promote private initiative, guaranteeing the creation of wealth and its just distribution, as well as the production of goods and services in order to satisfy the needs of the population, freedom to work, and the free enterprise, commerce and industry, without prejudice to the power of the State to promulgate measures to plan, rationalize and regulate the economy and promote the overall development of the country.

505. In 2007, by means of the Constitutional Reform Draft that was rejected by referendum held on December that same year, the President of the Republic proposed to eliminate this constitutional provision guarantying economic freedom, substituting it with one only defining as a matter of state policy, the obligation to promote, "the development of a Productive Economic Model, that is intermediate, diversified and independent … founded upon the humanistic values of cooperation and the preponderance of common interests over individual ones, guaranteeing the meeting of the people's social and material needs, the greatest possible political and social stability, and the greatest possible sum of happiness". The proposal added that the State, in the same way, "shall promote and develop different forms of businesses and economic units from social property, both directly or communally, as well as indirectly or through the state, " According to this norm, additionally, the state was to promote, "economic units of social production and/or distribution, that may be mixed properties held between the State, the private sector, and the communal power, so as to create the best conditions for the collective and cooperative construction of a Socialist Economy."

II. Property Rights

506. Regarding the right to property, Article 115 of the Constitution, although following the orientation of the previous 1961 Constitution,[295] in the sense of guarantying the right to property, did not establish private property as having a "social function" to be accomplished, as did the 1961 Constitution. Nonetheless, it provides that property shall be subject to such contributions, restrictions and obligations as may be established by law in the service of the public or general interest. On the other hand,

295 See Allan R. Brewer-Carías "El derecho de propiedad y libertad económica. Evolución y situación actual en Venezuela," in *Estudios sobre la Constitución. Libro Homenaje a Rafael Caldera*, Tomo II, Caracas 1979, pp. 1139 - 1246.

Article 115 defines the attributes of the right to property that traditionally were only enumerated in the Civil Code (Article 545), that is, the right to use, the enjoyment, and the disposition of property are now in the Constitution.

This constitutional regime regarding property rights was proposed to be radically changed in the 2007 rejected Constitutional Reforms, in which the President of the Republic sought to eliminate private property as a constitutionally protected right, and substituting the right's conception by a recognition of private property only referred to "assets for use and consumption or as means of production," altogether with other forms of properties, and in particular, public property. The proposed reform regarding Article 115 of the Constitution tended to recognize and guaranty "different forms of property" instead of guaranteeing the right to private property, enumerating them as follows: public property, as the one that belongs to State entities; social property, as the one that belongs to the people jointly and to future generations; collective property, as the one pertaining to social groups or persons, exploited for their common benefit, use, or enjoyment, that may be of social or private origin;" mixed property, as the one constituted between the public sector, the social sector, the collective sector and the private sector, in different combinations, for the exploitation of resources or the execution of activities, subject always to the absolute economic and social sovereignty of the nation; and private property, as the one owned by 'natural or legal persons, only regarding assets for use or consumption, or as means of production legitimately acquired."

507. Regarding expropriation, Article 115 of the Constitution establishes that it can be decreed regarding any kind of property only for reasons of public benefit or social interest, by means of a judicial process and payment of just compensation.[296] Consequently, the Constitution prohibits confiscation (expropriation without compensation), except in cases permitted by the Constitution itself, regarding property of persons responsible for crimes committed against public property, or who have illicitly enriched themselves exercising public offices. Confiscations may also take place regarding property deriving from business, financial or any other activities connected with illicit trafficking of psychotropic or narcotic substances (Article 116 y 271).

508. Article 307 of the Constitution declares the regimen of large private real estate holdings (*latifundio)* to be contrary to social interests, charging the legislator to tax idle lands, and establish the necessary measures to transform them into productive economic units, as well as to recover arable land. The same constitutional provision entitle peasants to own land, constitutionalizing the obligation of the State to protect and promote associative and private forms of property in order to guarantee agricultural production, and oversee sustainable arrangements on arable lands to guaranty its food-producing potential. In exceptional cases, the same Article requires that the legislature must establish federal tax revenue to provide funds for financing, research, technical assistance, transfer of technology and other activities aimed to raise productivity and competitiveness of the agricultural sector.

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296 See, José L. Villegas Moreno, "El derecho de propiedad en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen II. Imprenta Nacional, Caracas, 2001, pp. 565-582.

III. Quality services and good rights

509. On the other hand, Article 117 contains a constitutional innovation in the economic area, providing for the right of all persons to access to goods and services of good quality, as well as to adequate and non-misleading information regarding the content and characteristics of the products and services they consume; to freedom of choice with respect to them; and to be treated fairly and dignified. The mechanisms necessary to guarantee these rights, the standards of quality and quantity for goods and services, consumer protection procedures, compensation for damages caused and appropriate penalties for the violation of these rights shall be established by law.[297]

IV. Popular economy rights

510. Article 118 of the Constitution also recognized the right of workers and of the community to develop associations of social and participative nature such as cooperatives, savings funds, mutual funds and other forms of association, in order to develop any kind of economic activities in accordance with the law. The law shall recognize the specificity of these organizations, especially those relating to the cooperative, the associated work and the generation of collective benefits. The state shall promote and protect these associations destined to improve the popular economic alternative.[298]

V. Limits to private economic activities

511. Article 113 of the Constitution prohibits monopolies. Consequently, any act, activity, conduct or agreement of private individuals which is intended to establish a monopoly or which leads by reason of its actual effects to the existence of a monopoly, regardless of the intentions of the persons involved, and whatever the form it actually takes, is declared contrary to the fundamental principles of this Constitution. Also contrary to such principles is the abuse of a position of dominance which a private individual, a group of individuals or a business enterprise or group of enterprises acquires or has acquired in a given market of goods or services, regardless of what factors caused such position of dominance; or the case of a concentration of demand. In all of the cases indicated, the State shall be required to adopt such measures as may be necessary to prevent the harmful and restrictive effects of monopoly, abuse of a position of dominance and a concentration of demand, with the purpose of protecting consumers and producers and ensuring the existence of genuine competitive conditions in the economy.

512. In the case of the exploitation of natural resources which are the property of the Nation or in the case of public services rendering by private entities, on an exclusive basis or otherwise, the State shall grant concessions for a certain period, in all

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297 Ley del Sistema Venezolano para la Calidad (*Gaceta Oficial* Nº 37.555 de 23-10-2002); Ley para la Defensa de las Personas en el Acceso a los Bienes y Servicios, Decreto Ley N° 6.092, *G.O.* N° 5.889 Extraordinario de 31-7-2008.

298 Ley para el Fomento y Desarrollo de la Economía Popular, Decreto Ley N° 6.130, *G.O.* N° 5.890 Extraordinario de 31-7-2008.

cases ensuring the existence of adequate compensation regarding public interest (Article 113).

§2. STATE PARTICIPATION IN THE ECONOMY REGIME

I. State promotion of economic activities

513. The Constitution also regulates various forms of State economic intervention that have developed in Venezuela in the last decades. In this regard, the Constitution regulates the State as a promoter, that is, without substituting private initiatives, to foster and order the economy in order to ensure the development of private initiative. In this regard, Article 112 sets forth that in any case, the State must promote private initiative, guaranteeing the creation of wealth and its just distribution, as well as the production of goods and services in order to satisfy the needs of the population, freedom to work, and the free enterprise, commerce and industry, without prejudice to the power of the State to promulgate measures to plan, rationalize and regulate the economy and promote the overall development of the country.

514. In this same regard, Article 299 sets forth that the State, jointly with private initiative, shall promote the harmonious development of the national economy, to the end of generating sources of employment, a high rate of domestic added value, raising the standard of living of the population and strengthening the economic sovereignty of the country; and guaranteeing the reliability of the law, as well as the solid, dynamic, sustainable, continuing and equitable growth of the economy, to ensure a just distribution of wealth through participatory democratic strategic planning with open consultation.

515. Specifically regarding the agricultural activities, Article 305 of the Constitution establishes that the State shall promote sustainable agriculture as the strategic basis for overall rural development, and consequently shall guarantee the population a secure food supply, defined as the sufficient and stable availability of food within the national sphere and timely and uninterrupted access to the same for consumers. A secure food supply must be achieved by developing and prioritizing internal agricultural and livestock production, understood as production deriving from the activities of agriculture, livestock, fishing and aquaculture. Food production is in the national interest and is fundamental to the economic and social development of the Nation. To this end, the State shall promulgate such financial, commercial, technological transfer, land tenancy, infrastructure, manpower training and other measures as may be necessary to achieve strategic levels of self-sufficiency. In addition, it shall promote actions in the national and international economic context to compensate for the disadvantages inherent to agricultural activity. The State shall protect the settlement and communities of nonindustrialized fishermen, as well as their fishing banks in continental waters and those close to the coastline, as defined by law.

516. Regarding rural development, Article 306 imposes on the State the duty to promote conditions for overall rural development, for the purpose of generating employment and ensuring the rural population an adequate level of well-being, as well as their inclusion in national development. It shall likewise promote agricultural ac-

tivity and optimum land use by providing infrastructure projects, supplies, loans, training services and technical assistance.

517. Regarding industrial activities, the Constitution (Article 308) imposes on the State the role to protect and promote small and medium-sized manufacturers, cooperatives, savings funds, family-owned businesses, small businesses and any other form of community association for purposes of work, savings and consumption, under an arrangement of collective ownership, to strength the country's economic development, based on the initiative of the people. Training, technical assistance and appropriate financing shall be guaranteed. On the other hand, Article 309 provides that typical Venezuelan crafts and folk industries shall enjoy the special protection of the State, in order to preserve their authenticity, and they shall receive credit facilities to promote production and marketing.

518. On commercial matters, Article 301 reserves to the State the use of trade policy to protect the economic activities of public and private Venezuelan enterprises. In this regard, more advantageous status than those established for Venezuelan nationals shall not be granted to foreign persons, enterprises or entities. Foreign investment is subject to the same conditions as domestic investment.

519. Finally, Article 310 of the Constitution declares tourism as an economic activity of national interest, and of high priority in the country's strategy of diversification and sustainable development. As part of the foundation of the socioeconomic regime contemplated by the Constitution, the State shall promulgate measures to guarantee the development of tourism and shall create and strengthen a national tourist industry.

II. State Economic planning

520. Regarding economic planning, Article 112 empowers the State to promulgate measures to plan, rationalize and regulate the economy and promote the overall development of the country. The President of the Republic must formulate the National Plan of Development and, once approved by the National Assembly, direct its execution (Article 187,8; 236,18)

III. State direct assumption of economic activities

521. No provisions are established in the Constitution in order for the State to promote highly qualified or heavy industries, and what is established is for the State the possibility to reserve for its own exploitation, through an organic law and by reasons of national convenience, the petroleum industry (already nationalized since 1975) and other industries, operations and goods and services which are in the public interest and of a strategic nature. The State shall promote the domestic manufacture of raw materials deriving from the exploitation of nonrenewable natural resources, with a view to assimilating, creating and inventing technologies, generating employment and economic growth and creating wealth and wellbeing for the people (Article 302).

522. As aforementioned, based on a similar constitutional provision establishing the power of the State to reserve for its own exploitation services or resources (Article

97, 1961 Constitrution), the oil industry was nationalized in 1975, being managed by a state-own enterprise, *Petróleos de Venezuela S.A*., regarding which, Article 303 of the 1999 Constitution set forth that for economic and political sovereignty and national strategy reasons, the State shall retain all shares of such public enterprise, but with the exception of its subsidiaries, strategic joint ventures, enterprises and any other venture established or to be established as a consequence of the carrying on of the business of *Petróleos de Venezuela, S.A.* This last possibility has been considered as a loosening of the strict nationalization process carried out through the 1975 Organic Law that reserves to the State the Industry and Commercialization of Hydrocarbons.[299] In this regard, the 2000 Organic Law on Hydrocarbons allowed the establishment of mixed companies for the exploitation of primary hydrocarbons activities, although with the State as majority shareholder,[300] which has been implemented in 2006-2007.[301]

523. On the other hand, regarding public enterprises in general, Article 300 of the Constitution refers to the statutes to determine the conditions for the creation of functionally decentralized entities to carry out social or entrepreneurial activities, with a view to ensuring the reasonable economic and social productivity of the public resources invested in such activities.

524. All the aforementioned provisions regarding the participation of the State in the economy were proposed to be radically changed in the rejected 2007 Constitutional Reform Draft, in which the whole economic role of the State pretended to be reduced to promote and develop economic and social activities "under the principles of the socialist economy" (Article 300).

CHAPTER 2. TAXATION REGIMEN

525. The Constitution also establishes the general principles of the taxation regimen, providing in Article 316 that the tax system must seek for a fair distribution of public burden (taxation), following the principle of progressive taxation according to the economic capacity of taxpayers; for the protection of the national economy and

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299 See Allan R. Brewer-Carías, "El régimen de participación del capital privado en las industrias petrolera y minera: Desnacionalización y regulación a partir de la Constitución de 1999", in *VII Jornadas Internacionales de Derecho Administrativo Allan R. Brewer-Carías, El Principio de Legalidad y el Ordenamiento Jurídico-Administrativo de la Libertad Económica*, Caracas noviembre 2004. Fundación de Estudios de Derecho Administrativo FUNEDA, Caracas Noviembre, 2004 pp. 15-58.

300 Ley Orgánica de Hidrocarburos, *Gaceta Oficial* Nº 38.493 de 4-8-2006.

301 See Allan R. Brewer-Carías, "The 'Statization' of the Pre 2001 Primary Hydrocarbons Joint Venbture Exploitations: Their Unilateral termination and the Assets'Confiscation of Some of the Former Private parties" in Oil, Gas & Energy Law Intelligence, www.gasandoil.com/ogel/ ISSN: 1875-418X, Issue Vol 6, Issue 2, (OGEL/TDM Special Issue on Venezuela: The battle of Contract Sanctity vs. Resource Sovereignty, ed. By Elizabeth Eljuri), April 2008; and "La estatización de los convenios de asociación que permitían la participación del capital privado en las actividades primarias de hidrocarburos sucritos antes de 2002, mediante su terminación anticipada y unilateral y la confiscación de los bienes afectos a los mismos", in Víctor Hernández Mendible (Coordinador), *Nacionalización, Libertad de Empresa y Asociaciones Mixtas*, Editorial Jurídica Venezolana, Caracas 2008, pp. 123-188.

the raising of the standard of living of the population, sustaining itself through efficient collections.[302]

526. The Constitution also establishes the general principle of "tributary legality," that is, that all taxes must always be created by statute approved by the representatives of the people, which must also be the one to provide for exemptions, reductions and any other incentives (Article 317).[303] In addition, the principle that taxes shall never have confiscatory effect is also expressly established.[304]

527. Almost all taxation powers have been attributed to the national (federal level of government) but in addition, Article 156,13 of the Constitution assigns the National Assembly the power to enact legislation in order to guarantee the coordination and harmonization of the different national, state, and municipal government taxation power. Such legislation shall define appropriate principles, parameters, and limitations; determine the types of taxes or aliquots of state and municipal taxes; and establish specific funds for the purpose of ensuring interterritorial solidarity.[305]

528. But the Constitution also establishes some prohibitions for the States and Municipalities in taxation matters. For instance, on matters of agriculture, animal husbandry, fisheries and forest activities, the States and Municipalities can only tax them at the opportunity, in the form prescribed by, and through measures permitted by national statute. This is confirmed in Article 183 of the Constitution that prohibits states and municipalities from creating taxes on matters reserved to the national level of government; from creating customs or from taxing the import, export, or transit of national or foreign goods; from taxing consumption goods before entering in their territories; from taxing them in a different way as those produced in their territory.

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302 See Gabriel Ruán Santos, "Principios substantivos de la tributación en la Constitución de 1999", in *Revista de Derecho Corporativo,* Vol. 1, Nº 2, Caracas, 2001, pp. 11-38; Moisés Ballenilla Tolosa y otros, "El régimen tributario constitucional", in *Comentarios a la Constitución de la República Bolivariana de Venezuela",* Vadell Hermanos Editores, Caracas, 2000, pp.117-148; Alejandro R. Van Der Velde; Antonio Planchart Mendoza; Adriana Vigilanza García, "El poder tributario antes y después de la Constitución de 1999", in *Revista de Derecho Constitucional,* Nº 3 (julio-diciembre), Editorial Sherwood, Caracas, 2000, pp. 187-228; Juan D. Alfonzo Paradisi, "El Poder Tributario y los derechos y garantías constitucionales como límites a su ejercicio", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 3151-3184.

303 See Eduardo E. Meier García, "Reflexiones sobre el sistema tributario y el principio de legalidad tributaria en la Constitución de 1999", in *Revista de Derecho Corporativo,* Vol. 2, Nº 1, Caracas, 2002, pp. 73-124.

304 See Allan R. Brewer-Carías, "Les protections constitutionnelles et légales contre les impositions confiscatoires," in *Rapports Generaux. XIII Congrès International de Droit Comparé,* Montreal 1990, pp. 795 - 824.

305 See Manuel Rachadell, "La distribución del poder tributario entre los diversos niveles del Poder Público según la Constitución de 1999," in *Revista de Derecho Administrativo, Nº 8 (enero-abril).* Editorial Sherwood, Caracas, 2000, pp. 179-205; Adriana Vigilanza García, "Menú para la armonización y coordinación de la potestad tributaria de Estados y Municipios. Algunas reflexiones," in *Revista de Derecho Tributario,* Nº 99 (abril-junio). Legislec Editores, Caracas, 2003, pp. 9-26, and in *Revista de Derecho Constitucional,* Nº 6, enero-diciembre-2002, Editorial Sherwood, Caracas, 2003, pp. 213 a 230.

The Constitution also prohibits the States and Municipalities to forbid the consumption of goods produced outside their territory.

CHAPTER 3. BUDGETARY SYSTEM

529. Within the innovations of the 1999 Constitution are a set of provisions governing fiscal and budgetary issues, the monetary system, and macro-economic coordination, not only applicable to the national level of government, but also to the states and municipalities (Article 311).

§1. PRINCIPLES OF FISCAL POLICY

530. Article 311 of the Constitution established the general principles governing the fiscal policy, which must be based on efficiency, solvency, transparency, liability and fiscal balance. Fiscal policy is to be balanced over a multiyear budget framework, in such manner that ordinary revenues shall be sufficient to cover ordinary expenses. The National Executive must submit for enactment by the National Assembly a multiyear framework for budgeting that establishes the maximum limits of expenditures and indebtedness to be contemplated in national budgets. The characteristics of this framework, the requirements for modifying the same and the terms for carrying out are established in the Organic Law of State Financial Administration.[306] The Constitution also establishes the principle that any revenues generated by exploiting underground wealth (hydrocarbon) and minerals, in general, shall be used to finance real productive investment, education and health. All these principles and provisions established for national economic and financial management shall also govern that of the States and Municipalities, to the extent applicable.

§2. PRINCIPLES OF PUBLIC DEBT POLICY

531. According to Article 312 of the Constitution, public debt limits shall be set by law in accordance with a prudent level in terms of the size of the economy, reproductive investment and the ability to generate revenues to cover public debt service. In order to be valid, public credit transactions shall always require a special law authorizing them, with the exceptions established under the Organic Law on State Financial Administration. The special law shall indicate the modalities of the transactions and authorize the appropriate budget credits in the pertinent budget law. The annual special indebtedness law shall be submitted to the National Assembly together with the budget law. The State shall not recognize any obligations other than those assumed by lawful National Authority organs in accordance with law.

306 Ley Orgánica de la Administración Financiera del Sector Público, Decreto Ley N° 6.233, *G.O.* N° 5.891 Extraordinario de 31-7-2008.

§3. PRINCIPLES OF BUDGET

532. Regarding budget, in particular Article 313 of the Constitution establishes the general principle that the economic and financial management of the State shall be governed by a budget approved annually by law. The National Executive shall submit the draft Budget Law or statute to the National Assembly at the time prescribed by the same Organic Law on State Financial Administration. Nonetheless, if the Executive Power fails for any reason to submit the budget bill within the time limit established by law, or the bill is rejected, the budget for the then current fiscal year shall be applicable.

533. Regarding the Budget draft law, the National Assembly has the power to alter budget items, but shall not authorize measures leading to a decrease in public revenues or to expenses exceeding the estimated revenue amounts in the budget bill (Article 313). In the annual public expense budgets at all levels of government, the specific objective to which each credit item in the budget is addressed shall be clearly established, as well as the concrete results expected and the public officials responsible for achieving these results. The latter shall be established in quantitative terms, by means of performance indicators, where this is technically possible (Article 315). Also, in each annual budget the Constitutional Contribution to the States (*Situado Constitucional*) must be calculated in an amount equivalent to a minimum of 15% and a maximum of 20% of total ordinary national income (Article 167,4) (*See Supra 176*).

534. In submitting the multiyear budget framework, the special indebtedness law and the annual budget, the National Executive Branch shall explicitly state the long-term objectives of fiscal Policy and explain how these objectives are to be achieved, in accordance with principles of responsibility and a fiscal balance (Article 313).

535. According to Article 314, a balanced budget is a constitutional principle, so no expense of any kind shall be disbursed unless the same has been provided for in the budget law. Additional budget credit items may be ordered to cover essential unforeseen expenses or items that had not been adequately funded only if the treasury has resources to cover the expenditure concerned; this shall be done only following a vote in favor by the Council of Ministers and authorization by the National Assembly, or in its absence, by the Delegated Commission. The Executive Power shall submit to the National Assembly within six months of the close of the fiscal year the annual accounting and budget implementation balance sheet for such fiscal year (Article 315).

CHAPTER 4. MONETARY SYSTEM AND THE MACROECONOMIC POLICIES

536. In addition to the abovementioned provisions on the State economic regime, for the first time in Venezuelan constitutional history, the text of the Constitution incorporates a set of norms regulating the monetary system, and in particular, the

autonomy and role of the Central Bank of Venezuela, as well as the State's macroeconomic policies (Articles 318-321).[307]

§1. AUTONOMY OF THE CENTRAL BANK OF VENEZUELA REGARDING THE MONETARY POLICY

537. The monetary policy of the State, according to Article 318 of the Constitution, is attributed in an exclusive way to the Venezuelan Central Bank, whose fundamental objective is to achieve price stability and preserve the internal and foreign exchange value of the monetary unit. The Venezuelan Central Bank is conceived in the Constitution as a public-law juridical person with autonomy to formulate and implement policies within its sphere of competence. The Venezuelan Central Bank shall perform its functions in coordination with general economic policy, in the interest of attaining the higher objectives of the State and the Nation. In order to provide for the adequate attainment of its objective, the functions of the Venezuelan Central Bank shall include those of formulating and implementing monetary policy, participating in the design of and implementing foreign exchange policy, currency regulation, credit and interest rates, administrating international reserves and any others established by law.[308]

538. According to Article 319 of the Constitution, the Venezuelan Central Bank shall be governed by the principle of public responsibility, to which end it shall render an accounting of its actions, goals and the results of its policies to the National Assembly, in accordance with law. It shall also issue periodic reports on the behavior of the country's macroeconomic variables and on any other matters concerning which reports may be requested, including sufficient analysis to permit its evaluation. Failure to meet the objective and goals, without justifiable cause, shall result in removal of the Board of Directors and imposition of administrative penalties, in accordance with law.

539. The Venezuelan Central Bank shall be subject to oversight after the fact by the Office of the General Comptroller of the Republic and inspection and supervision by the public entity that supervises banking, which shall send to the National Assembly reports on the inspections it conducts. The budget of operating expenses of the Venezuelan Central Bank shall require discussion and approval by the National Assembly, and its accounts and balance sheets shall be subjected to independent audits on such terms as may be established by law.

540. Nonetheless, in the 2007 Constitutional Reform which was proposed by the President of the Republic and rejected by referendum, the purpose of it on these matters was to eliminate the Bank's competencies and autonomy, and render the Bank totally and directly dependent upon the National Executive. To this end, the following reforms were proposed and sanctioned by the National Assembly regarding Article

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307 See Isabel C. Medina Ortiz, "Comentarios acerca de las normas constitucionales y legales que regulan el funcionamiento del Banco Central de Venezuela", in *Revista del Tribunal Supremo de Justicia*, Nº 8, Caracas, 2003, pp. 357-389.

308 Ley del Banco Central de Venezuela (*Gaceta Oficial* Nº 38.232 de 20-7-2005).

318 of the Constitution: to require that the national monetary system be directed towards the achievement of the essential ends of the "Socialist State;" to attribute the conduction of monetary policies to the National Executive and the Central Bank; to eliminate the autonomy of the Bank, proposing to establish that it was to be subordinated to general economic policy and to the National Development Plan in order to achieve the "superior objectives of the Socialist State;" and to remove from the Central Bank the exclusive competency to administer international reserves, by proposing to place it under the administration and direction of the President of the Republic as administrator of the National Public Treasury. Although the 2007 Reform was rejected by the people on December 2007 (*See Supra 36*), the fact is that because of the political and legislative practice of the authoritarian government that has been consolidated during the past decade (1999-2009), the Central bank has been completely controlled.

§2. NATIONAL CURRENCY

541. The monetary unit of the Bolivarian Republic of Venezuela is the Bolívar. Nonetheless, the Constitution provides that in the event a common currency is instituted within the framework of Latin American and Caribbean integration, it shall be permissible to adopt the currency provided for by a treaty signed by the Republic (Article 318).

§3 MACROECONOMIC POLICIES

542. Regarding macroeconomic policies, the Constitution also innovated by providing the general framework for it coordination. In this regard, Article 320 establishes the general principle that the State must promote and defend economic stability, avoid its vulnerability, and to watch over the monetary and price stability, in order to assure social welfare (Article 320). In order to facilitate the attaining of such objectives, the Minister of Finances and the Central Bank must contribute to the harmonization of the fiscal and monetary policies, although the Central Bank in the exercise of its functions shall not be subordinated to the Executive directives and would not avail or finance fiscal deficits.

The coordination between the National Executive and the Central Bank must be formalized in an annual agreement of policies, in which the final objectives of growth and its social repercussion must be expressed, as well as the external balance and inflation, regarding the fiscal, exchange and monetary policies. It must also include the levels of intermediate variables and required instruments in order to attain the final objectives. The agreement must be signed by the President of the Central Bank and the Minister of Finance, and must be published once the Budget is approved by the National Assembly. They are responsible that the policy actions to be taken be consistent with its objectives, so the agreement must specify the attained results, and the policies and actions to be achieved.

543. The Constitution also created a Macroeconomic Stabilization Fund in charge of guarantying the stability of the public expenses in all National, States and Munici-

pal levels, regarding the ordinary income fluctuations. The Law on the Macroeconomic Stabilization Fund,[309] has defined the basic principles the Constitution enumerated for its functioning: efficiency, equity and non discrimination between the public entities that contribute to it with resources (Article 321).

CHAPTER 5. CONSTITUTIONAL PROVISIONS ON PUBLIC DOMAIN

544. The 1999 Constitution declares all mining and hydrocarbons deposits, of any nature, including those under the ocean floor in territorial waters, within Venezuela's exclusive economic zone, and on the continental shelf, as "public domain" or public property (Article 12).[310] Consequently, according to the terms of Article 453 of the Civil Code, this property is inalienable and not subject to status of limitation.[311]

545. The same provision of Article 12 of the Constitution sets forth that the nation's sea coasts are within the public domain, meaning those of the nation's shores that touch the ocean, that is the beaches between high and low tides.[312].

546. Article 304 of the Constitution provides, further, that all waters constitute property in the national public domain, irreplaceable for life and development. The Constitution provides that legislation is to be enacted as necessary to guarantee: the protection of national waters, and their productive use and recuperation, while respecting the phases of the hydrological cycle, and criteria pertaining to territorial order.[313]

547. Municipal land (*ejidos)* is considered in the Constitution as inalienable and imprescriptible. The Constitution establishes the presumption that all land without specific owner located in urban areas are considered as such *ejidos* (Article 181), although without prejudice to the legitimate and validly constituted rights of third parties.

CHAPTER 6. THE PROGRESSIVE NATIONALIZATION AND STATE OWNERSHIP OF THE ECONOMY

548. Within the general framework of the economic mixed system established in the Constitution, and due to the importance of oil exploitation, and of oil income in

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309 *Gaceta Oficial* Nº 38.846 del 9-01-2008.

310 See Isabel Boscán de Ruesta, "La propiedad de los yacimientos de los hidrocarburos. Evolución histórica," in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías,* Tomo III, Instituto de Derecho Público, UCV, Civitas Ediciones, Madrid, 2003, pp. 3061-3105.

311 The principle has also been established in the Mining Law (Article 2), *Gaceta Oficial* Nº 5382 de 28-09-99, and in the Organic Law on Gaseous Hydrocarbons (Article 1º), *Gaceta Oficial* Nº 36.793 of 23-9-99). See Armando Rodríguez García, "Comentarios sobre el régimen de los bienes públicos en la Constitución de 1999", in *Revista de Derecho Público,* Nº 84 (octubre-diciembre), Editorial Jurídica Venezolana, Caracas, 2000, pp. 63-68.

312 Costal Zones Law, *Gaceta Oficial* Nº 37.349 of 19-12-2001.

313 Waters Law, *Gaceta Oficial* Nº 38.595 of 02-01-2007. See, Allan R. Brewer-Carías, *Ley de Aguas,* Editorial Jurídica Venezolana, Caracas 2007.

the Venezuelan economy, during almost all the past hundred years the State has been the most powerful component of the economic system. In 1975, the Oil Industry was nationalized (*See Supra 501*).

As aforementioned, this explains why the Constitution is not only manifestly statist in its economic provisions, but also establishes extended State responsibility for the management and provision of health, education, and social security services, as well as that of public utilities including water, electricity, and gas. The State has derived, through the regulation of these tasks, a complete set of powers to plan and control the economy, with wide possibilities of intervention in the private sector in some aspects, missing the necessary equilibrium between the public and private sectors. The only protected or privileged economic activities in the private sector are those that are *not* basic to the generation of wealth and employment in the country, such as agriculture (Article 305); handcraft and craft work (Article 309); small and medium business enterprises (Article 308), and tourism (Article 310). Added to this are the constitutional rules of control and sanctioning, such as those norms governing monopoly and other economic offenses (Articles 113, 114); the declaration of the country's subsoil, sea coasts, and waters to be within the public domain (Articles 112, 304); the State's reservation of rights in the oil industry; the possibility of similar State control in other exploitations, activities, and services of a "strategic nature;" and finally, the constitutional provisions that provide for the planning powers of the State, on the national (Articles 112, 299) and local (Article 178) levels. As a result, the State, is responsible for nearly everything, and can regulate everything, and private initiative and investment seems both marginal and marginalized.

549. The result of the implementation of the constitutional text by an authoritarian government in the area of the economy, from a comprehensive viewpoint, has been the increase of the economic intervention by the State, with for instance the almost complete State ownership of the whole economy, by means of nationalizations and expropriations of industries and private enterprises, in many cases without compensation.

For instance, regarding the private enterprise participation in the exploitation of the Oil industry, after its nationalization in 1975, through the policy known as the "Oil Opening" (Operating Agreements and Association Agreements), such participation was allowed by the 1975 Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons.[314] Nonetheless, in 2006-2007[315] through the Decree Law N°

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314 *Gaceta Oficial Extraordinaria* Nº 1.769 of August 29, 1975.

315 See Allan R. Brewer-carías, "The 'Statization' of the Pre 2001 Primary Hydrocarbons Joint Venbture Exploitations: Their Unilateral termination and the Assets'Confiscation of Some of the Former Private parties" in Oil, Gas & Energy Law Intelligence, www.gasandoil.com/ogel/ ISSN: 1875-418X, Issue Vol 6, Issue 2, (OGEL/TDM Special Issue on Venezuela: The battle of Contract Sanctity vs. Resource Sovereignty, ed. By Elizabeth Eljuri), April 2008; and "La estatización de los convenios de asociación que permitían la participación del capital privado en las actividades primarias de hidrocarburos sucritos antes de 2002, mediante su terminación anticipada y unilateral y la confiscación de los bienes afectos a los mismos", in Víctor Hernández Mendible *et al., Nacionalización, Libertad de Empresa y Asociaciones Mixtas*, Editorial Jurídica Venezolana, Caracas 2008, pp. 123-188.

5.200 on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt and of the Shared-Risk-and-Profit Exploration Agreements" of February 2007,[316] and the Law on the Effects of the Process of Migration to Mixed Companies of the Orinoco Oil Belt Association Agreements and the Shared-Risk-and-Profit Exploration Agreements of September 11, 2007,[317] the private sector participation in the oil Industry was reduced to being minority shareholders on public mixed enterprises controlled by the State, following the provisions of the 2001 Organic Hydrocarbons Law,[318] which was then applied retroactively to the Agreements entered into in the 1990s.'

In addition, all the electricity companies, and the telephone company were assumed by the State, the Steel industry and the cement industry were nationalized,[319] as well as all the assets and services related to the hydrocarbon industry were also reserved to the State.[320]

316 *Gaceta Oficial* Nº 38.632 of February 26, 2007.

317 *Gaceta Oficial* Nº 38.785 of October 8, 2007.

318 *Gaceta Oficial* Nº 37.323 of November 13, 2001. See Isabel Boscán de Ruesta, *La actividad petrolera y la nueva Ley Orgánica de Hidrocarburos*, FUNEDA, Caracas, 2002.

319 *Gaceta Oficial* Nº Nº 38.928 of may 12, 2008; and See in Víctor Hernández Mendible *et al*., *Nacionalización, Libertad de Empresa y Asociaciones Mixtas*, Editorial Jurídica Venezolana, Caracas 2008.

320 *Gaceta Oficial* Nº 39.173 del 7 de mayo de 2009.

Part Eleven. Rule of Law and Judicial Review

550. The formal consolidation in the Constitution of the principles of the rule of law (*Estado de Derecho*), following the general trends of modern constitutionalism, has led to the reinforcement in the Constitution not only of the aforementioned principle of its supremacy, considered as the foundation of the juridical order (Article 7) (*See Supra 77*), but also of various judicial means in order to guaranty such supremacy. In this regard, the 1999 Constitution follows a long tradition on the matter and the general trends already set forth in the previous 1961 Constitution, [321] by establishing a system of judicial review of the constitutionality of legislation; a specific means for the judicial protection of human rights, known as the amparo action or recourse; and a system of judicial review of administrative action.

CHAPTER 1. JUDICIAL REVIEW SYSTEM

551. As aforementioned (*See Supra 55*), Article 334 of the Constitution provides for the diffuse method of judicial review allowing any court to apply the Constitution in any case of incompatibility between its provisions and a statute. In addition to the diffuse method, in Venezuela there also exists the concentrated method of judicial review being attributed to the Supreme Tribunal of Justice, as Constitutional Jurisdiction, exercised by its Constitutional Chamber, which has the exclusive powers to declare the nullity of statutes and other State acts issued in direct and immediate execution of the Constitution, or that have the force of law (statute) (Article 334).

552. These provisions of the Constitution established the general framework of the judicial review of constitutionality system in Venezuela, which was particularly developed since the democratic system was consolidated during the second half of the 20th century. It is important to insist that judicial review is above all an institutional tool essentially linked to democracy, understood as a political system not just reduced to the fact of having elected governments, but where separation and control of power and the respect and enforcement of human rights is possible through an independent and autonomous judiciary. And precisely, it has been because of this process of reinforcement of democracy in Latin American countries that judicial review of the constitutionality of legislation and other governmental actions has become an important tool in order to guarantee the supremacy of the Constitution, the rule of law, and the respect of human rights. It is in this sense that judicial review of the constitutionality

321 See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol VI: *La Justicia Constitucional*, Universidad Católica del Táchira, Editorial Jurídica Venezolana, San Cristóbal-Caracas, 1998; *Estado de Derecho y Control Judicial*, Instituto de Administración Pública, Madrid 1985; *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; *Justicia Constitucional. Procesos y Procedimienos constitucionales*, Ed. Porrúa, México 2006.

of state acts has been considered as the ultimate result of the consolidation of the *rule of law*, when precisely in a democratic system the courts can serve as the ultimate guarantor of the Constitution, effectively controlling the exercise of power by the organs of the state.

On the contrary, as happens in all authoritarian regimes even having elected governments, if such control is not possible, the same power vested, for instance, upon a politically controlled Supreme Court or Constitutional Court, can constitute the most powerful instrument for the consolidation of authoritarianism, the destruction of democracy, and the violation of human rights.[322] With this important warning, the following are the general trends governing the very comprehensive judicial review system established in Venezuela, in many aspects, since the nineteenth century. [323]

§1. A General Overview of the Systems of Judicial Review and the Venezuelan System

553. Judicial review can always be analyzed according to the criteria established a few decades ago by Mauro Cappelletti[324] who, following the trends of the so-called "North American" and "European" systems, distinguished between the "diffuse" (decentralized) and "concentrated" (centralized) methods of judicial review of the constitutionality of legislation. The former is exercised by all the courts of a given country, while the latter is only assigned to a Supreme Court or to a court specially created for that purpose such as a Constitutional Court or Tribunal.

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

323 See Jesús M. Casal H., *Constitución y justicia constitucional: los fundamentos de la justicia constitucional en la nueva Carta Magna*, Universidad Católica Andrés Bello, Caracas, 2000; Jesús M. Casal H., "Hacia el fortalecimiento y racionalización de la justicia constitucional", in *Revista de Derecho Constitucional*, Nº 2 (enero-junio), Editorial Sherwood, Caracas, 2000, pp. 215-242; Antonio Canova González, "La futura justicia constitucional en Venezuela", in *Revista de Derecho Constitucional*, Nº 2 (enero-junio), Editorial Sherwood, Caracas, 2000, pp. 93-181; María A. Bonnemaison, "El control constitucional de los Poderes Públicos", in *Bases y principios del sistema constitucional venezolano* (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001*)*, Volumen II, pp. 233-260; Carla Crazut Jimenez, "Progreso de la protección constitucional en Venezuela", in *Libro Homenaje a Enrique Tejera París, Temas sobre la Constitución de 1999*, Centro de Investigaciones Jurídicas (CEIN), Caracas, 2001, pp. 273- 289; José Vicente Haro G., "La justicia constitucional en Venezuela y la Constitución de 1999," in *Revista de Derecho Constitucional*, Editorial Sherwood, Nº 1, Caracas, sep-dic. 1999, pp. 137-146; Allan R. Brewer-Carías, *El Sistema de Justicia Constitucional en la Constitución de 1999: Comentarios sobre su desarrollo jurisprudencial y su explicación a veces errada, en la Exposición de Motivos*, Editorial Jurídica Venezolana, Caracas, 2000; "La Justicia Constitucional en la Nueva Constitución" in *Revista de Derecho Constitucional*, Nº 1, Septiembre-Diciembre 1999, Editorial Sherwood, Caracas, 1999, pp. 35-44, in *Derecho Procesal Constitucional*, Colegio de Secretarios de la Suprema Corte de Justicia de la Nación, A.C., Editorial Porrúa, México 2001, pp. 931-961, and in *Reflexiones sobre el Constitucionalismo en América*, Editorial Jurídica Venezolana, Caracas, 2001, pp. 255-285.

324 *See* Mauro Cappelletti, *Judicial Review in the Contemporaly World*, Indianapolis, 1971; "El control judicial de la constitucionalidad de las leyes en el derecho comparado," in *Revista de la Facultad de Derecho de Mexico*, Nº 61, Mexico 1966.

554. In the diffuse, or decentralized, method, all the courts are empowered to judge upon the constitutionality of statutes, as is the case in the United States of America, where the "diffuse method" was born. That is why it is also referred as the "American model," initiated with *Marbury v. Madison,* 5 U.S. 137 (1803), later followed in many countries with or without a common law tradition. It is called "diffuse" or decentralized because judicial control is shared by all courts, from the lowest level up to the Supreme Court of the country. In Latin America, the only country that has kept the diffuse method of judicial review as *the only* judicial review method available is Argentina. In other Latin American countries, the diffuse method coexists with the concentrated method (Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Perú and Venezuela).

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

556. It has been this mixture, or parallel functioning, of the diffuse and concentrated methods, which has given rise to what can be considered the "Latin American" model of judicial review. This model can be identified in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Perú and Venezuela. On the one hand, all courts are entitled to decide upon the constitutionality of legislation by autonomously deciding upon a statute's inapplicability in a particular case, with inter partes efects; and on the other hand, the Supreme Court or a Constitutional Court or Tribunal has been empowered to declare the total nullity of statutes contrary to the Constitution.[325] The Venezuelan judicial review system is precisely one of the latter, combining the diffuse and the concentrated methods of judicial review since the nineteenth century[326] that in addition can also be exercised through a variety of other means.

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

326. *See* Allan R. Brewer-Carías, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela,* Bogotá 1995; Manuel Arona Cruz, "El control de la constitucionalidad de los actos jurídicos en Colombia ante el Derecho Comparado," in *Archivo de Derecho Publico y Ciencias de la Administración*, Vol. VII 1984-1985, *Derecho Publico en Venezuela y Colombia,* Instituto de Derecho Publico, UCV, Caracas 1986, pp. 39-114; Antonio Canova González, "Rasgos generales de los modelos de justicia constitucional en derecho comparado: Estados Unidos de América", in *Temas de Derecho Administrativo: Libro Homenaje a Gonzalo Pérez Luciani,* Volumen I. Editorial Torino, Caracas, 2002, pp. 373-411; Antonio Canova González, "Rasgos generales de los modelos de justicia constitucional en Derecho Comparado: (2) Kelsen", in *Revista de Derecho Constitucional,* Nº 6, enero-diciembre-2002, Editorial Sherwood, Caracas, 2003, pp. 65 a 88; Antonio Canova González,

557. According to the express provision of Article 335 of the 1999 Constitution, the Supreme Tribunal and specifically its Constitutional Chamber, has the duty to guarantee the supremacy and effectiveness of constitutional norms and principles, and is the final and authoritative interpreter of the constitutional text. For this reason, it is the Tribunal's duty to oversee the maintenance of uniformity in the Constitution's interpretation and application.

558. On the other hand, it must be pointed out that the constitutional interpretations made by the Constitutional Chamber have binding effects upon all the other Chambers of the Supreme Tribunal of Justice and all other courts of the Republic (Article 334). This is particularly true with respect to the content and scope of constitutional norms and principles. Thus, these constitutional interpretations have the weight and value of precedent, and, as such, are mandatory in the other Chambers of the Supreme Tribunal, as well as in all tribunals or courts in Venezuela.

The constitutional interpretation of the Constitution, of course, is normally established by the Constitutional Chamber when deciding any of the aforementioned actions or petitions for judicial review that the Constitution expressly has enumerated.

559. Based on all the aforementioned constitutional provisions, judicial review of constitutionality in Venezuela can be exercised not only through the diffuse and concentrated methods, but also through a variety of other means. Judicial review may occur through any of the following means: (1) The diffuse method of judicial review of the constitutionality of statutes and other normative acts, exercised by all courts; (2) The concentrated method of judicial review of the constitutionality of certain state acts, exercised by the Constitutional Chamber of the Supreme Tribunal of Justice; (3) The protection of constitutional rights and guarantees through the actions for *amparo*; (4) The concentrated method of judicial review of Executive regulations and administrative actions, exercised by special courts controlling their unconstitutionality and illegality (*contencioso adminsitrativo*); (5) The judicial review powers to control the constitutionality of legislative omissions; (6) The concentrated judicial review power to resolve constitutional conflicts between the State organs; (7) The protection of the Constitution through the abstract recourse for interpretation of the Constitution; and (8) The Constitutional Chamber's power to remove from ordinary courts jurisdiction over particular cases.

§2. THE DIFFUSE METHOD OF JUDICIAL REVIEW

560. Since 1897, the Venezuelan Civil Procedure Code has regulated the diffuse method of judicial review,[327] which is currently set forth in Article 20. This Article prescribes that "In the case in which a law in force, whose application is requested, collides with any constitutional provision, judges shall apply the latter with prefer-

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"Rasgos generales de los modelos de justicia constitucional en Derecho Comparado: (3) Europa Actual", in *Revista de Derecho Constitucional,* Nº 7, enero-junio 2003, Editorial Sherwood, Caracas, 2003, pp. 75 a 114.

327. Expressly established in the Civil Procedure Code of 1897. *See* Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, cambridge 1989, pp. 127 ff.

ence." The principle of the diffuse method of judicial review also has been more recently set forth in Article 19 of the Criminal Procedure Organic Code, as follows: "*Control of the Constitutionality*. The control of the supremacy of the Constitution corresponds to the judges. In case that a statute whose application is requested would collide with it, the courts shall abide [by] the constitutional provision."

561. Article 334 of the 1999 Constitution consolidated the diffuse method of judicial review of the constitutionality of legislation by setting forth that: "In case of incompatibility between this Constitution and a law or other legal provision, constitutional provisions shall be applied, corresponding to all courts in any case whatsoever, even at their initiative, the pertinent decision."

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

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

562. The general judicial procedural system in Venezuela is governed under the "by-instance principle," so that judicial decisions resolving cases on judicial review are subject to ordinary appeal. Therefore, the cases could only reach the Cassation Chambers of the Supreme Tribunal through cassation recourses (Article 312 Civil Procedure Code). Because this situation could lead to possible dispersion of the judicial decision on constitutional matters, the 1999 Constitution specifically set forth a corrective procedure. The Constitution granted the Constitutional Chamber of the Supreme Tribunal of Justice the power to review final judicial decisions issued by the courts of the Republic on *amparo* suits and when deciding judicial review of statutes in the terms established by the respective organic law (Article 336,10).

Regarding this provision, it must be pointed out that it is neither an appeal nor a general second or third procedural instance. Instead, it is an exceptional faculty of the Constitutional Chamber to review, upon its judgment and discretion, through an extraordinary recourse, similar to a writ of certiorari. Such review is exercised against last instance decisions in which constitutional issues are decided by means of judicial review, or in *amparo* suits. It is a reviewing, non-obligatory power that can be exercised optionally. The Constitutional Chamber is empowered to choose the cases in which it considers convenient to decide due to the constitutional importance of the matter. The Chamber also has the power to give a general binding effect to its interpretation of the Constitution, similar to the effect of *stare decisis* (Article 335).

563. Nonetheless, the Constitutional Chamber has distorted its review power regarding judicial decisions, extending it far beyond the precise cases of judicial review and *amparo* established in the Constitution. The Chamber has extended its review power over any other judicial decision issued in any matter when it considers it con-

trary to the Constitution, a power that the Chamber has proceeded to exercise without any constitutional authorization, even *ex officio* and regarding the Constitutional Chamber's interpretation of the Constitution, or in cases in which it has considered that the decision is affected by a grotesque error regarding constitutional interpretation.[328]

§3. THE CONCENTRATED METHOD OF JUDICIAL REVIEW: THE POPULAR ACTION

564. The second traditional method of judicial review in Venezuela is the judicial power to annul unconstitutional statutes and other state acts of similar rank, which has been granted exclusively to the Supreme Court of the country since 1858. According to the 1999 Constitution, this power is now attributed to one of the Chambers of the Supreme Tribunal of Justice -the Constitutional Chamber- as Constitutional Jurisdiction (Articles 266,1; 334 and 336).

For the purpose of implementing the concentrated method of judicial review, the Constitution has provided for different judicial means and, in particular, for the *a posteriori* popular action of unconstitutionality that can be filed directly against statutes before the Constitutional Chamber by any citizen. In addition to this main judicial review action, the Constitution also provides for various *a apriori* judicial review means. Consequently, this method of judicial review can be exercised in three ways: (1) when the Chamber is requested through a popular action to decide upon the unconstitutionality of statutes already in force, (2) in some cases, in an obligatory way, or (3) when deciding on the matter in a preventive way before the publication of the challenged statute. In all of these cases, the Constitutional Chamber has the power to annul the unconstitutional challenged statutes with *erga omnes* effects.

565. The second traditional method of exercising judicial review in Venezuela has been the judicial power to annul statutes and other state acts of similar rank issued in direct and immediate execution of the Constitution. This power is granted solely to the Constitutional Chamber of the Supreme Court of Justice, as the Constitutional Jurisdiction (Articles 266,1; 334 and 336).

According to Article 334 of the Constitution of 1999, following a tradition that began in 1858, the court retains competence "to declare the nullity of the statutes and other acts of the organs exercising public power issued in direct and immediate execution of the Constitution or being ranked equal to a law, [which] corresponds exclusively to the Constitutional Chamber of the Supreme Court of Justice." This judicial review power to annul state acts on the grounds of their unconstitutionality refers to: (1) National laws or statutes and other acts which have the force of laws; (2) State constitutions and statutes, municipal ordinances, and other acts of the legislative bodies issued in direct and immediate execution of the Constitution; (3) State acts with rank equal to statutes issued by the National Executive; and (4) State acts issued in direct and immediate execution of the Constitution by any State organ exercising

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328 See Allan R. Brewer-carías, *Justicia Constitucional. Procesos y Procedimienos constitucionales*, Ed. Porrúa, México 2006, pp. 389 ff.

the public power. The judicial decisions declaring the nullity of statutes and the other State acts have *erga omnes*, general effects, and in principle *ex nunc* or *pro futuro* effects, unless the Constitutional Chamber disposes in an express way its retroactive effects.

566. Since the 1858 Constitution, constitutional jurisdiction was assigned to the Supreme Court of Justice in Plenary Session. Therefore, one of the novelties of the 1999 Constitution was to assign constitutional jurisdiction to just one of the Chambers of the Supreme Court of Justice, namely the Constitutional Chamber (Articles 262; 266,1). This chamber, like all of the other chambers, has the mission of "Guaranteeing the supremacy and effectiveness of the constitutional rules and principles: it shall be the last and maximum interpreter of the Constitution and guardian of its standard interpretation and application" (Article 335). The specificity of the Constitutional Chamber in these cases, according to Article 335 of the Constitution, is that, "The interpretations made by the Constitutional Chamber on the content or the scope of the constitutional rules are binding [on] the other Chambers of the Supreme Court and other courts of the Republic."

567. The most important feature of the concentrated method of judicial review under the Venezuelan system is that the standing necessary to raise an action resides in all individuals, being an *actio popularis*.[329] Consequently, according to Article 5 of the Organic Law of the Supreme Tribunal of Justice, any individual or corporation with legal capacity is entitled to file a nullification action against the abovementioned state acts on grounds of the act's unconstitutionality. According to the doctrine of the Supreme Tribunal, the objective of the popular action is that anybody with legal capacity has the necessary standing to sue.

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

§4. OTHER CONCENTRATED JUDICIAL REVIEW MEANS

I. The Obligatory Judicial Review of "State Of Exception" Decrees

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

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329. *See* Allan R. Brewer-Carías, *La Justicia Constitucional*, Ed. Porrúa, México 2006.

This judicial power of obligatory judicial review is also a novelty introduced by the 1999 Constitution. This model followed the precedent of Colombia (Article 241,7) but added the Constitutional Chamber's power to exercise judicial review *ex officio*.

569. By exercising this control, the Constitutional Chamber can decide not only the constitutionality of the decrees declaring "states of exception," but also the constitutionality of its content. This control is exercised pursuant to the provisions of Article 337 and the Constitution. In particular, in case of restriction of constitutional guaranties, the Chamber must verify that the decree effectively contains a *regulation* regarding "the exercise of the right whose guarantee is restricted" (Article 339).

II. The Preventive Judicial Review

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

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

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

A. Preventive Judicial Review of International Treaties

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

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

It is important to point out that this provision originated in the European constitutional systems, like those existing in France and Spain, and subsequently adopted in Colombia. This system is now incorporated in the Venezuelan system of judicial review, and permits the preventive judicial review of international treaties subscribed by the Republic, thereby avoiding the possibility of subsequent challenge of the statutes approving the treaty.

In this case, if the treaty turns out not to be in conformity with the Constitution, it cannot be ratified, and an initiative for constitutional reform to adapt the Constitution to the treaty may result. On the other hand, if the Constitutional Chamber decides that

the international treaty conforms to the Constitution, then a popular action of unconstitutionality against the approving statute could not subsequently be raised.

B. The Preventive Judicial Review of the Organic Laws

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

Article 203 of the Constitution defines the organic laws in five senses (*See Supra 93*): (1) those the named as such in the Constitution; (2) the organic laws issued in order to organize public branches of government (Public Powers); (3) those intended to "develop the constitutional rights," which implies that all laws issued to develop the content of Articles 19 to 129 shall be Organic Laws; (4) those organic laws issued to "frame other laws;" and (5) those Organic Laws named "organic" by the National Assembly, when they are admitted by 2/3 vote of the present members before initiating the discussion.

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

C. Judicial Review of Statutes Sanctioned Before their Promulgation

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

III. Judicial Review of Legislative Omissions

574. The fifth judicial review method established in the 1999 Constitution refers to legislative omissions, empowering the Constitutional Chamber to review the unconstitutional omissions of the legislative organ.[330] This is another new institution in matters of judicial review established by the 1999 Constitution. In Article 336, the Constitution grants the Constitutional Chamber faculty:

To declare the unconstitutionality of municipal, state or national legislative organ omissions, when they failed to issue indispensable rules or measures to guarantee the

330. This institution has its origins in the Portuguese system. *See* Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge Univ. Press, Cambridge 1989, p. 269.

enforcement of the Constitution, or when they issued them in an incomplete way; and to establish the terms, and if necessary, the guidelines for their correction.

This provision has given extended judicial power to the Constitutional Chamber, which surpasses the trends of the initial Portuguese antecedent on the matter, where only the President of the Republic, the Ombudsman or the Presidents to the Autonomous Regions had standing to require such decisions. On the contrary, the Venezuelan Constitution of 1999 does not establish any condition whatsoever for standing; whereby regarding normative omissions,[331] standing has been treated similarly as in *popular actions*.

575. In many cases, the Chamber has been asked to rule on omissions of the National Assembly in sanctioning statutes, like the Organic Law on Municipalities which, according to the Transitory dispositions of the 1999 Constitution, was due to be sanctioned within two years following its approval. Even though the Chamber issued two decisions in the case, the National Assembly failed to sanction the statute until 2005.[332] In these cases, fortunately, the Chamber has not itself decided (in this case to legislate) in place of the legislative body, as it has done regarding the election of the National Electoral Council. There, due to the failure of the National Assembly to elect those members with the needed two-thirds majority vote, the Constitutional Chamber, which has been completely controlled by the Executive, directly appointed them in violation of the Constitution. Through that decision, the Constitutional Chamber guaranteed the complete control of the Electoral body by the Executive.[333]

IV. Judicial Review of the Constitutional Controversies

576. The sixth judicial review method refers to the power attributed to the Constitutional Chamber of the Supreme Tribunal to "decide upon constitutional controversies aroused between any organ of the branches of government (public power)" (Article 336)

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

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331. It has been called by the Constitutional Chamber: "legislative silence and the legislative abnormal functioning," decision N° 1819 of Aug. 8, 2000, of the Political-Administrative Chamber, case: *Rene Molina vs. Comisión Legislativa Nacional*.

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

333. *See* decisions Nº 2073 of Aug. 4, 2003 (Caso: *Hermánn Escarrá Malaver y oros*) and Nº 2341 of August 25, 2003 (Caso: *Hermánn Escarrá M. y otros*) in Allan R. Brewer-Carías, in "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004," in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero-abril 2005 pp. 11-73.

577. The "administrative" controversies that can arise between the Republic, the states, municipalities or other public entities are to be decided by the Political-Administrative Chamber of the Supreme Tribunal (Article 266,4) as an Administrative Jurisdiction.

As the Supreme Court of Justice specified, in order to identify the constitutional controversy, it is required "that the parties of the controversy are those who have been expressly assigned faculties for those actions or provisions in the constitutional text itself, that is, the supreme state institutions, whose organic regulation is set forth in the Constitution, different from others, whose concrete institutional frame is established by the ordinary legislator".[334]

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

V. Recourse of Constitutional Interpretation

578. Finally, regarding the jurisdiction of the Constitutional Chamber, mention must be made of the faculty to decide abstract recourses of interpretation of the Constitution. This is a judicial means that the Constitutional Chamber has created from the interpretation of Article 335 of the Constitution, which grants the Supreme Tribunal the character of "maximum and final interpreter of the Constitution," in order for the Citizenship to seek from the Constitutional Chamber an abstract interpretation of the Constitution without referring to any particular case or controversy.[335]

In effect, before the 1999 Constitution was sanctioned, the only recourse of interpretation existing in the Venezuelan legal order was the recourse of interpretation of statutes in cases expressly provided for them, formerly established in 42,24 of the Organic Law of the Supreme Court of Justice, and exclusively attributed to the Politico Administrative Chamber of such former Supreme Court of Justice.

It was according to this previous regulation that the 1999 Constitution also attributed to the Supreme Tribunal the same power to decide the recourses of interpretation regarding the content and scope of statutes (Article 266,6) but attributing it, not only to the Politico Administrative Chamber of the new Supreme Tribunal, but to all its Chambers according to their respective competencies (Article 266,6). This attribution was later repeated in the 2004 Organic Law of the Supreme Tribunal of Justice (Article 5, paragraph 1, 52).

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

335 See Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación", in *Revista de Derecho Público*, No 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7-27; "Le recours d'interprétation abstrait de la Constitution au Vénézuéla", in *Le renouveau du droit constitutionnel, Mélanges en l'honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70.

579. In the 1999 Constitution, therefore, no recourse for abstract interpretation of the Constitution was established to be filed before the Supreme Tribunal of Justice. Nonetheless, in the absence of any constitutional provision, the Constitutional Chamber of the Supreme Tribunal, interpreting its character of "maxim and last interpreter of the Constitution" (Article 335), created an autonomous recourse to seek for the interpretation of the Constitution in an abstract way, founded on Article 26 of the Constitution, which established the right to access justice, from which it was deduced that although said action was not set forth in any statute, it was not forbidden, either. Therefore, it was decided that "Citizens do not require statutes establishing the recourse for constitutional interpretation, in particular, to raise it."[336] Based on such preposition, the Chamber considered that no constitutional or legal provision was necessary to allow the development of such recourse.[337] This power of the Constitutional Chamber of the Supreme Tribunal to decide recourses of abstract interpretation of the Constitution, even though created by the Chamber, was not incorporated in the 2004 Organic Law of the Supreme Tribunal of Justice. Nonetheless, its main rules have been developed by the Constitutional Chamber in subsequent decisions on the matter, as a recourse of the same nature to the one provided for the interpretation of statutes, that is, as having the purpose of obtaining a declarative ruling of mere certainty on the scope and content of constitutional norms.

580. Regarding the standing to file such recourses on constitutional interpretation, the Chamber has only required for the petitioner to invoke an actual, legitimate and juridical interest based on a particular and specific situation in which he stand, which necessarily requires the interpretation of a constitutional applicable provision, in order to put an end to the uncertainty that impedes the development and effects of such juridical situation. In the petition, the plaintiff must always argue on "the obscurity, the ambiguity or contradiction between constitutional provisions" justifying the filing of the recourse. The petition, if applicable, must also specify "the nature and scope of the applicable principles," or "the contradictory or ambiguous situations aroused between the Constitution and the rules of its transitory regime."[338] The interpretation of the Constitution made by the Constitutional Chamber in these cases has binding effects.[339]

581. Even though this recourse for constitutional interpretation must result in the opening of a constitutional process in order to confront the different criteria on the interpretation of a constitutional provision, and thus the need to a public call for any interested party to participate in the process, the Chamber denied such contradictory character of the process, arguing that the conditions established for the standing are only to justify the filing of the recourse and to avoid the use of the recourse only as a

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

337 See Decision Nº 1077 of the Constitutional Chamber of Septemmber 22, 2000, Case: *Servio Tulio León Briceño,* in *Revista de Derecho Público,* Nº 83, Caracas, 2000, pp. 247 y ss.

338. *Idem.*

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

mean to seek advisory opinions from the Chamber. Nonetheless, the Chamber has the discretion to call to the process all those that could have something to say on the matter, according to their right to participate, extended to the judicial activities, due to the binding and *erga omnes* effects of the decision.[340] In addition, the Constitutional Chamber decision on these matters of deciding abstract recourses of constitutional interpretation, according to Article 335 of the Constitution, have the character of a "true *jurisdatio*, providing that it declares *erga omnes* and *pro futuro* the content and scope of the constitutional principles and norms whose constitutional interpretation is requested by means of the corresponding extraordinary action." The Chamber added that "the general norm produced by the abstract interpretation has *erga omnes* effects, and is, as a true *jurisdatio*, a quasi authentic or para constituent, that declares the constitutional content declared in the fundamental text"[341].

This extraordinary interpretive power, although theoretically an excellent judicial means for the interpretation of the Constitution, unfortunately has been extensively abused by the Constitutional Chamber to distort important constitutional provisions, to interpret them in a way contrary to the text, or to justify constitutional solutions according to the will of the Executive. This was the case, for instance, with the various Constitutional Chamber decisions regarding the consultative and repeal referendums between 2002 and 2004, where the Chamber confiscated and distorted the peoples' constitutional right to political participation.[342]

VI. The Constitutional Chamber's Power to assume any cause from Lower Courts

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

This extraordinary judicial power was initially established in the 1976 Organic Law of the Supreme Court of Justice as a competence attributed only to the Politico-Administrative Chamber of the Supreme Court, which the Chamber used in a self-restricted way.[343] However, the Constitutional Chamber has now assumed for itself

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340 Decision Nº 2651 of October, 2003 (Caso: *Ricardo Delgado (Interpretación artículo 174 de la Constitución)*

341 Decision Nº 1.309 of June 19, 2001 (case: *Hermann Escarrá*) ratified in decision N° 1684 of November 4, 2008 (Caso: *Carlos Eduardo Giménez Colmenárez*, Expediente Nº 08-1016).

342. *See* decisions: Nº 1139 of June 5, 2002 (Caso: *Sergio Omar Calderón Duque y William Dávila Barrios*); Nº 137 of Feb. 13, 2003 (Caso: *Freddy Lepage y otros*); Nº 2750 of Oct. 21, 2003 (Caso: *Carlos E. Herrera Mendoza*); Nº 2432 of Aug. 29, 2003 (Caso: *Luis Franceschi y otros*); and Nº 2404 of Aug. 28, 2003 (Caso: *Exssel Alí Betancourt Orozco, Interpretación del artículo 72 de la Constitución*), in Allan R. Brewer-Carías, *La Sala Constitucional versus el Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Ares, Caracas 2004.

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

the *avocamiento* power in matters of *amparo* cases,[344] and eventually annulled the former Organic Law provision.[345]

In 2004, the new Organic Law of the Supreme Tribunal granted to all the Chambers of the Tribunal a general power to remove cases from the jurisdiction of lower courts, *ex officio* or through a party petition, and when convenient, to decide the cases (Arts. 5,1,48; 18,11).

583. This power has been highly criticized as a violation of due process rights, and particularly, the right to a trial on a by-instance basis by the courts. It has allowed the Constitutional Chamber to intervene in any kind of process, including cases being tried by the other Chambers of the Supreme Tribunal, with very negative effects. For instance, this Constitutional Chamber power was used to annul a decision issued by the Electoral Chamber of the Supreme Tribunal,[346] which protected the Citizens' rights to political participation. There, the Electoral Chamber suspended the effects of a National Electoral Council decision,[347] objecting the presidential repeal referendum petition of 2004.

In this way,[348] the Constitutional Chamber interrupted the process which was normally developing before the Electoral Chamber of the Supreme Tribunal, took the case away from that Chamber, and annulled its ruling. Instead, the Constitutional Chamber decided the case according to the will of the Executive, restricting the peoples' right to participate through petitioning referendums.[349]

§5. SOME GENERAL CONCLUSIONS

584. As abovementioned, judicial review has played a very important role in the contemporary world and can be considered as the ultimate result of the consolidation of the *rule of law*. Judicial review can contribute to the consolidation of democracy, which ensures control over the exercise of state powers and guarantees the respect of human rights. When exercised for those purposes, judicial review powers are the

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

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

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

347. *See* Resolution Nº 040302-131 of Mar. 2, 2004.

348. *See* Decision Nº 566 of April 12, 2004.

349. *See* Allan R. Brewer-Carías, *La Sala Constitucional versus el Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Ares, Caracas 2004; and "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004," in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero-abril 2005 pp. 11-73.

most important instruments for a Supreme Court or a Constitutional Tribunal to guarantee the supremacy of the Constitution.

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

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

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

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

That is why, unfortunately, the politically controlled Constitutional Chamber of the Supreme Tribunal of Justice in Venezuela, instead of being the guarantor of constitutionalism, of democracy, and of the *rule of law*, has instead been a façade of "constitutionality" or "legality," camouflaging the authoritarian regime we now have installed in the country.

CHAPTER 2. JUDICIAL PROTECTION OF CONSTITUTIONAL RIGHTS: THE AMPARO PROCEEDING

586. Constitutional declarations of rights, in the Constitutions or in international treaties and covenants, would be of no use at all if those rights were not supported by a set of constitutional guaranties for their protection, and particularly, by the judicial guaranty, that is to say, the set of judicial means established in benefit of persons in order to assure not only the supremacy of the Constitution but the effective exercise and protection of the rights therein contained.

For that purpose, an effective Judiciary has to be built upon the principle of separation of powers. So, on the contrary, if the Government controls the courts and judges, no effective guaranty can exist regarding constitutional rights, particularly when the offending party is a governmental agency. In this case, and in spite of all constitu-

tional declarations, it is impossible to speak of rule of law, as happens in many Latin American countries, and as has been the case of Venezuela during the past decade (1999-2009).

587. Nonetheless, regarding the general provisions of the Constitution and the means for protection of constitutional rights and freedoms, their judicial protection and guaranty in general terms can be achieved in two ways: First, by means of the general established ordinary or extraordinary suits, actions, recourses or writs regulated in procedural law; and second, in addition to those general means, by means of specific judicial suits, actions or recourses of *amparo* seeking remedies specifically and particularly established in order to protect and enforce constitutional rights and freedoms and to prevent and redress wrongs regarding those rights [350].

That is, the judicial guaranty of constitutional rights can be achieved through the general procedural regulations that are established in order to enforce any kind of personal or proprietary rights and interest, or it can also be achieved by means of a specific judicial proceeding established only and particularly for the protection of the rights declared in the Constitution. In this regard, it can be considered as a general trend in Latin America to establish these specific means of amparo,[351] mainly because the traditional insufficiencies of the general judicial means for granting effective protection to constitutional rights.

588. The habeas corpus recourse is also considered as an amparo proceeding regarding the protection of personal freedom; and in addition, the Constitution has set forth for the habeas data recourse in order to guaranty the right to have access to the information and data concerning the claimant contained in official or private registries, as well as to know about the use that has been made of such information and about its purpose, and to petition the competent court for the updating, rectification or destruction of erroneous records and those that unlawfully affect the petitioner's right (Article 28).

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350 On the action of amparo in Venezuela, in general, see Gustavo Briceño V., *Comentarios a la Ley de Amparo*, Editorial Kinesis, Caracas, 1991; Rafael J. Chavero Gazdik, *El nuevo régimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas, 2001; Gustavo José Linares Benzo, *El Proceso de Amparo*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Caracas, 1999; Hildegard Rondón De Sansó, *Amparo Constitucional*, Caracas, 1988; Hildegard Rondón De Sansó, *La acción de amparo contra los poderes públicos*, Editorial Arte, Caracas, 1994; Carlos M. Ayala Corao and Rafael J. Chavero Gazidk, "El amparo constitucional en Venezuela" in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coordinadores), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2006, pp. 649-692; Hildegard Rondón de Sansó, "La acción de amparo constitucional a raíz de la vigencia de la Constitución de 1999", in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la UCV,* Nº 119, Caracas, 2000, pp. 147-172; Richard D. Henríquez Larrazábal, "El problema de la procedencia del amparo constitucional en el Derecho venezolano", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de Noviembre de 2001),* Volumen II, pp. 403-475; Víctor R. Hernández-Mendible, "El amparo constitucional desde la perspectiva cautelar", in *El Derecho Público a comienzos del siglo XXI. Estudios homenaje al Profesor Allan R. Brewer-Carías*, Tomo I, *op. cit.*, pp. 1219-1301.

351 See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. A Comparative Study of Amparo Proceedings*, Cambridge University Press, New York 2008.

§1. THE RIGHT OF AMPARO (TO BE PROTECTED)

589. The action or suit for protection, or amparo, as a specific judicial means for the protection of all constitutional rights and guarantees has been constitutionalized in Venezuela since the 1961 Constitution. This provision implies the obligation of all the courts to protect persons in the exercise of their constitutional rights and guarantees. In the *amparo* suit decisions, judicial review of the constitutionality of legislation can also be exercised by the courts as part of their rulings.

Article 27 of the Constitution of 1999 establishes:

> Every individual is entitled to be protected by the courts in the enjoyment and exercise of rights, even those which derive from the nature of man that are not expressly set forth in this Constitution or in the international treaties on human rights.
>
> The *amparo* suit is governed by an informal, oral proceeding that shall be public, brief and free of charge. The judge is entitled to immediately restore the affected legal situation, and the court shall issue the decision with preference to all other matters.

As per the Organic Law on A*mparo* of Constitutional Rights and Guarantees of 1988,[352] in principle, all courts of first instance are competent to decide *amparo* suits.

590. Standing to file the action of *amparo* corresponds to every individual whose constitutional rights and guarantees are affected (whether individual, political, social, cultural, educative, economic, Indigenous peoples' or environmental rights), even those inherent rights that are not expressly provided for in the Constitution or in the international treaties on human rights that are ratified by the Republic. In Venezuela, such treaties rank on the same level as the Constitution, and they even prevail in the internal order as long as they establish more favorable rules on the enjoyment and exercise of rights than those established under the Constitution and other laws (Article 23) (*See Supra 367*).

591. In Venezuela, the action of *amparo* may be instituted against state organs, against corporations and even against individuals whose actions or omissions may infringe or threaten constitutional rights and guarantees. In all cases of *amparo* proceedings, if the alleged violation of the constitutional right involves a statutory provision, in his decision, the *amparo* judge can decide that the statute is unconstitutional and not apply it to the case.

592. Generally, the individual directly affected by the infringement of the constitutional rights and guarantees has standing in an action for *amparo*. But by virtue of the constitutional acknowledgement of the legal protection of diffuse or collective interests, the Constitutional Chamber of the Supreme Court has admitted the possibility of

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352. *See Gaceta Oficial* Nº33.891 dated Jan. 22, 1988. See Allan R. Brewer-Carías and Carlos M. Ayala Corao, *Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales*, Caracas, 1988. See also Allan R. Brewer-Carías, *El derecho y la acción de amparo*, Tomo V, *Instituciones Políticas y Constitucionales*, Editorial Jurídica venezolana, Caracas, 1998, pp. 163 ff.

exercising the action of *amparo* to enforce collective and diffuse rights. For instance, those rights related to an acceptable quality of life and also those pertaining to the political rights of voters, admitting precautionary measures with *erga omnes* effects.[353]

In such cases the Constitutional Chamber has admitted that:

> any individual with legal capacity to bring suit, who is going to prevent damage to the population or parts of it to which he belongs, is entitled to bring the [*amparo*] suit grounded in diffuse or collective interests . . . . This interpretation, based on Article 26, extends standing to companies, corporations, foundations, chambers, unions and other collective entities, whose object be the defense of the society, as long as they act within the boundaries of their corporate object, aimed at protecting the interests of their members regarding their object.[354]

On the other hand, regarding the general defense and protection of diffuse and collective interests, the Constitutional Chamber has also admitted the standing of the Defender of the People.[355]

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

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353. Decision of the Constitutional Chamber Nº 483 of May 29, 2000 (Case: *"Queremos Elegir" y otros*), *Revista de Derecho Público*, Nº 82, Editorial Jurídica Venezolana, caracas 2000, pp 489-491. In the same sense, decision of the same Chamber Nº 714 of July 13, 2000 (Case: *APRUM*), in *Revista de Derecho Público*, Nº 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 319 ff.

354. *See* decision of the Constitutional Chamber N° 487 of April 6, 2001, Case: *Glenda López,*in *Revista de Derecho Público*, Nº 85-88, Editorial Jurídica Venezolana, Caracas 2001, pp. 453 ff. In these cases (are there more tan one case in this decisión?) If so 'these cases' is fine. If not, should just be 'this case.', as stated by the Constitutional Chamber in a decision dated February 17, 2000 (Nº 1.048, Case: *William O. Ojeda O. vs. Consejo Nacional Electoral*), in order to enforce diffuse or collective rights or interests, it is necessary that the following elements be combined: 1. That the plaintiff sues based not only on his personal right or interest, but also on a common or collective right or interest; 2. That the reason for the claim filed on the action of amparo, be the general damage to the quality of life of all the inhabitants of the country or parts of it, since the legal situation of all the members of the society or its groups has been damaged when their common quality of life was unimproved; 3. That the damaged goods are not susceptible of exclusive appropriation by one subject (such as the plaintiff); 4. That the claim concerns an indivisible right or interest that involves the entire population of the country or a group of it [and] that a necessity of satisfying social or collective interests exists, before the individual ones." *See* in *Revista de Derecho Público*, Nº 83, Editorial Jurídica Venezolana, Caracas 2000, pp. 375 ff.

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

§2. THE VARIOUS JUDICIAL MEANS FOR AMPARO

594. This *right to amparo* can be exercised through an "autonomous action for amparo"[356] that in principle is filed before the first instance court; or by means of pre existing ordinary or extraordinary legal actions or recourses to which an amparo petition is joined, being the judges empowered to immediately re-establish the infringed legal situation. In all such cases, it is not that the ordinary means substitute the constitutional right of protection (or diminish it), but that they can serve as the judicial mean for protection since the judge is empowered to protect fundamental rights and immediately re-establish the infringed legal situation.

This last possibility does not presuppose in Venezuela that for the filing of an autonomous amparo action all other pre-existing legal judicial or administrative means have to be exhausted, as is the case for instance, of the recourse for *amparo* or the "constitutional complaint" developed in Europe, particularly in Germany and in Spain.

595. This right for amparo has been regulated in the 1988 Organic Law of Amparo,[357] expressly providing for its exercise, as aforementioned, not only by means of an autonomous action for amparo, but also through other pre existing actions or recourses already established in the legal system. This main characteristic of the Venezuelan amparo was summarized in a decision by the former Supreme Court of July 7, 1991 (*Case Tarjetas Banvenez*), as follows:

> "The Amparo Law sets forth two adjective mechanisms: the (autonomous) action for amparo and the joint filing of such action with other actions or recourses, which differs in their nature and legal consequences. Regarding the latter, that is to say, the filing of such action of amparo jointly with other actions or recourses, the Amparo Law distinguishes three mechanism: a) the action of amparo filed jointly with the popular action of unconstitutionality against statutes and State acts of the same rank and value (Article 3); b) The action of amparo filed jointly with the judicial review of administrative actions recourses against administrative acts or against omissions from Public Administration (Article 5); and c) the amparo action filed jointly with another ordinary judicial actions (Article 6,5).[358]

The same Supreme Court also ruled that in these latter cases, the action for amparo is not an autonomous action, "but a subordinate one, ancillary to the action or recourse to which it has been joined, thus subject to its final decision. Being joint actions, the case must be heard by the competent court regarding the principal one."[359]

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356 See Allan R. Brewer-Carías, "El derecho de amparo y la acción de amparo", *Revista de Derecho Público*, N° 22, Editorial Jurídica Venezolana, Caracas, 1985, pp. 51 ff.

357 See *Gaceta Oficial* n° 33.891 of January 22, 1988..

358 See the text in *Revista de Derecho Público*, Nº 47, EJV, Caracas, 1991, pp. 169-174.

359 See in *Revista de Derecho Público*, Nº 50, EJV, Caracas, 1992, pp. 183-184.

596. Regarding the first mean for protection, that is, the autonomous action for amparo, in principle it can be brought before the first instance courts, and has a re-establishing nature in order to return things to the situation they had when the right was violated and to definitively make the offending act or fact disappear. For such purposes the plaintiff must invoke and demonstrate that it is a matter of flagrant, vulgar, direct and immediate constitutional harm, and the courts must decide based on the violation of the Constitution and not only on the violation of statutes, because on the contrary, it will not be a constitutional action for amparo but rather another type of recourse, for instance, the judicial review action against administrative acts whose annulatory effects do not correspond with the restitutory effects of the amparo..

597. Regarding the second mean for protection, the right to amparo can also be enforced by filing an amparo petition conjunctly with other preexisting actions, recourses and proceedings, for which the Amparo Law provides the following possibilities:

First, according to Article 3 of the Amparo Law, it is possible to file an amparo petition against statutes, bringing the petition together or jointly with the popular action of unconstitutionality of statutes exercised before the Constitutional Chamber of the Supreme Tribunal of Justice. In these cases, when the popular action is founded on the violation of a constitutional right or guaranty by the statute, the Organic Law authorizes the Supreme Tribunal to suspend the effects of the disputed statute regarding the specific case and in some cases with general effects, pending the issue of the requested decision on the nullity of the statute. Since the amparo petition is subordinate to the nullity action against statutes, the amparo decision in the proceeding has a preliminary character of suspending the effects of the challenged statute pending the Court's decision on the merits of the nullity of the statute.

598. Second, according to Article 5 of the Amparo Law, as already mentioned, it expressly establishes that the petition for amparo against administrative acts and against Public Administration omissions may also be brought before the corresponding courts of the Administrative Jurisdiction (*Jurisdicción contencioso-administrativa*) jointly with the judicial review of administrative actions' recourses (*See Infra 602*).

In such cases, when the recourse is founded in the violation of a constitutional right by the challenged administrative act, the general admissibility conditions of the *contencioso administrativo* nullity recourse have been made more flexible, in particular referring to the need to previously exhaust the exiting administrative procedures, and to the term for the filing of the recourse; conditions that have been eliminated when the petition for amparo is filed jointly with the nullity recourse. In such cases, in addition, the courts are allowed to adopt immediate steps for the reduction of procedure terms, and also have the power to suspend the effects of the challenged administrative acts while the nullity action is decided (Articles 5, and 6,5). Also in these cases, the amparo protection is reduced to the suspension of the effects of the challenged administrative act pending the court's decision on the nullity of the challenged act.

599. Third and finally, according to Article 6,6 of the same Amparo Law, it is implicitly recognized that the claim for amparo may also be brought before the courts

jointly with any other "ordinary judicial procedures" or with the "pre-existing judicial means," through which the "violation or threat of violation of a constitutional right or guaranty may be alleged". In these cases, for instance, the amparo petition can be filed jointly with the recourse of cassation when the claim against the challenged judicial decision is based on violations of a constitutional right or guaranty. In such cases, the Cassation Chambers of the Supreme Tribunal shall follow the procedure and terms established in the Organic Law of Amparo (Article 6,5) and the recourse will anyway have the effect of suspending the challenged decision.

All these cases of amparo petitions in Venezuela, do not substitute the ordinary or extraordinary judicial means allowing the amparo claim to be filed jointly with those other judicial means.

§3. THE UNIVERSAL CHARACTER OF THE AMPARO PROCEEDING

600. From all these regulations, the Venezuelan right for amparo has certain peculiarities that distinguish it from the other similar institutions for the protection of the constitutional rights and guaranties established in Latin America. Beside the adjective consequences of the amparo being a constitutional right, it can be characterized by the following trends:

First, the right of amparo can be exercised in Venezuela for the guaranty of *all* constitutional rights, not only of civil rights, freedoms or individual rights. Consequently, the social, economic, cultural, environmental, political and indigenous peoples rights declared in the Constitution and in international treaties are also justiciables and protected by means of amparo. The *habeas corpus action* is an aspect of the right to constitutional protection, or one of the expressions of the *amparo*.

Second, the right to amparo seeks to assure protection of constitutional rights and guaranties against *any disturbance* in their enjoyment and exercise, whether originated by *public* authorities or by *private* individuals, without distinction. And in the case of disturbance by public authorities, the amparo is admissible in Venezuela against statutes, and also against legislative, administrative and judicial acts, as well as against material or factual courses of action of Public Administration or public officials.

Third, the judicial adjudication on amparo matters as a consequence of the exercise of this right to amparo, whether through the pre-existing actions or recourses or by means of the autonomous action for amparo, is not limited to be of a precautionary or preliminary nature, but is conceived to re-establish the infringed legal situation by deciding on the merits, that is, the legality and legitimacy of the alleged disturbance of the constitutional right or guaranty.

Fourth, since the Venezuelan system of judicial review is a mixed one (*See Supra 151*), judicial review of legislation can also be exercised by the courts when deciding action for amparo. This can happen, for instance, when the alleged violation of the right is based on a statute deemed unconstitutional. In such cases, if the protection requested is granted by the courts, it must previously declare the statute inapplicable on the grounds of it being unconstitutional. Therefore, in such cases, judicial review

of the constitutionality of legislation (diffuse method) can also be exercised when an action for amparo of fundamental rights is filed.

601. Finally, it must also be mentioned that in the Venezuelan systems of judicial review and of amparo, the 1999 Constitution introduced an extraordinary means of review recourse which allows the Constitutional Chamber of the Supreme Court to issue final judgments in all cases of constitutional importance decided by lower courts. This extraordinary review recourse can be filed, in effect, against judicial final decisions issued in amparo suits and also, against any judicial decision issued when the diffuse judicial review method is exercised resolving the inapplicability of statutes because they are considered unconstitutional (Article 336,10).

The essential trend of this attribution of the Constitutional Chamber is its discretionary character that allows it to choose the cases to be reviewed. As the same Constitutional Chamber of the Supreme Tribunal pointed out in its decision Nº 727 of April 8th, 2003, "in the cases of the decisions subject to revision, the Constitution does not provide for the creation of a third instance. What has set forth the constitutional provision is an exceptional and discretional power of the Constitutional Chamber that as such, must be exercised with maxim prudence regarding the admission of recourses for reviewing final judicial decisions"[360].

CHAPTER 3. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION JURISDICTION (ADMINISTRATIVE CONTENTIOUS JURISDICTION)

602. The most important consequence of the rule of law and of the principle of legality applied to Public Administration is the provision in the same Constitution of the existence of the Administrative Contentious Jurisdiction *(Jurisdicción contenciosa administrativa*) (Article 259) as well as the Electoral Contentious Jurisdiction (Article 297), both integrated in the general organization of the Judiciary for the purpose of controlling administrative actions.

With these constitutional provisions the Constitution adopted the judicial system regarding the Judicial review of Administrative Action (Contentious Administrative) Jurisdiction, departing from the French model and reaffirming the traditional tendency in the national legislation to assign to the Judicial Branch the power to control the legality of administrative acts. [361]

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360 Case: *Revisión de la sentencia dictada por la Sala Electoral en fecha 21 de noviembre de 2002*, in *evista de Derecho Público*, Nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003.

361. See Luis Torrealba Narváez, "Consideraciones acerca de la Jurisdicción Contencioso Administrativa, su Procedimiento y Algunas Relaciones de éste con el de la Jurisdicción Judicial Civil", in *Anales de la Facultad de Derecho,* Universidad Central de Venezuela, Caracas, 1951; Hildegard Rondón de Sansó, *El Sistema Contencioso administrativo de la Carrera Administrativa. Instituciones, Procedimiento y Jurisprudencia,* Ediciones Magón, Caracas, 1974; José Araujo Juárez, José, *Derecho Procesal Administrativo,* Vadell Hermanos editores, Caracas, 1996; Allan R. Brewer–Carías, *Instituciones Fundamentales del Derecho Administrativo y la Jurisprudencia Venezolana*, Universidad Cenbtral de Venezuela, Caracas 1964, pp. 451 ff.; *Estado de derecho y Control Judicial,* Madrid, 1985, pp. 281 ff., and *Contencioso Administrativo,* Vol. VII of *Instituciones Políticas y Constitucionales,* Editorial Jurídica Venezolana, Caracas-San Cristóbal, 1997; Antonio Canova González, *Reflexiones para la reforma del sistema contencioso administrativo venezolano,* Editorial

603. The difference between the "Constitutional Jurisdiction" attributed to the Constitutional Chamber of the Supreme Court of Justice, and the "Administrative Contentious Jurisdiction" attributed to the Politico Administrative and Electoral Chambers of the Supreme Tribunal and to other special courts for judicial review of administrative actions, resides on the State's acts subjected to control: The Constitutional Jurisdiction is in charge of annulling unconstitutional statutes and other acts of similar rank or issued in direct and immediate execution of the Constitution; and the Administrative Contentious Jurisdiction is in charge of annulling unconstitutional or illegal administrative acts or regulations, with general *erga omnes* effects.

604. The courts of this Jurisdiction have the power to annul general and individual administrative acts when contrary to the legal order, including those issued with abuse of public power (*desviación de poder*). They are also competent to order the State to pay sums of money, and to repair injuries or damages caused by the Administration, to hear claims concerning the rendering of public services, and to rule as necessary to re-establish subjective legal rights affected by administrative acts (Article 259).

605. Regarding the standing to challenge administrative acts on the grounds of unconstitutionality and illegality, when referring to normative administrative acts or regulations, anybody can bring an action before the court by means of the popular action of nullity. Consequently, a simple interest in the legality or constitutionality is enough for any citizen to be sufficiently entitled to raise the nullity action for unconstitutionality or illegality against regulations and other normative administrative acts. This simple interest has been defined, as "the general right granted by law upon every citizen to access the competent courts to raise the nullity of an unconstitutional or illegal administrative general act."[362]

606. As to the administrative acts of particular effects, the standing to challenge such acts before the Administrative Jurisdiction courts corresponds solely to those who have a personal, legitimate and direct interest in the annulment of the act (Article 5, Law). This has been the general rule on the matter even though some decisions

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Sherwood, Caracas, 1998. See also, *El Control Jurisdiccional de los Poderes Públicos en Venezuela,* Instituto de Derecho Público, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Caracas, 1979; *Contencioso Administrativo en Venezuela,* Editorial Jurídica Venezolana, tercera edición, Caracas, 1993; *Derecho Procesal Administrativo,* Vadell Hermanos editores, Caracas, 1997; *8ª Jornadas "J.M. Domínguez Escovar" (Enero 1983), Tendencias de la jurisprudencia venezolana en materia contencioso administrativa*, Facultad de Ciencias Jurídicas y Políticas, U.C.V., Corte Suprema de Justicia; Instituto de Estudios Jurídicos del Estado Lara, Tip. Pregón, Caracas, 1983; *Contencioso Administrativo, I Jornadas de Derecho Administrativo Allan Randolph Brewer-Carías,* Funeda, Caracas, 1995; *XVIII Jornadas "J.M. Domínguez Escovar, Avances jurisprudenciales del contencioso– administrativo en Venezuela*, 2 Tomos, Instituto de Estudios Jurídicos del Estado Lara, Diario de Tribunales Editores, S.R.L. Barquisimeto, 1993.

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

have been issued by the Politico-Administrative Chamber of the Supreme Tribunal, giving standing to any person with only a legitimate interest.[363]

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

Nonetheless, despite very impressive advances regarding judicial review of administrative actions experienced in the past decades, due to the political control of the Judiciary during the past seven years, the role of the Administrative Jurisdiction in controlling Public Administration has dramatically diminished in Venezuela, affecting the rule of law.[364]

607. The procedure and organization of the Administrative Contentious Jurisdiction, since 1976, has been transitorily regulated in the statute referred to the Supreme Tribunal: first, by the 1976 Organic Law of the Supreme Court of Justice in 1976,[365] and after the sanctioning of the 1999 Constitution by the 2004 Organic Law of the Supreme Tribunal of Justice. In the latter, regarding the organization of the Jurisdiction, it is attributed to the Politico Administrative Chamber of the Supreme Tribunal, to the First and Second Administrative Contentious Courts and to the eight Superior Courts on Administrative Contentious. In addition, other special statutes attributed to other courts with ?special aspects of the Administrative Contentious Jurisdiction, as has happened with the Taxation Superior Courts for the taxation contentious recourses; and with the Agrarian Superior Courts, with the agrarian contentious actions.

608. The Constitution assigns to the Politico Administrative Chamber of the Supreme Tribunal exclusive jurisdiction to totally or partially annul Executive regulations and other general or individual administrative acts issued by the National Executive; to decide administrative controversies between the Republic, a State, a Municipality and other public entities, when the other party involved is one of them, except controversies between Municipalities that can be attributed to other courts; and to decide recourses of interpretation of statutes (Article 266,5). Consequently, competencies to decide actions challenging administrative acts of the states and of the municipalities and any other public corporations of entity are assigned to the other courts of the Jurisdiction.

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363. *See* decision of the Supreme Court of Justice in Political-Administrative Chamber of April 13, 2000, case: *Banco Fivenez vs. Junta de Emergencia Financiera, Revista de Derecho Público*, N° 82, Editorial Jurídica Venezolana, Caracas, 2000, pp. 582-83.

364. *See* Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004", in *XXX Jornadas J.M Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33-174.

365 Organic Law Supeme Court of Justice, *Gaceta Oficial* Nº 1.893, Extra, of July 30, 1976. See Allan R. Brewer-Carías and Josefina Calcaño de Temeltas, *Ley Orgánica de la Corte Suprema de Justicia*, Editorial Jurídica Venezolana, Caracas 1994.

609. According to the provision of Article 259 of the Constitu-tion, the Administrative Contentious Jurisdiction in Venezuela is governed by the following general principles: [366]

First, the universal character of the judicial control of constitu-tionality and illegality exercised over any regulations and ad-ministrative acts, which means that it is made without exception regarding the challenged act and no matter the motive of the challenging action. The Constitution allows the challenging of those acts when "contrary to the law."

Second, the multiplicity of recourses or means of actions to be filed against administrative acts seeking to nullify unconstitutional or illegal executive regulations and administrative acts, to which it must be added those recourses of amparo seeking to obtain constitutional protection of human rights violated by the challenged administrative act; the actions against administrative omissions particularly regarding responses to administrative petitions (*See Supra 589*); the recourse of interpretation of statutes; the various actions that can be filed against Public Administration seeking liability and compensation for damages caused by its functioning (*See Supra 254*); the recourse for the solution of administrative conflicts between public entities; the recourses for the solution of conflicts regarding public contracts, whether between the parties to the contracts or in cases of actions filed by any interested person seeking the annulment of public contracts; and the actions filed because of the malfunctioning of public services.

Third, the broad and extended power of control assigned to the administrative contentious judges of extended powers of control, not only to annul administrative acts, but to decide on the various subjective rights or interests that the individuals could have regarding Public Administration.

Consequently, the administrative contentious system in Venezuela has not only been conceived as an objective process against administrative acts, but also as a subjective process for the protection of personal subjective rights and interest of persons regarding Public Administration, including the protection of fundamental rights. That is why administrative contentious judges not only have power to annul administrative acts, but to restore subjective individual situations harmed by administrative authorities.

366. Véase Allan R. Brewer-Carías, *Nuevas Tendencias en el Contencioso Administrativo en Venezuela*, Editorial Jurídica Venezolana, Caracas, 1993.

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