CONSTITUTIONAL LITIGATION IN VENEZUELA: GENERAL TRENDS OF THE AMPARO PROCEEDING AND THE EFFECTS OF THE LACK OF JUDICIAL INDEPENDENCE*

Allan R. Brewer-Carías
Professor at the Central University of Venezuela

INTRODUCTION

The title of the 2010 International Seminar on *Constitutional Litigation and Procedural Protections of Constitutionalism in the Americas... and Beyond* organized by Professor Robert S. Barker in the Duquesne Law School, from a Latin American perspective, suggest the study of the amparo proceeding, which is an extraordinary judicial remedy specifically conceived for the protection of constitutional rights against harms or threats inflicted by authorities or by individuals. This is an institution that has been developed in Latin America, as a judicial mean for constitutional litigation that normally concludes with a judicial order or writ of protection, indistinctly called as action, recourse or suit of *amparo, protección* or *tutela*.[1]

This constitutional litigation mean was introduced in the American Continent during the nineteenth century, and although similar remedies were established in the twentieth century in some European countries, like Austria, Germany, Spain and Switzerland, and also in Canada, it has been adopted by all Latin American countries, except in Cuba, being considered as one of the most distinguishable features of Latin American constitutional law.[2] As such, it has influenced the introduction of a similar remedy in other countries, like The Philippines, where the writ of amparo has been created by the Supreme Court in 2007.[3]

This specific remedy provided for the protection of fundamental rights contrasts with the constitutional system of the United States, where the protection of human rights is effectively assured, following the British procedural law tradition, through the general judicial actions and equitable remedies, particularly the injunctions, which are also used to protect any other kind of personal or property rights or interests.

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[1] See Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (Coord.), *El derecho de amparo en el mundo*, Edit. Porrúa, México, 2006; Allan R. Brewer-Carías, *El amparo a los derechos y libertades constitucionales. Una aproximación comparativa*, Universidad Católica del Táchira, San Cristóbal, 1993, also published in *La protección jurídica del ciudadano. Estudios en Homenaje al Profesor Jesús González Pérez*, Tomo 3, Editorial Civitas, Madrid, 1993, pp. 2.695–2.740. See also Allan R. Brewer-Carías, *Mecanismos nacionales de protección de los derechos humanos (Garantías judiciales de los derechos humanos en el derecho constitucional comparado latinoamericano)*, Instituto Interamericano de Derechos Humanos, San José, 2005.

[2] See, in general, Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. A Comparative Study of the Amparo Proceedings*, Cambridge University Press, New York 2009.

[3] See, in general, Allan R. Brewer-Carías, "The Latin American Amparo Proceeding and the Writ of Amparo in The Philippines," en *City University of Hong Kong Law Review*, Volume 1:1 October 2009, pp 73–90.

The amparo proceeding was first introduced in Mexico in 1857 as the *juicio de amparo*, evolving in that country into a unique and very complex institution exclusively found in Mexico, not only designed to guaranty judicial protection of constitutional guarantees against the State acts or actions, but to perform multipurpose judicial roles, including actions and procedures that in all other countries are separated processes, like judicial review, cassation review and judicial review of administrative actions.

In the rest of Latin America the amparo gave rise to a very different specific judicial remedy established with the *exclusive* purpose of protecting human rights and freedoms, becoming in many cases more protective than the original Mexican institution; being named in various ways, always meaning the same, as follows: *Amparo* (Guatemala); *Acción de amparo* (Argentina, Ecuador, Honduras, Paraguay, Uruguay, Dominican Republic, Venezuela); *Acción de tutela* (Colombia); *Proceso de amparo* (El Salvador, Peru); *Recurso de amparo* (Bolivia, Costa Rica, Nicaragua, Panama); *Recurso de protección* (Chile) or *Mandado de segurança* and *mandado de injunçao* (Brazil).[4] In all of the Latin American countries, the provisions for the action are embodied in the constitutions; and in all of them, except Chile, the actions of amparo have been expressly regulated by statutes; particularly in special statutes related to constitutional litigations, with the exception of Panama and Paraguay where the amparo action is regulated in the general procedural codes (*Código Judicial, Código Procesal Civil)*).

Of course, for this specific protective judicial mean to be an effective tool for constitutional litigation, as I expressed in a recent book,

> " the most elemental institutional condition needed in any country, is the existence of a really autonomous and independent Judiciary, out of the reach and control from the other branches of government, empowered to interpret and apply the law in an impartial way and protect citizens, particularly when referring to the enforcement of rights against the State. Such Judiciary has to be built upon the principle of separation of powers. If this principle is not implemented and 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 constitutional declarations, it is impossible to speak of rule of law, as happens in many Latin American countries."[5]

Unfortunately, this is the current situation in Venezuela, with a Judiciary completely subjected to the Executive Power. That is why, in addition to the analysis of the current regime of the amparo proceeding in the Constitution and in the Amparo Law, I will refer to the tragic situation affecting the Judiciary as a whole, whose independence and autonomy has been progressively dismantled, turning completely ineffective the amparo proceeding.

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[4] See, in general, Allan R. Brewer-Carías, *El amparo a los derechos y garantías constitucionales (una aproximación comparativa)*, Caracas, 1993; Eduardo Ferrer Mac-Gregor, "Breves notas sobre el amparo latinoamericano (desde el derecho procesal constitucional comparado)," in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *El derecho de amparo en el mundo*, Edit. Porrúa, México, 2006, pp. 3–39.

[5] See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. A Comparative Study on the Amparo Proceedings*, Cambridge University Press, New York 2009, p. 418.The

I. GENERAL TRENDS OF THE VENEZUELAN AMPARO PROCEEDING

In the case of Venezuela, since 1961, the Constitution establishes a "constitutional right for amparo" or to be protected by the courts,[6] that everybody have for the protection of all the rights, freedoms and guarantees declared in the constitution and in international treaties, or which, even if not listed in the text, are inherent to the human person. The constitution does not set forth a separate action of habeas corpus for the protection of personal freedom and liberty (habeas corpus), which is included within the scope of the action for amparo.

Additionally, the Venezuelan Constitution has also set forth the habeas data recourse in order to guarantee 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 rights (Article 28).

The amparo proceeding, has been regulated in the 1988 Organic Law on Amparo for the protection of constitutional rights and guaranties (*Ley Orgánica de Amparo sobre derechos y garantías constitucionales*),[7] in which it has been set forth that the right to amparo that can be exercised through two different judicial means: first, an "autonomous action for amparo"[8] that in general is filed before the first instance courts[9] (Article 7 Amparo Law),

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[6]Article 49 of the 1961 Constitution, and Article 27 of the 1999 Constitution. See 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 (Coord.), *El derecho de amparo en el mundo*, Universidad Nacional Autónoma de México, Editorial Porrúa, México, 2006, pp. 649–692.

[7]See *Gaceta Oficial* n° 33.891 of January 22, 1988. See Allan R. Brewer-Carías, Carlos M. Ayala Corao and Rafael Chavero G., *Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales*, Caracas, 2007. See also Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Tomo V, El derecho y la acción de amparo*, Editorial Jurídica Venezolana, Caracas, 1998, pp. 163 ff.; Hildegard Rondón de Sansó, *Amparo constitucional*, Caracas, 1988; Gustavo J. Linares Benzo, *El proceso de amparo*, Universidad Central de Venezuela, Caracas, 1999; Rafael J. Chavero Gazdik, *El Nuevo regimen del amparo constitucional en Venezuela*, Editorial Sherwood, Caracas, 2001; Carlos Ayala Corao and Rafael Chavero G., "El amparo constitucional en Venezuela," in Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor, *Idem,* Edit. Porrúa, México, 2006, pp. 649–692.

[8]See Allan R. Brewer-Carías, "El derecho de amparo y la acción de amparo," in *Revista de Derecho Público*, n° 22, Editorial Jurídica Venezolana, Caracas, 1985, pp. 51 ff.

[9]According to Article 7 of the Organic Law on Amparo, the competent courts to decide amparo actions are the courts of First Instance with competent on matters related to the constitutional rights or guaranties violated, in the place where the facts, acts or omission have occurred. Regarding amparo of personal freedom and security, the competent courts should be the criminal first instance courts (Article 40). Nonetheless, when the facts, acts or omissions harming or threatening to harm the constitutional right or guaranty occurs in a place where no First Instance court exists, the amparo action may be brought before and any judge of the site, which must decide according to the law, and in a twenty-four hour delay it must send the files for consultation to the competent First Instance court (Article 9). Only in cases in which facts, acts or omissions of the President of the Republic, his Cabinet members, the National Electoral Council, the Prosecutor General, the

with a re-establishing nature, in general regarding flagrant, vulgar, direct and immediate constitutional harm upon the plaintiff's rights; and second, by means of other preexisting ordinary or extraordinary legal actions or recourses already established in the legal system to which an amparo petition is joined. That is, the amparo petition can be joined to the popular action of unconstitutionality of statutes; the judicial review of administrative actions' recourses; and to other "ordinary judicial procedures" or "preexisting judicial means," through which the "violation or threat of violation of a constitutional right or guaranty may be alleged."[10]

From these regulations it results that 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,[11] being characterized by the following general trends:

First, it can be exercised for the protection of all constitutional rights, not only of civil individual rights. Consequently, the social, economic, cultural, environmental and political rights declared in the constitution and in international treaties are also protected by means of amparo. As aforementioned, the habeas corpus is an aspect of the right to constitutional protection, or one of the expressions of the amparo. Conversely, the habeas data action is conceived as a separate action.

Second, the right to amparo seeks to assure the protection of constitutional rights and guaranties against any disturbance in their enjoyment and exercise that can be originated not only in public authority's actions or omissions but also in private individuals ones. In addition, in the case of disturbance by public authorities, the amparo is admissible against statutes; against legislative, administrative and judicial acts; and against material or factual courses of action of Public Administration or public officials.

Third, the decision of the judge, as a consequence of the exercise of this right to amparo, is not limited to be of a precautionary or preliminary nature, but to reestablish the infringed legal situation by deciding on the merits, that is, the constitutionality of the alleged disturbance of the constitutional right.

Fourth, the competent courts on matters of amparo are all the first instance courts, and if no such court exists in the place of the events, any court is competent to receive the petition.

Fifth, because the Venezuelan system of judicial review is a mixed one, judicial review of legislation can also be exercised by the courts when deciding action for amparo when, for instance, 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 can also be exercised when an action for amparo of fundamental rights is filed.

Finally, an extraordinary review recourse, with some similarities to the writ for certiorari has been established, granting the Constitutional Chamber of the Supreme Court

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Attorney General and the General Comptroller of the Republic are involved does the power to decide the amparo actions correspond to the Constitutional Chamber of the Supreme Tribunal of Justice (Article 8).

[10] Allan R. Brewer-Carías, "La reciente evolución jurisprudencial en relación a la admisibilidad del recurso de amparo," in *Revista de derecho público*, nº 19, Caracas, 1984, pp. 207–218.

[11] See, in general, H. Fix-Zamudio, *La protección procesal de los derechos humanos ante las jurisdicciones nacionales,* Madrid, 1982, p. 366.

the power to review final decisions issued in amparo proceedings, and also by any court when applying the diffuse method of judicial review resolving the inapplicability of statutes because they are considered unconstitutional (Article 336,10).

Very briefly, the following are the main aspects to be highlighted regarding the legal provisions governing this proceeding:

Regarding the *injured party*, one of the most distinguishable principles pf the amparo proceeding as an extraordinary judicial mean for the protection of constitutional rights is the principle of bilateralism, which implies the need for the existence of a controversy between two or more parties. The main consequence of this principle is that the amparo proceeding can only be initiated at a party's request, which excludes any case of *ex officio* amparo proceeding.

Consequently, in order to initiate this proceeding, an action must be brought before a court by a plaintiff as the injured party, against the injurer party or parties, who as defendants, must be called to the procedure as having caused the harm or the violation to the constitutional rights of the former.

The injured party, in principle is the person having the constitutional right that has been violated; a situation that gives him a particular interest in bringing the case before a court. That is why the amparo action has been considered as an action *in personam* (*personalísima*) through which, seeking for the protection of constitutional rights, the plaintiff must be precisely the injured or aggrieved person.

Regarding the *justiciable constitutional rights and guarantees*[12] as a matter of principle, in Venezuela, are protected through the amparo proceeding: first, the rights expressly declared in the constitution; second, those rights that even not enumerated in the constitution are inherent to human beings; and third, those rights enumerated in the international instruments on human rights ratified by the State, that in Venezuela have constitutional rank being applied with preference in all cases in which they provide more favorable conditions for the enjoyment of the right (article 23, Constitution). Consequently, all the rights listed in the constitution are protected though the amparo action; being those rights, the citizenship rights, the civil rights, the political rights, the social and family rights, the cultural and educational rights, the economic rights, the environmental rights and the indigenous people's rights enumerated in Articles 19 to 129. Additionally, all other constitutional rights and guaranties derived from other constitutional provisions can also be protected even if not included in Title III, like for instance, the constitutional guaranty of the independence of the Judiciary, or the constitutional guaranty of the legality of taxation (that taxes can only by set forth by statute).[13] Also, regarding the protected rights, through the open clause of constitutional rights, the constitution admits the amparo action for the protection of those other constitutional rights and guaranties not expressly listed in the constitution, but that can be considered inherent to human beings (article 22, Constitution).

Regarding the *injuries* violating constitutional rights, against which the amparo action is established, they can consist of harms or threats affecting those rights. These injuries –

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[12] "Their quality of being suitable to be protected by courts." See Brian A. Garner (Editor in Chief), *Black's Law Dictionary*, West Group, St. Paul, Minn. 2001, p. 391.

[13] See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales*, Vol V, *Derecho y Acción de Amparo,* Caracas, 1998, pp. 209 ff. See decision of the First Court on Judicial Review of Administrative Action, *Fecadove* case, in Rafael Chavero G., *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, p. 157.

harms or threats– caused to constitutional rights, in order to be protected by means of the amparo proceeding, must be evident, actual and real, that is, they must affect personally and directly the rights of the plaintiff, in a manifestly arbitrary, illegal and illegitimate way, which the plaintiff must not have consented.

In addition, regarding harms, they must have a reparable character; and regarding threats, they must affect the rights in an imminent way. That is why, the type of injuries inflicted on constitutional rights, conditions the purpose of the amparo proceeding: if harms, being reparable, the amparo has a restorative effect; and if threats, being imminent, the amparo has a preventive effect.

That is, in case of harms, the amparo proceeding seeks to restore the enjoyment of the plaintiff's injured right, reestablishing the situation existing when the right was harmed, by eliminating or suspending, if necessary, the detrimental act or fact. In this regard, the amparo action has some similarities with the reparative injunctions in the United States, which seeks to eliminate the effects of a past wrong or to compel the defendant to engage in a course of action that seeks to correct those effects.[14]

However, in some cases, due to the factual nature of the harm that has been inflicted, these restorative effects cannot be obtained, in which cases the amparo decision must tend to place the plaintiff right "in the situation closest or more similar to the one that existed before the injury was caused."[15]

However, as mentioned, the amparo proceeding is not only a judicial mean seeking to restore harmed constitutional rights, it is also a judicial mean established for the protection of such rights against illegitimate threats that violate those rights. It is in these cases that the amparo proceeding has a preventive character in the sense of avoiding harm, similar to the United States preventive civil rights injunctions seeking "to prohibit some act or series of

[14]As has been explained by Owen M. Fiss: "To see how it works, let us assume that a wrong has occurred (such as an act of discrimination). Then the missions of an injunction –classically conceived as a preventive instrument– would be to prevent the recurrence of the wrongful conduct in the future (stop discriminating and do not discriminate again). But in *United States v. Louisiana* (380 U.S. 145, (1965)), a voting discrimination case, Justice Black identified still another mission for the injunction: the elimination of the effects of the past wrong (the past discrimination). The reparative injunction –long thought by the nineteenth-century textbook writers, such as High (A *Treatise on the Law of Injunction* 3, 1873) to be an analytical impossibility– was thereby legitimated. And in the same vein, election officials have been ordered not only to stop discriminating in the future elections, but also to set aside a past election and to run a new election as a means of removing the taint of discrimination that infected the first one (*Bell v. Southwell*, 376 F.2de 659 (5TH Cir. 1976)). Similarly, public housing officials have been ordered to both cease discriminating on the basis of race in their future choices of sites and to build units in the white areas as a means of eliminating the effects of the past segregative policy (placing public housing projects only in the black areas of the city) (*Hills v. Gautreaux*, 425 U.S. 284 (1976)). Seen Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press, 1978, pp.7–10.

[15]In this sense, it has been decided by the former Venezuelan Supremo Court of Justice ruling that "one of the principal characteristics of the amparo action is to be a restorative (*restablecedor*) judicial means, the mission of which is to restore the infringed situation or, what is the same, to put the claimant again in the enjoyment of his infringed constitutional rights." See Decision of February 6, 1996, *Asamblea legislativa del Estado Bolívar* case. See in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela*, Ed. Sherwood, Caracas, 2001, pp. 185, 242–243.

acts from occurring in the future,"[16] and designed "to avoid future harm to a party by prohibiting or mandating certain behavior by another party."[17]

The main condition for the filing of an amparo actions against threats (*amenaza*) to constitutional rights, is that they must be real, certain, immediate, imminent, possible and realizable. And this is important because there are some constitutional rights that essentially and precisely need to be protected against threats, like the right to life in cases of imminent death threats, because on the contrary, they could lose all sense. In this case, the only way to guaranty the right to life is to avoid the threats to be materialized, for instance, by providing the person with effective police protection.

Regarding the *injuring party*, because as mentioned, the amparo procedure is governed by the principle of bilateralism, the party that initiates it must always file the action against an injuring party, whose actions or omissions are those that have caused the harm or threats. This means that the action must always be filed against a person or a public entity that must also be individuated as defendant.[18] That is why in the amparo proceeding, as well as the injunctions in the United States, the final result has to be a judicial order "addressed to some clearly identified individual, not just the general citizenry."[19]

It is true that the amparo proceeding was originally created to protect individuals against the State; and that is why some countries like Mexico remain with that traditional trend; but that initial trend has not prevented the possibility for the admission of the amparo proceeding for the protection of constitutional rights against other individual's actions. The current situation is that in the majority of Latin American countries the admission of the amparo action against individuals is accepted, as is the case in Argentina, Bolivia, Chile, the Dominican Republic, Paraguay, Peru, Venezuela and Uruguay, as well as, although in a more restrictive way, in Colombia, Costa Rica, Ecuador, Guatemala and Honduras. Only a minority of Latin American countries the amparo action remains exclusively as a protective mean against authorities, as is the case in Brazil, El Salvador, Panama, Mexico and Nicaragua. This is also the case in the United States where the civil rights injunctions, in matters of constitutional or civil rights or guaranties,[20] can only be admitted against public entities.[21]

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[16]See Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press, 1978, p. 7.

[17]See William M. Tabb and Elaine W. Shoben, *Remedies*, Thompson West, 2005, p. 22. In Spanish the word "preventive" is used in procedural law (medidas preventivas o cautelares) to refer to the "temporary" or "preliminary" orders or restraints that in the United States the judge can issue during the proceeding. So the preventive character of the amparo and of the injunctions cannot be confused with the "medidas preventivas" or temporary or preliminary measures that the courts can issue during the trial for the immediate protection of rights, facing the prospect of an irremediable harm that can be caused.

[18]The only exception to the principle of bilateralism is the case of Chile, where the offender is not considered a defendant party but only a person whose activity is limited to inform the court and give it the documents it has. That is why in the Regulation set forth by the Supreme Court (*Auto Acordado*) it is said that the affected state organ, person or public officer "can" just appear as party in the process (4). See Juan Manuel Errazuriz G. and Jorge Miguel Otero A., *Aspectos procesales del recurso de protección*, Editorial Jurídica de Chile 1989, p. 27.

[19]See Owen M. Fiss, *The Civil Rights Injunction*, Indiana University Press, 1978, p. 12.

[20]In other matters the injunctions can be filed against any person as "higher public officials or private persons." See M. Glenn Abernathy and Barbara A. Perry, *Civil Liberties under the Constitution*, Sixth Edition, University of South Carolina Press, 1993, p. 8.

[21]As explained by M. Glenn Abernathy and Barbara A. Perry: "Limited remedies for private interference with free choice. Another problem in the citizen's search for freedom from restriction lies in that many types of interference stemming from private persons do not constitute actionable wrongs under the law. Private

But of course, being the amparo action originally established to defend constitutional rights against the State and authorities violations, the most common and important injuring parties in the amparo proceeding are the public authorities or public officials.

The general principle in this matter in Venezuela, with some exceptions, is that any authority can be questioned through amparo actions, and that any act, fact or omission of any public authority or entity or public officials causing an injury to constitutional rights can be challenged by means of such actions. That is also why the courts in Venezuela have decided that "there is no State act that can be excluded from revision by means of amparo.[22]

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prejudice and private discrimination do not, in the absence of specific statutory provisions, offer grounds for judicial intervention on behalf of the sufferer. If one is denied admission to membership in a social club, for example, solely on the basis of his race or religion or political affiliation, he may understandably smart under the rejection, but the courts cannot help him (again assuming no statutory provision barring such distinctions). There are, then, many types of restraints on individual freedom of choice which are beyond the authority of courts to remove or ameliorate. It should be noted that the guaranties of rights in the U.S. Constitution only protect against governmental action and do not apply to purely private encroachments, except for the Thirteenth Amendment's prohibition of slavery. Remedies for private invasion must be found in statutes, the common law, or administrative agency regulations and adjudications." *Idem,* p. 6.

[22]See the former Supreme Court of Justice decision dated January 31, 1991, *Anselmo Natale* case, in *Revista de Derecho Público*, nº 45, Editorial Jurídica Venezolana, Caracas, 1991, p. 118. See also the decision of the First Court on Judicial Review of Administrative Action of June 18, 1992, in *Revista de Derecho Público*, n° 46, Editorial Jurídica Venezolana, Caracas, 1991, p. 125. This universality character of the amparo regarding public authorities acts or omissions, according to the Venezuelan courts, implies that: "From what Article 2 of the Amparo law sets forth, it results that no type of conduct, regardless of its nature or character or their authors, can per se be excluded from the amparo judge revision in order to determine if it harms or doesn't harm constitutional rights or guaranties." See decision of the First Court on Judicial Review of Administrative Action of November 11, 1993, *Aura Loreto Rangel* case, in *Revista de Derecho Público*, nº 55–56, Editorial Jurídica Venezolana, Caracas, 1993, p. 284. The same criterion was adopted by the Political Administrative Chamber of the former Supreme Court of Justice in a decision of May 24, 1993, as follows: "The terms on which the amparo action is regulated in Article 49 of the Constitution (now Article 27) are very extensive. If the extended scope of the rights and guaranties that can be protected and restored through this judicial mean is undoubted; the harm cannot be limited to those produced only by some acts. So, in equal terms it must be permitted that any harming act –whether an act, a fact or an omission– with respect to any constitutional right and guaranty, can be challenged by means of this action, due to the fact that the amparo action is the protection of any norm regulating the so-called subjective rights of constitutional rank, it cannot be sustained that such protection is only available in cases in which the injuring act has some precise characteristics, whether from a material or organic point of view. The jurisprudencia of this Court has been constant regarding both principles. In a decision nº 22, dated January 31, 1991, *Anselmo Natale* case, it was decided that 'there is no State act that could not be reviewed by amparo, the latter understood not as a mean for judicial review of constitutionality of State acts in order to annul them, but as a protective remedy regarding public freedoms whose purpose is to reestablish its enjoyment and exercise, when a natural or artificial person, or group or private organization, threatens to harm them or effectively harm them. See, regarding the extended scope of the protected rights, decision of December 4, 1990, *Mariela Morales de Jimenez* case, nº 661, in *Revista de Derecho Público*, n° 55-56, Editorial Jurídica Venezolana, Caracas, 1993, pp. 284–285. In another decision dated February 13, 1992, the First Court ruled: "This Court observes that the essential characteristic of the amparo regime, in its constitutional regulation as well as in its statutory development, is its universality.., so the protection it assures is extended to all subjects (physical or artificial persons), as well as regarding all constitutionally guaranteed rights, including those that without being expressly regulated in the Constitution are inherent to human beings. This is the departing point in order to understand the scope of the constitutional amparo. Regarding Public Administration, the amparo against it is so extended that it can be filed against all acts, omissions and factual actions, without any kind of exclusion regarding some matters that are always related to the public order and social interest." See in *Revista de Derecho Público*, nº 49, Editorial Jurídica Venezolana, Caracas, 1992, pp. 120–121.

In this regard, amparo actions can be filed against *legislative actions* or omissions, when they cause harms on constitutional rights of individuals, for instance, acts adopted by parliamentary commissions, and also *statutes*. It is true that that this has been rejected in the majority of Latin American countries, being in some countries accepted like in Venezuela regarding self-executing statutes that can harm the constitutional rights without the need for any other State act executing or applying them, or only regarding the acts applying the particular statute.

Regarding *executive authorities*, the general principle is that the action is admitted against acts, facts or omissions from public entities or bodies conforming to the Public Administration at all its levels (national, state, municipal), including decentralized, autonomous, independent bodies and including acts issued by the Head of the Executive, that is, the President of the Republic.

Regarding *administrative acts*, as mentioned, the Law admits the filing of amparo actions against them, providing for possibility of exercising the amparo action in two ways: in an autonomous way or conjunctly with nullity recourse for judicial review of the administrative act (Article 5).[23]

Regarding *judicial acts*, contrary to what happens in the majority of Latin American countries, in Venezuela, the amparo action is admitted against them when the corresponding court acts outside its specific competence, issuing arbitrary resolution, decision, or orders that impairs a constitutional right."

On the other hand, being a judicial means specifically established for the protection of constitutional rights, the amparo action is conceived in Venezuela as an *extraordinary judicial instrument* that, consequently, does not substitute for all the other ordinary judicial remedies established for the protection of personal rights and interest. This implies that the amparo action, as a matter of principle, only can be filed when no other adequate judicial mean exists and is available in order to obtain the immediate protection of the violated constitutional rights. This has implied the provisions of rules referred to the admissibility of the action, established in order to determine the existence or inexistence of other adequate judicial mean for the immediate protection of the rights, which justifies or not the use of the extraordinary action.

This rule of admissibility of the amparo action is similar to the general rule existing in the United States regarding the injunctions and all other equitable remedies, like the mandamus and prohibitions, all reserved for extraordinary cases,[24] in the sense that they are available only "after the applicant shows that the legal remedies are inadequate."[25]

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[23]Regarding the latter, the former Supreme Court of Justice in the decision of July 10, 1991 (*Tarjetas Banvenez* case), clarified that in such case, the action is not a principal one, but subordinated and ancillary regarding the principal recourse to which it has been attached, and subjected to the final nullifying decision that has to be issued in it. See the text in *Revista de Derecho Público*, nº 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 169–174, and comments in *Revista de Derecho Público*, nº 50, Editorial Jurídica Venezolana, Caracas, 1992, pp. 183–184. That is why, in such cases, the amparo pretension that must be founded in a grave presumption of the violation of the constitutional right, has a preventive and temporal character, pending the final decision of the nullity suit, consisting in the suspension of the effects of the challenged administrative act. This provisional character of the amparo protection pending the suit is thus subjected to the final decision to be issued in the nullity judicial review procedure against the challenged administrative act. See in *Revista de Derecho Público*, nº 47, Editorial Jurídica Venezolana, Caracas, 1991, pp. 170–171.

[24]*Ex-parte Collet*, 337 U.S. 55, 69 S. Ct 944, 93 L. Ed. 1207, 10 A.L.R. 2D 921 (1949). See in John Bourdeau *et al*., "Injunctions," in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*,

This extraordinary character of the amparo proceeding also conditions the general rules governing the procedure, which in general terms are related to its bilateral character; to the brief and preferred character of the procedure, and to the role of the courts directing the procedure.

In this regard, one of the most important phases in the procedure is the hearing that the court must convene, also in a very prompt period of time, with the participation of the parties before adopting its decision on the case (Article 26). This hearing which must be oral, public and contradictory, in principle must always take place and must not be suspended.

Two general sorts of *judicial adjudications* can be issued by the courts for the protection of constitutional rights: preliminary measures that can be ordered from the beginning of the procedure, with effects subject to the final court ruling; and the definitive decisions preventing the violation or restoring the enjoyment of the threatened or harmed rights.

The *preliminary measures* are conceived in order to preserve the status quo, avoiding harms or restoring the plaintiff's situation to the original one it had before the harm was inflicted. These preliminary measures, regulated in Amparo Law and the Civil Procedure Code, in order to be adopted, a few conditions must be met. The courts must consider, first, "the appearance of the existence of a good right" (*fumus boni juris*), that is, the need for the petitioner to prove the existence of his constitutional right or guaranty as being violated or threatened; second, the "danger because of the delay" (*periculum in mora*), that is, the need to prove that the delay in granting the preliminary protection will make the harm irreparable; third, the "danger of the harm" (*periculum in dammi*"), that is the need to prove the imminence of the harm that can be caused; and fourth, the balance between the collective and particular interest involved in the case.[26]

These preliminary protective measures can be decided and issued by the court in an immediate way, even without a previous hearing of the potential defendants, that is, *inadi alteram parte* or *inaudita pars*. In a similar sense, as in the United States, in cases of great urgency and when an immediate threat of irreparable injury exists, preliminary injunctions or restraining orders can be issued without giving reasonable notice to the plaintiff, but always balancing the harm sought to be preserved with the rights of notice and hearing.[27]

Volume 43A, Thomson West, 2004, p. 20. This main characteristic of the injunction as an extraordinary remedy has been established since the nineteenth century in *In re Debs* 158 U.S. 564, 15 S.Ct 900, 39 L. Ed. 1092 (1895), in which case, in the words of Justice Brewer, who delivered the opinion of the court, it was decided that: "As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter." See in Owen M. Fiss and Doug Rendleman, *Injunctions*, The Foundation Press, Mineola, 1984, p. 8.

[25] *Idem,* p. 59.

[26] As for instance has been decided by the Venezuelan First Court on Administrative Jurisdiction, *Video & Juegos Costa Verde, C.A. vs. Prefecto del Municipio Maracaibo del Estado Zulia* case, in *Revista de Derecho Público*, nº 85-98, Editorial Jurídica Venezolana, Caracas, 2001, p. 291.

[27] See for instance *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed.2d 325, 1968; *Board of Ed. of Community Unit School Dist. No 101 v. Parlor*, 85 Ill. 2d 397, 54 Ill. Dec 249, 424 N.E 2d 1152, 1981; in John Bourdeau *et al.*, "Injunctions," in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 339 ff.

Regarding the *definitive judicial decisions* in the amparo proceedings, their purpose for the injured party is to obtain the requested judicial protection (*amparo*) of his constitutional rights when illegitimately harmed or threatened by an injuring party.

Consequently, the final result of the process is a formal judicial decision or order issued by the court for the protection of the threatened rights or to restore the enjoyment of the harmed one, which can consist, for instance, in a decision commanding or preventing an action, or commanding someone to do, not to do, or to undo some action.[28] This is to say, the amparo, as the injunction,[29] is a writ framed according to the circumstances of the case commanding an act that the court regards as essential in justice, or restraining an act that it deems contrary to equity and good conscience.

That is why the amparo judicial order in Venezuela, is very similar in its purposes and effects not only to the United States' injunction, but also to the other equitable and non-equitable extraordinary remedies, like the mandamus, prohibition and declaratory legal remedies. Accordingly, for instance, the amparo order can be first, of a prohibitory character, similar to the prohibitory injunctions, issued to restrain an action, to forbid certain acts or to command a person to refrain from doing specific acts. Second, it can also be of a mandatory character, that is, like the mandatory injunction requiring the undoing of an act, or the restoring of the status quo; and like the writ of mandamus, issued to compel an action or the execution of some act, or to command a person to do a specific act. Third, the amparo order can also be similar to the writ of prohibition or to the writ of error when the order is directed to a court,[30] which normally happens in the cases of amparo actions filed against judicial decisions. And fourth, it can also be similar to the declaratory legal remedy through which courts are called to declare the constitutional right of the plaintiff regarding the other parties.

Consequently, in the amparo proceeding, the courts have very extensive powers to provide for remedies in order to effectively protect constitutional rights, issuing final adjudication, orders to do, to refrain from doing, to undo or to prohibit,[31] or as the Amparo Law establishes in Article 32,b the decision must "determine the conduct to be accomplished."[32]

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[28]In the United States' injunction, the order can be commanding or preventing virtually any type of action (*Dawkins v. Walker*, 794 So. 2d 333, Ala. 2001; *Levin v. Barish*, 505 Pa. 514, 481 A.2d 1183, 1984), or commanding someone to undo some wrong or injury (*State Game and Fish Com'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427, 2001). It is a judicial order requiring a person to do or refrain from doing certain acts (*Skolnick v. Altheimer & Gray*, 191 Ill 2d 214, 246 Ill. Dec. 324, 730 N.E.2d 4, 2000), for any period of time, no matter its purpose (*Sheridan County Elec. Co-op v. Ferguson*, 124 Mont. 543, 227 P.2d 597, 1951). *Idem,* p. 19.

[29]See *Nussbaum v. Hetzer*, 1, N.J. 171, 62 A. 2d 399 (1948). *Idem,* p. 19.

[30]See William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp. 86 ff. 246 ff.; and in John Bourdeau *et al.*, "Injunctions," in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thompson West, 2004, pp. 21 ff.; 28 ff.

[31]See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales,* Vol V, *Derecho y Acción de Amparo,* Editorial Jurídica Venezolana, Caracas, 1998, pp. 143 ff.

[32]Rafael Chavero G. *El nuevo amparo constitucional en Venezuela,* Ed. Sherwood, Caracas, 2001, p. 185 ff., 327 ff.; Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales,* Vol V, *Derecho y Acción de Amparo,* Editorial Jurídica Venezolana, Caracas, 1998, pp. 399 ff.

Another specific aspect that must be mentioned regarding amparo decisions in Venezuela is that it has no compensatory character[33] being in this case the function of the courts only to protect the plaintiff's rights and not to condemn the defendant to pay the plaintiff any sort of compensation for damages caused by the injury.[34] The judicial actions tending to seek for compensation from the defendant, because of its liability as a consequence of the injury inflicted to the constitutional right of the plaintiff, must be filed by means of a separate ordinary judicial remedy established for such purpose before the civil or administrative judicial jurisdiction.[35]

One last aspect that must be highlighted regarding the effects of the amparo decision refers to its obligatory character. As all judicial decisions, the amparo ruling is obligatory not only for the parties to the process but regarding all other persons or public officers that must apply them.

In order to execute the decision, the courts, *ex officio* or at the party's request, can adopt all the measures directed to its accomplishment. Yet the amparo judges in Venezuela do not have direct power to punish by imposing criminal sanctions for disobedience of their rulings. In other words, they do not have criminal contempt power, which in contrast is one of the most important features of the injunctive relief system in the United States.[36] These contempt powers are precisely what gave the injunction in the United States its effectiveness regarding any disobedience, being the same court empowered to vindicate its own power by imposing criminal or economic sanctions by means of imprisonment and fines. In Venezuela, in contrast, the amparo courts do not have such powers, and regarding the application of criminal sanctions to the disobedient party, the amparo courts or the interested party must seek for the initiation of a judicial criminal procedure against the disobedient to be brought before the competent criminal courts (Article 31

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[33]In a similar way to the United States injunctions. See *Simenstad v. Hagen*, 22 Wis. 2d 653, 126 N.W.2d 529, 1964, in John Bourdeau *et al*., "Injunctions," in Kevin Schroder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, p. 20.

[34]For instance in the case of an illegitimate administrative order issued by a municipal authority demolishing a building, if executed, even if it violates the constitutional right to property, the amparo action has not the purpose to compensate, being in this case inadmissible, particularly due to the irreparable character of the harm.

[35]Article 27 of the Venezuelan Amparo Law also expressly provides that in cases of granting an amparo, the court must send copy of the decision to the competent authority where the public officer causing the harm works, in order to impose the corresponding disciplinary measures.

[36]This is particularly important regarding criminal contempt, which was established since the *In Re Debs* case (158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895)), where according to Justice Brewer who delivered the court's opinion, it was ruled: "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its order it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceedings of half its efficiency." In *Watson v. Williams,* 36 Miss. 331, 341, it was said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as the necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." See Owen M. Fiss and Doug Rendleman, *Injunctions*, The Foundation Press, 1984, p. 13. See also William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, pp. 72 ff.

Finally, it must be noted that due to the general by-instance procedural principle, the amparo decisions can be appealed before the superior courts according to the general rules established in the procedural codes. In addition, as aforementioned, the Constitutional Chamber of the Supreme Court as Constitutional Jurisdictions, has the power to review lower courts' decisions on constitutional matters, including amparo decisions, in a discretionary basis,[37] by means of *an extraordinary recourse for review* (Article 336,10).

II. THE FRUSTRATION ON MATTERS OF AMPARO DUE TO THE LACK OF AUTONOMY AND INDEPENDENCE OF THE COURTS

From what has been said, undoubtedly, and in theory, Venezuela has established one of the most complete and comprehensive regulations regarding the amparo proceeding.

But as afore mentioned, the country lacks the basic condition for any amparo proceeding to be effective, that is, the existence of a really autonomous and independent Judiciary, out of the reach and control from the other branches of government, that could allow the courts to interpret and apply the law in an impartial way, and to protect citizens, particularly when referring to the enforcement of rights against authorities. On the contrary, in Venezuela, the Government controls the courts and judges, being completely impossible to enforce and defend rights particularly when the offending party is a governmental agency. That is, that if it is true that in the past the amparo proceeding worked as a very important tool, widely used for the protection of constitutional rights, particularly against public authorities, nowadays, however, this is a matter of the past; it is history.

That is why, instead of describing in more detail an institution like the amparo proceeding that in practice is completely ineffective when used against the State, I think it is important to analyze the situation of the Judiciary in Venezuela, in the process the country has suffered of dismantling the rule of law and the democratic regime, using constitutional provisions and even democratic tools;[38] a process in which, in a contradictory way, the Supreme Tribunal has been one of the main tools used by the authoritarian government for such purposes.

The fact is that since 1999, a tragic setback has occurred in Venezuela regarding democratic standards and the rule of law, a country that just a few decades ago was envied for its institution building and democratic accomplishments. The past decade, on the contrary, has shown a continuous, persistent, and deliberate process of demolishing the rule of law institutions[39] and of destroying democracy in a way never before experienced in all the constitutional history of the country.[40]

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[37] In a similar way to the writ of certiorari in the United States. See Jesús María Casal, *Constitución y Justicia Constitucional,* Caracas, 2002, p. 92.

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

[39] See in *general,* 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; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial," in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías "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

In December of 1999, the people of Venezuela approved a new Constitution considered by many as one of the best Constitutions in contemporary Latin America; an assertion with which I have never agreed, except regarding its provisions precisely referred to human rights and to the system of judicial review that unfortunately are dead words. As Member of the 1999 Constituent Assembly I participated in the drafting of the Constitution, but I was also one of the few members of the Assembly that campaigned for the rejection of the Constitution in the referendum of December 1999.

Nonetheless the most chocking fact regarding this celebrated Constitution is that it has been constantly violated by all branches of government, and more seriously, by the Supreme Tribunal of Justice and its Constitutional Chamber, theoretically designed to be the guarantor par excellence of the Constitution. Contrary to that role, in Venezuela, the Constitutional Chamber, as Constitutional Jurisdiction, equivalent to a Constitutional Court, has been completely controlled by the Executive, and as such, as I mentioned, has been the main tool used to erode the rule of law and, to sustain authoritarianism, legitimizing all the constitutional violations that have occurred.

The result of this process has been the complete lack of all essential elements that a rule of law and a democratic state request, which are much more than voting in elections and referenda.

This process of dismantling the rule of law in Venezuela began in the same year 1999, when the then newly elected President of the Republic, Hugo Chávez on the same day of his first Inauguration, convened a non-plural Constituent Assembly (February 2, 1999)[41] which was not established in the Constitution as a mean for constitutional review, based on a very ambiguous ruling issued by the Supreme Court of Justice (January 19, 1999),[42] without deciding the merits of what had been requested.[43] The result of this initial and

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Pons, Madrid 2007, pp. 25-57, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

[40] See, in general, 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 the book *Temas constitucionales. Planteamientos ante una Reforma,* Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74; and "La demolición del Estado de Derecho en Venezuela Reforma Constitucional y fraude a la Constitución (1999-2009)," in *El Cronista del Estado Social y Democrático de Derecho*, No. 6, Editorial Iustel, Madrid 2009, pp. 52-61.

[41] See Decree No. 3 of February 2, 1999, in *Gaceta Oficial* Nº 36.634 of February 2, 1999.

[42] See the text of the decisions in Allan R. Brewer–Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente,* Editorial Jurídica Venezolana, Caracas 1998, pp. 25 a 53; and the comment regarding its content, in pp. 55 a 114. See also in Allan R. Brewer–Carías, *Asamblea Constituyente y Ordenamiento Constitucional, Academia de Ciencias Políticas y Sociales, Caracas 1998,* pp. 153 a 228; and in *Revista de Derecho Público*, Nº 77–80, Editorial Jurídica Venezolana, Caracas 1999, pp. 56 ff. and 68 ff. Regarding these decisions, Lolymar Hernández Camargo has expressed that "far from giving answer to the important question raised to the Court, opened the possibility for a consultative referendum, but without establishing the mechanism that can allow its convening, leaving that task entirely to the 'competent organs,'" in *La Teoría del Poder Constituyente. Un caso de estudio: el proceso constituyente venezolano de 1999,* UCAT, San Cristóbal 2000, pp. 54-63

[43] See Allan R. Brewer–Carías, "La configuración judicial del proceso constituyente o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción," in *Revista de Derecho Público*, Nº 77–80, Editorial Jurídica Venezolana, Caracas 1999, pp. 453 y ss.; y *Golpe de Estado y proceso constituyente en Venezuela*, UNAM, México, 2001, pp. 60 ff.

unconstitutional decision adopted by President Chávez,[44] was the election, on July 1999, of a costume-made Constituent Assembly, completely controlled by the President's followers, being used as the main tool for the political assault on all branches of government, ignoring the provisions of the then in force Constitution. This elected Constituent Assembly, technically was the result of a coup d'état given against the Constitution,[45] and in addition, it was itself the instrument used to give another coup d'état against the existing constituted powers,[46] interfering upon all the then elected, and non-elected branches of government, particularly the Judicial Power, whose autonomy and independence began to be progressively and systematically demolished.[47] All this happened, unfortunately, with the consent and complicity of the former Supreme Court of Justice that endorsed the creation of a Commission of Judicial Emergency,[48] which after eleven years continues to function although with another name, in violation of the new Constitution.[49]

All these acts of the Constituent Assembly were challenged before the then already bend Supreme Court, which in another much criticized decision of October 14, 1999, upheld their constitutionality, recognizing the Constituent Assembly supposed supra-constitutional power. This was the only way to justify the unconstitutional intervention of all the existing branches of governments, including the Judiciary, for which the Court paid

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[44] See the text of the popular action filed seeeking to annul on grounds of its unconstitutionality the presidencial Decree, in Allan R. Brewer–Carías, *Asamblea Constituyente y Ordenamiento Constitucional*, Academia de Ciencias Políticas y Sociales, Caracas 1999, pp. 255 a 321. See also Carlos M. Escarrá Malavé, *Proceso Político y Constituyente,* Caracas 1999, anexo 4.

[45] The Assembly assumed in its By-Laws, an "original constituent power." See in *Gaceta Constituyente (Diario de Debates), Agosto–Septiembre 1999*, Session, August 7, 1999, Nº 4, p. 144. In the inauguration act of the Assembly, its President said "the National Constituent Assembly is original and sovereign," in *Gaceta Constituyente (Diario de Debates), Agosto–Septiembre 1999,* Sesión de 03–08–99, Nº 1, p. 4. See the text also in *Gaceta Oficial* Nº 36.786 of September 14, 1999. As pointed out by Lolymar Hernández Camargo, with this By-Laws, "the inobservance of the popular will that had imponed limits to the National Constituent Assembly was materialized, … The Assembly proclaimed itself as original, absolute constituent power, without limits, having the State lost its raison d'être, because if the popular will and its normative expression (the Constitution) was violated, it is not possible to qualify the State as a rule of law and much less as democratic," in *La Teoría del Poder Constituyente,* UCAT, San Cristóbal 2000, p. 73. See my dissident votes regarding the approval of the By-Laws of the Assembly in Allan R. Brewer–Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)* tomo I, *(8 agosto–8 septiembre 1999)*, Caracas 1999, pp. 15-39. See also en *Gaceta Constituyente (Diario de Debates), Agosto–Septiembre 1999*, Session of August 7, 1999, Nº 4, pp. 6-13

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

[47] On Auguts 19, 1999, the National Constituent Assembly decided to declare "the Judicial Power in emergency." *Gaceta Oficial* Nº 36.772 of August 25, 1999 reprinted in *Gaceta Oficial* N° 36.782 of September 8, 1999. See in Allan R. Brewer–Carías, *Debate Constituyente,* tomo I, Fundación de Derecho Público, Editoriual Jurídica Venezolana, Caracas 1999, p. 57-73; and in *Gaceta Constituyente (Diario de Debates), Agosto–Septiembre de 1999,,* Session of August 18, 1999, Nº 10, pp. 17-22. See the text of the decree in *Gaceta Oficial* Nº 36.782 of September 08, 1999.

[48] "Resolution" of the Supreme Court of Justice of August 23, 1999. See the comments regarding this Resolution in en Allan R. Brewer–Carías, *Debate Constituyente,* tomo I, Fundación de Derecho Público, Editoriual Jurídica Venezolana, Caracas 1999, pp. 141 ff. See also the comments of Lolymar Hernández Camargo, *La Teoría del Poder Constituyente,* UCAT, San Cristóbal 2000, pp. 75 ff.

[49] See Allan R. Brewer–Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002, p. 160.

a very high price, which was its own existence. With such decision, the Court pronounced its own death sentence, disappearing two months later as the first victim of the authoritarian government, which it helped to grab power.

This happened in December 22 of the same year 1999, in a decision adopted by the Constituent Assembly after the new Constitution was popularly approved (December 15, 1999), when the Assembly, violating both, the old (still in force) 1961 Constitution, and the new (approved but still not published) 1999 Constitution,[50] eliminated the Supreme Court itself, and dismissed its Magistrates and all the other public officials elected only a few months earlier. This was achieved through the enactment of a Transitory Constitutional Regime[51] which was not submitted to popular approval. In particular, regarding the Judiciary, the result of such Regime was the appointment of new Magistrates of the new Supreme Tribunal of Justice, without fulfilling the conditions established in the to-be new Constitution, completely packed with Chávez' supporters. That Supreme Tribunal has precisely been the one that during the past decade has been the most ominous instrument for consolidating authoritarianism in the country.

Today, eleven years after the 1999 constitution making-process, a centralized, militaristic, and concentrated authoritarian regime has been imposed to the Venezuelans, following a socialist model of society for which nobody has voted, that is based in a supposed "participatory democracy" which is directly controlled by the central government. Within such system, despite the political rhetoric, exuberant spending and waste of an immense public income, of a rich state in a poor country, no effective social and economic reforms or improvements have been achieved, except the building of an enormous bureaucratic State that has appropriated or confiscated all main private enterprises in the country, consolidating a corrupt and inefficient system of capitalism of State.

In this process, again, the Supreme Tribunal and particularly its Constitutional Chamber, has been the main tool in order to legitimate the violations of the Constitution; and particularly the perversion of many of its institutions and provisions that have been used by the government in order to strengthen the concentration of power, the state centralization, the extreme presidentialism, the extensive state participation in the economy, and the general marginalization of civil society in public activities.

All these institutional deformations lead the President of the Republic to propose in 2007, a Constitutional Reform aimed to consolidate the authoritarian regime in the Constitution itself, formally regulating a socialist, centralized, militaristic and police state.[52] The National Assembly sanctioned those reforms proposals in November 2, 2007, violating the Constitution because no substantive reforms of such kind are allowed to be made through the constitutional review procedure, but only by means of the convening of a new Constituent Assembly. Of course, the Supreme Tribunal, very diligently, refused to decide all the multiple judicial review challenges filed against the proposal of the unconstitutional

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[50] See in *Gaceta Constituyente (Diario de Debates), Noviembre 1999–Enero 2000*, Session of December 22, 1999, N° 51, pp. 2 ff. See *Gaceta Oficial* N° 36.859 of December 29, 1999; and *Gaceta Oficial* N° 36.860 of December 30, 1999.

[51] See in *Gaceta Oficial* N° 36.859 of December 29, 1999.

[52] See Allan R. Brewer-Carías, *Hacia la consolidación de un Estado Socialista, Centralizado, Policial Y Militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007,* Colección Textos Legislativos, No. 42, Editorial Jurídica Venezolana, Caracas 2007.

Constitutional Reform.[53] Nonetheless, fortunately, the people rejected the reforms proposal in the referendum held on December 2, 2007, but unfortunately, the rejection has been mocked by Government, which during the past three years, defrauding the Constitution, has been implementing the rejected reforms by means of ordinary legislation or through decree-laws unconstitutionally enacted.[54] The President of the Republic has been completely sure that the submissive Constitutional Chamber he has controlled would never exercise any sort of judicial review control over such unconstitutional acts.

That is why, in this context, it is hardly surprising to hear President Chávez, when referring to the delegate legislation enacted by himself, to say in August 2008, simply: "*I am the Law.... I am the State* !!;[55] repeating the same phrases he used in 2001, also referring to other series of decree-laws he enacted at that time as delegate legislation.[56] Such phrases, as we all know, were attributed in the seventeen century to Louis XIV, in France, as a sign of the meaning of an Absolute Monarchy –although in fact he never expressed them–;[57] but to hear in our times a Head of State saying them, is enough to understand the tragic institutional situation that Venezuela is currently facing, characterized by a complete absence of separation of powers and, consequently, of a democratic and rule of law government. [58]

This has lead to successive illegitimate mutations of the Constitution or constitutional distortions that have been made defrauding the Constitution itself, [59] being the first one, the

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[53] See the comments on the various decisions in 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*, núm. 112, Caracas, Editorial Jurídica Venezolana, 2007, pp. 661-694

[54] See Lolymar Hernández Camargo, "Límites del poder ejecutivo en el ejercicio de la habilitación legislativa: Imposibilidad de establecer el contenido de la reforma constitucional rechazada vía habilitación legislativa," in *Revista de Derecho Público*, No. 115 *(Estudios sobre los Decretos Leyes),* Editorial Jurídica venezolana, Caracas 2008, pp. 51 ff.; Jorge Kiriakidis, "Breves reflexiones en torno a los 26 Decretos-Ley de Julio-Agosto de 2008, y la consulta popular refrendaría de diciembre de 2007", *Idem,* pp. 57 ff.; and José Vicente Haro García, Los recientes intentos de reforma constitucional o de cómo se está tratando de establecer una dictadura socialista con apariencia de legalidad (A propósito del proyecto de reforma constitucional de 2007 y los 26 decretos leyes del 31 de julio de 2008 que tratan de imponerla)", *Idem*, pp. 63 ff.

[55] Hugo Chávezs Frís, August 28, 2008. See in Gustavo Coronel, *Las Armas de Coronel*, October 15, 2008, available at http://lasarmasdecoronel.blogspot.com/2008/10/yo-soy-la-leyyo-soy-el-estado.html

[56] See in *El Universal,* Caracas, December 4, 2001, pp. 1,1 and 2,1. This is the Orly thing that can explain tha a head of State in 2009 could qualify "frepresentative democracy, separation of Powers and alternate government" as doctrines that "poisons the masses mind." See "Hugo Chávez seeks to catch them young," in *The Economist*, August 22-28, 2009, p. 33.

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

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

[59] See Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *IUSTEL, Revista General de Derecho Administrativo*, No. 21, junio 2009, Madrid, ISSN-1696-9650

decision issued by the Constitutional Chamber of the Supreme Tribunal of Justice a few weeks after approval of the 1999 Constitution, accepting the existence of not one, but of two constitutional transitory regimes: one which was approved by popular vote, and embodied in the text of the Constitution; and another not approved by the people, and adopted one week after the Constitution was popularly approved by the same Constituent Assembly. This latter Decree on the Regime of Transition of the Public Power, enacted by the Assembly without any constitutional support, eliminated the prior Congress along with its senators and representatives; assigned the legislative power to a National Legislative Commission not established in the Constitution; dissolved the states' legislative assemblies; controlled the mayor's offices and municipal councils; and, as mentioned, eliminated the former Supreme Court of Justice, appointing the magistrates of the new Supreme Tribunal but without complying with the conditions established in the Constitution. It also transformed the former Judicial Emergency Commission into a Commission for the Reorganization and Functioning of the Judiciary in order to continue with the removal of judges from office without due process, which still today continues to work.

Of course, this unconstitutional Decree was challenged before the new Constitutional Chamber which was appointed in it, being the result that the Constitutional Chamber, deciding in its own cause violating one of the most basic principles of law, argued that the Constituent Assembly had supra-constitutional power to create constitutional provisions without popular approval.[60] The consequence has been the existence in the country of two transitional constitutional regimes: one approved by the people, and the other illegitimately imposed to the people, leading to a long and endless period of constitutional instability that, eleven years later, has eroded institutional confidence and legal security. [61]

One of the unconstitutional results of the transitory constitutional regime adopted by the Constituent Assembly, as I mentioned, was the appointment of the Magistrates of the new Supreme Tribunal without fulfilling the conditions for those appointments and without guarantying the citizens' participation in the process. In this particular aspect, the 1999 Constitution provides for a direct mean of citizen participation in the nominating process of High non elected Officials, preventing the National Assembly to appoint them without being previously proposed by nominating committees; committees that were to be integrated in an exclusive way by representatives of "different sectors of civil society." Nonetheless, these committees have never been established in the country in the way provided in the Constitution, and have been supplanted by ordinary parliamentary commissions, extending in an illegitimate way, through legislation, the initial transitory regime. [62]

In 2000, for instance, a Special Law for the Ratification or Appointment of High Officials and Magistrates to the Supreme Tribunal of Justice[63] was enacted by the then newly elected National Assembly, but without organizing the aforementioned nominating

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[60] See decision Nº 4 of January 26, 2000, case: *Eduardo García,* in *Revista de Derecho Público*, Nº 81, Editorial Jurídica Venezolana, Caracas 2000, pp. 93 ff.

[61] See decision of March 28, 2000, *case: Allan R. Brewer-Carías y otros,* in *Revista de Derecho Público*, Nº 81, (enero-marzo), Editorial Jurídica Venezolana, Caracas, 2000, p. 86.

[62] 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.

[63] See *Gaceta Oficial* Nº 37.077 of November 14, 2000.

committees, thereby confiscating the citizens' right to political participation. Such Special Law, of course, was challenged before the Constitutional Chamber (this time by the Peoples' Defendant),[64] which has never decided the merits of the case. Instead, the Chamber, in a preliminary ruling (December 2000), decided again in its own cause, establishing that the Constitution was not applicable to the Magistrates that were signing the decision, because they were not going to be "appointed" but to be "ratified;"[65] a decision that was a grotesque mockery regarding the Constitution.

This irregular situation continued in 2004, when the National Assembly eventually sanctioned the Organic Law of the Supreme Tribunal of Justice, increasing the number of magistrates from twenty to thirty-two, distorting the constitutional conditions for their appointment and dismissal, and consolidating the judicial nominating committee as a dependent parliamentary commission. This reform, as the Inter-American Commission on Human Rights emphasized in its *2004 Annual Report*, "lack the safeguards necessary to prevent other branches of government from undermining the Supreme Tribunal's independence and to keep narrow or temporary majorities from determining its composition." [66]

After this 2004 legal reform, the process for selecting new Magistrates, although being an exclusive competency of the National Assembly, in fact was controlled by the President of the Republic, as was publicly recognized by the representative head of the parliamentary nominating committee, when he publicly announced that fact and, in addition, said that "There is now one in the group of nominees that could act against us."[67] This configuration of the Supreme Tribunal, as highly politicized and subjected to the will of the president, has completely eliminated the autonomy of the Judiciary, and even the basic principle of separation of powers; allowing the government the absolute control of the Supreme Tribunal of Justice, and particularly, of its Constitutional Chamber.

Through the Supreme Tribunal, which is in charge of governing and administering the Judiciary, the political control over all judges has been also assured, reinforced by means of the survival of the 1999 "provisional" Commission on the Functioning and Restructuring of the Judicial System, which has been legimimazed by the same Tribunal, making completely

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[64] See *El Universal,* Caracas, December 14, 2000, pp. 1-2.

[65] The Constitutional Chamber accepted the point of view that the Magistrates could be "ratified" according to the Special Law without complying with the Constitution, because the latter only established their nomination but said noting about the "ratification" of those in office, signing the decision. See Decision of December 12, 2000 in *Revista de Derecho Público N° 84*, Editorial Jurídica Venezolana, Caracas, 2000, p. 109. See the comments in Allan R. Brewer-Carías, "La participación ciudadana en la designación de los titulares de los órganos no electos de los Poderes Públicos en Venezuela y sus vicisitudes políticas," in *Revista Iberoamericana de Derecho Público y Administrativo*, Año 5, Nº 5-2005, San José, Costa Rica 2005, pp. 76-95, available at www.allanbrewercarias.com (Biblioteca Virtual, II.4. Artículos y Estudios No. 469, 2005) pp. 1-48.

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

[67] He expressed to the press: "If it is true that the representatives have the power to choose, the opinión of the President of the Republic has been ask, and has been very much taken into account." See *El Nacional*, Caracas, December 13, 2004. The Inter-American Commission of Human Rights suggested in its *2004 Report on Venezuela* that "those provisions of the Organic Law of the Supreme Tribunal of Justice had facilitated the Executive Power to manipulate the 2004 process of election of the magistrates," paragraph párrafo 180.

inapplicable the 1999 constitutional provisions seeking to guarantee the independence and autonomy of judges. [68]

According to the text of the 1999 Constitution, judges can only enter the judicial career by means of public competition that must be organized with citizens' participation. Nonetheless, this provision has not yet been implemented, being the judiciary almost exclusively made up of temporary and provisional judges, without any stability. Regarding this situation, for instance, since 2003 the Inter-American Commission on Human Rights has repeatedly express concern about the fact that provisional judges are susceptible to political manipulation, which alters the people's right to access to justice, reporting cases of dismissals and substitutions of judges in retaliation for decisions contrary to the government's position.[69] In its *2008 Annual Report*, the Commission again verified the provisional character of the judiciary as an "endemic problem" because the appointment of judges was made without applying constitutional provisions on the matter – thus exposing judges to discretionary dismissal – which highlights the "permanent state of urgency" in which those appointments have been made. [70]

Contrary to these facts, according to the words of the Constitution in order to guarantee the independence of the Judiciary, judges can be dismissed from their tenure only through disciplinary processes, conducted by disciplinary courts and judges, conforming a disciplinary judicial jurisdiction. Nonetheless, that jurisdiction has never been created, corresponding the disciplinary judicial functions to the already mentioned transitory Commission, [71] which, as reported by the same Inter-American Commission in its *2009 Annual Report*, "in addition to being a special, temporary entity, does not afford due guarantees for ensuring the independence of its decisions,[72] since its members may also be appointed or removed at the sole discretion of the Constitutional Chamber of the Supreme

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[68] See in general, 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; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial," in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías "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, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

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

[70] See *Annual Report 200*8 (OEA/Ser.L/V/II.134. Doc. 5 rev. 1. 25 febrero 2009), paragraph 39

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

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

Tribunal of Justice, without previously establishing either the grounds or the procedure for such formalities." [73]

The Commission has then "cleansed" the Judiciary of judges not in line with the authoritarian regime, removing judges in a discretionary way when they have issued decisions not within the complacency of the government.[74] This lead the Inter-American Commission on Human Rights, again in its *2009 Annual Report,* to observe that "in Venezuela, judges and prosecutors do not enjoy the guaranteed tenure, necessary to ensure their independence following changes in policies or government." [75]

One of the leading cases showing this situation took place in 2003, after the First Court of the Contentious Administrative Jurisdiction issued a preliminary amparo measure suspending administrative actions, pending the trial, because presumptively being discriminatory. In effect, based on the previous democratic tradition of the country in matters of control and review of Public Administration actions, on July 17, 2003, the Venezuelan National Federation of Doctors brought before the aforementioned Judicial Review of Administrative Actions highest Court in Caracas (First Court), a nullity claim against the Mayor of Caracas and the Ministry of Health and the Caracas Metropolitan Board of Doctors (*Colegio de Médicos*) actions hiring Cuban doctors for an important popular governmental health program in the Caracas slums, but without complying with the legal conditions established for doctors to practice the medical profession in the country. The National Federation of Doctors considered that the program was discriminatory and against the rights of licensed doctors to exercise their medical profession, allowing doctors to exercise it without complying with the Medical Profession Statute regulations. The consequence was the filing an amparo petition against both public authorities, seeking the collective protection of the Venezuelan doctors' constitutional rights.[76]

One month later, in August 21, 2003, the First Court issued a preliminary protective amparo measure, considering that there were sufficient elements to deem that the equality before the law constitutional guaranty was violated in the case. The Court ordered in a preliminary way the suspension of the Cuban doctors' hiring program and ordered the Metropolitan Board of doctors to substitute the Cuban doctors already hired, by Venezuelan ones or foreign Doctors who had fulfilled the legal regulations in order to exercise the medical profession in the country. [77]

Nonetheless, in response to that preliminary judicial amparo decision, instead of enforcing it, the Minister of Health, the Mayor of Caracas, and even the President of the Republic made public statements to the effect that the decision was not going to be

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[73] See *Annual Report 2009*, Paragraph 481, available at http://www.cidh.org/annualrep/2009eng/Chap.IV.f.eng.htm.

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

[75] See *Informe Anual de 2009*, paragraph 480, available at http://www.cidh.oas.org/annualrep/2009eng/Chap.IV.f.eng.htm

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

[77] See Decision of August, 21 2003, in *Idem,* pp. 445 ff.

respected or enforced.[78] Following these statements, the government-controlled Constitutional Chamber of the Supreme Tribunal of Justice adopted a decision, without any appeal being filed, assuming jurisdiction over the case and annulling the preliminary amparo ordered by the First Court; a group of Secret Service police officials seized the First Court's premises; and the President of the Republic, among other expressions he used, publicly called the President of the First Court a "bandit."[79] A few weeks later, in response to the First Court's decision in an unrelated case challenging a local registrar's refusal to record a land sale, a Special Commission for the Intervention of the Judiciary, which in spite of being unconstitutional continued to exist, dismissed all five judges of the First Court.[80] In spite of the protests of all the Bar Associations of the country and also of the International Commission of Jurists;[81] the First Court remained suspended without judges, and its premises remained closed for about nine months,[82] period during which simply no judicial review of administrative action could be sought in the country.[83]

The dismissed judges of the First Court brought a complaint to the Inter-American Commission of Human Rights for the government's unlawful removal of them and for violation of their constitutional rights. The Commission in turn brought the case, captioned *Apitz Barbera et al.* (*Corte Primera de lo Contencioso Administrativo vs. Venezuela*) before the Inter-American Court of Human Rights. On August 5, 2008, the Inter-American Court ruled that the Republic of Venezuela had violated the rights of the dismissed judges established in the American Convention of Human Rights, and ordered 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.[84]

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

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

[80] *See El Nacional*, Caracas, November 5, 2003, p. A2. The dismissed President of the First Court said: "*La justicia venezolana vive un momento tenebroso, pues el tribunal que constituye un último resquicio de esperanza ha sido clausurado.*" ("The Venezuelan judiciary lives a dark moment, because the court that was a last glimmer of hope has been shut down.") *Id.* The Commission for the Intervention of the Judiciary had also massively dismissed almost all judges of the country without due disciplinary process, and had replaced them with provisionally appointed judges beholden to the ruling power.

[81] *See* in *El Nacional*, Caracas, October 10, 2003, p. A-6; *El Nacional*, Caracas, October 15, 2003, p. A-2; *El Nacional*, Caracas, September 24, 2003, p. A-4; and *El Nacional*, Caracas, February 14, 2004, p. A-7.

[82] *See El Nacional*, Caracas, October 24, 2003, p. A-2; and *El Nacional*, Caracas, July 16, 2004, p. A-6.

[83] See, in general, Allan R. Brewer-Carías, "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, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios No. 550, 2007).

[84] Inter-American Court of Human Rights, case *Apitz Barbera et al. (Corte Primera de lo Contencioso Administrativo) v. Venezuela,* Decision of August 5, 2008, *available at* www.corteidh.or.cr.

Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal issued Decision No. 1.939, declaring that the August 5, 2008 decision of the Inter-American Court of Human Rights was non-enforceable (*inejecutable*) in Venezuela. As simple as that, showing the subordination of the Venezuelan judiciary to the policies, wishes, and dictates of the President. The Constitutional Chamber also accused the Inter-American Court of having usurped powers of the Supreme Tribunal of Justice, and asked the Executive Branch to denounce the American Convention of Human Rights.[85]

In general terms, this was the global governmental response to an amparo judicial preliminary decision that affected a very sensitive governmental social program; a response that was expressed and executed through the government-controlled judiciary.[86] The result was that the subsequent newly appointed judges replacing those dismissed, began to "understand" how they needed to behave in the future.

This emblematic case, contrast with the very progressive text of the constitution in force in Venezuela (1999), and shows that with a Judiciary controlled by the Executive, the declaration of constitutional rights is a death letter, and the provision of the action for amparo is no more that an illusion. As mentioned, this has been the tragic institutional result of the deliberated process of dismantling democracy to which Venezuela has been subjected during the past decade, through the imposition of an authoritarian government, defrauding the constitution and democracy itself.[87]

Last year, in December 2009, another astonishing case was the detention of a criminal judge (María Lourdes Afiuni Mora) for having ordered, based on a previous recommendation of the UN Working Group on Arbitrary Detention, the release of an individual in order for him to face criminal trial while in freedom, as guaranteed in the Constitution. The same day of the decision, the president publicly asked for the judge to be incarcerated asking to apply her a 30–year prison term, which is the maximum punishment in Venezuelan law for horrendous or grave crimes. The fact is that judge has remained to this day in detention without trial. The UN Working Group described these facts as "a blow by President Hugo Chávez to the independence of judges and lawyers in the country," demanding "the immediate release of the judge," concluding that "reprisals for exercising their constitutionally guaranteed functions and creating a climate of fear among the judiciary and lawyers' profession, serve no purpose except to undermine the rule of law and obstruct justice."[88]

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[85] Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1.939 of December 18, 2008 (Case: *Abogados Gustavo Álvarez Arias et al.*) (Exp. No. 08-1572).

[86] 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 Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33–174.

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

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

The fact is that in Venezuela, no judge can adopt any decision, particularly amparo decision against public authorities, that could affect the government policies, or the President's wishes, the state's interest, or public servants' will, without previous authorization from the same government. [89] That is why the Inter-American Commission on Human Rights, after describing in its *2009 Annual Report* "how large numbers of judges have been removed, or their appointments voided, without the applicable administrative proceedings," noted "with concern that in some cases, judges were removed almost immediately after adopting judicial decisions in cases with a major political impact," concluding that "The lack of judicial independence and autonomy vis-à-vis political power is, in the Commission's opinion, one of the weakest points in Venezuelan democracy." [90]

In this context of political subjection, the Constitutional Chamber, since 2000, far from acting as the guardian of the Constitution, has been the main tool of the authoritarian government for the illegitimate mutation of the Constitution, by means of unconstitutional constitutional interpretations, [91] not only regarding its own powers of judicial review, which have been enlarged, but also regarding substantive matters. The Supreme Tribunal has distorted the Constitution through illegitimate and fraudulent "constitutional mutations" in the sense of changing the meaning of its provisions without changing its wording. And all this, of course, without any possibility of being controlled, [92] so the eternal question arising from the uncontrolled power, – *Quis custodiet ipsos custodes* –, in Venezuela also remaines unanswered.

In this regard, one of the most lethal instruments for distorting the Constitution that has been used in Venezuela has been the filing of direct actions or recourses for the abstract interpretation of the Constitution, a judicial mean that has been created by the Constitutional Chamber itself without any constitutional support.[93] These recourses can be filed by any person or very convenient, by the Attorney General; so it has been through these actions that the Constitutional Chamber eventually has "reformed" the Constitution, and has even implemented in a very illegitimate way the constitutional reforms that were rejected by the people in the referendum of 2007.

Many cases can illustrate this unconstitutional process. For instance, Article 72 of the Constitution establishes the principle of the revocation of mandates of all popularly elected offices through recall referendums, establishing that when "a number of electors equal or

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

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

[91] See Allan R. Brewer-Carías, "*Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Editorial Jurídica Venezolana, Caracas 2007.

[92] 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*, Fondo Editorial and Colegio de Abogados de Arequipa, Arequipa, Peru, 2005, 463-89; and *Crónica de la "In"Justicia constitucional: La Sala constitucional y el autoritarismo en Venezuela*, Ëditorial Jurídica Venezolana, Caracas 2007, pp. 11-44 and 47-79.

[93] See Decision Nº 1077 of the Constitutional Chamber of September 22, 2000, case: *Servio Tulio León Briceño*. See in *Revista de Derecho Público,* Nº 83, Caracas, 2000, pp. 247 ff. This ruling was later ratified in decisions of November 9, 2000 (Nº 1347), November 21, 2000 (Nº 1387), and April 5, 2001 (Nº 457). See Allan R. Brewer-Carías, "Le recours d'interprétation abstrait de la Constitution au Vénézuéla," en *Le renouveau du droit constitutionnel, Mélanges en l'honneur de Louis Favoreu*, Dalloz, Paris, 2007, pp. 61-70

higher than those who elected the official, vote in favor of the revocation,"[94] the official's mandate is considered revoked. Nevertheless, clearly in an unconstitutional way, in 2003, when a recall referendum was first called by popular initiative to revoke the President's mandate, the National Electoral Council issued a regulation on the matter, adding to the constitutional provision that the number of votes to repeal, in no case could be "lower than the number of electors that voted against the revocation," changing the sense of the constitutional provisions on the matter. With that addition – established in a regulation – the right for the revocation of mandates was restricted, disrupting the nature of the recall referendum by transforming it into a "ratifying" referendum of mandates of popular election not provided in the Constitution. This constitutional fraud was endorsed by the Constitutional Chamber of the Supreme Court when it decided a recourse on the abstract interpretation of article 72 of the Constitution stating that "*if the option of the permanence [of the official] obtains more votes in the referendum, [the officer] should remain in office*, even if a sufficient number of people vote against him to revoke his mandate,"[95] and consequently, turning the "vote against the revocation" into a "vote to ratify" the official. This illegitimate distortion of the Constitution, nonetheless, in 2004 had a precise purpose, just to avoid the revocation of President Hugo Chávez's mandate. He was elected in August 2000 with 3,757,744 votes, and the number of votes casted to revoke his mandate was 3,989,008, surpassing that former number. But instead of announcing the revocation of the mandate according to the Constitution, the National Electoral Council, applying a custom-made doctrine established by the Constitutional Chamber, decided to ratify the President in its mandate due to the fact that at that moment more people (5,800,629) had voted not to revoke his mandate. [96] The recall referendum was thus illegitimately transformed into a non existing plebiscite to ratify the President.[97]

Also on electoral maters, for instance, the Constitutional Chamber distorted the mixed electoral system established in the Constitution that combines personalized and proportional representation ballots. This system requires a complex mathematical application in order to function regarding the election of representatives combining majority and list ballots. The Constitutional Chamber of the Supreme Tribunal of Justice in 2005, before the election of the members of the National Assembly took place, legitimized a defrauding method applied by the parties supporting the government that distorted the principle of proportional representation, transforming the system into a majority one. This, among other factors, led to the opposition parties decision in 2005 to not to participate in such election, unfortunately allowing the complete control of the Assembly by the government. In 2009, the new Organic Law on Electoral Processes was sanctioned legalizing this distorted electoral method, which was applied in the last week legislative

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[94] Decision Nº 2750 of October 21, 2003, Case: *Carlos Enrique Herrera Mendoza, (Interpretación del artículo 72 de la Constitución (Exp. 03-1989);* Decision Nº 1139 of June 5, 2002, Case: *Sergio Omar Calderón Duque y William Dávila Barrios,* in *Revista de Derecho Público,* Nº 89-92, Editorial Jurídica Venezolana, Caracas 2002, p. 171. The same ruling was followed in Decision Nº 137 of February 13, 2003, Case: *Freddy Lepage Scribani y otros* (Exp. 03-0287).

[95] See Decision Nº 2750 of October 21, 2003, Case: *Carlos E. Herrera Mendoza, Interpretación del artículo 72 de la Constitución*), in Véase *El Nacional*, Caracas, August 28, 2004, pp. A-1 y A-2

[96] See in *El Nacional*, Caracas, August 28, 2004, pp. A-1 y A-2

[97] 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 *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Editorial Jurídica Venezolana, Caracas 2007, 349-378.

election (September 2010), but introducing another distorted element in order to neutralize even more the proportional representation method, through the configuration of the constituencies. The result of the election, as has been announced a few days ago, has been that the opposition, although obtaining more votes than the official party (52% v. 48%), has succeeded to elect only one third of the representatives in the Assembly.

The role of the Constitutional Chamber mutating the Constitution has also affected the general regime on human rights. According to the Constitution, human rights' treaties, pacts and conventions have constitutional rank and prevail in the internal order as long as they contain more favorable provisions regarding their enjoyment and exercise. However, the Constitutional Chamber in 2008, after declaring unenforceable in the country a decision of the Inter-American Court of Human Rights, resolved that Article 23 of the Constitution "does not grant supra-constitutional rank to international treaties on human rights," the Chamber also decided that in case of contradiction between a disposition of the Constitution and a provision of an international treaty, it correspond only to it to determine which one would be applicable, [98] but emphasizing that "the political project of the Constitution" could never be affected, particularly – I quote – "with ideological interpretative elements that could privilege in a decisive way, individual rights, or that welcome the supremacy of the international judicial order over national law at the sacrifice of the sovereignty of the State." The Chamber also said that "a system of principles, supposedly absolute and supra-historic, cannot be above the Constitution" and that the theories that pretend to limit "under the pretext of universal legalities, the sovereignty and the national auto-determination" "are unacceptable."

With this decision, once again, the Constitutional Chamber illegitimately distorted the Constitution, reforming Article 23 of the Constitution by eliminating the supra-constitutional rank of the American Convention on Human Rights in cases in which it contains more favorable provisions for the benefit and exercise of human rights than the Constitution.

In addition, the Chamber also distorted another provision of the Constitution that grants power to all courts to directly apply human rights provisions of international treaties, reserving such power to the Constitutional Chamber itself.

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

The following year, in 2001, it was the Constitutional Chamber of the Supreme Tribunal, the one that distorted the Constitution when dismissing an *amparo* action filed against the President of the Republic by a citizen and a nongovernmental organization asking for the exercise of their right to response against the attacks made by the President in his weekly TV program. The Constitutional Chamber reduced the scope of freedom of information, eliminating the right to response and rectification regarding opinions in the media when they are expressed by the president in a regular televised program. In addition,

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[98] See Decision Nº 1492 of June 15, 2003, Case: *Impugnación de diversos artículos del Código Penal*, in *Revista de Derecho Público*, Nº 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 135 ff.

the tribunal excluded journalists and all those persons that have a regular program in the radio or a newspaper column, from the right to rectification and response.[99]

In addition, in 2003, the Constitutional Chamber dismissed an action of unconstitutionality filed against a few articles of the Criminal Code that limit the right to formulate criticism against public officials, considering that such provisions could not be deemed as limiting the freedom of expression, contradicting a well established doctrine in the contrary ruled by the Inter-American Courts on Human Rights.[100] The Constitutional Chamber also decided in contradiction with the constitutional prohibition of censorship, that through a statute it was possible to prevent the diffusion of information when it could be considered contrary to other provisions of the Constitution. [101]

Finally, it has been the Supreme Tribunal in 2007, the State organ that materialized the State intervention in order to terminate authorizations and licenses of radio and television enterprises to use frequencies, particularly those owned by persons considered in opposition to the government. It was the case of the arbitrarily closing of *Radio Caracas Televisión*, the oldest private TV in the country, whose assets were confiscated and its equipment assigned to a state-owned enterprise through an illegitimate Supreme Tribunal decision.[102]

On different matters, regarding the organization of the State, the same illegitimate constitutional mutation has occurred regarding the federal system of distribution of competencies among territorial entities of the State, which in Venezuela is constitutionally organized as a "decentralized federal State;" a distribution that cannot be changed except by means of a constitutional reform. Specifically, for instance, the Constitution provides that the conservation, administration, and use of roads and national highways, as well as of national ports and airports of commercial use, are of the exclusive powers of the states, which they must exercise in "coordination" with the Federal government.

One of the purposes of the rejected 2007 constitutional reform was precisely to change this competency of the States. But in spite of the popular rejection of the reform, nonetheless, it was the Constitutional Chamber, through a decision adopted four month after the referendum (April 15, 2008), the State organ in charge of implementing the reform. The Chamber, in effect, when deciding an autonomous recourse for the abstract interpretation of the Constitution filed by the Attorney General, modified the content of that constitutional provision, considering that the exclusive attribution it contained, was not

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[99] See Allan R. Brewer-Carías, "La libertad de expresión del pensamiento y el derecho a la información y su violación por la Sala Constitucional del Tribunal Supremo de Justicia", en Allan R. Brewer-Carías (Coordinador y editor), Héctor Faúndez Ledesma, Pedro Nikken, Carlos M. Ayala Corao, Rafael Chavero Gazdik, Gustavo Linares Benzo and Jorge Olavarria, *La libertad de expresión amenazada (Sentencia 1013),* Edición Conjunta Instituto Interamericano de Derechos Humanos y Editorial Jurídica Venezolana, Caracas-San José 2001, pp. 17-57; and 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)," *Revista de Derecho Constitucional* 5, Editorial Sherwood, Caracas 2002, 305-25.

[100] See Decision Nº 1492 of June 15, 2003, Case: *Impugnación de diversos artículos del Código Penal*, in *Revista de Derecho Público*, Nº 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 135 ff.

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

[102] See the Constitutional Chamber Decision N° 957 (May 25, 2007), in *Revista de Derecho Público* 110, Editorial Jurídica Venezolana, Caracas 2007, 117ff. See the comments in Allan R. Brewer-Carías, "El juez constitucional en Venezuela como instrumento para aniquilar la libertad de expresión plural y para confiscar la propiedad privada: El caso RCTV", in *Revista de Derecho Público*", No. 110, (abril-junio 2007), Editorial Jurídica Venezolana, Caracas 2007, pp. 7-32.

"exclusive," but a "concurrent" one, to be exercised together with the federal government, which even could reassume the attribution or decree its intervention. [103]

With this interpretation, again, the Chamber illegitimately modified the Constitution usurping popular sovereignty, compelling the National Assembly to enact legislation contrary to the Constitution, which it did in March 2009, by reforming of the Organic Law for Decentralization. [104]

In other cases, the Constitutional Chamber has been the instrument of the government in order to assume direct control of other branches of government, as happened in 2002 with the take-over of the Electoral Power, which since then has been completely controlled by the Executive. This began in 2002 after the Organic Law of the Electoral Power[105] was sanctioned and the National Assembly was due to appoint the new members of the National Electoral Council. Because the representatives supporting the government did not have the qualified majority to approve such appointments by themselves, and did not reached agreements on the matter with the opposition, when the National Assembly failed to appoint the members of the National Electoral Council, that task was assumed, without any constitutional power, by the Constitutional Chamber itself. Deciding an action that was filed against the unconstitutional legislative omission, the Chamber instead of urging the Assembly to comply with its constitutional duty, directly appointed the members of the Electoral Council, usurping the Legislator's functions, but without complying with the conditions established in the Constitution for such appointments. [106] With this decision, the Chamber assured the government's complete control of the Council, kidnapping the citizen's rights to political participation, and allowing the official governmental party to manipulate the electoral results.

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

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[103] 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, (abril-junio 2008), Editorial Jurídica Venezolana, Caracas 2008, pp. 247-262; and "La ilegitima mutación de la Constitución y la legitimidad de la jurisdicción constitucional: la "reforma" de la forma federal del Estado en Venezuela mediante interpretación constitucional," en *Memoria del X Congreso Iberoamericano de Derecho Constitucional,* Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de Investigaciones Jurídicas-UNAM y Maestría en Derecho Constitucional-PUCP, IDEMSA, Lima 2009, tomo 1 , pp. 29-51

[104] See *Gaceta Oficial* N° 39 140 of March 17, 2009

[105] See *Gaceta Oficial* No. 37.573 of November 19, 2002

[106] See Decision No. 2073 of August 4, 2003, Case: *Hermánn Escarrá Malaver y oros*), and Decision No. 2341 of August 25, 2003, Case: *Hemann Escarrá y otros*. See in Allan R. Brewer-Carías, "El secuestro del poder electoral y la conficación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004", **in** *Stvdi Vrbinati, Rivista tgrimestrale di Scienze Giuridiche, Politiche ed Economiche*, Año LXXI – 2003/04 Nuova Serie A – N. 55,3, Università degli Studi di Urbino, pp.379-436

FINAL REMARKS

The result of all these facts is that at the beginning of the twenty-first century, Latin America has witnessed in Venezuela the birth of a new model of authoritarian government that did not immediately originate itself in a military coup, as happened in many other occasions during the long decades of last century, but in an constituent coup d'état and in popular elections, which despite its final goal of destroying the rule of law and democracy, have provided it the convenient camouflage of "constitutional" and "elective" marks, although of course, lacking the essential components of democracy, which are much more than the sole popular or circumstantial election of governments.

In particular, among all the essential elements and components of democracy, the one regarding the separation and independence of public powers is maybe the most fundamental pillar of the rule of law, because it is the only one that can allow the other factors of democracy to become political reality. To be precise, democracy, as a rule of law political regime, can function only in a constitutional system where control of power exists, so without effective check and balance, no free and fair elections can take place; no plural political system can be developed; no effective democratic participation can be ensured; no effective transparency in the exercise of government can be assured; no real government accountability can be secure; and no effective access to justice can be guaranteed in order to protect human rights.

All these factors are lacking at the present time in Venezuela, where a new form of constitutional authoritarianism has been developed, based on the concentration and centralization of state powers, which prevent any possibility of effective democratic participation, and any possible check and balance between the branches of government. Today, all the State organs are subjected to the National Assembly, and through it, to the President. That is why the legislative elections of last September 2010 were so important, particularly bearing in mind that according to the Constitution, the presidential system of government was conceived to function only if the government has complete control over the Assembly. A government that does not have such control will find difficult to govern, and that is why the President of the Republic, just before the election, repeatedly affirmed that if the opposition was to win the control of the Assembly, that would signify war.

In any case, the fact is that the President, his official party and the National Assembly tried to configure the last September 2010 legislative elections as a plebiscite regarding the President and his socialist model and policies. And the result has been that effectively, the President lost his plebiscite, in which the Venezuelan people sent a clear message of rejection.

After a decade of demolishing the rule of law and the democratic institutions, by controlling, at the government will, all the branches of government, particularly the Judiciary, it will be very difficult for the government and its official party to admit the democratic need they have to share power in the Assembly. They are not used to democracy, that is to say, they are not used to any sort of compromise and consensus, but only to impose their decisions; and that is why they have already announced that they are not going to participate in any sort of dialogue. It is then possible, that in the near future, we could witness, even before the new elected representative take their sits in the Assembly in January 2011, the approval by the old Assembly of new legislation seeking to consolidate what the people has rejected, the so called "Socialism of the XXI Century" which is based on the centralized framework of the so-called "Popular Power" to be

exercised by "Communes" and by the government controlled "Communal Councils," minimizing the future role of the National Assembly and of its representativeness.

One further example of the perversion of the Constitution and of the will of the people expressed in the September 2010 Legislative election, and it is very sad to pointed out, is currently in course of being materialized regarding the appointment of the new Magistrates of the Supreme Tribunal. What just a weeks ago was only a treat of the government, once lost the popular vote, for the current National Assembly – completely dominated by the official party - to immediately proceed to appoint the new magistrates of the Supreme before the inauguration of the new elected members of the National Assembly in January 2011, in order to avoid the participation in the nominating process of the opposition members of the Assembly; is now a real fact. Nonetheless, for such appointments to be done between September and December 2010, a modification of the Organic Law of the Supreme Tribunal was necessary, which has been done, not through the ordinary procedure to reform statutes, but through a completely irregular mechanism of "reprinting" the text of the statute in the *Official Gazette* based in a supposed "material error" in the copying of the text of the statute; reprinting made precisely a few days after the Government lost the majority in the National Assembly..[107]

Article 70 of the Organic Law of the Supreme Tribunal, in effect, established that the term in order to propose candidates to be nominated Magistrate of the Supreme Tribunal before the Nominating Judicial Committee "must not be *less* that thirty continuous days;" wording that has been change through a "notice" published by the Secretary of the Assembly in the Official Gazette stating that establishing that instead of the word "*less*" the correct word to be used in the antonym word "*more*" in the sense of the term "must not be more that thirty continuous days." That means that the "reform" of the statute by changing a word (less to more), transformed a minimum term was transformed into a maximum term in order to reduce the term to nominate candidates and allow the current national Assembly to proceed to make the election before the new National Assembly initiates its activities in January 2010.[108] This is the "procedure" currently used in order to reform statutes, by means of the reprinting of the text in the *Official Gazette*, without any possible judicial review.

In any case, this is currently happening, so with this sort of actions, we will then be able to characterize the government, not only by its constant actions adopted perverting or defrauding the Constitution, but now, also, defrauding the popular will as it was expressed in the last legislative election. This is the tragic institutional situation we are currently experiencing in Venezuela, where of course, no amparo proceedings can be effectively filed in order to face the arbitrary actions of the government.

Pittsburgh, November 5, 2010

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[107] See *Gaceta Oficial* Nº 39.522 of October 1, 2010

[108] See the comments in Víctor Hernández Mendible, "Sobre la nueva reimpresión por "supuestos errores" materiales de la LOTSJ en la *Gaceta Oficial* Nº 39.522, de 1 de octubre de 2010," and Antonio Silva Aranguren, "Tras el rastro del engaño, en la web de la Asamblea Nacional," published as an *Addendum* to the book of Allan R. Brewer-Carías and Víctor Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia de 2010,* Editorial Jurídica Venezolana, Caracas 2010.