

## THE RECENT PROCESS OF "DECONSTITUTIONALIZATION" OF THE VENEZUELAN STATE\*

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One of the main trends of the so called “Bolivarian Revolution” that Hugo Chávez Frías has imposed in Venezuela since 1999 is that almost all the political changes introduced in the country during the past decade have been made in contempt of the Constitution and of its supremacy; that is, its without following the review procedures set forth in its text.

In effect, according to the 1999 Constitution following the trends of the previous 1961 Constitution, the State was constituted as a Democratic and Social State of Law and Justice (Article 2), organized as “a decentralized federal State” (Article 4).<sup>1</sup>

The political framework of the organization of the State, is based, among other well known principles, on the one hand, in the principle of separation or powers (between five and not only three powers, adding to the traditional ones, the Electoral and the Citizens powers), with their autonomy and independence; and on the other hand, on a vertical distribution of public powers in three territorial levels of government: National (Federal), State and Municipal levels (Art. 136). In each level, as stated un the Constitution, the government must always be “elective, decentralized, alternative, responsible, plural, and of revocable mandate” (Article 6).

The political system of government is based on the principles of representative democracy, political decentralization and participation, and political pluralism, according to which, no political institution of the State can be created without ensuring its elective character through elected representatives of the people by means of universal, direct and secret suffrage; without guaranteeing its political

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<sup>1</sup> See the study of the constitution regarding the regulation of this State Constitutional Model, in Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional venezolano*, 2 vols., Caracas 2004, and *La Constitución de 1999 y la Enmienda Constitucional de 2009*, Editorial Jurídica Venezolana, Caracas 2011.

autonomy, which is essential to its decentralized nature; and without guaranteeing its plural character in the sense that it cannot be linked to a particular ideology.

And finally, the economic system was conceived as a mixed one, declaring economic liberty and free private initiative, altogether with the guaranty of private property, allowing the State participation in the economy, and in all case with the purpose of satisfying social justice.

These are the constitutional ground principles embodied in the 1999 Constitution, which as a rigid one cannot be changed by the government without changing the Constitution itself.

Nonetheless, in the name of a so-called “Bolivarian Revolution,” which of course has nothing to do with Simón Bolívar or with his thoughts,<sup>2</sup> all these basic principles have been changed in Venezuela defrauding or in degradation of the 1999 Constitution, in order to progressively implement a new XXI century “Communist State.”

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<sup>2</sup> All the proposals formulated by Chávez to construct socialism were linked to Simón Bolívar’s 1819 *Discurso de Angostura*, which he considered “perfectly applicable to a socialist project” in the sense of considering that it was possible to “take the original Bolivarian ideology as a basic element of a socialist project.” Of course, this assertion has no serious foundations: it is enough to read Bolívar’s 1819 Angostura discourse on presenting the draft constitution to realize that it has nothing to do with a “socialist project” of any kind. See Simón Bolívar, *Escritos fundamentales*, Caracas 1982. See also Pedro Grases ed., *El Libertador y la Constitución de Angostura de 1819*, Caracas 1969; José Rodríguez Iturbe, ed., *Actas del Congreso de Angostura*, Caracas 1969. On the other hand, it must be remember, that if Bolívar would have expressed any idea related to socialism, Karl Marx himself would have detected it when he wrote the entry on “Simón Bolívar y Ponte” for the *New American Cyclopaedia* published in New York in 1857 (See *The New American Cyclopaedia*, Vol. III, 1858, on “Bolívar y Ponte, Simón,” available at <http://www.marxists.org/archive/marx/works/1858/01/bolivar.htm>), eleven years after publishing his book with Fredrick Engels on *The German Ideology* (The book was written between 1845 and 1846. The Communist Manifest was published in February 1848). It was in this book were they used the word “communism” perhaps for the first time (See in Karl Marx and Frederick Engels, “The German Ideology,” in *Collective Works*, Vol. 5, International Publishers, New York 1976, p. 47. See the pertinent texts at [http://www.educa.madrid.org/cms\\_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf](http://www.educa.madrid.org/cms_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf)); and the fact is that in the 1857 article on Bolívar Marx made no mention at all regarding any socialist ideas of Bolívar, being that article, by the way, one if not the most critical work on Bolívar ever written.

## I. THE 2007 ATTEMPT TO PASS A CONSTITUTIONAL REFORM IN ORDER TO CREATE A SOCIALIST, CENTRALIZED AND COMMUNAL STATE IN SUBSTITUTION OF THE DEMOCRATIC DECENTRALIZED SOCIAL STATE

In order to begin to implement the so-called “Bolivarian Revolution” in 2007 President Chávez submitted to the National Assembly a complete draft of Constitutional Reforms,<sup>3</sup> with the purpose of establishing a “communal state” of the “popular power” or of the “communal power” (*Estado del poder popular o del poder communal, o Estado comunal*) built upon communal councils (*consejos comunales*) as the primary political units of social organization; that is, in general terms, a socialist, centralized, militaristic, and police State,<sup>4</sup> called the “Popular Power State” or “Communal State,” affecting the most essential and fundamental aspects of the political organization of the state.<sup>5</sup>

The general trends of the proposed constitutional changes were the following:

**First**, the democratic and decentralized State regulated in the Constitution was to be converted into a centralized state of concentrated power that under the illusory guise of a popular power, what implied was the definitive elimination of the federal form of the state,<sup>6</sup> rendering political participation impossible, degrading and progressively eliminating representative democracy.

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<sup>3</sup> The first Draft circulated in June 2007 under the title *Consejo Presidencial para la Reforma de la Constitución de la República Bolivariana de Venezuela, “Modificaciones propuestas.”* The complete text was published as *Proyecto de reforma constitucional. Versión atribuida al Consejo Presidencial para la reforma de la Constitución de la República Bolivariana de Venezuela*, Editorial Atenea, Caracas 2007, 146. The presidential proposals were published as *Proyecto de Reforma Constitucional. Elaborado por el ciudadano Presidente de la República Bolivariana de Venezuela, Hugo Chávez Frías*, Editorial Atenea, Caracas 2007

<sup>4</sup> 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.

<sup>5</sup> See Rogelio Pérez Perdomo, “La Constitución de papel y su reforma,” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, p. 14; G. Fernández, “Aspectos esenciales de la modificación constitucional propuesta por el Presidente de la República. La modificación constitucional como un fraude a la democracia,” *Id.*, p. 22; Alfredo Arismendi, “Utopía Constitucional,” in *id.*, p. 31; Manuel Rachadell, “El personalismo político en el Siglo XXI,” in *id.*, p. 66; Allan R. Brewer-Carías, “El sello socialista que se pretendía imponer al Estado,” in *id.*, p. 71-75; Alfredo Morles Hernández, “El nuevo modelo económico para el Socialismo del Siglo XXI,” in *id.*, p. 233-36.

<sup>6</sup> See Manuel Rachadell, “El personalismo político en el Siglo XXI,” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, 67; Ana Elvira Araujo, “Proyecto de reforma constitucional (agosto a noviembre 2007). Principios

For such purpose, the reform established a new “popular power” (*poder popular*) (art. 16), composed by communities (*comunidades*), each of which “shall constitute a basic and indivisible territorial nucleus of the Venezuelan Socialist State, where ordinary citizens will have the power to construct their own geography and their own history;” which were to be grouped into communes (*comunas*).<sup>7</sup>

The main aspect of these reforms, as was expressly stated, without any disguise, that the popular power “does not arise from suffrage or from any election, but arises from the condition of the organized human groups that form the base of the population.” Consequently, representative democracy at the local level and territorial political autonomy was to disappear, substituted with a supposed participatory and protagonist democracy that would, in fact, in a very undemocratic way, be controlled by the National Executive, proscribing any form of political decentralization and territorial autonomy.<sup>8</sup> Even anticipating to the proposed constitutional reforms, perhaps being sure of its approval – which did not occur -, the previous year, in 2006, the National Assembly approved the Law on the Councils of the Popular Power (*Consejos del Poder Popular*)<sup>9</sup> along the same undemocratic trends, seeking the dismantling of the traditional local governments or municipalities of the country.

**Second**, with the proposed 2007 constitutional reforms, the state was to be converted into a socialist state for the purpose of the “construction of a Socialist

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fundamentales y descentralización política,” in id., 77-81; José Luis Villegas, “Impacto de la reforma constitucional sobre las entidades locales,” in id., 119-23.

<sup>7</sup> The communes were created in the statute on the Federal Council of Government. See *Ley Orgánica del Consejo Federal de Gobierno*, *Gaceta Oficial* N° 5.963 Extra. of Feb. 22, 2010).

<sup>8</sup> This fundamental change, as the president stated on August 15, 2007, constituted “the development of what we understand by decentralization, because the Fourth Republic concept of decentralization is very different from the concept we must work with. For this reason, we have here stated ‘the protagonist participation of the people, transferring power to them, and creating the best conditions for the construction of social democracy.’” See *Discurso de orden pronunciado por el ciudadano Comandante Hugo Chávez Frías*, op. cit., 50.

<sup>9</sup> See Giancarlo Enriquez Maionica, “Los Consejos Comunales (una breve aproximación a su realidad y a su proyección ante la propuesta presidencial de reforma constitucional),” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, pp. 89-99; Allan R. Brewer-Carías, “El inicio de la desmunicipalización en Venezuela: La organización del poder popular para eliminar la descentralización, la democracia representativa y la participación a nivel local,” in *AIDA, Opera Prima de Derecho Administrativo. Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Asociación Internacional de Derecho Administrativo, Mexico City 2007, pp. 49-67. The 2006 law was replaced by *Ley Orgánica de los Consejos Comunales*, *Gaceta Oficial* N° 39.335, Dec. 28, 2009. See the comments on this Law in Allan R. Brewer-Carías, *Ley de los Consejos Comunales*, Editorial Jurídica Venezolana, Caracas 2010.



democracy” (art. 158); thus establishing a political official doctrine of socialist character – the Bolivarian doctrine – allowing the formal official criminalization of all dissidence and legalizing political persecution.

**Third**, in the 2007 constitutional reforms proposals, the mixed economic system was to be converted into a wholly state-owned, socialist, centralized economy by means of eliminating economic liberty and private initiative as constitutional rights, as well as the constitutional right to private property; conferring the means of production to the state, to be centrally managed; and configuring the state as an institution on which all economic activity will depend.<sup>10</sup>

**Fourth**, the state was to be converted into a repressive (police) state, given the regressive character of the regulations established in the reform regarding human rights, and also into a militarist state, on the basis of the role assigned to the “Bolivarian Armed Force” (*Fuerza Armada Bolivariana*). This was configured to function wholly under the direct control by the President, creating of the new “Bolivarian National Militia (*Milicia Nacional Bolivariana*).

As the President himself explained, the motivation for the drafting of the constitutional reforms in 2007, was to construct a “Bolivarian Socialism, Venezuelan Socialism, our Socialism, and our socialist model,” having “the community” (*la comunidad*), as its “basic and indivisible nucleus,” and considering that “real democracy is only possible in socialism.”<sup>11</sup>

The proposed constitutional reform, without doubt, would have formally altered the basic foundations of the state,<sup>12</sup> in particular if one takes into consideration the proposals of the substitution of the democratic and social state with the socialist state; the elimination of decentralization as a policy of the state

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<sup>10</sup> See Gerardo Fernández, “Aspectos esenciales de la modificación constitucional propuesta por el Presidente de la República. La modificación constitucional como un fraude a la democracia,” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, p. 24; Alfredo Arismendi, “Utopía Constitucional,” in *id.*, p. 31; José Antonio Muci Borjas, “La suerte de la libertad económica en el proyecto de Reforma de la Constitución de 2007,” in *id.*, pp. 203-208; Tamara Adrián, “Actividad económica y sistemas alternativos de producción,” in *id.*, pp. 209-14; Víctor Hernández Mendible, “Réquiem por la libertad de empresa y derecho de propiedad,” in *id.*, pp. 215-18; Alfredo Morles Hernández, “El nuevo modelo económico para el Socialismo del Siglo XXI,” in *id.*, pp. 233-236.

<sup>11</sup> See *Discurso de orden pronunciado por el ciudadano Comandante Hugo Chávez Frías*, op cit., 32, 34, 35.

<sup>12</sup> See Eugenio Hernández Bretón, “Cuando no hay miedo (ante la Reforma Constitucional),” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, oo. 17-20; Manuel Rachadell, “El personalismo político en el Siglo XXI,” in *id.*, pp. 65-70.

designed to develop public political participation; and the elimination of economic freedom and the right to property.<sup>13</sup>

Of course, none of these reforms changing so radically the State could be achieved through the constitutional review procedure (“constitutional reform”) used by the President and the National Assembly. The Constitution provides for three different methods of constitutional review: constitutional amendments, constitutional reforms, and the convening of a National Constituent Assembly, so major constitutional changes as those proposed in 2007 can only be approved by means of the convening of a Constituent Assembly. In contrast, in the case of the 2007 constitutional reforms proposals draft, it was proposed and sanctioned by the National Assembly evading the procedure established in the Constitution for such fundamental change, which imposed the convening of a Constituent Assembly. The reform proposed in itself defrauded the Constitution,<sup>14</sup> as one more step of the “permanent coup d’état” that since 1999 has occurred in Venezuela.<sup>15</sup>

The unconstitutional procedure that was followed for the reform was challenged on grounds of unconstitutionality before the Constitutional Chamber of the Supreme Tribunal of Justice, which being completely controlled by the Executive, of course refused to exercise judicial review on these matters declaring that such actions could no even be filed.<sup>16</sup>

Nonetheless, the fact was that all these constitutional reforms, were submitted to popular vote, and were all rejected by the people in the referendum that took

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<sup>13</sup> See on these reforms, Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, 2010.

<sup>14</sup> See Rogelio Pérez Perdomo, “La Constitución de papel y su reforma,” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, 14; Gerardo Fernández, “Aspectos esenciales de la modificación constitucional propuesta por el Presidente de la república. La modificación constitucional en fraude a la democracia,” in id., 21-25; Fortunato González, “Constitución histórica y poder constituyente,” in id., pp. 33-36; Lolymar Herández Camargo, “Los límites del cambio constitucional como garantía de pervivencia del Estado de derecho,” in id., 37-45; Claudia Nikken, “La soberanía popular y el trámite de la refroma constitucional promovida por iniciativa presidencial el 15 de agosto de 2007,” in id., 51-58.

<sup>15</sup> See José Amando Mejía Betancourt, “La ruptura del hilo constitucional,” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, p. 47. The term was first used by Francois Mitterand, *Le coup d’État permanent*, Éditions 10/18, Paris 1993.

<sup>16</sup> See Allan R. Brewer-Carías, “El juez constitucional vs. la supremacía constitucional O de cómo la jurisdicción constitucional en Venezuela renunció a controlar la constitucionalidad del procedimiento seguido para la ‘reforma constitucional’ sancionada por la Asamblea Nacional el 2 de noviembre de 2007, antes de que fuera rechazada por el pueblo en el referendo del 2 de diciembre de 2007,” in Eduardo Ferrer Mac Gregor y César de Jesús Molina Suárez (Coordinadores), *El juez constitucional en el Siglo XXI*, Universidad nacional Autónoma de México, Suprema Corte de Justicia de la Nación, México 2009, Tomo I, pp. 385-435—.

place on December 2, 2007,<sup>17</sup> a fact that nonetheless for the authoritarian government ruling the country meant nothing.

## **II. THE IRREGULAR FRAUDULENT IMPLEMENTATION OF THE REJECTED CONSTITUTIONAL REFORM THROUGH LEGISLATION AND JUDICIAL CONSTITUTIONAL INTERPRETATIONS (CONSTITUTIONAL MUTATIONS)**

The formal popular rejection of the constitutional reforms in the 2007 referendum, which in any democratic state would have the government to listen and follow the will of the people, on the contrary in Venezuela did not prevent the Government of beginning to implement them without even bothering to try again to change the Constitution, in order to establish the Socialist State.

This has been achieved during the past four years, first through the progressive political process of concentrating and controlling all public powers by the National Executive, through the National Assembly, as has occurred regarding the Judiciary;<sup>18</sup> second, through the enactment of ordinary legislation by the National Assembly, and decrees laws issued by the President of the Republic as delegate legislation;<sup>19</sup> and third, through constitutional “mutations,” that is, changes

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<sup>17</sup> See Allan R. Brewer-Carías, “La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario”, in *Anuario de Derecho Público 2007*, Año 1, Instituto de Estudios de Derecho Público de la Universidad Monteávila, Caracas 2008, pp. 17-65. According to information from the National Electoral Council on Dec. 2, 2007, of 16,109,664 registered voters, only 9,002,439 voted (44.11% abstention); of voters, 4,504,354 rejected the proposal (50.70%). This means that there were only 4,379,392 votes to approve the proposal (49.29%), so only 28% of registered voters voted for the approval.

<sup>18</sup> See 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)]” en *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007*, Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57

<sup>19</sup> 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 115 (Estudios sobre los Decretos Leyes)*, Editorial Jurídica Venezolana, Caracas 2008, pp. 51ff.; Jorge Kiriakidis, “Breves reflexiones en torno a los 26 Decretos-Ley de julio-agosto de 2008, y la consulta popular referendaria de diciembre de 2007,” in *id.*, pp. 57ff.; 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),” in *id.*, pp. 63ff.; Ana Cristina Nuñez Machado, “Los 26 nuevos Decretos-Leyes y los principios que regulan la intervención del Estado en la actividad económica de los particulares,” in *id.*, pp. 215-20; Aurilivi Linares Martínez, “Notas sobre el uso del poder de legislar por decreto por parte del Presidente venezolano,” in *id.*, pp. 79-89; Carlos Luis Carrillo Artiles, “La paradójica situación de los Decretos Leyes Orgánicos

introduced in the Constitution by means of interpretation made by the Constitutional Chamber of the Supreme Tribunal of Justice as Constitutional Jurisdiction.<sup>20</sup> The result has been that absolutely all the mentioned general trends and basic purposes of the rejected 2007 constitutional reform draft have been implemented in the country in contempt of the Constitution, and on the sight of all the democratic world.

As mentioned, this process began even before the 2007 reforms proposals were even submitted to the National Assembly, in June 2006 when the National Assembly passed the Law on the Communal Councils,<sup>21</sup> organizing them in parallel to the municipal entities, supposedly to channel citizen participation in public affairs, but subjected to a system of centralized management by the national executive power and without any political or territorial autonomy.<sup>22</sup>

The following year, in June 2007, a Central Planning Commission was created,<sup>23</sup> and in December 13, the National Assembly approved the 2007–13

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frente a la Ingeniería Constitucional de 1999,” in id., pp. 93-100; Freddy J. Orlando S., “El “paquetazo,” un conjunto de leyes que conculcan derechos y amparan injusticias,” in id., pp. 101-104

<sup>20</sup> 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),” en *Revista de Administración Pública*, No. 180, Madrid 2009, pp. 383-418; “La fraudulenta mutación de la Constitución en Venezuela, o de cómo el juez constitucional usurpa el poder constituyente originario,” en *Anuario de Derecho Público*, Centro de Estudios de Derecho Público de la Universidad Monteávila, Año 2, Caracas 2009, pp. 23-65; José Vicente haro, “La mutación de la Constitución ‘Bolivariana’,” in Gonzalo Pérez Salazar and Luis Petit Guerra, *Los retos del derecho procesal constitucional en Latinoamérica, I Congreso Internacional de Derecho Procesal Constitucional, 19 y 20 Octubre de 2011*, Vol I, Universidad Monteávila Funeda, Caracas 2011, pp. 93-141.

<sup>21</sup> *Ley de Consejos Comunales*, *Gaceta Oficial, Extra.* 5.806, of Apr. 10, 2006. This statute was replaced by Ley Orgánica de los Consejos Comunales. See *Gaceta Oficial* N° 39.335, Dec. 28, 2009.

<sup>22</sup> See Allan R. Brewer-Carías, “El inicio de la desmunicipalización en Venezuela: La organización del poder popular para eliminar la descentralización, la democracia representativa y la participación a nivel local,” in *AIDA, Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Asociación Internacional de Derecho Administrativo, Mexico City 2007, 49-67.

<sup>23</sup> Decree Law No. 5,841 was enacted on June 12, 2007, *Gaceta Oficial* N° 5.841, Extra., of June 22, 2007. See Allan R. Brewer-Carías, “Comentarios sobre la inconstitucional creación de la Comisión Central de Planificación, centralizada y obligatoria,” in *Revista de Derecho Público* 110, Editorial Jurídica Venezolana, Caracas 2007, pp. 79-89; Luis A. Herrera Orellana, “Los Decretos-Leyes de 30 de julio de 2008 y la Comisión Central de Planificación: Instrumentos para la progresiva abolición del sistema político y del sistema económico previstos en la Constitución de 1999,” in *Revista de Derecho Público* 115, (*Estudios sobre los Decretos Leyes*), Editorial Jurídica Venezolana, Caracas 2008, pp. 221-32

Economic and Social Development National Plan, providing that the “planning, production and distribution system oriented towards socialism,” being “the relevant matter” the progressive development of “social property of the production means.”

Through another Law the State assumed all powers in order to control farming, livestock, fishing, and aquaculture, and in particular the production of food,<sup>24</sup> allowing the State to directly assume distribution and commercialization of goods, and the occupation of industries without compensation.<sup>25</sup>

In 2008, another Law on the Popular Economy Promotion and Development was passed, establishing a “socio-productive communal model,” with different socio-productive organizations following the “socialist model.”<sup>26</sup> Also a general law on matters of Consumer and Users Protection was sanctioned in 2008 in the same openly socialist orientation.<sup>27</sup>

These Laws extended the state powers of control to the point of establishing the possibility of confiscating goods and services by means of their takeover and

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<sup>24</sup> Decree Law on the Organic Law on Farming and Food Security and Sovereignty. *Gaceta Oficial* N° 5.889, Extra., July 31, 2008. See José Ignacio Hernández G., “Planificación y soberanía alimentaria,” in *Revista de Derecho Público* 115, (*Estudios sobre los Decretos Leyes*), Editorial Jurídica Venezolana, Caracas 2008, pp. 389-94; Juan Domingo Alfonso Paradisi, “La constitución económica establecida en la Constitución de 1999, el sistema de economía social de mercado y el decreto 6.071 con rango, valor y fuerza de Ley Orgánica de seguridad y soberanía agroalimentaria,” in *id.*, pp. 395-415; Gustavo A. Grau Fortoul, “La participación del sector privado en la producción de alimentos, como elemento esencial para poder alcanzar la seguridad alimentaria (Aproximación al tratamiento de la cuestión, tanto en la Constitución de 1999 como en la novísima Ley Orgánica de soberanía y seguridad alimentaria),” in *id.*, pp. 417-24.

<sup>25</sup> See Carlos García Soto, “Notas sobre la expansión del ámbito de la declaratoria de utilidad pública o interés social en la expropiación,” in *Revista de Derecho Público* 115, (*Estudios sobre los Decretos Leyes*), Editorial Jurídica Venezolana, Caracas 2008, pp. 149-51; Antonio Canova González, Luis Alfonso Herrera Orellana, and Karina Anzola Spadaro, *¿Expropiaciones o vías de hecho? (La degradación continuada del derecho fundamental de propiedad en la Venezuela actual)*, Funeda, Universidad Católica Andrés Bello, Caracas 2009.

<sup>26</sup> Decree Law, No. 6,130 of June 3, 2008,. *Gaceta Oficial* N° 5.890, Extra., July 31, 2008. See Jesús María Alvarado Andrade, “La desaparición del bolívar como moneda de curso legal (Notas críticas al inconstitucional Decreto N° 6.130, con rango, valor y fuerza de la ley para el fomento y desarrollo de la economía comunal, de fecha 3 de junio de 2008,” in *Revista de Derecho Público* 115, (*Estudios sobre los Decretos Leyes*), Editorial Jurídica Venezolana, Caracas 2008, pp. 313-20.

<sup>27</sup> Decree Law No. 6,092 enacting the Access to Goods and Services Persons Defense Law. *Gaceta Oficial* N° 5,889 Extra of July 31, 2008; José Gregorio Silva, “Disposiciones sobre el Decreto-Ley para la defensa de las personas en el acceso a bienes y servicios,” in *id.*, pp. 277-79; Carlos Simón Bello Rengifo, “Decreto N° 6.092 con rango, valor y fuerza de la ley para la defensa de las personas en el acceso a los bienes y servicios (Referencias a problemas de imputación),” in *id.*, pp. 281-305; Alfredo Morles Hernández, “El nuevo modelo económico del socialismo del siglo XXI y su reflejo en el contrato de adhesión,” in *id.*, pp. 229-32.

occupation of private industries and services through administrative decisions,<sup>28</sup> which since 2008 has systematically occurred in the country, of course in an unconstitutional but uncontrolled way.

As mentioned, a primary purpose of the 2007 constitutional reforms was to complete the dismantling of the federal form of the state by centralizing power attributions of the states, creating administrative entities to be established and directed by the national executive, attributing powers to the president to interfere in regional and local affairs, and voiding state and municipal competency by means of compulsory transfer of that competency to communal councils.<sup>29</sup> The implementation of these rejected constitutional reforms was also completed with the approval in 2010 of the Law on the Federal Council of Government,<sup>30</sup> forcing the states and municipalities to transfer its attributions to local non representative institutions (communal councils) controlled by the central power,

The last set of unconstitutional legislation implementing the 2007 rejected reform was approved one year ago, in December 21, of 2010, by formally establishing a Communal State (or Socialist or Communist state) based upon the exercise of a new Popular Power that has no constitutional basis, created in parallel to the existing Constitutional decentralized State based upon the Public Power (National, state, municipal) expressly established in the Constitution.<sup>31</sup> For such purpose the National Assembly passed eight important Organic Laws referred to “the Popular Power;” “the Communes;” “the Communal Economic System;” “the

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<sup>28</sup> See Juan Domingo Alfonso Paradisi, “Comentarios en cuanto a los procedimientos administrativos establecidos en el Decreto N° 6.092 con rango, valor y fuerza de Ley para la defensa de las personas en el acceso a los bienes y servicios,” in *Revista de Derecho Público* 115, (*Estudios sobre los Decretos Leyes*), Editorial Jurídica Venezolana, Caracas 2008, pp. 245-60; Karina Anzola Spadaro, “El carácter autónomo de las ‘medidas preventivas’ contempladas en el artículo 111 del Decreto-Ley para la defensa de las personas en el acceso a los bienes y servicios,” in *id.*, pp. 271-76. See, in general, Antonio Canova González, Luis Alfonso Herrera Orellana, and Karina Anzola Spadaro, *¿Expropiaciones o vías de hecho? (La degradación continuada del derecho fundamental de propiedad en la Venezuela actual)*, Funeda, Universidad Católica Andrés Bello, Caracas 2009

<sup>29</sup> See See Manuel Rachadell, “La centralización del poder en el Estado federal descentralizado,” in *Revista de Derecho Público*, 115, (*Estudios sobre los Decretos Leyes*), Editorial Jurídica Venezolana, Caracas 2008, pp. 111-131.

<sup>30</sup> See *Ley Orgánica del Consejo Federal de Gobierno*, *Gaceta Oficial* N° 5.963 Extra. of Feb. 22, 2010.

<sup>31</sup> See Gustavo Linares Benzo, “Sólo un Poder Público más. El Poder Popular en la reforma del 2007,” in *Revista de Derecho Público* 112 (*Estudios sobre la reforma constitucional*), Editorial Jurídica Venezolana, Caracas 2007, pp. 102-105; Arturo Peraza, “Reforma, Democracia participativa y Poder Popular,” in *id.*, pp. 107-13.

Public and Communal Planning;” and “the Social Comptrollership;”<sup>32</sup> and reformed in the same framework of organizing the Communal State,<sup>33</sup> the Organic Law of Municipal Public Power, the Public Policy Planning and Coordination of the State Councils, and of the Local Council Public Planning.<sup>34</sup>

All these laws were approved after the President of the republic himself confessed in January 2010 that his supposedly “Bolivarian revolution,” in fact was no more than the resurrection of the historically failed “Marxist revolution,” but in this case led by a president who – he said - has never even read Marx’s writings.<sup>35</sup> Three months after this presidential announcement, the governmental United Socialist Party of which the President of the Republic presides, adopted in its First Extraordinary Congress a “Declaration of Principles” in which it officially declared itself as a “Marxist,” “Anti-imperialist” and “Anti-capitalist” party; prescribing that its actions are to be based on “scientific socialism” and on the “inputs of Marxism as a philosophy of praxis,” in order to substitute the “Capitalist Bourgeois State” with a “Socialist State” based on the Popular Power and the socialization of the means of production.<sup>36</sup>

Of course, as aforementioned, none of these ideas can be found in the works of Simón Bolívar, his name only being used as a pretext to continue to manipulate the Bolívar “cult” to justify authoritarianism, as has occurred so many times before in the history of the country.<sup>37</sup>

With these declarations by the President and his Party, it can be said, finally, that the so called “Bolivarian Revolution” has been unveiled; a revolution for which nobody in Venezuela has voted except for its rejection, first, in the December 2, 2007 referendum<sup>38</sup> in which the President’s proposals for

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<sup>32</sup> See *Gaceta Oficial* N° 6.011 Extra. Dec. 21, 2010.

<sup>33</sup> See on all these organic laws, Allan R. Brewer-Carías (Coord.) *et al.*, *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal*, Editorial Jurídica Venezolana, Caracas 2011, 719 pp.

<sup>34</sup> See *Gaceta Oficial* N° 6.015 Extra. Of Dec. 28, 2010.

<sup>35</sup> In his annual speech before the National Assembly on Jan. 15, 2010, in which Chávez declared to have “assumed Marxism,” he also confessed that he had never read Marx’s works. See María Lilibeth Da Corte, “Por primera vez asumo el marxismo,” in *El Universal*, Caracas Jan. 16, 2010, [http://www.eluniversal.com/2010/01/16/pol\\_art\\_por-primeravez-asu\\_1726209.shtml](http://www.eluniversal.com/2010/01/16/pol_art_por-primeravez-asu_1726209.shtml).

<sup>36</sup> See “Declaración de Principios, I Congreso Extraordinario del Partido Socialista Unido de Venezuela,” Apr. 23, 2010, at <http://psuv.org.ve/files/tcdocumentos/Declaracion-de-principios-PSUV.pdf>

<sup>37</sup> See *supra* note 2.

<sup>38</sup> The definitive voting figures in such referendum have never been informed to the country by the government controlled National Electoral Council. See Allan R. Brewer-Carías, “Estudio sobre la

constitutional reforms in order to establish a Socialist, Centralized, Police and Militaristic state received a negative popular response;<sup>39</sup> and second, in the parliamentary elections of September 26, 2010, in which the Government lost the support of the majority of the popular vote, after an electoral campaign developed as a sort of “plebiscite” on the President, his performance and his socialist policies.

#### **IV. THE UNCONSTITUTIONAL IMPLEMENTATION BY ORDINARY LEGISLATION OF THE REJECTED 2007 CONSTITUTIONAL REFORM REGARDING THE CREATION OF THE COMMUNAL STATE OF THE POPULAR POWER**

In particular, in such Legislative elections of September 2010, although the opposition won the majority of the popular vote in the election, it did not won the majority of seats in the National Assembly, due to distorting electoral regulations. Nonetheless, it won enough parliamentary seats in the National Assembly (approximately 40%), preventing the Government on the possibility of passing laws or decisions requiring a qualified vote, like the Organic Laws.

That is the explanation of why the President and his party, having lost the absolute control they used to have since 2005 over the National Assembly, before the newly elected deputies to the Assembly could began their tenure in January 2011, in December 21, 2010 forced the National Assembly to proceed to the sanctioning a the set of organic laws that I have mentioned, finishing the definition of the legislative framework for a new State.

In this way, by-passing the Constitution and in parallel to the Constitutional State, the National Assembly formally regulated through statutes the socialist, centralized, military and police State popularly rejected in a referendum held three years before, called the “Communal State” of the “Popular Power.” These organic laws as mentioned were approved in December 21, 2010, regulating the Popular Power, the Communes, the Communal Economic System, the Public and

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propuesta de Reforma Constitucional para establecer un estado socialista, centralizado y militarista (Análisis del anteproyecto presidencial, Agosto de 2007),” *Cadernos da Escola de Direito e Relações Internacionais da UniBrasil* 7, Curitiba 2007, pp. 265-308.

<sup>39</sup> See on the 2007 constitutional reforms proposals, 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*, Editorial Jurídica Venezolana, Caracas 2007; *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Editorial Jurídica Venezolana, Caracas 2007.



Communal Planning and the Social Comptrollership,<sup>40</sup> by-passing the municipal organization of the state.

The delegitimized National Assembly also passed an enabling Law authorizing the President, through delegated legislation, to enact laws on all imaginable subjects, including laws of organic nature, emptying the new National Assembly of matters on which to legislate for a period of 18 months until 2012.

The main purpose of these laws, as aforementioned, was the organization of the “Communal State” which has the commune as its fundamental unit, unconstitutionally supplanting the municipalities as the “primary political units of the national organization” (Art. 168 of the Constitution). It is through that organization that the Popular Power is conceived to be exercised, although not through representatives. In this “Communal State” representative democracy and representation is simply ignored, openly violating the Constitution.

In this way, after failing to formally transform the Constitutional State into a Communal State, what the government has done with the legislation approved in December 2010 Laws, is to create such Communal State in parallel or alongside to the Constitutional State. Accordingly, Venezuelans currently have two state organizations in the national territory: a Socialist State based on the supposed direct exercise of sovereignty by the people; and the Constitutional State, based representative democratic principles for the indirect exercise of sovereignty by the people through elected representatives by universal suffrage; but in a system conceived for the purpose to allow the Socialist or Communal State to gradually strangle and empty competencies from the Constitutional State.

All of this, or course, is unconstitutional, although without any possibility so subject those laws to any sort of judicial review due to the tight political control exercise upon the Supreme Tribunal. And it is unconstitutional, because in the structure of the Communal State that is established, the exercise of sovereignty is factually indirect, through supposed “representatives” that are not popularly elected through universal and direct suffrage, but “elected” in Citizens’ Assemblies, that are subjected to the control of the Central Power, being the whole system structured, directly controlled by a Ministry from the National Executive Branch of Government. Consequently, far from being an instrument of participation and decentralization is a centralized system of communal organizations tightly controlled the National Executive.

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<sup>40</sup> See Gaceta Oficial N° 6.011 Extra. of Dec. 21, 2010. See on all these organic laws, Allan R. Brewer-Carías *et al.*, *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal*, Editorial Jurídica Venezolana, Caracas 2011.

On the other hand, this Communal State is established imposing a unique official socialist concept and doctrine, contrary to any sort of pluralism, so that all those that are not socialist are automatically discriminated and excluded.

The December 2010 Laws on the Communal State and the Popular Power also reformed the Economic Constitution, establishing in parallel to the mixed economic system regulated in the Constitution, the so-called Communal Economic System to be developed “under communal forms of social ownership, to satisfy collective needs, social reinvestment of the surplus, and contribute to the country's overall social development in a sustainable manner” (art. 18).<sup>41</sup> This system must be exclusively developed through “socio-productive organizations under communal social property forms” created as public enterprises, family productive units, or bartering groups, in which private initiative and private property are excluded.

The socialist productive model is expressly established in the Law (art. 3.2), and defined as a “production model based on social property, oriented towards the elimination of the social division of work that appertains to the capitalist model,” directed to satisfy the increasing needs of the population through new means of generation and appropriation as well as the reinvestment of social surplus” (art. 6.12).

This is nothing different than to legally impose a “communist system,”<sup>42</sup> which is confirmed by the copying in the same text of the law of isolated phrases, perhaps of a forgotten old manual of a failed communist revolution used by the drafters of the law, paraphrasing what Karl Marx and Friedrich Engels wrote 150 years ago (1845-1846) on the “communist society;”<sup>43</sup> precisely using the three basic concepts listed for the communist society, which are, the social property of production means, the elimination of social division of work, and the social reinvestment of surplus (art. 1).

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<sup>41</sup> Organic Law of the Communal Economic System .See *Gaceta Oficial* N° 6.011 Extra. Dec 21, 2010

<sup>42</sup> “Sobre la Ley Orgánica del Sistema Económico Comunal o de cómo se implanta en Venezuela un sistema económico comunista sin reformar la Constitución,” in *Revista de Derecho Público*, No. 124, (octubre-diciembre 2010), Editorial Jurídica Venezolana, Caracas 2010, pp. 102-109

<sup>43</sup> See in Karl Marx and Frederich Engels, “The German Ideology,” in *Collective Works*, Vol. 5, International Publishers, New York 1976, p. 47. Véanse además los textos pertinentes en [http://www.educa.madrid.org/cms\\_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf](http://www.educa.madrid.org/cms_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf)

Fredrick Engels on *The German Ideology*.<sup>44</sup> It was in this book were they used the word “communism” perhaps for the first time;<sup>45</sup>

## SOME CONCLUSIONS

This Communal or Socialist State, regulated on the fringes of the Constitution, as mentioned, has been established as a “Parallel State” to the Constitutional State, but with provisions that through its implementation, will enable the Communal State to drown the Constitutional State, for which purpose the Law has provided that all organs of the Constitutional State are subjected to the mandates of the organizations of Popular Power, establishing a “new” principle of government, the so-called in the Law as the principle of “govern obeying,” no other than obeying the wishes of the central government<sup>46</sup> through the controlled organization of the Communal State.

As the Popular Power organizations have no political autonomy, since their "spokespersons" are not democratically elected by universal, direct and secret ballot, but appointed by Citizen's Assemblies politically controlled and operated by the governing party and the National Executive who controls and guides all the organizational process of the Communal State in the sphere of socialist ideology, there is no way there can be a spokesperson who is not a socialist.

Consequently, this "govern obeying" principle is a limitation to the political autonomy of the elected bodies of the Constitutional State such as the National Assembly, Governors and Legislative Councils of the States, and Mayors and Municipal Councils, upon who ultimately is imposed an obligation to obey any provision made by the National Executive and the ruling party, framed exclusively in the socialist sphere as a political doctrine.

Therefore, in the unconstitutional framework of these Popular Power Laws, the popular will expressed in the election of representatives of the Constitutional State bodies has no value whatsoever, and the people have been confiscated of their sovereignty by transferring it to assemblies that do not represent them.

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<sup>44</sup> The book was written between 1845 and 1846. The Communist Manifest was published in February 1848.

<sup>45</sup> See in Karl Marx and Frederich Engels, “The German Ideology,” in *Collective Works*, Vol. 5, International Publishers, New York 1976, p. 47. Véanse además los textos pertinentes en [http://www.educa.madrid.org/cms\\_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf](http://www.educa.madrid.org/cms_tools/files/0a24636f-764c-4e03-9c1d-6722e2ee60d7/Texto%20Marx%20y%20Engels.pdf)

<sup>46</sup> Article 24 of the Law establishes the following principle: “Proceedings of the bodies and entities of Public Power. All organs, entities and agencies of Public Power will govern their actions by the principle of “govern obeying”, in relation to the mandates of the people and organizations of Popular Power, according to the provisions in the Constitution of the Republic and the laws.”

The result of these Laws is that the National Assembly has imposed on the Venezuelan people, against the popular will and defrauding the Constitution, a Socialist State model, called “the Communal State,” in order to supposedly exercise Popular Power directly by the people, as an alleged form of direct exercise of sovereignty.

By regulating this Communal State of the Popular Power through ordinary legislation, in addition to defrauding the Constitution, a technique that has been consistently applied by the authoritarian regime in Venezuela since 1999 to impose its decisions outside of the Venezuelan Constitution,<sup>47</sup> it now adds fraud to the popular will by imposing upon Venezuelans, through organic laws, a State model for which nobody has voted, and that has been expressly rejected by the people.

What is clear about all this is that there are no more masks to deceive anyone, or by reason of which someone pretends to be deceived or fooled about what essentially the “Bolivarian revolution” in Venezuela is nothing else but a communist Marxist revolution, carried out deliberately by misusing and defrauding constitutional institutions.

Princeton, November 18<sup>th</sup>, 2011

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<sup>47</sup> See Allan R. Brewer-Carías, *Reforma constitucional y fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009; *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010.