

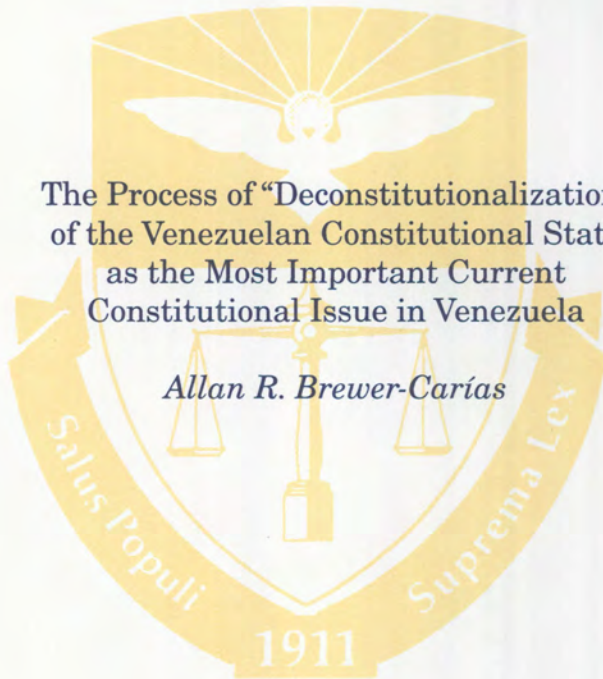


# DUQUESNE

## LAW REVIEW

The Process of “Deconstitutionalization”  
of the Venezuelan Constitutional State  
as the Most Important Current  
Constitutional Issue in Venezuela

*Allan R. Brewer-Carías*



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## I. INTRODUCTION

The Constitutional State was conceived in the 1999 Venezuelan Constitution, which is still formally in force, as a democratic and social rule of law and state of justice.<sup>1</sup> As a *democratic state*, the Constitution organized the state based upon the two most classic principles of modern constitutionalism. On the one hand, the principle of separation of powers is embodied by the distribution of power among five autonomous branches of government (legislative, executive, judicial, electoral, and citizens). On the other hand, as “a decentralized federal State,”<sup>2</sup> the principle of the vertical distribution of public powers is found in three territorial levels of government: national, state, and municipal levels.<sup>3</sup> In each of such levels, the corresponding governments must always be of an “elective, decentralized, alternative, responsible, plural, and of revocable mandate” character.<sup>4</sup> That is, the political organization of the nation must be based on the democratic principles,<sup>5</sup> as a “democratic society,”<sup>6</sup> of representative and participatory character.

As a *social state*, according to the extended declaration of rights, particularly of social rights, it has social obligations established to procure social justice, an objective which can bring the State to intervene in social and economic activity as a welfare state. That is why this Social State must seek for the application of the fundamental values of equality and solidarity, the preeminence of human rights,<sup>7</sup> and the achievement of “social justice” as one of the basis of the economic system.<sup>8</sup> That is why the economic sys-

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1. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 2.

2. *Id.* at art. 4. See the study of the Constitution regarding the regulation of this Constitutional State Model in ALLAN R. BREWER-CARIÁS, *LA CONSTITUCIÓN DE 1999. DERECHO CONSTITUCIONAL VENEZOLANO* (2004) and ALLAN R. BREWER-CARIÁS, *LA CONSTITUCIÓN DE 1999 Y LA ENMIENDA CONSTITUCIONAL DE 2009* (2011).

3. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 136.

4. *Id.* at art. 6.

5. *Id.* at arts. 2, 3, 5, 6.

6. *Id.* at pmbL.

7. *Id.* at pmbL, arts. 1, 21.

8. *Id.* at art. 299. On the social values in the Constitution, see Jacqueline Lejarza A., *El carácter normativo de los principios y valores en la Constitución de 1999*, in 1 *REVISTA DE DERECHO CONSTITUCIONAL* 195 (1999) and Liliana Fasciani, *De la Justicia a la Justicia Social*, in 1 *TENDENCIAS ACTUALES DEL DERECHO CONSTITUCIONAL. HOMENAJE A JESÚS MARÍA CASAL MONTBRUN* 161 (Jesús María Casal, Alfredo Arismendi & Carlos Luis Carrillo Artiles eds., 2008).

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

As a *rule-of-law state* (*Estado de derecho*), the Constitution expressly provides that all the organs of the State must always act subject to and according to the provisions established in the Constitution and in the statutes enacted by the National Assembly.<sup>9</sup> For such purpose, the Constitution is considered to be the “supreme law” of the land, and “the ground of the entire legal order,” as it is declared in its Article 7, which in addition prescribes that the provisions of the Constitution are obligatory for all branches of government as well as for individuals.<sup>10</sup> In order to assure such supremacy and enforceability, the Constitution has been conceived as a very rigid one in the sense that it is only possible to modify it through three procedures set forth in the Constitution, depending on the importance and the scope of the modification proposed and always with popular participation.<sup>11</sup> The three procedures are first, the convening of a national “Constituent Assembly” for the whole transformation of the state, the “Constitutional reform” procedure for major constitutional changes, and the “Constitutional Amendment” for minor constitutional changes.<sup>12</sup>

Finally, as a *state of justice*, the organs of the state are the ones called to guarantee and enforce the Constitution, and above all, the fundamental rights (political, social, educational, cultural, economic, and environmental rights) it declares, in order to assure their enjoyment by all persons without any sort of discrimination.<sup>13</sup>

Also, as a state of justice, Article 334 of the Constitution, in order to assure its supremacy and the functioning of the State in all its qualifications (democratic, rule of law, social and justice state),

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9. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), arts. 137, 141.

10. *Id.* at arts. 7, 131.

11. See Allan R. Brewer-Carías, *La intervención del pueblo en la revisión constitucional en América latina*, in *EL DERECHO PÚBLICO A LOS 100 NÚMEROS DE LA REVISTA DE DERECHO PÚBLICO 1980-2005* 41 (Allan R. Brewer-Carías ed., 2006).

12. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), arts. 340 *et seq.*; see Allan R. Brewer-Carías, *Los procedimientos de revisión constitucional en Venezuela*, in *I PROCEDIMENTI DI REVISIONE COSTITUZIONALE NEL DIRITTO COMPARATO* 137 (Eduardo Roza Acuña ed.) (1999); Allan R. Brewer-Carías, *Modelos de revisión constitucional en América Latina*, 141 *BOLETÍN DE LA ACADEMIA DE CIENCIAS POLÍTICAS Y SOCIALES* 115 (2003).

13. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 21.

assigns all courts and judges the duty “of guaranteeing the integrity of the Constitution” with the power to decide not to apply a statute that they deemed to be unconstitutional when deciding a particular case.

In addition, Article 335 of the Constitution also assigns the Supreme Tribunal of Justice the duty of guaranteeing “the supremacy and effectiveness of the constitutional rules and principles” as “the maximum and final interpreter of the Constitution” with the duty to seek for “its uniform interpretation and application.”<sup>14</sup> For such purposes, the Constitution has organized a very extended and comprehensive system of judicial review in order to assure the enforceability of the Constitution, which combines the diffuse method of judicial review with the concentrated method of judicial review, assigning the latter to the Constitutional Chamber of the Supreme Tribunal of Justice.<sup>15</sup>

Constitutionally speaking, therefore, the Venezuelan state was constitutionalized according to all the general principles of modern constitutionalism, namely, the principles of separation of powers, representative democracy, political pluralism, political decentralization and participation, controlled government, and human rights guarantees;<sup>16</sup> established in a rigid way such that no change to those principles can be made without reforming the Constitution. That is, for instance, from the democratic perspective, the alternate form of government cannot be eliminated at any level of government without a constitutional reform, and 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 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.

Nonetheless, and in sharp contrast with the constitutional framework of the Constitutional State, the most important current constitutional issue in Venezuela is not its constitutionalization in the very publicized 1999 Constitution, but the

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14. *Id.* at art. 335.

15. See Allan R. Brewer-Carías, *Judicial Review in Venezuela*, 45 DUQ. L. REV. 439 (2007).

16. See ALLAN R. BREWER-CARÍAS, REFLEXIONES SOBRE LA REVOLUCIÓN NORTEAMERICANA (1776), LA REVOLUCIÓN FRANCESA (1789) Y LA REVOLUCIÓN HISPANOAMERICANA (1810-1830) Y SUS APORTES AL CONSTITUCIONALISMO MODERNO (2d ed. 2008).

“deconstitutionalization” process of the Constitutional Democratic, Social and Rule of Law State of Justice resulting from the now one-decade-long systematic institutional demolition process, which has been carried on by the authoritarian government installed in the country since 1999, in the name of a so called “Bolivarian Revolution,”<sup>17</sup> which imposed a series of political and “constitutional” changes in contempt of the Constitution and of its supremacy.

That is, during the past decade, almost all the basic principles of the organization of the State and of the political system of the country embodied in the Constitution have been changed without following the formal constitutional review procedures set forth in the Constitution. The Constitutional Chamber of the Supreme Court of Justice has failed to enforce the Constitution regarding the functioning of the State, refusing to guarantee its rigidity, allowing “constitutional reforms” to be sanctioned by means of ordinary legislation or even introducing “constitutional mutations” to the Constitution changing its meaning through constitutional interpretations.

This paper has the purpose of highlighting the most recent expressions of such process of deconstitutionalization of the Constitutional State in Venezuela, which is the most important current constitutional issue in the country. That process has been developed thanks to the actions and to the omissions of the Constitutional Chamber of the Supreme Tribunal of Justice, which as Constitutional Jurisdiction, has refused to consider constitutional issues as such, allowing instead, in the name of the “Bolivarian Revolution,” the introduction of changes in all the basic principles embodied in the Constitution without a formal constitutional reform. The Supreme Tribunal, on the contrary, defrauding or in degradation of the 1999 Constitution, has progressively allowed the implementation of the so called new “twenty-first century Socialism” replacing the Constitutional State by a Communal State, without formally reviewing the Constitution.

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17. See ALLAN R. BREWER-CARÍAS, *DISMANTLING DEMOCRACY. THE CHÁVEZ AUTHORITARIAN EXPERIMENT* (2012).

II. THE GENERAL FRAMEWORK FOR THE  
“DECONSTITUTIONALIZATION” PROCESS OF THE STATE: THE  
“BOLIVARIAN” LABEL IN ORDER TO DISGUISE THE IMPLANTATION OF  
A SOCIALIST OR COMMUNIST STATE, WITHOUT REFORMING THE  
CONSTITUTION

One of the most distinguished and apparently formal changes to the Venezuela Constitution adopted in 1999 was the new name given to the Republic as “Bolivarian Republic of Venezuela” (article 1), in substitution of the two hundred years old name of “Republic of Venezuela.”

That change of name and the parallel initiation of the political changes derived from the “Bolivarian Revolution” was made by a National Constituent Assembly that was convened and elected in the same year of 1999 without being provided in the 1961 Constitution, that is, in violation of the constitutional review procedures established in it.<sup>18</sup> That 1999 elected Constituent Assembly was completely controlled by the followers of the then recently elected (1998) President Hugo Chávez who, after thirteen years, still remains as the head of the Executive Power.

The motivation for the new name given to the country in 1999 was formally to refer to the ideas and actions of Simón Bolívar, who not only was the “Liberator” of the Venezuelan territory at the beginning of the Nineteenth Century in the wars that followed the declaration of independence from Spain (1811), but also of other Latin American countries such as Colombia, Ecuador, Bolivia, and Peru which have been historically called the “Bolivarian” republics. Among them, Venezuela is the one with the oldest constitutional tradition, beginning with the sanctioning of the Federal Constitution of the United Provinces of Venezuela of December 21, 1811.<sup>19</sup>

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18. See on the 1999 constitution-making process, ALLAN R. BREWER-CARIÁS, *GOLPE DE ESTADO Y PROCESO CONSTITUYENTE EN VENEZUELA* (2002); Allan R. Brewer-Carías, *The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the development of an Authoritarian Political Regime*, in *FRAMING THE STATE IN TIMES OF TRANSITION. CASE STUDIES IN CONSTITUTION MAKING* 505 (Laura E. Miller ed.) (2010); Allan R. Brewer-Carías, *Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience*, 19 *LATEINAMERIKA ANALYSEN* 119 (2008).

19. The 1811 Constitution was the first modern republican and democratic constitution of Latin America, sanctioned by an elected congress following the principles of modern constitutionalism derived from the French and American revolutions. That constitution and all the papers of the independence process from Spain were conceived and written without the participation of Simón Bolívar, who in fact began his influence in the country

During and after the wars against Spain (1813-1824), Bolívar participated in the subsequent constitution-making processes of the country first, in 1819, reformulating the constitutional framework of the State proposing a new Constitution called *Angostura*; and second, in 1821 by proposing the constitution of a new state, the Republic of Colombia, which comprised the territories of what is today Venezuela, Colombia, and Ecuador. These constitutions (1819, 1821), in contrast with the 1811 Federal Constitution, organized a centralized state with militaristic roots derived from the bitter independence wars.

In any case, as the name of Bolívar is so closely linked with the initial organization of the State after the Independence, it has been used for political purposes by many rulers and in many occasions in Venezuelan history, in order to attract followers or to give some “doctrinal” basis to political regimes, mainly with military and authoritarian roots. It was the case in the nineteenth century, of Antonio Guzmán Blanco, and during the twentieth century, of Cipriano Castro, Juan Vicente Gómez, Eleazar López Contreras, and Marcos Pérez Jiménez;<sup>20</sup> and now, at the beginning of the twenty-first century, of Hugo Chávez Frías, who has unearthed the name of Bolívar not only in order to change the very name of the country, but also to serve as the support for a new, but at the same time very old, political doctrine of Socialism, which was completely unknown in Bolívar’s times.

Professor John Lynch, the most important non-Venezuelan biographer of Bolívar, noted that military rulers using the name of Bolívar during the nineteenth and twentieth centuries, had “at least more or less respected the basic thought of the Liberator, even when they misrepresented its meaning.”<sup>21</sup> Nonetheless, referring to the current situation of the Chávez regime, the same

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as a military figure, fighting and commanding the national forces against the Spanish military invasion of the country in 1812. This is the reason for his name being indissolubly attached to the Venezuelan Independence, as well as to the independence of other Latin American countries. See ALLAN R. BREWER-CARÍAS, *LOS INICIOS DEL PROCESO CONSTITUYENTE HISPANO Y AMERICANO. CARACAS 1811 – CÁDIZ 1812* (2012).

20. See generally ALLAN R. BREWER-CARÍAS, *HISTORIA CONSTITUCIONAL DE VENEZUELA* (2008).

21. See JOHN LYNCH, *SIMÓN BOLÍVAR: A LIFE* 304 (2007); see also GERMÁN CARRERA DAMAS, *EL CULTO A BOLÍVAR, ESBOZO PARA UN ESTUDIO DE LA HISTORIA DE LAS IDEAS EN VENEZUELA* (1969); LUIS CASTRO LEIVA, *DE LA PATRIA BOBA A LA TEOLOGÍA BOLIVARIANA* (1987); ELÍAS PINO ITURRIETA, *EL DIVINO BOLÍVAR. ENSAYO SOBRE UNA RELIGIÓN REPUBLICANA* (2008); ANA TERESA TORRES, *LA HERENCIA DE LA TRIBU. DEL MITO DE LA INDEPENDENCIA A LA REVOLUCIÓN BOLIVARIANA* (2009). See also the historiography study on these books in TOMÁS STRAKA, *LA ÉPICA DEL DESENCANTO* (2009).



Professor Lynch concluded his comments on the political use of the name of Bolívar that:

In 1998 Venezuelans were astonished to learn that their country had been renamed ‘the Bolivarian Republic of Venezuela’ by decree of President Hugo Chávez, who called himself a ‘revolutionary Bolivarian.’ Authoritarian populist, or neocaudillos, or Bolivarian militarists, whatever their designation, invoke Bolívar no less ardently than did previous rulers, though it is doubtful whether he would have responded to their calls. . . . But the new heresy, far from maintaining continuity with the constitutional ideas of Bolívar, as was claimed, invented a new attribute, the populist Bolívar, and in the case of Cuba gave him a new identity, the socialist Bolívar. By exploiting the authoritarian tendency, which certainly existed in the thought and action of Bolívar, regimes in Cuba and Venezuela claim the Liberator as patron for their policies, distorting his ideas in the process.<sup>22</sup>

An effective and novel adherence to Bolívar had led to the change of the very name of the Republic, and to the invention of a new “Bolivarian doctrine” in order to justify the government’s policies, as the retired Lieutenant General Chávez has done regarding what he has called the “Bolivarian Revolution” linked to his idea of a “twenty-first century Socialism”<sup>23</sup> implemented under the tutelage of the Cuban dictators. Of course, it is needless to say that no relation can be found in any of Simón Bolívar writings to any aspect related to “socialism.” Note that if Bolívar would have expressed any idea related to socialism, Karl Marx himself would have commented upon it when he wrote the entry on “Simón Bolívar y Ponte” for the *New American Cyclopaedia* published in New York<sup>24</sup> eleven years after publishing his book with Fredrick Engels

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22. See LYNCH, *supra* note 21, at 304; see also A.C. CLARK, THE REVOLUTIONARY HAS NO CLOTHES: HUGO CHÁVEZ’S BOLIVARIAN FARCE 5-14 (2009).

23. The last attempt to completely appropriate Simón Bolívar for the “Bolivarian Revolution,” was the televised exhumation of his remains that took place at the National Pantheon in Caracas on July 26, 2010, conducted by President Chávez himself and other high officials, including the Prosecutor General, among other things, for the purpose of determining if Bolívar died of arsenic poisoning in Santa Marta in 1830, instead of from tuberculosis. See Simon Romero, *Building a New History By Exhuming Bolívar*, N.Y. TIMES, August 4, 2010, at A7.

24. See *Bolívar y Ponte, Simón*, in THE NEW AMERICAN CYCLOPAEDIA (1858), available at <http://www.marxists.org/archive/marx/works/1858/01/bolivar.htm>.

on *The German Ideology*.<sup>25</sup> It was in this 1847 book where those authors used the word “communism” perhaps for the first time;<sup>26</sup> and the fact is that ten years later, in the 1857 article on Bolívar, Marx made no mention at all regarding any “socialist” ideas of Bolívar, especially considering that the article, by the way, was one of, if not the most critical work on Bolívar ever written.

On the other hand, and beside any ideological issues, in all Venezuelan constitutional history, the only “Bolivarian Republic” that has existed, strictly speaking, has been the State that resulted from the “union of the peoples of Colombia” proposed by Simón Bolívar in 1819, and materialized in the 1821 Constitution of the Republic of Colombia (comprising the territories of today’s Venezuela, Nueva Granada, and Ecuador). With that constitution, the Republic of Venezuela disappeared as an autonomous state,<sup>27</sup> a situation that endured up to 1830, until Bolívar’s death.

Consequently, the renaming of the Republic in 1999 as “Bolivarian Republic,” this time fortunately without affecting the country’s sovereignty, can only be explained as an intent to give the Republic, a “definitive” national doctrine supposedly based on the thoughts of Bolívar, which has been no more than the label used by the new rulers of the country in order to impose their own socialist doctrine disguised as a “Bolivarian” one.

To that end, the first step adopted by Chávez was to give the country the name of Bolívar, initially with an exclusive political or partisan purpose derived from the name given in 1982 to the political movement used by Chávez to gain power, which was called the “Bolivarian Revolutionary Movement 200 (MBR-200).” Because such an organization, once transformed into a formal political party, was not allowed to use the name of Bolívar,<sup>28</sup> the decision taken was to incorporate the name of Bolívar in the Constitu-

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25. The book was written between 1845 and 1846. The Communist Manifesto was published in February 1848.

26. See KARL MARX & FREDERICH ENGELS, *The German Ideology*, in 5 COLLECTIVE WORKS 47 (Int. Pub. 1976), available 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).

27. See the texts of all these laws in ALLAN R. BREWER-CARÍAS, 1 LAS CONSTITUCIONES DE VENEZUELA 643-46 (2008).

28. According to the Political Parties Law, GACETA OFICIAL NO. 27.725, Apr. 30, 1965, political parties cannot use the name of the founders of the country or homeland symbols. The political organization the president formed before campaigning for the 1998 election was Movimiento Bolivariano 200. That name could not be used to identify the political party he founded, which became Movimiento V República.

tion of the country.<sup>29</sup> The party itself became the Fifth Republic Movement (*Movimiento V República*, MVR) that was later transformed into the United Socialist Party of Venezuela (PSUV), which declared itself as a “Marxist” party following the “Bolivarian doctrine.”<sup>30</sup>

In 1999, I was one of the few members of the 1999 Constituent Assembly that voted against the country’s renaming proposal,<sup>31</sup> not only because I considered it was partisan motivated, but also because I considered that a republic organized as “a federal decentralized State” was essentially anti-“Bolivarian,” Bolívar being the one that in the first decades of Latin American independence promoted the idea of centralized governments – non-federal – in the new republics.<sup>32</sup> In any case, the new name was given to the Republic, later linked with socialism as a political doctrine.

The consequence of the 1999 constitutional reform, in any case, was that everything related to the new political regime was called “Bolivarian,” beginning, for instance, with the creation ten years ago of the “Bolivarian Circles” that were the first social or communal organizations promoted and supported by the government in order to react against any opposition to the government and to threaten anybody with different views.<sup>33</sup> This led to the bitter polarization of the country between “Bolivarian” and “non-Bolivarians” which supposedly led to the polarization, between patriots and anti-patriots, good people and bad people, pure people and corrupt people, revolutionary and antirevolutionary or oligarchs; and now between socialists and non-socialists. All that was accomplished by manipulating history and popular feelings regarding the image of Bolívar.

29. *Mutatis mutandi*, in a certain way it happened with the use of the name of Augusto C. Sandino in the name of the *Frente Sandinista de Liberación* and of the Sandinista Republic of Nicaragua.

30. See “Declaration of Principles” of the United Socialist Party of Venezuela (Apr. 23, 2010), available at [http://www.psuve.org/wp-content/uploads/2010/06/Declaracion\\_principios.pdf](http://www.psuve.org/wp-content/uploads/2010/06/Declaracion_principios.pdf).

31. See Allan R. Brewer-Carías, 3 DEBATE CONSTITUYENTE (APORTES A LA ASAMBLEA NACIONAL CONSTITUYENTE) 237, 251-52.

32. See Allan R. Brewer-Carías, *Ideas centrales sobre la organización el Estado en la Obra del Libertador y sus Proyecciones Contemporáneas*, 95-96 BOLETÍN DE LA ACADEMIA DE CIENCIAS POLÍTICAS Y SOCIALES, 137 (1984).

33. The general assembly of the Organization of American States, in its report of Apr. 18, 2002, said about the Bolivarian Circles, that they “are groups of citizens or grassroots organizations which support the President’s political platform. Many sectors consider them responsible for the human rights violations, acts of intimidation, and looting.” See the reference in ALLAN R. BREWER-CARIÁS, *LA CRISIS DE LA DEMOCRACIA EN VENEZUELA* (2002).

In 2007, the constant promotion of the “Bolivarian Revolution,” led the President of the Republic himself to draft and propose a constitutional reform before the National Assembly to formally include in the text of the Constitution, the link between the “Bolivarian doctrine” and socialism as the fundamental doctrine of the state, even for international relations.

This constitutional reform based on the then so-called “twenty-first century socialism,” failed to be implanted, and was rejected by the people through popular vote in a referendum that took place on December 2, 2007.<sup>34</sup> Nonetheless, despite its rejection by the people’s votes, in the following year (2008), the 2007 constitutional reform proposals began to be implemented by the authoritarian government in violation of the Constitution through a massive number of decree laws issued by the President, and by means of organic laws sanctioned by the National Assembly, “reforming” in this way the Constitution but without formally reviewing it. The last set of unconstitutional legislation implementing the 2007 rejected reform was approved in December of 2010, by formally creating a Communal State (or Socialist or Communist state) based upon the exercise of a Popular Power without any constitutional basis, in parallel to the existing Constitutional decentralized State based upon the Public Power (National, state, municipal) expressly established in the Constitution.<sup>35</sup>

These laws related to the implantation of Socialism as the doctrine of the new Communal State, were sanctioned in 2010, after Chávez confessed himself in January 2010, that the supposedly “Bolivarian revolution,” was no more than the phantasmagoric resurrection of the historically failed “Marxist revolution,” but led by a president who denied ever reading Marx’s writings.<sup>36</sup> This public announcement led to the adoption in April 2010, by the

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34. 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 propuesta de Reforma Constitucional para establecer un estado socialista, centralizado y militarista (Análisis del anteproyecto presidencial, Agosto de 2007)*, 7 CADERNOS DA ESCOLA DE DIREITO E RELAÇÕES INTERNACIONAIS DA UNI-BRASIL 265 (2007).

35. See Gustavo Linares Benzo, *Sólo un Poder Público más. El Poder Popular en la reforma del 2007*, 112 REVISTA DE DERECHO PÚBLICO 102 (2007); Arturo Peraza, *Reforma, Democracia participativa y Poder Popular*, 112 REVISTA DE DERECHO PÚBLICO 107 (2007).

36. 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*, EL UNIVERSAL (Caracas), Jan. 16, 2010, available at [http://www.eluniversal.com/2010/01/16/pol\\_art\\_por-primera-vez-asu\\_1726209.shtml](http://www.eluniversal.com/2010/01/16/pol_art_por-primera-vez-asu_1726209.shtml).

governmental United Socialist Party of Venezuela (over which the President presides), in its First Extraordinary Congress, of a “Declaration of Principles” in which the party was officially declared as a “Marxist,” “Anti-imperialist” and “Anti-capitalist” party. According to the same document, the party’s actions are 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>37</sup> Of course, none of these ideas can be found in the works of Simón Bolívar, his name is only being used as a pretext to continue the manipulation of the Bolívar “cult” in order to justify authoritarianism, which has occurred so many times before in the history of Venezuela.<sup>38</sup>

With these declarations, it can finally be said that the so called “Bolivarian Revolution” was unveiled; a revolution for which nobody in Venezuela has voted except for its rejection in the December 2, 2007 referendum, in which the President’s proposals for constitutional reforms in order to establish a Socialist, Centralized, Police and Militaristic state received a negative popular response.<sup>39</sup>

III. THE INTENT TO RADICALLY TRANSFORM THE CONSTITUTIONAL STATE INTO A SOCIALIST, CENTRALIZED AND COMMUNAL STATE, IN 2007, IN VIOLATION OF THE CONSTITUTION, BY MEANS OF A “CONSTITUTIONAL REFORM” PROCEDURE THAT WAS REJECTED BY THE PEOPLE, AND THAT WAS DECLARED BY THE SUPREME TRIBUNAL OF JUSTICE AS NON-JUSTICIABLE

As aforementioned, a major step taken to formally consolidate in the Constitution an authoritarian government by establishing a socialist, centralized and communal state in substitution of the democratic decentralized social State, was the 2007 constitutional reform proposal in order to establish a “Popular Power State” or

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37. See “Declaración de Principios, I Congreso Extraordinario del Partido Socialista Unido de Venezuela,” Apr. 23, 2010, available at [http://www.psu.org.ve/wp-content/uploads/2010/06/Declaracion\\_principios.pdf](http://www.psu.org.ve/wp-content/uploads/2010/06/Declaracion_principios.pdf).

38. See *supra* notes 21-22.

39. See on the 2007 constitutional reform 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 (2007); ALLAN R. BREWER-CARÍAS, LA REFORMA CONSTITUCIONAL DE 2007 (COMENTARIOS AL PROYECTO INCONSTITUCIONALMENTE SANCIONADO POR LA ASAMBLEA NACIONAL EL 2 DE NOVIEMBRE DE 2007) (2007).

“Communal State,”<sup>40</sup> which was submitted by the president of the republic before the National Assembly. As mentioned, the reform was approved by the Assembly, but once submitted to popular vote, it was rejected by the people on December 2, 2007.

The constitutional reform was intended to radically transform the most essential and fundamental aspects of the state,<sup>41</sup> being one of the most important reforms proposals in all of Venezuelan constitutional history. With it, the decentralized, democratic, pluralistic, and social state built and consolidated since the Second World War would have been radically changed to create a socialist, centralized, repressive and militaristic state grounded in the so-called “Bolivarian doctrine,” identified with “21<sup>st</sup> century socialism” and a socialist economic system of state capitalism. As mentioned, this reform was sanctioned by evading the procedure established in the Constitution for such fundamental change, which imposed the convening of a Constituent Assembly. In fact, the reform designed defrauding the Constitution<sup>42</sup> was one additional step in the “permanent coup d’état” that has occurred in Venezuela since 1999.<sup>43</sup>

The most important consequence of the proposed reform was the adoption of an official state ideology and doctrine in Venezuela, which was the socialist and supposedly “Bolivarian” doctrine. These principles could have applied if approved by the people to impose a duty on all citizens to actively contribute to its implementation. This would eliminate any vestige of political plural-

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40. See BREWER-CARIAS, *supra* note 39.

41. See Rogelio Pérez Perdomo, *La Constitución de papel y su reforma*, 112 REVISTA DE DERECHO PÚBLICO 14 (2007); Gerardo Fernández, *Aspectos esenciales de la modificación constitucional propuesta por el Presidente de la República. La modificación constitucional como un fraude a la democracia*, 112 REVISTA DE DERECHO PÚBLICO 22 (2007); Alfredo Arismendi, *Utopía Constitucional*, 112 REVISTA DE DERECHO PÚBLICO 31 (2007); Manuel Rachadell, *El personalismo político en el Siglo XXI*, 112 REVISTA DE DERECHO PÚBLICO 66 (2007); Allan R. Brewer-Carías, *El sello socialista que se pretendía imponer al Estado*, 112 REVISTA DE DERECHO PÚBLICO 71 (2007); Alfredo Morles Hernández, *El nuevo modelo económico para el Socialismo del Siglo XXI*, 112 REVISTA DE DERECHO PÚBLICO 233 (2007).

42. See Perdomo, *supra* note 41, at 112; Fernández, *supra* note 41, at 21-25; González, *supra* note 41, at 33-36; Lolymer Herández Camargo, *Los límites del cambio constitucional como garantía de pervivencia del Estado de derecho*, 112 REVISTA DE DERECHO PÚBLICO 37 (2007); Claudia Nikken, *La soberanía popular y el trámite de la refroma constitucional promovida por iniciativa presidencial el 15 de agosto de 2007*, 112 REVISTA DE DERECHO PÚBLICO 51 (2007).

43. See José Amando Mejía Betancourt, *La ruptura del hilo constitucional*, 112 REVISTA DE DERECHO PÚBLICO 47 (2007). The term was first used by Francois Mitterand in LE COUP D'ÉTAT PERMANENT (Éditions, 1993) (1964).

ism, and allow for the formal criminalization of any dissidence regarding the unique and official way of thinking.

Guidelines for the proposed reforms emerged from various discussions and speeches of the president. These pointed out, on the one hand, to the formation of a state of “popular power” or of “communal power,” or a “communal state” (*Estado del poder popular o del poder communal, o Estado comunal*) built upon communal councils (*consejos comunales*) as primary political units or social organizations. The communal councils, whose members are not elected by means of universal, direct, and secret suffrage, which is contrary to the democratic principles established in the Constitution, were created by statute since 2006<sup>44</sup> with a status parallel to the municipal entities, supposedly to channel citizen participation in public affairs. However, since their creation, they have operated within a system of centralized management conducted by the national executive power and without any political or territorial autonomy.<sup>45</sup>

On the other hand, the guidelines for the proposed constitutional reform also referred to the structuring of a socialist state and the substitution of the existing system of economic freedom and mixed economy by a state and collectivist socialist economic system subject to centralized planning, thus minimizing the role of individuals and eliminating any vestige of economic liberties or private property as constitutional rights.

These proposals had the purpose of radically transforming the state by creating a completely new juridical order, a change that according to Article 347 of the 1999 Constitution, required the convening and election of a Constituent Assembly and could not be undertaken by means of mere constitutional reform procedures.<sup>46</sup> This latter procedure for constitutional reform can only be applied to “partial revisions of the Constitution and for substitution of one or several of its provisions without modifying the structure and

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44. *Ley de Consejos Comunales*, GACETA OFICIAL, EXTRA., 5.806, Apr. 10, 2006. This statute was replaced by *Ley Orgánica de los Consejos Comunales*. See GACETA OFICIAL NO. 39.335, Dec. 23, 2009.

45. 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 49 (2007).

46. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 347.

fundamental principles of the Constitutional text.<sup>47</sup> In such case, the limited constitutional change is achieved through debate and sanctioning in the National Assembly, followed by approval in popular referendum.

Nonetheless, ignoring these constitutional provisions, the same political tactic was repeatedly employed since 1999 by acting fraudulently with respect to the Constitution. That is, the use of the existing institutions with the appearance of its adherence to constitutional form and procedure, in order to proceed, as the Supreme Tribunal had warned, "towards the creation of a new political regime, a new constitutional order, without altering the established legal system."<sup>48</sup> This occurred in February, 1999 in the proposal of a consultative referendum in order to ask the people on whether to convene a Constituent Assembly when that institution was not prefigured in the then-existing Constitution of 1961.<sup>49</sup> It occurred with the December 1999 Decree on the Transitory Regime of the Public Powers, with respect to the 1999 Constitution, which was never the subject of an approbatory referendum.<sup>50</sup> It has continued to occur in subsequent years with the progressive destruction of democracy through the factual elimination of any effective separation of powers, and the sequestering of successive public rights and liberties, all supposedly based on legal and constitutional provisions.<sup>51</sup>

In this instance, once again, constitutional provisions were fraudulently used for ends other than those for which they were established. The "constitutional reform" procedure was used to radically transform the state, thus disrupting the civil order of the

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47. Antonio Ramirez, *An Introduction to Venezuelan Governmental Institutions and Primary Legal Sources*, GLOBALEX (May 2006), <http://www.nyulawglobal.org/globalex/venezuela.htm>.

48. See Allan R. Brewer-Carías, *The Decision of the Constitutional Chamber of the Supreme Tribunal of Justice No. 74 (Jan. 25, 2006)*, 105 REVISTA DE DERECHO PÚBLICO 76 *passim* (2006).

49. See ALLAN R. BREWER-CARIÁS, ASAMBLEA CONSTITUYENTE Y ORDENAMIENTO CONSTITUCIONAL (Academia de Ciencias Políticas y Sociales ed., 1999).

50. See BREWER-CARIÁS, *supra* note 18.

51. See Allan R. Brewer-Carías, *Constitution-Making Process in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy: The Recent Venezuelan Experience*, paper presented at the VII International Congress of Constitutional Law, (Athens, Jun. 2007); 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 electoral para minar la democracia y establecer un régimen autoritario de supuesta 'dictadura de la democracia' que se pretende regularizar mediante la reforma constitucional)*, in TEMAS CONSTITUCIONALES. PLANTEAMIENTOS ANTE UNA REFORMA 13-74 (2007).



social-democratic state to convert the state into a socialist, centralized, repressive, and militarist state in which representative democracy, republican alternation in office and the concept of decentralized power would have disappeared, with all power instead concentrated in the decisions of the head of state.<sup>52</sup> That result could only be achieved constitutionally through the convening of a Constituent Assembly, which was avoided.

The consequence was that the various state acts adopted the irregular constitutional review procedure. The presidential initiative, the sanction of the reform by the National Assembly, and the convening of referendum by the National Electoral Council were all challenged through judicial review actions of unconstitutionality and actions of *amparo*, filed before the Constitutional Chamber of the Supreme Tribunal. The response of the Chamber regarding the actions filed, being as it is completely controlled by the Government, was to declare the issues as non-justiciable, allowing the deconstitutionalization of the Constitutional State.<sup>53</sup>

The purposes of the approved "constitutional reform" for the radical transformation of the state and the creation a new juridical order were evidenced, first, from the proposals elaborated by the president's Council for Constitutional Reform that began to circulate in June 2007,<sup>54</sup> and later, from the final draft filed by the President before the National Assembly on August 15, 2007,<sup>55</sup> in which the following concepts were proposed:<sup>56</sup>

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52. As is constitutionally proscribed, and as the Constitutional Chamber of the Supreme Tribunal of Justice summarized in Decision No. 74 (Jan. 25, 2006), a symbolic case, it occurred "with the fraudulent use of powers conferred by martial law in Germany under the Weimar Constitution, forcing the Parliament to concede to the fascist leaders, on the basis of terms of doubtful legitimacy, plenary constituent powers by conferring an unlimited legislative power." Brewer-Carías, *supra* note 48, at 76.

53. On these decisions, 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*, 112 REVISTA DE DERECHO PÚBLICO 661 (2007).

54. The document 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 146 (Editorial Atenea ed., 2007).

55. The full text was published as PROYECTO DE REFORMA CONSTITUCIONAL. ELABORADO POR EL CIUDADANO PRESIDENTE DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, HUGO CHÁVEZ FRÍAS (Editorial Atenea ed., 2007). The director of the National Electoral Council, Vicente Díaz, stated on July 16, 2007, "The presidential proposal to reform the constitutional text modifies fundamental provisions and for that reason it would be necessary to convene a National Assembly to approve them." This council member was consulted

*First*, to convert the decentralized federal state into a centralized state of concentrated power, under the illusory guise of a popular power, which implied the definitive elimination of the federal form of the state.<sup>57</sup> This rendered political participation impossible and consequently, degrading representative democracy.

For such purpose, the reform established a new “popular power” (*poder popular*)<sup>58</sup>, composed by communities (*comunidades*), each of which “shall constitute a basic and indivisible spatial 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>59</sup>

The main aspect of these reforms was to provide the popular power “through the constitution of communities, communes, and the self-government of the cities, by means of the communal councils, workers’ councils, peasant councils, student councils, and other entities established by law.”<sup>60</sup> However, although “the people” (*el pueblo*) were designated as the “depository of sovereignty” to be “exercised directly through the popular power,” it was expressly stated 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.”<sup>61</sup> Consequently, representative democracy at the local level and territorial political autonomy disappeared, substituted with a supposed par-

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on this matter on Unión Radio, Aug. 16, 2007, available at <http://www.unionradio.com.ve/Noticias/Noticia.aspx?noticiaid=212503>. The initiation of the reform process in the National Assembly could have been challenged before the Constitutional Chamber of the Supreme Tribunal on the basis of unconstitutionality. Nonetheless, the president of the Constitutional Chamber – who was also a member of the Presidential Council for the Reform of the Constitution – made clear that “no legal action related to modifications of the constitutional text would be heard until such modifications had been approved by citizens in referendum,” adding that “any action must be presented after a referendum, when the constitutional reform has become a norm, since we cannot interpret an attempted norm. Once a draft reform has become a norm we can enter into interpretations of it and hear nullification actions.” See Juan Francisco Alonso, *EL UNIVERSAL* (Caracas), Aug. 18, 2007.

56. On the reform proposals, see the sources cited in *supra* note 39. Additionally, see all the articles published in 112 *REVISTA DE DERECHO PÚBLICO* (2007).

57. See Rachadell, *supra* note 41; Ana Elvira Araujo, *Proyecto de reforma constitucional (agosto a noviembre 2007); Principios fundamentales y descentralización política*, 112 *REVISTA DE DERECHO PÚBLICO*, 77 (2007); José Luis Villegas, *Impacto de la reforma constitucional sobre las entidades locales*, 112 *REVISTA DE DERECHO PÚBLICO* 119 (2007).

58. Constitutional reform proposal, art. 16.

59. The communes were created in the statute on the Federal Council of Government. See *Ley Orgánica del Consejo Federal de Gobierno*, GACETA OFICIAL NO. 5.963 EXTRA., Feb. 22, 2010.

60. ALLEN R. BREWER-CARÍAS, *DISMANTLING DEMOCRACY IN VENEZUELA* 93 (2010).

61. *Id.*

ticipatory and protagonist democracy that would, in fact, be controlled by the president and that proscribed any form of political decentralization and territorial autonomy.<sup>62</sup>

In advance of the constitutional reform proposal, perhaps being that the government was sure of the support of its approval, the Law on the Councils of the Popular Power (*Consejos del Poder Popular*) was sanctioned in 2006.<sup>63</sup> In the same trend of such law, the reforms proposals conceived “the communes and communities” (*comunas y comunidades*) as “the basic and indivisible spatial nucleus of the Venezuelan Socialist State,”<sup>64</sup> adding that the only objective of the constitutional provision for political participation was “for the construction of socialism” requiring that all citizens’ political associations be devoted “to develop the values of mutual cooperation and socialist solidarity.”<sup>65</sup>

*Second*, to convert the democratic and pluralist state into a socialist state, with the obligation to “promote people’s participation as a national policy, devolving its power and creating the best conditions for the construction of a Socialist democracy,”<sup>66</sup> thus, establishing a political official doctrine of socialist character—a so-called “Bolivarian doctrine.” The consequence of this would have been that any thoughts differing from the official one were to be rejected. The official political doctrine was to be incorporated into the Constitution itself, establishing a constitutional duty for all citizens to ensure its compliance, imposing the teaching in the schools of the “*ideario Bolivariano*” (Bolivarian ideology), and stating that the primary investment of the state in education was to be done “according to the humanistic principles of the Bolivarian socialism.” As a consequence, the basis for criminalizing all dissidence was formally established.

62. 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.’” *Id.*; see *Discurso de orden pronunciado por el ciudadano Comandante Hugo Chávez Frías*, op. cit., 50.

63. See Giancarlo Henríquez Maionica, *Los Consejos Comunales (una breve aproximación a su realidad y a su proyección ante la propuesta presidencial de reforma constitucional)*, 112 REVISTA DE DERECHO PÚBLICO 89 (2007); Brewer-Carías, *supra* note 48, at 49-67. The 2006 law was replaced by *Ley Orgánica de los Consejos Comunales*, GACETA OFICIAL NO. 39.335, Dec. 28, 2009. See the comments on this law in ALLAN R. BREWER-CARIAS, *LEY DE LOS CONSEJOS COMUNALES* (Editorial Jurídica Venezolana ed., 2010).

64. Constitutional reform proposal, art. 15.

65. *Id.* at art. 70.

66. *Id.* at art. 158.

*Third*, to convert the mixed economic system into a 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 depended and to whose bureaucracy the totality of the population is subject. In this sense, the reform established that the socialist economic model created was to achieve “the best conditions for the collective and cooperative construction of a Socialist Economy,”<sup>67</sup> through “socialist means of production”<sup>68</sup> by constituting “mixed corporations and/or socialist units of production,”<sup>69</sup> or “economic units of social production” as to “create the best conditions for the collective and cooperative construction of a socialist economy,” or “different forms of businesses and economic units from social property, both directly or communally, as well as indirectly or through the state.”<sup>70</sup> The reforms sought simply to derogate and eliminate the right to the free exercise of economic activities as a constitutional right and economic freedom itself.<sup>71</sup> The reforms then referred to the “socialist principles of the socioeconomic system”<sup>72</sup> and to the “socialist state” and the “socialist development of the nation.”<sup>73</sup> All the reforms collided with the ideas of liberty and solidarity proclaimed in the 1999 Constitution and established a state that substitutes itself for society and private economic initiative.

*Fourth*, to convert the liberal state into a repressive (*i.e.*, police) state, given the regressive character of the regulations established in the reform regarding human rights, particularly civil rights, and the expansion of the president’s emergency powers, under which he was authorized to suspend constitutional rights indefinitely.

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67. *Id.* at art. 112.

68. *Id.* at art. 168.

69. *Id.* at art. 113.

70. *Id.* at art. 112.

71. See Fernández, *supra* note 41, at 24; Arismendi, *supra* note 41, at 31; José Antonio Muci Borjas, *La suerte de la libertad económica en el proyecto de Reforma de la Constitución de 2007*, 112 REVISTA DE DERECHO PÚBLICO 203 (2007); Tamara Adrián, *Actividad económica y sistemas alternativos de producción*, 112 REVISTA DE DERECHO PÚBLICO 209 (2007); Víctor Hernández Mendible, *Réquiem por la libertad de empresa y derecho de propiedad*, 112 REVISTA DE DERECHO PÚBLICO 215 (2007); Hernández, *supra* note 41, at 233-36.

72. Constitutional reform proposal, art. 299.

73. *Id.* at arts. 318, 320.

*Fifth*, and finally, to convert the civil state into a militarist state, on the basis of the role assigned to the “Bolivarian Armed Force” (*Fuerza Armada Bolivariana*), which was configured to function wholly under the president, and the creation of the new “Bolivarian National Militia (*Milicia Nacional Bolivariana*). All were to act “by means of the study, planning and execution of Bolivarian military doctrine”—that is, according to socialist doctrine.

All the reforms implied the radical transformation of the Venezuelan political system sought to establish a centralized socialist, repressive and militaristic state of popular power and departed fundamentally from the concept of a civil social-democratic state under the rule of law and justice based on a mixed economy. None of those reforms could be achieved through a “constitutional reform” procedure.

The motives for the reforms were all very explicitly expressed by the president of the republic in 2007, beginning with his speech of presentation of the draft reforms before the National Assembly. In that speech, he said that the reforms’ main objective was “the construction of a Bolivarian and socialist Venezuela”—that is, to sow “socialism in the political and economic realms.”<sup>74</sup> He clearly expressed that in his presidential campaign in 1999, he did not propose such thing as “projecting the road of socialism” to be incorporated in the Constitution. In contrast to that claim, as candidate for reelection in 2006, he said: “Let us go to Socialism,” deducing from that “everyone who voted for [reelecting] candidate Chávez then, voted to go to socialism.”<sup>75</sup>

This was then the motivation for the drafting of the constitutional reforms in 2007, aiming to construct “Bolivarian Socialism, Venezuelan Socialism, our Socialism, and our socialist model,” having “the community” (*la comunidad*) as a “basic and indivisible nucleus,” and considering that “real democracy is only possible in socialism.” However, the democracy referred to was not at all a representative democracy because it was “not born of suffrage or

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74. See *Discurso de orden pronunciado por el ciudadano Comandante Hugo Chávez Frías, Presidente Constitucional de la República Bolivariana de Venezuela en la conmemoración del ducentésimo segundo aniversario del juramento del Libertador Simón Bolívar en el Monte Sacro y el tercer aniversario del referendo aprobatorio de su mandato constitucional*, special session, Aug. 15, 2007, Asamblea Nacional, División de Servicio y Atención legislativa, Sección de Edición, Caracas 2007, 4, 33.

75. *Id.* at 4. That is, it sought to impose the wishes of only 46% of registered voters who voted to reelect the president on the remaining 56% of registered voters who did not vote for presidential reelection. According to official statistics from the National Electoral Council, of 15,784,777 registered voters, only 7,309,080 voted to reelect the president.

from any election, but rather is born from the condition of organized human groups as the base of the population.<sup>76</sup>

The president in that speech summarized the aims of his reform proposals explaining that on the political ground, the purpose was to “deepen popular Bolivarian democracy” and, on the economic ground, to “create better conditions to sow and construct a socialist productive economic model,” which he considered “our model.” That is, “in the political field: socialist democracy; on the economic, the productive socialist model; in the field of public administration, incorporate new forms in order to lighten the load, to leave behind bureaucracy, corruption, and administrative inefficiency, which are heavy burdens of the past still upon us like weights, in the political, economic and social areas.”<sup>77</sup>

All his proposals to construct socialism were linked by the president to Simón Bolívar’s 1819 Constitution of 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.”<sup>78</sup> Of course, this assertion had 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.<sup>79</sup>

The rejected constitutional reform, without doubt, would have altered the basic foundations of the state.<sup>80</sup> This is true particularly with respect to the proposals on the constitutional amplifica-

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76. See Hugo Chávez, *Discurso de orden pronunciado por el ciudadano Comandante Hugo Chávez Frías*, op cit., 32, 34, 35 (Aug. 15, 2007).

77. *Id.* at 74.

78. *Id.* at 42. Only one month before the president’s speech on the proposed constitutional reforms, the former minister of defense, General in Chief Raúl Baduel, who was in office until July 18, 2007, stated on leaving the Ministry of Popular Power for the Defense that the president’s call to “construct socialism for the twenty-first century, implied a necessary, pressing and urgent need to formalize a model of Socialism that is theoretically its own, autochthonous, in accord with our historical, social, political and cultural context.” He added, “Until this moment, this theoretical model does not exist and has not been formulated.” See the reference in Brewer-Carías, *supra* note 17, at 272. It is hard to imagine that it could have been formulated just one month later.

79. See SIMÓN BOLÍVAR, *ESCRITOS FUNDAMENTALES* (German Carrera Damas ed., 1982); see also SIMÓN BOLÍVAR, *EL LIBERTADOR Y LA CONSTITUCIÓN DE ANGOSTURA DE 1819* (Pedro Grases ed., Banco Hipotecario de Crédito Urbano) (1970); *ACTAS DEL CONGRESO DE ANGOSTURA*, (José Rodríguez Iturbe ed.) (1969). The contrary at least would have been noticed by Karl Marx who, on the contrary, in 1857 wrote a very critical entry regarding Bolívar, without discovering any socialist trends in his life, in Bolívar y Ponte, Simón. See *CYCLOPAEDIA*, *supra* note 24.

80. See Eugenio Hernández Bretón, *Cuando no hay miedo (ante la Reforma Constitucional)*, 112 *REVISTA DE DERECHO PÚBLICO* 17 (2007); Rachadell, *supra* note 41, at 65-70.

tion of the so-called Bolivarian doctrine; the substitution of the democratic, social state with the socialist state; the elimination of decentralization as a policy of the state designed to develop public political participation; and the elimination of economic freedom and the right to property.<sup>81</sup> All these constitutional reforms, approved by the National Assembly through defrauding of the Constitution, as aforementioned, were submitted to popular vote, and were all rejected by the people in the referendum that took place on December 2, 2007.<sup>82</sup>

Of course, as mentioned, none of these radical reforms of the State could be achieved through the constitutional review procedure ("constitutional reform") used by the President and the National Assembly. Major constitutional changes as those proposed in 2007 can only be approved by means of the convening of a Constituent Assembly.

That is why the unconstitutional procedure that was followed for the reform, as mentioned, was of course challenged as unconstitutional before the Constitutional Chamber of the Supreme Tribunal of Justice. That body, however, was completely controlled by the Executive and refused to exercise judicial review on these matters, declaring that such actions could not even be filed ("*improponible*").<sup>83</sup>

Nonetheless, as aforementioned, through the December 2, 2007 referendum, the proposed constitutional reform was rejected by popular vote,<sup>84</sup> which did not prevent the authoritarian government to proceed to implement the new system ignoring such popular vote, through ordinary legislation and through constitutional interpretations.

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81. See Brewer-Carías, *supra* note 17 (discussing these reforms).

82. See Allan R. Brewer-Carías, *La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario*, in ANUARIO DE DERECHO PÚBLICO 2007 17 (2008). 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.

83. See Brewer-Carías, *supra* note 53, at 385-435.

84. See Brewer-Carías, *supra* note 82, at 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.

## IV. THE FRAUDULENT IMPLEMENTATION OF THE REJECTED 2007 CONSTITUTIONAL REFORM

In effect, the formal popular rejection of the 2007 constitutional reforms proposals through the December, 2007 referendum, which in any democratic state would have lead the government to listen and follow the will of the people, meant nothing to the president of the republic and to the president and other main officials of the National Assembly from beginning to implement the reforms in order to establish the socialist state. This effort was undertaken without even bothering to try again to formally change the Constitution.

This has been achieved during the past five 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>85</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>86</sup> which the Supreme Tribunal has refused to control; *third*, through the implementation of a nationalization, expropriation and confiscation process of private industries, private assets and private properties;<sup>87</sup> and *fourth*, through constitutional “mutations,” that is, changes introduced in the Constitution

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85. 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)]*, in CUESTIONES INTERNACIONALES. ANUARIO JURÍDICO VILLANUEVA 2007 25-57 (2007).

86. 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*, 115 REVISTA DE DERECHO PÚBLICO 51 *passim* (2008); 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*, 115 REVISTA DE DERECHO PÚBLICO 57 *passim* (2008); 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)*, 115 REVISTA DE DERECHO PÚBLICO 63 (2008); 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*, 115 REVISTA DE DERECHO PÚBLICO 215 (2008); Aurilivi Linares Martínez, *Notas sobre el uso del poder de legislar por decreto por parte del Presidente venezolano*, 115 REVISTA DE DERECHO PÚBLICO 79 (2008); Carlos Luis Carrillo Artilles, *La paradójica situación de los Decretos Leyes Orgánicos frente a la Ingeniería Constitucional de 1999*, 115 REVISTA DE DERECHO PÚBLICO 93 (2008); Freddy J. Orlando S., *El “paquetazo,” un conjunto de leyes que conculcan derechos y amparan injusticias*, 115 REVISTA DE DERECHO PÚBLICO 101 (2008).

87. See 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 (2009).



by means of interpretation made by the Constitutional Chamber of the Supreme Tribunal of Justice as Constitutional Jurisdiction.<sup>88</sup>

The result has been that absolutely all the mentioned general trends and basic purposes of the popularly rejected 2007 constitutional reform draft have been implemented in the country in contempt of the Constitution, and in view of the entire democratic world.

This occurred, first, by means of decree laws issued by the president in execution of the February 2007 enabling law<sup>89</sup> (legislative delegation) sanctioned by the National Assembly as was proposed by the president at the beginning of 2007, with the idea of advancing in the proposals for the constitutional reform submitted to the National Assembly later that year. As aforementioned, perhaps assuming that such presidential constitutional-reform proposal was going to be approved by the people, the president began to implement it in advance through decree laws, and continue to do so even after the popular rejection of the reforms.<sup>90</sup> This happened particularly in economic and social matters, beginning the structuring of the socialist centralized state,<sup>91</sup> in a process of delegate legislation developed in absolute secrecy with no public consultation or participation, in violation of Article 210 of the Constitution.<sup>92</sup>

As aforementioned, the process began even before the draft reforms were even submitted to the National Assembly, when Decree Law No. 5,841 was enacted on June 12, 2007,<sup>93</sup> containing the organic law creating the Central Planning Commission. This was

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88. 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)*, 180 REVISTA DE ADMINISTRACIÓN PÚBLICA 383 (2009); Allan R. Brewer-Carías, *La fraudulenta mutación de la Constitución en Venezuela, o de cómo el juez constitucional usurpa el poder constituyente originario*, in ANUARIO DE DERECHO PÚBLICO 23-65 (2009); José Vicente Haro, *La mutación de la Constitución "Bolivariana"*, 1 LOS RETOS DEL DERECHO PROCESAL CONSTITUCIONAL EN LATINOAMÉRICA, I CONGRESO INTERNACIONAL DE DERECHO PROCESAL CONSTITUCIONAL, 19 Y 20 OCTUBRE DE 2011 93 (2011).

89. GACETA OFICIAL NO. 38.617, Feb. 1, 2007.

90. See Camargo, *supra* note 86, at 51 *passim*; Kiriakidis, *supra* note 86, at 57 *passim*; García, *supra* note 86, at 63 *passim*.

91. See Machado, *supra* note 86, at 215-20.

92. See Martínez, *supra* note 86, at 79-89; Artiles, *supra* note 86, at 93-100; Orlando, *supra* note 86, at 101-04.

93. GACETA OFICIAL NO. 5.841, EXTRA., June 22, 2007.

the first formal state act devoted to build the socialist state.<sup>94</sup> Once the 2007 constitutional reform was rejected in referendum, a few days later, on December 13, 2007, the National Assembly approved the 2007–13 Economic and Social Development National Plan, established in Article 32 of the Decree Law enacting the Planning Organic Law,<sup>95</sup> in which the basis of the “planning, production and distribution system oriented towards socialism” was established, providing that “the relevant matter is the progressive development of social property of the production means.”

For such purpose, the proposed 2007 rejected constitutional reforms to assign the state all powers over farming, livestock, fishing and aquaculture, and in particular the production of food were then materialized in the Decree Law on the Organic Law on Farming and Food Security and Sovereignty.<sup>96</sup> That law assigned to the state power not only to authorize food imports but also to prioritize production and directly assume distribution and commercialization. The law also expanded expropriation powers of the executive violating the constitutional guarantee of the previous declaration of a specific public interest or public utility involved, and allowing the State occupation of industries without compensation,<sup>97</sup> what has repeatedly occurred during the past years.<sup>98</sup>

Another Decree Law, No. 6,130 of June 3, 2008, enacted the Popular Economy Promotion and Development Law, establishing a “socio-productive communal model,” with different socio-

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94. See Allan R. Brewer-Carías, *Comentarios sobre la inconstitucional creación de la Comisión Central de Planificación, centralizada y obligatoria*, 110 REVISTA DE DERECHO PÚBLICO 79 (2007); 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*, 115 REVISTA DE DERECHO PÚBLICO 221 (2008)

95. GACETA OFICIAL NO. 5.554, Nov. 13, 2001.

96. GACETA OFICIAL NO. 5.889, EXTRA., July 31, 2008; see José Ignacio Hernández G., *Planificación y soberanía alimentaria*, 115 REVISTA DE DERECHO PÚBLICO 389 (2008); 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*, 115 REVISTA DE DERECHO PÚBLICO 395 (2008); 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)*, 115 REVISTA DE DERECHO PÚBLICO 417 (2008).

97. See Carlos García Soto, *Notas sobre la expansión del ámbito de la declaratoria de utilidad pública o interés social en la expropiación*, 115 REVISTA DE DERECHO PÚBLICO 149, 149-51 (2008).

98. See, GONZÁLEZ ET AL., *supra* note 87.

productive organizations following the “socialist model.”<sup>99</sup> In the same openly socialist orientation, Decree Law No. 6,092 was also issued enacting the Access to Goods and Services Persons Defense Law,<sup>100</sup> which derogated the previous Consumer and Users Protection Law,<sup>101</sup> with the purpose of regulating all commercialization and different economic aspects of goods and services, extending the state powers of control to the point of establishing the possibility of confiscating goods and services by means of their takeover and occupation of private industries and services through administrative decisions,<sup>102</sup> which has also repeatedly occurred during the past years.<sup>103</sup>

Regarding the 2007 rejected constitutional reforms related to eliminating local-level representative democracy, as aforementioned, the same began to be implemented in 2006, even before its formal proposal, with the sanctioning of the Communal Councils Law, which created them as social units and organizations not directed by popularly elected officials, without any sort of territorial autonomy, supposedly devoted to channeling citizens’ participation but in a centralized conducted system from the apex of the national executive.<sup>104</sup> This law was later reformed and elevated to organic law rank in 2009.<sup>105</sup>

99. GACETA OFICIAL NO. 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, 115 REVISTA DE DERECHO PÚBLICO 313 (2008).

100. GACETA OFICIAL NO. 5.889, EXTRA., July 31, 2008; José Gregorio Silva, *Disposiciones sobre el Decreto-Ley para la defensa de las personas en el acceso a bienes y servicios*, 115 REVISTA DE DERECHO PÚBLICO 277 (2008); 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)*, 115 REVISTA DE DERECHO PÚBLICO 281 (2008); Hernández, *supra* note 41, at 229-32 (2008).

101. GACETA OFICIAL NO. 37.930, May 4, 2004.

102. 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*, 115 REVISTA DE DERECHO PÚBLICO 245 (2008); 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*, 115 REVISTA DE DERECHO PÚBLICO 271 (2008).

103. See generally GONZÁLEZ, ET AL., *supra* note 87.

104. *Ley Orgánica de los Consejos Comunales*, GAZETA OFICIAL NO. 39.335, Dec. 28, 2009. See Juan M. Raffali A., *Límites constitucionales de la Contraloría Social Popular*, 115 REVISTA DE DERECHO PÚBLICO 133 (2008).

105. See GACETA OFICIAL NO. 39.335, Dec. 28, 2009. See Decision No. 1.676, 12-03-2009 Constitutional Chamber, Supreme Tribunal of Justice about the constitutionality of the organic character of the Communal Councils Organic Law, available at

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>106</sup> The implementation of the rejected constitutional reforms regarding the organization of the "Popular Power" based on the strengthening of the communes and communal councils was completed with the approval in 2010 of the Law on the Federal Council of Government.<sup>107</sup>

To implement these reforms, several steps were taken. The states and municipalities were forced to transfer their attributions to local institutions controlled by the central power (communal councils). Further, Decree Law No. 6217 of July 15, 2008, on the Organic Law of Public Administration that is directly applicable to the States' and Municipalities' Public Administrations was passed, in which the National Executive implemented the principle of centralized planning, subjecting regional and local authorities to the Central Planning Commission.<sup>108</sup> This Organic Law also assigns to the president, as proposed in the 2007 reforms, the power to appoint regional authorities with powers to plan, execute, follow up on and control land use and territorial development policies, thus subjecting all programs and projects to central planning approval.

Regarding the vertical distribution of state attributions between the national level and the states, one of the general purposes of the rejected 2007 constitutional reform was to change the federal

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<http://www.tsj.gov.ve/decisiones/scon/diciembre/1676-31209-2009-09-1369.html>. See ALLAN R. BREWER-CARÍAS, *LEY ORGÁNICA DE LOS CONSEJOS COMUNALES* (2010).

106. See Manuel Rachadell, *La centralización del poder en el Estado federal descentralizado*, 115 *REVISTA DE DERECHO PÚBLICO* 111, 113 (2008).

107. See *Ley Orgánica del Consejo Federal de Gobierno*, GACETA OFICIAL NO. 5.963, EXTRA., Feb. 22, 2010.

108. GACETA OFICIAL NO. 5.890, EXTRA., July 31, 2008; see Allan R. Brewer-Carías, *El sentido de la reforma de la Ley Orgánica de la Administración Pública*, 115 *REVISTA DE DERECHO PÚBLICO* 155 (2008); Cosimina G. Pellegrino Pacera, *La reedición de la propuesta constitucional de 2007 en el Decreto N° 6.217, con Rango, Valor y Fuerza de Ley Orgánica de la Administración Pública*, 115 *REVISTA DE DERECHO PÚBLICO* 163 (2008); Jesús Caballero Ortiz, *Algunos comentarios sobre la descentralización funcional en la nueva Ley Orgánica de la Administración Pública*, 115 *REVISTA DE DERECHO PÚBLICO* 169 (2008); Alberto Blanco-Urbe Quintero, *Afrenta a la Debida Dignidad frente a la Administración Pública. Los Decretos 6.217 y 6.265*, 115 *REVISTA DE DERECHO PÚBLICO* 175 (2008).

form of the state and the territorial distribution of the competencies established in Articles 156 and 164 of the Constitution. This process centralizes the state even further by concentrating almost all competencies of the public power at the national level.<sup>109</sup> Particularly, it “nationalized” the competency set forth in Article 164.10 of the Constitution, which attributed to the states exclusive jurisdiction on the conservation, administration, and use of national highways, roads, ports and airports.<sup>110</sup>

Despite the rejection of the constitutional reforms in the December 2007 referendum, in order to change such provision, the Constitutional Chamber of the Supreme Tribunal, in Decision No. 565 (April 15, 2008), issued an abstract constitutional interpretation at the request of the attorney general of the republic, modifying the content of the constitutional provision, and arguing that the “exclusive” attribution “was not exclusive” but “concurrent”—meaning that the national government could also exercise that competency interfering with the states’ powers.<sup>111</sup> With that interpretation, the Chamber illegitimately modified the Constitution, usurping popular sovereignty, and changed the federal form of the state by misrepresenting the territorial distribution system of powers between the national power and the states.<sup>112</sup> The Chamber, consequently, urged the National Assembly to issue legislation against the provisions of the 1999 Constitution, which was effectively accomplished in May 2009 by reforming the Organic Law on Decentralization, Delimitation, and Transfer of Public Attributions,<sup>113</sup> eliminating the aforementioned exclusive attribution of the states.<sup>114</sup>

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109. See Allan R. Brewer-Carías & Jan Kleinheisterkamp, *Unification of Laws in Federal Systems. National Report on Venezuela*, in *FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS* 378-91 (Daniel Halberstam, Mathias Reimann & Jorge A. Sánchez Cordero eds.) (2012).

110. See Brewer-Carías, *supra* note 39, at 57; Brewer-Carías, *supra* note 56, at 24.

111. See Decision No. 565 of the Constitutional Chamber (Apr. 15, 2008), Case: *Procurador General de la República, Interpretación del artículo 164.10 de la Constitución*, available at <http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm>.

112. See Decision No. 565 of the Constitutional Chamber (Apr. 15, 2008), Case: *Procurador General de la República, Interpretación del artículo 164.10 de la Constitución*, available at <http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm>.

113. GACETA OFICIAL NO. 39.140, Mar. 17, 2009; see Decision No. 565 of the Constitutional Chamber (Apr. 15, 2008), Case: *Procurador General de la República, Interpretación del artículo 164.10 de la Constitución*, available at <http://www.tsj.gov.ve/decisiones/scon/Abril/565-150408-07-1108.htm>.

114. 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 territo-*

The rejected 2007 constitutional reforms also sought to eliminate the Capital District that the 1999 Constitution had created as a political entity in substitution of the former Federal District, which was dependent on the national level of government. Notwithstanding popular rejection of the 2007 reform proposals, in April 2009, such reform was unconstitutionally implemented by the National Assembly, defrauding once more the Constitution by sanctioning the Special Law on the Organization and Regime of the Capital District.<sup>115</sup> In it, instead of organizing a democratic political entity to govern the capital district in Caracas, the capital of the Republic, the law established an organization completely dependent on the national level of government in the same territorial jurisdiction that “used to be one of the extinct Federal District.”<sup>116</sup> According to this law, the capital district, contrary to what is provided for in the Constitution, has no elected authorities of government, and is governed at the national level by means of a “special regime” consisting of the exercise of the legislative function by the National Assembly itself and a chief of government as the executive branch appointed by the president.<sup>117</sup> This means that through a national statute, in the same territory of Caracas, a new national structure has been unconstitutionally imposed.

Finally, the rejected 2007 proposed constitutional reforms sought to transform the military and the armed force into the Bolivarian Armed Force organized for the purpose of reinforcing socialism. Those radical changes have nonetheless been implemented by the president, also usurping the constituent power, by means of a Decree Law reforming the Organic Law on the Armed Force,<sup>118</sup> creating the “Bolivarian National Armed Force” subjected to a “military Bolivarian Doctrine,” and creating in it the “National Bolivarian Militia”—all of this according to what was proposed and rejected by the people in the 2007 Constitutional Reform.<sup>119</sup>

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*rial del poder público*, 114 REVISTA DE DERECHO PÚBLICO 247, 247 (2008); Rachadell, *supra* note 106, at 120.

115. GACETA OFICIAL NO. 39.156, Apr. 13, 2009. See the comments on this law in ALLAN R. BREWER-CARÍAS ET AL., LEYES SOBRE EL DISTRITO CAPITAL Y EL ÁREA METROPOLITANA DE CARACAS (2009).

116. *Id.*

117. Special Law on the Organization and Regime of the Capital District, *supra* note 115, art. 3.

118. Decree Law No. 6.239, on the Organic Law of the National Bolivarian Armed Force, in GACETA OFICIAL NO. 5.933, EXTRA., Oct. 21, 2009.

119. See Alfredo Arismendi A., *Fuerza Armada Nacional: Antecedentes, evolución y régimen actual*, 115 REVISTA DE DERECHO PÚBLICO 187, 198-99 (2008); Jesús María Alvarado Andrade, *La nueva Fuerza Armada Bolivariana (Comentarios a raíz del Decreto N°*

Almost all these laws and decree laws have been challenged on grounds of their unconstitutionality before the Constitutional Chamber of the Supreme Tribunal, which has never issued decision on the matters. Its inaction has been, without doubt, the main source of the deconstitutionalization of the Constitutional State.

V. THE CONCLUSION OF THE DECONSTITUTIONALIZATION PROCESS OF THE CONSTITUTIONAL STATE: THE CREATION OF THE COMMUNAL STATE OF THE POPULAR POWER THROUGH ORDINARILY LEGISLATION IN 2012

In September 26, 2010 a parliamentary election was held in the country, the result of which was that the opposition to the government won the popular vote, although not the majority of seats in the National Assembly, due to distorting electoral regulations. This result meant, in fact, that the majority of popular vote expressed was against the proposals debated in the electoral campaign for the establishment of a socialist state in Venezuela, a matter that the president and the governmental majority of the National Assembly, with a massive campaign for their candidates, posed as a sort of "plebiscite" on the president, his performance and his socialist policies.

In disdain of the popular will expressed in the parliamentary elections ratifying the previous rejection by the people of the reforms in the 2007 referendum, the president and his party, having lost the absolute control they had since 2005 over the National Assembly, before the newly elected deputies to the Assembly could have taken possession of office in January 2011, in late December 2010 forced the National Assembly to proceed to sanction a set of organic laws. Those laws finished defining the legislative framework for a new state, different to the Constitutional State. In this way, by-passing the Constitution and in parallel to the Constitutional State, the National Assembly regulated a socialist, centralized, military and police State, called the "Communal State" or the State of "Popular Power," already rejected by the people in the referendum of December 2007.

The organic laws that were approved on December 21, 2010 are the laws on the Popular Power; the Communes; the Communal

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6.239, *con rango, valor y fuerza de Ley Orgánica de la Fuerza Armada Nacional Bolivariana*, 115 REVISTA DE DERECHO PÚBLICO 207 (2008).

Economic System; the Public and Communal Planning; and the Social Comptrollership.<sup>120</sup> Furthermore, in the same framework of organizing the “Communal State” based on the “Popular Power,” the reform of the Organic Law of Municipal Public Power and the Public Policy Planning and Coordination of the State Councils,<sup>121</sup> and of the Local Council Public Planning Laws stand out.

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 eighteen months until June 2012.

All these laws were also challenged on grounds of their unconstitutionality before the Constitutional Chamber of the Supreme Tribunal,<sup>122</sup> which, once again, never issued any decisions pertaining to these matters. As aforementioned, the Tribunal’s inaction has been, without doubt, the main source of the deconstitutionalization of the Constitutional State.

The general defining framework of the Socialist State imposed on Venezuelans through such unconstitutional legislation, and for which nobody has voted, is supposedly based on the exercise of the sovereignty of the people but exclusively in a “direct” manner through the exercise of the Popular Power and the establishment of a Communal State. This is provided in the Organic Law for Popular Power, which is to be applied to everyone and everything as an essential part of the new “socialist principle of legality” in the creation, implementation and control of public management.<sup>123</sup>

The main purpose of these laws is the organization of the “Communal State” which has the commune as its fundamental unit, supplanting in an unconstitutional way the municipalities as

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120. See GACETA OFICIAL NO. 6.011, EXTRA., Dec. 21, 2010. The Constitutional Chamber through decision No. 1329 (Dec. 16, 2010), among others, declared the constitutionality of the organic character of these Laws. See <http://www.tsj.gov.ve/decisiones/scon/Diciembre/%201328-161210-2010-10-1437.html>. See on all these organic laws, ALLAN R. BREWER-CARIAS, ET AL., *LEYES ORGÁNICAS SOBRE EL PODER POPULAR Y EL ESTADO COMUNAL* (2011).

121. See GACETA OFICIAL NO. 6.015, EXTRA., Dec. 28, 2010.

122. See José Ignacio Hernández, Jesús María Alvarado Andrade, & Luis A. Herrera Orellana, *Sobre los vicios de inconstitucionalidad de la Ley Orgánica del Poder Popular*, in BREWER-CARIAS ET AL., *supra* note 120, at 509-93.

123. See Allan R. Brewer-Carías, *Introducción general al régimen del Poder Popular y del Estado Comunal (O de cómo en el siglo XXI, en Venezuela se decreta al margen de la Constitución, un Estado de Comunas y de Consejos Comunales y se establece una sociedad socialista y un sistema económico comunita, por los cuales nadie ha votado)*, in BREWER-CARIAS ET AL., *supra* note 120, at 9-182.



the “primary political units of the national organization.”<sup>124</sup> The exercise of Popular Power is made through the Communes, as an expression of the exercise of popular sovereignty, although not through representatives. It is therefore a political system in which representative democracy is ignored, openly violating the Constitution.

The Socialist State or Communal State sought to be established through these laws, in parallel to the Constitutional State, is supposedly based on Article 5 of the Constitution that provides that “[s]overeignty resides untransferably in the people, who exercise it directly as provided in this Constitution and the Law, and indirectly, by suffrage, through the organs exercising Public Power.”<sup>125</sup> Instead, it has been created through by-passing the basic rule of the Constitutional State structure grounded on the concept of representative democracy, that is, the exercise of sovereignty indirectly through the vote.

The Communal State is now structured based only on the supposedly direct exercise of sovereignty<sup>126</sup> through the Communes, “with an economic model of social property and endogenous sustainable development that allows reaching the supreme social happiness of the Venezuelan people in a socialist society.”<sup>127</sup>

What is being sought is to establish a Socialist or Communal State alongside the Constitutional State—the first supposedly based on the direct exercise of sovereignty by the people; and the second based on the indirect exercise of sovereignty by the people through elected representatives by universal suffrage; in a system in which the former will gradually strangle and empty competencies from the latter. All of this is contrary to the Constitution, particularly because in the structure of the Communal State that

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124. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 168.

125. *Id.* at art. 5.

126. This has even been “legitimized” by the Supreme Tribunal Constitutional Chamber’s decisions analyzing the organic character of the laws, such as the one issued in connection with the Organic Law of Municipalities. See Decision No. 1.330, Case: *Organic Character of the Law of the Communes*, Dec. 17, 2010, available at <http://www.tsj.gov.ve/decisiones/scon/Diciembre/1330-171210-2010-10-1436.html>.

127. Organic Law on the Popular Power, art. 8.8, GACETA OFICIAL NO. 6.011, EXTRA., Dec. 21, 2010. The Organic Law of Municipalities, however, defines the Communal State at article 4.10 as follows: “From of sociopolitical organization, based on the democratic and social state of law and justice established in the Constitution of the Republic, whose power is exercised directly by the people through communal self governments, with an economic model of social property and endogenous and sustainable development that achieves the supreme social happiness of the Venezuelan people in a socialist society. Forming the basic unit of the Communal State is the commune.”

is established, in the end, the exercise of sovereignty is factually indirect, through supposed “representatives” members of the Communal Councils that are not popularly elected through universal and direct suffrage, but “elected” in Citizens’ Assemblies.<sup>128</sup> They are the ones called to exercise Popular Power in the name of the people, with the name of “spokespersons,” but that as already mentioned, are not elected through universal, secret and direct suffrage.

This system is directly controlled by a Ministry from the National Executive Branch of Government. Far from being an instrument of participation and decentralization—a concept that is indissolubly linked to political autonomy—it is a centralized and tightly controlled system of the communities by the central power, in which the members of the communal councils, the communes and all organizations of the Popular Power are not elected but “appointed” through a show of hands by assemblies controlled by the official party and the executive branch.

This Communal State system, which exists in parallel to the Constitutional State, is structured on a unique concept which is socialism, so that anyone who is not a socialist is automatically discriminated against. Under the framework of these laws, it is not possible, therefore, to reconcile pluralism and the principle of non-discrimination on grounds of “political opinion” guaranteed by the Constitution with the provisions of these Law pursuing the opposite, that is, the establishment of a Communal State whose bodies can only act on the basis of socialism and in which any citizen who has another opinion is excluded. Thus, through these Organic Laws, in a way evidently contrary to the Constitution, the defining framework of a new model of a state parallel and different from the Constitutional State has been established, called the Communal State, based exclusively on socialism as the political doctrine and practice.

Regarding the Communal State, on the other hand, article 5 of the Organic Law on the Popular Power states that the “people’s organization and participation in exercising its sovereignty is based on Simon Bolívar the Liberator’s doctrine, and is based on socialist principles and values,<sup>129</sup>—a link that, as aforementioned,

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128. See on the Organic Law on the Communal Councils, Claudia Nikken, *La Ley Orgánica de los Consejos Comunales y el derecho a la participación ciudadana en los asuntos públicos*, in BREWER-CARÍAS, ET AL., *supra* note 120, at 183-358.

129. Organic Law on the Popular Power, art. 5, *supra* note 127. The same expression was used in the Organic Law of the Communes with respect to their constitution, shaping

is untenable. This law links the organization of the Communal State (established in parallel to the Constitutional State) with the socialist political ideology, for which purpose the Law defined socialism, as:

a mode of social relations of production, centered in coexistence with solidarity and the satisfaction of material and intangible needs of all of society, which has as fundamental basis, the recuperation of the value of work as a producer of goods and services to meet human needs and achieve supreme social happiness and integral human development. This requires the development of social ownership of the basic and strategic means of production, so that all families, Venezuelan citizens, possess, use and enjoy their patrimony, individual or family property, and exercise full enjoyment of their economic, social, political and cultural rights.<sup>130</sup>

Article 7 of the same Organic Law on the Popular Power defines as a purpose of the Popular Power, to strengthen "the organization of the people in order to consolidate the revolutionary democracy and build the bases of a socialist society, democratic, of law and justice," and to "establish the bases that allow organized communities to exercise social comptrollership to ensure that the investment of public resources is efficiently performed for the collective benefit; and monitor that the activities of the private sector with social impact develop within legal rules that protect users and consumers."<sup>131</sup> This, of course, is a well-known procedure established in other authoritarian regimes in order to construct a general system of social espionage to be developed among peoples in order to institutionalize the denunciation and persecution of any deviation regarding the socialist framework imposed on the citizenship.<sup>132</sup>

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and functioning (art. 2), in the Communal Council's Law (art. 1) and in the Organic Law of Social Comptrollership (art. 6).

130. *Id.* at art. 8.14. The same definition is found in Article 4.14 of the Organic Law of the Communes. Many are the definitions of socialism, but in all, its basic elements can be identified: (i) a system of social and economic organization, (ii) based on collective or State ownership and administration of the means of production, and (iii) State regulation of economic and social activities and distribution of goods, (iv) seeking the gradual disappearance of social classes.

131. Organic Law on the Popular Power, *supra* note 127, art. 7.

132. See Luis A. Herrera Orellana, *La Ley Orgánica de Contraloría Social: Funcionalización de la participación e instauración de la desconfianza ciudadana*, in BREWER-CARÍAS ET AL., *supra* note 120, at 361 *passim*.

According to the Law of the Communes,<sup>133</sup> these communes are conceived as a “local entity” or “socialist space” of the Communal State, where citizens exercise the Popular Power.”<sup>134</sup> Nonetheless, according to the Constitution, this expression of “local entity” can only be applied to local political entities of the Constitutional State with autonomous and self-governments entities composed of elected representatives by universal, direct and secret ballot.<sup>135</sup> This means that there can be no “local entities” directed by persons that are not elected by the people but appointed by other bodies.

And this is precisely what happens with the so-called “governments of the communes.” Under this legislation on Popular Power and its organizations, the origin of the Communes is not secured through democratic representative election by universal, direct and secret suffrage. Thus, the conception of the Communes in this organic law is an unconstitutional conception.

Within the areas of communal power, the law has specifically regulated the communal economy that must 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.”<sup>136</sup> This area of public power has been regulated by the Organic Law of the Communal Economic System,<sup>137</sup> which must be developed exclusively 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. This system radically changes the mixed economic system of the 1999 constitutional framework, substituting it with a state-controlled economic system, mixed with provisions belonging to primitive societies. The statute even provides for the creation of local or “communal” currencies in a society that must be ruled only “by socialist principles and values” that

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133. See GACETA OFICIAL NO. 6.011, EXTRA., Dec. 21, 2010.

134. Law of the Communes, *supra* note 120, art. 1.

135. CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 169.

136. Law of the Communes, *supra* note 130, art. 18.

137. See GACETA OFICIAL NO. 6.011, EXTRA., Dec. 21, 2010. On this law, see Allan R. Brewer-Carías, *Sobre la Ley Orgánica del Sistema Económico Comunal o de cómo se implanta en Venezuela un sistema económico comunista sin reformar la Constitución*, 124 REVISTA DE DERECHO PÚBLICO 102 (2010); Jesús María Alvarado Andrade, *La “Constitución Económica”, y el sistema económico comunal (Reflexiones críticas a propósito de la Ley Orgánica del Sistema económico Comunal)*, in BREWER-CARIAS, ET AL., *supra* note 120, at 375-456.

the Law declares to be inspired, without any historical support, on the "Simón Bolívar's doctrine."<sup>138</sup>

The socialist productive model established in the Law, is precisely 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,"<sup>139</sup> directed to satisfy "the increasing needs of the population through new means of generation and appropriation as well as the *reinvestment of social surplus*."<sup>140</sup> This is nothing different than to legally impose a communist system by copying isolated paragraphs perhaps of a forgotten old manual of a failed communist revolution, paraphrasing what Karl Marx and Friedrich Engels wrote 170 years ago (1845-1846) on the "communist society,"<sup>141</sup> precisely based upon those three basic concepts: the social property of production means, the elimination of social division of work, and the social reinvestment of surplus.<sup>142</sup>

## VI. SOME CONCLUSIONS

This Communal State, regulated on the fringes of the Constitution, has been established through ordinary legislation as a parallel State to the Constitutional State. The provisions of the Communal State, which are in the process of being implemented, will enable the Communal State to drown the Constitutional State, for which purpose the Law has provided that all organs of the Constitutional State that exercise Public Power are subjected to the mandates of the organizations of Popular Power. This establishes a new principle of government the so-called principle of "govern obeying," which is nothing other than obeying the wishes of the central government.<sup>143</sup>

The Popular Power organizations have no political autonomy, since their "spokespersons" are not democratically elected by universal, direct and secret ballot, but are rather appointed by citizen

138. Organic Law of the Communal Economic System, *supra* note 130, art. 5.

139. *Id.* at art. 3.2.

140. *Id.* at art. 6.12.

141. See KARL MARX & FRIEDRICH ENGELS, *The German Ideology*, in 5 COLLECTIVE WORKS 47 (1976), available 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).

142. Organic Law of the Communal Economic System, *supra* note 130, art. 1.

143. 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." *Id.*

Assemblies politically controlled and operated by the governing party and the National Executive. The National Executive controls and guides all the organizational process of the Communal State in the sphere of socialist ideology, thus there is no way there can be a spokesperson who is not a socialist. Consequently, with the implementation of the Communal State, the decentralization principle of the Constitution eventually will be completely abandoned.<sup>144</sup>

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 States and Mayors and Municipal Councils. It is these groups upon whom ultimately is imposed an obligation to obey any decision adopted by the National Government 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. The sovereignty of the people has been confiscated by transferring it to assemblies who do not represent them.

With this “Organic Laws of Popular Power” framework, there is no doubt about the political decision taken in December 21, 2010 by the completely delegitimized National Assembly. That National Assembly, elected in 2005, no longer represented the majority of the popular will as it was expressed in the September 26, 2010 legislative election, which was instead lodged against the President of the Republic, the National Assembly itself and socialist policies they have developed. These policies are designed to impose on Venezuelans, against popular will and defrauding the Constitution, a Socialist State model, called “the Communal State” and conceived as a Socialist State. While these steps are taken supposedly to exercise Popular Power directly by the people as an alleged form of direct exercise of sovereignty, this is not true because it is instead exercised through “spokespersons” who supposedly “represent” them but without being elected in universal, direct and secret suffrage.

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144. See José Ignacio Hernández G., *Descentralización y Poder Popular*, in BREWER-CARÍAS, ET AL., *supra* note 120, at 457-73; Adriana Vigilanza Garcia, *La descentralización política de Venezuela y las nuevas Leyes del “Poder Popular”*, in BREWER-CARÍAS, ET AL., *supra* note 120, at 475-505.

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>145</sup> it now adds fraud to the popular will by imposing on Venezuelans through organic laws a state model for which nobody has voted.

The new state framework radically and unconstitutionally changes the text of the 1999 Constitution, which has not been reformed as the regime had wished in 2007. These steps are taken in open contradiction to the popular rejection that the majority expressed in the referendum of December 2, 2007, even in violation of the Constitution, and in defiance of the popular rejection of the socialist policies of the President to the Republic and his National Assembly on the occasion of the parliamentary elections of September, 26 2010.

What is clear about all this is that there are no masks to deceive anyone, or any reason for someone to pretend to be deceived or fooled about what essentially the “Bolivarian revolution” is. It is nothing other than a communist Marxist revolution, carried out deliberately by misusing and defrauding constitutional institutions, which subsist due to the abstention or omission of the Constitutional Chamber of the Supreme Tribunal to exercise its power of judicial review.

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145. See ALLAN R. BREWER-CARÍAS, REFORMA CONSTITUCIONAL Y FRAUDE A LA CONSTITUCIÓN (1999-2009) (2009).





