THE GOVERNMENT OF JUDGES, AND DEMOCRACY. THE TRAGIC INSTITUTIONAL SITUATION OF THE VENEZUELAN JUDICIARY*

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I. DEMOCRACY AND SEPARATION OF POWERS

The essential components of democracy are much more than the sole popular or circumstantial election of government officials, as it has been formally declared in the Inter American Democratic Charter *(Carta Democratica Interamericana)* adopted by the Organization of American States in 2001, [1] after so many antidemocratic, militarist and authoritarian regimes disguised as democratic because of their electoral origin that Latin American countries have suffered.

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

The principle of separation and independence of powers is so important, as one of the "essential elements of democracy", that it is the one that can allow all the other "fundamental components of democracy" to be politically possible. To be precise, democracy, as a political regime, can only function in a constitutional Rule of law system where the control of power exists; that is, check and balance based on the separation of powers with their independence and autonomy guaranteed, so that power can be stopped by power itself. Consequently, without separation of powers and the possibility of control of power, any of the other essential factors of democracy cannot be guaranteed, because only by controlling Power, can free and fair elections and political pluralism exist; only by controlling Power, can effective democratic participation be possible, and effective transparency in the exercise of government be assured; only by controlling Power can there be a government submitted to the Constitution and the laws, that is, the Rule of law; only by controlling Power can there be an effective access to justice functioning with autonomy and independence; and only by controlling Power can there be a true and effective guaranty for the respect of human rights.[2]

The consequence of the aforementioned, is that democratic regimes cannot exist without separation of powers, and in particular, without the possibility of an independent and autonomous Judicial Power

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* Venezuelan National Report, Section IB, 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, July 2014

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

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

with the capacity of controlling all the other powers of the State. That is why the most important principle governing the functioning of the Judiciary in democratic regimes, is the independence and autonomy of judges, so they can apply the rule of law without interference from other State's Powers, from institutions, corporation or even from citizens; and only subjected to the rule of the Constitution and of law.

II. THE PROVISIONS OF THE VENEZUELAN CONSTITUTION REGARDING THE JUDICIAL SYSTEM AND ITS GOVERNANCE

For such purpose, in contemporary world, Constitutions have included express provisions in such respect, being no exception the Venezuelan Constitution of 1999.[3] In effect, according to article 253 of the Constitution, the power to render or administer justice emanates from the citizenry and is imparted "in the name of the Republic and by the authority of the law." For such purposes, Article 26 of the Constitution provides that the State must guaranty a "cost-free, accessible, impartial, adequate, transparent, autonomous, independent, accountable, equitable, and expeditious justice, without undue or dilatory delay, formalism, or unnecessary replication of procedures."[4] Consequently, the Constitution denies the Judiciary the power to establish court costs or fees, or to require payment for services (Article 254).

The system of justice, according to the same Article 253 of the Constitution, is composed not only by the organs of the Judicial Branch (Supreme Tribunal of Justice and all the other courts established by law), but by the offices of the Prosecutor General, the Peoples' Defender, the criminal investigatory organs, the penitentiary system, the alternative means of justice, the citizens who participate in the administration of justice as provided in the law, and the attorneys authorized to practice law.[5]

The principle of the independence of the Judicial Power is set forth expressly in Article 254 of the Constitution, which, in addition, establishes its financial autonomy,[6] and assigns "functional, financial, and administrative autonomy" to the Supreme Tribunal. Fos such purpose the Constitution provides that within the National general annual budget, an appropriation of at least two percent (2%) of the ordinary national budget is established for the judiciary, a percentage amount that cannot be changed without prior approval by the National Assembly.

With the purpose of guaranteeing the impartiality and independence of judges in the exercise of their duties, Article 256 of the Constitution requires that magistrates, judges and prosecutors of the Public Prosecutor and the Public Defenders' offices may not, from the time of entering their respective jobs until they step down, engage in partisan political activity other than voting. This includes political party activism, union, guild and similar activities. Magistrates, judges and prosecutors are also prohibited from engaging in private or business activities that are incompatible with their judicial functions, on their own behalf or on the behalf of others, and they may not undertake any other public functions other than educational activities. In addition, Judges are prohibited from associating with one another (Article 256), which is a limit regarding the constitutional right of association set forth in Article 52 of the Constitution.

According to Article 257 of the Constitution, the fundamental instrument for the realization of justice is the judicial process; regarding which the procedural laws must establish simplified, uniform and effective procedures, and adopt brief, public, and oral proceedings, through which in no case justice should be sacrificed based on the omission of non-essential formalities. These provisions are complemented by Article 26 of the Constitution that set forth that the State must guarantee expeditious justice without undue delay, formalisms, or useless procedural repositions. In addition, being the

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3 See on the Venezuelan 1999 Constitucion, Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezulano*, Editorial Jurídica Venezolana, Caracas 2004, 2 vols..

4 See Gustavo Urdaneta Troconis, "El Poder Judicial en la Constitución de 1999", in *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Volumen I. Imprenta Nacional, Caracas, 2001, pp. 521-564.

5 See the Law on the Judicial System, *Gaceta Oficial* Nº 39.276 of October 1, 2009. See in general Gustavo Urdaneta Troconis, "El Poder Judicial en la Constitución de 1999," en *Estudios de Derecho Administrativo: Libro Homenaje a la Universidad Central de Venezuela,* Vol. I, Imprenta Nacional, Caracas, 2001, pp. 521-564; Román J. Duque Corredor, "El sistema de Justicia," en Jesús María Casal, Alfredo Arismendi y Carlos Luis Carrillo Artiles (Coord.), *Tendencias Actuales del Derecho Constitucional. Homenaje a Jesús María Casal Montbrun,* Vol. II, Universidad Central de Venezuela/Universidad Católica Andrés Bello, Caracas 2008, pp. 87-112.

6 See Juan Rafael Perdomo, "Independencia y competencia del Poder Judicial," in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 8, Caracas, 2003, pp. 483 a 518.

alternative means of justice part of the judicial system (Article 253), Article 258 of the Constitution imposes on the Legislator the duty to promote arbitration, conciliation, mediation, and other alternative means for conflicts resolution.

Finally Article 255 of the Constitution, judges are personally responsible for unjustified errors, delays, or omissions, for substantial failures to observe procedural requirements, for abuse of or refusal to apply the law (*denegación*), for bias, for the crime of graft (*cohecho*) and for criminally negligent or intentional injustice (*prevaricación*) effectuated in the course of performing their judicial functions.

One of the innovations of the 1999 Constitution was to confer to the Supreme Tribunal of Justice "the Governance and Administration of the Judicial Branch," while eliminating the former Council of the Judiciary (*Consejo de la Judicatura*) which exercised these functions under Article 217 of the Constitution of 1961, as one of the organ with functional autonomy separate and independent from all the branches of government, including the former Supreme Court of Justice.

Consequently, since 2000, as provided in Article 267 of the Constitution, the Supreme Tribunal of Justice is charged with the direction, governance and administration of the Judicial Branch, including inspection and oversight of the other courts of the Republic as well as the offices of the Public Defenders.[7] For such purposes the Supreme Tribunal is in charge of drafting and putting into effect its own budget and the budget of the Judicial Branch in general, according to principles set out in Article 254.

In order to perform these functions, the plenary Supreme Tribunal of Justice has created an Executive Directorate of the Judiciary (*Dirección Ejecutiva de la Magistratura*) with regional offices. Judicial Circuits are to be established and organized by statute, as are the creation of jurisdictions of tribunals and regional courts in order to promote administrative and jurisdictional decentralization of the Judicial Power (Article 269).

As mentioned, jurisdiction for judicial discipline is to be carried out by disciplinary tribunals as determined by law (Article 267), which nonetheless was only formally established in 2010-2011 after the sanctioning of the Code of Ethics of the Venezuelan Judge, providing that disciplinary proceedings must be public, oral, and brief, in conformity with due process of law.

III. THE CONSTITUCIONAL REGULATIONS REGARDING THE STABILITY AND INDEPENDENCE OF JUDGES

The basic constitutional provision in order to guaranty the independence and autonomy of courts and judges is established in Article 255, which provides for a specific mechanism to assure the independent appointment of judges, and to guaranty their stability.

In this regard, the judicial tenure is considered as a judicial career, in which the admission as well as the promotion of judges within it must be the result of a public competition or examinations to assure the excellence and adequacy of qualifications of the participants, who are to be chosen by panels from the judicial circuits (Article 255). The naming and swearing-in of judges is to be done by the Supreme Tribunal of Justice, and the citizens' participation in the selection procedure and designation of judges are to be guarantied by law. Unfortunately, up to 2011, all these provisions have not been applicable because of a lack of legislation implementing them.

The Constitution also creates a Judicial Nominations Committee (Article 270) as an organ for the assistance of the Judicial Branch in selecting not only the Magistrates for the Supreme Tribunal of Justice (Article 264), but also to assist judicial colleges in selecting judges for the courts including those of the jurisdiction in Judicial Discipline. This Judicial Nominations Committee is to be composed of representatives from different sectors of society, as determined by law. The law is required to promote the professional development of judges, to which end universities are to collaborate with the judiciary by developing training in judicial specialization in law school curricula. Nonetheless, none of these provisions have been implemented, and on the contrary, since 1999, the Venezuelan Judiciary has been

[7] See the Organic Law of the Supreme Tribunal of Justice *Gaceta Oficial* Nº 39.522 of October 1, 2010, See Allan R. Brewer-Carías and Víctor Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia 2010,* Editorial Jurídica Venezolana, Caracas 2010; Laura Louza, "El Tribunal Supremo de Justicia en la Constitución de la República Bolivariana de Venezuela," en *Revista del Tribunal Supremo de Justicia,* Nº 4. Caracas, 2002, pp. 379-437; Nélida Peña Colmenares, "El Tribunal Supremo de Justicia como órgano de dirección, gobierno, administración, inspección y vigilancia del Poder Judicial venezolano", in *Revista de derecho del Tribunal Supremo de Justicia,* Nº 8, Caracas, 2003, pp. 391 a 434; and Olga Dos Santos, "Comisión Judicial del Tribunal Supremo de Justicia," in *Revista de derecho del Tribunal Supremo de Justicia*, Nº 6, Caracas, 2002, pp. 373 a 378.

almost completely composed by temporal and provisional judges,[8] lacking stability and being subjected to political manipulation, altering the people's right to an adequate administration of justice.

On the other hand, in order to guaranty the stability of judges according to the express provision of the Constitution, they can only be removed or suspended from office through judicial procedures or trails expressly established by statutes, led by Judicial Disciplinary Judges (Article 255). Nonetheless, up to 2011, because of the lack of implementing the Disciplinary Jurisdiction, judges were removed without due process guaranties by a "transitory" Reorganization Commission of the Judicial Power in charge of the disciplinary procedures, only eliminated in June 2011, which has been substituted by courts but whose judges are appointed by the political organ of the State, the National Assembly, instead of by the Supreme Tribunal of Justice.

IV. THE CATASTROPHIC DEPENDENCE OF THE JUDICIARY IN THE VENEZUELAN AUTHORITARIAN GOVERNMENT

Now, despite all the provisions included in the text of the 1999 Constitution, since 1999, Venezuela has experienced a process of progressive concentration of powers, implemented by controlling the nomination of the head of the State's organs. In effect, on of the mechanism established in the 1999 Constitution in order to assure their independence of powers was the provision of a system to assure that their appointment by the National Assembly was to be limited by the necessary participation of special collective bodies called Nominating Committees that must be integrated with representatives of the different sectors of society (arts. 264, 279, 295). Those Nominating Committees were to be in charge of selecting and nominating the candidates, guaranteeing the political participation of the Citizens in the process.

Consequently, the appointment of the Justices of the Supreme Tribunal, and of all other head of the other State's powers can only be made among the candidates proposed by the corresponding "Nominating Committees," which are the ones in charge of selecting and nominating the candidates before the Assembly. These constitutional previsions, were designed in order to limit the discretional power the political legislative organ traditionally had to appoint those high officials through political party agreements, by assuring political Citizenship participation. [9] Unfortunately, these exceptional constitutional provisions have not been applied, due to the fact that the National Assembly during the past years, defrauding the Constitution, has deliberately "transformed" the said Committees into simple "parliamentary Commissions" reducing the civil society's right to political participation. The Assembly in all the statutes sanctioned regarding such Committees and the appointment process, has established the composition of all the Nominating Committees with a majority of parliamentary representatives (whom by definition cannot be representatives of the "civil society"), although providing, in addition, for the incorporation of some other members chosen by the National Assembly itself from strategically selected "non-governmental Organizations."[10] The result has been the complete political control of the Nominating Committees, and the persistence of the discretional political and partisan way of appointing the official heads of the non elected branches of government, which the provisions of the 1999

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

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

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

Constitution intended to limit, by a National Assembly that since 2000 has been completely controlled by the Executive.

That is why, that in this context, it was hardly surprising to hear former President Chávez, when referring to the delegate legislation enacted by him, to say in August 2008, simply: "*I am the Law…. I am the State* !!;[11] repeating the same phrases he used in 2001, also referring to other series of decree-laws he enacted at that time as delegate legislation.[12] Such phrases, as we all know, were attributed in the seventeen century to Louis XIV, in France, as a sign of the meaning of an Absolute Monarchy –although in fact he never expressed them–;[13] but to hear in our times a Head of State saying them, is enough to understand the tragic institutional situation that Venezuela is currently facing, characterized by a complete absence of separation of powers and, consequently, of a democratic and rule of law government.[14] Consequently, since 1999, a tragic setback has occurred in Venezuela regarding democratic standards, by means of a continuous, persistent, and deliberate process of demolishing the rule of law institutions[15] and of destroying democracy in a way never before experienced in all the constitutional history of the country.[16]

This has lead to the complete control of the Judiciary, which after being initially intervened by the Constituent National Assembly in 1999,[17] with the consent and complicity of the former Supreme Court

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

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

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

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

15 See in *general*, Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)," in *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial," in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías "La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)," in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios Nº 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

16 See, in general, Allan R. Brewer-Carías, "El autoritarismo establecido en fraude a la Constitución y a la democracia y su formalización en "Venezuela mediante la reforma constitucional. (De cómo en un país democrático se ha utilizado el sistema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la reforma constitucional)" in the book *Temas constitucionales. Planteamientos ante una Reforma,* Fundación de Estudios de Derecho Administrativo, FUNEDA, Caracas 2007, pp. 13-74; and "La demolición del Estado de Derecho en Venezuela Reforma Constitucional y fraude a la Constitución (1999-2009)," in *El Cronista del Estado Social y Democrático de Derecho*, Nº 6, Editorial Iustel, Madrid 2009, pp. 52-61.

17 See on the national Constituent Assembly of 1999: Allan R. Brewer-Carías, "Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", en *Lateinamerika Analysen*, 19, 1/2008, GIGA, German Institute of Global and Area Studies, Institute of Latin American Studies, Hamburg 2008, pp. 119-142. On Auguts 19, 1999, the National Constituent Assembly decided to declare "the Judicial Power in emergency." *Gaceta Oficial* Nº 36.772 of August 25, 1999 reprinted in *Gaceta Oficial* N° 36.782 of September 8, 1999. See in Allan R. Brewer–Carías, *Debate Constituyente,* tomo I, Fundación de Derecho Público, Editoriual Jurídica Venezolana, Caracas 1999, p. 57-73; and in *Gaceta Constituyente (Diario de Debates), Agosto–Septiembre de 1999,,* Session of August 18, 1999, Nº 10, pp. 17-22. See the text of the decree in *Gaceta Oficial* Nº 36.782 of September 08, 1999

of Justice, which endorsed the creation of a Commission of Judicial Emergency[18] that continued to function, although with another name, in violation of the new Constitution, until 2011.[19] In this matter, in the past fifteen years the country has witnessed a permanent and systematic demolition process of the autonomy and independence of the judicial power, aggravated by the fact that according to the 1999 Constitution, as aforementioned, the Supreme Tribunal that is completely controlled by the Executive is in charge of administering all the Venezuelan judicial system, particularly, by appointing and dismissing judges.[20]

The process began by the National Constituent Assembly, after eliminating the Supreme Court itself, and dismissing its Magistrates, with the appointment, in 1999, of new Magistrates of the new Supreme Tribunal of Justice, without complying with the constitutional conditions, by means of a Constitutional Transitory regime sanctioned after the Constitution was approved by referendum.[21]. That Supreme Tribunal, completely packed with the government supporters, has been precisely the one that during the past fifteen years has been the most ominous instrument for consolidating authoritarianism in the country. From there on, the intervention process of the Judiciary continued up to the point that the President of the Republic has politically controlled the Supreme Tribunal of Justice and, through it, the complete Venezuelan judicial system.

For that purpose, the constitutional conditions needed to be elected Magistrate of the Supreme Tribunal and the procedures for their nomination with the participation of representatives of the different sectors of civil society, were violated since the beginning. First, as aforementioned, in 1999 by the National Constituent Assembly itself once it dismissed the previous Justices, appointing new ones without receiving any nominations from any Nominating Committee, and many of them without compliance with the conditions set forth in the Constitution to be Magistrate. Second, in 2000, by the newly elected National Assembly, by sanctioning a Special Law in order to appoint the Magistrates in a transitory way without complying with the Constitution.[22] This reform, as the Inter-American Commission on Human Rights emphasized in its *2004 Annual Report*, "lack the safeguards necessary to prevent other branches of government from undermining the Supreme Tribunal's independence and to keep narrow or temporary majorities from determining its composition." [23] Third, in 2004, again by the National Assembly by sanctioning the Organic Law of the Supreme Tribunal of Justice, increasing the number of Justices from 20 to 32, and distorting the constitutional conditions for their appointment and dismissal, allowing the government to assume an absolute control of the Supreme Tribunal, and in particular, of its Constitutional Chamber.[24] And fourth, in 2010, once more, the National Assembly

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

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

20 See Rafael J. Chavero Gazdik, *La Justicia Revolucionaria. Una década de reestructuración (o involución) Judicial en Venezuela*, Editorial Aequitas, Caracas 2011; Laura Louza Scognamiglio, *La revolución judicial en Venezuela*, FUNEDA, Caracas 2011; Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)", in *XXX Jornadas J.M. Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005. pgs. 33-174; and "La justicia sometida al poder (La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57.

21 See in *Gaceta Constituyente (Diario de Debates), Noviembre 1999–Enero 2000*, Session of December 22, 1999, Nº 51, pp. 2 ff. See *Gaceta Oficial* Nº 36.859 of December 29, 1999; and *Gaceta Oficial* Nº 36.860 of December 30, 1999.

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

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

24 *Gaceta Oficial* Nº 37.942 of May 20, 2004. See the comments in Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004.

reformed the Organic Law of the Supreme Tribunal of Justice, firs in a regular way,[25] and subsequently in an irregular manner,[26] in order to pack the Tribunal with new government controlled members.

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

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score auto-goals. In the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is no one in the group of postulates that could act against us…"[27]

This configuration of the Supreme Tribunal, as highly politicized and subjected to the will of the President of the Republic has been reinforced in 2010,[28] eliminating all autonomy of the Judicial Power and even the basic principle of the separation of power, as the corner stone of the Rule of Law and the base of all democratic institutions.

On the other hand, as aforementioned, according to Article 265 of the 1999 Constitution, the Magistrates can be dismissed by the vote of a qualified majority of the National Assembly, when grave faults are committed, following a prior qualification by the Citizen Power. This qualified two-thirds majority was established to avoid leaving the existence of the heads of the judiciary in the hands of a simple majority of legislators. Unfortunately, this provision was also distorted by the 2004 Organic Law of the Supreme Tribunal of Justice, in which it was established in an unconstitutional way that the Magistrates could be dismissed by simple majority when the "administrative act of their appointment" is revoked (Article 23,4). This distortion, contrary to the independence of the Judiciary, although eliminated in the reform of the Law in 2010, also pretended to be constitutionalized with the rejected 2007 Constitutional reform, which proposed to establish that the Magistrates of the Supreme Tribunal could be dismissed in case of grave faults, but just by the vote of the majority of the members of the National Assembly.

The consequence of this political subjection is that all the principles tending to assure the independence of judges at any level of the Judiciary have been postponed. In particular, the Constitution establishes that all judges must be selected by public competition for the tenure; and that the dismissal of judges can only be made through disciplinary trials carried out by disciplinary judges (Articles 254 and 267). Unfortunately, none of these provisions have been implemented, and on the contrary, since 1999, the Venezuelan Judiciary has been composed by temporal and provisional judges,[29] lacking stability and being subjected to the political manipulation, altering the people's right to an adequate administration of

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25 *Gaceta Oficial* Nº 39.483 of August 9, 2010 and Nº 39.522 of October 1, 2010 . See the comments in Allan R. Brewer-Carías and Víctor Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2010

26 See the comments Víctor Hernández Mendible, "Sobre la nueva reimpresión por 'supuestos errores' materiales de la Ley Orgánica del Tribunal Supremo, octubre 2010," and Antonio Silva Aranguren, "Tras el rastro del engaño, en la web de la Asamblea Nacional," in *Revista de Derecho Público*, No. 124, Editorial Jurídica Venezolana, Caracas 2010, pp-110-113.

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

28 See Hildegard Rondón de Sansó, "*Obiter Dicta*. En torno a una elección," in *La Voce d'Italia*, Caracas December 14, 2010.

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

justice. And regarding the disciplinary jurisdiction of the judges, it was only in 2010[30] when it was established. Until then, with the authorization of the Supreme Tribunal, a "transitory" Reorganization Commission of the Judicial Power created since 1999, continued to function, removing judges without due process.[31]

The worst of this irregular situation is that since 2006 the problem of the provisional status of judges has been "regularized" through a "Special Program for the Regularization of Tenures", addressed to accidental, temporary or provisional judges, bypassing the entrance system constitutionally established by means of public competitive exams (Article 255), by consolidating the effects of the provisional appointments and their consequent power dependency.

V. THE JUDICIARY PACKED BY TEMPORAL AND PROVISIONAL JUDGES AND THE USE OF THE JUDICIARY FOR POLITICAL PERSECUTION

Through the Supreme Tribunal, which is in charge of governing and administering the Judiciary, the political control over all judges has been also assured, reinforced by means of the survival until 2011, of the 1999 "provisional" Commission on the Functioning and Restructuring of the Judicial System, which was legitimized by the same Tribunal, making completely inapplicable the 1999 constitutional provisions seeking to guarantee the independence and autonomy of judges. [32]

In effect, as aforementioned, according to the text of the 1999 Constitution, judges can only enter the judicial career by means of public competition that must be organized with citizens' participation. Nonetheless, this provision has not yet been implemented, being the judiciary almost exclusively made up of temporary and provisional judges, without any stability. Regarding this situation, for instance, since 2003 the Inter-American Commission on Human Rights has repeatedly express concern about the fact that provisional judges are susceptible to political manipulation, which alters the people's right to access to justice, reporting cases of dismissals and substitutions of judges in retaliation for decisions contrary to the government's position.[33] In its *2008 Annual Report*, the Commission again verified the provisional character of the judiciary as an "endemic problem" because the appointment of judges was made without applying constitutional provisions on the matter –thus exposing judges to discretionary dismissal– which highlights the "permanent state of urgency" in which those appointments have been made. [34]

Contrary to these facts, according to the words of the Constitution in order to guarantee the independence of the Judiciary, judges can be dismissed from their tenure only through disciplinary processes, conducted by disciplinary courts and judges of a Disciplinary Judicial Jurisdiction. Nonetheless, as aforementioned, that jurisdiction was only created in 2011, corresponding to that year

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30 The Law on the Etics Code of the venezuelan Judges *Gaceta Oficial* Nº 39.494 of August, 24, 2010, created the expected Disciplinary Judicial Jurisdiction. In 2011 the corresponding tribunal was appointed.

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

32 See in general, Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)," in *XXX Jornadas J.M Dominguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial," in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)*, Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; and Allan R. Brewer-Carías "La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)," in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57, available at www.allanbrewercarias.com, (Biblioteca Virtual, II.4. Artículos y Estudios Nº 550, 2007) pp. 1-37. See also Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, Editorial Alfa, Tomo II, Caracas 2008, pp. 402-454.

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

34 See *Annual Report 20*08 (OEA/Ser.L/V/II.134. Doc. 5 rev. 1. 25 febrero 2009), paragraph 39.

the disciplinary judicial functions to the already mentioned transitory Commission, [35] which, as reported by the same Inter-American Commission in its *2009 Annual Report*, "in addition to being a special, temporary entity, does not afford due guarantees for ensuring the independence of its decisions,[36] since its members may also be appointed or removed at the sole discretion of the Constitutional Chamber of the Supreme Tribunal of Justice, without previously establishing either the grounds or the procedure for such formalities."[37]

The Commission had then "cleansed" the Judiciary of judges not in line with the authoritarian regime, removing judges in a discretionary way when they have issued decisions not within the complacency of the government.[38] This lead the Inter-American Commission on Human Rights, to observe in its *2009 Annual Report,* that "in Venezuela, judges and prosecutors do not enjoy the guaranteed tenure necessary to ensure their independence." [39]

One of the leading cases showing this situation took place in 2003, when a High Contentious Administrative Court ruled against the government in a politically charged case regarding the hiring of Cuban physicians for medical social programs. In response to a provisional judicial measure suspending the hiring procedures, due to discrimination allegations made by the Council of Physicians of Caracas, [40] the government after declaring that the decision was not going to be accepted [41] seized the Court using secret police officers, and dismissed its judges after being offended by the President of the Republic.[42] The case was brought before the Inter-American Court of Human Rights and after it ruled in 2008 that the dismissal effectively violated the American Convention on Human Rights,[43] the Constitutional Chamber of the Supreme Tribunal response to the Inter-American Court ruling, at the request of the government, was that the decision of the Inter-American Court could not be enforced in Venezuela.[44] As simple as that, showing the subordination of the Venezuelan judiciary to the policies, wishes, and dictates of the President.

In December 2009, another astonishing case was the detention of a criminal judge (María Lourdes Afiuni Mora) for having ordered, based on a previous recommendation of the UN Working Group on Arbitrary Detention, the release of an individual in order for him to face criminal trial while in freedom, as guaranteed in the Constitution. The same day of the decision, the president publicly asked for the judge to be incarcerated asking to apply her a 30–year prison term, which is the maximum punishment in

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

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

37 Véase *Annual Report 2009*, Par. 481, en http://www.cidh.org/annualrep/2009eng/Chap. IV.f.eng.htm.

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

39 See *Informe Anual de 2009*, paragraph 480, available at http://www.cidh.oas.org/annual-rep/2009eng/Chap.IV.f.eng.htm

40 See Decision of August, 21 2003, in *Revista de Derecho Público*, nº 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 445 ff. See the comments in Claudia Nikken, "El caso "Barrio Adentro": La Corte Primera de lo Contencioso Administrativo ante la Sala Constitucional del Tribunal Supremo de Justicia o el avocamiento como medio de amparo de derechos e intereses colectivos y difusos," in *Idem*, pp. 5 ff.

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

42 See in *El Nacional*, Caracas November 5, 2004, p. A2.

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

44 Supreme Tribunal of Justice, Constitutional Chamber, Decision Nº 1.939 of December 18, 2008 (Case: *Abogados Gustavo Álvarez Arias et al.*) (Exp. Nº 08-1572), available at http://www.tsj.gov.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html

Venezuelan law for horrendous or grave crimes. The fact is that judge has remained to this day in detention without trial. The UN Working Group described these facts as "a blow by President Hugo Chávez to the independence of judges and lawyers in the country," demanding "the immediate release of the judge," concluding that "reprisals for exercising their constitutionally guaranteed functions and creating a climate of fear among the judiciary and lawyers' profession, serve no purpose except to undermine the rule of law and obstruct justice."[45]

The fact is that in Venezuela, no judge can adopt any decision that could affect the government policies, or the President's wishes, the state's interest, or public servants' will, without previous authorization from the same government. [46] That is why the Inter-American Commission on Human Rights, after describing in its *2009 Annual Report* "how large numbers of judges have been removed, or their appointments voided, without the applicable administrative proceedings," noted "with concern that in some cases, judges were removed almost immediately after adopting judicial decisions in cases with a major political impact," concluding that "The lack of judicial independence and autonomy vis-à-vis political power is, in the Commission's opinion, one of the weakest points in Venezuelan democracy." [47]

In this context of political subjection, the Constitutional Chamber, since 2000, far from acting as the guardian of the Constitution, has been the main tool of the authoritarian government for the illegitimate mutation of the Constitution, by means of unconstitutional constitutional interpretations, [48] not only regarding its own powers of judicial review, which have been enlarged, but also regarding substantive matters. The Supreme Tribunal has distorted the Constitution through illegitimate and fraudulent "constitutional mutations" in the sense of changing the meaning of its provisions without changing its wording. And all this, of course, without any possibility of being controlled, [49] so the eternal question arising from the uncontrolled power, – *Quis custodiet ipsos custodes* –, in Venezuela also remains unanswered.

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

The following year, in 2001, it was the Constitutional Chamber of the Supreme Tribunal, the one that distorted the Constitution when dismissing an *amparo* action filed against the President of the Republic by a citizen and a nongovernmental organization asking for the exercise of their right to response against the attacks made by the President in his weekly TV program. The Constitutional Chamber reduced the scope of freedom of information, eliminating the right to response and rectification regarding opinions in the media when they are expressed by the president in a regular televised program. In addition, the tribunal excluded journalists and all those persons that have a regular program in the radio or a newspaper column, from the right to rectification and response. [50]

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

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

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

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

49 See Allan R. Brewer-Carías, "*Quis Custodiet ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *VIII Congreso Nacional de Derecho Constitucional*, Fondo Editorial and Colegio de Abogados de Arequipa, Arequipa, Peru, 2005, 463-89; and *Crónica de la "In"Justicia constitucional: La Sala constitucional y el autoritarismo en Venezuela*, Ëditorial Jurídica Venezolana, Caracas 2007, pp. 11-44 and 47-79.

50 See Allan R. Brewer-Carías, "La libertad de expresión del pensamiento y el derecho a la información y su violación por la Sala Constitucional del Tribunal Supremo de Justicia", en Allan R. Brewer-Carías (Coordinador y editor), Héctor Faúndez Ledesma, Pedro Nikken, Carlos M. Ayala Corao, Rafael

In addition, in 2003, the Constitutional Chamber dismissed an action of unconstitutionality filed against a few articles of the Criminal Code that limit the right to formulate criticism against public officials, considering that such provisions could not be deemed as limiting the freedom of expression, contradicting a well established doctrine in the contrary ruled by the Inter-American Courts on Human Rights. The Constitutional Chamber also decided in contradiction with the constitutional prohibition of censorship, that through a statute it was possible to prevent the diffusion of information when it could be considered contrary to other provisions of the Constitution. [51]

Regarding other cases in which the Judiciary has been used for political persecution, they are referred to the exercise of freedom of expression, concluding in the shutdown of TV stations that had a line of political opposition regarding the government and the persecution of their main shareholders. One leading case was the *Radio Caracas Televisión* case, referred to a TV station that, in 2007, was the most important television station of the country, critical of the administration of President Hugo Chavez. In that case, it was the Supreme Tribunal in 2007, the State organ that materialized the State intervention in order to terminate authorizations and licenses of the TV station, whose assets were confiscated and its equipment assigned to a state-owned enterprise through an illegitimate Supreme Tribunal decision. [52] The case is the most vivid example of the illegitimate collusion or confabulation between a politically controlled Judiciary and an authoritarian government in order to reduce freedom of expression, and to confiscate private property. For such purpose, it was the Constitutional Chamber of the Supreme Tribunal of Justice and the Political Administrative Chamber of the same Tribunal that in May 2007, instead of protecting the citizens' right of freedom of expression, conspired as docile instruments controlled by the Executive, in order to kidnap and violate them. In this case, it was the highest level of the Judiciary that covered the governmental arbitrariness with a judicial veil, executing the shout down of the TV Station, reducing the freedom of expression in the country, and with total impunity, proceeded to confiscate private property in a way that neither the Executive nor the Legislator, could have done, because being forbidden in the Constitution (art. 115). In the case, it was the Supreme Tribunal, which violated the Constitution, with the aggravating circumstance that the conspirators knew that their actions could not be controlled. This case has also been recently submitted before the Inter American Court of Human Rights.

Other cases of political persecution, also related to freedom of expression are the cases against Guillermo Zuloaga and Nelson Mezerhane; two very distinguish businessman that were the principal shareholders of Globovisión, the other independent TV station that after the takeover of Radio Caracas Television, remained with a critic line of opinion regarding the government. They both were harassed by the Public Prosecutor Office and by the Judiciary; accused of different common crimes that they did not commit; they were detained without any serious base, their enterprises were occupied and their property confiscated. They both had to leave the country, without any possibility of obtaining Justice. Their cases have also been submitted before the Inter American Commission of Human Rights.

The Judiciary, particularly on criminal matters, has also been used as the government instrument to pervert Justice, distorting the facts in specific cases of political interest, converting innocent people into criminals, and liberating criminals of all suspicion. It was the unfortunate case of the mass killings committed by government agents and supporters as a consequence of the enforcement of the so-called Plan Avila, a military order that encouraged the shooting of peoples participating in the biggest mass demonstration in Venezuelan history which on April 11, 2002, was asking for the resignation of President Chávez. The soothing provoked a general military disobedience by the high commanders, in a way witnessed by all the country in TV, which ended with the military removal of the President,

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Chavero Gazdik, Gustavo Linares Benzo and Jorge Olavarria, *La libertad de expresión amenazada (Sentencia 1013),* Edición Conjunta Instituto Interamericano de Derechos Humanos y Editorial Jurídica Venezolana, Caracas-San José 2001, pp. 17-57; and Jesús A. Davila Ortega, "El derecho de la información y la libertad de expresión en Venezuela (Un estudio de la sentencia 1.013/2001 de la Sala Constitucional del Tribunal Supremo de Justicia)," *Revista de Derecho Constitucional* 5, Editorial Sherwood, Caracas 2002, 305-25.

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

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

although just for a few hours, until the same military reinstated him in office. Nonetheless, in order to change history, the shooting and mass killing were re-written, and those responsible that everybody saw in live in TV, because being government supporters were gratified as heroes, and the Police Officials trying to assure order in the demonstration, like the Officers Simonovic and Forero, were blamed of crimes that they did not commit, and condemned of murder with the highest term of 30 years of prison. The former Chief Justice of the Criminal Chamber of the Supreme Tribunal of Justice, general Eladio Aponte Aponte, confessed last year 2012 in a TV Program (SolTV)in Miami, when answering about if there were "political persons in prison in Venezuela, saying "Yes, there are people regarding which there is an order not to let them free," referring particularly to "the Police Officers," mentioning Officer Simonovic. The same former Justice, answering a question about "*Who gives the order,"* simply said*: "*The order comes from the President's Office downwards," adding that "we must have no doubts, in Venezuela there are no sewing point if it is not approved by the President." He finally said, answering a question if he "*received the order not tolet free Simonovis*" he explained that: "the position of the Criminal Chamber" was "To validate all that arrived already done; that is, in a few words, to accept that these gentlemen could not be freed**."** [53]

To hear this answers given by one who until recently was the highest Justice in the Venezuelan Criminal System, produce no other than indignation, because it was him, as Chief Criminal Justice, the one in charge of manipulating justice, in the way he confessed; condemning the Police Officers to 30 years in prison, just because obeying orders from the Executive.

VI. THE USE OF THE JUDICIARY TO FACILITATE THE CONCENTRATION OF POWER AND THE DESMANTLING OF DEOCRAXCY

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

One of the purposes of the rejected 2007 constitutional reform was precisely to change this competency of the States. But in spite of the popular rejection of the reform, nonetheless, it was the Constitutional Chamber, through a decision adopted four month after the referendum (April 15, 2008), the State organ in charge of implementing the reform. The Chamber, in effect, when deciding an autonomous recourse for the abstract interpretation of the Constitution filed by the Attorney General, modified the content of that constitutional provision, considering that the exclusive attribution it contained, was not "exclusive," but a "concurrent" one, to be exercised together with the federal government, which even could reassume the attribution or decree its intervention..[54]

With this interpretation, again, the Chamber illegitimately modified the Constitution usurping popular sovereignty, compelling the National Assembly to enact legislation contrary to the Constitution, which it did in March 2009, by reforming of the Organic Law for Decentralization. [55]

In other cases, the Constitutional Chamber has been the instrument of the government in order to assume direct control of other branches of government, as happened in 2002 with the take-over of the Electoral Power, which since then has been completely controlled by the Executive. This began in 2002 after the Organic Law of the Electoral Power[56] was sanctioned and the National Assembly was due to appoint the new members of the National Electoral Council. Because the representatives supporting the

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53 See the text of the statement on, in *El Universal*, Caracas 18-4-2012, available at: http://www.eluniversal.com/nacional-y-politica/120418/historias-secretas-de-un-juez-en-venezuela

54 See Allan R. Brewer-Carías, "La Sala Constitucional como poder constituyente: la modificación de la forma federal del estado y del sistema constitucional de división territorial del poder público, in *Revista de Derecho Público*, Nº 114, (abril-junio 2008), Editorial Jurídica Venezolana, Caracas 2008, pp. 247-262; and "La ilegitima mutación de la Constitución y la legitimidad de la jurisdicción constitucional: la "reforma" de la forma federal del Estado en Venezuela mediante interpretación constitucional," en *Memoria del X Congreso Iberoamericano de Derecho Constitucional,* Instituto Iberoamericano de Derecho Constitucional, Asociación Peruana de Derecho Constitucional, Instituto de Investigaciones Jurídicas-UNAM y Maestría en Derecho Constitucional-PUCP, IDEMSA, Lima 2009, tomo 1, pp. 29-51

55 See *Gaceta Oficial* N° 39 140 of March 17, 2009

56 See *Gaceta Oficial* Nº 37.573 of November 19, 20022

government did not have the qualified majority to approve such appointments by themselves, and did not reached agreements on the matter with the opposition, when the National Assembly failed to appoint the members of the National Electoral Council, that task was assumed, without any constitutional power, by the Constitutional Chamber itself. Deciding an action that was filed against the unconstitutional legislative omission, the Chamber instead of urging the Assembly to comply with its constitutional duty, directly appointed the members of the Electoral Council, usurping the Legislator's functions, but without complying with the conditions established in the Constitution for such appointments. [57] With this decision, the Chamber assured the government's complete control of the Council, kidnapping the citizen's rights to political participation, and allowing the official governmental party to manipulate the electoral results.

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

The Constitutional Chamber of the Supreme Tribunal has also been the instrument in order to attack the democratic principle, limiting the right to be elected, imposing non elected officials as Head of State, or revoking the popular mandate of elected officials without having competency or jurisdiction.

Between January and March 2013, the Constitutional Chamber of the Supreme Tribunal, openly violated the democratic principle by imposing a non elected official as head of State, during the illness of former President Chávez and after his death, in two decisions adopted, in addition, without proving anything. The decisions were issued after deciding interpretations recourses of the Constitution: The first decision, No. 2 of January 9, 2013, was issued to resolve the legal situation of the non attendance by the President elected to his Inauguration for the presidential term 2013-2019, refusing the Constitutional Chamber to consider that the situation was one of absolute absence of the elected President, and instead constructing, without proving anything on the heath condition of the elected and ill President, a supposed "administrative continuity" of Chávez, affirming that even been absent of the country (he was said to be in an Hospital in La Habana), he was supposedly effectively in charge of the Presidency, so his nonelected Vice President (N. Maduro) was to be in charge of the Presidency. [58] The second decision, No. 141, of March 8, 2013, was issued after the announcement of the death of President Chávez, but without proving such fact or when it did effectively occurred, in order to assure that the Vice President (N. Maduro), already imposed as President in charge by the same Supreme Tribunal, was to continue in charge of the Presidency; and additionally allowing him, contrary to the text of the Constitution, to be candidate to the same position in the subsequent election, without leaving the post.[59]

In other decisions, also contrary to the democratic principle, the Constitutional Chamber of the Supreme Tribunal revoked the popular mandate of two mayors, a decision that according to the Constitution only can be adopted by the people that elected the officials by means of a referendum (art. 74). The Supreme Tribunal, ignoring such principle and provision, without having constitutional competency and usurping the jurisdiction of the criminal courts that are the only competent to impose criminal sanctions to officials for not obeying judicial decisions, issued decision No. 138 of March 17, 2014,[60] condemning the Mayors by considering that they had committed a crime (not to obey a preliminary injunction), and imprisoning them, without guarantying a due process of law. The common trend in this case was that both Mayors were from the opposition to the government

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

58 See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/Enero/02-9113-2013-12-1358.html

59 See the text of the decision in http://www.tsj.gov.ve.decisioes/scon/Marzo/141-9313-2013-13-0196.html

60 See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/marzo/162025-138-17314-2014-14-0205.HTML

In another case, the Constitutional Chamber of the Supreme Tribunal also revoked the popular mandate of a representative to the National Assembly, which also can only be revoked by the people through a referendum, issuing decision No. 207 of March 31, 2014, [61] in a case that the Tribunal had already concluded because the action was declared inadmissible, proceeding the Tribunal to act ex officio, and interpret an article of the Constitution (Article 93), that prevent representatives to accept another public positions without losing their elected one. The initial petition that was declared inadmissible was a requested for the Tribunal to condemn the *the facto* actions of the President of the National Assembly to strip out the elected condition of one representative; being the result of the case, once declared the petition inadmissible, for the Tribunal, to *ex officio* decide to revoke the popular mandate to the representative that was supposed to be protected by the Tribunal. The reason for such decision was that the representative (María Corina Machado), had talked as such representative, before the Permanent Council of the Organization of American States, in a session devoted to analyze the political situation of Venezuela, from the site of the representative of Panama that had invited her to do so.

Finally, in another decision, the Supreme Tribunal, also in violation of the democratic principle, accepted that the right of a citizen to be elected, which is a constitutional right, could be limited by an administrative body as the General Audit Office, when issuing decisions imposing public officials the sanction of disqualifying them to run for elected positions. In decision Nº 1265 of August 5, 2008, [62] the Supreme Tribunal refused to declare that such disqualification for the exercise of a political right was contrary to the American Convention of Human Rights, that in Venezuela had constitutional hierarchy (Article 23). The lack of justice in Venezuela, lead the interested person, a former Mayor, to filed a petition before the Inter American Court of Human Right, seeking the protection of his political right, the result being a decision of such Court pf September 1st, 2011 (case *López Mendoza vs. Venezuela*), condemning the Venezuelan State for the violation of the Convention. Nonetheless, the response of the State was to file before the Supreme Tribunal of Justice, at the initiative of the Attorney General, an action for "judicial review" of the Inter American Court decision, which was astonishingly admitted by the Constitutional Chamber, which through decision No. 1547 of October 17, 2011, [63] declared the Inter American Court of Human Rights as "non enforceable" in Venezuela, recommending the Government to denounce the Convention,. This eventually happened in 2012.

SOME CONCLUSIONS

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

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

All these factors are lacking at the present time in Venezuela, where a new form of constitutional authoritarianism has been developed, based on the concentration and centralization of state powers, which prevent any possibility of effective democratic participation, and any possible check and balance between the branches of government. Today, all the State organs are subjected to the National Assembly, and through it, to the President. That is why the legislative elections are so important,

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61 See the text of the decision in http://www.tsj.gov.ve/decisiones/scon/marzo/162546-207-31314-2014-14-0286.HTML. Also in *Gaceta Oficial* No. 40385 April 2, 2014

62 See the text of the decision in en http://www.tsj.gov.ve:80/decisiones/scon/Agosto/1265-050808-05-1853.htm

63 See the text of the decision in en http://www.tsj.gov.ve/decisiones/scon/Octubre/1547-171011-2011-11-1130.htmll

particularly bearing in mind that according to the Constitution, the presidential system of government was conceived to function only if the government has complete control over the Assembly. A government that does not have such control will find difficult to govern, being that the reason, for example, for the then President of the Republic, to declare just before the 2010 parliamentary election, that if the opposition was to win the control of the Assembly, "that would signify war."

The fact is that after a fifteen years of demolishing the rule of law and the democratic institutions, by controlling, at the government will, all the branches of government, it will be very difficult for the government and its official party to admit the democratic need they have to share power in the Assembly.[64] They are not used to democracy, that is to say, they are not used to any sort of compromise and consensus, but only to impose their decisions; and that is why they, when in 2010 they lost the 2/3majority they used to have in the Assembly, they announced that they were not going to participate in any sort of dialogue. That is why, even before the new elected representative took their sits in the Assembly in January 2011, the old Assembly approved an unconstitutional legislation in order to enforce what the people had rejected in a referendum of December 2007, the so called "Communal State" which is based on the centralized framework of the so-called "Popular Power" to be exercised by "Communes" and by the government controlled "Communal Councils."[65]

One further example of the perversion of the Constitution and of the will of the people expressed in the September 2010 Legislative election, was the move made regarding the appointment of the new Magistrates of the Supreme Tribunal. What just a weeks before was only a treat of the government, once it lost the 2/3 control of the National Assembly which prevented the government representatives to appoint by themselves in 2011, such magistrates; they immediately proceed to appoint the new magistrates of the Supreme before the inauguration of the new elected members of the National Assembly in January 2011, avoiding the participation in the nominating process of the opposition members of the Assembly. Nonetheless, in order to make such appointments, which required a previous reform the Organic Law of the Supreme Tribunal, for which they had no time to approve it; they proceed to make such "reform," not through the ordinary procedure, but through a completely irregular mechanism of "reprinting" the text of the statute in the *Official Gazette* based in a supposed "material error" in the copying of the text of the statute.[66]

Article 70 of the Organic Law of the Supreme Tribunal, in effect, established that the term in order to propose candidates to be nominated Magistrate of the Supreme Tribunal before the Nominating Judicial Committee "must not be *less* that thirty continuous days;" wording that has been change through a "notice" published by the Secretary of the Assembly in the Official Gazette stating that establishing that instead of the word "*less*" the correct word to be used in the antonym word "*more*" in the sense of the term "must not be more that thirty continuous days." That means that the "reform" of the statute by changing a word (less to more), transformed a minimum term was transformed into a maximum term in order to reduce the term to nominate candidates and allow the current national Assembly to proceed to make the election before the new National Assembly initiates its activities in January 2010.[67] This is the "procedure" currently used in order to reform statutes, by means of the reprinting of the text in the *Official Gazette*, without any possible judicial review

With this legal "reform," the National Assembly, composed by representatives that by December 2010, after the Legislative elections, can be said that they did not represented the majority of the people, proceeded to fill the Supreme Tribunal of Magistrates members of the Official political party, and even with members of the same Assembly that were finishing their tenure and that did not comply with the constitutional conditions to be Magistrate. As the former magistrate of the Supreme Court of Justice, Hildegard Rondón de Sansó, wrote:

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64 See Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez's Authoritarian Experiment*, Cambridge University Press, New York, 2009; Allan R. Brewer-Carías, *Authoritarian Government v. The Rule of Law*, Editorial Jurídica Venezolana, Caracas 2014.

65 See the Orcanic Laws on the Popular Power, in *Gaceta Oficial* Nº 6.011 Extra. de 21-12-2010. See on these Laws, Allan R. Brewer-Carías *et al*., *Leyes Orgánicas del Poder Popular*, Editorial Jurídica Venezolana, Caracas 2011.

66 See *Gaceta Oficial* Nº 39.522 of October 1, 2010

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

> "The biggest risk for the State of the improper actions of the Nation al Assembly in the recent nomination of the magistrates of the Supreme Tribunal of Justice, lies not only in the lacking, in the majority of the appointed of the constitutional conditions, but having taken into the apex of the Judicial Power the decisive influence of one sector of the legislative Power, due to the fact that for different Chambers, five legislators were elected."[68]

The same former Magistrate Sansó affirmed that "a whole fundamental sector of the power of the State is going to be in the hands of a small group of persons that are not jurist, but politician by profession, to whom will correspond, among other functions, the control of normative acts," adding that "the most grave I that those appointing, even for a single moment realized that they were designating the highest judges of the Venezuelan legal system that, as such, had to be the most competent, and of recognized prestige as the Constitution imposes."[69] She concluded, as aforementioned, recognizing within the "grave errors" accompanying the nomination, the fact of:

> "The configuration of the Nominating Judicial Committee, that the Constitution created as a neutral organ, representing the 'different sectors of society' (Article 271), but the Organic Law of the Supreme Tribunal converted it in an unconstitutional way, into an appendix of the Legislative Power. The consequence of this grave error was unavoidable: those electing elected their own colleagues, considering that acting in such a way was the most natural thing in this world, and, as example of that, were the shameful applauses with which each appointment was greeted."[70]

Unfortunately, the political control over the Supreme Tribunal of Justice has permeated to all the judiciary, due mainly to the already mentioned fact that in Venezuela, it is the Supreme Tribunal the one in charge of the government and administration of the Judiciary. This has affected gravely the autonomy and independence of judges at all levels of the Judiciary, which has been aggravated by the fact that during the past fifteen years the Venezuelan Judiciary has been composed primarily of temporary and provisional judges, without career or stability, appointed without the public competition process of selection established in the Constitution, and dismissed without due process of law, for political reasons.[71] This reality amounts to political control of the Judiciary, as demonstrated by the dismissal of judges who have adopted decisions contrary to the policies of the governing political authorities.

New York, April 2014

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68 See Hildegard Rondón de Sansó, "*Obiter Dicta*. En torno a una elección," in *La Voce d'Italia*, 14-12-2010.

69 *Id*.

70 *Id.*

71 See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118, doc. 4 rev. 2, December 29, 2003, par. 174, *available at* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm.