THE DECEMBER 2014 COUP D'ÉTAT IN VENEZUELA, ACHIEVED THROUGH THE UNCONSTITUTIONAL INDIRECT ELECTION OF SENIOR PUBLIC OFFICIALS OF THE BRANCHES OF GOVERNMENT*

Allan R. Brewer-Carías
Professor at the Central University of Venezuela
allan@brewercarias.com
www.allanbrewercarias.com

A coup d'état occurs, as noted by Diego Valadés, when "the Constitution is ignored by a constitutionally elected body", adding, as an example, that "a president elected under the Constitution cannot invoke a vote, even if it is with an overwhelming majority, to later ignore the constitutional order. Doing so would mean that a coup has taken place"[1].

And this is precisely what happened in Venezuela in December 2014, when the President of the National Assembly and a group of members of the Assembly who were once elected, in some cases by means of a conspiracy with the Justices of the Constitutional Chamber of the Supreme Court, ignored the Constitution and proceeded to elect, violating it's provisions, the senior officials of the Branches of government who are not directly elected by the people, that is, those of the Citizen and the Electoral Branch of government, and the Supreme Court itself as head of the Judicial Branch.

With this, they have done nothing more than to follow the same unconstitutional line of systematic and continuous coup d'état that has occurred in Venezuela since President Hugo Chávez, when taking office for the first time on February 2 1999, convened a National Constituent Assembly, not foreseen in the Constitution then in force. [2]

What occurred in December 2014, to the same effect, is nothing more than a coup d'état, executed, in this case, by the State authorities themselves, by electing, without legal power to do so and violating the Constitution, a set of senior civil servants. This happened, first with the election of the members of the Citizen Branch of government (General Comptroller, Attorney General and People's Defender or Ombudsman), by the National Assembly, with the vote of a simple majority of deputies, when the Constitution requires a vote of more than 2/3 of its members;

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1 See Diego Valadés, *Constitución y democracia*, Universidad Nacional Autónoma de México, México 2000, p. 35; and Diego Valadés, "La Constitución y el Poder," in Diego Valadés y Miguel Carbonell (Coordinadores), *Constitucionalismo Iberoamericano del siglo XXI*, Cámara de Diputados, Universidad Nacional Autónoma de México, México 2000, p.145

2 See Allan R, Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002.

Second, with the election of the members of the Electoral Branch of government by the Constitutional Chamber of the Supreme Court, which is by a body different than what is Constitutionally required that is the National Assembly with a vote of more than 2/3 of its members; and Third, with the appointment of Justices of the Supreme Court, by the National Assembly, with a vote of a simple majority of deputies, when a vote of more than 2/3 of its members is constitutionally required; and all this, without any citizens' participation and in some cases, by means of a fraudulent citizens' participation.

I. THE FIVE BRANCHES OF GOVERNMENT AND THE POPULAR ELECTION (DIRECT AND INDIRECT) OF ALL THE SENIOR OFFICIALS OF THE BODIES OF THE BRANCHES OF GOVERNMENT

1. The popular election of senior government officials

One of the most important innovations of the 1999 Venezuelan Constitution undoubtedly was the establishment of a division of public power into five branches, of government, being in this sense the only constitution in the world in which, in addition to three classic government branches (Legislative, Executive and Judiciary) two additional branches were established, the Citizen Branch consisting of the General Comptroller, the Attorney General and the People's Defender or Ombudsman, and the Electoral Branch.

All five powers are regulated in the Constitution on an equal basis, with autonomy and independence among each other. To assure their independence, a specific form of election of its members was established, consisting in all cases of popular election by the people, directly in some cases, and indirectly in others, that is, through direct or indirect elections; all in order to ensure that no power is dependent on another, and that there may be checks and balances among them.

This democratic structure in choosing the members of the Public Branches derives from the principle established in Article 6 of the Constitution which states that the government of Venezuela "is and will always be democratic, participatory and elective," which requires precisely that senior officials of all bodies of government be popularly elected in a democratic and participatory manner.

The difference in the popular election is nevertheless in the way it's done, in the sense that in some cases, the popular election is done directly by the people through universal and secret vote as is the case of the election of the President of the Republic (art 228.) and the deputies the National Assembly (art. 186). In other cases, the popular election is indirect, held in the name of the people by their elected representatives, that is, the deputies to the National Assembly, as in the case of the Justices of the Supreme Tribunal, (art. 264, 265), the General Comptroller, the Attorney General and the People's defender of Ombudsman (art.279), and members of the National Electoral Council (art. 296).

This means that in both cases, according to the constitutional provisions, all members of the bodies of Public Branches of government must be popularly elected,

either directly or indirectly. Therefore in accordance to the provisions of the Constitution, anyone who is not elected directly by the people cannot exercise the office of President of the Republic or be a Member of the National Assembly; and anyone who is not elected indirectly by the people through a qualified majority (2/3) of deputies to the National Assembly, may not exercise a senior posts in the Citizen, Electoral and Judicial branches of government.

In the second case of indirect popular election, therefore, only the National Assembly acting as an electoral body may appoint the members of the Citizen, Electoral and Judicial Branches, and this exclusively by a qualified majority of 2/3 of the deputies as representatives of the people that they are.

2. The representative and participatory democratic logic in the election

All these constitutional provisions that regulate the popular election of the high public officials of all the branches of government, and to ensure the autonomy and independence of the same, respond to a representative and participatory democratic logic that derives from the aforementioned declaration of Article 6 of the Constitution imposing as a rock-like principle that "the government is and will always be democratic, participatory, and elective."

With regard to the elective or representative democratic logic, in order to ensure the election, through universal, direct and secret suffrage of the President of the Republic and of the deputies to the National Assembly, and for the purposes of ensuring a greater democratic representation in the indirect popular election of judges of the Supreme Court, the General Comptroller, the Attorney General, the People's defender and members of the National Electoral Council, the Constitution provides that it can only be done with a qualified majority vote of 2/3 of the deputies in the National Assembly. This qualified majority is set explicitly regarding the election of General Comptroller, the Attorney General and the People's Defender (art.279), and members of the National Electoral Council (Article 296.); and implicitly regarding the election of judges of the Supreme Court, by requiring such qualified vote for their removal (art. 264, 265).

With this, the Constituent, in substitution to providing for the direct popular election of such senior officials, established the indirect popular election, but ensuring a qualified democratic representation through a qualified vote of the electoral body (2/3).

The consequence of this is that the electoral technique differs depending on whether it is a direct or indirect election. In the case of a direct election by the people, each person or voter votes for the candidate of their choice; but in indirect elections, the second degree electors, in this case composed of deputies to the National Assembly, when a political group does not control the qualified majority of the deputies, in order to carry out the election of the public official, an agreement among the political groups must be reached. That is the democratic logic of the electoral process in these cases, even if a political group has a majority of the deputies. In such case, it has to give up hegemonic pretensions and have to

necessarily reach agreements, commitments or consensus with the various political forces represented in the Assembly, so that it can ensure the qualified majority of votes. In a democracy, there is no other way to make an indirect election in an electoral body like an Assembly, and in no case the political force that has the majority, but does not control the qualified majority vote, may seek to impose it will individually, as this would be undemocratic.

What is important to note, in any case, is that in these cases of indirect elections of senior officials of the State by the deputies of the National Assembly, such elected body does not act constitutionally as a regular general or legislative body, but rather as an electoral body, to the point that the responsibilities assigned to it as such, are not even included among the general powers of the National Assembly specified in Article 187 of the Constitution. This implies that in exercising the powers as an electoral body, the National Assembly, pursuant to the Constitution, is not and cannot be subject to the simple majority regime that applies and governs its general operation as a legislative body, instead being subjected only to the qualified vote regime that regulates articles 264, 265, 279 and 296 of the Constitution.

Meanwhile, in terms of the participatory democratic logic in cases of indirect popular election, it implies also, that to ensure greater democratic participation, the indirect popular election of the Justices of the Supreme Court, of the General Comptroller, of the Attorney General, of the People's Defender, and of the members of the National Electoral Council, cannot be carried out by the mere will of the deputies of the National Assembly even with the required qualified majority. It must only be done through a process which assures that before the election is made by such majority, citizen participation is assured through various sorts of Nominating Committees: the Judicial Nominations Committee (Articles 264, 270) [3], the Citizen Branch Nomination and Evaluation Committee (Article 279)[4] and the Electoral Nominations Committee (Article 295) [5], which must be formed exclusively with representatives of various sectors of society; that is, with people from civil society, which means that in their composition there is no place for public officials. Therefore, the deputies of the National Assembly cannot be part of those committees, being unconstitutional their inclusion in them. [6]

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[3] According to Article 270, The Judicial Nominating Committee "will be composed by representatives from Civil Society."

[4] According to Article 279, Nominations Evaluating Committee of the Citizens Branch, "will be composed by representatives from diverse sectors of society."

[5] According to Article 295, the Electoral Nominating Comittee "will be composed by representatives from diverse sectors of society."

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

Now, the logic of representative and participatory democracy in the indirect elections of the members of some Branches of Government is such in the Constitution,[7] that for example, in terms of the election of the members of the bodies of Citizen Branch of government, Article 279 provides that if from the list of candidates for each office presented by the Nomination and Evaluation Committee of the Citizen Branch, the National Assembly, within a period not exceeding thirty consecutive days fails to agree to choose the member of the of Citizen Branch by the favorable vote of two thirds of its members, then "the Electoral Branch shall submit the shortlist to popular consultation," that is, a consultative referendum.

None of this, however was complied with in December 2014, and the members of the bodies of the Citizen Branch, i.e. the Comptroller General, the Attorney General and the People's Defender; the members of the National Electoral Council and the Judges of the Supreme Court, were unconstitutionally elected in some cases by a simple majority of the deputies of the National Assembly or in other by the Constitutional Chamber of the Supreme Court, in both cases violating the Constitution, in what was a coup d'état. In order to execte this, the President of the National Assembly and a group of deputies, in one case conspired with the Attorney General, other members of the Moral republican Council and the judges of the Constitutional Chamber of the Supreme Court committing a fraud against the Constitution; and in another case, unlawfully mutating its text.

II. THE UNCONSTITUTIONAL ELECTION OF THE MEMBERS OF THE CITIZEN BRANCH AND THE ILLEGITIMATE MUTATION OF ARTICLE 297 OF THE CONSTITUTION

In fact, on December 22, 2014 the National Assembly, by simple majority, as if acting as a general legislative body, ignoring the status of electoral body it had under the Constitution, appointed the Citizen Branch, i.e. the Comptroller General, the Attorney General, and the People's Defender in clear violation of Article 279 of the Constitution, and against all representative and participatory democratic logic required by Article 6, which is developed in this case in Article 279.

In fact that provision of Article 279 provides that:

> **"Article 279**: The Republican Moral Council shall convene a Citizen Power Nomination Evaluating Committee, which shall be made up of a group of

[7] To this it can be added, as indicated by Maria Amparo Grau, the reference to the importance of the functions of these Branches of government, which require the greatest consensus in their selection. These bodies have attributions of controlling the legal and ethical conduct of public officials, controlling the legal and ethical use of money and of State property; the protection of human rights, the adequate functioning of the course of justice and the investigation and criminal prosecution. "Its political dependence must be avoided, thereby the necessary consensus to guarantee that this power becomes a containment wall against arbitrariness, corruption and crime." See in Maria Amparo Grau, "Golpe a la Constitución ¡de nuevo!," in *El Nacional*, Caracas, 24 de diciembre 2014

representatives from various sectors of society, and shall conduct public proceedings resulting in the provision of a shortlist from each body of the Citizen Branch to be submitted for consideration by the National Assembly, which, by a two-thirds vote of its members, shall select within 30 calendar days the member of the Citizen Branch body under consideration in each case. If the National Assembly has not reached an agreement by the end of this period, the Electoral Branch shall submit the shortlist to a public consultative referendum.

If the Citizen Branch Nomination and Evaluating Committee has not been convoked, the National Assembly shall proceed, within such time limit as may be determined by law, to designate the member of the pertinent Citizen Branch Body.

Members of the Citizen Branch shall be subject to removal by the National Assembly, following a ruling by the Supreme Tribunal of Justice, in accordance with the procedure established by law."

For any slightly informed reader, regarding the election of the members of the Citizen Branch, the rule essentially says what it expresses in its own text, not needing any interpretation, in the sense that the election of these senior officials is carried out by the National Assembly "*through the favorable vote of two thirds of its members*", which responds to the representative and participatory constitutional logic of the configuration of the National Assembly as an electoral body for an indirect election. This implies, *first*, that to guarantee maximum representativeness of the indirect election to office, representing the people, the National Assembly must appoint the members the Citizen Branch by the affirmative vote of two thirds of its members; and *second*, that to guarantee maximum citizen's participation in the election, the National Assembly, for that purpose, cannot just appoint whoever their deputies choose and decide with a qualified vote of the majority of the deputies of the National Assembly, but only among the candidates indicated in a short list submitted by the Citizen Branch Nomination and Evaluation Committee, which shall be composed by representatives from various sectors of society.

The only exception to this representative and participatory democratic logic that the Constitution imposes on the National Assembly when acting as an indirect electoral body, does not refer to the representative democratic principle itself, but only to the participatory democratic principle, providing that if in case it has not been possible to convene the Citizen Branch Nomination and Evaluating Committee and therefore, even in the absence of the popular participation mechanism that regulates the Constitution, the National Assembly should proceed as such electoral body, "to the appointment of the member of the corresponding body of the Citizen Branch," of course, only as indicated by the favorable vote of two thirds of its members, since that representative democratic logic is not subject to any exception.

Therefore, you need not even be curious about laws, to read and understand what the rule says.

However, in an evident fraud to the Constitution[8], and mutating its contents, all carried out as part of a conspiracy to violate it and change it with institutional violence, in which the President of the National Assembly and a group of deputies, the President of the Republican Moral Council and its other members and the magistrates of the Constitutional Chamber of the Supreme Court participated, on December 22, 2014 the National Assembly proceeded to appoint the General Comptroller, the Attorney General and the People's Defender without submitting to the rule of the qualified majority with which it could only act as an electoral body, proceeding to do so with the vote of a simple majority of the deputies as if it were acting as a general legislative body, violating the representative democratic principle of popular indirect election of such senior officials as established by the Constitution.[9]

This constitutional fraud, as mentioned by José Ignacio Hernández, "was committed in six acts"[10], which in essence were the following:

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[8] This has not been uncommon in the conduct of public authorities in the last three decades. See for example, as indicated in Allan R. Brewer-Carías: *Reforma constitucional y fraude a la constitución (1999-2009*), Academia de Ciencias Políticas y Sociales, Caracas 2009; "Reforma Constitucional y fraude a la Constitución: el caso de Venezuela 1999-2009," in Pedro Rubén Torres Estrada y Michael Núñez Torres (Coordinators), *La reforma constitucional. Sus implicaciones jurídicas y políticas en el contexto comparado*, Cátedra Estado de Derecho, Editorial Porrúa, México 2010, pp. 421-533; "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; "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.

[9] As observed by Sergio Sáez as soon as the decision of the National Assembly was adopted:" It remains in the air the bitter taste of complicity among the powers. Some for not meeting its obligations to the evidence of having had the Comptroller´s Office acephalous for such a long time; other facing the proximity of the term expiration of the remaining members of the Republican Moral Council, and having raised the impossibility of fulfilling the process under the Constitution to safeguard the election of its members; another when finding the intricacies of the law to get rid of the responsibility of having to choose members in strict compliance with the Law; and the last one, when exercising its discretionary power, again to mutate the Constitution, instead of interpreting it adjusted to the legitimate canon of Constitutional Law." See Sergio Sáez, "Bochorno y desgracia en la Asamblea Nacional," 23 diciembre de 2014, at http://www.academia.edu/9879823/Venezuela_Bochorno_y_desgracia_en_la_Asamblea._de_Ing._Sergio_Saez and http://www.frentepatriotico.com/inicio/2014/12/24/bochorno-y-desgracia-en-la-asamblea-nacional/

[10] See José Ignacio Hernández, "La designación del Poder Ciudadano: fraude a la Constitución en 6 actos;" in *Prodavinci*, 22 de diciembre, 2014, at http://prodavinci.com/blogs/la-designacion-del-poder-ciudadano-fraude-a-la-constitucion-en-6-actos-por-jose-i-hernandez/ .

First Act: The Republican Moral Council, composed of the heads of its three bodies of the Citizens Branch (General Comptroller, Attorney General and Ombudsman), in September 2014, under the presidency of the Attorney General and according to Article 279 of the Constitution, adopted some *rules for convening and conforming the Citizen Power Nominating and Evaluating Committee*, which should be integrated by "representatives of various sectors of society", and whose members should have been designated by the Republican Moral Council. To this end, members declared themselves in permanent session.[11]

Second Act: In late November 2014, the Chair of the Moral Republican Council (Attorney General) publicly reported that no "consensus" had been achieved to appoint the members of the Evaluation Committee, without explanation of any kind. Of course, nobody can believe that these senior government officials could not agree to appoint members of that committee, especially when the members of such bodies were all supporters of the government and his party.

Third Act: The National Assembly, without competence to do so, on December 2, 2014, appointed the members of the aforementioned Evaluating Committee. However, notwithstanding that no State body other than the Republican Moral Council has constitutional jurisdiction to appoint such members of the Nominations Committee. The National Assembly, when making the designation of the Committee, violated Article 279 of the Constitution, in spite of the fact that the Assembly recognized that the Republican Moral Council had breached its constitutional obligation to appoint them.

Fourth Act: The President of the National Assembly on Friday December 19, 2014, publicly stated that the Assembly would proceed to appoint the members of the bodies of popular power, and proceeded to ask the Constitutional Chamber of the Supreme Court for a "constitutional interpretation" of Article 279 of the Constitution, to support the possibility of the election of the members of the bodies of popular power in the Assembly by a vote of only a simple majority, ignoring its status as an electoral body in such cases, which may only be decided with a qualified 2/3 majority of its members. Meanwhile, the President of the National Assembly proceeded to convene a session of the Assembly on Saturday 20 December 2014. However, as he probably would have found out that the Constitutional Court could not have the decision he had requested ready by the next day, he strategically deferred the session scheduled for December 20 for Monday December 22, 2014. So the Constitutional Court would have time to deliver judgment during the weekend.

Fifth Act: The Constitutional Chamber then, very diligently and through a joint presentation, drafted the requested decision on Saturday 20 and Sunday 21of December 2014, and published it on Monday, December 22, 2014, just before the session of the National Assembly was convened to elect the members of the Citizens

[11] See the note: "Consejo Moral activa conformación del Comité que evaluará postulaciones de aspirantes al Poder Ciudadano,"at http://www.cmr.gob.ve/index.php/noticia/84-cmr-aspirante

Branch. The Constitutional Chamber in that sentence concluded, in essence, and of course in an unconstitutional manner, that as the second paragraph of Article 279 of the Constitution supposedly did not specify which majority was required to appoint the representatives of Citizen Branch - which of course was not necessary because it was already indicated in the first paragraph of the rule - then it should be understood that such appointment could be made with "half plus one of the deputies present at the parliamentary session that corresponds", ignoring the character of indirect electoral body of the National Assembly in such cases, to perform an election on behalf of the people.

Sixth Act: The National Assembly appointed the members of the bodies of Citizens Branch of government, by ratifying the Attorney General, the same who as President of the Ethics Council had supposedly failed to reach a consensus to appoint the members of the Nomination and Evaluation Committee of Citizen Branch and had conspired with the other aforementioned officials to change, with institutional violence, unconstitutionally, the Constitution. Her illegitimate appointment was a repeat, as she also had been appointed illegally in 2007.[12] The National Assembly also appointed as Comptroller General of the Republic, to control the executive branch, someone who was serving as in charge of the General Prosecutor of the Republic, that is, the State's lawyer subject to the instructions of the Executive, which is an absolutely incompatible appointment. And as People's Defender or Ombudsman, a known militant of the ruling party, former Governor of a State of the Republic was appointed. [13]

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[12] See the comment in Allan R. Brewer-Carías, "Sobre el nombramiento irregular por la Asamblea Nacional de los titulares de los órganos del poder ciudadano en 2007", in Revista *de Derecho Público***,** No. 113, Editorial Jurídica Venezolana, Caracas 2008, pp. 85-88.

[13] See the Decision of the National Assembly in *Gaceta Oficial* No. 40.567 of December 22 2014. What occurred in the National Assembly to justify the unconstitutional decision to elect with a simple majority of deputies present, the members of the Citizen Branch, was summed up by journalist Alex Velazquez, as follow: "The 'Chavismo' played their cards. In yesterday's four hour long special meeting, the ruling bloc of the National Assembly was assured of the Citizen Branch control, contrary to what the Constitution states, but with the approval of TSJ (Supreme Tribunal of Justice) [...]. How did they do it? With an awkward explanation, Deputy Pedro Carreno said that the 110 votes mandated by Article 279 of the Constitution are only necessary if the selection is done after the Moral Council has installed the Nominating Committee of the Citizen Branch. But since that did not happen, the Constitution states that it is up to the Assembly to make the appointments and it "does not mention how many votes are needed" in that case. As it is up to the Assembly, said the deputy, the Rules of Procedure and Debate, indicating that the decisions of the Assembly shall be by a majority plus one-half of those present is applied "except where the Constitution or this regulation specify it". If there was any doubt, Parliament President Diosdado Cabello surprised everyone with an announcement: on December 19 he went to the Supreme Tribunal to "urgently" ask the Constitutional Chamber to clarify how many votes were needed. "As I am not a lawyer, and so they do not say that I am dumb, I went to the Supreme Court to explain the selection process of the Citizen Branch" he said. The answer was published yesterday on the website of the Supreme Court. It reaffirmed Carreño's thesis exactly: that as the opinion rests with the Assembly and the Moral Council did

As was clearly sensed by José Ignacio Hernandez in his analysis of the case, the first act of the conspiracy was conducted by the Attorney General of the Republic, as Chair of the Moral Republican Council, to allegedly failing to reach an "agreement" or "consensus" with the other members of the Citizen Branch, to appoint members of the Evaluation and Appointment Committee. With that, she allowed the possibility of a constitutional fraud in the appointment of the members of the Citizen Branch by the National Assembly without the required qualified majority demanded by its condition as an electoral body, appealing in an isolated form to the second paragraph of Article 279 of the Constitution, and thereby proceeding to their election by simple majority of deputies present. The third act of the conspiracy was led by the President of the National Assembly postponing the session scheduled for the appointments, and requesting the Constitutional Chamber's constitutional interpretation of the rule, The fifth act of conspiracy, took place, this time by the judges of the Constitutional Court, ruling in the required direction, ignoring the status of the National Assembly in these cases as an electoral body, and making possible a constitutional fraud, allowing the election of the members of the Citizen Branch by simple majority of the deputies, as if it were one more act of the ordinary legislative body.

From all this, José Ignacio Hernández concluded by correctly saying that:

> "With these appointments, the fraud against the Constitution was materialized: a 2/3 majority became a 'simple' or 'absolute majority'. The appointment of representatives of the Citizen Branch by a simple or absolute majority of the members of the Assembly may be technically qualified as 'fraud on the Constitution' because the violation of the Constitution results in a series of events that are apparently valid, but deep down involve a clear violation of Article 279 of the Constitution, according to which the appointment of representatives of the Citizen Branch should be done by the majority of 2/3 of the members of the National Assembly. In fact, Article 279 of the Constitution was modified, to endorse the appointment of representatives of the Citizen Branch by 'simple' or 'absolute' majority". [14]

The architect of the constitutional fraud, in any case, eventually became the Constitutional Chamber of the Supreme Tribunal, with its ruling No. 1864 of

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not finalize its process, decisions "are taken by an absolute majority, except where the Constitution or the Rules so specify it". Deputy Stalin González (UNT) explained that there are not two separate procedures and that in both cases two thirds of the deputies are needed. He wondered if the committee was never installed precisely to "commit fraud to the Constitution.". See Alex Vásquez, "Imponen al Poder Ciudadano al margen de la Constitución," in *El Nacional*, December 22, 2014, at http://www.el-nacional.com/politica/Imponen-Poder-Ciudadano-margen-Constitucion_0_542345921.html The

[14] See José Ignacio Hernández, "La designación del Poder Ciudadano: fraude a la Constitución en 6 actos;" in *Prodavinci*, December 22, 2014, at http://prodavinci.com/blogs/la-designacion-del-poder-ciudadano-fraude-a-la-constitucion-en-6-actos-por-jose-i-hernandez/

December 22, 2014,[15] in response to the request made by "Major General[16] Diosdado Cabello Rondón in his capacity as President of the National Assembly" about the interpretation of the content and scope of Article 279 of the Constitution, incorrectly and falsely claiming that:

> *"The Constitution clearly establishes two procedures for the appointment and each one with its methodology. First when the Assembly receives the shortlist from the Nomination Committee of the Citizen Branch, three conditions are established: a) the period for the appointment (30 days), b) a vote by (2/3) two thirds of the deputies c) if there is no agreement, the electoral branch proceeds to submit the shortlist to popular consultation. For the second procedure, when the Citizen Branch fails to agree on the Nomination and Evaluation Committee of Citizen Branch, the Constituent imposed the direct responsibility of such designation on the National Assembly, with no other requirement than the 30 day limit. In that sense it is assumed that as the qualified vote it is not expressly established, the appointment procedure is by absolute majority, according to the provisions of Article 89 of the Rules of Interior Debates of the National Assembly."*

The premise from which the aforementioned "Major General" formulated the plea for interpretation is false, as the constitutional provision whose "interpretation" was sought provides only a single method that, acting as an electoral body and with a mechanism for citizen participation, the Assembly elects the members of the mentioned public authorities by a vote of 2/3 of its members, being the second part of the article an exception referred exclusively to the mechanism for citizen participation, that does not affect the voting system. Therefore, in reality, the rule does not generate any "doubt", being the argument of the President of the Assembly completely false that, first, "two thirds are only required when the Evaluation Committee of Citizen Branch is convened", and second that if it has not been possible to convene the Evaluation Committee, then the election of the members with the absolute or simple majority would proceed.

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[15] The decision was published initially on December 22 2014 in http://www.tsj.gob.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML. A few days later it was placed at: http://historico.tsj.gov.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML

[16] It appeared this way on the website of the Supreme Court when I personally consulted it the same day December 22 2014 (at http://www.tsj.gob.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML). Later the text of the decision was modified on this website, eliminating the military rank of this person and of course, without letting the reader how to know what other parts of the text of the sentence may have been illegally modified. See in http://historico.tsj.gov.ve/decisiones/scon/diciembre/173494-1864-221214-2014-14-1341.HTML See about this, as indicated in the Note: "Constitutional Court forged sentence which authorized the naming of authorities with a simple majority", at https://cloud-1416351791-cache.cdn-cachefront.net/sala-constitucional-forjo-sentencia-que-autoriza-nombrar-autoridades-con-mayoria-simple/#.VJ2Y5U9KGAE.twitter

With these false premises, and as was argued, it was “urgently” requested to the Constitutional Chamber of the Supreme Court, last and highest interpreter of our Constitution, the interpretation of Article 279.

And indeed, the Constitutional Court, without further argument, and without reference to the alleged “reasonable doubt as to the content, scope and applicability of the constitutional provisions regarding the factual situation” in which the military plaintiff was acting also as President of the National Assembly, very diligently and submissively, during a weekend, did what it was asked (ordered?). To do this, the Constitucional Chamber considered that the matter was just a matter of law, eliminating the right of the deputies who had a different opinion on the requested “interpretation” and on their performance in the electoral body, to be heard and to present arguments, in violation of Article 49 of the Constitution. Subsequently, the Chamber, proceeded to decide without any formalities, disregarding the values and axiological principles on which Venezuelan constitutional government rests as a democratic state, which requires that members of the Citizen Branch to be appointed by indirect popular election by the National Assembly, by a vote of 2/3 of the deputies which are the terms established in the Constitution.

On the contrary, what the Chamber decided was that the electoral body character of the National Assembly acting with a qualified majority would only exist when the Republican Moral Council “has convene a Nomination and Evaluation Citizen Branch Committee," so presumably, if it is not convened, the Assembly is no longer an electoral body and becomes a general legislative body, being able to proceed to elect these high officials with a simple majority vote, in accordance with the Interior Rules of Procedure of the National Assembly (art. 89), considering that the “absolute majority, is the one consisting of the affirmative manifestation of half plus one of the deputies present” [17]. In other words, not even half plus one of the elected deputies which compose the Assembly, but only of those present at the meeting, which of course is contrary to the “axiological values and principles on which the Constitutional State is based”, which in this case, are the democratic principles that

[17] As reported in the newspaper *El Carabobeño* about what was said by Pablo Aure: "The Government uses the Supreme Court to violate the Constitution and to stay in power, said Pablo Aure, Coordinator of the “*Valencia se Respeta* Movement”. He cited the collusion of the National Assembly with the Constitutional Chamber of the Supreme Court to ’with gross ploy’ interpret Article 279 of the Constitution which provides that, to elect the Citizen Branch, the approval by two thirds of the members of the National Assembly is required. However, the Constitutional Chamber fraudulently interpreted that this percentage is only required in the case that the candidates to conform the Citizen Branch are proposed by the Nomination and Evaluation Committee of Citizen Branch. But since it did not start there, a simple majority was enough, Aure said. That is outrageous, because it is illogical to think that the Constitution is less demanding in naming these officers, in the case that they had previously been shortlisted by the Nomination and Evaluation Committee, since qualifying for such appointments, does not come from the way they are shortlisted but the importance of the positions in the Citizen Branch, explained the university authority.” See in Alfredo Fermín, “Aure: El Gobierno utiliza al TSJ para violar la Constitución,” in *El Carabobeño*, Valencia, 24 de diciembre de 2014.

derive from the electoral body character of second degree that the rule assigns to the National Assembly.

As has been highlighted by María Amparo Grau, the Constitutional Chamber "is not allowed to deliver a judgment which is contrary to the text of the Constitution, which is crystal clear, although the ruling party trusted that the solution to the issue would come from the wise decision of the Tribunal".[18] But instead of being a wise decision, the interpretation given by the Chamber is so absurd, that from an indirect popular election attributed to an electoral body such as the National Assembly ensuring maximum democratic representation with the vote of 2/3 of the elected deputies, permitted the election of the senior officials with a simple majority (half plus one) of the members present at that session, what becomes a total distortion of the democratic sense of the regulated second degree election. Contrary to the decision of the Chamber, as there is no specification given in the second paragraph of Article 279 of the Constitution of which a specific system of majority to use for the election of the members of the Republican Moral Council by the National Assembly, what has to be understood is that this does not change the regime of qualified majority provided for in the rule, having no constitutional foothold to indicate that the absolute majority of the ordinary operation of the Assembly is to be applied.

With the decision of the Constitucional Chamber, therefore, what has occurred is a total illegitimate constitutional mutation, because keeping the same text of Article 279 of the Constitution, the Supreme Tribunal has changed its purpose and meaning, distorting the character of electoral body of the National Assembly which can only act with 2/3 of the vote of the elected deputies, allowing instead that with a simple majority of the members present at a meeting the members of the Citizen Branch can be can be elected; all of this to materialize the conspiracy to change the Constitution with institutional violence, carried out by the Attorney General and the other members of the Republican Moral Council, and the President and some members of the National Assembly.

On this, José Román Duque Corredor rightly observed that:

> "The above interpretation is accommodating and forced because as the ruling party was not being able to obtain the required two thirds vote within the constitutionally established span, the appointments had to be submitted to a popular consultative referendum. With this decision, popular sovereignty was replaced by a simple majority. Being that the appointment of the members of the Citizen Branch was under discussion in the National Assembly, in relevant debates, and since the Republican Moral Council had sent the respective shortlists, surreptitiously it informed that it had not complied with the appointment of the Nominating Committee for lack of agreement between them,

[18] See in María Amparo Grau, "Golpe a la Constitución ¡de nuevo!," in *El Nacional*, Caracas, December 24, 2014.

so that they could then appoint the Citizen Branch through the National Assembly and not by popular will. In any case, supposing that it could be done by the National Assembly, the intangible principle for the appointment of the Citizen Branch, as is clear from Article 279 of the Constitution, requires a vote a qualified two-thirds majority and not a simple majority. With this decision, constitutional norms relating to the legitimacy of the members of the Citizen Branch and respect for popular sovereignty were violated by the erroneous interpretation carried out by Constitutional Chamber.[19]

Now, regarding the elected officials in a way which is contrary to the letter and spirit of the Constitution, as highlighted by María Amparo Grau, their illegitimacy is of origin, "regardless of their performance, they will be officers by fact but not by right", but with the added difficulty that in this case the doctrine of "officers by fact" ("*funcionario de hecho*") would not apply" since in this case:

> "There is no good faith in the conduct of an Assembly which flagrantly violates the selection procedure of these authorities to impose candidates of their choice without going through the necessary parliamentary agreement with representatives of other political groups and without submitting to the popular will, which is the one who ultimately had to solve, on an absence of agreement by those who should have occupied the leading positions of the bodies of the Branch that comprise the Republican Moral Council. A few days after the official celebration of the 15th anniversary of the Constitution, it is shamelessly violated again, but this time bypassing even the power conferred by it to the sovereign itself. The tenures so designated are corrupted by an illegitimacy of origin that makes them de facto officials. We are in a regime characterized by hyper-rulings and discourse, but in which the value of the law, including the Constitution, does not exist." [20]

III. THE UNCONSTITUTIONAL ELECTION OF MEMBERS OF THE NATIONAL ELECTORAL COUNCIL BY THE CONSTITUTIONAL CHAMBER OF THE SUPREME COURT OF JUSTICE.

The same day, December 22, 2014 the parliamentary group of the ruling party, failing to elect on their own, without agreement with the other political groups, the members of the Electoral Branch of government, specifically the National Electoral Council, for not fulfilling the qualified 2/3 votes of the deputies, the same President of the National Assembly, Mr. Diosdado Cabello, publicly announced "that the Supreme Court of Justice will be responsible for appointing the principal and alternate members of the National Electoral Council (CNE) since the two thirds

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[19] See letter from Román Duque Corredor about the appointment of the Ombudsman to the Preident of the Ltin American Institute of the Ombudsman, December 27, 2014, at http://cronicasvenezuela.com/2014/12/27/carta-de-romn-duque-corredor-por-designacin-del-defensor-del-pueblo/

[20] See in María Amparo Grau, "Golpe a la Constitución ¡de nuevo!," in *El Nacional*, Caracas, December 24, 2014.

needed for the appointment had not been achieved".[21] In other news concerning the decision of the National Assembly, it was reported that:

> "The appointment of new members of the National Electoral Council (CNE) was sent by the National Assembly to the Supreme Tribunal of Justice (TSJ) for not achieving the majority required by the Constitution of the Bolivarian Republic of Venezuela, consequently corresponding to the Constitutional Chamber of the Supreme Tribunal to appoint the members of the Electoral Branch" [22]

It was also reported in the press that: "Cabello read and signed the communication that was sent" immediately to the highest "institution of justice in the country"[23]

This decision of the President of the National Assembly, of course, was essentially unconstitutional, because, as an electoral body conceived to perform an indirect election, it cannot delegate its constitutional functions in any organ of the State, and less so in the Supreme Court of Justice.

Moreover, it is false that when the required majority of votes of deputies for the election of members of the National Electoral Council is not achieved "it corresponds" to the Supreme Tribunal to make such a choice. On the contrary, the Supreme Tribunal lacks competence to make such an election; and much less competence with the argument that the National Assembly "could not achieve the majority required by the Constitution."

The Constitutional Chamber of the Supreme Tribunal, in effect, cannot, under any circumstances, substitute the National Assembly as an electoral body for an indirect election, and elect these officials, as indeed it did, incurring in usurpation of authority that in accordance with Article 138 the Constitution "is ineffective and its acts are null".

1. The unconstitutional precedent of 2003 on the occasion of judicial review of a legislative omission

It is very likely that the President of the National Assembly when making his decision, remembered the unconstitutional actions of the Constitutional Chamber of the Supreme Tribunal in 2003, when it elected the members of the National Electoral Council, exercising Judicial Review of the legislative omission to do so. The decision was issued at the request of a citizen, exercising the Chamber its competence established under Article 336.7 of the Constitution, which provides that the Chamber has the power:

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[21] See "TSJ decidirá cargos de rectores del CNE", Noticias "Globovisión, Caracas, December 22, 2014, in http://globovision.com/tsj-decidira-cargos-de-rectores-del-cne/

[22] See "Designación de rectores y suplentes del CNE pasa al TSJ," in *Informe21.com*, Caracas, December 22, 2014, in http://informe21.com/cne/designacion-de-rectores-y-suplentes-del-cne-pasa-al-tsj

[23] See "TSJ decidirá cargos de rectores del CNE", Caracas Noticias "Globovisión, December 22, 2014 in http://globovision.com/tsj-decidira-cargos-de-rectores-del-cne/

"To declare the unconstitutionality of municipal, state or national legislative branch omissions when failing to dictate rules or measures essential to ensure compliance with this Constitution, or dictating them incompletely; and if necessary, set the term, and the guidelines for its correction."

Regarding the competence of the Constitutional Chamber to control the constitutionality of the legislative omission, in terms of this provision, the Chamber cannot replace the legislator and dictate the respective law or measure, obviating the deliberative function of popular representation. However, the Constitutional Chamber has forced its role in the matter and although it has acknowledged that because of the complexity of the matter, the Constitutional Court could hardly make up for the omission of the legislator as a whole, noting that "it is constitutionally impossible even for this Chamber, despite its broad constitutional authority, to become a legislator and provide the community the laws it demands", however it has considered that it is authorized to provide solutions to specific issues, including the adoption of general rules that temporarily take the place of the absent rules, but not to completely correct the inactivity of the legislator and to make rules as required.[24].

In these cases, the Constitutional Chamber has decided popular actions brought before it to control the legislative omission by the National Assembly to indirectly elect the senior public officials that it should do under the Constitution. And that's what happened in 2003 regarding the election of members of the National Electoral Council due to the omission of the Assembly, but with the peculiarity that the Constitutional Chamber not only declared unconstitutional this legislative omission, but replaced the Assembly in the exercise of such attribution as an indirect electoral body.[25]

In fact, in 2003, the Constitutional Chamber through decision No. 2073 of August 4, 2003 (*Case: Hermann Escarra Malaver and others*) [26] delivered a ruling deciding on the omission of the legislature, and provisionally appointed members of such Council. It began however by recognizing the reality of the political functioning of the political representative bodies, discarding any unconstitutional situation in the difficulty to make the indirect election, saying:

"The parliamentary system, in many instances, requires decisions by

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[24] See sentence Nº 1043 de 31–5–2004 (Caso: Consejo Legislativo del Estado Zulia), in *Revista de Derecho Público*, Nº 97–98, Editorial Jurídica Venezolana, Caracas 2004, p. 408.

[25] See Allan R. Brewer-Carías, *La Justicia Constitucional. Procesos y procedimientos constitucionales*, México, 2007, pp. 392 ss.

[26] See in http://historico.tsj.gov.ve/decisiones/scon/agosto/2073-040803-03-1254%20Y%201308.HTM. See the comments in Allan R. Brewer-Carías, "El control de la constitucionalidad de la omisión legislativa y la sustitución del Legislador por el Juez Constitucional: el caso del nombramiento de los titulares del Poder Electoral en Venezuela," in *Revista Iberoamericana de Derecho Procesal Constitucional***,** No. 10 Julio-Diciembre 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 271-286

qualified majorities and not by absolute or simple majority; and when this happens (which may even occur in the case of a simple majority), if the members of the Assembly do not achieve the necessary agreement to reach the required majority and the election cannot be made, strictly speaking on matters of principles, it may not be considered as a legislative omission, since it is the nature of these bodies and their voting procedures, that there may be disagreement among members of national, state or municipal legislative bodies, and the number of necessary votes may not be achieved, and those that do not agree cannot be forced to reach an agreement that would go against the conscience of voters. From this point of view, a constitutional omission cannot be considered to exist that involves the responsibility of the bodies referred to in Article 336.7 of the Constitution."

However, if the lack of parliamentary agreement was considered by the Constitutional Chamber as normal in representative parliamentary action, in this case the Chamber considered that the failure to elect the members of the National Electoral Council even without being illegitimate, could lead it to exercise jurisdiction under Article 336.7 of the Constitution and declare the omission unconstitutional, setting a deadline to correct it and, and the guidelines of such concretion. And that's what happened, so the Constitutional Chamber in its decision only ordered the National Assembly to comply in a period of 10 days with its obligation, expressing that if it did not do it within that period, the Chamber would then proceed to correct it, in the best possible way according to the situation born from the concrete omission, which was none other in this case that to proceed to make the election "within a period of ten (10) calendar days". In its decision, the Chamber in any event made the following arguments and established the following criteria, which framed the form under which it would operate what was ultimately a kidnapping of Electoral Power:[27]

First, that in case of omission of the elections, the appointment that the Chamber could make would only be temporary, so they would cease when the competent body, the National Assembly, assumes its competence and makes the election.

Second, the Chamber considered that to make the provisional appointments, it should "adapt to the conditions that the law requires for the officer", but clarified, however that "due to the temporary nature and the need for the body to function" the Chamber was not required to "fulfill step by step the legal formalities required by law to the competent elector, since the important thing is to fill the institutional vacuum, until it is formalized the definitive", disassociating the Chamber from the legal requirements that the normal elector would have to comply with to make the appointments.

[27] See in general about these decisions Allan R. Brewer-Carías, La Sala Constitucional vs. El Estado democrático de derecho *(El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política).*Ediciones El nacional, Caracas 2004.

Third, the Constitutional Chamber confirmed the existence of an "institutional vacuum", considering that "the absence of designation of the members in the legal period constitutes a gap to be filled by this Chamber if the National Assembly does fulfill it", since the Constitutional Chamber itself in a previous decision No. 2816 of November 18, 2002 (Case: *Consejo Nacional Electoral*)[28], had materially paralyzed, of course unconstitutionally, the operation of the initial National Electoral Council that had been appointed by the Constituent Assembly in 1999.

The Constitutional Chamber, after the 10 days it had given to the National Assembly to fulfill its obligation, having the ruling party failed to achieve the majority of 2/3 of the members of the Assembly to impose their views and elect the members of the National Electoral Council, then proceeded, in this case, to substitute the National Assembly and decide in accordance with what the ruling party had wanted, which was achieved through decision No. 2341 of August 25, 2003 (case: *Hermann Escarra M. and others*)[29], in which it proceeded to elect the members of the National Electoral Council and their alternates "in accordance with Article 13 of the Organic Law of the Electoral Power", without a doubt, usurping a competence that is unique to the National Assembly as electoral body, [30] and therefore "overstepping its duties and limiting unwarranted and unlawfully the own autonomy of the National Electoral Council as the governing body of that public branch". [31]

However, it was certainly a precedent, although unconstitutional, of election of the members of Electoral Council by the Constitutional Court, usurping the powers of the National Assembly as indirect electoral body, but which was not even alluded

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28 See in http://historico.tsj.gov.ve/decisiones/scon/noviembre/2816-181102-02-1662.HTM

29 See in http://historico.tsj.gov.ve/decisiones/scon/agosto/PODER%20ELECTORAL.HTM See the comments in Allan R. Brewer-Carías, "El control de la constitucionalidad de la omisión legislativa y la sustitución del Legislador por el Juez Constitucional: el caso del nombramiento de los titulares del Poder Electoral en Venezuela," in *Revista Iberoamericana de Derecho Procesal Constitucional***,** No. 10 Julio-Diciembre 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 271-286

30 See Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000–2004", in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero–abril 2005 pp. 11–73; and "La autonomía e independencia del Poder Electoral y de la Jurisdicción Electoral en Venezuela, y su secuestro y sometimiento por la Jurisdicción Constitucional." Paper presented to the *III Congreso Iberoamericano de Derecho Electoral*, Facultad de Estudios Superiores de Aragón de la Universidad Nacional Autónoma de México, Estado de México, 27-29 Septiembre de 2012.

31 Véase.Allan R. Brewer-Carías, *La Justicia Constitucional. Procesos y procedimientos constitucionales*, México, 2007, p. 392

to in the request of the President of the National Assembly, or in the sentencing of the Constitutional Chamber on December 2014.[32]

2. *The new usurpation of the functions of the National Assembly, as an electoral body, by the Constitutional Chamber of the Supreme Court.*

In fact, on December 22, 2014, the President of the National Assembly, on his own, because no decision on the matter was adopted by the National Assembly as a collegiate body, mistakenly considering that having the Assembly failed to achieve the 2/3 qualified majority to elect the members of the National Electoral Council, decided that supposedly automatically, it was up to the Constitutional Chamber to make the election. For such purpose, that same day, December 22, 2014, he addressed the Chamber requesting to proceed to materialize this usurpation of authority, which the Constitutional Chamber executed, very diligently, by decision No. 1865 of December 26, 2014.[33]

The content of the request of the President of the Assembly was summarized in the Tribunal decision, in which it is said that he merely noted that the Assembly "failed to reach the majority of two thirds of its members required by the Constitution in its Article 296, for the appointment of the Principals and Alternates of the National Electoral Council nominated by Civil Society", which is why it decided to forward "the highest court, the present information, for its consideration and corresponding purpose, as established in the Constitution of the Bolivarian Republic of Venezuela, in its Article 336, subsection 7". Based on these vague assertions, it was the Constitutional Chamber that "inferred" that this was a request for declaration of omission, for which purpose it constructed its own competence for the cases of filing of an action for unconstitutionality by omission, according to the interpretation of Article 336.7 of the Constitution made in its decision No. 1556 of July 9, 2002.

Nonetheless, that provision, as shown by its own text, only authorizes the Constitutional Chamber to declare that the National Assembly, has incurred in unconstitutionality, for example, when it has not issued a decision or a law required under the Constitution, or a necessary measure to ensure compliance with the Constitution, ordering the Assembly to dictate a norm or measure, and eventually establish guidelines for the correction; but the Constitutional Chamber can never

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[32] It was only ex post facto, through public statements that the President of the Supreme Court on December 29, 2014, she "remembered" that "the Chamber" had acted in the same way in 2003 and 2005, when it also recorded cases of "legislative omission" See "Gladys Gutierrez: in: "En elección de rectores del CNE se siguió estrictamente el procedimiento,: Caracas December 29, 2014, at http://www.lapatilla.com/site/2014/12/29/gladys-gutierrez-en-eleccion-de-rectores-del-cne-se-siguio-estrictamente-el-procedimiento/

[33] I initially consulted the sentence in http://www.tsj.gob.ve/decisiones/scon/diciembre/173497-1865-261214-2014-14-1343.HTML Later it is only available in http://historico.tsj.gov.ve/decisiones/scon/diciembre/173497-1865-261214-2014-14-1343.HTML .

replace the will of the Assembly, or dictate by itself neither law nor the measure of its specific competence.

However, the Chamber, in this case, when analyzing the standing of the President of the Assembly to make such request, given the popular nature of the action against the omission, falsely expressed, that the said official, exercising "the representation of the parliamentary body and in that role declaring the impossibility of the deliberative body to appoint the Governing members of the National Electoral Council", had requested the Chamber "*to fill the alluded omission*", which was not true. This was not specified by the abovementioned official in his request, as the same Constitutional Chamber summarized it. One thing is controlling the unconstitutionality of the omission, which is what is stated in Article 336.7 of the Constitution, to which without argument the "plaintiff" made reference to, and another thing is to ask the Chamber "to take the place" of the Assembly, that is, to make the election in substitution of the electoral body, something which was not requested and that could not be done because it is unconstitutional. But that was what the Constitutional Chamber ultimately did in a "process" that at its own discretion it considered a being just a matter of law, deciding "without opening any proceedings," to deny other interested persons, such as the own Members of the National Assembly who did not agree with the petition, their right to be heard; all, in violation of the right to due process established in Article 49 of the Constitution.

In Addition, as observed by José Ignacio Hernández,

> "...in this case, it was precisely the President of the National Assembly who incurred in the omission, which is the institution controlled by the action of omission.
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> By doing this, a paradoxical situation was reached: the National Assembly sued itself. In fact, it was the President of the Assembly who sued for the legislative omission, which according to the lawsuit the Assembly would have incurred in that omission. A kind of "self-lawsuit", so incoherent, that it reveals the unconstitutionality of the commented judicial decision." [34]

In deciding the case, the Constitutional Chamber, besides narrating commonplaces about the separation of public power in five branches of government, and indicating that all five, including the Electoral should have had elected members under the terms established in the Constitution, referred to the information given to the Chamber by the President of the National Assembly himself, which it also considered as a "notorious communicational fact", in the sense that they had failed "to achieve the respective majority of the members of that body who is responsible for the appointment of the members of the National Electoral Council", from which the Chamber evidenced "the occurrence of an omission by the national

[34] See José Ignacio Hernández, "La inconstitucional designación de los rectores del CNE," in *Prodavinci*, Caracas December 27, 2014, at http://prodavinci.com/blogs/la-inscostitucional-designacion-de-los-rectores-del-cne-por-jose-ignacio-hernandez/

parliamentary body", in addition to finding that the procedures provided for in Article 296 of the Constitution and in Article 30 of the Organic Law of the Electoral Power were exhausted, all of which, in the judgment of the Constitutional Chamber had been recognized by the President of the National Assembly.

The Constitutional Chamber specified that "the omission of the appointment is an objective fact which is confirmed from the request made by the President of the National Assembly, that arises from the fact that a qualified majority consisting of the favorable vote from two thirds of its members does not exist in the parliamentary body," as required by Article 296 of the Constitution, from which the Constitutional Chamber then inferred that there was "the existence of an omission by the National Assembly to appoint the members of the National Electoral Council in accordance with the nominations made by civil society".

It only took this simple and unfounded reasoning for the Constitutional Chamber "in response to the mandate established in Articles 296, 335 and 336, paragraph 7, of the Constitution", to resolve not to demand the Assembly to perform its functions, setting, for example, a deadline for compliance, as it occurred in the judicial precedent of 2003, but to directly elect the following members of the National Electoral Council: "as first principal member Tibisay Lucena, and her alternates Abdón Rodolfo Hernandez and Ali Ernesto Padrón Paredes; as second principal member, Sandra Oblitas and her alternates Carlos Enrique Quintero Pablo Cuevas Jose Duran; as the third principal member Luis Emilio Rondon, and his alternates Octavio Marcos Méndez Andrés Eloy Brito". After that the Chamber convened the designated principal and alternate members for their swearing in ceremony, which took place in the Supreme Tribunal on Monday 29 December, 2014.

The election of these members to the National Electoral Council by the Constitutional Chamber, moreover, was made in a definitive way for the corresponding constitutional period, abandoning the idea of the "provisional nature" of the designation that had prevailed in the aforementioned judicial precedent of 2003.

All of this, of course, was unconstitutional, because in the National Assembly in December 2014, in fact, there was no unconstitutional omission in the election, to the point that the President of the Assembly himself did not even use the word "omission" in his request. It is false, therefore, the statement made by the Constitutional Chamber in the sense that that "omission designation" has been an "objective fact which is confirmed from the request made by the President of the National Assembly", because he said nothing in this regard.[35] The only thing that he expressed was that the required qualified 2/3 majority was not achieved so that the election of members of the National Electoral Council could not materialize; and

[35] Because of this José Ignacio Hernández rightly indicated that "a nonexistent omission was declared." See José Ignacio Hernández, "La inconstitucional designación de los rectores del CNE," in *Prodavinci*, Caracas December 27, 2004 at http://prodavinci.com/blogs/la-inscostitucional-designacion-de-los-rectores-del-cne-por-jose-ignacio-hernandez/,

this in itself is not unconstitutional. About this, however it was the Constitutional Chamber which falsely concluded that such a qualified majority did not exist ("does not exist in the parliamentary body"), deducting then, therefore, an alleged "existence of the omission by the National Assembly".

In a deliberative body such as the National Assembly, which on certain occasions does not reach parliamentary agreements through discussion and consensus, does not mean there is an "omission" and much less unconstitutionality. This is what democracy is about, agreements and consensus when a single political force does not control the majority required to decide. In such cases, it must agree with the other political forces. As expressed by the Constitutional Chamber itself in 2003 in the aforementioned judgment No. 2073 from August 4, 2003 (Case: *Hermann Escarra Malaver and others*),[36] when "the members of the Assembly fail to reach the necessary agreement to attain a majority vote, the election cannot be carried out, without it, in purity of principle, being considered a legislative omission, since it is the nature of these bodies and their voting procedures that there may be disagreement among members of legislative bodies, and that the number of votes needed cannot be achieved, not being possible to force those who dissent to agree in a way that it would go against their conscience." In these cases, therefore, there is no unconstitutionality at all, but the need for some political forces to reach an agreement, compromising and ceding among them, which is normal in democracy.

As noted by José Román Duque Corredor, the Constitutional Chamber:

> "considered as an unconstitutional omission the lack of political agreement among the members of the National Assembly to reach a majority of 2/3 of the votes necessary to designate the members of the National Electoral Council, when it is not a matter of a failing to pass a law or some juridical measure essential to comply with the Constitution, but the lack of consensus in parliamentary discussions to achieve political decisions required for the democratic legitimacy of origin of a Branch of government. Political disagreement is not really an inactivity of the National Assembly; which is what on the contrary the Constitutional Chamber wants to show."[37]

Therefore, when the Constitutional Chamber decided, *ex-officio*, that because a qualified majority was not reached in the National Assembly as the ruling party

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[36] See in http://historico.tsj.gov.ve/decisiones/scon/agosto/2073-040803-03-1254%20Y%201308.HTM. See the comments in Allan R. Brewer-Carías, "El control de la constitucionalidad de la omisión legislativa y la sustitución del Legislador por el Juez Constitucional: el caso del nombramiento de los titulares del Poder Electoral en Venezuela," in *Revista Iberoamericana de Derecho Procesal Constitucional*, No. 10 Julio-Diciembre 2008, Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal Constitucional, México 2008, pp. 271-286.

[37] See Román José Duque Corredor, "El logaritmo inconstitucional: 7 Magistrados de la Sala Constitucional son iguales a 2/3 partes de la representación popular de la Asamblea Nacional,: Caracas December 29, 2014, at http://www.frentepatriotico.com/inicio/2014/12/29/logaritmo-inconstitucional/

wanted, since that becomes an "unconstitutional omission," what has been decided is that the parliamentary democracy is unconstitutional in itself, being "constitutional" the situation where one political party imposes its own will, without having to reach agreements with the other political groups or parties represented in the Assembly. With this decision, the Constitutional Chamber has legitimized authoritarianism, considering as "constitutional" when the ruling party adopts and imposes decisions without any opposition, and conversely as "unconstitutional", when representative parliamentary democracy comes into play and when in any parliamentary session the ruling party cannot impose its will because it cannot achieve the qualified 2/3 majority of its deputies, having to reach agreement or consensus with other groups.[38]

And amid this absurdity it is even more absurd that in a very undemocratic manner the Constitutional Chamber not only usurped the electoral body character of the National Assembly in these cases to elect indirectly the members of a Branch of Government with a qualified majority vote of 2/3 of its members, but considered "constitutional" that its seven judges, who are people not elected by direct vote, assuming the condition of electoral body of the Assembly, replaces the will of 2/3 of its members, and appoints without complying with the constitutional requirements, the members of the National Electoral Council.

This entire absurd situation was summed up by José Román Duque Corredor when analyzing what he called the "unconstitutional logarithm," expressing as follows:

> "The Un-Constitutional Chamber or rather the permissive Chamber of the Supreme Tribunal, crookedly manipulates Articles 336.7 and 296 of the Constitution in order to appoint as members of the National Electoral Council, instead of the 2/3 majority of the members of the National Assembly, those nominated by the PSUV [ruling party] who did not obtain the consent of the qualified majority. To do this the Chamber declared as unconstitutional that in the parliamentary session's deputies had not attained the majority of 2/3 and

[38] As highlighted by José Ignacio Hernández "The existence of qualified majorities to appoint certain civil servants as is the case of the two thirds of the members of the Assembly needed to designate the National Electoral Council, has a clear purpose: to force the consensus between the different political parties, preventing the party that has a simple (or absolute) majority dictate all decisions. This is so because if a single political party in the Assembly makes all decisions without having to compromise with other parties this would be what Alexis de Tocqueville called the "tyranny of the majority". [...] So it is why the 1999 Constitution does not allow the Constitutional Chamber to assume the appointment of the members of the National Electoral Council, for that designation could only be made by the will of two thirds of the deputies of the Assembly. That is, it is not enough -it shouldn't be enough - a single will to make that designation. The Constitutional Court assumed this in a unilateral way, a designation that by the Constitution should be plural. It additionally did it ignoring those two thirds of the Assembly, which is a distinct entity of who chairs the Assembly,- because not even a previous trial followed," in *Prodavinci*, Caracas December 27, 2014, at http://prodavinci.com/blogs/la-inscostitucional-designacion-de-los-rectores-del-cne-por-jose-ignacio-hernandez/

considered competent its seven magistrates, in a new logarithm, to replace that qualified majority. That is, exponentially seven magistrates are equivalent to 110 deputies. With this formula it appointed the members of the National Electoral Council that 99 members of the ruling party could not designate. The basis of this unconstitutional logarithm is the distortion of constitutional provisions that makes such designation to have the democratic legitimacy of an election of the second degree [indirect election], which requires a consensus or a large majority of the popular representation which voted to elect the National Assembly. With this 2/3 majority, what the Constitution intended was to ensure the authenticity of the popular base of the designation. In other words, the requirement of a qualified majority vote is one way that popular sovereignty indirectly intervenes in the shaping the electoral authority, which belongs to the people according to the terms of Article 5 of the Constitution. [...]

Based therefore in its crooked interpretation, the Constitutional Chamber, again in its function as the permissive Chamber of the government, and as executor of barrack orders, through an unconstitutional logarithm replaced 2/3 of popular representation in the National Assembly that is, 110 of its members, for its seven magistrates, which again contributes to the loss of validity and deinstitutionalization of democratic rule of law in Venezuela."[39]

IV. THE UNCONSTITUTIONAL ELECTION OF THE SUPREME TRIBUNAL OF JUSTICE BY THE NATIONAL ASSEMBLY

The last step of the conspiracy to consolidate the total stockpiling and control of the Branches of government by the ruling party, occurred on December 28, 2014 with the election by the National Assembly of 12 magistrates the Supreme Tribunal of Justice

As established in Articles 264 and 265 of the Constitution, as we have pointed out, the Constitution also provides for the indirect popular election of the judges of the Supreme Tribunal by the National Assembly as an electoral body, and although it is not mentioned, as in the other cases, that the election must be made by a vote of the 2/3 majority the deputies, it is provided however that their removal can only take place with a 2/3 majority vote of them, it should be understood within the democratic constitutional logic of the Constitution that the election must also be made by such qualified majority.

This was established as a principle in Article 38 of the Organic Law of the Supreme Court, but with an unfortunate and inconsistent subsidiary provision, regulating the election of Judges of the Supreme Tribunal by the National Assembly for a single term of 12 years according to the following procedure:

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[39] See Román José Duque Corredor, "El logaritmo inconstitucional: 7 Magistrados de la Sala Constitucional son iguales a 2/3 partes de la representación popular de la Asamblea Nacional,: Caracas, December 29, 2014, at http://www.frentepatriotico.com/inicio/2014/12/29/logaritmo-inconstitucional/

"When the second pre-selection filed by the Citizen Branch is received, in accordance with Article 264 of the Constitution and this Law, in a plenary session that must be convened with at least three working days in advance notice, the National Assembly will make the final selection by the affirmative vote of two thirds (2/3) of its members. If the vote of the required qualified majority is not achieved, a second plenary meeting will be convened, in accordance with this article; and if the affirmative vote of two thirds (2/3) is not obtained it will convene a third session and if it does receive the favorable vote of two thirds (2/3) of the members of the National Assembly, a fourth plenary session will be convened, in which the appointment will be made by the affirmative vote of a simple majority of the members of the National Assembly".

By the provision of the last part of this article 38 of the Law, in short, if a qualified majority for the election of the justices cannot be achieved, the deputies members of the Assembly could elect them with a simple majority, which we have considered that "it is completely inconsistent" with the majority vote required for their removal under Article 265 of the Constitution.[40]

But precisely, based in such legal inconsistency, on December 27, 2014, it was reported in the press, that the President of the National Assembly, considering that at the meeting that day, "there was not a qualified two-thirds majority vote of 110 deputies for the appointment of judges to the Supreme Court, [...] he convened a fourth extraordinary session for Sunday December 28th at 10:00 am" simply announcing that "We will designate them with the favorable vote of a simple majority (99 deputies)".[41]

And in fact that was what happened in the session of the National Assembly of December 28, 2014 in which, with a simple majority vote[42] the ruling party deputies appointed twelve magistrates of the Supreme Court,[43] without having effectively assured the participation of the various sectors of society in the Judicial Nominations Committee, which, in the Organic Law of the Supreme Tribunal, was configured as an "expanded" parliamentary committee controlled by the National Assembly, in violation of the provisions for citizen's participation established in the Constitution.

V. THE REINSTATEMENT OF THE CONSTITUTION AND THE RIGHT TO RESISTANCE AGAINST UNLAWFUL AUTHORITIES

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[40] See Allan R. Brewer-Carías y Víctor Hernández Mendible, *Ley Orgánica del Tribunal Supremo de Justicia 2010*, Editorial Jurídica Venezolana, Caracas 2010, p. 34p.

[41] See in: "AN convoca a cuarta sesión para designar a magistrados del TSJ," in Globovisión.com, Caracas December 27, 2014, at http://globovision.com/an-convoca-a-cuarta-sesion-para-designar-a-magistrados-del-tsj-2/

[42] See in: "AN designa a los magistrados del TSJ," en Globovisión.com, December 28, 2014, at http://globovision.com/an-designa-a-los-magistrados-del-tsj/

[43] See the National Assembly Agreement with the apointments in *Gaceta Oficial* No.40.570, 29 de diciembre de 2014, y N 6.165 Extra., 28 de diciembre de 2014.

This way, in just one week and as a product of a conspiracy to change the Constitution with institutional violence, the Chair of the Republican Moral Council and other organs of the Citizen Branch of government, the President of the National Assembly and the group of ruling party deputies, and the magistrates of the Constitutional Chamber of the Supreme Tribunal, executed a coup d'État which unlawfully and unconstitutionally mutated the Constitution to elect the heads of the bodies of Citizen Branch, the Electoral Branch and the Supreme Tribunal Justice through a bodies which lack competence to do so: first, regarding the Officers of the Citizen and Judicial Branch, by the National Assembly acting as an ordinary legislature, and second, in the case of the Electoral Branch of government, by the Constitutional Chamber of the Supreme Court of Justice, when in both cases, it corresponds to the National Assembly, acting as an indirect electoral body needing a 2/3 majority vote of its members to approve. In both cases there has been a usurpation of functions that makes void the acts dictated, leaving the appointments made as illegitimate of origin.

The violated Constitution, however, as stated in its Article 333, even if there has been a failure to comply with it because of the aforementioned act of institutional force, remains valid, being every citizen required, be he invested of authority or not, to collaborate with the means at his disposal to reinstate the effective return of the enforcement of the Constitution.

And as for the illegitimate designated authorities through the coup d'état of December 2015, under Article 350 of the Constitution, the people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, have the duty to ignore them, for being contrary to the democratic values, principles and guarantees, and for undermining the rights of the citizens to democracy and constitutional supremacy.

This right of resistance to oppression or tyranny, as noted by the Constitutional Chamber's decision No. 24 of 22 January 2003 (Case: *Interpretation of Article 350 of the Constitution*), is precisely what "is recognized in Article 333 of the Constitution, whose wording is almost identical to Article 250 of the Charter of 1961" adding the Chamber that:

> "This provision is linked to Article 138 of the Constitution, which states that 'all usurped authority is inefficient and its acts are null.' The right to the restoration of democracy (defense of the constitutional regime) referred to in Article 333, is a legitimate mechanism of civil disobedience which implies the resistance to an usurper and an unconstitutional regime."[44]

But nevertheless, the same conspiratorial Constitutional Chamber, when "interpreting" said article 350, in the same decision No. 24 of January 22, 2003

[44] See in *Revista de Derecho Público*, Nº 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 126-127.

argued restrictively, that the right of the people to ignore the illegal authorities provided for therein only:

> "can manifest constitutionally through various mechanisms for citizen participation contained in the Constitution, particularly of a political nature, dictated in Article 70, namely: through 'the election of public officials, a referendum, popular consultation, a revocation of mandate, legislative, constitutional and constituent initiatives, open forums and assembly of citizens.'"[45]

That is, in general, the Constitutional Chamber, materially, reduced the forms of exercising the right to resistance to the mechanisms of suffrage (election or voting) whose exercise is precisely controlled by one of the illegitimate bodies and that the people have the right to not recognize, such as the National Electoral Council whose members were elected by the Constitutional Chamber itself, usurping the role of the National Assembly as an electoral body for their indirect popular election.

This, by making impossible the exercise this right to resistance, against the actions of the usurping National Assembly and of the usurping Constitutional Chamber, or against the illegitimate decisions of the unconstitutionality elected National Electoral Council, must necessarily open other democratic alternatives for its manifestation. [46]

Paris, at rue des Saints Pères, January 1st, 2015.

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[45] *Idem*.

[46] See Allan R. Brewer-Carías, "El derecho a la desobediencia y a la resistencia contra la opresión, a la luz de la *Declaración de Santiago"* in Carlos Villán Durán y Carmelo Faleh Pérez (directores), *El derecho humano a la paz: de la teoría a la práctica***,** CIDEAL/AEDIDH, Madrid 2013, pp. 167-189. See also: "El Juez Constitucional vs. El derecho a la desobediencia civil, y de cómo dicho derecho fue ejercido contra el Juez Constitucional desacatando una decisión ilegítima (El caso de los Cuadernos de Votación de las elecciones primarias de la oposición democrática de febrero de 2012)," in *Revista de Derecho Público*, No 129 (enero-marzo 2012), Editorial Jurídica Venezolana, Caracas 2012, pp. 241-249.