

Chapter 11

The Government of Judges and Democracy. The Tragic Institutional Situation of the Venezuelan Judiciary

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Abstract This chapter analyzes the situation of the Venezuelan judiciary, after 15 years of authoritarian government (1999–2014), which was imposed in the country in contempt of what was expressly established in the 1999 Constitution and in the 2001 Inter American Democratic Charter. The result has been the complete subjection of the Supreme Tribunal to the National Executive, and the packing of the courts with temporary and provisional judges who, lacking stability, are subject to political instruction. In such circumstances, the judiciary has been the main tool used by the government to facilitate the concentration of power, the dismantling of democracy and the rule of law, and the persecution of dissidents in an illegitimate way.

Keywords Venezuela • Judiciary • Judicial power • Judicial independence • Democracy • Separation of powers • Authoritarian regime

1 Democracy and Separation of Powers

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

The Charter enumerates the *essential elements of representative democracy*. These include periodical, fair and free elections based on a universal and secret vote as the expression of the will of the people. However, they also involve the following: respect for human rights and fundamental liberties; access to power and its exercise

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with subjection to the rule of law; a plurality of political parties and organizations; and, most importantly of all, the ‘*separation and independence of public powers*’ (Article 3), that is, the possibility of checks and balances on the different branches of government. The *Inter-American Charter* also defined the following *fundamental components of democracy*: transparency of governmental activities; integrity and responsibility of government in public management; respect of social rights and freedom of speech and the press; constitutional subordination of all institutions of the state to the legally constituted civil authority; and respect for the rule of law by all the entities and sectors of society.

The principle of the separation and independence of powers is so important as one of the ‘essential elements of democracy’ because it is the one that allows 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 there are controls on power: that is, checks and balances based on the separation of powers, with their independence and autonomy guaranteed, so that power can be stopped by power itself. Consequently, without the separation of powers and the possibility of control of power, none of the other essential elements of democracy can be guaranteed. Only by controlling power can free and fair elections and political pluralism exist; only by controlling power can effective democratic participation be possible, and can effective transparency in the exercise of government be assured. Only by controlling power can there be a government subordinate to the Constitution and the laws, that is, the rule of law; only by controlling power can there be effective access to justice, functioning with autonomy and independence; and only by controlling power can there be a true and effective guarantee of respect for human rights.¹

As a consequence, democratic regimes cannot exist without the separation of powers, and in particular, without an independent and autonomous judicial power that has the capacity to control 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. This allows them to apply the rule of law without interference from other state powers, institutions or corporation, or even citizens; and only subjected to the rule of the Constitution and of law.

2 The Provisions of the Venezuelan Constitution Regarding the Judicial System and Its Governance

For this purpose, in the contemporary world, constitutions have included express provisions to secure the separation of powers. The Venezuelan Constitution of 1999 is no exception.² In effect, according to article 253 of the Constitution, the power to

¹ See AR Brewer-Carías, ‘Democracia: sus elementos y componentes esenciales y el control del poder’ in Nuria González Martín (ed), *Grandes temas para un observatorio electoral ciudadano, Vol. I, Democracia: retos y fundamentos* (México, Instituto Electoral del Distrito Federal, 2007) 171–220.

² See on the Venezuelan 1999 Constitution, AR Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezolano* (Caracas, Editorial Jurídica Venezolana, 2004).

PREVIEW