

**THE UNCONSTITUTIONAL *EX OFFICIO* JUDICIAL REVIEW RULINGS ISSUED BY
THE CONSTITUTIONAL CHAMBER OF THE SUPREME TRIBUNAL OF
VENEZUELA ANNULING ALL THE 2019 NATIONAL ASSEMBLY DECISIONS
SANCTIONED WITHIN THE FRAMEWORK OF THE 2019 TRANSITION REGIME
TOWARDS DEMOCRACY FOR THE RESTORATION OF THE ENFORCEMENT OF
THE CONSTITUTION***

Allan R. Brewer-Carías

Emeritus Professor, Central University of Venezuela

During 2019, the Constitutional Chamber of the Supreme Tribunal of Justice issued numerous rulings as “*unilateral declarations*” adopted *ex-officio*, declaring the nullity of the decisions approved by the National Assembly declaring and implementing the Transition Process towards democracy;¹ rulings that under the Venezuelan constitutional system of judicial review, have no validity whatsoever on matters of judicial review,² being all of them null and void because they violate all the rules and principles of due process guaranteed in article 49 of the Constitution, and as established in article 25 of the same Text.

In effect, the National Assembly, after the act of the election of Mr. Nicolás Maduro held on May 20, 2018 was declared as null and void on May, 22, 2018 by the National Assembly, which formally rejected the results of such an election,³ proceeded in January 2019 to solve the political crisis arising from the unprecedented political event in Venezuela’s history, which was that, on January 10, 2019, the country lacked a legitimately elected and recognized president who could be sworn in, and that could

* Paper presented at the VII Congreso de Derecho Procesal Constitucional 2021, organized by the *Universidad Monteávila*, Caracas February 2021.

¹ See Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores* (Con Prólogo de Asdrúbal Aguiar; y Epílogo de Román José Duque Corredor), Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana, Miami 2019, 360 pp.

² See about when the Constitutional Chamber can issue *ex officio* rulings on matter of judicial review in Allan R. Brewer-Carías, “Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela”, in *Revista IURIDICA*, N° 4, Centro de Investigaciones Jurídicas Dr. Aníbal Rueda, Universidad Arturo Michelena, Valencia, julio-diciembre 2006, pp. 13-40.

³ Text of the Resolution available at http://www.asambleanacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica. Similarly, in the review “National Assembly does not accept the results of 20M and declares Maduro an ‘usurper,’ in *NTN24*, May 22, 2018, available at <http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas>

assume the office of the President of the Republic for the 2019-2025 term under article 231 of the Constitution. Specifically. It was against all the important decisions sanctioned by the National Assembly established after the parliamentary elections of December 2015 (when the Government lost the absolute majority control it used to have in such Assembly), that the Constitutional Chamber of the Supreme Tribunal issued the ex officio aforementioned rulings, specifically, decisions No. 3 of January 21, 2019; No. 6 of February 8, 2019; No. 39 of 14 February 14, 2019; No. 74 of April 11, 2019 and No. 247 of July 25, 2019, which are hereto analyzed.

I. THE ROLE OF THE NATIONAL ASSEMBLY AS THE PRIMARY INTERPRETER OF THE CONSTITUTION IN THE ABSENCE OF A LEGITIMATELY ELECTED PRESIDENT THAT COULD TAKE THE OATH OF OFFICE ON JANUARY 2019, AND THE POSITION OF THE PRESIDENT OF THE NATIONAL ASSEMBLY AS PRESIDENT IN CHARGE OF THE REPUBLIC SINCE JANUARY 10, 2019.

In this context, since January 2019, the National Assembly took on the role imposed by political and constitutional circumstances of the moment, and, as the legitimate political and legislative body representing popular sovereignty, and in its role as the primary interpreter of the Constitution on behalf of the people, it effectively proceeded to interpret the Constitution in order seek for the restoration of the Constitution and of democracy.

For such purpose the National Assembly proceeded, as the *representative* of the people, to exercise the Legislative Power of the State it has, as *the main official and primary interpreter of the Constitution*,⁴ by means of sanctioning laws (articles 202-218) as well as other parliamentary acts also dictated on behalf of the people, in direct and immediate execution of the Constitution.

The Constitution, of course, can and should be interpreted by all persons, all officials, and all the organs of the Government who are responsible for applying it. No organ of the State, not even the Supreme Tribunal of Justice when acting as interpreter of the

⁴ See Claudia Nikken, *Consideraciones sobre las fuentes del derecho constitucional y la interpretación de la Constitución*, Centro de Derecho Público y de la Integración Editorial Jurídica Venezolana, Caracas 2019, p. 85; See José Vicente Haro, “La interpretación de la Constitución y la sentencia No.1077 de la Sala Constitucional (Un comentario sobre los límites del juez constitucional),” in *Revista de Derecho Constitucional*, No. 2, Editorial Sherwood, Caracas 2000, pp.2, 7.

Constitution (Article 335), has a monopoly on constitutional interpretation.⁵ However, the National Assembly, as the body representing popular sovereignty is “the primary interpreter of the Constitution and the most important one,” being the Legislator, “the normal, ordinary interpreter of the Constitution.”⁶ In other words, as expressed by José Vicente Haro: “Although the Constitutional Chamber of the Supreme Court of Justice is the highest and last interpreter of the Constitution, it is not technically the first. The first interpreter of the Constitution is the legislator, the National Assembly.”⁷

It was precisely in the context of the aforementioned political crisis that the National Assembly, interpreting the Constitution on behalf of the people, and in the absence of an express text regulating the denounced situation, decided to address this crisis by applying article 233 of the Constitution in an analogous manner, which refers to cases of “absolute vacancy of a president before the inauguration of office.” Consequently, it considered that, in the absence of a legitimately elected president who could be sworn in as President of the Republic for the 2019-2025 term, the President of the National Assembly had a duty to take the office of the Presidency of the Republic, since he has, among the functions inherent in his office, precisely the duty to take on the responsibilities of the presidency in cases of absolute vacancy of the President of the Republic.

Thus, on the same day January 10, 2019, when the country began in the unique situation previously described, the National Assembly decreed an “emergency due to

⁵ See Nestor Pedro Sagués, *La interpretación judicial de la Constitución*, Second edition, Lexis Nexis, Buenos Aires 2006, p. 2; See Elisur Arteaga Nava, “La interpretación constitucional,” in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación Constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, Mexico 2005, Volume I, pp.108 and 109

⁶ As for instance it has been stated by Javier Pérez Royo, adding that: “the Constitution is a legal rule that refers at first instance to a political interpreter. Parliament is the political body that interprets the Constitution in the only way it knows how to do so: in a political sense. It is also a *privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will.*” That is precisely why its interpretation in the form of a law is imposed on the whole of society.” See Javier Pérez Royo, “La interpretación constitucional,” in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación Constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2005, Volume I, pp.889.

⁷ See José Vicente Haro, “La Interpretación de la Constitución y la Sentencia 1077 de la Sala Constitucional (Un comentario sobre los límites del juez constitucional), in *Revista de Derecho Constitucional*, No. 2, Editorial Sherwood, Caracas 2002, p.455. This author adds: “the first interpreter of the Constitution is not nor can it be the Constitutional Chamber. That high function corresponds constitutionally to Parliament in exercise of its power to legislate,” p.456.

the total rupture of constitutional continuity,” and began to set the path for “ceasing the usurpation.”⁸ A few days later, the same National Assembly by the Resolution of January 15, 2019 ratified “the declaration of usurpation of the Presidency of the Republic by Nicolás Maduro Moros and the reinstatement of the Constitution,”⁹ deciding “to formally declare the usurpation of the Presidency of the Republic by Nicolás Maduro Moros and, consequently, consider the *de facto* status of Nicolás Maduro as legally ineffective, and declare all the alleged actions of the Executive Branch to be null and void, pursuant to Article 138 of the Constitution. It also decided to “apply by analogy Article 233 of the Constitution, in order to fill in the absence of a president-elect while concurrently acting to restore the constitutional order based on Articles 333 and 350 of the Constitution and cause the ceasing of the usurpation by effectively forming a Transition Government and proceeding to organize free and transparent elections.”

All these political decisions interpreting the Constitution, about the role of the *President* of the National Assembly as President in Charge of the Republic, were later ratified by the *Statute that governs the transition to democracy in order to reinstate the Constitution of the Bolivarian Republic of Venezuela*, of February 5th, 2019, in which Article 14 sets forth the following: “Article 14. The President of the National Assembly is, according to article 233 of the Constitution, the legitimate President in Charge of the Bolivarian Republic of Venezuela. The decisions of the President in Charge are to be subjected to parliamentary control of the National Assembly according to article 187.3 of the Constitution.”¹⁰

After these formal constitutional interpretations issued by the National Assembly, applying by analogy Article 233 of the Constitution due to the absence of a legitimate president-elect that could be sworn in as President of the Republic for the 2019-2025

⁸ See: “Venezuela: Asamblea Nacional se declara "en emergencia" por jura de Nicolás Maduro. Su presidente, Juan Guaidó hizo un llamado a las fuerzas militares de Venezuela para que acompañen una eventual transición política, in Tele13, 10 de enero de 2019, available at: <http://www.t13.cl/noticia/mundo/venezuela-asamblea-nacional-se-declara-emergencia-juranicolasmaduro>

⁹ Published in *Gaceta Legislativa*, No. 2, January 23, 2019, pp.4-5 Also available at: https://asambleanacional-media.s3.amazonaws.com/documentos/gaceta/gaceta_1567432078.pdf

¹⁰ See the text of the *Statute for Transition* in *Gaceta Legislativa*, No. 1, February 6, 2019. Also available at https://asambleanacional-media.s3.amazonaws.com/documentos/gaceta/gaceta_1570546878.pdf

term, as of January 10, 2019, representative Juan Guaidó, in his capacity as president of the National Assembly, by mandate of the Constitution and without losing his capacity as President of the Assembly, became by law the Interim President of Venezuela (President in charge of the Presidency of the Republic of Venezuela) and, consequently, according to article 226 of the Constitution, at the same time, the Head of State and the Head of the National Executive of Venezuela, having the constitutional authority to direct, as such, the actions of the Government.,¹¹.

Moreover, on the same day, January 10th, 2019, the National Assembly proceeded to declare itself “in a state of emergency due to the complete breakdown of the constitutional thread,” proceeding, as the primary interpreter of the Constitution, to establish what it called “the path to the cessation of usurpation.”¹² This route was subsequently defined by the National Assembly through another Resolution, dated January 15, 2019, already mentioned, through which it pronounced, “*the declaration of the usurpation of the Presidency of the Republic by Nicolás Maduro Moros and the restoration of the validity of the Constitution.*”¹³

¹¹ See on this topic Allan R. Brewer-Carías, “Juan Guaidó is not ‘Self-Proclaimed.’ He assumed the Interim Presidency of the Republic of Venezuela as of January 10, 2019, in observance of the Constitution, due to the absence of a legitimately-elected President,” March 8th, 2019, available at: <http://allanbrewercarias.com/wp-content/uploads/2019/03/189.-Juan-Guaid%C3%B3-is-not-Self-Procalaimed.-March-2018.pdf>. See also the text in the book: Allan R. Brewer-Carías, *Crónica Constitucional de una Venezuela en las Tinieblas*, Ediciones Olejnik, Santiago, Buenos Aires, Madrid, 2019, pp.289-290 (Available at: <http://allanbrewercarias.com/wp-content/uploads/2019/04/188.-CRONICA-CONSTITUCIONAL-VZLA-EN-TINIEBLAS-Car%C3%A1tula-e-%C3%ADndice.pdf>); and in the book Allan R. Brewer-Carías, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas/Miami 2019, pp.227-233 (Available at: <http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf>).

¹² See the report “Venezuela: National Assembly declares itself ‘in emergency’ due to Nicolás Maduro’s swearing into office. Its president, Juan Guaidó, called on Venezuela’s military to accompany an eventual political transition, in *Tele13*, January 10, 2019, available at: <http://www.t13.cl/noticia/mundo/venezuela-asamblea-nacional-se-declara-emergencia-jura-nicolas-maduro>

¹³ Available at http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion. Also available *Gaceta Legislativa*, No. 2, January 23, 2019, pp.4-5.

In that *Resolution* of January 15, 2019, given the constitutional obligation of all citizens and officials provided for in article 333 of the Constitution,¹⁴ which compels them to cooperate in the *restoration of the effective validity of the Constitution* when it has been violated; given “the right to civil disobedience in the face of the usurpation of Nicolás Maduro,” which derives from article 350 of the Constitution;¹⁵ and given “the absence of a constitutional rule regulating the current situation,” again proceeded to interpret the Constitution, deciding to “*apply analogously Article 233 of the Constitution, in order to supplement the absence of an elected president* at the same time as taking action to *restore constitutional order based on articles 333 and 350 of the Constitution*, and, thus, make cease the usurpation, effectively conform the Transitional Government, and proceed to the organization of free and transparent elections.”¹⁶

In this way, the National Assembly, as the primary interpreter of the Constitution and as a body through which the people exercise their sovereignty, formally declared, “the usurpation of the Presidency of the Republic by Nicolás Maduro Moros, and, therefore, assumed as legally ineffective the *de facto* situation of Nicolás Maduro, deeming as null and void all the alleged acts emanating from the Executive Power, in accordance with article 138 of the Constitution.” This was ratified by the National Assembly in its Resolution of November 13, 2018, and in the text of the “*Statute governing the transition to democracy to restore the validity of the Constitution of the Bolivarian Republic of Venezuela*” of February 5, 2019, providing the following: “Article 9. By virtue of the *provisions* of the preceding article, the exercise of the Presidency of the Bolivarian Republic of Venezuela by Nicolás Maduro Moros or any other official or representative of the *de facto* regime is a usurpation of authority according to Article 138 of the

¹⁴ Article 333 states: “This Constitution will not lose its validity or cease to be observed by act of force or because it is repealed by any means, other than those provided for therein. In such an event, any citizen, whether or not vested with authority, shall have a duty to cooperate in the restoration of its effective validity.”

¹⁵ Article 350 states: “The people of Venezuela, faithful to their republican tradition, to their struggle for independence, peace, and freedom, will not recognize any regime, legislation, or authority that contradicts the democratic values, principles, and guarantees or undermines human rights.”

¹⁶ Available at http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion

Constitution.”¹⁷ As a result of the analogous application of Article 233 of the Constitution, *in the absence of a legitimately elected president to be sworn in as President of the Republic for the 2019-2025 term, the Assembly considered that the President of the National Assembly would be in charge of the Presidency of the Republic*; deciding, in the aforementioned Resolution of January 15, 2019, pursuant to Articles 333 and 350 of the same Constitution, to: *“Adopt, within the framework of the application of Article 233, measures to restore conditions of electoral integrity, so that, once the usurpation has ceased and the Transitional Government has been effectively established, proceed to the convening and holding of free and transparent elections within the shortest possible time, as provided for in the Constitution and other laws of the Republic and applicable treaties.”*¹⁸ Under this framework, adopted in a parliamentary act issued in direct and immediate implementation of the Constitution, it can be said that the National Assembly assumed the political process of restoring democratic order, ceasing the usurpation of the Presidency by Nicolás Maduro, establishing the framework for political transition, anticipating that the President of the National Assembly (Juan Guaidó), that is, of the Legislative Power, would take over the functions corresponding to him to take over the Presidency of the Republic, formally entrusting him, “to ensure compliance with legal regulations approved until the democratic order and the Rule of Law in the country are restored.”¹⁹

In that situation, moreover, as regards Mr. Maduro, in spite of being formally considered by the National Assembly as illegitimately “re-elected” President of the Republic for the

¹⁷ The text of the *Statute for Transition* is available at http://www.asambleanacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf. Also available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf

¹⁸ Available at http://www.asambleanacional.gob.ve/actos/_acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion

¹⁹ The National Assembly, one year later, on May 19, 2020, issued a “Resolution of Ratification for the support of the National Assembly to Juan Gerardo Guaidó Márquez as President In Charge of the Bolivarian Republic of Venezuela and the need for a National Emergency Government as a solution to the crisis of Venezuela” (*Acuerdo de ratificación del respaldo de la Asamblea Nacional a Juan Gerardo Guaidó Márquez como Presidente Encargado de la República Bolivariana de Venezuela y a la necesidad de un gobierno de emergencia nacional como solución a la crisis de Venezuela*).

2019-2025 term, in an election formally declared “non-existent,” and who, therefore, could not be sworn in for that period before the popular representation as ordered by the Constitution, did so illegitimately, not before the National Assembly, but before the Supreme *Tribunal* of Justice, controlled by the Executive Power; an act that had no value, and which was not accepted nor recognized by the National Assembly as well as by many of the national institutions and of the international community.²⁰

II. THE REACTION OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME TRIBUNAL AGAINST THE TRANSITION TOWARDS DEMOCRACY PROCESS, AND THE RECOGNITION ABROAD OF THE VALIDITY OF THE *TRANSTITION STATUTE*

1. *The reaction of the Constitutional Chamber of the Supreme Tribunal against the National Assembly: the ex-officio decision No. 3 of January 21, 2019*

In view of the important Resolution of the National Assembly of January 15, 2019, the Constitutional Chamber of the Supreme Tribunal of Justice, issued “judgment” No. 3 of January 21, 2019.²¹ This decision was issued as a kind of *unilateral declaration* rendered without any process, case or controversy, that is, without trial or parties, without anyone having asked for it, violating all the most fundamental rules and principles of due process of law, as set forth in article 49 of the Constitution.²² Needless to say, such decision, in terms of article 25 of the Constitution must be considered null and void and with no effect;²³ being a decision that could not be recognized in other

²⁰ Indeed, on the same day, January 10, 2019, the Permanent Council of the Organization of American States, decided “not to recognize the legitimacy of Nicolás Maduro’s regime,” by approving the proposal made by Argentina, Chile, Colombia, Costa Rica, the United States, Perú and Paraguay, approved with the favorable vote of Jamaica, Panamá, Paraguay, Peru, The Dominican Republic, Santa Lucía, Argentina, Bahamas, Brazil, Canada, Colombia, Costa Rica, Ecuador, Grenada, Guatemala, Guyana, Honduras, and Haití. See information in *El País*, January 11, 2019, at https://elpais.com/internacional/2019/01/10/estados_unidos/1547142698_233272.html. See *El Nacional*, January 10, 2019, at http://www.el-nacional.com/noticias/mundo/oea-aprobo-resolucion-para-desconocer-juramentacion-maduro_265882

²¹ See the references in the report: “SJ [Supreme Tribunal of Justice] declares the current Board of Directors of the National Assembly null and void” *Runrunes.com*, January 21, 2019, at <https://runrun.es/noticias/370711/tsj-declara-nula-actual-junta-directiva-de-asamblea-nacional/>

²² Article 49 of the Constitution states, among many other provisions that: “All judicial and administrative actions shall be subject to due process, therefore:1. Defense and legal assistance are inviolable rights at all stages and levels during the investigation and proceeding [...]”

²³ “Article 25: Any act on the part of the Public Power that violates or encroaches upon the rights guaranteed by this Constitution and by law is null and void, and the public employees ordering or

foreign jurisdictions, like for instance, in the United States, where in order for a court to recognize as a comity a foreign judicial ruling, as has been decided by the US Supreme Court since 1895, the courts must assure that the foreign judgement is issued by an independent and autonomous judicial tribunal, respecting the principles and rules of due process and the right to defense.²⁴

The decision, in fact, was rendered *ex officio*, and relied only on a previous ruling issued by the same Chamber two years before (No. 2 of January 11, 2017), whereas the same Chamber had declared the National Assembly in “contempt,” and had provided that the “action of the National Assembly and any person or individual contrary to what is decided here will be null and void.” Starting from there, and considering that it was “a public, flagrant, and communicative fact” that the National Assembly had disrespected that ruling by engaging in an alleged “repeated constitutional omission,” the Chamber purely and simply stated: “That the National Assembly has no valid Board of Directors, incurring the invalid ‘Board’ elected on January 5, 2019 (like those unconstitutionally ‘appointed’ in 2017 and 2018), in usurpation of authority, so all its acts are void, with absolute nullity, in accordance with the provisions of article 138 of the Constitution.²⁵ It is thus declared.”

This declaration, of course, has no sense nor effect, *because* the Legislative Power according to the Constitution, corresponds exclusively to the elected National Assembly, not being possible to consider that it is a usurped authority. In its pronouncement²⁶ (Decision No.3 of January 21, 2019),²⁷ the Chamber further “declared” that the National Assembly’s Resolution of January 15, 2019, “implies an act of force that seeks to repeal

implementing the same shall incur criminal, civil and administrative liability, as applicable in each case, with no defense on grounds of having followed the orders of a superior.”

²⁴ See US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895). Available at: <https://supreme.justia.com/cases/federal/us/159/113/>

²⁵ Article 138 of the Constitution: “An usurped authority is of no effect, and its acts are null and void.”

²⁶ See the references in the report: “SJ [Supreme Tribunal of Justice] declares the current Board of Directors of the National Assembly null and void” *Runrunes.com*, January 21, 2019, at <https://runrun.es/noticias/370711/tsj-declara-nula-actual-junta-directiva-de-asamblea-nacional/>

²⁷ See the references in the report: “SJ [Supreme Tribunal of Justice] declares the current Board of Directors of the National Assembly null and void” *Runrunes.com*, January 21, 2019, at <https://runrun.es/noticias/370711/tsj-declara-nula-actual-junta-directiva-de-asamblea-nacional/>

the constitutional text (Article 333)²⁸ and all the consequential acts of the National Public Power,” which, the Chamber said, forced it “*to act ex officio* for the protection of the fundamental text, in accordance with *Articles 266.1, 333, 334, 335, and 336, the latter of Title VIII (Regarding the Protection of the Constitution).*”

Conversely, the National Assembly acted interpreting the Constitution in order to restore its validity, and it is not possible to consider that its Resolution was an “act of force.” It was an act issued according to the Constitution, seeking to restore it, due to the act of force of usurping the Presidency of the Republic performed by Nicolás Maduro after January 10, 2019, and the seizure of legislative functions by the Constitutional Chamber purporting to neutralize the National Assembly.

The Chamber also considered it “unheard of” to seek to apply “analogically” the clauses contained in Article 233 of the Constitution in order to justify the alleged absolute lack of the President of the Republic,” considering that it could not:

“add to these clauses, another ‘accommodative’ clause, through a purported legal fiction, to determine that there were no elections in our country on May 20, 2018, and that from the results of the elections convened by the Constituent Power and the Electoral Power, that no Head of Government was elected.

Such clauses are of strict law and may not be modified and/or expanded analogously, without violating the Constitution. It is thus decided.”

The Constitutional Chamber, however, ignored that what the National Assembly had done in making that Resolution, had been precisely to interpret article 233 of the Constitution analogously, without “adding” to said rule any alleged additional “clause.” Simply, as the first interpreter of the Constitution and, in particular, because it was called to apply this rule, the National Assembly interpreted it analogously, applying it to the situation, to resolve the constitutional crisis affecting the country, in execution of what had already been agreed upon since May 22, 2018, that is, to “declare as non-existent the farce carried out on May 20, 2018,” “not accepting the alleged results announced by the National Electoral Council and, in particular, the alleged election of Nicolás Maduro Moros as President of the Republic, who should be regarded as a

²⁸ Article 333 of the Constitution says, “This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because or repeal in any manner other than as provided for herein. In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect”.

usurper of the office of the Presidency of the Republic,” and “to ignore any null and illegitimate acts of proclamation and swearing in under which it is intended to vest the citizen Nicolás Maduro Moros as the alleged president of the Bolivarian Republic of Venezuela for the 2019-2025 term.”²⁹

The Constitutional Chamber, cutting off the right of popular representation to apply and interpret the Constitution, and in particular, to invoke article 350 (that gives the people of Venezuela the essential right to “disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights”), it declared it “absolutely impertinent,” ending its “declarative argument” stating that “the National Assembly cannot assume the role of a Supreme Tribunal of Justice to declare a purported usurpation, since it would imply the characterization of the conduct described in Articles 138 and 139, in accordance with Articles 136 and 137, all of the Constitution. It is thus declared.” In this way, the Chamber again ignored the essential power of the National Assembly to be the original body for the interpretation of the Constitution,³⁰ a body through which the people exercise their sovereignty.

But the declaration of the Constitutional Chamber did not stop there. With regard to the National Assembly Resolution of January 15, 2019, it declared that it allegedly violated “Articles 130, 131, and 132 of the Constitution, in particular the duty that ‘everyone’ has to comply with and abide the Constitution, the laws, and other acts that the bodies of the Public Power order in the exercise of their duties,” because they did not recognize “the Judiciary by disregarding its judgments, the Electoral Power that conducted the

²⁹ Text of the Resolution of May 22, 2018 (ratified by National Assembly in *Legislative Gazette* no. 8 of June 5, 2018, on pages 6-7) available at http://www.asambleanacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica . Similarly, in the review “National Assembly does not accept the results of 20M and declares Maduro a ‘usurper,’[”] in *NTN24*, May 22, 2018, available at <http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas>

³⁰ As mentioned before, and as Javier Pérez Royo stated: “The first interpreter of the Constitution and the most important, by far, is the legislator. The legislator is the normal, ordinary interpreter of the Constitution. Consequently, the Constitution is a legal rule that refers at first instance to a political interpreter. Parliament is the political body that interprets the Constitution in the only way it does: in a political register. It is also a privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will.” See Javier Pérez Royo, “La interpretación constitucional,” in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, México 2005, Volume I, pp. 889.

electoral process which elected, proclaimed, and swore in” Mr. Maduro as President “for the 2019-2025 term,” and “the Executive Power by ignoring the investiture of its holder and, most seriously, the sovereignty holder, the people, who made its choice in transparent elections, through universal, direct, and secret suffrage,” which had “elected” the *Constituent Assembly* “who was the convener of the aforementioned presidential elections.”

As already argued, on the contrary, it was the National Assembly as the legitimate representative of the people, the one that declared the unconstitutionality of the Constituent Assembly, the usurpation by it of the attributions of the Electoral Power, the non-existence of the purported election of Nicolás Maduro in May 2018, and the usurpation of the Presidency of the Republic by Maduro since January 10, 2019.

2. The violation by the decision No. 3 of the Constitutional Chamber of the most elemental principles of judicial review

This “decision” of the Constitutional Chamber cannot be considered as a valid and effective judicial review ruling, being contrary to what the Venezuelan constitutional and legal standard establishes on matters of judicial review. In fact, according to the Venezuelan Constitution (Article 336), the Constitutional Chamber of the Supreme Court has the power to exercise judicial review *of* constitutionality over the laws and the other acts of the National Assembly having the rank of law or issued in direct and immediate execution of the Constitution. However, those judicial review powers can only be exercised by the Constitutional Chamber, as imposed by the Organic Law on the Supreme Tribunal of Justice,³¹ at the request of an interested party (Article 89), through the filing of a “popular action of unconstitutionality” (*actio popularis*) (Article 32), with which a process of unconstitutionality against a law or other acts by the State can be initiated. That is, in Venezuela, as is the general trend on matters of judicial review in comparative law, judicial review of legislation can only take place at the request of an interested party by means of a popular action, in a case and controversy judicial process, with all the due process of law guaranties.³² The only exception to this principle

³¹ See in *Official Gazette* No 39.483 of August 9, 2010.

³² See Allan R. Brewer-Carías, “The Citizen’s Access to Constitutional Jurisdiction: Special Reference to the Venezuelan System of Judicial Review,” in *Cuadernos de Soluções Constitucionais*, No.4, Associação Brasileira de Constitutionistas Democratas, ABCD, Malheiros Editores, São Paulo 2012,

is the possibility for the Constitutional Chamber to exercise judicial review control in an *ex officio* manner, or at its own initiative, only of the Executive decrees declaring states of exception (Article 366.6).³³

So, there is no other way that the Constitutional Chamber of the Supreme Tribunal of Justice may initiate, *ex officio*, a judicial process for judicial review over any act of the State, and much less, in no way can the Constitutional Chamber purport to annul a State's acts without a case and controversy process, and without giving notice to and hearing the interested State entity in a judicial procedure in which the rules of due process of law rules must be respected.

So that was the case of Decision No. 3, of January 21, 2019, which was issued, *ex officio*, only based on a previous ruling issued by the same Chamber two years before, No. 2 of January 11, 2017, that voided all the actions of the National Assembly for "contempt" of court. So, starting from there, the Constitutional Chamber, considering that it was "a public, flagrant, and communicative fact" that the National Assembly had disrespected that 2017 ruling by incurring an alleged "repeated constitutional omission," it simply stated: "That the National Assembly has no valid Board of Directors, incurring the invalid 'Board' elected on January 5, 2019 (like those unconstitutionally 'appointed' in 2017 and 2018), in usurpation of authority, so all its acts are void, with absolute nullity, in accordance with the provisions of Article 138 of the Constitution. It is thus declared."

But the declaration of the Constitutional Chamber did not stop there. With regard to the National Assembly Resolution of January 15, 2019, it declared that it allegedly violated "Articles 130, 131, and 132 of the Constitution, in particular, the duty that 'everyone' has to comply with and abide by the Constitution, the laws, and other acts that the bodies of the Public Power order in the exercise of their duties," because they did not recognize "the Judiciary by disregarding its judgments, the Electoral Branch that conducted the

pp.13-29, available at <http://allanbrewercarias.com/wp-content/uploads/2012/06/II-4-711.-THE-CITIZENS-ACCES-TO-CONSTITUTIONAL-JURISDICTION-Round-Table-IACL-Brasil-2009-Lecture.doc.pdf>.

³³ See Allan R. Brewer-Carías, "Judicial Review in Venezuela," in *Duquesne Law Review*, Volume 45, NO.3, Spring 2007, pp.439-465; available at <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab241efb849fea8/Content/II,%204,%20502.%20Judicial%20Review%20in%20Venezuela.%202006%20Duquesne%20Nov.%202006%20Revised%20version.pdf>.

electoral process that elected, proclaimed, and swore in” Mr. Maduro as President “for the 2019-2025 term,” and “the Executive Branch, by ignoring the investiture of its holder and, most seriously, the sovereignty holder, the people, who made its choice in transparent elections, through universal, direct, and secret suffrage,” which had “elected” the Constituent Assembly “who was the convener of the aforementioned presidential elections.”

On this basis, the Chamber “declared” that the National Assembly’s Resolution of January 15, 2019, allegedly “implies an act of force that seeks to repeal the constitutional text (Article 333) and all the consequential acts of the National Public Power,” all of which, the Chamber said, forced it “*to act ex officio* for the protection of *the* fundamental text, in accordance with Articles 266.1, 333, 334, 335, and 336, the latter of Title VIII (Regarding the Protection of the Constitution). It is thus decided.”

The Chamber also considered it “unheard of” to seek to apply “by analogy” the causes contained in Article 233 of the Constitution in order to justify the alleged absolute lack of the President of the Republic,” considering that it could not:

“add to these causes, another ‘accommodative’ cause, through a purported legal fiction, to determine that there were no elections in our country on May 20, 2018, and that from the results of the elections convened by the Constituent and the Electoral Branches, that no Head of Government was elected.

Such clauses are of strict law and may not be modified and/or expanded analogously, without violating the Constitution. It is thus decided.”

The Constitutional Chamber, however, ignored that what the National Assembly had done in sanctioning that January 15, 2019 Resolution, had been precisely to interpret Article 233 of the Constitution by analogy, without “adding” to said rule any alleged additional “clause.” Simply, as *the first interpreter of the Constitution and, in particular, because it was called to apply this rule, the National Assembly interpreted it analogously, applying it to the situation, in order to resolve the constitutional crisis affecting the country, in execution of what had already been agreed upon since May 22, 2018*, resolving:

[To] “*declare* as non-existent the farce carried out on May 20, 2018,”

[Not to *accept*] “the alleged results announced by the National Electoral Council and, in particular, the alleged election of Nicolás Maduro Moros as President of the Republic, who should be regarded as a usurper of the office of the Presidency of the Republic,” and

“to ignore any null and illegitimate acts of proclamation and swearing in under which it is intended to vest citizen Nicolás Maduro Moros as the alleged president of the Bolivarian Republic of Venezuela for the 2019-2025 term.”³⁴

The Constitutional Chamber, cutting off the right of popular representation to apply and interpret the Constitution, when referring to Article 350 thereof, declared it “absolutely impertinent,” ending its “declarative argument” by stating that “the National Assembly cannot assume the role of a Supreme Tribunal of Justice to *declare* a purported usurpation, since it would imply the characterization of the conduct described in Articles 138 and 139, in accordance with Articles 136 and 137, all of the Constitution. It is thus declared.” In this way, the Chamber again ignored the essential power of the National Assembly to be the original body for the interpretation of the Constitution,³⁵ a body through which the people exercise their sovereignty.

3. *The reaction of the Constitutional Chamber of the Supreme Tribunal based on its previous Decisions holding the National Assembly, as an institution, in contempt, and sanctioning it by annulling all its acts, present and future*

The basis of the Constitutional Chamber No. 3 of January 21, 2019 related to the previous decision No. 2 of January 11, 2017, is above all, unconstitutional, because in Venezuela no contempt measure is admissible against institutions and can only be imposed upon individuals or public servants in a criminal procedure. An institution like the National Assembly, as an organ of the State integrated by the representatives of the people, cannot be declared in contempt, and certainly cannot be “sanctioned” for contempt, and in any event, there is no type of sanction of a declaration that all its acts, present and future, are null and void, which would otherwise ignore the very existence of the National Assembly, as the representative of the people.

³⁴Text of the Resolution of May 22, 2018 available at http://www.asambleanacional.gob.ve/actos/_acuerdo-reiterando-el-desconocimiento-de-la-farsa-realizada-el-20-de-mayo-de-2018-para-la-supuesta-eleccion-del-presidente-de-la-republica . Similarly, in the review “National Assembly does not accept the results of 20M and declares Maduro a ‘usurper,’” in *NTN24*, May 22, 2018, available at <http://www.ntn24.com/america-latina/la-tarde/venezuela/asamblea-nacional-desconoce-resultados-del-20m-y-declara-nicolas>

³⁵ As mentioned before, and as Javier Pérez Royo stated: “The first interpreter of the Constitution and the most important, by far, is the legislator. The legislator is the normal, ordinary interpreter of the Constitution. Consequently, the Constitution is a legal rule that refers in first instance to a political interpreter. Parliament is the political body that interprets the Constitution in the only way it does: in a political register. It is also a privileged interpreter, insofar as it is the democratically elected representative of the citizens and, therefore, expresses the general will.” See Javier Pérez Royo, “La interpretación constitucional,” in Eduardo Ferrer Mac Gregor (Coordinator), *Interpretación constitucional*, Universidad Nacional Autónoma de México, Editorial Porrúa, Mexico 2005, Volume I, pp. 889.

Article 122 of the Organic Law of the Supreme Tribunal of Justice expressly provides that the Supreme Tribunal can only impose *fines* on those *individuals* or *public officers* that refuse to comply with its orders, notwithstanding the criminal, civil, administrative or disciplinary sanctions that could be applied by the competent authorities.

As for contempt, in Venezuela the matter is regulated in article 485 of the Penal (Criminal) Code, providing *sanctions of fines and arrest* from five to thirty days to be applied on those individuals who have disobeyed an order legally issued by a competent authority. Some special laws, like the Organic Protection of Fundamental Rights Law (*amparo*), establish a sanction of six to fifteen years of prison to be imposed on one who breaches a judicial order for constitutional protection. Therefore, in Venezuela, the sanction of contempt can only be imposed by a criminal court in a criminal proceeding, and it can only be imposed upon an individual or a public official and not upon an institution (such as the National Assembly). Despite of it, it must be mentioned that through ruling No. 145 of June 18, 2019 (Case: *Joe Taouk, Jajaa*), the Constitutional Chamber issued a “binding interpretation,” by which all *amparo* judges were assigned jurisdiction to impose such criminal punishment, under the control of the Chamber.³⁶

Before such interpretation, the situation was that no court acting in civil, administrative or constitutional proceedings had the power to impose a sanction of contempt, upon an individual or a public official who refuses to comply with an order of that court. In such cases what the specific court was obligated to do was to send the case, regarding the specific individuals or public officials that have refused to comply, to the competent criminal court, according the Penal Code and the Criminal Procedure Code.³⁷

³⁶ See in *Revista de Derecho Público*, No.158-159, enero-junio 2019, Editorial Jurídica Venezolana, Caracas 2019, pp.332 ss.

³⁷ It must be noticed that before the aforementioned binding interpretation, the doctrine of the Supreme Tribunal considering that sanctions for contempt could only be imposed by a criminal court in criminal proceedings was constant before and after the enactment of the Constitution of 1999, expressed, for instance, in the following decisions: No. 789 of the Politico-Administrative Chamber of the Supreme Court of Justice dated November 7, 1995 (See in *Revista de Derecho Público*, No.63-64 (julio-diciembre 1995), Editorial Jurídica Venezolana, Caracas 1995, pp.370-373. Available at: <http://allanbrewercarias.com/wp-content/uploads/2017/01/1995-REVISTA-63-64.pdf>); No.895 of the Constitutional Chamber of the Supreme Tribunal of Justice dated May 31, 2001 in the case of “*Aracelis del Valle Urdaneta*,” (Available at: <http://tsj.gob.ve/decisiones/scon/mayo/895-310501-00-2788.HTM>.. See the quotation in Allan R. Brewer-Carías, “La ilegítima e inconstitucional revocación del mandato

In any case, in addition, if the failure to comply by an individual or a public official relates to a judicial order issued by the Supreme Tribunal, according to article 122 of its own Organic Law of the Supreme Tribunal of Justice, and notwithstanding the criminal, civil, administrative or disciplinary sanctions that could be applied, the Supreme Tribunal can impose fines on individuals or public officials that refuse to comply with its orders. Such sanctions, in any case, can only be imposed upon individuals or public officials, and not upon an institution (such as the National Assembly).³⁸

4. The decision No. 3 of January 21, 2019 of the Constitutional Chamber within the general pattern of conduct of the Constitutional Chamber against the National Assembly

As I already referred, the Constitutional Chamber has been instrumental for the authoritarian regime in Venezuela for many years,³⁹ trying to neutralize the action of the

popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento “sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarano Spisso y Daniel Ceballos),” in *Revista de Derecho Público*, No 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp.185-187. Available at: <http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653125-txt.pdf>), and No. 74 of the Constitutional Chamber of the Supreme Tribunal of Justice dated January 24, 2002 (Available at: <http://tsj.gob.ve/decisiones/scon/enero/74-240102-01-0934.HTM>. See the quotation in Allan R. Brewer-Carías, “La ilegítima e inconstitucional revocación del mandato popular de Alcaldes por la Sala Constitucional del Tribunal Supremo, usurpando competencias de la Jurisdicción penal, mediante un procedimiento “sumario de condena y encarcelamiento. (El caso de los Alcaldes Vicencio Scarano Spisso y Daniel Ceballos),” in *Revista de Derecho Público*, No 138 (Segundo Trimestre 2014, Editorial Jurídica Venezolana, Caracas 2014, pp.185-187. Available at: <http://allanbrewercarias.com/wp-content/uploads/2017/01/9789803653125-txt.pdf>).

³⁸ And even in very controversial cases in which the Constitutional Chamber of the Supreme Tribunal of Justice violated the competencies of the Criminal Jurisdiction and assumed and usurped in an unconstitutional way such competency in order to directly impose criminal sanctions for contempt established in the Amparo Proceeding Law (*Ley Orgánica de Amparo sobre derechos y garantías constitucionales*) against some Mayors that have disobeyed its orders, they were imposed only on the public officials and of course not on the Municipal Executive (*Alcaldía*) institution. See *Idem*.

³⁹ See among others: Allan R. Brewer-Carías, *Crónica sobre la “In” Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*. Colección Instituto de Derecho Público, Universidad Central de Venezuela, No.2, Editorial Jurídica Venezolana, Caracas 2007. Available at: <http://allanbrewercarias.com/wp-content/uploads/2007/09/113.-CRONICA-SOBRE-LA-IN-JUSTICIA-07-07-2017-2.pdf>; “El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009),” in *Revista de Administración Pública*, No. 180, Madrid 2009, pp.383-418. Available at: <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/BREWER-CARIAS.pdf>; “El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009),” in *IUSTEL, Revista General de Derecho Administrativo*, No. 21, June 2009, Madrid, ISSN-1696-9650. Available at: [17](http://allanbrewercarias.com/wp-content/uploads/2009/07/607.-599.-JUSTICIA-</p></div><div data-bbox=)

National Assembly, by considering all its actions null and void. In that context, Decision No. 3 of January 21, 2019⁴⁰ was not the first judgement issued by the Chamber in this sense. It was issued, as already mentioned, only based in a reference it made to a previous judgment No. 2 of January 11, 2017,⁴¹ which declared null and void both the act of the Assembly's constitution for its second annual period held on of January 5, 2017, and the Resolution of January 9, 2017 that declared the absolute lack of a President. Decision No.2 of January 11, 2017 stated that: "Any action of the National Assembly and of anybody or individual against what is decided herein shall be null and void of any validity and legal effectiveness, without prejudice to the liability to which there may be in place."

With such a declaration, ratified in the same Constitutional Chamber decision No. 3 of January 11, 2017,⁴² it sought to definitively take away from the people their most elementary right in a Rule of Law, that is, to exercise sovereignty through their representatives. This was all again confirmed in another judgment No. 7 of January 26, 2017, whereas the same Chamber again declared the absolute nullity and unconstitutionality of all the actions of the Assembly.⁴³

The above mentions serve to highlights how, since 2016, as has been mentioned before, the Supreme Tribunal has sought to strip the National Assembly of all its legislative constitutional powers, having also nullified its powers of political and

CONSTITUCIONAL-Y-DEMOLICI%C3%93N-DEL-ESTADO-DE-DERECHO.-Seminario-EGE-marzo-2009.doc.pdf .

⁴⁰ Available at <http://historico.tsj.gob.ve/decisiones/scon/enero/194892-03-11117-2017-17-0002.HTML>

⁴¹ Available at <http://historico.tsj.gob.ve/decisiones/scon/enero/194891-02-11117-2017-17-0001.HTML>.

⁴² Available at <http://historico.tsj.gob.ve/decisiones/scon/enero/194892-03-11117-2017-17-0002.HTML>.

⁴³ Available at <http://historico.tsj.gob.ve/decisiones/scon/enero/195578-07-26117-2017-17-0010.HTML>.

administrative control,⁴⁴ and annulled almost all the laws adopted by the National Assembly.⁴⁵

The National Assembly response to such abuse of power was to reject and not recognize the Constitutional Chamber's rulings rendered against the popular representation, considering that, despite being rulings of the Supreme Tribunal, they cannot unlawfully change the text of the Constitution, nor can its rules be repealed by such Chamber. Moreover, as the latter has indeed happened through many of these Chamber's rulings, the National Assembly, as stated in Article 333 of the Constitution, has assumed "the duty to cooperate in the restoration of its effective validity." Congressmen who were elected represent the popular sovereignty and they have the duty, on behalf of the people who elected them, to reject the illegitimate mutations and changes to the Constitution, by doing what is in their hands within their powers to restore its effective validity.

The National Assembly has therefore assumed the duty to confront not only the illegitimate Executive Power, but the Constitutional Chamber of the Supreme Tribunal controlled by the latter, and is not obliged to abide any of its decisions that are in violation of the Constitution.⁴⁶ In the structure of the Constitution, there is no body of the

⁴⁴ See Allan R. Brewer-Carías, "El desconocimiento de los poderes de control político del órgano legislativo sobre el gobierno y la administración pública por parte del juez constitucional en Venezuela", in *Opus Magna Constitucional, Tomo XII 2017 (Homenaje al profesor y exmagistrado de la Corte de Constitucionalidad Jorge Mario García Laguardia*, Instituto de Justicia Constitucional, Adscrito a la Corte de Constitucionalidad, Guatemala, 2017, pp.9-12; 20-23. Available at: <http://allanbrewercarias.com/wp-content/uploads/2017/06/891.-desconocim.-libro-h.Garcia-LaG.pdf>

⁴⁵ See the comments in Allan R. Brewer-Carías, "El fin del Poder Legislativo: La regulación por el Juez Constitucional del régimen interior y de debates de la Asamblea Nacional, y la sujeción de la función legislativa de la Asamblea a la aprobación previa por parte del Poder Ejecutivo," in *Revista de Derecho Público*, No.145-146, Enero-Junio 2016, Editorial Jurídica Venezolana, Caracas 2016, pp.428-443; Available at: <http://allanbrewercarias.com/wp-content/uploads/2017/01/art.-4-879.-Fin-Poder-legislativo-sujeci%C3%B3n-al-Poder-Ejecutivo-RDP-145-146-.2016.docx.pdf> ; and in Allan R. Brewer-Carías, *La dictadura judicial y la perversión del Estado de derecho. El Juez Constitucional y la destrucción de la democracia en Venezuela*. Editorial Jurídica Venezolana, Caracas 2016, pp.259-276. Available at: <http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf>. Carlos Ayala and Rafael J. Chavero Gazdik, "*El libro negro del TSJ de Venezuela: Del secuestro de la democracia y la usurpación de la soberanía popular a la ruptura del orden constitucional (2015-2017)*" Editorial Jurídica Venezolana, Caracas 2017, pp.101-103; 215-217; 354-356

⁴⁶ On this, see the work of José Amando Mejía, "El deber de la Asamblea Nacional de desconocer a la Sala Constitucional" in Teodilo López Méndez, *Siglo XXI. La Democracia del Siglo XXI*, available at:

Government other than the National Assembly itself that can assure the enforcement and imposition of its decisions adopted in accordance with the Constitution and on behalf of the popular will. The National Assembly has therefore been compelled to formally declare that the Constitutional Chamber's unconstitutional judgments and the unconstitutional decisions of the Executive Power do not have and cannot have any legal effect.⁴⁷

This was precisely the case with judgment No. 9 of March 1, 2016, by which that Chamber “intended to limit the constitutional powers of the National Assembly,” and which the National Assembly rejected by Resolution dated March 3, 2016,⁴⁸ not just for

<https://teodulolopezmelendez.wordpress.com/2016/04/24/el-deber-de-la-asamblea-nacional-de-desconocer-a-la-sala-constitucional/>

⁴⁷ It is inescapable to cite, as a precedent, the National Assembly Resolution of March 22, 2007 (*Official Gazette* No.38,635 of March 1, 2007, which left *without any legal effect* an unconstitutional judgment of Constitutional Chamber No. 301 of February 27, 2007 (Case: *Adriana Vigilanza and Carlos A. Vecchio*) published in *Official Gazette* No 38,651 of March 23, 2007. The Resolution was preceded by the following motives: “That, as provided for in article 187 of the Constitution of the Bolivarian Republic of Venezuela, ‘It is for the National Assembly to legislate in matters of national jurisdiction and on the functioning of the various branches of the National Power’, except for the exception provided for in Article 203 ejusdem; // It is for the National Assembly to exercise supervisory functions over the Government and the National Public Administration under the terms enshrined in the Constitution and in the laws; //That ‘Any act dictated in the exercise of the Public Power that violates or impairs the rights guaranteed by this Constitution and the Law is null and void...,’ as established by article 25 of our Constitution; // That ‘All usurped authority is ineffective and its acts are null and void’, in accordance with article 138 of our constitutional text; // That the content of that judgment shows an analysis and decision that, exceeding its functions and invading the privative powers of the National Assembly, ‘constitutionally interprets the meaning and scope of the proposition contained in Article 31 of the Income Tax Act...’ substantially altering the content of the article, its scope, and legal consequences, even if the nullity of that article was not denounced and thus expressly stated in numeral 2 of the decision.” Based on these Recitals, the Assembly agreed: *First*: To consider null and void number 2 of the judgment of the Constitutional Chamber of the Supreme Tribunal of Justice no. 01-2862, dated February 27, 2007 and published in the *Official Gazette* of the Bolivarian Republic of Venezuela No. 38,635 of Thursday March 01, 2007, as well as the reasoning with which it was supported and, consequently, [left] without any legal effect. // *Second*: To urge the Venezuelan people, and in particular the taxpayers, as well as the National Integrated Customs and Tax Administration Service (Seniat), not to apply number 2 of the operative part of said ruling, as it is considered to be a violating act of the Constitution of the Bolivarian Republic of Venezuela.” See, on that judgment No. 301 of 27 February 2007, my comments in Allan R. Brewer-Carías, “El juez constitucional en Venezuela como legislador positivo de oficio en materia tributaria,” in *Revista de Derecho Público*, No.109 Enero-Marzo 2007, Editorial Jurídica Venezolana, Caracas 2007, pp.193-212. Available at: <http://allanbrewercarias.com/wp-content/uploads/2007/08/2007-REVISTA-109.pdf>

⁴⁸ See “Asamblea Nacional aprobó acuerdo de rechazo contra sentencia del TSJ”, at *Infome 21.com*. March 1, 2016, at <http://infor-me21.com/politica/asamblea-nacional-aprobo-acuerdo-de-rechazo-contra-sentencia-del-tsj>.

formal reasons,⁴⁹ but for the unconstitutional content of the judgment, stating, among other reasons:

(xi) That “the Constitutional Chamber’s judgment No. 9 of March 1, 2016, in attempting to take away the constitutional powers of parliament because of the change that has democratically taken place in the parliamentary majority, represents a blow to popular *sovereignty*.”

(xii) That “this judgment is part of a sequence of decisions of the Supreme Tribunal of Justice aimed at cutting off the integrity and functioning of the National Assembly, as well as not accepting the institutional consequences of the outcome of the elections of December 6, 2016.”

On the same Resolution of March 3, 2016, the National Assembly finally resolved to “Categorically reject the alleged judgment No. 9 of March 1, 2016, of the Constitutional Chamber of the Supreme Tribunal of Justice, as non-existent for violating Article 40 of the Organic Law of the Tribunal Supreme Tribunal of Justice.”

III. THE STATUTE GOVERNING THE TRANSITION TOWARDS DEMOCRACY TO RESTORE THE VALIDITY OF THE CONSTITUTION ENACTED BY THE NATIONAL ASSEMBLY ON FEBRUARY 5TH, 2019, ITS BASIC RULE FOR THE PROTECTION OF THE INTERESTS OF THE REPUBLIC ABROAD AND THE REACION OF THE CONSTITUCIONAL CHAMBER OF THE SUPREM TRIBUNAL

In any event, in view of the irrelevance of what was unconstitutionally “declared” *ex officio* by the Constitutional Chamber, without trial or proceeding in the above mentioned judgment No. 3 of January 21, 2019, the National Assembly, based on its earlier Resolution dated January 15, 2019, pursuant to articles 7 and 333 of the Constitution,⁵⁰ and for the purpose of “establishing the regulatory framework governing

⁴⁹ The President of the National Assembly, Henry Ramos Allup, in addition, in rejecting sentence No.9 of March 1, 2016, highlighted the fact that “The TSJ invalidated its own sentence by a lack of signatures of the magistrates,” Ramos Allup said in the legislative plenary debate./ The President of the National Assembly (AN) stressed that the ruling was signed by four judges of the Constitutional Chamber, instead of at least five of the seven judges who make up the chamber./ “Therefore, this judgment does not exist,” added Ramos Allup, who warned that “the country will not accept” that now, seeing the error, the TSJ will issue a correction of the ruling with the signatures required for its validity.” See *Grupo Fórmula*, March 3, 2016, <http://www.radioformula.com.mx/no-tas.asp?Idn=575332&idFC=2016> . See also: Henry Ramos: “La sentencia número 9 del TSJ no existe” <http://www.eluniversal.com/nacional-y-politica/> . In reality, the important thing is that the fact that there appear on the website of the Supreme Tribunal the names of all seven judges (*Gladys M. Gutiérrez Alvarado, Arcadio de Jesús Delgado Rosales, Carmen Zuleta de Merchán, Juan José Mendoza Jover, Calixto Ortega Ríos, Luis Fernando Damiani Bustillos, Lourdes Benicia Suárez Anderson*) at the end of the judgment, without any indication of whether some of them rejected it or not, and only an indication that the last three did not sign it, presumes that they participated in the debate and consideration of the judgment, which was inadmissible. Available at <http://historico.tsj.gob.ve/decisiones/scon/mar-zo/185627-09-1316-2016-16-0153.HTML>

⁵⁰ Text available at http://www.asambleanacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-

the democratic transition in the Republic,” on February 5, 2019 enacted the *Transition Statute*⁵¹ as the first fundamental decision to conduct the democratic transition process.⁵²

1. Nature of the Transition Statute as a legislative act passed by the National Assembly as Legislator

Given these objectives, the *Transition Statute* was issued with the purpose to “establish[ing] the normative framework that rules the democratic transition of the Republic (art. 1), and particularly, as set forth in its article 6, with the following objectives relating to the institutional reorganization of the Republic:

“1. Regulate the actions of the different branches of the Public Power [branches of government] during the democratic transition process in accordance with article 187, number 1 of the Constitution,⁵³ allowing the National Assembly to initiate the process of restoring constitutional and democratic order.”

2. Establish the guidelines according to which the National Assembly will protect, before the international community, the rights of the Venezuelan government and people, until a provisional government of national unity is formed.”

That is why, the *Transition Statute* was formally qualified to be a “normative act,” (article 4), having the rank and value of law, issued “in direct and immediate implementation of Article 333 of the Constitution of the Bolivarian Republic of Venezuela,” being as its article 4 points out, “of mandatory compliance for all public authorities and officials, as well as for individuals” (article 4).

venezuela-282.pdf . Also available at https://www.prensa.com/mundo/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282_LPRFIL20190205_0001.pdf

⁵¹Text available at http://www.asambleanacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucionde-la-republica-bolivariana-de-venezuela-282.pdf . The *Transition Statute* was published in the *Legislative Gazette*, No. 1 of February 6, 2019. Available at: http://www.asambleanacional.gob.ve/documentos/gaceta/gaceta_1570546878.pdf. See comments to said Statute and its constitutional basis in Allan R. Brewer-Carías, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, Iniciativa Democrática España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 239 ff. (Available at: <http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf>)

⁵² Article 7 refers to the supremacy of the Constitution and article 333 establishes the duty of any citizen and authorities, to “cooperate in the restoration of its effective validity.”

⁵³ Article 187.1 states: “The National Assembly is responsible for: 1. Legislating on the matters of national competence and on the functioning of the various branches of the National Power.”

Having the rank of law issued according to articles 187.1 and 202 of the Constitution, the Statute has the effect of *lex specialis* and *lex posterior*, that is, with power to abrogate or amend any legislation then in force, as well as any other State acts of inferior normative rank, during the period of the “transition towards democracy to restore the validity of the Constitution.” That is why the Statute has even been considered by some authors as a “constitutional normative act” and “a normative act superior to the formal laws;”⁵⁴ and “as a legislative act of constitutional rank, or at least, the authentic interpretation of the same Constitution, and consequently, of obligatory compliance under the principle of constitutional supremacy.”⁵⁵

That is also the reason why the *Transition Statute* includes in its text the statement that “Any action decreed by entities of the Public Branch to carry out the guidelines established in this Statute are also based on article 333 of the Constitution, and are mandatory for all authorities and public officials, as well as all individuals” (article 4). Conversely, in article 11 of the same *Transition Statute*, it is provided that no individual, invested or not with authority, will obey orders from the usurped authority, adding that public officials that cooperate with the usurpation, will be liable, as established in articles 25 and 139 of the Constitution. The same provision establishes that all public officials have the duty to comply with articles 7 and 333 of the Constitution in order to obey the orders of the legitimate Branches of Government in Venezuela, in particular those acts enacted in order to implement the *Transition Statute*.

The *Transition Statute* was formally recognized by the National Academy of Political and Social Sciences, in a Pronouncement issued on February 15, 2019, whereas it decided:

⁵⁴ See José Duque Corredor, “Bloque Constitucional de Venezuela. Comentarios y reflexiones sobre el Estatuto de Transición de la dictadura a la democracia de Venezuela,” Epilogue to the book: Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, IDEA, Editorial Jurídica Venezolana, Caracas/Miami 2019, pp.321, 331-333. Available at: <http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf>

⁵⁵ See Asdrúbal Aguiar, “Transición hacia la democracia y responsabilidad de proteger en Venezuela: Mitos y realidades,” prologue to the book: Allan R. Brewer-Carías, *Transición hacia la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, IDEA, Editorial Jurídica Venezolana, Caracas/Miami 2019, p.26, 39-40, available at <http://allanbrewercarias.com/wp-content/uploads/2019/06/193.-Brewer.-bis-5.-TRANSICI%C3%93N-A-LA-DEMOCRACIA-EN-VLA.-BASES-CONSTITUC.-1-6-2019-para-pag-web-1.pdf>

First: To manifest its conformity with the constitutional legal regime established by the National Assembly in the *Statute governing the transition to democracy to restore the validity of the Constitution of the Bolivarian Republic of Venezuela*,” as an unknown political process that it is developing representing the popular sovereignty in order to reestablish the enforcement of the Constitution and achieve the conditions for the celebration of free, just, competitive elections.

Second: Support in a special way the constitutional function of political conduction and direction of the State exercised by the National Assembly and its Board of Directors,; as well as constitutional functions of the President in Charge of the Republic, legitimately and in a temporal condition assumed, according to the Constitution and to the referred Statute, by Engineer Juan Guaidó, which must be exercised under the public law principle of coordination and parliamentary control, without subordination nor undo interferences.⁵⁶

This means, the Academy supported in a special way the constitutional function of political conduction and direction of the State exercised by the National Assembly and its executive committee [*Junta Directiva*], as well as the constitutional functions of the President in Charge of the Presidency of the Republic, legitimately and in a temporary condition assumed by Engineer Juan Guaidó according to the Constitution and to the referred *Transition Statute*.

2. The protection of the rights and assets of the Republic and of its decentralized entities abroad

In particular, in Article 15 of the same *Statute*, the National Assembly regulated various mechanisms for the “defense of the rights of the Venezuelan people and government,” providing for the possibility that the necessary decisions be “taken to that end; “in order to ensure the safeguarding of the assets, goods, and interests of the Government abroad and to promote the protection and defense of the human rights of the Venezuelan people, all in accordance with the treaties, conventions, and international agreements in force.”

These safeguard measures were therefore conceived to be applied abroad, that is, regarding the assets and interest of the Republic outside the country, and for that purpose Article 15 of the *Statute*, confirmed that the President of the National Assembly,

⁵⁶Available at

<http://www.acienpol.org.ve/cmacionpol/Resources/Pronunciamientos/Pronunciamiento%20sobre%20Estaduto%20de%20Transici%C3%B3n.%20def.pdf> ; and in the book: Academia de Ciencias Políticas y Sociales, *Doctrina Académica Institucional. Instrumento de reinstitucionalización democrática. Pronunciamientos 2012-2019*, Tomo II, Editorial Jurídica Venezolana, Caracas 2019, p.337 ff. Available at: <http://allanbrewercarias.com/wp-content/uploads/2019/07/libro.-PRONUNCIAMIENTOS-DE-LA-ACADEMIA-19-6-2019-DEFINITIVO.pdf>.”

is the “legitimate President in charge of the Republic” (article 14), and that “under article 333 of the Constitution,” has the power to exercise, inter alia, the following powers, “subject to the authoritative scrutiny of the National Assembly under the principles of transparency and accountability”:

a. Appoint Ad-Hoc Management Boards of Directors to assume the management and administration of public institutes, autonomous institutes, state foundations, state civil associations or societies or State enterprises, including those incorporated abroad, and any other decentralized bodies, in order to appoint its administrators and, in general, to take the necessary measures for the control and protection of their assets. Decisions taken by the President in charge of the Republic shall be immediately complied with and shall have full legal effects.”

b. While the Attorney General of the Republic is validly appointed pursuant to Article 249 of the Constitution, in line with the provisions of Articles 15 and 50 of the Organic Law of the Office of the Special Attorney General of the Republic, the President in Charge of the Republic may designate the person to discharge the office of special attorney general for the defense and representation of the rights and interests of the Republic, the State-owned corporations and other decentralized entities of the Public Administration abroad. This special attorney will have the authority to appoint judicial attorneys-in-fact, even in international arbitration proceedings, and shall exercise the functions referred to in paragraphs 7, 8, 9 and 13 of Article 48 of the Organic Law of the Office of the Special Attorney General of the Republic, with the limitations arising from Article 84 of that Law and from this Statute. This representation shall be directed especially towards ensuring the protection, control and recovery of the State’s assets abroad, and to carry out any action that may be necessary in order to safeguard the rights and interests of the State. The attorney so appointed shall have the power to carry out any action and exercise all the rights that would pertain to the Special Attorney General with regard to the assets referred to herein. To this end, he must satisfy the same conditions demanded by Law to hold the office of Attorney General of the Republic.

Therefore, according to these provisions of the *Transition Statute*, two main attributions were assigned by the National Assembly to the “President of the National Assembly, as President in charge of the Republic,” to be exercised “subject to the authoritative scrutiny of the National Assembly under the principles of transparency and accountability,” for the purpose of protecting the assets and interest of the Republic outside the country, and therefore conceived to have their main effects abroad:

(i) on the one hand, to appoint a Special Attorney in order to defend and represent abroad the rights and assets of the Republic, State-owned enterprises and the decentralized entities of Public Administration; and (ii) on the other hand, to appoint Ad-Hoc Management Boards of Directors to assume the management and administration of public institutes, autonomous institutes, state foundations, state civil associations or societies or State owned enterprises, as was the case of *Petróleos de Venezuela S.A*

(PDVSA), and its subsidiaries, including those incorporated abroad, and any other decentralized bodies of the State, like the Central Bank of Venezuela, in order to appoint its administrators and, in general, to take the necessary measures for the control and protection of their assets .

The enumeration of the decentralized entities of the Venezuelan State in this provision of article 15.a of the *Transition Statute* is *exhaustive*. Almost all of them are expressly enumerated in the same text (“public institutes, autonomous institutes, state foundations, state civil associations or societies or State-owned enterprises”), adding the catch-all expression “any other decentralized body,” including within this term, without doubt, the Central Bank of Venezuela a decentralized entity of the Venezuelan State .

This concept of “decentralized entity” is a general concept used in Venezuela public law in order to identify public “entities” or entities of the State, characterized by the fact that they have their own personality of public or private law (different to the legal person of the State – the Republic -), for the purpose of differentiating such entities, from the “organs” of the National State that comprise the centralized government (the Ministries, for instance).⁵⁷ From the point of view of administrative law the distinction between organs and entities, gives origin to the classical distinction between central public administration and decentralized public administration, the latter being the decentralized entities of the State with their own legal personality.⁵⁸

⁵⁷ See Allan R. Brewer-Carías, “Sobre las personas jurídicas en el derecho administrativo: personas estatales y personas no estatales, y personas de derecho público y de derecho privado,” in the book: *Estudios de derecho público en Homenaje a Luciano Parejo Alfonso* (Coordinadores: Marcos Vaquer Caballería, Ángel Manuel Moreno Molina, Antonio Descalzo González), Editorial Tirant lo Blanch, Valencia 2018, pp.2093-2100. Available at: <http://allanbrewercarias.com/wp-content/uploads/2019/05/Brewer.-art.-personas-jur%C3%ADdicas.-Libro-Homenaje-Luciano-Parejo.pdf>

⁵⁸ See Allan R. Brewer-Carías, *Principios del régimen jurídico de la Organización Administrativa venezolana*, Editorial Jurídica Venezolana, Caracas 1991, pp.117-120 ss. Available at: <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab241efb849fea5/Content/II.1.62%20PRINC.REG.JUR.ORG.ADM.%201991.pdf>

3. The new reaction of the Constitutional Chamber against the Transition Statute enacted by the National Assembly: the ex-officio decision No. 6 of February 8, 2019

The *Transition Statute*, as was also expected, was the subject matter of another *unilateral declaration*, also issued *ex officio*, called “judgment” No. 6, of February 8, 2019,⁵⁹ by which the Constitutional Chamber, citing for this purpose:

(i) the abovementioned judgment No. 2 of January 11, 2017, declaring the contempt of the National Assembly, the nullity of the act of installation of the same of January 5, 2017, and the appointment of its board of January 9, 2017, and the nullity and invalidity of any action of the National Assembly against what was decided therein;

(ii) the aforementioned unilateral declaration *ex officio* No. 3 of January 21, 2019, which declared the Resolution of the National Assembly of January 15, 2019 to be invalid, “on the declaration of the usurpation of the Presidency of the Republic by Nicolás Maduro Moros and the restoration of the validity of the Constitution;” and

(iii) the judgment No. 4 of January 23, 2019, where it made reference to previous decisions stating that “any action of the National Assembly and of any person or individual against what is decided herein shall be null and void of any validity and legal effect, without prejudice to the liability applicable.”

Based on those previous decisions, the Constitutional Chamber declared null and void the *Transition Statute* towards democracy, without anyone having asked for it or having claimed it. The *judgement* said that the Transition Statute had been adopted, “in plain contempt and without a validly appointed or sworn in executive committee [*Junta Directiva*];” and furthermore, ratifying “that any action of the National Assembly and any person or individual against what is decided herein will be null and void of any validity and legal effect.”

The election and swearing in of the executive committee [*Junta Directiva*] of the National Assembly, on the contrary, was made, as it occurs each year, in January 2019, at the beginning of the ordinary session of the Assembly, according to the Constitution (articles 194 and 219). It ought to be noted that the Constitutional Chamber’s claim of the issuance of the *Transition Statute* as an “act of force” or “coup d’état,” is absolutely baseless. Conversely, what the National Assembly has sought to achieve is precisely

⁵⁹ Exp. No. 17-0001. See the “Notice” of the Decision at <http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-declara-nulo-estatuto-que-rige-la-transicion-a-la-democracia-emanado-de-la-asamblea-nacional-en-desacato>.

the cessation of the usurpation, which indeed is an act of force, and put an end to the “permanent coup d’état” the Constitutional Chamber itself has participated in,⁶⁰ all of which has produced a “constitutional and legal abnormality,”⁶¹ that the Transition Statute was designed to overcome.

Under Venezuelan constitutional and legal system, the Constitutional Judge exercising the concentrated method of judicial review is banned from initiating *ex-officio* a process of nullity (judicial review) and then “argue” in it on his own account.⁶² Regardless of this, the new “unilateral statement” by the Chamber, was pronounced without any action filed or any case or controversy, trial or process, without arguments made by anyone, as has already been said. It was issued in violation of the most basic rules and principles of due process as set forth in article 49 of the Constitution, not having legal effect and being null according to article 25 of the same Constitution; let alone the mention of alleged defects of unconstitutionality of the articles of the *Statute*, which no one had claimed and to which, of course, no one had responded. Such a decision, as already mentioned, and as it has been held by the US Supreme Court since 1895, cannot not be recognized by a US court, because it has not being issued by an independent and autonomous judicial tribunal, respecting the principles and rules of due process and the right to defense.⁶³

⁶⁰ See Allan R. Brewer-Carías, *La dictadura judicial y la perversión del Estado de derecho. El Juez Constitucional y la destrucción de la democracia en Venezuela*, Editorial Jurídica Venezolana, 2016 pp. 18; 51-59; 140; 194. Available at: <http://allanbrewercarias.com/wp-content/uploads/2016/06/Brewer.-libro.-DICTADURA-JUDICIAL-Y-PERVERSI%C3%93N-DEL-ESTADO-DE-DERECHO-2a-edici%C3%B3n-2016-ISBN-9789803653422.pdf>

⁶¹ See Claudia Nikken, *Consideraciones sobre las fuentes del derecho constitucional y la interpretación de la Constitución*, Centro para la Integración y el Derecho Público, Editorial Jurídica Venezolana, Caracas 2019, pp. 141 ss.

⁶² See Article 32, Organic Law of the Supreme Tribunal Of Justice, in *Official Gazette* No.39483 of August 9, 2010. See also in Allan R. Brewer-Carías, “Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela,” in *Revista IURIDICA*, No. 4, Centro de Estudios Jurídicos Dr. Aníbal Rueda, Universidad Arturo Michelena, Valencia, Julio-Diciembre 2006, pp.5-10. Available at: <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,4%20497.%20INCONSTITUCIONALIDAD%20DE%20OFICIO%20EN%20MATERIA%20DE%20JUSTICIA%20CONSTITUCIONAL.%20SANTIAGO%202006.pdf>

⁶³ See US Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895). Available at: <https://supreme.justia.com/cases/federal/us/159/113/>

In connection with the transitional regime, for instance, in the case of *Petróleos de Venezuela S.A.* and its subsidiaries provided for in the *Statute*, in the face of the irregular functioning of the management that used to exist in such enterprises that put Venezuela's assets abroad at risk, the only "observation" issued by the Chamber in its ruling was that "everything concerning acts of government corresponds to the President of the Republic as a body of the Executive Power," which is precisely the reason why the National Assembly authorized the President in charge of the Republic to carry out the appointments of the Ad-Hoc Board of Directors provided for in the norm.

IV. THE TRANSITION GOVERNMENT DECISIONS FOR THE PROTECTION AND DEFENSE OF THE INTERESTS OF THE REPUBLIC ABROAD AND THE REACION OF THE CONSTITUCIONAL CHAMBER OF THE SUPREM TRIBUNAL

1. The National Assembly's decision to appoint of a Special Attorney General for the protection of the rights and assets of the Republic abroad

The *Transition Statute* enacted by the National Assembly, notwithstanding the unconstitutional and ineffective unilateral declaration of the Constitutional Chamber No. 6 of February 8, 2019, Being a parliamentary act of normative order, issued in direct and immediate enforcement of the Constitution, has the rank of law, and therefore, has the power to amend the legislation then in force, being a special law and subsequent law (*lex specialis* and *lex posterior*), for the duration of the period of the "transition towards democracy to restore the validity of the Constitution." Accordingly, under article 15 of the *Transition Statute* regarding the protection of assets of the Republic and its instrumentalities abroad, the Interim President of the Republic adopted, among other, three important decisions: (i) the appointment of the Special Attorney; (ii) the appointment of the Ad-Hoc Board of Directors of *Petróleos de Venezuela S.A.*; and (iii) the appointment of the Ad-Hoc Administration Board of the Central Bank of Venezuela.

In fact, and in spite of the "declaration" of the Constitutional Chamber No. 6, of February 8, 2019 against the *Transition Statute*, Interim President Juan Guaidó, through an administrative act dated February 5, 2019, appointed Mr. José Ignacio Hernández as Special Attorney General. This appointment was authorized by the Permanent Commission on Interior Policy of the National Assembly as was officially notified by

letter of February 26, 2019 to the Secretary General of the National Assembly;⁶⁴ authorization that was approved by the National Assembly in Plenary Session of February 27, 2019. Such administrative act of appointment duly authorized by the National Assembly was later ratified by the same Assembly through a Resolution dated March, 19, 2019.⁶⁵

Mr. Hernández began to perform his duties within the regulatory framework of the Transition Statute, assuming “the defense and representation of the rights and interests of the Republic, the state-owned enterprises and all other *decentralized entities* of Public Administration *abroad*,”⁶⁶ within the scope of Articles 15 and 50 of the Organic Law of the Office of the Attorney General of the Republic.⁶⁷ On June 23, 2020, after Mr. Hernández resigned his position, the Interim President Juan Guaidó by Decree No. 21 appointed Mr. Enrique Sánchez Falcón as Special Attorney General.⁶⁸

In any event, the representation of the Special Attorney General is directed especially towards ensuring the protection, control and recovery of the State’s assets abroad, and to carry out any action that may be necessary in order to safeguard the rights and interests of the State. That is why, under the *Transition Statute*, the appointed Special Attorney General shall have the power to carry out any action and exercise all the rights that would pertain to the Attorney General with regard to the assets, rights and interests of the Republic, the state owned enterprises and all other *decentralized entities* of Public Administration *abroad*.

As already mentioned, pursuant to article 15 of the *Transition Statute* regarding the protection of assets of the Republic abroad, the Interim President of the Republic was authorized to appoint Ad-Hoc Management Boards of Directors in order to assume the management and administration of *public institutes, autonomous institutes, state*

⁶⁴ Letter from the Permanent Commission on Interior Policy of the National Assembly to the Secretary General of the National Assembly dated February, 26 2019.

⁶⁵ See *Legislative Gazette* no. 5 of 19 March 2019 pp.6-7. Available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1567518481.pdf

⁶⁶ See the text in *Gaceta Legislativa*, No.4, February 20, 2019. Available at: <http://www.asambleanacional.gob.ve/gacetas>

⁶⁷ See the text of the Organic Law in in *Official Gazette* Extra N° 6.210 of December 30, 2015, reprinted in *Official Gazette* Extra N° 6.220 of March 15, 2016.

⁶⁸ See the text in *Gaceta Legislativa*, No. 24, July 1, 2020.

foundations, state civil associations or societies or State enterprises, and any other decentralized bodies, in order to take the necessary measures for the control and protection of their assets abroad. Based on this authorization, the Interim President of the Republic adopted, among other decisions, appointed the Ad-Hoc Board of Directors of Petr6leos de Venezuela S.A., which is a state-owned enterprise; and the Ad-Hoc Administration Board of the Central Bank of Venezuela, which is a decentralized entity of the State.

2. The control and protection of the rights, interest and assets of Petr6leos de Venezuela S.A. (PDVSA) abroad and the National Assembly’s decision to appoint an Ad Hoc Management Board for such purpose and to its autonomy.

According to what is provided in article 15.a of the *Transition Statute*, authorizing the Interim President of the Republic, to appoint Ad-Hoc Management Boards of Directors to assume the management and administration of *public institutes, autonomous institutes, state foundations, state civil associations or societies or State enterprises*, including those incorporated abroad, and any other decentralized bodies, in order to appoint its administrators and, in general, to take the necessary measures for the control and protection of their assets; and to what is also provided in article 34 of the same *Statute*, specifically referred the appointment of an Ad-Hoc management Board of Petr6leos de Venezuela S.A. PDVSA (from now onwards: Ad-Hoc PDVSA Board), due to “the risks in which PDVSA and its subsidiaries are in as a result of usurpation,” Interim President Guaid6, appointed such Ad-Hoc PDVSA, as a “transitional regime of PDVSA and its affiliates,” to govern, “while such a situation persists.”

That is to say, the *Transition Statute* expressly empowered the “President in charge of the Republic, under the authoritative control of the National Assembly and within the framework of the application of Article 333 of the Constitution,” to appoint “the *Ad-hoc Management Board of Petr6leos de Venezuela S.A. (PDVSA)* pursuant to Article 15, section a,” of the *Statute*, so that the Ad-Hoc PDVSA Board “exercises the rights that correspond to PDVSA as a shareholder of *PDV Holding, Inc.*” (article 34).

This decision of the National Assembly regarding PDVSA was not to substitute the Board of Directors of PDVSA in Venezuela, but only to appoint an Ad-Hoc PDVSA Board of such company to assume the management and administration of *its*

subsidiaries incorporated abroad, “to appoint its administrators and, in general, to take the necessary measures for the control and protection of their assets,” particularly, as already mentioned, due to “the risks in which PDVSA and its subsidiaries are in as a result of usurpation,” and as the result of the excessive control that the Chávez and Maduro regime had developed over PDVSA during the past twenty years.

Consequently, and regardless the invalid and ineffective “declaration” of the Constitutional Chamber No. 6 of February 8, 2019 against the Statute for Transition, the National Assembly passed on February 13, 2019 the “*Resolution by which it is authorized the appointment to serve as the intervention body, called “Ad-hoc Management Board,” to assume the functions of the Shareholder’s Assembly and Board of Directors of Petróleos de Venezuela S.A., to act on its behalf and, as the sole shareholder of PDV Holding, Inc., proceed to appoint its Board of Directors, and consequently to appoint the Board of Directors of Citgo Holding, Inc., and Citgo Petroleum Corporation.*”⁶⁹

By this Resolution the National Assembly reaffirmed that the Statute *is a law* sanctioned “in compliance with Article 333 and Article 187.1 of the Constitution,” “as a pact of coexistence for the civic life of Venezuelans, and as a sure path towards democratic transition, having as its main basis the re-institutionalization of the Constitution of the Republic intentionally misplaced by the National Executive Power.”

Therefore, during the period of transition to democracy and of the full restoration of the validity of the Constitution, the Ad-Hoc PDVSA Board, provided for in the Statute and appointed in the manner provided for therein, is entitled to exercise “the powers of the shareholder’s meeting and the PDVSA board of directors,” “the rights that correspond to PDVSA as a shareholder of *PDV Holding, Inc.*,” and to “perform all necessary steps to appoint the Board of Directors of *PDV Holding, Inc.*, representing PDVSA as a shareholder in that company;” with the new directors of *PDV Holding, Inc.*, having competence to carry out “all necessary actions for the purpose of appointing the new

⁶⁹ Available at: http://www.asambleanacional.gob.ve/actos/_acuerdo-que-autoriza-el-nombramiento-para-ejercer-los-cargos-del-organo-de-intervencion-llamado-junta-administradora-ad-hoc-que-asuma-las-funciones-de-la-asamblea-de-accionista-y-junta-directiva-de-pe.

boards of directors of the subsidiaries of that company, including *Citgo Petroleum Corporation*.”

In other words, the rules governing the actions of the Ad-Hoc PDVSA Board, have legal status in the Venezuelan legal order, rendering them mandatory, and they may also amend the existing legislation in the relevant aspects regulated, as it is a special law and subsequent law, but only for as long as the transition to democracy to restore the validity of the Constitution lasts.⁷⁰

In compliance with the rules of Articles 15 and 34 of that *Statute*, dated February 8, 2019, the President in charge of the Presidency of the Republic, Juan Guaidó, appointed the members of the Ad-Hoc PDVSA Board,⁷¹ with the powers corresponding to the Shareholders’ Assembly and the PDVSA Board of Directors, in order to carry out, among others, all the necessary actions to appoint the Board of Directors of *PDV Holding, Inc.*, representing PDVSA as a shareholder in that company.

3. *The ex officio reaction of the Constitutional Chamber against the appointments of the Special Attorney General and of the Ad Hoc Board of PDVSA made according with the Transition Statute*

As set out above, the Constitutional Chamber of the Supreme Tribunal *issued* unconstitutional *ex officio* and unilateral declarations in decisions No. 3 of January 21, 2019, and No. 6 of February 8, 2019, declaring the supposed nullity of the Resolutions and of the *Transition Statute* issued by the National Assembly. This was followed by the same Constitutional Chamber declaring the supposed nullity of the decisions adopted by the same National Assembly in execution of the said Transition Statute related to the appointments of the Special Attorney General of the Republic and of the

⁷⁰ Therefore, in the “Report presented by the Permanent Committee on Energy and Petroleum to authorize the appointment to hold the positions of the intervention body, called the ‘Ad-hoc Management Board’, which assumes the functions of the Shareholder’s Meeting and Board of *Petróleos de Venezuela S.A.*, to act on its behalf and, as the sole shareholder of *PDV Holding, Inc.*, proceed to appoint its Board of Directors, and consequently appoint the Board of Directors of *Citgo Holding, Inc.*, and *Citgo Petroleum Corporation*,” of February 12, 2019, the Statute is described as “a Law by which it is possible to have a special legal regime,” which was established in article 34 of the Statute Governing the Transition to Democracy to Restore the Validity of the Constitution,” “where a special and temporary regime for the intervention of Government companies is created, which in a special way allows to appoint an intervention body, called an ‘Ad-hoc Management Board.’”

⁷¹ Published in *Legislative Gazette*, No 4 of February 20, Available at: https://pandectasdigital.blogspot.com/2019/03/gaceta-legislativa-de-la-asamblea_20.html

Ad-Hoc Administration Board of the Central Bank of Venezuela, issuing for such effects, decisions No. 39 of February 14, 2019, No. 74 of April 11, 2019, and 247 of July 25, 2019.

All *such* decisions are null and void and ineffective in Venezuela and abroad, according to article 25 of the Constitution, because they violate all the rules and principles of due process declared in article 49 of the same Constitution. In the case of the National Assembly “*Resolution by which the appointment to serve as the intervention body, called ‘Ad-hoc Management Board,’ is authorized to assume the functions of the Shareholder’s Assembly and Board of Directors of Petróleos de Venezuela S.A., to act on its behalf and, as the sole shareholder of PDV Holding, Inc., proceed to appoint its Board of Directors, and consequently to appoint the Board of Directors of Citgo Holding, Inc., and Citgo Petroleum Corporation,*” dated February 13, 2019, passed following the mandate contained in the *Transition Statute*, it was also expected that the Constitutional Chamber would rule *ex officio* purporting to annul it, which it did immediately, also by a unilateral and unconstitutional declaration or “judgment” No. 39 of February 14, 2019.⁷²

Again, this new decision of the Constitutional Chamber is an invalid and unconstitutional judicial review ruling, issued *ex-officio*, which, as already *explained*, is prohibited in the Organic Law of the Supreme Tribunal of Justice. It was delivered by the Chamber only on the basis of its decision taken a week earlier, in the aforementioned judgment No. 6 of February 8, 2019, whereas the absolute nullity of the *Transition Statute* had been declared; also formulated, as already explained, without any process, case or controversy, that is, without trial or parties, without anyone having asked for it. In this case, it was based only, on its turn, the previous already referred to ruling issued by the same Constitutional Chamber two years before (No. 2 of January 11, 2017), whereas the National Assembly was declared to be in “contempt,” and it was provided that the “action of the National Assembly and anybody or individual contrary to what is decided here will be null and void.”⁷³

⁷² Available at: <https://www.accesoalajusticia.org/wp-content/uploads/2019/02/SC-39-14-02-2019.pdf>

⁷³ Available at <http://historico.tsj.gob.ve/decisiones/scon/enero/194891-02-11117-2017-17-0001.HTML> . See comments to this judgment in Allan R. Brewer-Carías, *La consolidación de la tiranía judicial en Venezuela*, Editorial Jurídica Venezolana, Caracas 2017, pp. 21, 81, 116 ff. and 131 ff. Available at:

All these “unilateral declarations,” are no more than that, not having pursuant to the Venezuelan constitutional system of judicial review, any validity. They have been issued, in the process of confrontation of the Constitutional Chamber against the legitimately elected National Assembly, particularly after the parliamentary elections of December 2015, in which the Government lost the absolute majority control it used to have in such Assembly.⁷⁴

In any case, in its “declaration” No.39 dated February 14, 2019, the Constitutional Chamber, after analyzing the legal status of PDVSA in accordance with the Constitution (articles 302 and 303) and its own Bylaws, which regulates everything relating to the PDVSA Board of Directors, and its appointment by the President of the Republic, went on to state purely and simply that the above-mentioned Resolution was issued by the National Assembly “in pure and contumacious contempt of all the decisions of this Chamber as the highest instance of the constitutional jurisdiction of the Republic,” simply resolving, and without anyone having asked, without trial or process, that the Resolution “is null and void, without legal effect, as it emanates from the National Assembly in serious and contumacious contempt,” and it constitutes an “usurpation of the constitutional president of the Bolivarian Republic of Venezuela,” with the Resolution constituting “a flagrant and gross violation of the Constitutional Text and the socio-economic system of the Republic.”

In this new *unilateral* declaration No.39, the Constitutional Chamber, again without trial or process, usurping the competences that would fall within the commercial courts, in addition, went on to declare that the Resolution “contains appointments of authorities of the Board of Directors of PDVSA and some of its Affiliate Companies, which are null and void,” and usurping the competences that would fall within the criminal courts,

<http://allanbrewercarias.com/wp-content/uploads/2017/06/ALLAN-BREWER-CARIAS-LA-CONSOLIDACI%C3%93N-DE-LA-TIRAN%C3%8DA-JUDICIAL-EN-VZLA-JUNIO-2017-FINAL.pdf>.

⁷⁴ See on the attempt of the Constitutional Chamber to suffocate the National Assembly in Allan R. Brewer-Carías, “Transition from Democracy to Tyranny through the Fraudulent Use of Democratic Institutions: The Case of Venezuela (1999-2018),” Lecture at the Clough Center for the Study of Constitutional Democracy, Boston College, Boston, September 25, 2108. Available at: <http://allanbrewercarias.com/wp-content/uploads/2018/09/1218.-Brewer.-conf.-Transictiion-Democracy-to-Tyranny.-B.C.-2018.pdf>.

further state that “those who appear there engage in crimes of usurpation of functions and other crimes of public action enshrined in the Venezuelan criminal legal order relating to corruption, organized crime, and terrorism, among others.” It even issued various “precautionary measures” against the persons named in the Resolution, such as those of the “prohibition of leaving the country,” “prohibition of selling and compromising assets,” and “blocking and freezing bank accounts,” without them having any relation with any constitutional process as required by article 130 of the Organic Law of the Supreme Tribunal.

Again, as mentioned above with regard to the other unilateral and *ex officio* declarations issued by the Constitutional Chamber, in the current situation of *confrontation* of the Constitutional Chamber against the National Assembly, whereas the National Assembly has formally rejected and not recognized the decisions of the Supreme Tribunal of Justice, and in the existing national and international political situation, whereas the President of the National Assembly, Juan Guaidó, has been recognized as the person in charge of the Presidency of the Republic, and the National Assembly recognized as the only legitimately elected body in the country, the legal and political inefficiency that the decisions of the Constitutional Chamber may have is evident, in particular in those countries that have recognized the legitimacy of the National Assembly and the government of the Interim President, where such recognition implies that the decisions of the National Assembly have all their legal effects, as was for instance the case of the United States of America and of Colombia, where as detailed above, the Courts have recognized Juan Guaidó as the legitimate President in charge of the Presidency of the Republic, and the Assembly as the legitimate representative of the people.

Moreover, the act of appointment of the Ad-Hoc PDVSA Board by the President in charge, Juan Guaidó, dated February 8, 2019, and modified by decree of the same Juan Guaidó, dated April 10, 2019, is an administrative act, and as such, is solely and exclusively subject to judicial review by the Administrative Political Chamber of the Supreme Tribunal of Justice (articles 259, 266.5 of the Constitution) and not the Constitutional Chamber.

This means that pursuant to article 26.5 of the Organic Law of the Supreme *Tribunal* of Justice, and article 23.5 of the Organic Law of Administrative Contentious Jurisdiction,⁷⁵ the Constitutional Chamber cannot adopt any ruling regarding such administrative acts; which is another reason to sustain that ruling No. 39 of February 14, 2019, in no case could affect the validity of the administrative acts issued by the President in charge, Juan Guaidó, appointing the directors of the Ad-Hoc PDVSA Board. Moreover, those administrative acts also enjoy a presumption of validity until declared null and void by the competent courts.

It follows that all the aforementioned appointment of the members of the *Ad-hoc Management Board* of *Petróleos de Venezuela, S.A.*, made by the President of the National Assembly, Juan Guaidó Márquez, in his role as person in charge of the Presidency of the Republic and within the framework of the *Statute of Transition to Democracy* of February 5, 2019, should be regarded as a constitutional and legal appointment, with all legal effects; just as the appointments made by the Ad-Hoc PDVSA Board, by the members of the Board of Directors of the company *PDV Holding, Inc.*; the appointment made by the members of the latter company of the members of the Board of Directors of *Citgo Holding Inc.*; and the appointment made by the members of the latter company of the members of the Board of Directors of the company *Citgo Petroleum Corporation*, all located outside the territory of Venezuela, should also be considered as constitutional and legal, within the framework of the same Statute.

After issuing the aforementioned ex officio decision No. 39 of February 14, 2019, the same Constitutional Chamber of the Supreme Tribunal on April 5, 2019, was requested by the representative of PDVSA in Venezuela to expand the precautionary measures that it had issued against the persons appointed in the Ad-Hoc Management Board of Directors of PDVSA and of its affiliates.

Then, on the basis of the same arguments of the supposed situation of contempt of the National Assembly regarding previous decisions of the Constitutional Chamber issued since 2016, the same Constitutional Chamber, also ex-officio issued decision No. 74 of

⁷⁵ *Official Gazette* No. 39.451, June 22, 2010.

April 11, 2019,⁷⁶ not only ratified and expanded the precautionary measures according to what was requested, but also in an *ex-officio* way, without having being requested by anybody and without hearing anybody, proceed to ratified its prior purported declaration of the nullity of the appointment of the Ad-Hoc Management Board of Directors of PDVSA made by Juan Guaidó, President in Charge of the Republic contained in Decree No. 3 of President in Charge Juan Guaidó, of April 10, 2019, in which he amended his previous decision on the matter,⁷⁷ as well as of the appointment of the Special Attorney General of the Republic in order to defend and represent the rights and interests of the Republic and all other Public Administration decentralized entities abroad.⁷⁸

Specifically, the Constitutional Chamber, declared such Appointment of the Special Attorney General as “not having legal effects,” considering that “the attribution assigned to him of taking care of the matters related to the Venezuelan oil industry, usurps the exclusive attributions of the President of *Petróleos de Venezuela S.A.* according to the By Laws of the company, declaring the Ad-Hoc PDVSA Board appointed by the National Assembly and Interim President Guaidó, also absolutely null.

As I have already stated this unilateral declaration, issued *ex officio*, No. 74 of April 11, 2019, as was also the case of the previous decisions No.3 of January 21, 2019 and No. 6 of February 8, 2019, is also to be considered null and void, according to what is established in Article 25 of the Constitution, because having been issued in violation of all the rules and principles of due process, as declared in Article 49 of the Constitution; as well than in violation to what is established in article 32 of the Organic Law of the Supreme Tribunal of Justice.

⁷⁶ Text <http://tsj.gob.ve/decisiones/scon/enero/74-240102-01-0934.HTM>

⁷⁷ *Legislative Gazette* N° 6, dated April 10, 2019. Available at: <http://www.asambleanacional.gob.ve/gacetas>

⁷⁸ On February 26, 2019, José Ignacio Hernández was appointed special Attorney General of the Republic. In the brief filed by the representative of PDVSA before the Constitutional Chamber, it was reported that he had send requests before the International Center for Settlement of Investment Disputes ICSID, and the lawyers representing PDVSA, objecting the legitimacy of the representatives of the Republic.

4. The control and protection of the rights, interest and assets of the Banco Central de Venezuela abroad and of the International Reserves of Venezuela, and the National Assembly's decision to appoint an Ad Hoc Management Board of the Bank for such purposes.

As already mentioned, article 15.a of the *Transition Statute*, in addition to authorized the Interim President of the Republic, to appoint Ad-Hoc Management Boards of Directors to assume the management and administration of *public institutes, autonomous institutes, state foundations, state civil associations or societies or State enterprises*, including those incorporated abroad; also authorized the Interim President of the Republic to appoint Ad-Hoc Management Boards of Directors to assume the management and administration of “*any other decentralized bodies*” of the Venezuelan State; all in order to take the necessary measures for the control and protection of their assets.

Within the decentralized bodies of the Venezuelan State, one of particular importance is the Central Bank of Venezuela, so pursuant to such provision, Interim President Guaidó also appointed the members of the *Ad-Hoc Administrative Board of the Central Bank of Venezuela*, by issuing Decree 8 of July 18, 2019 (amended by Decree No. 10 of August 13, 2019 and by Decree No. 11 of 23 August 2019), in strict execution of what is provided by the *Transition Statute*, and in the Resolution issued by the National Assembly on July 16, 2019.⁷⁹

Such appointment was possible because the Central Bank of Venezuela, although not being any of the entities expressly enumerated in article 15.a of the *Transition Statute* (*public institutes, autonomous institutes, state foundations, state civil associations or societies or State enterprises*), is one of the “other decentralized bodies” of the Venezuelan State also mentioned in the same provision, with the purpose of precisely assuring that all decentralized bodies of the Venezuelan State are within the scope of the *Transition Statute*.

The Central Bank as a *legal person of public law*, following the provision incorporated in the 1999 Constitution (Article 318), is a decentralized entity of the Venezuelan State, or

⁷⁹ See in *Legislative Gazette* No. 11, August 28, 2019. Available at https://asambleanacional-media.s3.amazonaws.com/documentos/gaceta/gaceta_1570106471.pdf

according to the decision of the Constitutional Chamber of the Supreme Tribunal of Justice No. 259 of March 31, 2016 (*Case: Review of the constitutionality of the Central Bank Law at the request of the President of the Republic, N. Maduro*): “is a legal person of public law with autonomy for the formulation and exercise of the policies of its competency,” [being] “an organ that is part of the National Public Administration with functional autonomy, integrated within the structure of the State.”⁸⁰

Therefore, according to article 15.a of the *Transition Statute*, the National Assembly issued Resolution dated July 16, 2019, authorizing, as was summarized in the recitals of the Decree No. Decree 10 of August 11, 2019, “the appointment by the Interim President of the Republic, of an *Ad -Hoc Administrative Board of the Central Bank of Venezuela*, made up of five (5) members, with the only purpose of representing such Institution in the contracts and other operations carried out abroad and related to the administration of the International Reserves.”⁸¹ The Resolution, in fact, stated in article that the “the Ad-Hoc Board “have the purpose of rescuing and protecting the international reserves owned by the Republic, for whose purpose their functions are limited, therefore, the funds rescued may not be used or disposed of” (art. 1).⁸²

Based on the aforementioned Resolution of the National Assembly dated July 16, 2019, Interim President Juan Guaidó, issued Decree 8 of July 18, 2019 (amended by Decree No.10 of August 13, 2019), appointing the five members⁸³ of the *Ad-Hoc Administrative Board of the Central Bank of Venezuela*, tacitly repealing the Decrees 3.474 of June 19, 2018⁸⁴ and No. 3.518 of 6 July 2018⁸⁵ of Nicolás Maduro, purporting to appoint the President and the Board of Directors of the Central Bank of Venezuela, which in

⁸⁰ This decision No. 259 of March 31, 2016 is extensively quoted in the text of the decision of the Constitutional Chamber No. 618 of July 20, 2016.

⁸¹ See in *Legislative Gazette* No. 11, August 28, 2019 Available at http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570106471.pdf

⁸² See in *Legislative Gazette* No. 10, August 14, 2019 Available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570197827.pdf

⁸³ According to article 15 of the Central Bank Law, the Board of the Bank is made up of the President and six members, one of which is the Minister of the National Executive in charge of the economic sector. Text of the Law available at: <http://www.bcv.org.ve/marco/decreto-ley-del-banco-central-de-venezuela>

⁸⁴ See in the *Official Gazette* No. 41.422 of the same date June 19, 2018.

⁸⁵ See in *Official Gazette* No.41.434, July 6, 2019. Available at: <http://gacetaoficial.tuabogado.com/gaceta-oficial/decada-2010/2018/gaceta-oficial-41434-del-6-julio-2018>

addition were enounced and rejected as unconstitutional and illegal by the National Assembly on June 26, 2018⁸⁶ and on July 16, 2019.⁸⁷

5. The reaction of the Constitutional Chamber against the appointments of the Ad Hoc Management Board of Banco Central de Venezuela made according to the Transition Statute

Following the same pattern of unilateral declarations aforementioned, issued *ex officio*, without any case or controversy, also in violation of all the most elemental rules and principles of due process enumerated in article 49 of the Constitution, the Constitutional Chamber of the Supreme Tribunal issued Decision No. 247 of July 25, 2019,⁸⁸ in which it declared the absolute nullity of the “Resolution of the National Assembly rejecting the appointment of Calixto Ortega Sánchez as President of the Central Bank of Venezuela” passed on June 26, 2019; as well as of the “Resolution of the same National Assembly on the appointment of the Ad-Hoc Administration Board of the Central Bank of July 16, 2019.” Consequently, the Constitutional Chamber, in a decision which was also an absolute nullity under article 25 of the Constitution because it was issued in violation of its article 49, purported to decide that the appointments of the said authorities of the Central Bank of Venezuela that could be made according to such Resolutions were to be deemed null and void.

This unilateral declaration of the Constitutional Chamber also began with the transcription of what the Chamber declared in its own previous and also unilateral ruling No. 6 of February 8, 2019, also issued *ex-officio*, in which it declared the *Transition Statute* null and void and without legal effects, considering it as an act of force that “had the ultimate purpose of repeal the constitutional text (article 333) and all the subsequent acts of the National Branch of Government” (*Poder Público Nacional*). Consequently, based in such previous unilateral declaration, the Constitutional Chamber in its decision

⁸⁶ See “Acuerdo de rechazo a la designación de Calixto Ortega Sánchez como Presidente del Banco Central de Venezuela,” 26 June 2018, available at: <http://www.asambleanacional.gob.ve/actos/detalle/acuerdo-de-rechazo-a-la-designacion-de-calixto-ortega-sanchez-como-presidente-del-banco-central-de-venezuela-283>

⁸⁷ See *Legislative Gazette*, No. 10, 14 August 2019, available at: http://www.asambleanacional.gob.ve//storage/documentos/gaceta/gaceta_1570197827.pdf

⁸⁸ Available at: <http://www.tsj.gob.ve/-/sala-constitucional-del-tsj-declara-nulo-acuerdo-del-parlamento-en-desacato-para-designar-directorio-ad-hoc-del-bcv>

No. 247 proceeded also in a unilateral *ex officio* way to declare that, due the fact that the “Resolution of the National Assembly rejecting the appointment of Calixto Ortega Sánchez as President of the Central Bank of Venezuela” passed on June 26, 2019, was issued based on the *Transition Statute*, declaring that it has the same legal consequences being also vitiated of absolute nullity.

The Constitutional Chamber, in addition, condemned the decision adopted by the National Assembly to notify of its Resolutions of appointment of the members of the Ad-Hoc Board of the Central Bank, to the authorities of the United Kingdom of Great Britain and Northern Ireland asking them to ignore such appointment, considering that it was issued “only for the purpose of attacking the socioeconomic system of the Nation and to break the constitutional order,” then asking the same authorities of foreign countries to ignore such petition, considering it without legal effects and nonexistent as explained in the decision No. 6 of the same Chamber.

V. GENERAL COMMENT ON THE UNCONSTITUTIONALITY OF THE “NEW MODALITY” OF *EX OFFICIO* JUDICIAL REVIEW CREATED BY THE CONSTITUTIONAL CHAMBER

All these previously mentioned “*unilateral declarations*” adopted *ex-officio* by the Constitutional Chamber of the Supreme Tribunal, specifically, the decisions No. 3 of January 21, 2019; No. 6 of February 8, 2019; No. 39 of 14 February 14, 2019; No. 74 of April 11, 2019 and No. 247 of July 25, 2019, issued by the Constitutional Chamber confronting the legitimately elected National Assembly, particularly after the parliamentary elections of December 2015 (when the Government lost the absolute majority control it used to have in such Assembly), amount to no more than that: “unilateral declarations” issued *ex officio* by the Constitutional Chamber, which under the Venezuelan constitutional system of judicial review, have no validity whatsoever on matters of judicial review, being null and void because they violate all the rules and principles of due process guaranteed in article 49 of the Constitution, and as established in article 25 of the same Text.

The situation of confrontation that provoked the unconstitutional means of judicial review reflected in these decisions was denounced by the Secretary General of the Organization of American States in his *Report* of June 2016, in which he expressed how

the world has “witnessed a constant effort by the executive and judiciary powers to prevent or even invalidate the normal functioning of the National Assembly. The Executive Power has repeatedly used unconstitutional interventions against the legislature, with the collusion of the Constitutional Chamber of the Supreme Tribunal of Justice. The evidence is clear [...] These examples clearly demonstrate the lack of independence of the judiciary. The tripartite system of democracy has failed, and the judiciary has been co-opted by the executive power [...]”⁸⁹

In Venezuela, according to the Constitution there cannot be any sort of judicial review process without the existence of a case or controversy, that must have been initiated before the competent court through a demand, action or request filed by an interested party.⁹⁰ That is, in Venezuela, no judicial review process can be initiated by the Constitutional Chamber of the Supreme Tribunal on its own initiative. The powers of the Constitutional Chamber to act *ex officio*, are limited solely to *existing judicial processes*.⁹¹ That is why prior to 2019 when the present constitutional crisis in Venezuela arose, there had been no examples of any case of application of the concentrated method of judicial review with such characteristic of unilateral *ex officio* declarations issued in violation of the most elemental rules and principles of due process guaranteed by article 49 of the Constitution, like those contained in the aforementioned unilateral *ex officio* declarations.

⁸⁹ Text of Secretary-General Luis Almagro’s statement to the Permanent Council of the OAS, June 23, 2016, available at: http://www.el-nacional.com/politica/PresentacinDelSecretarioGeneraldeLaOEAante_NACFIL20160623_0001.pdf.

⁹⁰ See Allan R. Brewer-Carías, *El sistema de justicia constitucional en la Constitución de 1999 (Comentarios sobre su desarrollo jurisprudencial y su explicación, a veces errada, en la Exposición de Motivos)*, Editorial Jurídica Venezolana, Caracas 2000 p.78. Available at: <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2090.%20EL%20SISTEMA%20DE%20JUSTICIA%20CONSTITUCIONAL%20DEFINITIVO.pdf>

⁹¹ See Allan R. Brewer-Carías, Allan R. Brewer-Carías, “Régimen y alcance de la actuación judicial de oficio en materia de justicia constitucional en Venezuela,” in *Revista IURIDICA*, No. 4, Centro de Estudios Jurídicos Dr. Aníbal Rueda, Universidad Arturo Michelena, Valencia, Julio-Diciembre 2006, pp. 5-10. <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II,4%20497.%20INCONSTITUCIONALIDAD%20DE%20OFICIO%20EN%20MATERIA%20DE%20JUSTICIA%20CONSTITUCIONAL.%20SANTIAGO%202006.pdf>; Juan Alberto Berrios Ortigoza, “El control concentrado de oficio de la constitucionalidad 2000-2011), in *Revista Cuestiones Jurídicas de la Universidad Rafael Urdaneta*, Vol V, No. 2 (julio-diciembre 2011), pp.42-45. Available at: <https://www.redalyc.org/pdf/1275/127521837003.pdf>

The system of judicial review in Venezuela, as in many other Latin American countries, is a mixed one, which combines the concentrated method of judicial review (Austrian Model) with the diffuse method of judicial review (American Model).⁹² In the first system of judicial review (*Concentrated method of judicial review*), the Constitutional Chamber of the Supreme Tribunal is empowered to annul laws, acts of state with similar rank and value, and other acts issued in direct and immediate execution of the Constitution (like decree-laws, acts of government and acts of parliament) (articles 266.1 and 336 of the Constitution)⁹³ when they are challenged on grounds of unconstitutionality through the filing of a popular action (*action popularis*) (articles 266.1; 334 *in fine*; 336.1-336.4 of the Constitution).⁹⁴ This means that a *concentrated method of judicial review* can be applied by the Constitutional Chamber, only when a popular action is filed by an interested party, and a judicial process is initiated and is underway according to the rules and principles of due process of law. No judicial review decision *annulling a law* can therefore be issued by the Constitutional Chamber according to the Constitution, without a request (action, recourse) filed by a party before the Constitutional Chamber. In this sense a concentrated judicial review of constitutionality process cannot be initiated *ex officio* by the Constitutional Chamber, as did occur in the aforementioned Decisions No. 3, 6,74 and 247.

This principle is expressly established in article 32 of the Supreme Tribunal of Justice Organic Law (2010), which provides that the Constitutional Chamber exercises the

⁹² See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989, pp. 275-287 Available at: <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II.1.59.pdf>; and *Judicial Review. Comparative Constitutional Law Essays, Lectures and Courses (1985-2011)*, Fundación Editorial Jurídica Venezolana, Editorial Jurídica Venezolana, 2014, 1198 pp.1079-1087 Available at: <http://allanbrewercarias.com/wp-content/uploads/2014/02/JUDICIAL-REVIEW.-9789803652128-txt-PORTADA-Y-TEXTO-PAG-WEB.pdf>

⁹³ According to articles 259, 266.5 of the Constitution, administrative acts are not subjected to judicial review by the Constitutional Chamber, but only by the Political/Administrative Chamber of the Supreme Tribunal on grounds of unconstitutionality and illegality.

⁹⁴ See Allan R. Brewer-Carías, *El control concentrado de la constitucionalidad de las leyes. Estudio de derecho comparado*, Editorial Jurídica Venezolana, Caracas-San Cristóbal 1994, pp.50-52 Available at: <http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea5/Content/II,%201,%2071.%20EL%20CONTROL%20CONCENTRADO%20DE%20LA%20CONSTITUCIONALIDAD%20DE%20LAS%20LEYES%20ESTUDIO%20DE%20DERECHO%20COMPARADO.%20LIBRO%20ARBCDOC.pdf>

“concentrated control of constitutionality in the terms provided in this Law, by means of the filing of a judicial popular action (*demanda*), in which case, being a matter of public policy, once the action is filed, the Chamber “could supplement, *ex officio*, the deficiencies of the claimant request.” That is to say, in order for the Constitutional Chamber to decide on a concentrated process of judicial review of legislation, an action must be formally filed by an interested party, and only in cases of deficiencies of the request or complaint filed by the claimant is the Constitutional Chamber empowered to supplement, *ex officio*, such deficiencies. The only exception to this principle is established in article 34 of the same Organic Law of the Supreme Tribunal of Justice in cases in which in a particular judicial process (case or controversy), a court declares the inapplicability of a norm to the case, based in the exercise of a diffuse judicial review method, in which case the Constitutional Chamber may order to begin a process of nullity according to the provisions of the Organic Law. This can also occur, when the diffuse judicial review method is applied in a particular process by the same Chamber.

According to article 335 of the Constitution, when deciding on matters of judicial review, the Constitutional Chamber can declare that a particular interpretation on the content or scope of constitutional provisions and principles related to The core or holding of the decision in a particular case, that is, to the *thema decidendum*, is to be considered binding for the other Chambers of the Supreme Tribunal and for all the courts of the Republic.⁹⁵ This interpretation must be expressly identified in the final decision of the specific constitutional process, which in any case, always must be initiated through a petition, an action or a recourse filed by an interested party; and it must be published in the *Official Gazette*.

In the second system of judicial review (*diffuse method*) (article 334, Second paragraph of the Constitution), all judges in the country, when deciding a particular case that must have been initiated by a party, that is, in a cases or controversy, have the power to give

⁹⁵ See Allan R. Brewer-Carías, “La potestad de la Jurisdicción Constitucional para interpretar la Constitución con efectos vinculantes,” in Jhonny Tupayachi S. (Coordinador), *El precedente constitucional vinculante en el Perú (Análisis, comentarios y doctrina comparada)*, Editorial Adrus, Lima 2009, pp.10-11. Available at: http://allanbrewercarias.com/wp-content/uploads/2011/02/638.II-4-648-LA-INTERPRETACI%C3%93N-VINCULANTE-DE-LA-CONSTITUCI%C3%93N-_Venezuela_-Lima-2009.doc.pdf (pp.10-11)

priority to the Constitution over statutory provisions, applying the Constitution and not the law, when they deem it would be unconstitutional.⁹⁶ In this second case, the courts do not “annul” the law, but only declare it inapplicable because its application would be unconstitutional. The court thus gives preference to the Constitution. In this system of judicial review also, the ruling by the court on matter of unconstitutionality may be adopted only when the court is deciding a case that has been initiated by means of a party’s claim.

Until 2019, whether before or after the passage of the 1999 Constitution, we have never witnessed in Venezuela any decision by a constitutional judge similar to the aforementioned unilateral declarations issued by the Constitutional Chamber in 2019 under the Numbers, 3, 6, 74 and 247 (and Decision 39 relating to PDVSA), in which the Supreme Tribunal has adopted *ex officio* judgments exercising the concentrated method of judicial review, in judicial procedures that no party has initiated, and that consequently, have been initiated by the same Chamber, at its sole initiative, relying only on transcripts of parts of previous decisions, without any claim by a party, without hearing any legal argument and without giving any party the right to be heard.

These decisions are contrary to the constitutional right to due process and to self-defense declared in article 49 of the Constitution and are therefore null and void according to article 25 of the same Constitution. Thus, they have no legal value or effect in the Venezuelan system of judicial review, and consequently, having been issued in violation of the most fundamental principles and rules of due process of law, they cannot be considered as legitimate judicial decisions, being in my opinion impossible for a court of a democratic rule of law state to recognize as legitimate judicial rulings.

New York, January 2021

⁹⁶ See Allan R. Brewer-Carías, “El método difuso de control de constitucionalidad de las leyes en el derecho venezolano,” in Víctor Bazán, *Derecho Procesal Constitucional Americano y Europeo*, Edit. Abeledo Perrot, Tomo I, Buenos Aires 2010, pp.15-20. Available at: <http://allanbrewercarias.com/wp-content/uploads/2010/05/643.-634.-El-m%C3%A9todo-difuso-de-control-de-constitucionalidad-en-Venezuela.-Brewer.-VBaz%C3%A9n-Argentina-2008.doc.pdf>