Allan R. Brewer-Carías

THE FAKE RULE OF LAW AND THE RISE OF KAKISTOCRACY IN VENEZUELA

(RULE OF LIES AND RULE OF POWER)

Essays and Lectures 2021-2023

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THE FAKE RULE OF LAW AND THE RISE OF KAKISTOCRACY IN VENEZUELA

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HOW VENEZUELA BECOME A FAILED STATE

The predatory state and the pervasive kakistocracy

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INTRODUCTION

Professor Allan R. Brewer-Carías most recent book[1] explains the collapse of Venezuela from the political theory of the kakistocracy, that is, a Government based on an elite that concentrates all the Government´s vices. Or, in short words, the Government of the worst.[2]

Despite its ancient origins, the term "kakistocracy" has found widespread usage in characterizing authoritarian regimes from the late 20th century to the early 21st century.[3] Particularly, the expression

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1 In Spanish, *See* Brewer-Carías, Allan (2023), *Kakistrocracia depredadora e inhabilitaciones políticas,* Caracas: Editorial Jurídica Venezolana. Professor Brewer prepared an English version: *Kakistocracy and the Fake Rule of Law in Venezuela,* which is the work on which this paper is based.

2 Professor Brewer relies on the seminal work of Michelangelo Bovero, "La ricetta di Polibio e il suo "rovescio". Ovvero: Kakistocrazia, la pessima repubblica", *1 Teoría Política,* 1996.

3 "Kakistocracy, a 374-year-old word that means 'government by the worst,' just broke the dictionary", *The Washington Post*, April 13, 2018.

describes the evolution of some political regimes after the collapse of the Soviet Union, including Russia. According to Vahram Abadjian:[4]

> "The major features of kakistocracy are usurpation of power through unfair and falsified elections; growing polarization of the society, impoverishment of the bulk of population and enrichment of a handful of nouveaux riches; selling out to the foreign capital the economic and other assets based on clan interests; thriving corruption and the rule of lawlessness."

Between 1999 and 2023, not only did the Venezuelan constitutional democracy collapse, but Venezuela also degenerated into a fragile state in which informal and criminal institutions coopted weak institutions. The most visible sign is the economy's collapse, only comparable to that of countries facing severe wars. Hence, a complex humanitarian emergency has been triggered, resulting in the biggest migrant crisis in the region—and one of the worst in the world.

The Venezuela collapse was not a consequence of natural disasters (as has happened in Haiti), military interventions (the current situation in Ukraine), or civil wars (as in Syria). This is a self-inflicted crisis caused by arbitrary policies that decimated the rule of law, destroyed the market mechanisms, created a massive foreign exchange deficit because of over-indebtedness and the destruction of the oil industry, and, finally, caused the collapse of the state capability.[5] That situation can be described as a war but an unconventional one.[6] Following Professor Brewer-Carías:[7]

> "That war that has been waged by the State and the klepto-kakistocracy leading it has manifested itself in the following aspects:

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4 Abadjian, Vahram (2010), "Kakistocracy or the True Story of What Happened in the Post-Soviet Area", in *1-2 Journal of Eurasian Studies*, 156.

5 For instance, *See* Araujo Cuauro, Juan (2020), "Socialismo del siglo XXI: degeneración de la democracia venezolana", *2-1 SUMMA. Revista disciplinaria en ciencias económicas y sociales*, 13-40.

6 Banasik, Miroslaw (2016), "Unconventional War and Warfare in the Gray Zone. The New Spectrum of Modern Conflicts," *7-1 Journal of Defense Resources Management*, 37–37.

7 Brewer-Carías (n. 1).

(i) A war against the State itself; (ii) A war against its institutional foundations; (iii) A war against its form of political decentralization; (iv) A war against the public economy and public services; (v) A war against the country and its inhabitants; and (vi) A war against democracy and the citizen"

In that sense, Venezuela could be considered the poster child of a state collapse caused by predatory policies, that is, arbitrary policies that not only decimate the rule of law but extract wealth from the society, transforming the person into a subjugated subject without human dignity.[8]

From the economic and political sciences, there is an increasing interest in studying the interaction between institutions, state capability, and development. That interaction can be studied in Venezuela to demonstrate how predatory and extractive institutions caused the collapse of the country and the suffering of millions of Venezuelans -including more than 7 million that have left the country-.

I. STATE CAPABILITY, DEVELOPMENT AND THE RULE OF LAW

There has been a long discussion about the relationship between the development and the rule of law. Inspired by Amartya Sen's theory[9], the United Nations has insisted on the correlation between both, particularly from the perspective of the *Millennium Goals* and, currently, the *2030 Sustainable Development Goals Agenda*.

For instance, according to the Declaration of the High-level Meeting of the United Nations General Assembly on the Rule of Law at the National and International Levels (2012), *"(...) the rule of law and development are strongly interrelated and mutually reinforcing*", because:[10]

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8 For a technical concept of predatory policies regarding Venezuela, *See* Hernández G., José Ignacio (2021), *Control de cambio y de precio en Venezuela,* Caracas: Editorial Jurídica Venezolana, 151.

9 Sen, Amartya (1999), *Development and freedom,* New York: Anchor Books, Nueva 13.

10 Resolution n° A/67/L.1, dated November 30, 2012.

> "the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms".

This conclusion is included as a subcomponent of the 16th objective of the 2030 Agenda: "*promote the rule of law at the national and international levels and ensure equal access to justice for all*". Effective rule of law, good governance at all levels, and transparent, effective, and accountable institutions are necessary for sustainable development.[11]

Despite being a very general expression, for that purpose, the rule of law includes institutions that *(i)* prevent the Government´s abuse of power, *(ii)* promote democratic governance based on principles such as transparency, accountability, and citizens´ participation and *(iii)* protect human rights.[12]

The rule of law formal institutions encompasses the arrangements outlined in Constitutions, legislation, and other official decisions. However, it is essential to recognize that these formal institutions are not self-enforced. That means that they need a capable Government to effectively enforce them. Without the necessary capacity, the enforcement of these institutions may become deficient, leading to informal institutions – social arrangements that develop in areas where the Government cannot act. Hence, it is crucial to distinguish between the rule of law *de jure* (formal institutions) and the rule of law *de facto* (informal institutions that could emerge due to the Government´s lack of capacity). This distinction is particularly relevant for understanding the intricate relationship between the rule of law and the development process.[13]

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11 *See* https://sdgs.un.org/goals/goal16.

12 Regarding the rule of law concepts, *See* Tasioulas, John, "The Rule of Law", in Tasioulas, John (ed.) (2020), *The Cambridge Companion to the Philosophy of Law,* Cambridge: Cambridge University Press, 117

13 The distinction between the formal institutions (the rule of *law de jure*) and the informal institutions (the rule of law *de facto*) is inspired by the works of North. *See* North, Douglass (1999), *Institutions, institutional change and economic performance,* Cambridge: Cambridge University Press, 36.

1. *Why Nations Fail. The Role of Institutions in Development. Institutions and the Rule of Law. The Constitutional authoritarian-populism*

In an influential book, Acemoglu and Robinson conclude that the critical conditions for development are inclusive institutions, that is, formal arrangements that prevent the abuse of power, foster democratic governance (political institutions), and recognize and protect economic rights (economic institutions). Countries that have built inclusive political and economic institutions can promote development. On the contrary, extractive institutions favor the Government´s abuses (political institutions) and destroy the market mechanism and the ability of civil society to organize itself to satisfy its own needs (economic institutions). Those institutions extract well-being from society.[14]

To illustrate this theory, Acemoglu and Robinson use the example of Sonora Mexico and Sonora U.S. The exact geographical area has resulted in different development outcomes because of the institutions. Because institutions result from a lengthy political and social evolution, the authors also conclude that the historical origins of institutions -including colonialism- influence the development outcomes.[15]

We can discuss whether institutions are the only prevalent element. Ricardo Hausmann has observed that institutional theory cannot explain the development difference within the same countries despite the general application of national institutions.[16] However, in any case, it is possible to conclude that inclusive institutions are, at least, necessary to promote development.

Inclusive institutions are, in general terms, the rule of law. The rule of law, for that purpose, is an institutional design that, through rules over human conduct, prevents the Government´s abuses, promotes democratic

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14 Acemoglu, Daron, and Robinson, James (2012), *Why Nations Fail,* New York: Crown Business, 70.

15 Acemoglu, Daron, *et al*. (2001) "The Colonial Origins of Comparative Development: An Empirical Investigation" *91-5 The American Economic Review*, 2001, 1369–1401

16 Hausmann, Ricardo, et al., "Growth diagnostic" (2007), in Rodrick, Danni, *One economics, many recipes,* Princeton: Princeton University Press, 56.

governance, and favors market mechanisms. The protection of market mechanisms -based on economic rights, such as economic freedom and private property- is harmonized with the social welfare policies that promote social and economic equality under the rule of law.[17] Therefore, the deviation from the rule of law and the emergence of non-democratic or authoritarian regimes[18], create obstacles to promoting development because those regimes are based on extractive institutions. An evidence -pointed out by Amartya Sen- is that famines are common in non-democratic regimes.[19]

Francis Fukuyama has also studied how political decay -through deviations in the rule of law, including clientelism, patronage, and corruption- creates obstacles to promoting development.[20] Political crisis can result in the emergence of a predatory state, that is, the Government that deprives the civil society's well-being.[21] Because the stability of the Government does not depend on free and fair elections, authoritarian regimes rely on their ability to distribute corrupt revenues among the selectorate, including rents.[22]

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17 In Latin America -and Venezuela- the rule of law follows a model like the *Rechtsstaat*, in which the Government is subject to the supremacy of the Constitution, based on civil, commercial, and criminal codification. The region uses the expression Constitutional State (Estado de Derecho) to describe that arrangement, which should be based on the Democratic Government. Since 1917, the Constitutional and Democratic State evolved into a Welfare State (Estado Social). *See* Brewer-Carías, Allan (2016), *Principios del Estado de Derecho. Aproximación histórica,* Miami: Ediciones EJV Internacional, 18-37.

18 Linz, Juan (2000), *Totalitarian and authoritarian regimes. With a major new introduction,* Boulder: Lynne, Rienner Publishers, 49.

19 Sen, Amartya (1982), *Poverty, and famines. An essay on entitlement and deprivation,* New York: Clarendon Press-Oxford University Press, 10.

20 Fukuyama, Francis (2014), *Political order and political decay,* New York: Farrar, Straus and Giroux, 199.

21 Robinson, James A. (1999), "When Is a State Predatory?" *IDEAS Working Paper Series from RePEc*.

22 The selectorate describes the persons who support authoritarian regimes and, more specifically, the winning coalition or the elite within the selectorate that are essential to the regime´s stability. Bueno de Mesquita, Bruce, and Alastair Smith (2011), *The Dictator's Handbook: Why Bad Behavior Is Almost Always Good Politics*, New York: Public Affairs, 2011, 21.

The classic example of an authoritarian regime -particularly in Latin America- were the governments that emerged from military coups, that is, the *de facto* governments, that eventually were able to build a functional bureaucracy.[23] In the 1970s, the third wave of democratization marked the end of military or *junta* regimes[24], heralding the rise of democratic governments in the region. Venezuela served as an exemplary case of a successful democratic transition. [25] However, the 21st century as proved that the battle between democracy and authoritarian is far from been solved.

As Larry Diamonds observed, during the last decades there has been a democratic recession regarding fewer transitions towards democracy or more autocratic advances in democratic regimes.[26] This slow-motion process has blurred the difference between autocracy and democracy with the emergence of hybrid regimes or competitive authoritarianisms.[27] In hybrid regimes, Constitutional Law is often used to achieve autocratic objectives, a concept described by Mark Tushnet as "Constitutional authoritarianism."[28] This form of abusive constitutionalism effectively weaponizes the Constitution.[29]

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23 O'Donnell, Guillermo A. (1988) *Bureaucratic Authoritarianism: Argentina, 1966-1973, in Comparative Perspective*. Berkeley: University of California Press, 40.

24 Huntington, Samuel (1991), *Third wave. Democratization in the Late Twentieth Century,* Norman: University of Oklahoma Press, 3.

25 Levine, Daniel H. "Venezuela since 1958: the consolidation of democratic politics" (1978), in Stepan, Alfred C., and Juan J. Linz (ed), *The Breakdown of Democratic Regimes. Latin America*, Baltimore: Johns Hopkins University Press, 82.

26 Diamond, Larry (2016), *In search of democracy,* New York: Routledge, 147.

27 Levitsky, Steven and Way, Lucan (2010), *Competitive authoritarianism,* Cambridge: Cambridge University Press, 5.

28 Tushnet, Mark "Authoritarian Constitutionalism: Some Conceptual Issues" (2014), in Ginsburg, Tom, and Alberto Simpser, *Constitutions in Authoritarian Regimes*., New York: Cambridge University Press, 36.

29 Landau, David (2013), "Abusive Constitutionalism", in *47-1 U.C. Davis Law Review N° 47 (1),* 189, and Collot, Pierre-Alain, "Propos introductifs. Constitutionnalisme abusif et régimes hybrides" (2022), in Collot, Pierre-Alain (ed), *Le constitutionnalisme abusive en Europe,* Paris : Mare & Martin, 23.

The democratic backslide is also characterized by the rising of authoritarian populism.[30] The populist rhetoric exalts the *vox populi* to cover authoritarian decisions that usually are implemented with a veneer of constitutionality The general will of the people, and the popular foundations of democracy, are distorted in the exaltation of the majority rule[31]. We have referred to the Constitutional authoritarian populism to describe the constitutional abuses simulated behind the populist rhetoric.[32] In those cases, as Moisés Naim explains, the concept of the Law is distorted in a quasi-law that emasculates authoritarian measures.[33] As Professor Brewer recalls, the rule of law degenerated into the rule of lies.[34]

2. *State Capability, political decay, and humanitarian emergencies. The dismantling of the electoral conditions and the kleptocracy emergence*

The rule of law -or the inclusive institutions- results from a delicate balance between the Government and civil society capability. Acemoglu and Robinson describe that balance as a narrow corridor in which the Government has enough power to promote the common good, and civil society is sufficiently strong to prevent the Government´s abuses. To describe Latin America, the authors use the expression "paper leviathans", that is, weak states in weak societies.[35]

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30 Norris, Pippa and Inglehart, Ronald (2019), *Cultural Backlash. Trump, Brexit, and authoritarian populism,* Cambridge: Cambridge University Press, 3 and 65.

31 Tushnet, Mark and Bugaric, Bojan (2021), *Power to the People*, Oxford: Oxford University Press, 9.

32 José Ignacio Hernández G., "Towards a Concept of Constitutional Authoritarianism: The Venezuelan Experience", *Int'l J. Const. L. Blog*, Dec. 14, 2018, at: http://www.iconnectblog.com/2018/12/towards-a-concept-of-constitutional-authoritarianism-the-venezuelan-experience/

33 Naím, Moisés (2022), *The revenge of power*, New York: St. Martin´s Press, 7.

34 Brewer-Carías (n 1).

35 Acemoglu, Daron and Robinson, James (2019), *The narrow corridor,* New York: Penguin Press, 338.

Latin America is a region of fragile states because of the peculiar formation of states in the region, as explained by Sebastián Mazzuca.[36] State fragility is not only a constraint for development but also a constraint for effectively implementing the rule of law. State capacity can be defined as the power that allows the Government to fulfill its goals, including those described in the Constitution and the International Law.[37] The state fragility reflects a limited capacity to implement those goals in a scale that includes different fragility ranges, following Rotberg.[38] As an organization without the capacity to exert violence monopolization, the failed state is an extreme and rare case of state fragility.[39] Therefore, it is better to focus on the state's fragility or the limited governmental capacity to implement its tasks. All the states have a degree of fragility that only, in extreme cases -usually related to the dissolution of the central authority- results in a failed state.[40]

In areas where the Government does not have the capacity to deliver goods and services, informal governance institutions can emerge, known as areas of limited statehood.[41] In those areas, the *de jure* rule of law is somewhat translucent, and instead, the *de facto* rule of law emerges. Particularly the state-centered violence monopolization (the Weberian

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36 Mazzuca, Sebastián (2021), *Latecomer state formation*, New Haven: Yale University Press, 32.

37 Dincecco, Mark (2017), *State Capacity and Economic Development,* Cambridge: Cambridge University Press, 3.

38 Rotberg, Robert, "Failed States, Collapsed States, Weak States" (2003), in Rotberg, Robert (ed), *State failure and State Weakness in a Time of Terror,* Cambridge-Washington DC: World Peace Foundation and Brookings Institution Press.

39 Woodward, Susan (2017), *The Ideology of failed States,* Cambridge: Cambridge University Press, 1 and 34.

40 Howard, Tiffany (2014), *Failed States and the Origins of Violence,* Surrey-Burlington: Ashgate, 1.

41 Risse, Thomas, "Governance in Areas of Limited Statehood" (2015), in Levi-Faur, David (ed) *The Oxford Handbook of Governance*, Oxford: Oxford University Press, 700, and Börzel Tanja A., et al., "Governance in Areas of Limited Statehood: Conceptual Clarifications and Major Contributions of the Handbook" (2018), in Börzel Tanja A., Risse, Thomas, and Draude, Anke (ed), *The Oxford Handbook of Governance and Limited Statehood,* Oxford: Oxford University Press, 3-6.

essence of the state)[42] can pave the way to informal institutions that, in some extreme cases, can lead to organized crime.[43] Nevertheless, the areas of limited statehood are not necessarily characterized by chaos. On the contrary, non-state actors can adopt informal governance mechanisms to supply the goods and services the Government cannot deliver,[44] even regarding violence fragmentation and the loss of territorial control.[45] Regarding the market mechanism, informal institutions can lead to shadow markets. [46] In extreme cases, the weak bureaucracy can degenerate into a gangster state.[47]

Comparative Constitutional Law has been focusing on how state capability impairs the effective implementation of constitutional institutions.[48] Fragility becomes more pronounced when the Constitution broadens the government's responsibilities. Consequently, social constitutionalism in Latin America has resulted in ambitious Constitutions with expansive and indeterminate transformative mandates, along with an extensive catalog of social and economic rights, as expanded by Inter-American Law.[49] The Latin American Transformative Constitutional Law

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42 Weber, Max (2013), *Max Weber's Complete Writings On Academic and Political Vocations*, New York: Algora Publishing, 367.

43 North, Douglass, *et al*. (2012), *Violence and social order. A conceptual framework for interpreting recorded human history,* New York: Cambridge University Press, 11.

44 Risse, Thomas, and Eric Stollenwerk (2018) "Limited Statehood Does Not Equal Civil War." *147-1 Daedalus,* 104–115.

45 Chayes, Sarah (2015), *Thieves of State. Why corruption threatens global security,* New York: W.W. Norton & Company, 91.

46 Schneider, Friedrich, "Shadow economies and corruption all over the world: what do we really know?" (2018), in Pickhardt, Michael, and Shinnick, *The Shadow Economy, Corruption and Governance*, Cheltenham: Edward Elgar, 122.

47 Hirschfeld, Katherine (2015), *Gangster States,* London: Palgrave Macmillan, London, 68.

48 Khosla, Madhav and Tushnet, Mark (2022) "Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry", *70-1. The American Journal of Comparative Law,* 95.

49 Bogdandy, Armin von, "Ius Constitutionale Commune in America Latina: Observations on Transformative Constitutionalism" (2017), in Bogdandy, Armin von, et al, (ed) *Transformative Constitutionalism in Latin America*, Oxford: Oxford University Press, 27.

is fragile because the Government does not have enough capabilities to fulfill transformative goals, resulting in areas of limited statehood.[50] We have referred to the *failed Constitutional Law* to describe the gap between the *de jure* institutions of the Transformative Constitutional Law and the *de facto* institutions of clientelism, corruption, and inequality.[51]

The state fragility has different causes, including Latin America's historical origins and extractive industries' impact.[52] Our interest is to understand how the rule of law deviations, or the emergence of authoritarian institutions, can erode the state's capability. In that sense, political decay promoted by predatory policies can result in state fragility and areas of limited statehood. Not all autocratic deviations impair state capability. Totalitarian regimes, for instance, are only possible in states with enough capabilities to control society. In any case, autocratic regimes, not subject to checks and balances, are prone to predatory policies that undermine the state capability, and particularly, the bureaucratic capacity of the State.[53]

In the most severe cases, state fragility resulting from predatory policies can lead to extensive areas of limited statehood, hindering the Government's ability to perform fundamental tasks such as maintaining violence monopolization and ensuring equitable access to essential goods and services, particularly those related to social and economic rights. Political decay-induced state fragility also undermines civil society's capacity for two primary reasons: first, due to predatory policies that disrupt market mechanisms, and second, as a result of missing resources that society requires. For instance, this can manifest in the lack of access

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50 Brinks, Daniel *et al.* (2019)*, Understanding Institutional Weakness. Power and design in Latin American institutions,* Cambridge: Cambridge Elements. Political and Society in Latin America, 11.

51 Hernández G. José Ignacio (2022), *La pandemia de la COVID-19 y el Derecho Administrativo en América Latina. Un estudio sobre la fragilidad de las Administraciones Públicas*, Bogotá: Tirant Lo Blanch-Universidad del Rosario, Bogotá, 294.

52 Soifer, Hillel David (2015), *State Building in Latin America,* New York: Cambridge University Press, 18-19.

53 That is the thesis of extractive institutions as an adverse condition to development.

to essential infrastructural services like electricity supply. Weak states often produce weakened societies.[54]

A humanitarian crisis arises when the Government and society lack the capacity to meet basic human needs. This crisis can stem from natural disasters, but it can also be instigated by political decay. In the latter scenario, the humanitarian crisis is "complex".[55] International intervention is often contemplated when domestic capacities cannot guarantee essential needs.[56] This consideration becomes significantly pronounced when political decay involves mass atrocities and grave human rights violations. Such interventions are typically associated with the "responsibility to protect" commitment, wherein states have a general duty to shield persons from atrocities, even if perpetrated by foreign Governments.[57]

The responsibility to protect extends beyond military intervention. International sanctions can be employed to prevent atrocities.[58] The International Criminal Court (ICC) also serves as a safeguard, mainly due to the subsidiary and complementarity principles outlined in the Rome Statute. According to these principles, the Court can only step in if the investigated state is not conducting genuine investigations. Consequently,

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54 Migdal, Joel (1988), *Strong societies and weak states,* New Jesery: Princeton University press, 33.

55 Complex humanitarian emergencies represent extreme situations where political decay, including political and social unrest, severely hampers the Government and society's capacity to fulfill essential needs. *See* Everett, Andrea L. (2016), "Post-Cold War complex humanitarian emergencies: Introducing a new dataset", *33-3 Conflict Management and Peace Science,* 311-399.

56 This intervention is usually referred to as "humanitarian intervention". *See* Caroni, Martina, "Legitimate, but Illegal? From Humanitarian Intervention to Responsibility to Protect", in Eger, Thomas, et al. (ed) (2017), *International Law and the Rule of Law under Extreme Conditions,* Tübingen: Mohr Siebeck, 267-282

57 Hilpold, Peter, "From Humanitarian Intervention to the Responsibility to Protect" (2014), in Hilpold, Peter (ed), *Responsibility to Protect (R2P). A New Paradigm of International Law?,* Boston: Brill, 1-37.

58 Fehl, Caroline, "Probing the Responsibility to Protect's Civilian Dimension: What Can Non-Military Sanctions Achieve?" (2015), in Fiott, Daniel, and Joachim Alexander Koops, *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization*, New York: Palgrave Macmillan, 39-57.

the ICC serves as an incentive to deter atrocities, fostering a transition away from the political crisis that has led to systematic human rights violations.[59]

Constitutional meltdowns typically result from severe deviations from the rule of law. When checks and balances function correctly, they act as a bulwark against predatory policies. Even in hybrid regimes, a selectorate often wields these controls to safeguard their interests. However, without adequate oversight, predatory policies can set a dangerous cycle toward state fragility and the emergence of informal institutions. Corruption, as a vice within the bureaucratic system, can escalate into misappropriating vast funds, commonly called "grand corruption." This can further evolve into a dominance system built on the distribution of rents and incomes, known as "kleptocracy."[60] While this vice can permeate governments with consolidated statehood, such as Russia[61], it is particularly prevalent in fragile states where kleptocracy becomes the governing system in the areas of limited statehood. Those informal and criminal institutions are usually connected with global crime.[62]

Free and fair elections could be the starting point of this debacle, as reflects the 21st-century experience. Social and economic crises and cultural backlash can lead the electorate to embrace authoritarian values and support a populist leader. The emergence of an electoral populism that endorses authoritarian values can be explained from the demand side: The electors support authoritarian and populist leaders who offer to challenge the elites or status quo. [63]

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59 Contarino, Michael and Negrón-González, Melinda, "The International Criminal Court" (2013), in Zyberi, Gentian (ed), *An instructional approach to the responsibility to protect,* Cambridge: Cambridge University Press, 411-435.

60 Acemoglu, Daron, et al. (2004), "Kleptocracy and Divide-and-Rule: A Model of Personal Rule", *2-3 Journal of the European Economic Association,* 162–92.

61 Aslund, Anders (2019), *Russia's Crony Capitalism: The Path from Market Economy to Kleptocracy*. New Haven, CT: Yale University Press, 132-153

62 Bullough, Oliver (2018), "The Rise of Kleptocracy: The dark Side of Globalization", *29-1 Journal of Democracy*, 25-38.

63 Norris, Pippa and Inglehart, Ronald (n 29).

Once in power, the authoritarian leader can use populist rhetoric to justify authoritarian measures to protect the people, dismantling in a slow-motion process the constitutional democracy in an inside-out process.[64] As a result, the electoral integrity conditions are dismantled in a degenerative process that can lead to the transition from functional democracy to a hybrid regime and, from there, to non-competitive authoritarianism in which elections are not anything more than a façade.[65]

Precisely, kakistocracy, as Professor Brewer-Carías explains, encapsulates the array of state vices.[66] In such instances, the rule of law deteriorates into an authoritarian regime, with the Constitution serving as a mere veneer upheld by populist rhetoric. Instead of safeguarding individuals' rights, the Government engages in systematic human rights violations through predatory policies. In extreme instances, these vices cripple the state's capacity, resulting in fragile states and weakened societies unable to meet basic needs. This leads to complex humanitarian crises, areas of limited statehood, and the proliferation of informal institutions, including organized crime and kleptocracy. Hence, only severe rule of law deviations -kakistocracy- can result in this meltdown.

Following Rotberg's analysis[67], such extreme cases manifest in growing internal tensions and conflicts, systemic violence, the state's loss of control over significant territories, patronage policies by authoritarian regimes, severe problems in the provision of public services and infrastructure, social crises marked by food and medicine shortages, rampant corruption, a sharp decline in GDP, accelerated inflation, and the private acquisition of public services and goods.

Venezuela exhibits all these symptoms, as we will elucidate in the following section.

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64 Ginsburg, Tom y Huq, Aziz, "How we lost constitutional democracy" (2018), in Sunstein, Cass (ed), *Can it happen here?* New York: Dey St., 151, and Levitsky, Steven, and Ziblatt, Daniel (2018), *How democracies die,* New York; Crown, 8 and 91.

65 Norris, Pippa (2014), *Why electoral integrity matters,* Oxford: Oxford University Press, 7.

66 Brewer-Carías (n 1).

67 Rotberg (38).

II. THE VENEZUELAN CONSTITUTIONAL MELTDOWN: A CAUTIONARY TALE

Venezuela is a unique case to analyze how the rule of law decimation can accelerate the state collapse, leading to a complex humanitarian emergency. The autocratic degeneration promoted by the Government of Hugo Chávez and continued during Nicolás Maduro's regime severely damaged the capability of the country and transformed the civil society into a weak organization. As summarized by Professor Brewer-Carías, the problem is not about the quantitative dimension of the state, that is, an excessive intervention based on welfare policies. The real challenge is the dramatic qualitative destruction of the state. Hence, the hard task that faces the Venezuelan people is "*to reconstitute and rebuild the State itself, as an institution subjected to the rule of law, set to manage the government of the society, securing the wellbeing and free development of each individual's personality*."[68]

1. *The consolidation and predation stages under Hugo Chávez*

The beginning of the Venezuela meltdown follows the populist handbook explained in the previous section. The political and economic model implemented in Venezuela under the scope of the 1961 Constitution deviated into a deep crisis, influenced by the Petro-State political institutions.[69] The democratic institutions based on the separation of powers and the citizens´ participation degenerated as a result of the concentration of powers in the Presidency promoted by the Petro-State: the Executive was the administrator of the oil deposits, the manager of the oil industry, and the final beneficiary of the oil rents.[70] As a result, several vices impaired the democracy quality of democracy and economic performance. The result was a deep crisis that triggered authoritarian

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68 Brewer-Carías (n 1).

69 Hausmann, Ricardo and Rodríguez, Francisco, "Why did Venezuelan Growth collapse?" (2014), in Hausmann, Ricardo and Rodríguez, Francisco (ed), *Venezuela before Chávez,* Pennsylvania: The Pennsylvania State University Press, 15-16.

70 Karl, Terry Lynn, "Petroleum and Political Pacts: The Transition to Democracy in Venezuela", en *Latin American Research Review Vol. 22, No. 1*, 1987, pp. 63 y ss.

values in the Venezuelan society, which freely chose a charismatic and populist leader as President in December 1998: Hugo Chávez.[71]

Once in power, Chávez used his charisma to advance in a slow-motion process of autocratization that can be divided into two stages: (i) consolidation (1999-2004) and (ii) predation (2005-2012).[72]

During the *consolidation stage*, Chávez concentrated powers based on an abusive constitutionalism boosted by populist rhetoric. For that purpose, and violating the 1961 Constitution, Chávez convened a constituent assembly -the best example of the *vox populi.* Rather than focusing on the draft of the new Constitution, the assembly dismantled the separation of powers, particularly by the political intervention of the Judiciary, in a gross violation of the 1961 Constitution. After the new Constitution was approved in December 1999, the assembly violated it by a transitory framework that increased Chávez´s control over the new political institutions. Although the new Constitution sanctioned the separation of powers, that principle has never been effective in practice.[73]

Based on the concentrated powers, Chávez moved to increase his political control with abusive actions that decimated the autonomy of the national oil company (PDVSA) in 2002.[74] Two years later, he consolidated his control over the Supreme Tribunal.[75] It is relevant that,

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71 Professor Brewer-Carías denounced, at that time, the "terminal crisis" of the Venezuelan political model. *See* Brewer-Carías, Allan (2013), *Tratado de Derecho Constitucional Tomo IV. Asamblea Constituyente y Proceso Constituyente (1999),* Caracas: Fundación de Derecho Público-Editorial Jurídica Venezolana, 16.

72 Corrales, Javier (2022), *Autocracy rising. How Venezuela transitioned to authoritarianism,* Washington, D.C.: Brookings Institution Press, 21.

73 The 1999 constituent process was a fraud against the constitutional democracy, boosted by the populist rhetoric, whose real purpose was to dismantle -in substance- the separation of powers principle. *See* Brewer-Carías, Allan (2015), *Tratado de Derecho Constitucional. Tomo VIII. Golpe de Estado Constituyente, Estado Constitucional y Democracia,* Caracas: Fundación de Derecho Público-Editorial Jurídica Venezolana, 25.

74 Hernández G., José Ignacio (2023), *La privatización de facto de PDVSA y la destrucción del Petro-Estado venezolano,* Caracas: Editorial Jurídica Venezolana, 163.

75 Notably, Chávez approved -through the Legislative acting under his control- the Supreme Tribunal Organic Law, which increased the number of justices of the

to advance in his authoritarian model, Chávez decided to control, first, the oil industry and then the Supreme Tribunal. Chávez understood that, in a Petro-State, the first institution that should be controlled to advance in an autocratization process is the oil industry. The final step of the consolidation stage was the abusive manipulation of the recall referendum in 2004.[76] That manipulation demonstrated that Venezuela was no longer a functional democracy but a hybrid regime or a competitive authoritarianism.[77]

After 2005, Chávez used his autocratic power to implement predatory policies that destroyed the market mechanisms under the label of "socialism of the 21st century". Among others, the predatory policies were implemented through centralized price and exchange controls, expropriation measures, and the implementation of a "communal economic system."[78] The consequences of those policies were hidden beneath the *oil boom* of the commodities super-cycle, which allowed Chávez to administer 700.000 million dollars in oil revenues (without considering the subsidies to the domestic market).[79] In addition, under opaque conditions, the Government promoted an unsustainable indebtedness, including 60 billion dollars in financial debt and a similar amount in loans provided by China.[80] Without an adequate checks and balances system,

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Constitutional Chamber. Since then, the Constitutional Chamber, under the political control of the presidency, actively supported the dismantling of constitutional democracy. *See* Brewer-Carías, Allan (2017), *El juez legislador y la patología de la justicia constitucional. Colección Tratado de Derecho Constitucional, Tomo XIV*, Caracas: Fundación de Derecho Público-Editorial Jurídica Venezolana, 17.

76 Brewer-Carías, Allan (2004), *La Sala Constitucional versus el Estado democrático de Derecho. El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Caracas: Libros El Nacional, 17.

77 Levitsky, Steven and Ziblatt, Daniel (n. 65), 72.

78 Hernández G., José Ignacio (2022), *Control de cambio y de precio. Auge y colapso institucional,* Caracas: Editorial Jurídica Venezolana, 17.

79 Monaldi, Francisco and Hernández, Igor (2016), *Weathering Collapse: An Assessment of the Financial and Operational Situation of the Venezuelan Oil Industry,* CID Working Paper N° 327, Harvard Kennedy School.

80 Hernández G., José Ignacio (2022), *La defensa judicial del Estado venezolano en el extranjero y la deuda pública de Chávez y Maduro (2019-2020),* Caracas: Editorial

those revenues became a massive corruption, degenerating into a transnational kleptocracy.[81]

When Chávez died in 2013, the constitutional democracy in Venezuela was already dismantled. In appearance, Venezuela had solid political institutions that, under the separation of powers, could promote inclusive development; for instance, it was recognized by the United Nations agencies regarding the food program.[82] But those institutions were nothing more than a façade[83], while the development policies were just consequences of the corrupt and clientelist policies that had already destroyed the market mechanisms and the oil industry.[84] Beyond the well-being illusion, the collapse of Venezuela was imminent.

2. *The end of the constitutional democracy under Nicolás Maduro´s rule (2013-2023). The kakistocracy raising*

Nicolás Maduro inherited the autocratic political institutions shaped by Chávez and based on the concentration of powers under a façade of constitutional democracy.[85] Nevertheless, he did not inherit two key institutions: the petro-dollars and the charismatic leadership. Therefore, Maduro resorted to systematic human rights violations to consolidate

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Jurídica Venezolana, 283. The total amount of the Venezuelan external debt could be estimated at 140 billion.

81 While corruption is a vice in the political system, kleptocracy *is* the political system: the decision-making process is not based on bureaucracy dominance but on the distribution of gains. *See* Bullough, Oliver (2018), "The Rise of Kleptocracy: The dark Side of Globalization", *29-1 Journal of Democracy*, 25-38.

82 In 2013, the Food and Agriculture Organization of the United States awarded Venezuela, among other countries, "*for reducing hunger by half, well ahead of international targets for the year 2015*". *See* https://www.fao.org/news/story/en/item/178065/icode/ (retrieved 15.10.23).

83 Brewer-Carías, Allan (2010), *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment,* Cambridge: Cambridge University Press, Cambridge, 7.

84 Halff, Antoine, *et al*. (2017), *Apocalypse Now: Venezuela, Oil and Reconstruction,* Columbia Center on Global Energy Policy, New York, 8.

85 Corrales, Javier and Penfold, Michael (2015), *Dragon in the Tropics. Venezuela and the Legacy of Hugo Chavez,* New York: Brookings Institution Press, 15.

power, starting with the repression of the 2014 protests and escalating dramatically during the 2017 protests.[86]

The systematic human rights violations led to the suppression of the weak electoral institutions after the opposition won the majority of the seats at the National Assembly´s IV legislature in the December 2015 elections -the last competitive election organized in Venezuela.[87] Maduro abused the political institutions under his control to strip down the authority of the IV legislature. He used three institutions: *(i)* the Constitutional Chamber to annul the legitimate decisions adopted by the National Assembly, in an outstanding example of "constitutional hardballs."[88]; *(ii)* the state of emergency abusively declared in January 2016[89], and *(iii)* a fraudulent constituent process organized in 2017 to create a parallel legislative body.[90] From a hybrid regime, Venezuela becomes a non-competitive authoritarianism.

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86 For a recount of those systematic violations, currently under investigation by the International Criminal Court, *See*, among others, the report issued by the *Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela*, dated September 25, 2020: https://documents-dds-y.un.org/doc/UNDOC/GEN/G20/238/91/PDF/G2023891. pdf?OpenElement (retrieved 15-10-23).

87 Badell, Rafael (2021), *Asalto al parlamento,* Caracas: Academia de Ciencias Políticas y Sociales, and Brewer-Carías, Allan, (2016), *Dictadura Judicial y perversión del Estado de Derecho. La Sala Constitucional y la destrucción de la democracia en Venezuela*, Caracas: Editorial Jurídica Venezolana International. The sixth part of Professor Brewer-Carías´ book examines how the Constitutional Chamber annulled all the decisions adopted by the IV Legislature, particularly after its Speaker was internationally recognized as interim president in January 2019,

88 "Constitutional hardballs" are the sets of practices in which political actors "playing for keeps," acting within the formal constitutional boundaries but in tension with pre-constitutional understandings. *See* Tushnet, Mark (2004), *37 J. Marshall L. Rev. 523-553. See* Levitsky, Steven and Ziblatt, Daniel (n 65), 109.

89 Brewer-Carías, Allan (2020), *The collapse of the rule of law and the struggle for democracy in Venezuela lectures and essays (2015-2020),* Miami: Ediciones EJV International, 116.

90 Brewer-Carías, Allan and García, Carlos (2017) (ed) *Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria,* Bogotá: Temis. *See* also Landau, David "Constitution-making and authoritarianism in Venezuela: the first time as tragedy, the second as farce" (2018), in Graber, Mark A., et al., (ed), *Constitutional Democracy in Crisis?* Oxford: Oxford University Press, 161-176.

Because of the political decision to dismantle the essence of the competitive authoritarianism in place, Maduro decided not to implement the economic policies required to revert the economic collapse, particularly reinstating the market mechanisms, restructuring the external debt, and reforming the oil industry.[91] On the contrary, between 2013 and 2018, Maduro continued the predatory policies that inevitably accelerated the economic crisis. The inflation and shortage of food and medicines degenerated into hyperinflation and a complex humanitarian emergency.[92]

The sanctions policy implemented by the United States Government towards Venezuela, which began in 2015 and was extended in 2017 against some transactions conducted by the Venezuelan Government, has been considered a cause of the complex humanitarian emergency.[93] Certainty, those sanctions restricted the capacity of the Venezuelan Government, particularly after 2019, when the national oil company - PDVSA- was sanctioned. However, the causes of the complex humanitarian emergency predated sanctions.[94] Also, despite sanctions, oil

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91 Barrios, Douglas and Santos, Miguel Ángel, "¿Cuánto puede tomarle a Venezuela recuperarse del colapso económico y qué debemos hacer?" (2019), in Balza, Ronald y García Larralde, Humberto (ed), *Fragmentos de Venezuela. 20 escritos sobre economía*, Caracas; Fundación Konrad-Adenauer-Stiftung, 91.

92 Herrera-Cuenca, Marianella, et al. (2022), "Exploring Food Security/insecurity Determinants Within Venezuela's Complex Humanitarian Emergency." 1 *Dialogue in Health 1*, 100084, and Reyna, Feliciano, "Hum Venezuela: Venezuelan civil society and the right of access to public information" (2022), in *The complex humanitarian emergency in Venezuela. 80 Humanitarian Exchange,* 5-8.

92 Puente, José Manuel and Rodríguez, Jesús Adrián, "Venezuela: radiografía de un colapso macroeconómico (1980-2019)" (2021), in Gratius, Sussane and Puente, José Manuel (ed) *Venezuela en la encrucijada. Radiografía de un colapso,* Caracas: AB Ediciones-IESA-Konrad Adenauer Stiftung, 123.

93 Oliveros, Luis (2020), "Impacto de las sanciones financieras y petroleras sobre la economía venezolana", Washington Organization for Latin America: https://www.wola.org/wp-content/uploads/2020/10/Oliveros-informe-completo-2.pdf (retrieved 15-10-23.

94 Bahar, Danny *et al*. (2019), Bahar, Danny *et al*., *Impact of the 2017 sanctions on Venezuela. Revisiting the evidence,* Policy Brief, Global Economy and Development at Brookins, mayo de 2019, Policy Brief, Global Economy and Development at Brookins, Washington D.C.: https://www.brookings.edu/articles/revisiting-the-evidence-impact-of-the-2017-sanctions-on-venezuela/ (retrieved 15-10-23).

production -and the gross domestic product- increased between 2021 and 2022. Therefore, sanctions are not the binding constraint on economic growth in Venezuela.[95]

Indeed, in 2018, sanctions contributed to the decision adopted by Maduro to tolerate economic transactions outside the regulation that established centralized controls. The United States dollar was commonly used as transaction currency, promoting a *de facto* dollarization. Economic informality arose, particularly in the oil and mining industries. Inevitably, informal but licit economic activities emerged with illicit activities, including money laundering.[96] Transparency Venezuela estimated that 20% of the 2022 gross domestic product was derived from illicit funds.[97] Within those illicit economic funds, kleptocracy remains a prevalent cause, as demonstrated in 2023, due to the corruption scandals related to the oil commercialization mechanisms adopted by PDVSA, which resulted in the deviations of billions of dollars.[98]

It is hard to characterize the Venezuela case from the traditional Constitutional Law categories. It is possible to identify all the relevant constitutional deviations observed in the 21st century in Venezuela, ranging from abusive constitutionalism and authoritarian populism to kleptocracy and gross human rights violations within a constitutional façade. None of those abuses were adopted purely through de facto actions. For instance, instead of dissolving the IV legislature of the National Assembly -following the Peru example- Maduro used constitutional tools to dismantle the legislative authorities. De facto, he dissolved the IV legislature through constitutional abuses.

Professor Brewer-Carías used the kakistocracy framework to describe how Venezuela summarized all the modern vices of the Government. The distinctive feature of the Venezuela case is that the autocracy rising has

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95 Hernández G., José Ignacio (n. 75).

96 Hernández G., José Ignacio (n. 79).

97 Transparencia Venezuela (2022), *Economías ilícitas al amparo de la corrupción,* Caracas. The seventh part of the book by Professor Brewer-Carías describes the corruption degeneration in Venezuela.

98 Transparencia Venezuela (2023), *PDVSA Cripto. Una investigación que sorprendió al país,* Caracas.

been simulated under a constitutional patina, resulting in the substitution of the rule of law by a political system of rule of lies or rule of power, covering a false democracy. The result is the *deconstitutionalization* of the State: The Constitution is no longer the highest Law that prevents Government abuses but a tool weaponized to maintain the autocratic grip. That degeneration started in 1999 with the illegitimate constituent process and has continued since then.[99] The Judiciary, under the political control of the Presidency, has served as the main instrument to degenerate the constitutional democracy into a non-competitive authoritarianism. Within the Judiciary, the Constitutional Chamber has been the primary mechanism to simulate the authoritarian measures beneath an appetence of constitutional forms.[100] The situation cannot be adequately captured solely by focusing on the institutional violations of the Constitution. In practice, the 1999 Constitution was effectively nullified. However, rather than formally repealing it, Chávez and Maduro chose to simulate this nullification through layers of decrees, legislations, and rulings enacted by the Constitutional Chamber. This simulation has reached the point where gross human rights violations are paradoxically deemed "constitutional."

3. *The predatory state in figures*

The Government has deviated in Venezuela into an organization that extracts and destroys well-being from the society, that is, a predatory state. It does not promote the common good but the enrichment of the ruling elites and the winning coalition. To achieve this purpose, not only did the Government promote a transnational kleptocracy and illicit economic activities, but it also engaged in gross human rights violations.

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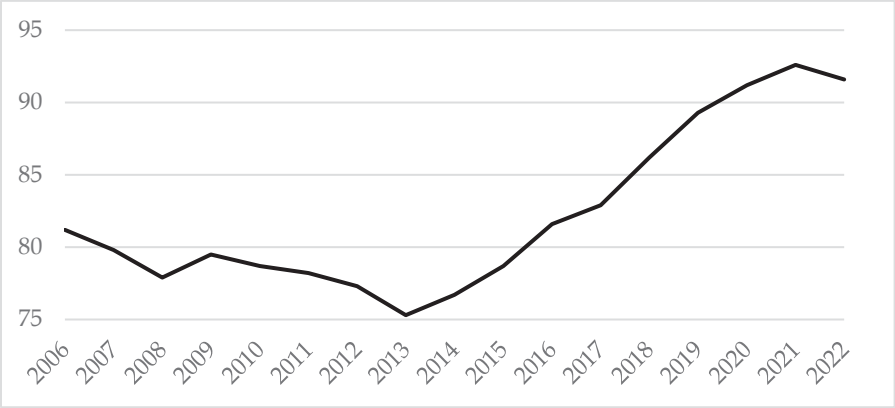
[99] In the second part of his book, Professor Brewer-Carías described the fake democracy and distortion of the rule of law that began with the 1999 constituent process. A key element was the attempt to transform the "representative democracy" into a sort of "participatory democracy", mainly through the organization of bodies that, dependent on the State, represented the so-called popular power (or communal power), that is, the direct sovereignty of the people.

[100] As Professor Brewer-Carías explained in the second part, the Judiciary and the Constitutional Chamber have been used in the process of *dehumanization* of the State. The judicial review degenerated into a tool to control the citizens and protect authoritarian behaviors.

The result has been an unconventional war based on six dimensions studied by Professor Brewer-Carías.[101] To illustrate those dimensions, we use some of the data that describe the unparalleled collapse of Venezuela.

The *first dimension* of the kakistocracy´s unconventional war is the war against the territory and its integrity. The Fragile State Index, produced by the Fund for Peace, illustrates the collapse of the Venezuelan state capability.



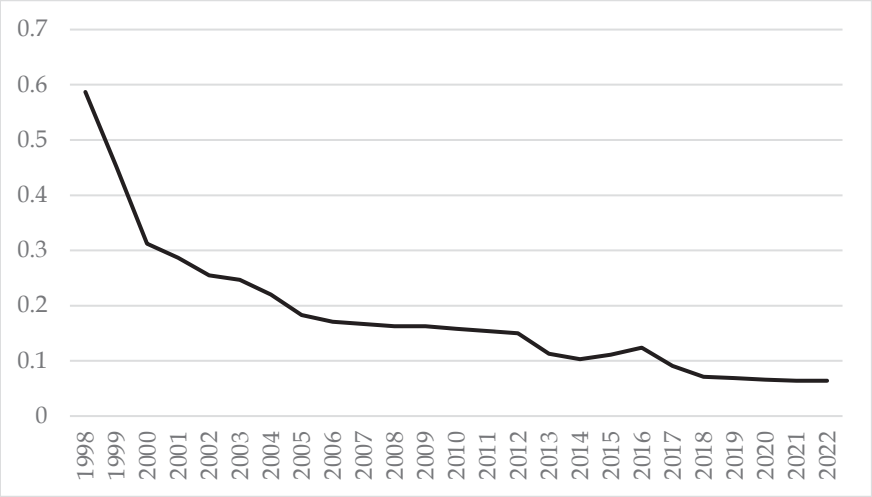
Graphic n° 1. Fragile State Index, Venezuela, 2006-2022.
Source: Fund for Peace

Instead of referring to failed states, the Fund for Peace measures the state fragility or the restrictions in the state´s capability that prevent it from effectively performing all the Government´s tasks. Because the index measures this fragility -and not the capability- an increase in the index reflects a deterioration in the state´s capability.

As can be seen, until 2013, the state capability increased because of the policies implemented to promote totalitarian and centralized controls over the economy. However, under Maduro´s rule, the fragility has dramatically grown until 2021, when a slight capacity improvement can be observed. That improvement is a consequence of the *de facto* liberalization process that increases governance in the areas of limited statehood. Therefore, it does not reflect the building of state capabilities toward the common good.

[101] In the third part of his book.

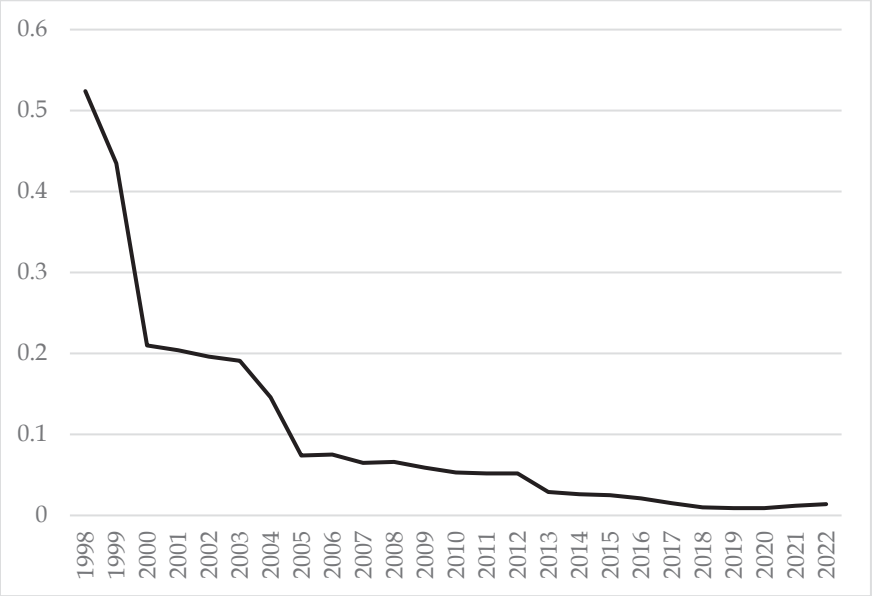
Precisely, the liberal democracy index produced by the V-Dem Institute reflects how the improvement in the capability has not been a consequence of the improvement in constitutional democracy quality. On the contrary, the Government has engaged in a war against the Venezuelan people.



Graphic n° 2. Liberal Democracy, Venezuela, 1998-2022.
Source: V-Dem Institute

The 1999 constituent process marked one of the most substantial declines in the liberal democracy index, a metric assessing the quality of constitutional democracy. Although the election of the IV legislature initially led to a slight improvement, this progress was short-lived due to the adoption of abusive constitutional tools that dismantled the legislature's authority. Since then, the collapse has remained unreversed, even in the midst of the state capability's improvement resulting from de facto liberalization.

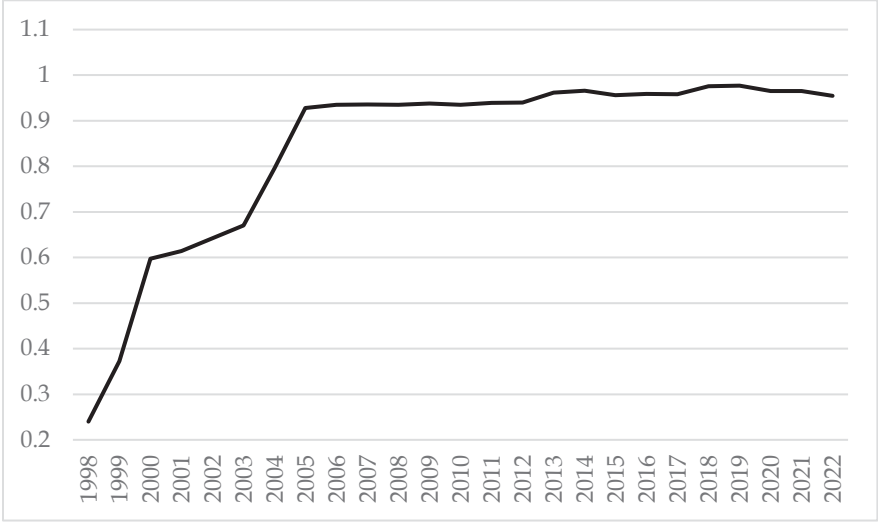
The *second dimension* is the war against the State´s foundational institutions. The Constitution has been weaponized against the people and the human rights. The Rule of Law index compiled by the V-Dem Institute illustrates this dimension of the unconventional war:



Graphic n° 3. Rule of Law Index, Venezuela, 1998-2022.
Source: V-Dem Institute

It is possible to identify three significant deviations. The first one resulted from the 1999 constituent process, demonstrating that, beyond its appearance, that process was used to dismantle the core institutions of constitutional democracy. Then, between 2003 and 2004, the index suffered another contraction, reflecting the process that ended with the Judiciary politicization. Finally, after Chávez´s death, the index suffered another contraction because of the transition towards a non-competitive authoritarianism.

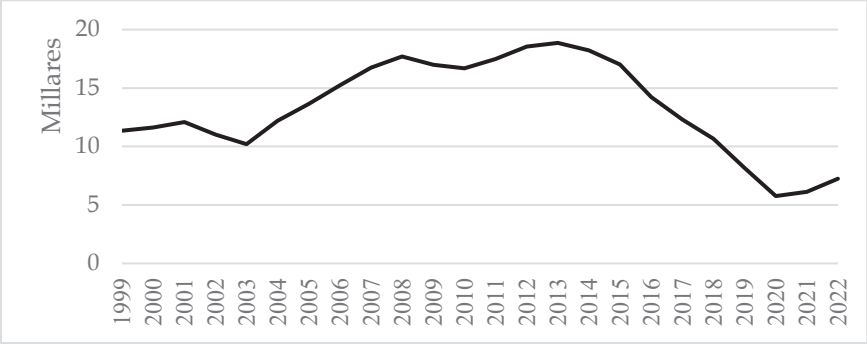
The *third dimension* encompasses the war of the state against political decentralization. The degeneration of the constitutional democracy in Venezuela was achieved through a slow-motion process that wrecked the autonomy of states and municipalities through several abusive constitutional institutions that increased the Presidency´s powers.



Graphic n° 4. Presidentialism Index, Venezuela, 1998-2022.
Source: V-Dem Institute

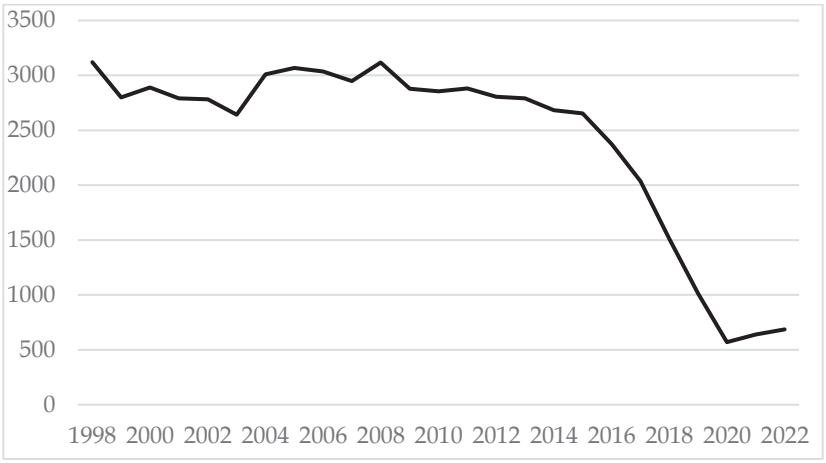
The Presidentialism Index measures the concentration of power in the Presidency and, as a result, captures the centralization process adopted in Venezuela. Since 1998, Venezuela began a concentration process reinforcing the presidential powers, particularly due to Chávez´s second reelection. Currently, the Presidency concentrates absolute power regarding the other Branches of the National Government and the subnational levels.

The concentration of powers in the Presidency was necessary to implement predatory policies that destroyed the market economy mechanisms, causing one of the worst economic collapses outside wars. Following Professor Brewer´s study, this marked the *fourth dimension* of the unconventional war: the State's war against the public economy and public services.



Graphic n° 5. Gross Domestic Product per capita, Venezuela, 1999-2022.
Source: International Monetary Fund

The autocratization process in Venezuela was financed by the artificial economic growth produced by the oil boom. Due to the PDVSA´s politicization and the expropriation measures, the Presidency captured oil revenues that were distributed through clientelist and corrupted schemes. That explains not only the economic growth until 2013 but also the economic collapse that followed, more significant than the economic collapse caused by the Great Depression in the United States or the Spanish Civil War. To understand that collapse, it is necessary to evaluate how the oil production was destroyed by the predatory policies:

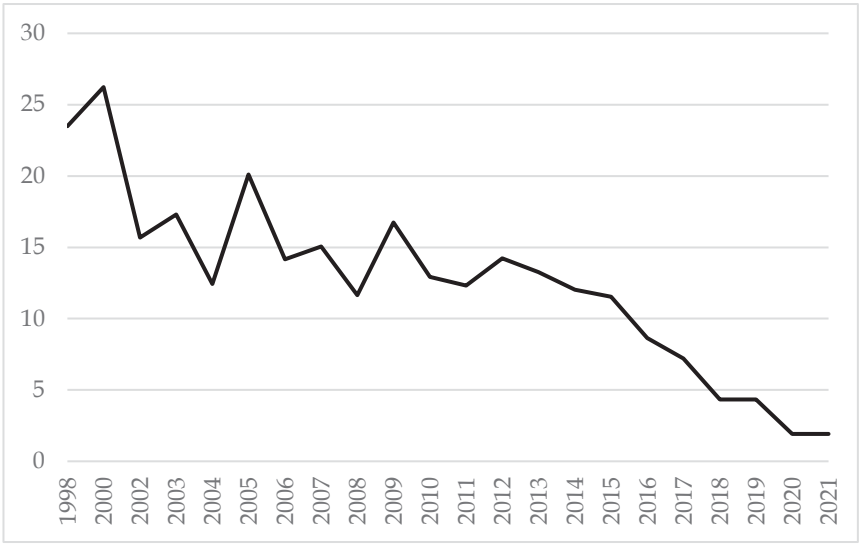


Graphic n° 6. Oil production, Venezuela, 1998-2022.
Source: Organization of the Petroleum Exporting Countries

The oil production began to collapse in 2008, after the arbitrary expropriation policies adopted by the Government. However, the oil boom and public indebtedness hid the consequences of that collapse. After 2017, the pace of the collapse increased, which can be explained, in part, by the sanctions policies. However, since 2020, oil production improved despite sanctions and the lack of inclusive institutions. This improvement explains, also the economic recovery.

Nevertheless, this recovery was propelled by a rise in informal and illicit economic activities. Consequently, instead of fostering inclusive development, the recovery has exacerbated inequality, as indicated by the findings of the 2022 National Survey of Living Conditions. This signifies that Venezuela stands as the most unequal country in Latin America and the Caribbean, representing the most unequal region in the world.[102]

Another way to illustrate the economic collapse is through the Government effectiveness, which measures the ability of the Government to deliver public goods, usually related to public services:



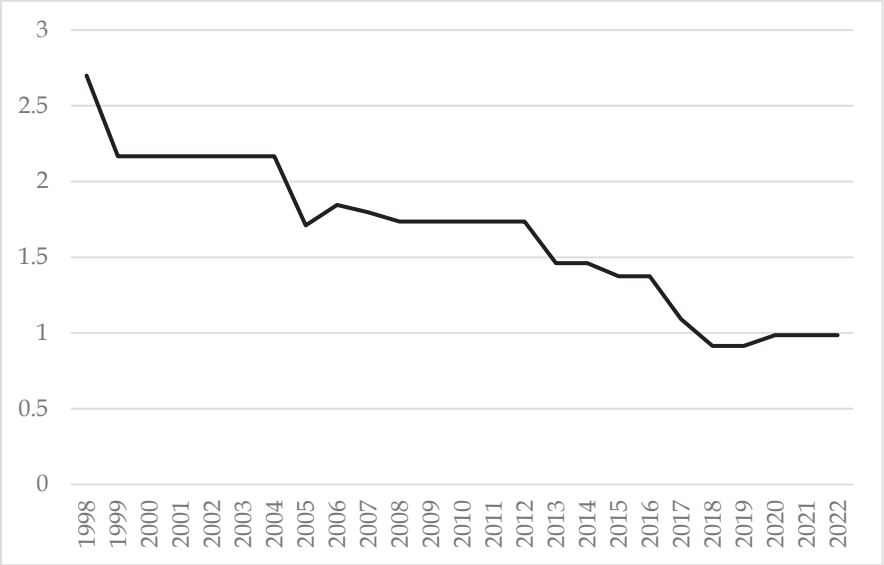
Graphic n° 7. Government Effectiveness 1999-2022
Source: World Bank

[102] The 2022 survey can be *See*n here https://www.proyectoencovi.com (retrieve 15-10-23).

After the 1999 constituent process, the capability of the Government to deliver goods and services started to collapse. The oil boom promoted isolated recoveries, which illustrates the ability of the Government to enforce the centralized controls that destroyed the market mechanisms. After 2012, however, the effectiveness dropped.

This index demonstrates that within the collapse of the state, the collapse of the Public Administration has been remarkable. Not only was the Administrative Law used as an instrument to implement predatory policies, but it also degenerated into a Failed Administrative Law that cannot promote the common good.

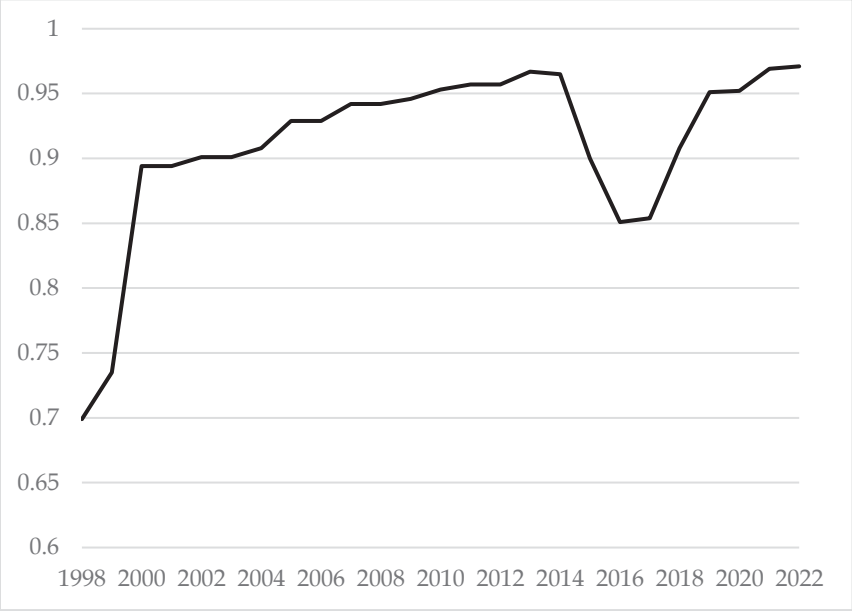
The economic collapse and the destruction of the capacity to effectively deliver public services relate to the *fifth dimension* of the unconventional war: The war against the country, its inhabitants, and the private economy. As Professor Brewer-Carías explains, the private sector was persecuted based on the "economic war" that justified not only predatory centralized controls but also the criminalization of the economy.



Graphic n° 7. State ownership of the economy, 1998-2022
Source: V-Dem

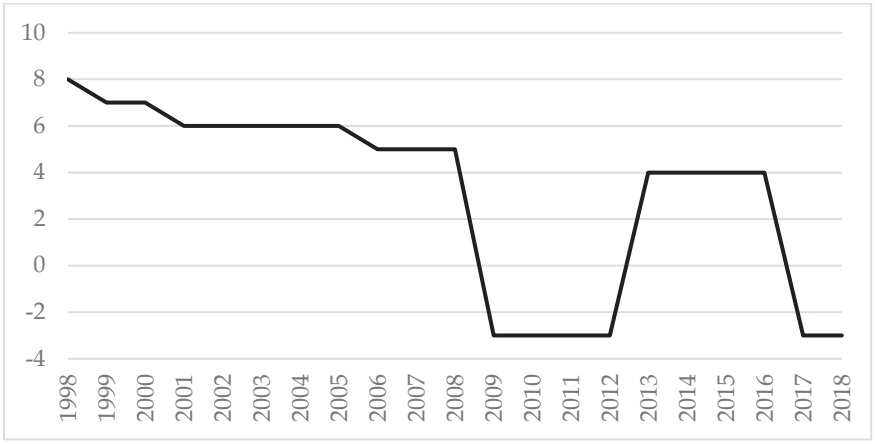
This index gauges the degree to which the State owns and controls capital (including land) in the industrial, agricultural, and service sectors, ranging from 4 (very little capital is owned by the State) to 0 (virtually all valuable capital belongs to the state). As a Petro-State based on development policies conducted mainly through state-owned enterprises, Venezuela was 1998 a country where the state owned significant portions of the economy. This dominance increased after 1999, and notably, after the implementation of the socialist policies, in 2005. The *de facto* privation process, triggered by the State's collapse, ended in stabilizing this index in 2020.

Without functional checks and balances, the Government´s totalitarian and centralized intervention boosted political corruption, as demonstrated in the next graphic, which shows the corruption index running from less corrupt to more corrupt, covering several dimensions of the polity realm. The 1998 corruption level demonstrates the "terminal crisis" of the political system based on the 1961 Constitution, but it also demonstrates that, despite those flaws, the democracy was functional. Under Chávez and Maduro´s rules, political corruption increased, particularly after the abuses against the 2015 National Assembly.



Graphic n° 8. Political Corruption, 1998-2022
Source: V-Dem

The *sixth* and final dimension of the kakistocracy wars reflects the war against democracy. The Polity 5 Index captures how the Venezuelan political system degenerated from a functional democracy to a non-competitive authoritarianism:



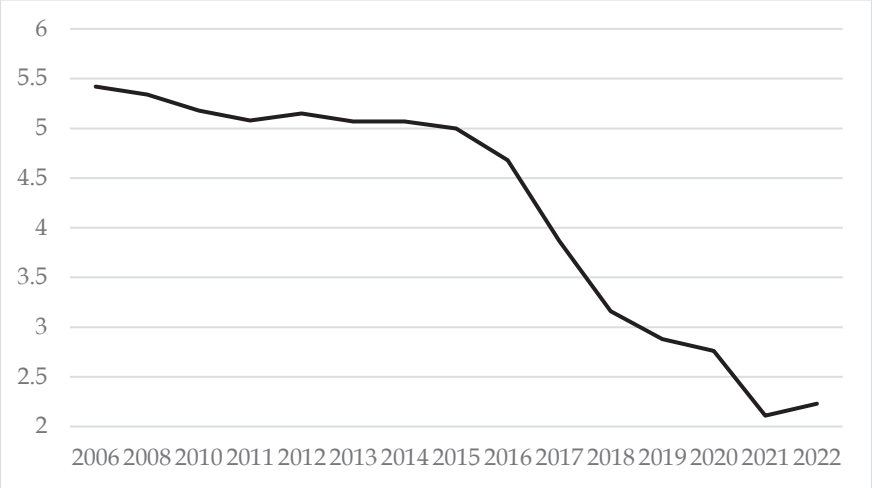
Graphic n° 8. Polity 5, Political regime in Venezuela, 1998-2018
Source: Center for the Systemic Peace

When Chávez was elected, the political system in Venezuela functioned as a flawed but functional democracy. Despite a slight decline, Venezuela retained its status as a competitive democracy until 2004, when the political obstruction of the recall referendum led to the degeneration of the political regime into a competitive authoritarianism. The autocratization level increased due to the constitutional hardball tactics implemented since 2008. However, the democratization level showed improvement following Chávez's death and the election of the IV legislature.

A noteworthy characteristic of this democratic degeneration is that elections boosted it. The free and fair election of Chávez in 1998 facilitated the slow-motion process of democracy backslide promoted by rigged elections, including the 2004 recall referendum. The opposition did not follow a rational strategy and, on the contrary, adopted erratic tactics from the electoral boycott (2005 parliamentary election and 2018 presidential election) to the participation in rigged elections (such as the 2017 sub-national election).

The 2015 parliamentary election marked the culmination of Venezuela's last competitive electoral process. This event underscores the limitation of elections in contributing to a democratic transition, as the autocratization process enables abusive constitutionalism capable of subverting electoral results. This wasn't an isolated incident; in 2007, Chávez lost the constitutional referendum to approve constitutional reform, but it was implemented through various abuses. Venezuela stands out as a case of autocratization through the electoral process.

Post-2017, Venezuela transitioned into a state of non-competitive authoritarianism or categorization as a not-free country. What distinguishes the Venezuela case is the gradual nature of this descent, primarily propelled by abusive constitutionalism. The Democracy Index serves as a poignant illustration of this degeneration:



Graphic n° 9. Democracy Index, Venezuela, 2006-2022
Source: The Economist Unit

The Democracy Index vividly depicts the descent of democracy into a slippery slope toward autocracy, accelerating notably after the systematic human rights violations adopted in 2014. However, post-2021, a modest recovery is evident, mirroring the impact of *de facto* liberalization policies. These policies have diminished the imperative to resort to human rights abuses, a shift attributed to the appeasement facilitated by the unstable economic recovery.

4. *The human rights hypocrisy, the Almagro Doctrine, and the veil pierced by the International Criminal Court Public Prosecution Office. The lawfare against democracy*

The examination of the six dimensions conducted by Professor Brewer-Carías in the state's war against human rights reveals the emergence of a kakistocracy vigorously assaulting human rights. This is substantiated by numerous investigations carried out by bodies within the United Nations and the Inter-American Human Rights Systems. Notably, these violations have been formalized through constitutional procedures, enshrined in decrees, legislations, and judicial rulings, encompassing both the Constitutional Chamber and the criminal courts.[103]

The 21st-century authoritarian regimes are masters of constitutionality because human rights violations are adopted through a veneer of constitutionality, among other intentions, to deter inquiries by international human rights bodies. That is precisely what happened in the Inter-American Human Rights System. The Venezuelan government not only ignored mandatory rulings of the Inter-American Human Rights Courts but, in addition, defended its predatory policies in the non-intervention principle, resulting in the illegitimate withdrawal of the American Convention on Human Rights, reverted in 2019.[104]

In 2016, the Organization of American State General Secretary Luis Almagro promoted an innovative interpretation of the Inter-American Democratic Charter to pierce the veil of these legal formalities and demonstrate the authoritarian essence of the Government of Venezuela´s decisions. That interpretation -that we have labeled as the Almagro Doctrine- shows that democracy must be protected, also, regarding elected Governments, because democracies can die, also, from the inside out.[105]

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103 The subjugation of the Judiciary has been a distinctive element of the kakistocracy, as Professor Brewer-Carías studied in the fourth path of his book.

104 The fifth part of the book analyzes, in detail, the predatory policies adopted to elude the Inter-American Human Rights System.

105 Hernández G., José Ignacio (2020), *Bases fundamentales de la transición en Venezuela,* Caracas: Editorial Jurídica Venezolana.

That strategy was also used by Maduro in a desperate attempt to ellude the investigation that the International Criminal Court (ICC) Prosecutor began on November 3, 2021. During the investigation stage, the critical element of discussion has been the complementary principle embedded in Art. 1 of the Rome Statute, and mainly, the capability of the Government of Venezuela to advance in investigations concerning the criminal act investigated, based on the admissibility criteria established in Art. 18.2 of the Statute. For that purpose, and among other elements, it is necessary to demonstrate that the domestic criminal investigations are genuine.

The Government of Venezuela argued that the judiciary system began 893 investigations, including the reform of the core criminal legislation, such as the Criminal Procedure Organic Code. The final purpose of Maduro was to demonstrate how, in appearance, the judiciary system and the criminal courts, based on legislation that fulfills human rights standards, were conducting investigations that impeded the ICC from acting. However, those investigations and legislative reforms were nothing more than a façade, or as is studied, an attempt to simulate compliance with human rights.[106] The ICC Public Prosecutor has penetrated the veil of constitutional and legal formalities to expose the absence of genuine investigations aimed at determining systematic human rights violations. This scrutiny reveals a lack of accountability within the ruling elite and brings into question the chain of command implicated in these violations.[107]

"Human rights hypocrisy" characterizes the superficial adherence to human rights standards through formal institutions that mimic the components of the rule of law but fundamentally operate as pseudo-law, degenerating into what Professor Brewer-Carías terms the "rule of lies."

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[106] Cronin-Furman, Kate (2022), *Hypocrisy and Human Rights. Resisting Accountability for Mass Atrocities,* Ithaca: Cornell University Press, 1.

[107] *See* the Prosecution request to resume the investigation into the situation of the Bolivarian Republic of Venezuela I pursuant article 18(2), dated November 1, 2022.

To expose these abuses, a textualist or positive interpretation is insufficient; instead, a nuanced approach is needed that acknowledges the authoritarian essence inherent in decisions adopted by the kakistocracy in Venezuela.[108]

To describe how the Law is weaponized against democracy, some scholars refer to the *lawfare* or the constitutional abuses through which the Constitution, the legislation, and the political institutions are used to decimate the constitutional democracy foundations.[109] Mainly, the expression describes how biased political courts can criminalize civil society and political parties, hindering electoral integrity conditions. A Constitutional Court, lacking autonomy and independence, can also decimate the constitutional democracy foundations.[110]

The distinction between lawfare and judicial control over the government can be challenging to ascertain, potentially leading to the erosion of constitutional democracy through two distinct mechanisms: (i) the utilization of abusive constitutional institutions to carry out political persecution, and (ii) the undermining of judicial autonomy, falsely asserting political persecution under the guise of legitimate judicial processes investigating abuses, corruption, and human rights violations. The politicization of the judiciary can be perceived either as a safeguard for constitutional democracy, achieved through impartial judicial review, or as a weapon to undermine constitutional democracy, manifested in a partial or biased judicial review.[111]

The kakistocracy framework developed by Professor Brewer-Carías helps to distinguish lawfare from genuine judicial review and criminal

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108 *See*, particularity, the introduction and the first part of Professor Brewer-Carías book.

109 Martins, Cristiano Zanin, et al. (2022), *Lawfare: Waging War through Law*, New York: Routledge, 1.

110 Mérieau, Eugénie (2022), "Democratic Breakdown through Lawfare by Constitutional Courts: The Case of Post- "Democratic Transition" Thailand", in *95 (3) Pacific Affairs,* 475.

111 Botero, Sandra, et al. "Working in New Political Spaces: The Checkered History of Latin American Judicialization" (2022), in Botero, Sandra, et al, (ed), *The Limits of Judicialization: From Progress to Backlash in Latin America*, Cambridge: Cambridge University Press, 1.

investigations. That difference can be appreciated from the rule of law performance and, particularly, the quality of the separation of powers. In Venezuela, judicial review and criminal investigation are conducted by biased bodies acting under the control of the Presidency, resulting in impunity and increasing corruption. As a result, not only Venezuela lacks genuine investigations on human rights violations, but in addition, the rule of law is weaponized to cover human rights violations and, notably, the political persecution against the democratic opposition, as demonstrated by the recent abuse of the political bans to participate in elections implemented through administrative decisions.[112]

CONCLUSIONS

The third wave of democratization, during the 20th century[113], was based on the ideal type of democracy, in which elections were the final step of a democratic transition.[114] Elections were a tool of the democratization process.[115]

That is not the case anymore. Elections do not necessarily promote democratization: Eventually, they can trigger an autocratization process.[116] In an upside world, the Constitution, and its political institutions -elections, judicial review, legislation, participatory democracy, and checks and balances- are distorted to cover authoritarian measures. In extreme cases, this deterioration can result in the collapse of the state capability, resulting in informal institutions and complex emergencies. Venezuela is, precisely, an extreme case.

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112 Brewer-Carías, Allan (n. 1).

113 Huntington, Samuel (1991), *Third wave. Democratization in the Late Twentieth Century,* Norman: University of Oklahoma Press, 3.

114 O'Donnell, Guillermo and Schmitter, Phillipe (1986), *Transitions from authoritarian rule. Tentative conclusions about uncertain democracies*, Baltimore: Johns Hopkins University Press, 5.

115 Lindeberg, Staffan (2009), *Democratization by elections: A new mode of transition,* Baltimore: Johns Hopkins University, 4-5.

116 Schedler, Andreas (2013), *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism,* Oxford: Oxford University Press, 372.

From an electoral democracy perspective, Venezuela degenerated from free and fair elections in 1998 to a competitive authoritarianism in 2004 and then towards a non-competitive regime. This authoritarian pace was promoted through elections, beginning with the free and fair presidential election in 1998, and continued through rigged and fraudulent processes, such as the 2018 presidential election. Elections did not promote democracy but autocracy. From a constitutional democracy perspective, the separation of powers was manipulated to simulate the checks and balances and to abuse the constitutional institutions to increase the authoritarian grip. The constitutional hardball ended in a lawfare and the judicialization of the democratic opposition.

The Venezuela democratic backslide defies conventional terms in Comparative Constitutional Law. While the political regime may not be democratic, it hasn't experienced a traditional coup aimed at overthrowing the elected Government. On the contrary, the Government elected in 1998 engaged in a series of constitutional abuses that reduced constitutional democracy to a mere façade. Corruption transcends being merely a flaw within the political system; it evolves into something more insidious–a mechanism by which feeble bureaucratic institutions make decisions. To a significant extent, corruption, rather than the pursuit of the common good, has become the *raison d'état*. Instead of solely addressing corruption, a more accurate term is kleptocracy, representing a facet of the illegal and informal institutions that have co-opted the fragile structures of the state.

This collapse resulted in a complex humanitarian emergency but not a total economic meltdown of chaos. On the contrary, informal economic institutions, including illicit ones, such as illegal mining, have emerged where the fragile state cannot provide goods and services -or areas of limited statehood. That can explain how, despite the lack of a market mechanism and the rule of law, the economy in Venezuela grew from 43,79 billion in 2020 to 92.1 in 2022.[117] The expansion observed did not originate from a social market economy supported by inclusive institutions. Instead, it stemmed from informal, predatory, illegal, and unequal institutions that facilitated this pseudo-economic development.

[117] According to the International Monetary Fund estimations: https://www.imf.org/en/Countries/VEN (retrieved 15-10-23).

Kakistocracy is the singular term that captures the transformation of Venezuela into a failed state. Every vice associated with modern constitutional democracies has found expression in Venezuela: electoral malpractices, abusive constitutionalism, authoritarian-populism, pseudo-law, kleptocracy, the breakdown of the monopoly on violence, clientelism, patronage, constitutional hardball, human rights hypocrisy, and lawfare. Professor Allan Brewer-Carías has illuminated these intricate dimensions, providing a clearer understanding of Venezuela's multifaceted crises and shedding light on the contemporary deviations of constitutional democracies in the 21st century.

Brookline, MA November 2023

INTRODUCTION

THE DISTORTION OF THE RULE OF LAW AND THE RISE OF *KAKISTOCRACIES*

In the contemporary world, before our eyes, and initially using democratic institutions, as it happened many decades ago with the rise of *fascism* in Europe, new false and fraudulent "models" of the "rule of law" have appeared, turning the rule of law into a "rule of lies," or a "rule of power,"[1] dismantling democracies through the forgery, depredation or degeneration of its basis,[2] transforming them into *pseudo* democracies; or into apparent, false or deceitful democracies and rule of law states.[3]

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1 *See* on the expression "Rule of Lies," James C. Nelson (former Montana Supreme Court Justice): "The Rule of Law or the Rule of Lies?," in *Daily Montanan*. December 11, 2022, at. https://dailymontanan.com/2022/12/11/the-rule-of-law-or-the-rule-of-lies/#:~:text=The%20rule%20of%20law%20is,with%20international%20human%20rights%20principles.%E2%80%9D; and in *Counterpunch*, 8 December 2022, at: https://www.counterpunch.org/2022/12/08/the-rule-of-law-or-the-rule-of-lie/. *See* also on the expression "Rule of power": Jonathan Coppess, "The rule of law vs. the rule of power: a Reflection," *Farmdocdaly*, Illinois, September 25, 2020, at https://farmdoc daily.illinois.edu/2020/09/the-rule-of-law-vs-the-rule-of-power-a-reflection.html.

2 *See* in general Allan R. Brewer-Carías, "El falseamiento del Estado de derecho (El caso de Venezuela)," in the book: Allan R. Brewer-Carías y Humberto Romero Muci (Coordinadores), *El falseamiento del Estado de Derecho,* Academia Colombiana de Jurisprudencia, Academia de Ciencias Políticas y Sociales, World Jurist Foundation, Editorial Jurídica Venezolana, 2021 pp. 31-102.

3 *See* Allan R. Brewer-Carías, *Kakistocracia depredadora e inhabilitaciones políticas: el falso Estado de derecho en Venezuela*, Colección Cuadernos de la Biblioteca Allan R. Brewer-Carías del Instituto de Investigaciones Jurídicas, Universidad Católica Andrés Bello, Editorial Jurídica Venezolana, 2023.

This has happened in many Latin American countries, as is the case of Venezuela, where the regime that assaulted power and was installed there more than twenty years ago (since 1999), in addition of destroying everything in the country insists on following an ultra-outdated autocratic model, such as the Cuban one, with the new name of XXI Century Socialism,[4] which has been repeated in Nicaragua and Bolivia, forging and twisting every and all democratic institutions.

These are -of course- nominal "Rule of law States," that even have a Constitution like the Venezuelan one, the State is formally declared (Article 2), as being a "democratic and social rule of law State" and even "of justice" (*Estado democrático y social de derecho y de justicia*), but with a malleable Constitution that is changed, modulated and molded freely by State bodies.

Hence, the reality is that such Constitution is not respected nor complied with, being the phrase *Estado democrático y social de derecho y de justicia*, commonly used by public officials and even judges, as a mask to disguise violation of the Constitution and of the law.[5]

In some cases, these Constitutions are the product of a National Constituent Assembly, elected as a democratic mechanism, but not to recompose a democratic political system in crisis, on the basis of, for example, some great national political plural agreement, as occurred in Colombia in 1991 and as has been happening in Chile, since 2020, with the plebiscites held, the Constitutional Convention and now the Constitutional Commission (2023), all product of political agreements

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4 *See* in general Manuel Rachadell, *Socialismo del Siglo XXI*, Fundación Estudios de Derecho Administrativo, Editorial Jurídica Venezolana, 2007.

5 That is why León Henrique Cottin has correctly pointed out that the phrase of article 2 of the Constitution, according to which "Venezuela is constituted in a democratic and social State of law and justice" has been used by judges every time they issue decisions that are not adjusted neither to the Constitution nor to the laws. He wrote: "every time in a ruling a judge refers to the fact that "*Venezuela is a democratic and social State of law and justice*" and takes that mention as the basis for his decision, we can expect anything in terms of the non-application of the laws. It is apprehensive to read that postulate that is used as a license to legislate." *See* León Henrique Cottin, *Hecho Notorio*, Editorial Dahbar, Caracas 2023, p. 65.

and consensus; but rather, to secure perpetuation of a specific political group taking power by assault, as an expression of constitutional populism.[6]

As a consequence of the exercise of power in such context, rulers who have not respected the supremacy of the Constitution have emerged, because in all these countries the Constitution has been a text of "wet paper" that is freely manipulated and mutated. They have not respected the separation of powers and, on the contrary, have established a system of total concentration and centralization of power, where there is no control, balance or independence of any kind between them. The most serious thing is that in this process, those who govern, from the beginning, have specifically assaulted the Judiciary and have turned it into the main mechanism of authoritarianism, with Constitutional Judges who control nothing in matters of judicial review, but who rather endorse government unconstitutionalities.[7]

These are governments that do not guarantee access to power in accordance with the rules of the Rule of Law. On the contrary, the electoral authority is used unreservedly in their favor and the electoral registry is manipulated, so that there are not -and cannot be- clean, fair or reliable elections. Systems where opposition candidates are disqualified and imprisoned, as has recently happened in Nicaragua and Venezuela; and where, as also happened in Venezuela in 2015, the proclamation of elected opposition members of the National may be suspended by judicial means, *sine die,* to take away the qualified majority from the

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6 *See* Allan R. Brewer-Carías, "El populismo constitucional y el "nuevo constitucionalismo"." O de cómo se destruye una democracia desde dentro," in the book: Juan Carlos Cassagne y Allan R. Brewer-Carías, *Estado Populista y Populismo Constitucional*, Ediciones Olejnik, Editorial Jurídica Venezolana, 2020, pp. 121 ss.

7 *See* Allan R. Brewer-Carías, *La demolición de la independencia y autonomía del Poder Judicial en Venezuela 1999-2021*, Colección Biblioteca Allan R. Brewer-Carías, Instituto de Investigaciones Jurídicas de la Universidad Católica Andrés Bello, No. 7, Editorial Jurídica Venezolana, Caracas 2021; "Dismantling the Rule of Law by politically controlling the Judiciary in Venezuela and its harmful projection on the Inter-American judicial system for the protection of human rights," *European Review of Public Law/Revue Européenne de Droit Public*, vol. 33, Nº 3, autumn/automne 2021 pp. 877-918.

opposition; or where the judiciary may intervene to favor the government as we saw again in Venezuela, in 2021, when without hindrance, the Constitutional Chamber of the Supreme Tribunal kidnapped all the opposition political parties, naming new partisan authorities in each of them, all linked to the government. In sum, these are systems where the elections carried out, in general, have turned out to be fraudulent; being very similar to the supposed Cuban elections, where only those chosen and proposed by the regime are "elected."

We are talking of systems where, of course, there is no real and effective respect for human rights. It suffices to mention the recent reports (2020-2023) of the United Nations High Commissioner for Human Rights, on the case of Venezuela, where the crimes committed against humanity have led to the formal initiation of an investigation by the International Criminal Court; investigation that has been recently renewed (2023), as announced by the Prosecutor of the same at the very headquarters of the government of Venezuela, whereas the entire chain of command: from the President of the Republic downwards, is involved.

Finally, these are systems where freedom of expression is violated and all communication media are either confiscated and/or controlled: people are disappeared and incommunicado, tortured, and human rights activists trade unionists are accused of being terrorists or traitors to the country. As has been the case of Venezuela many times in recent years, those who defend human rights, or defend labor rights are accused of inciting hatred and imprisoned, when hatred has been, precisely, the crudest form of institutional violence used by the regime.

In short, these are systems where representative democracy has been destroyed, eliminating political representativeness, on the basis of an alleged and fallacious "participatory democracy" that has nothing to do with effective political participation, because participating in politics, apart from doing it through voting, is only possible in politically decentralized systems of government, where exercise of power in close to citizens. Let us remember: There are not, nor have there been, nor can there be centralized and centralist democracies based on the concentration of power.

If the destruction of democracy by itself was not enough, this is aggravated by social inequality, achieved through the destruction of the economic productive apparatus, turning the population into a mass

dependent on the *crumbs* they receive from increasingly impoverished subsidies from the government; which in the case of Venezuela, has resulted in the largest population migration that has occur in the entire history of the Western Hemisphere.

This is all a characterization of the "new" fraudulent "Rule of Law," or "Rule of Lies" political system, a product in many cases of the so-called "new constitutionalism" that we have seen in Latin America, and that must be taken into account when analyzing the Rule of Law. It is not a mere "narrative," as was considered in 2023 by a President of one of the countries of the Continent when referring to the current regime of Venezuela.[8] No. It is not just a "narrative" or product of *fake news*, nor is it a consequence of international sanctions.

No. What is happening is real and is the closest thing to what Piero Calamandrei wrote in a posthumous book entitled *" Il fascismo come regime de la menzogna "* published in 2014, whereas he referred to the regime of lies, false rule of law and false democracies, which is what all these new authoritarian populist regimes are: a "Rule of Lies" or a "Rule of power" system.

In that book, referring to fascism, Calamandrei said that it "was something deeper and more complicated than an obscure illegality, it was - he said - the simulation of illegality, the fraud of legality organized legality."

Therefore, "to the traditional classification of the forms of government," Calamandrei said that:

> "It would now be worth adding a word that would manage to give meaning to this new and different regime: the government of *authoritarian indiscipline, of adulterated legality, of legalized illegitimacy, of constitutional fraud*." [9]

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[8] *See* on the expression by President Lula da Silva of Brazil, the answer of the Presidents of Chile (Boric) and Uruguay (Lacalle) in: "No es una construcción narrativa, es la realidad": las críticas de los presidentes de Chile y Uruguay a Lula por sus palabras sobre Venezuela," in *BBC News,* 31 mayo 2023, available at: https://www.bbc.com/ mundo/noticias-america-latina-65762357

[9] Lateza, Bari, 2014. Spanish edition: *El fascismo como régimen de la mentira*, tirant, Valencia 2019, p. 40. *See* alse some references to Calamandrei in Allan R. Brewer-

Calamandrei concluded, rightly, that what characterized fascism, that is, what was its common denominator, as also happens in Venezuela, was the use of lies, falsehood, and duplicity, which - he said -

> "…results from the combination of two orders, one within the other: There is an *official* order, which is expressed in laws, and another *informal* one, which is concretized in political practice systematically contrary to laws. And to this duplicity of orders corresponds another double level of organs: a state bureaucracy and a party bureaucracy, both paid for by the same taxpayers and united at the apex, around a single person who is, at the same time, Head of the Government and Duce of fascism (head of the party). So, between the bureaucracy of legality and the bureaucracy of illegality there is no antagonism, but a secret alliance, a kind of reciprocal *vicariedad*: so much so that to understand what exactly this regime is, one must hardly ask an explanation from only one of these bureaucracies, but one must look for it at the point where they meet, that is, halfway between legality and illegality." [10]

Reading these reflections of Calamandrei, there can be no doubt: what exists in Venezuela is a regime characterized by lies, deceit, falsehood and fraud applied as state policy.

This is precisely the "new" false, falsified and fraudulent "rule of law" or "rule of lies" or "rule of power" that has appeared in Latin America since the beginning of the 21st century, in light of the entire democratic world, dismantling all the principles of the rule of law, beginning with the forging of the Constitution and reflected in the degradation of the essential minimum principles that every Rule of law State must have.[11]

Carías, *La mentira como política de Estado*. *Crónica de una crisis política permanente. Venezuela 1999-2015* (Prólogo de Manuel Rachadell), Colección Estudios Políticos, No. 10, Editorial Jurídica Venezolana, Caracas 2015.

10 *See* Piero Calamandrei, *El fascismo como régimen de la mentira*, tirant, Valencia 2019, pp. 40-42.

11 *See* Allan R. Brewer-Carías, *Principios del Estado de derecho*. *Aproximación histórica*, Cuadernos de la Cátedra Mezerhane sobre democracia, Estado de derecho y derechos humanos, Miami Dade College, Programa Goberna Las Americas, Editorial Jurídica Venezolana International. Miami-Caracas, 2016.

For the sake of memory, those principles are the following:

In *first place*, the *principle of constitutionalism*, that is, of the very existence of a Constitution as a written political charter, emanating from popular sovereignty, of a rigid and permanent nature, containing norms of superior rank, immutable in certain aspects, that not only organizes the State subject to the law, that is, not only has an organic part establishing the basis of the separation of power and of the territorial organization of the State, but also has a dogmatic part where the fundamental values of society, the democratic principles and the rights and guarantees of citizens are declared in an entrenched way.

Second, the *principle of democratization*, based on the principle of popular sovereignty, which arose in modern constitutionalism when sovereignty was transferred from Monarch to the people or to the Nation, being the Constitutions the product of the exercise of said popular *sovereignty.* The principle of representation derives from here, assuring the access to power through democratic means. The essence of democracy, is therefore, to assure the representation of the people, indirectly, through free and fair elections of representatives by universal, direct and secret suffrage, regardless of other mechanisms for direct exercise of democracy, such as referendums of public consultation, that can be established.

In *third* place, *the principle of the separation of powers,* that is, their distribution in the organization of the State in order to limit, balance and control the exercise of political power, which must be limited by law, as a mean to guarantee the freedom of *citizens.* It implies the need for various branches of government to be in the hands of independent and autonomous bodies that must control each other, in particular, by the Judiciary. This distribution or *deconcentration* principle is, therefore, essentially linked to the principle of the separation of powers, which stands at the very essence of the rule of law, to avoid possible abuses of one branch of power in relation to the others.

This principle of the separation of power implies: (i) the organization of an *Independent Judiciary*, conducted by selected and duly protected judges that are appointed with the guaranty of enjoying a carrier based on stability, promotion and dismissal only for graves faults and following due process rules, and subject to judicial accountability. In the judicial processes, access to justice must be guaranteed, as well as the due length

of the proceedings and effective and efficient justice; (ii) the organization of government and of Public Administration not only to guaranty that their actions must always be according to the law but also subject to political, administrative and judicial control, in particular to assure government accountability. In the functioning of the government and Administration, systems must be established to prevent and persecute acts of corruption; (iii) the organization of the Legislative organ to allow the representative of the people to exercise sovereignty on their behalf, by means of enacting legislation. In the legislative process laws must be published, with general and prospective effects, have legal certainty and must be accessible to the people; and (iv) the organization of other independent bodies of the State in charge of organizing free and fair elections, the comptrollership of State finances, the prosecuting of crimes, and of the protecting human rights.

Fourth, the *principle of juridification and legality,* requiring all State bodies and, in particular, those that act on behalf of the people, the duty to abide by the Constitution, the law and other sources of the legal order. It also means that all State organs acts are subject to control by autonomous and independent judicial bodies within the organization of the State itself; having the power of judicial review of illegality and unconstitutionality of administrative actions and of unconstitutionality of legislation (powers of *judicial review*).

Fifth, the principle of humanization, with recognition and formal declaration of the existence of natural rights with constitutional rank, as well as the primacy of human dignity; which ought, therefore, to be guaranteed and respected by the State, limited in its powers by freedom and rights, establishing specific judicial means for their protections. The declaration must comprise *constitutional guaranties*, in particular, access to justice, equality and non discrimination, protection of minorities; *individual right*, in particular, right to life, right to freedom, right to personal integrity, free speech; *social rights*, like right to education, right to work, right to the protection of health, right to cultural goods; *economic rights*, like free enterprise, and right to property; *political rights*, beside the right to elect and be elected, the right to participate in political parties, the right to protest; *indigenous people rights* and *environmental rights*.

Sixth, the *principle of political decentralization of the State, to ensure the political participation* of citizens in the exercise of power, bringing it closer to all through creating regional and local entities, scattered throughout the territory of the State, governed by representatives elected through direct and secret universal suffrage; a principle that is the origin of federalism, of political regionalism and, in any case, of municipalism.

Seventh, as a corollary of all the previous principles, the *principle of civil government*, implying subordination of the military authority to the civil authority, the former being solely and exclusively in charge of the defense of the Nation, the territory and the principles and values established and guaranteed in the Constitution.

A democratic State of law is based on securing all these principles which make up the Political Constitution, all of which, due to the progressive insurgency of authoritarian regimes based on lies and regularized illegality, have been mercilessly crushed. This has been the case of Venezuela,[12] where the social State named by the Constitution did not go beyond being a vain propagandist illusion, having only acquired the deformed face of a populist State;[13] the representative and participatory democratic political system was never implemented; the structuring of a democratic State of law and justice based on the principle

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12 *See* Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010, 418 pp.; *Authoritarian Government v. The Rule of Law. Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, Public Law Foundation, Editorial Jurídica Venezolana, Caracas 2014, 986 pp.; *The Collapse of the Rule of Law and the Struggle for Democracy in Venezuela*. Lectures and Essays (2015-2020), Foreword: Asdrúbal Aguiar, Anales Collection, Mezerhane Chair on Democracy, Rule of Law, and Human Rights, Miami Dade College, 2020, 618 pp.

13 *See* Allan R. Brewer-Carías, *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela,* Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014.

of the separation of powers, never materialized; the consolidation of a decentralized federal State was abandoned,[14] and public rights and liberties have been materially despised.

The tragic consequence of all this is that instead of the development of a decentralized democratic State of law and justice, based on the principles of constitutionalism, deconcentration of power, democratization, legalization, humanization, decentralization and participation and civilian government, what we have witnessed in Venezuela has been a systematic process of deconstitutionalization, dedemocratization, concentration of power, delegalization, dehumanization, centralization and absence of participation, and militarization.

And all this, with an effective replacement of democracy itself by the closest thing to a *kakistocracy*, in its literal linguistic sense of "government of the worst;"[15] term coined by Michelangelo Bovero in a 1996 paper whereas, after analyzing Polybius's recipe for the "optimal republic", he expressed the following:

> "Let us imagine that we could see united in a single regime, not just the eminent characters of the best constitutions, but the most contemptible of the worst, not just the virtues of the three correct forms of government, but the vices of the corresponding corrupt forms. The result would be a mixed government exactly opposite to that of Polybius's recipe: not the best republic, but the worst republic, worse, by the sum of the evils, than each of the simple corrupt regimes, because it would unite in itself the perversions of all of them. It would be the worst government in the sense of the "government of the worst" of the different species, gathered and mixed almost like ingredients, not just for a salvific recipe, but for the

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[14] *See* the study of the Constitution regarding the regulation of this model of Constitutional State in Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezolano*, Caracas 2004.

[15] *Kakistocracy* (from the Greek: kakistos (κάκιστος: *worse*; and κράτος: *government*), that is, government managed by the worse, less qualified either further unscrupulous citizens (*See* https://www.google .com/search?q=kakistocracy).

> poisonous formula of a curse. If we wanted to give it a name, I would propose calling it *kakistocracy*: the opposite of aristocracy in the broadest and most noble sense of "rule by the best."[16]

In Venezuela, all the principles and foundations of the Rule of Law, which are summarized in Part One of this book, have been distorted and demolish, with the consequence of degrading democracy, by a *kakistocracy* that assaulted and took over the government of the State, converting the former rule of law state we had until 1999 into a Rule of Lies State and a false democracy, through the processes that are analyzed in the subsequent Parts of this book.

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[16] *See* Michelangelo Bovero, "La riceta di Polibio e il "rovescio". Ovvero: kakistocracia, the lousy repubblica," in Political Theory, Nº 1, 1966, p. 7-8. *See the references in* Ermanno Vitale, "Democracia, *kakistocracia, pleonocracia*. Michelanglo Bovero y *Teoría Política*," María Guadalupe Salmorán Villar (Coordinadora), Poder, democracia y derechos. Una discusión con Michelangelo Bovero, Universidad Nacional Autónoma de México, in Biblioteca JurídicaVirtual del Instituto de Investigaciones Jurídicas de la UNAM, at https://biblio.juridicas.unam.mx/bjv/detalle-libro/5703-poder-democracia-y-rights-a-discussion-with-michelangelo-bovero.

PART ONE

THE PRINCIPLES OF THE RULE OF LAW THAT HAVE BEEN DISTROYED AND DISMANTLED*

The substitution of the Rule of Law by a political system of Rule of Lies or Rule of Power covering a false democracy, has been possible by the successive demolition of the aforementioned principles of the Rule of Law that have characterized the contemporary democratic States, also named as *État de droit, Stato di diritto, Estado de derecho,* or *Rechtsstaat.*[1]

All them have their origin in the basic ideas and principles generated by the American and the French Revolutions of the eighteen century, when the Modern Constitutional State began to be conceived in substitution of the Absolut State, provoking a radical change in the organization and functioning of the State.

It is a comprehensive concept that when referred to the contemporary Modern Constitutional State as a State subject to the law, nonetheless implies much more that just the "principle of legality" or the "prevalence of the law," being referred in a concurrent way, to the State in which it exists, as already mentioned: *first,* a Constitution, as a supreme norm,

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* Text written for the First Meeting of the *Global Rule of Law Commission,* EPLO, Cascais, 11 January 2023.

1 A few decades ago, the International Commission of Jurists translated "Rule of Law" into Spanish as "*El imperio de la Ley*" (*See* the Report "*El Imperio de la ley en la Sociedades Libres*;" available at: Rule-of-Law-in-free-society-conference-report-1959. pdf (icj2.wpenginepowered.com)); and into French as "*Le Principle de la légalité"* (*See* the Report *Le principle de la légalité dans une societé libre*", 1959; available at: Rule-of-law-in-a-free-society-conference-report-1959-fra.pdf (icj2.wpenginepowered.com))

being the State organs subjected to it and in general to the principle of legality; *second,* a system of representative democratic government elected by the people, as sovereign; *third*, the declaration of fundamental rights and freedoms of citizens embodied in the Constitution, that all organs of the State must enforce and guarantee; *forth*, a system of limitation of the State power, through its distribution, separation or division, by which the public power is controlled as a guarantee of public freedoms; and *fifth*, a system of judicial or jurisdictional control of the constitutionality and legality of State acts in charge of autonomous and independent courts.

All these principles have a well settled historical background that departed from the Revolution that took place in the former Colonies of North America in 1776 where for the first time in Modern history a process of building a new State under a new Constitution was developed, to substitute what until then had been former English colonies. They were located far away from the Metropolis and its sovereign Parliament, having, for more than a century developed independently of each other, by their own means and enjoying a certain autonomy; a trend that a few decades later, with its obvious differences, was followed from 1811 on in the Revolutions that took place Hispanic America, with the constitutional process of building new States from the former Spanish Colonies.

In the case of the French Revolution, it was not a question of the construction of a new State, but of replacing, within the same existing unitary and centralized organization of the State, a monarchical constitutional political system that was typical of an Absolute Monarchy, by a totally different regime of a Monarchical constitutional representative character; a trend that was followed in Spain in the Constitution of Cádiz of 1812 and in the rest of the European countries, even in some cases imposing republicanism.

In both cases, the constitutional configuration of the States in the modern world was made in accordance with the already mentioned basic principles of the rule of law, which serve as its foundation, and which have been those that have been developed during the last two centuries, whose backgrounds are the following.

I. THE PRINCIPLE OF THE CONSTITUTION AS THE SUPREME LAW AND THE SUBMISSION OF THE STATE TO LEGALITY

The first principle of the Rule of Law State is that a constitution must exist, as a written or unwritten political charter, that has its source in popular sovereignty, with a rigid and permanent character, containing norms of higher rank, which are immutable in certain aspects. Currently, such Constitutions not only organizes the States, that is, not only have an organic part, but also have a dogmatic part where the fundamental values of society and the rights and guarantees of citizens are declared in an entrenched way.

Until the late eighteenth and early nineteenth centuries, in the Absolute State this idea of Constitution did not exist, and the Constitutions, at most, were mere charters granted by the Monarchs to their subjects, because the Monarch was the sovereign. Only when the people began to be the sovereign, did the Constitutions meaning change.

The first written Constitution of the modern world, product of popular sovereignty, was the United States of America Constitution of 1787, followed by the France Constitution of 1791. The third modern republican Constitution was adopted precisely in Venezuela, in Hispanic America, which was the Federal Constitution of the United Provinces of Venezuela sanctioned in 1811. Years before a Constitution was sanctioned in Haiti in 1804 but creating an Empire; being the fifth Constitution in the Modern world the Constitution of the Spanish Monarchy sanctioned in 1812.

This idea of the Constitution as the supreme written or unwritten law, in all cases has led to the development of a hierarchical system of norms that make up the legal order or system of each country, located at different levels according to their sphere of validity, normally established in relation to the supreme law. Within the different sources of the legal order, in general, the primacy of legislation has been accepted, regulating all the activities of the State, both executive and judicial branches. Being understood in this context by legislation, basically, the formal laws, that is, the laws sanctioned by the Legislative body or Parliament.

This idea of the Constitution, as a law of laws, has in addition imposed the principle of legality, which is another of the global principles that characterize the rule of law State. It implies the subordination of all organs of the State to the Constitution and to the law, understood in this case not only as the specific formal act emanating from the representative legislative body, but encompassing all other sources of the legal order, including regulations.

This implies, therefore, that all organs of the State are subject to the laws enacted by their own organs, and particularly, those emanating from the legislative organ; being, as a consequence, all acts of State organs are subject to control.

II. POPULAR SOVEREIGNTY AND DEMOCRATIC REPRESENTATION

Secondly, from the American and the French Revolutions of the eighteenth century, a new political idea also emerged about the new role that the people, that began to assume the condition of sovereign, electing their representatives and their government, and expressing their will in the process of the constitutionalization of the organization of the State.

Departing from those Revolutions, therefore, Constitutions began to be the product of popular sovereignty, and ceased to be a mere emanation or concession of a Monarch. It was in that sense that in the United States of America, from 1776, the colonial Assemblies integrated by representatives of the people, interpreted sovereignty, and sanctioned their own Constitutions; and in France, sovereignty was transferred from the Monarch to the people via the concept of the Nation; and through the idea of the sovereignty of the people, all the basis of democracy and republicanism emerged, which also constituted another of the great contributions of these Revolutions.

Likewise, in Hispanic America, in particular in Venezuela, the Supreme Junta constituted in the Municipality of Caracas from April 19, 1810, among the first constitutional acts that it adopted, following the steps taken that same year in Spain for the election of the deputies to the Cortes, was the call for elections of deputies for a General Congress with deputies representing all the Provinces that were part of the former colonial General Captaincy of Venezuela. Those deputies were the ones

who, representing the people, on December 21, 1811, sanctioned the Federal Constitution of the States of Venezuela, after having solemnly declared independence on July 5, and enacting the "Declaration of Rights of the People" on July 1 of the same year.

On the other hand, it must be stressed that from the American and French Revolutions it can be said that the conception of democracy as a political regime has dominate the modern world, based on representative democratic systems of government derived from on the popular election of representatives by the sovereign people through suffrage.

From this, resulted the presidential and the parliamentary systems of governments: the first one, a product of the American Revolution; and the second, as a system of government that dominated in Europe after the French Revolution, and which has been applied even in parliamentary monarchies. With them, representative democracy thus began to become part of the roots of the rule of law.

In Hispanic America, presidentialism as a form of government was first established in Venezuela, from 1811, initially as a tree head executive, and then, from 1819, unipersonal; a system of government that was then followed in all Latin American countries.

In contemporary world, this principle of democratic representation is the one that assures the access to power through democratic means, basically, through free and fair elections of representatives by universal, direct and secret suffrage, regardless of other mechanisms for direct exercise of democracy, such as referendums of public consultation, that can be established.

III. THE LIMITATION OF PUBLIC POWER, THE PRINCIPLE OF THE SEPARATION OF POWERS AND A SYSTEM OF CONTROL OF THE EXERCISE OF POWER

Third, within the same line of limitation to public power to guarantee the freedom of citizens, the French and American Revolutions contributed to modern constitutionalism with the fundamental idea of the separation of powers as a guarantee of freedom.

The principle was formulated, first, on the occasion of the American Revolution in the Constitutions of the independent Colonies from 1776,

and later in the constitutional structure designed in the Constitution of the United States of 1787, which was assembled entirely on the basis of the organic separation of powers.

The principle, of course, was reflected even more strongly in the constitutional system that resulted from the French revolutionary process, not only in the Declaration of the Rights of Man and of the Citizen of 1789 but in the Constitutions enacted from 1791, where they were added as additional elements, the principle of the supremacy of the Legislator resulting from the consideration of the law as an expression of the general will; and even prohibiting judges from interfering in any way in the exercise of legislative and administrative functions.

In the Hispanic-American world, the Venezuelan Federal Constitution of December 1811, was also the third constitutional text of the modern world, to establish expressly and precisely the principle of the separation of powers, although more within the line of the North American balance than of the extreme French conception.

From this constitutional principle of the rule of law, derives the other fundamental principle that the Public Power is and must be limited, which must be guaranteed by a system of separation, division or horizontal distribution thereof, at least between the Legislative, Executive and Judicial, to guarantee freedoms and try to avoid possible abuses of one branch of power in relation to another. And within such separation, by the consecration of the necessary autonomy and independence of the Judicial Power, with its power to control the subjection of all organs of the State to the Constitution and law.

Finally, the distribution of power in the Rule of law State also is characterized by the establishment of a system of territorial distribution of power which the one that originates political decentralization, and the extended exercise of democracy at the local levels of the State.

Thus, in contrast to the Absolute Monarchies organized on the basis of centralism, these revolutions gave rise to new forms of territorial organization that originated, on the one hand, federalism, particularly derived from the American Revolution with its essential bases of local government; and on the other, municipalism, originating particularly from the French Revolution.

In Hispanic America, it was also in the Venezuelan Federal Constitution of 1811, where for the first time in the history of the modern world after the American Constitution, the federal form was adopted in the organization of the State; and at the same time, it was the first country in the world, after those Revolutions, to have adopted in 1812 the municipal territorial organization that bequeathed the French Revolution.

All this contrasts with the organization of the former Absolute State, in which the Monarch accumulated all the powers: he was the legislator, the ruler, the administrator and was the one who imparted justice. Nothing and no one controlled the Sovereign, nor were his powers limited, nor could they be limited. ("The King can do no wrong; *Le roi ne peut mal faire*).

In the Rule of law State, on the other hand, in the context of the separation of powers, the principle of control between the powers predominates, and in particular, judicial control which, although initially developed in relation to the acts of the Executive Power and the Public Administration, whose organs must act in accordance with the law, it was progressively extended to all State acts including acts of Parliament.

For this reason, the control of power was also implemented in relation to the acts of the legislative body itself, putting an end on the absolute parliamentarism, and also of the government, through the adoption of a system of judicial review or jurisdictional control of the constitutionality of the laws and other acts of the State issued in direct execution of the Constitution, as a protection against the despotism of the Legislator and the of the government.

On the other hand, in order to judicially control the activity of the Administration, specialized courts were created as Contentious-Administrative jurisdiction; and to exercise control over the constitutionality of the legislator and the government, Constitutional Jurisdiction emerged, made up of special Constitutional Courts or the Supreme Courts themselves.

This, in contrast to the scheme of the Absolute State, according to which the Monarch was sovereign and infallible, so that since he could never make mistakes or cause evil, his acts were not subject to any control. The law that governed it was its own will, so that there could be no higher body of normative to limit it, and according to which its decisions could be controlled.

Summarizing and in relation to the contemporary world, this *principle of the separation of powers,* implies their distribution in the organization of the State in order to limit, balance and control the exercise of political power, which must be limited by law, as a mean to guarantee the freedom of *citizens.* It implies the need for various branches of government to be in the hands of independent and autonomous bodies that must control each other, in particular, by the Judiciary. This distribution or *deconcentration* principle is, therefore, essentially linked to the principle of the separation of powers, which stands at the very essence of the rule of law, to avoid possible abuses of one branch of power in relation to the others.

This principle of the separation of power nowadays implies: (i) the organization of an *Independent Judiciary*, conducted by selected and duly protected judges that are appointed with the guaranty of enjoying a carrier based on stability, promotion and dismissal only for graves faults and following due process rules, and subject to judicial accountability. In the judicial processes, access to justice must be guaranteed, as well as the due length of the proceedings and effective and efficient justice; (ii) the organization of government and of Public Administration not only to guaranty that their actions must always be according to the law but also subject to political, administrative and judicial control, in particular to assure government accountability. In the functioning of the government and Administration, systems must be established to prevent and persecute acts of corruption. In addition, the Government must be organized based on the *principle of civil government*, implying subordination of the military authority to the civil authority, the former being solely and exclusively in charge of the defense of the Nation, the territory and the principles and values established and guaranteed in the Constitution; (iii) the organization of the Legislative organ to allow the representative of the people to exercise sovereignty on their behalf, by means of enacting legislation. In the legislative process laws must be published, with general and prospective effects, have legal certainty and must be accessible to the people; (iv) the organization of other independent bodies of the State in charge of organizing free and fair elections, the comptrollership of State finances, the prosecuting of crimes, and of the protecting human rights; (v) and the *principle of political decentralization of the State, to ensure the political participation* of citizens in the exercise of power, bringing it closer to all through creating regional and local entities, scattered

throughout the territory of the State, governed by representatives elected through direct and secret universal suffrage; a principle that is the origin of federalism, of political regionalism and, in any case, of municipalism.

IV. THE PRINCIPLE OF LEGALITY

As already mentioned, derived from the previous principle, *forth,* other main feature of the concept of the Rule of Law is the general submission of the State to the law, which implies that all the actions of the public bodies of a given state and its authorities and officials must be carried out subject to the law and within the limits set by the law.[2]

This principle is has been always identified with the "principle of legality"; in the American system, with the whole idea of constitutionalism or government under the law; and in the British constitutional system, by the classical expression "Rule of Law."

All these expressions ultimately mean that state bodies should be subject to the law, although it is certain that these assertions do not always have the same meaning and scope in every system.

V. DECLARATIONS OF FUNDAMENTAL RIGHTS.

Fifth, from the same two Revolutions of the of the late eighteenth century, the formal declaration of the existence of natural rights of man and citizens began to be solemnly recognized and declared with constitutional rank, and therefore, with the obligation to be respected by the State.

Freedom was constituted, within these rights, as a limitation to the State and its powers, thus producing the end of the absolute and irresponsible State.

Therefore, since the beginning, the Constitutions of the North American Colonies, upon independence in 1776, were all preceded by extensive and entrenched Declarations of Rights, which were followed by the Declaration of the Rights of Man and of the Citizen of France of 1789, and the Bill of Rights contained in the first Amendments to the Constitution of the United States of the same year.

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2 *See Part Four* of this book.

The third of the declarations of fundamental rights in the history of modern constitutionalism, was also adopted in Hispanic America, and was the "Declaration of Rights of the People" sanctioned on July 1, 1811 by the General Congress of Venezuela, a text that months later was included and expanded in Chapter VIII of the Federal Constitution of December of the same year 1811.

This recognition of fundamental rights and freedoms is therefore another of the principles that globally identifies the rule of law, as a formal guarantee contained in constitutional texts, which ensure both its effective enjoyment and the various means of judicial and political control to guarantee them.

In contrast, in the scheme of the absolute State, citizens had no rights; they had only duties and among them, that of the subjection to the Monarch. Therefore, the very idea of constitutionally declared fundamental rights, as stated, product of the American and French Revolutions, is another characteristic of the rule of law, nowadays characterized by the primacy of human dignity, comprising *constitutional guaranties*, in particular, access to justice, equality and nondiscrimination, protection of minorities; *individual right*, in particular, right to life, right to freedom, right to personal integrity, free speech; *social rights*, like right to education, right to work, right to the protection of health, right to cultural goods; *economic rights*, like free enterprise, and right to property; *political rights*, beside the right to elect and be elected, the right to participate in political parties, the right to protest; *indigenous people rights* and *environmental rights*.

VI. JUDICIAL REVIEW AND THE ROLE OF THE JUDICIARY

Sixth, the American and French Revolutions also disrupted the very idea of the Judiciary and its role, since justice would cease to be administered by the Monarch and would begin to be given by independent officials, in the name of the Nation.

In addition, regarding the contribution of the American Revolution to the rule of law, as already mentioned the judges assumed a function that is fundamental in modern constitutionalism, which is the control of the constitutionality of laws.

That is, from the idea that the Constitution, as the supreme law, derives the principle that it must have some control, as a guarantee of its supremacy, being that control basically attributed to the Judicial Power. Hence, the important political role that the Supreme Court of Justice acquired in the United States of America, giving rise to the so-called diffuse method of judicial review, according to which all courts have the power to control the constitutionality of the laws they must apply when resolving specific cases. The system was almost immediately followed in many Hispanic American Countries.

It was in Venezuela, in the Federal Constitution of 1811, where under the influence of the North American experience, the role of the Judicial Power, as trusted balance between the powers of the State, was adopted, even with the inclusion in the text of the Constitution itself of the principle of its objective guarantee, by declaring null and void laws that contradict constitutional norms.

Also in Hispanic America, since the XIX century, and in Europe, since the beginning of the XX century, the other method of judicial review, the so-called concentrated method also developed, assigning to the Supreme Court of the country or to a special Constitutional Court or Tribunal created independently of all branches of government, the power to declare the nullity of unconstitutional laws challenged by an interested party.

This subsequently gave rise to the development in almost all Hispanic American countries of the comprehensive systems of control of constitutionality of laws, concentrated, diffuse and mixed, that characterizes the Hispanic American constitutionalism.

Consequently, in current times, as e mentioned, other of the key elements that distinguish the Rule of Law State is the indispensable existence of a judicial review system to guaranty the supremacy of the Constitution.

In addition, the Rule of Law also imposes the need for the development of a jurisdictional system of control of the administrative action (contentious administrative jurisdiction), which in general is assigned to special courts.

PART TWO

FAKE DEMOCRACY AND DISTORTION OF THE RULE OF LAW*

All the aforementioned basic principles of the rule of law, are the ones that have been dismantled in Venezuela in the past twenty years, after the assault of power materialized in 1999, executed by the same group of military that seven years before, in 1992, had tried unsuccessfully to give a coup d'état against a democratic government, but this time using democratic means like the convening of a Constituent Assembly.

Since then, a kakistocracy developed, taking over the complete control of the government and the State apparatus, and began the process of destruction of all the principles of the rule of law, being the State converted into a Rule of Lies political system.

I. THE DISTORTION OF THE PRINCIPLE OF POPULAR SOVEREIGNTY: DECONSTITUTIONALIZATION AND SEIZING OF POPULAR SOVEREIGNTY

The first process of destruction that began in Venezuela in 1999, was the process of deconstitutionalization of the State, which occurred in parallel to the sanctioning of the Constitution itself as a result of a poorly formed and worse structured National Constituent Assembly.[136]

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* Text written for the second Meeting of the *EPLO. Global Rule of Law Commission*, Cascais, Portugal, July 24th and 25th, 2023.

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

Such Assembly was convened violating the provisions of the 1961 Constitution, by the same group of officers commanded by Hugo Chávez who seven years earlier (1992) had attempted a coup against President Carlos Andrés Pérez, serving for the assault on power and the subjugation of the constituted powers.

With this Venezuelan experience, the so-called "new constitutionalism" began in Latin America,[137] spreading later to Ecuador and Bolivia, as a product of constitutional populism pretending to justify the yielding of constitutional supremacy when the sovereign people are supposedly summoned, even if unconstitutionally.[138]

The result of this deformation was the approval, by said Constituent Assembly, completely controlled by Chávez and his followers, of a Political Constitution that, as I expressed it in December 1999, when advocating for its rejection in the respective referendum:

> "When it is analyzed globally, [...] it reveals an *institutional scheme for authoritarianism*, which derives from the *combination of State centralism, exacerbated presidentialism, partidocracy and militarism* that constitute the central elements designed for the organization of the State Power."[139]

Unfortunately, what I predicted at the time was fully fulfilled, beginning the process of blatant violation of the Constitution only a few days after it was approved (12-15-1999) and before it was published (12-30-1999), through the sanctioning by the Constituent Assembly itself of a

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137 *See* Allan R. Brewer-Carías, *"El "nuevo constitucionalismo latinoamericano" y la destrucción del Estado democrático por el Juez Constitucional. El Caso de Venezuela,* Colección Biblioteca de Derecho Constitucional, Ediciones Olejnik, Madrid, Buenos Aires, 2018, 294 pp.

138 *See* Juan Carlos Cassagne and Allan R. Brewer-Carías, *Estado populista y populismo constitucional. Dos estudios,* Ediciones Olejnik, Santiago, Buenos Aires, Madrid 2020, 330 pp.

139 *See* Allan R. Brewer-Carías, "Razones del voto NO en el referendo aprobatorio de la Constitución," en Debate *Constituyente (Labor en la Asamblea Nacional Constituyente),* Tomo III, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2000.

"Transitory Regime" (12-22-1999)[140] not approved, by the people. This regime was, in practice, a parallel "constitution" that contravened the approved text and confirmed that it would not be complied with.

With this transitory constitutional regime, which I then described as a "constituent coup,"[141] the Constituent Assembly replaced all the founded Public Powers (branches of government) of the State and its authorities, handpicking their substitutes without complying with the requirements established in the new Constitution; not even for the appointment of the Justices of the Supreme Tribunal, creating also a "Commission for the Reorganization and Functioning of the Judiciary" that dismissed almost all the judges without due process.[142] All of this was endorsed by the irregularly named Constitutional Chamber of the Supreme Tribunal, which came to decide "in her own cause"[143] that the new Constitution did not apply to herself, considering that the acts of the Constituent Assembly had "supra-constitutional" rank, and were not subject to either the new or the former Constitution.

With this, and the so-called "new constitutionalism," the judiciary was mercilessly intervened and subject to political control, beginning the destruction of the foundations of the rule of law;[144] a process that was

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140 After the Constitution was approved by the people (December 15, 1999), the Assembly issued the Transitory Constitutional Regime (December 22, 1999), having published both texts at the same time (December 30, 1999) *See Official Gazette* No. 36,859 of December 29, 1999.

141 *See* Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002. *See* Allan R. Brewer-Carías, "Comentarios sobre la ilegítima "Exposición de Motivos" de la Constitución de 1999 relativa al sistema de justicia constitucional", in *Revista de Derecho Constitucional*, Nº 2, Enero-Junio 2000, Caracas 2000, pp. 47-59.

142 *See* Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela,* Universidad Nacional Autónoma de México, México 2002, 405 pp.; and *Golpe de Estado Constituyente, Estado Constitucional y Democracia*, Colección Tratado de Derecho Constitucional, Tomo VIII, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas, 1018 pp.

143 *See* ruling No. 6 dated January 27, 2000, in *Revista de Derecho Público*, Nº 81, (enero-marzo), Editorial Jurídica Venezolana, Caracas 2000, pp. 81 ff.

144 On the intervention of the Judiciary, *See* Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004", in *XXX Jornadas J.M Domínguez Escovar,*

conducted, since 2000, by the Constitutional Chamber, who began to decide forgetting that sovereignty resides "non-transferably" in the people, and that therefore, no one can assume it, allowing Constituent Assemblies to usurp it in and 2017,[145] as happened in 1999.[146]

For this reason, when the 1999 Constitution regulated the Constituent Assembly, it was established that the people as "repository of the original constituent power" (art. 347) is the one who can convene even a Constituent Assembly, to affect essential provisions of the conformation of the State. This was violated in 2007, when Chávez "covered up" his proposal for the transformation of the Constitutional State into a Communal State, using the "constitutional reform" procedure and not the Constituent Assembly,[147] an absurdity that the people rejected it by

Estado de derecho, Administración de justicia y derechos humanos, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33-174; "La Justicia sometida al poder y la interminable emergencia del Poder Judicial (1999-2006)", in *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, Nº 11, Caracas, septiembre 2007, pp. 122-138; "Sobre la ausencia de carrera judicial en Venezuela: jueces provisorios y temporales y la irregular Jurisdicción Disciplinaria Judicial," in *Revista de Derecho Funcionarial,* Números 12-19, Mayo 2014 – Diciembre 2016, Edición especial, Centro para la Integración y el Derecho Público (CIDEP), Fundación de Estudios de Derecho Administrativo (FUNEDA), Caracas 2018, pp. 8-26.

145 *See* Allan R. Brewer-Carías, *Usurpación Constituyente 1999, 2017. La historia se repite: una vez como farsa y la otra como tragedia,* Colección Estudios Jurídicos, No. 121, Editorial Jurídica Venezolana International, 2018, 654 pp.

146 *See* critical comments on this in Allan R. Brewer-Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente,* Academia de Ciencias Políticas y Sociales, Caracas 1999*,* pp. 67 ff.

147 *See* Allan R. Brewer-Carías, *Hacia la consolidación de un Estado socialista, centralizado, policial y* militarista*. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional* 2007*,* Colección Textos Legislativos, No. 42, Editorial Jurídica Venezolana, Caracas 2007; *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Colección Textos Legislativos, No. 43, Editorial Jurídica Venezolana, Caracas 2007.

referendum, despite the fact that the new Constitutional Chamber refused to control it.[148]

Ten years later, in May 2017, the popular sovereignty was attacked again, this time through the unconstitutional covenant of another National Constituent Assembly, but by Executive decree,[149] seizing the popular initiative, seeking again to constitutionalize the Communal State that was rejected by the people in 2007.[150] Although the Constitutional Chamber again refused to control this unconstitutionality,[151] this Constituent Assembly resulted in a fraudulent body "elected" just to deprive the

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148 *See* Allan R. Brewer-Carías, "El juez constitucional vs. la supremacía constitucional O de cómo la jurisdicción constitucional en Venezuela renunció a controlar la constitucionalidad del procedimiento seguido para la 'reforma constitucional' sancionada por la Asamblea Nacional el 2 de noviembre de 2007, antes de que fuera rechazada por el pueblo en el referendo del 2 de diciembre de 2007," in Eduardo Ferrer Mac Gregor y César de Jesús Molina Suárez (Coordinadores), *El juez constitucional en el Siglo XXI,* Universidad Nacional Autónoma de México, Suprema Corte de Justicia de la Nación, Mexico 2009, Volume I, pp. 385-435.

149 *See Official Gazette* No. 6295 Extraordinary of May 1, 2017.

150 *See* Allan R. Brewer -Carías, "La proyectada reforma constitucional de 2007, rechazada por el poder constituyente originario", in *Anuario de Derecho Público 2007,* Año 1, Instituto de Estudios de Derecho Público de la Universidad Monteávila, Caracas 2008, pp. 17-65. *See also in* Allan R. Brewer-Carías, *Reforma constitucional y fraude a la Constitución (1999-2009)*, Academia de Ciencias Políticas y Sociales, Caracas 2009, p. 64-66; and *La Constitución de 1999 y la Enmienda constitucional No. 1 de 2009*, Editorial Jurídica Venezolana, Caracas 2011, pp. 299-300.

151 *See judgment No. 378 of May 31, 2017*. *See the comments in* Allan R. Brewer-Carías, "El Juez Constitucional vs. El pueblo como poder constituyente originario. De cómo la Sala Constitucional del Tribunal Supremo de Justicia avaló la inconstitucional convocatoria de una Asamblea Nacional Constituyente, arrebatándole al pueblo su derecho exclusivo a convocarla," in Allan R. Brewer-Carías y Carlos García Soto (Coordinadores), *Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017***,** Colección Estudios Jurídicos No. 119, Editorial Jurídica Venezolana, Caracas 2017, pp. 481-494.

National Assembly, then controlled by the opposition, of the power to legislate.[152]

In this way, since its enactment, the Constitution in Venezuela lost all value as a supreme norm, becoming a normative set or "rules" that have lost their rigidity and can be bended by absolutely all public powers, and whose validity and scope have being changed through unconstitutional ordinary laws and decree-laws, which the Constitutional Chamber has refused to control. To make matters worse, the Political Constitution has been emptied of the principle of constitutionalism and popular sovereignty with the active participation of the Constitutional Chamber, through constitutional interpretation rulings made-to-measure for the government, as well as through illegitimate mutations to "guarantee" that unconstitutional actions are not controlled.[153]

II. THE EMPTYING OF THE PRINCIPLE OF DEMOCRATIZATION: DE-DEMOCRATIZATION AND THE ELIMINATION OF REPRESENTATIVE DEMOCRACY

This deconstitutionalization has been accompanied by a process of de-democratization of the State, developed as a State policy, in contempt of the principle of representative democracy, promoting its replacement by a so-called "participatory" democracy.

Representative democracy is, in fact, one of the cardinal principles recognized in the 1999 Constitution (art. 5), although the term "representative" regarding the government (art. 6) included in all previous Constitutions, was replaced by the word "elective."[154]

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152 *See* Allan R. Brewer-Carías, *Usurpación Constituyente 1999, 2017. La historia se repite: una vez como farsa y la otra como tragedia,* Colección Estudios Jurídicos, No. 121, Editorial Jurídica Venezolana International, 2018.

153 *See* on the constitutional mutation by the Constitutional Chamber: Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", *in IUSTEL, Revista General de Derecho Administrativo*, No. 21, junio 2009, Madrid.

154 *See* my critic on this matter in Allan R. Brewer-Carías, *Debate Constituyente, Aportes a la Asamblea Nacional Constituyente, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999,* Tomo I, pp. 184 ss. *See on*

Nonetheless, the Constitution refers to the indirect exercise of sovereignty by the people through elected representatives, according to the principle of representativeness,[155] considering it as a citizen's right,[156] implying that the representatives who govern must always have their origin in popular elections carried out through universal, direct and secret suffrage (art. 63, 70, 136).

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sovergnity and representative democracy: Allan R. Brewer-Carías, "El principio de la soberanía popular, el republicanismo y el gobierno democrático representativo", *in* Allan R. Brewer-Carías y José Araujo Juárez (Coordinadores*), Principios Fundamentales del Derecho Público. Desafíos actuales. Libro conmemorativo de los 20 años de la publicación de la Constitución de 1999*, Editorial Jurídica Venezolana International 2020, pp. pp. 15-39; Pedro L. Bracho Grand y Miriam Álvarez de Bozo, "Democracia representativa en la Constitución Nacional de 1999", in *Estudios de Derecho Público: Libro Homenaje a Humberto J. La Roche Rincón,* Volumen I, Tribunal Supremo de Justicia, Caracas 2001, pp. 235-254; and Ricardo Combellas, "Representación vs. Participación en la Constitución Bolivariana. Análisis de un falso dilema", in *Bases y principios del sistema constitucional venezolano (Ponencias del VII Congreso Venezolano de Derecho Constitucional realizado en San Cristóbal del 21 al 23 de noviembre de 2001),* Volumen II*, pp*. 383-402.

155 Criticism of representative democracy should be aimed at perfecting it, not eliminating it and even less so replacing it with the so-called "participatory democracy." *See*, for example, Allan R. Brewer-Carías, "Sobre los elementos de la democracia como régimen político: representación y control del poder," in *Revista Jurídica Digital IUREced*, Edición 01, Trimestre 1, 2010-2011, in http://www.megaupload.com/?d= ZN9Y2W1R; "La necesaria revalorización de la democracia representativa ante los peligros del discurso autoritario sobre una supuesta "democracia participativa" sin representación," in *Derecho Electoral de Latinoamérica. Memoria del II Congreso Iberoamericano de Derecho Electoral*, Bogotá, 31 agosto-1 septiembre 2011, Consejo Superior de la Judicatura, Bogotá 2013, pp. 457-482; "Participación y representatividad democrática en el gobierno municipal," in Revista *Ita Ius Esto, Revista de Estudiantes* (http://www.itaiusesto.com/)*, In Memoriam Adolfo Céspedes Zavaleta,* Lima 2011, pp. 11-36; at http://www.itaiusesto.com/participacion-y-representacion-democratica-en-el-gobierno-municipal/.

156 *See* Allan R. Brewer-Carías, "Algo sobre las nuevas tendencias del derecho constitucional: el reconocimiento del derecho a la constitución y del derecho a la democracia," in Sergio J. Cuarezma Terán y Rafael Luciano Pichardo (Directores), *Nuevas tendencias del derecho constitucional y el derecho procesal constitucional*, Instituto de Estudios e Investigación Jurídica (INEJ), Managua 2011, pp. 73-94.

Such is the essence of representative democracy, not to be replaced by a so called "participatory democracy" that has spread within the authoritarian discourse, eliminating representativeness through instances of the so-called Communal Power and Communal Councils controlled from the Central Power.[157] This has been made to make citizens believe they "participate," when what happens is that they are subject and controlled, improperly, but deliberately, confusing participatory democracy with elements that are more of direct democracy.[158] In addition,

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[157] These institutions were rejected by the people in the referendum on the constitutional reform of 2007, but they were established unconstitutionally through the Law on Communal Councils sanctioned in 2006 (*See Official Gazette* No. 5,806 Extra. of 10-04-2006. *See* Allan R. Brewer-Carías, "El inicio de la desmunicipalización en Venezuela: La organización del Poder Popular para eliminar la descentralización, la democracia representativa y la participación a nivel local", in AIDA, *Opera Prima de Derecho Administrativo. Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Facultad de Estudios Superiores de Acatlán, Coordinación de Postgrado, Instituto Internacional de Derecho Administrativo "Agustín Gordillo", Asociación Internacional de Derecho Administrativo, México, 2007, pp. 49 a 67) and later, in 2010, in the Organic Law on Popular Power and Communes (*See* in *Official Gazette* Nº 6.011 Extra. of 21 December 2010). The Constitutional Chamber by means of judgment No. 1330 of December 17, 2010 declared the constitutionality of the organic nature of this Law. *See* at http://www.tsj.gov.ve/decisiones/scon/ Diciembre/ 1330-171210-2010-10-1436.html. *See generally on these laws*, Allan R. Brewer-Carías, Claudia Nikken, Luis A. Herrera Orellana, Jesús María Alvarado Andrade, José Ignacio Hernández and Adriana Vigilanza*, Leyes Orgánicas sobre el Poder Popular y el Estado Comunal (Los consejos comunales, las comunas, la sociedad socialista y el sistema económico comunal),* Colección Textos Legislativos Nº 50, Editorial Jurídica Venezolana, Caracas 2011; Allan R. Brewer-Carías, "La Ley Orgánica del Poder Popular y la desconstitucionalización del Estado de derecho en Venezuela," in *Revista de Derecho Público*, Nº 124, Editorial Jurídica Venezolana, Caracas 2010, pp. 81-101), and also, on the reform of the Organic Law of Municipal Public Power (*See Official* Gazette No. 6,015 Extra. December 28, 2010)

[158] *See* Allan R. Brewer-Carías, "La democracia representativa y la falacia de la llamada "democracia participativa, sin representación," in Jorge Fernández Ruiz (Coordinador), *Estudios de Derecho Electoral. Memoria del Congreso Iberoamericano de Derecho Electoral*, Universidad Nacional Autónoma de México, Coordinación del Programa de Posgrado en Derecho, Facultad de Estudios Superiores Aragón, Facultad de Derecho y Criminología, Universidad Autónoma de Nuevo León, México 2011, pp. 25 a 36. *See* Allan R. Brewer-Carías, "La necesaria revalorización de la democracia representativa ante los peligros del discurso

decentralization of power has been eliminated, depriving citizens of their right to politically participate, as well as universal, direct and secret suffrage has been eliminated, for example, for the election of municipal authorities (2017) and for the election of deputies representing indigenous communities (2020).[159]

Despite the fact that all the laws related to Communal Power were challenged, the Constitutional Chamber ignored the appeals except one,[160] whereas it ignored the principle of representative democracy and the principle that the appointment of authorities representing the people can only be done through election by universal, direct and secret suffrage, and not through voting mechanisms in "citizen" assemblies controlled by a show of hands.

Consequently, the first victim of the Constitutional Chamber in Venezuela has been the representative democratic principle,[161] successively

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autoritario sobre una supuesta "democracia participativa" sin representación," in *Derecho Electoral de Latinoamérica. Memoria del II Congreso Iberoamericano de Derecho Electoral*, Bogotá, 31 agosto-1 septiembre 2011, Consejo Superior de la Judicatura, Bogotá 2013, pp. 457-482. *See* also, Allan R. Brewer-Carías, *Sobre la democracia*, (con Prólogo de Mariela Morales Antoniazzi). Editorial Jurídica Venezolana, New York / Caracas 2919, 576 pp.

159 In this new scheme, the "spokespersons" of the Communal Councils, without political autonomy, have been appointed by show of hands "in the name of the people," by assemblies controlled by the official party and by the National Executive.

160 Except for the one referring to the reform of the Organic Law of Municipal Power of 2010, which was decided by judgment No. 355 of May 16, 2017. *See* Case: *impugnación de la Ley de reforma de la Ley Orgánica del Poder Público Municipal*. Available at http://historico.tsj.gob.ve/decisiones/scon/mayo/199013-355-16517-2017-11-0120.HTML. *See the comments on this judgment in* Emilio J. Urbina Mendoza, "Todas las asambleas son sufragios, y muchos sufragios también son asambleas. La confusión lógica de la sentencia 355/2017 de la Sala Constitucional del Tribunal Supremo de Justicia y la incompatibilidad entre los conceptos de sufragio y voto asambleario," and José Ignacio Hernández G., "Sala Constitucional convalida la desnaturalización del Municipio. Notas sobre la sentencia N° 355/2017 de 16 de mayo," in *Revista de Derecho Público*, Nº 150-151 (enero-junio 2017), Editorial Jurídica Venezolana, Caracas 2017, pp. 107-116 y 349-352.

161 At this point we follow what is stated in Allan R. Brewer-Carías, "El Juez Constitucional en Venezuela y la destrucción del principio democrático

injured by the same Justices, who have affected the essence of proportional representation (2006) by endorsing the unconstitutional political disqualifications that affected the right of former public officials to be elected (2008, 2011); taking away from a deputy in office the power to continue exercising her mandate, revoking it unconstitutionally (2014); illegitimately and unconstitutionally revoking the popular mandate of several Mayors, usurping the powers of the Criminal Jurisdiction (2014); demolishing the principle of elective and representative democratic government, by imposing on Venezuelans a government without democratic legitimacy in 2013, without determining with certainty at that time the state of health of President Hugo Chávez Frías, or if he was alive; and eliminating the alternative nature of the government (2009) allowing for indefinite reelection.[162]

III. THE EMPTYING OF THE PRINCIPLE OF SEPARATION OF POWERS

1. *The Concentration of Power*

In the Venezuelan case the demolition of the principle of constitutionalism, the contempt on popular sovereignty and the abandonment of the representative democratic principle, was followed by the emptying of the first and fundamental pillar of any Rule of Law State, which is that of separation and independence of the government branches (public powers) and reciprocal control between them, that is, the

representativo," in *Revista de Derecho Público*, No. 155-156, julio-diciembre de 2018, Editorial Jurídica Venezolana, Caracas 2018, p. 7-44.

[162] *See* Allan R. Brewer-Carías, "La democracia y su desmantelamiento usando la justicia constitucional: Peligros del autoritarismo," O de cómo, en Venezuela, el Juez Constitucional demolió los principios de la democracia representativa, de la democracia participativa y del control del poder", prepared for the lectura on "Democracia y Justicia Constitucional: Peligros del Autoritarismo," in *Elecciones y democracia en América latina: El desafío autoritario – populista (Coloquio Iberoamericano, Heidelberg, septiembre 2019, homenaje a Dieter Nohlen),* (Editor: Allan R. Brewer-Carías), Colección Biblioteca Allan R. Brewer-carías, Instituto de Investigaciones Jurídicas de la Universidad Católica Andrés bello, Editorial Jurídica Venezolana International, Caracas 2020, pp. 98-117.

deconcentration of power, without which control simply does not exist, particularly by an autonomous and independent Judiciary.[163]

In Venezuela, in the last twenty years, this principle has been nothing but another facade to establish a Totalitarian State in disguise, with total concentration and centralization of power, and where -of course- none of the essential elements and of the fundamental components of democracy that are defined in the Inter-American Democratic Charter of 2001, have been insured.[164] Hence the description of the regime as a *kakistocracy*, which as commented by Ermmano Vitale, as stated by Michelangelo Bovero:

> "feeds and is fed, in a kind of perverse circle, by the confusion of powers, which annul the distinction and separation of powers typical of constitutional democraccies, both on the social level (political, economic and ideological power) and on the strictly institutional level (Legislative, Executive, Judicial)." [165]

In fact, for a democratic State to exist, above all it must secure the separation and independence of the government branches, because without balance and control of power, ultimately none of the aspects of democracy can be carried out, as they are defined in the aforementioned

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163 On the subject *See* Gustavo Tarre Briceño, *Solo el poder detiene al poder, La teoría de la separación de los poderes y su aplicación en Venezuela*, Colección Estudios Jurídicos Nº 102, Editorial Jurídica Venezolana, Caracas 2014; and Jesús María Alvarado Andrade, "División del Poder y Principio de Subsidiariedad. El Ideal Político del Estado de Derecho como base para la Libertad y prosperidad material" in Luis Alfonso herrera Orellana (Coord.), *Enfoques Actuales sobre Derecho y Libertad en Venezuela*, Academia de Ciencias Políticas y Sociales, Caracas, 2013, pp. 131-185.

164 *See* Allan R. Brewer -Carías, *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela,* Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014.

165 *See* Ermanno Vitale, "Democracia, *kakistocracia, pleonocracia*. Michelanglo Bovero y Teoría Política," María Guadalupe Salmorán Villar (Coordinadora), Poder, democracia y derechos. Una discusión con Michelangelo Bovero, Universidad Nacional Autónoma de México, p. 9, in Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM, at https://biblio.juridicas.unam.mx/bjv/detalle-libro/5703-poder-democracia-y-derechos-una-discussion-con-michelangelo-bovero.

Democratic Charter; that is, there can be no true free, fair and reliable elections; there can be no political pluralism, nor access to power in accordance with the Constitution; there can be no effective participation in the management of public affairs, nor administrative transparency in the exercise of government, nor accountability on the part of the rulers. In short, there can be no effective submission of the government to the Constitution and the laws, as well as the subordination of the military to the civilian government; there can be no effective access to justice; and no real and effective guarantee of respect for human rights, including freedom of expression and social rights.[166]

Contrary to all of this and against the promises of the Constitution, in Venezuela we have witnessed the development of a State where all power has been concentrated in the hands of the Executive Power, to whom all other branches of government (Public Powers) are subject; particularly the Supreme Tribunal of Justice and its Constitutional Chamber, as well as the electoral body, and even the National Assembly itself, even by drowning it when it was controlled by the opposition to the government (2015-2020).

2. *The catastrophic control of the Judiciary*

In this process of concentration of power, of course, the most devastating blow has been the political control that the Executive Branch has exercised over the Judiciary and particularly over the Constitutional Chamber of the Supreme Tribunal; a process that began in 1999 when the Constituent Assembly intervened the Judiciary,[167] and began to integrate

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166 *See* Allan R. Brewer-Carías, "Forword" to the book by Gustavo Tarre Briceño, *Solo el poder detiene al poder, La teoría de la separación de los poderes y su aplicación en Venezuela*, Colección Estudios Jurídicos Nº 102, Editorial Jurídica Venezolana, Caracas 2014, pp. 13-49; "El principio de la separación de poderes como elemento esencial de la democracia y de la libertad, y su demolición en Venezuela mediante la sujeción política del Tribunal Supremo de Justicia," in *Revista Iberoamericana de Derecho Administrativo, Homenaje a Luciano Parejo Alfonso,* Año 12, Nº 12, Asociación e Instituto Iberoamericano de Derecho Administrativo Prof. Jesús González Pérez, San José, Costa Rica 2012, pp. 31-43.

167 *See* our dissent vote on the intervention of the Judiciary by the National Constituent Assembly in Allan R. Brewer–Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*, Tomo I, (8 agosto–8 septiembre), Caracas 1999; an the criticism to this process in Allan R. Brewer–Carías, *Golpe de Estado y*

the Supreme Tribunal of Justice with politically controlled justices, completely kidnapping the Judiciary, which was made up of provisional or temporary judges subject to political pressure, who began to be fired without any guarantees of due process when their actions were not aligned with the government.

The result of all this was the tragic disappearance of the Judicial Power autonomy,[168] that began to work as an instrument at the service of the authoritarian; just like those "judges of the horror" of the Nazi regime, to the extent that the rulings of the Supreme Tribunal of Venezuela have been expressly repudiated in jurisdictions of other countries.[169]

3. *The Control of the other Branches of Government*

This entire process by which the Constitutional Judge neutralized the National Assembly through a continued *coup d'état* in collusion with the Executive Power, consolidated a "judicial dictatorship," and as a result,

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proceso constituyente en Venezuela, Universidad Nacional Autónoma de México, Mexico, 2002.

168 *See* Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía en independencia del Poder Judicial en Venezuela (1999–2004)", in *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33–174; and "La justicia sometida al poder [La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999–2006)]" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25–57; "La demolición de las instituciones judiciales y la destrucción de la democracia: La experiencia venezolana," in *Instituciones Judiciales y Democracia. Reflexiones con ocasión del Bicentenario de la Independencia y del Centenario del Acto Legislativo 3 de 1910,* Consejo de Estado, Sala de Consulta y Servicio Civil, Bogotá 2012, pp. 230-254.

169 *See* Allan R. Brewer-Carías, "Las Cortes Supremas de Costa Rica, Brasil y Chile condenan la falta de garantías judiciales en Venezuela. De cómo, ante la ceguera de los gobiernos de la región y la abstención de la Corte Interamericana de Derechos Humanos, han sido las Cortes Supremas de estos países las que con base en la jurisdicción universal de protección de los derechos humanos, han comenzado a juzgar la falta de autonomía e independencia del Poder Judicial en Venezuela, dictando medidas de protección a favor de ciudadanos venezolanos contra el Estado venezolano," in *Revista de Derecho Público,* No. 143-144, (julio- diciembre 2015, Editorial Jurídica Venezolana, Caracas 2015, pp. 495-500.

since then, of the five branches of government that make up the separation of powers in Venezuela (Executive, Legislative, Judicial, Citizen and Electoral), not only the National Assembly, but also the rest of the Public Powers have all remained dependent on the Executive, abandoning their powers of control.

This has happened with the silent approval of the other authorities that should intervene to halt this kind of situations. The Comptroller General exercises no control whatsoever, resulting in the first place in the corruption index in the world for the country,[170] whereas he is known only because of his political disqualification of opposition candidates to prevent their participation in elections. The Ombudsman, on the other hand, has never protected human rights, which have been violated with impunity, as results from the Reports of the High Commissioners of Human Rights, and the investigation carried out by the International Criminal Court.[171] The Prosecutor General's, rather than being a good faith party in all proceedings to guarantee the Constitution, has been the main mechanism to secure impunity in the country, particularly for crimes committed by public officers, and to secure prosecution of all political dissent.[172] As for the Electoral Body, vested in the National

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170 *See the Report of the German NGO, Transparency International of 2013, in the report:* "They assure that Venezuela is the most corrupt country in Latin America," in *El Universal*, Caracas December 3, 2013, at http://www.eluniversal.com/nacional-y-politica/131203/aseguran-que-venezuela-es-el-pais-más-corrupto-de-latinoamerica. Also *See* the report on BBC Mundo, "Transparency International: Venezuela and Haiti, the most corrupt in Latin America," December 3, 2013, at http://www.bbc.co.uk/mundo/ultimas_noticias/2013/12/131203_ultnot_transparencia_corrupcion_lp.shtml. *See* in this regard, Román José Duque Corredor, "Corrupción y democracia en América Latina. Casos emblemáticos de corrupción en Venezuela," in *Revista Electrónica de Derecho Administrativo*, Monteávila University, 2014.

171 *See* Allan R. Brewer-Carías y Asdrúbal Aguiar (editores), *Venezuela. Informes sobre violaciones grave de derechos humanos*, Iniciativa Democrática España América, Editorial Jurídica Venezolana, Miami 2019, 160 pp.

172 *As highlighted in the Report of the International Commission of Jurists on Fortalecimiento del Estado de Derecho en Venezuela, published in Geneva in March 2014, the* "Public Ministry without guarantees of independence and impartiality from other public powers and political actors, " leaving the prosecutors "vulnerable to external pressures and subject to superior orders." *See* at

Electoral Council, it has ended up being a kind of "electoral agency" of the government itself, made up of militants from the official party or, as denounced by the Secretary General of the Organization of American States, by "activist party politicians [who] held positions within the national government,"[173] in open violation of the Constitution, having ceased to be the independent arbitrator in any election.[174] Al this aggravated by the election of its members by the Constitutional Judge, seizing the powers of the National Assembly,[175] as has happened since 2004 and lastly in 2020.[176]

4. *The Distortion of the Principle of Political Decentralization and Citizen Participation: The Centralization, Deconstitutionalization and Demunicipalization of The State*

In addition to the principle of the limitation of power through its horizontal separation, so that power controls power, as another basis of

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http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf

173 *See* the statement of the OAS Secretary General of May 30, 2016 with the *Report on the situation in Venezuela in relation to compliance with the Inter-American Democratic Charter*, p. 88. Available at oas.org/documents/spa/press/OSG-243.es.pdf.

174 For example, in Allan R. Brewer-Carías and José Ignacio Hernández, *Venezuela. La ilegítima e inconstitucional convocatoria de las elecciones parlamentarias en 2020,* (Iniciativa Democrática de España y las Américas, Editorial Jurídica Venezolana International, 2020, 274 pp.

175 *See* Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000–2004,", in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Nº 112. México, enero–abril 2005 pp. 11–73; *La Sala Constitucional versus el Estado Democrático de Derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Are, Caracas, 2004, 172 pp.

176 *See* Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004", *in* Juan Pérez Royo, Joaquín Pablo Urías Martínez, Manuel Carrasco Durán, Editores), *Derecho Constitucional para el Siglo XXI. Actas del Congreso Iberoamericano de Derecho Constitucional,* Tomo I, Thomson-Aranzadi, Madrid 2006, pp. 1081-1126.

the democratic rule of law State, the Venezuelan Constitution of 1999 established a system of political decentralization of power ("Federal decentralized State"); distributing it among territorial entities on two levels (States, Municialities), to enable citizen participation in the management of public affairs, which can only be achieved by bringing power closer to the citizen. Even in the Constitution it was proclaimed that:

> "decentralization, as a national policy, must deepen democracy, bringing power closer to the population and creating the best conditions, both for the exercise of democracy and for the effective and efficient provision of state tasks" (art. 158).

However, in practice all of this has turned out to be another broken promise and another big lie. Totally falsifying the purpose of the Constituent Assembly, during the last twenty years a highly centralized State has developed in the country. Political participation - despite the authoritarian discourse of the so-called "participatory democracy" - has been reduced to the exercise of increasingly innocuous suffrage, due to the control of all electoral processes by the regime.

Actually, when referring to the Decentralized Federal State, the Constitution sought to configure - even if somewhat contradictory - [177] an effective system of decentralization of power, where local entities with effective political, regulatory and administrative autonomy (States, Municipalities) could truly develop their self-government. Nevertheless, when regulating the autonomy of the territorial entities, it was established

[177] We warned about this as soon as the Constitution was sanctioned in Allan R. Brewer-Carías, *Federalismo y municipalismo en la Constitución de 1999 (Alcance de una reforma insuficiente y regresiva)*, Cuadernos de la Cátedra Allan R. Brewer-Carías de Derecho Público, N° 7, Universidad Católica del Táchira, Editorial Jurídica Venezolana, Caracas-San Cristóbal 2001; and "El Estado federal descentralizado y la centralización de la federación en Venezuela. Situación y perspectiva de una contradicción constitucional" in *Federalismo y regionalismo*, Coordinadores Diego Valadés y José María Serna de la Garza, Universidad Nacional Autónoma de México, Tribunal Superior de Justicia del Estado de Puebla, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica Nº 229, México 2005, pp. 717-750.

that the limits to it could not only be established in the Constitution itself, but also in the subsequent national law that was actually enacted.[178]

Along with this, a centralistic approach was given to the constitutional system of distribution of powers among the political-territorial entities. Under the Constitution, States lack matters over which to exercise some exclusive jurisdiction (art. 164),[179] as most of their attributions are assigned concurrently with the National or Municipal Power. And as for a competence that had been decentralized in 1993 becoming "exclusive" of the States, - the administration and management of national airports and ports located in each State -, it was centralized or nationalized by the Constitutional Chamber of the Court Supreme Tribunal in 2008, mutating the Constitution for this purpose.[180]

Additionally to the emptying of the sphere of attributions of the States by the policy of national centralization, the national Executive Power has developed a policy to totally neutralize their precarious role, through the unconstitutional establishment of national structures parallel to States, in order to secure the emptying of their powers and neutralize the power of

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178 This led to the enactment of a national law in 2001 to regulate the operation and organization of the Legislative Councils of the States, (art. 162) (*Official Gazette* Nº 37.282 of September 13, 2001), in contradiction of the constitutional norm that gives the States the competence to enact their own Constitution to organize their public powers (art. 164.1). The same happened with municipal autonomy, which is no longer only subject to the provisions of the Constitution, but also to the provisions of national law.

179 *See* Allan R. Brewer-Carías, "La distribución territorial de competencias en la Federación venezolana" in *Revista de Estudios de Administración Local. Homenaje a Sebastián Martín Retortillo,* Nº 291, enero-abril 2003, Instituto Nacional de Administración Pública, Madrid 2003, pp. 163-200.

180 *See* ruling of the Constitutional Chamber, No. 565 of April 15, 2008 (*Procuradora General de la República, recurso de interpretación del artículo 164.10 de la Constitución de 1999*) *at* http://www.tsj.gov.ve/ decisions/scon/April/565-150408-07-1108.htm. *See* the comments on this judgment, in Allan R. Brewer-Carías, "La Sala Constitucional como poder constituyente: la modificación de la forma federal del estado y del sistema constitucional de división territorial del poder público, in *Revista de Derecho Público*, N° 114, (abril-junio 2008), Editorial Jurídica Venezolana, Caracas 2008, pp. 247-262.

State Governors; particularly if they are not members of the official party, and in general to control them indirectly.[181]

This process of drowning and neutralizing the territorial entities of the Republic, in addition, was particularly acute with respect to the existing entities in the Capital Region, where in 2008, in violation of the Constitution, authorities of the Capital District totally dependent on the Executive Power were created through the Special Law on the Organization and Regime of the Capital District.[182]

On the other hand, regarding the municipalities, the Constitutional Chamber "interpreted" that the "free management of matters within its competence" guaranteed by the Constitution is nothing more than "a conditional freedom, not only because of the limitations directly imposed by the Constituent but by all those that the National Legislator and the state legislators may impose on the exercise of municipal autonomy, in

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181 This began with the creation of "Decentralized Bodies of the Strategic Regions of Integral Development (REDI)," headed by national officials called "Regional Authorities," which also have "Dependencies" in each State of the Republic, which are in charge of State Delegations, whose holders, all, are freely appointed by the Vice President of the Republic. Said officials were regulated in the reform of the Organic Law of Public Administration of 2014 with the name of "[national] heads of government" (arts. 34, 41, 44). (*See* Resolution No. 031 of the Vice Presidency of the Republic, establishing the Structure and Operating Rules of the Decentralized Bodies of the Strategic Regions of Integral Development (REDI), in *Official Gazette* No. 40,193 *of* 6-20-2013). These Delegates or heads of government, who exercise their functions "within the territory of the State that has been assigned" (art. 19), have been conceived as the supposed "channels of communication" between the State Governors ant the National Power and vice-versa, also having as mission "to carry out the actions tending to promote the integration and operation of the organized communities, instances of popular power, organizations of popular power, the councils of economy and communal comptrollership under their demarcation, in terms of the applicable regulations, complying with the criteria established by the Regional Authority of Strategic Regions for Integral Development (REDI)" (art. 20). In short, these National Regional Authorities and the State Delegates are the administrative bodies of the National Power set up parallel to the State authorities. Said authorities, in any case, also found regulation in November 2014, in the *Comprehensive Regionalization Law for the Socio-productive Development of the Nation* (*See* Decree Law No. 1,425, in *Official Gazette* No. 6,151 Extra. of November 18, 2014).

182 *See* in *Official Gazette* No. 39,156 of April 13, 2009.

accordance with the norms of the Constitution itself and within the limits indicated by it."[183] Moreover, this is what has being used by National State, in a continuous process of deconstitutionalization of the federal State[184] and of the municipal regime, to create by laws, in parallel to the local government regime provided for in the Constitution, the

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183 *See* judgment No. 2257 of November 13, 2001, in *Revista de Derecho Público*, No. 85-88, Editorial Jurídica Venezolana, Caracas, 2001, pp. 202 et seq.

184 *See* in general about this process of deconstitutionalization of the State, Allan R. Brewer-Carías, "La desconstitucionalización del Estado de derecho en Venezuela: del Estado Democrático y Social de derecho al Estado Comunal Socialista, sin reformar la Constitución," *in Libro Homenaje al* profesor *Alfredo Morles Hernández, Diversas Disciplinas Jurídicas,* (Coordinación y Compilación Astrid Uzcátegui Angulo y Julio Rodríguez Berrizbeitia), Universidad Católica Andrés Bello, Universidad de Los Andes, Universidad Monteávila, Universidad Central de Venezuela, Academia de Ciencias Políticas y Sociales, Vol. V, Caracas 2012, pp. 51-82; *in* Carlos Tablante y Mariela Morales Antonorzzi (Coord.), *Descentralización, autonomía e inclusión social. El desafío actual de la democracia*, Anuario 2010-2012, Observatorio Internacional para la democracia y descentralización, En Cambio, Caracas 2011, pp. 37-84; *and in Estado Constitucional,* Año 1, Nº 2, Editorial Adrus, Lima, junio 2011, pp. 217-236. *See also* Allan R. Brewer-Carías, "Las leyes del Poder Popular dictadas en Venezuela en diciembre de 2010, para transformar el Estado Democrático y Social de Derecho en un Estado Comunal Socialista, sin reformar la Constitución," in *Cuadernos Manuel Giménez Abad*, Fundación Manuel Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, No. 1, Madrid, Junio 2011, pp. 127-131; "La Ley Orgánica del Poder Popular y la desconstitucionalización del Estado de derecho en Venezuela,"*in Revista de Derecho Público*, No. 124, (octubre-diciembre 2010), Editorial Jurídica Venezolana, Caracas 2010, pp. 81-101; y el estudio: *"Introducción General al Régimen del Poder Popular y del Estado Comunal (O de cómo en el siglo XXI, en Venezuela se decreta, al margen de la Constitución, un Estado de Comunas y de Consejos Comunales, y se establece una sociedad socialista y un sistema económico comunista, por los cuales nadie ha votado)," in Allan R. Brewer-Carías,* Claudia Nikken, Luis A. Herrera Orellana, Jesús María Alvarado Andrade, José Ignacio Hernández y Adriana Vigilanza, *Leyes Orgánicas sobre el Poder Popular y el Estado Comunal (Los consejos comunales, las comunas, la sociedad socialista y el sistema económico comunal)* Colección Textos Legislativos Nº 50, Editorial Jurídica Venezolana, Caracas 2011, pp. 9-182. *See more recently:* Rafael Badell, *Del Estado Federal al Estado Comunal,* Academia de Ciencias Políticas y Sociales, 2021.

aforementioned "Popular Power" or "Communal State," with which the process of demunicipalization of the country began.[185]

This process has increased precisely through the creation of the Communes and the Communal Councils, as entities with authorities that have not been elected through suffrage forming the so-called Communal State, outside of the Constitution and contravening the popular rejection of it in 2007. This seeks to seize the powers of the municipalities and forcing their transfer to said entities of the "People's Power" pursuant to the Organic Law for the Community Management of Powers, Services and Other Attributions (Law Decree No. 9,043).[186] Such provisions limited the role of the Municipality as a promoter of the participation of the people "through organized communities," thus destroying federalism, decentralization and the municipality itself, imposing a nebulous Communal State as an expression of transit towards socialism."[187]

In this scheme establishing Popular Power and the Communal State, for the purpose of progressively strangling the Constitutional State, the first territorial institutions affected were of course the Municipalities, that have been completely disconnected from the process of community development and popular participation, and even more serious, attempting to establish a "democracy" without representation.

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185 *See* Allan R. Brewer-Carías, "El inicio de la desmunicipalización en Venezuela: La organización del Poder Popular para eliminar la descentralización, la democracia representativa y la participación a nivel local", in *AIDA, Opera Prima de Derecho Administrativo. Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Facultad de Estudios Superiores de Acatlán, Coordinación de Postgrado, Instituto Internacional de Derecho Administrativo "Agustín Gordillo", Asociación Internacional de Derecho Administrativo, México, 2007, pp. 49 to 67.

186 *See Official Gazette* No. 6,097 Extra. June 15, 2012.

187 *See* what was expressed by José Luis Villegas M., "Hacia la instauración del Estado Comunal en Venezuela: Comentario al Decreto Ley Orgánica de la Gestión Comunitaria de Competencia, Servicios y otras Atribuciones, en el contexto del Primer Plan Socialista-Proyecto Nacional Simón Bolívar 2007-2013," *in Revista de Derecho Público*, Nº 130, Editorial Jurídica Venezolanaa, Caracas 2012, pp. 127 ff.

5. *The Principle of Civil Government and its Distortion with the overwhelming Militarization of the Country at the margin of Civil Authority*

Finally, another of the signs of distortion of the democratic State in Venezuela has been the process of decivilism, that is, the elimination of the civil government regime that is the essence of the rule of law and democracy, through an overwhelming process of militarization of the state and the country.

This process also began in 1999, with the assault on power that occurred on the occasion of the election to the National Constituent Assembly, which was made up of the bulk of the military members that had attempted, together with Hugo Chávez, two failed *coups d'état* in 1992.

As I warned in 1999, this assault of the Constituent Assembly caused the design of militaristic elements in the Constitution,[188] starting by eliminating from the constitutional text the express formulation of the principle of subjection or subordination of the military authority to the civil authority, and establishing, on the contrary, a great autonomy of the military authority and the Armed Forces, and providing the possibility of intervening in civil functions.

The development of militarism took place, thus, in the last decades, by the elimination of the traditional prohibition of simultaneous exercise of military and civil authority, as established in the previous Constitutions; the suppression of control by the National Assembly regarding the promotion of high-ranking officers, as had been regulated in historical constitutionalism, that is now an exclusive matter of the Armed Forces (art. 331); the removal of the duty of the Armed Forces to secure the stability of the democratic institutions provided for in article 132 of the 1961 Constitution, ceasing to be a constitutional obligation of the Armed Forces; the elimination of the duty of the Armed Forces to respect the Constitution and the laws, "whose compliance - as stated in article 132 of the 1961 Constitution - will always be above any other obligation."

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188 *See* Allan R. Brewer-Carías, "Razones del voto NO en el referendo aprobatorio de la Constitución," in Debate *Constituyente (Labor en la Asamblea Nacional Constituyente),* Tomo III, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2000.

All these changes were the basis for the development of militarism in Venezuela, aggravated, among other factors, by the 1999 Constitution adoption of the concept of the doctrine of national security, as globalizing, totalizing and all-encompassing. Pursuant to this doctrine, everything that happens in the State and the Nation concerns the security of the State, including economic and social development (art. 326). This was even worsened through the suppression of the principle of non-deliberative and apolitical nature of the military institution, as was established in article 132 of the 1961 Constitution.[189]

All of this opened the way for the Armed Forces, as a military institution, and for the military, to begin political deliberation, configuring the Armed Forces as a "Chavista" military party,[190] after a sustained and continuous process of destruction of military professionalism.[191] The political proselytism of the military has been formally regularized by a ruling of the Constitutional Chamber of June 11, 2024, mutating the Constitution[192], resulting in the military having become part of a

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189 *See* what we explained about the militarist framework of the Constitution in 1999, in Allan R. Brewer-Carías, *Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 1999; and in *Asamblea Constituyente y Poder Constituyente 1999*, Colección Tratado de Derecho Constitucional, Tomo VI, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014, pp. 1049-1050.

190 In the order speech that General Vladimir Padrino Lopez, Chief of the Strategic Operational Command of the Armed Forces, delivered in the National Assembly on Independence Day, on July 5, 2014, expressed: "I am going to say it with great responsibility in response to ethics and big politics: this FANB is chavista." *See at* http://www.diariolasamericas.com/america-latina/jefe-militar-venezolano-asegura-que-fuerzas-armadas-chavistas.html . Three months later, on October 23, 2014, he was appointed Minister of Popular Power for Defense was published. *See* Decree No. 1346 in *Official Gazette* No. 40,526, of October 25, 2014.

191 *See* Fernando Ochoa Antich, "Destruir el profesionalismo militar," in *El Nacional*, Caracas, September 28, 2014, at http://www.el-nacional.com/fernando_ochoa_antich/Destruir-profesionalismo-militar_0_490151147.html

192 *See* the judgment of the Constitutional Chamber No. 651 of June 11, 2014 *(Caso Rafael Huizi Clavier and others) at* http://www.tsj.gov.ve/decisiones/scon/junio/165491-651-11614-2014-14-0313.HTML. *See* the comment in Allan R. Brewer-Carías, "Una nueva mutación constitucional: el fin de la prohibición de la militancia política de la Fuerza Armada Nacional, y el reconocimiento del derecho de los militares activos de participar en la actividad política, incluso en cumplimiento de

privileged group in society, with secure access to goods and services that ordinary citizens do not have.[193]

This militaristic scheme that was established in the 1999 Constitution, was even intended to be reinforced and reconstitutionalized in the constitutional reform presented by Chávez in 2007,[194] fortunately rejected by the people, but which nevertheless has been put into practice during the last twenty years, not only with the creation outside the Constitution in 2008 of the "Bolivarian" Armed Forces, through its Organic Law, but also with the appointment of military and ex-military personnel to most of the highest public positions in Public Administration, and their election, also, for regional and local governments. This has led to the almost total seizure of the civil service of the State by the military and by the Armed Forces, to whom is even confided in the Constitution "active participation in national development" (art. 328).

Along these lines, in September 2014, the person who exercises the Presidency of the Republic handed over total control of the economy to the military by appointing military personnel to direct all the organs of the Public Administration in the economic sector,[195] designating even active

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las órdenes de la superioridad jerárquica," in *Revista de Derecho Público*, Nº 138, Editorial Jurídica Venezolana, Caracas 2014.

193 *See*, for example, the report published in *Bloomberg News*: "New Cars for the Army as Venezuelans Line Up for Food," September 19, 2014, at http://www.bloom-berg.com/news/2014-09-29/venezuelan-army-enjoys-meat-to-cars-denied-most-citizens. html.

194 *See* Allan R. Brewer-Carías, *Hacia la consolidación de un Estado socialista, centralizado, policial y militarista,* Editorial Jurídica Venezolana, Caracas 2007, 160 pp.

195 *See* the comment on the ministerial changes of September 2014 by Francisco Mayoirga, "Gustavo Azócar Alcalá, Los militares y la economía," in *ACN, Agencia Carabobeña de Noticias*, 10 de septiembre de 2014, *available at*: http://acn.com.ve/opinion/los-militares-y-la-economia/. *However, relinquishment of economy guidance power to the military is not new. See* for instance*:* Patricia Claremboux, *AFP*, "Bajo el ala de Maduro, los militares toman control del poder económico de Venezuela. En sus primeros 9 meses de gobierno, el mandatario ya nombró a 368 uniformados en puestos políticos. Ahora, con la designación de un general del Ejército al frente del Ministerio de Finanzas, la militarización se extiende a la economía," 20 enero de 2014, *in* http://www.infobae.com/2014/01/20/1538269-bajo-el-ala-maduro-los-militares-toman-control-del-poder-economico-venezuela. *See also*: "Maduro dejó

or recently retired military, without any knowledge of the oil business, to direct and finish the destruction of *Petróleos de Venezuela S.A* (PDVSA),[196] in the midst of a corruption scheme of immeasurable scale that forced the government itself in 2023 to make public part of the predatory catastrophe.

What is more serious about this military control of the economy and seizure of the Public Administratio, is the establishing of State-owned companies of a military nature attached to the Ministry of Defense and managed exclusively by the military. Such is the case of the *Compañía Anónima Militar de Industrias Mineras, Petrolíferas y de Gas* (CAMIMPEG), created by Decree No. 2,231 of February 10, 2016,[197] parallel to PDVSA. Said company, contrary to the Constitution, has turned out to be the most predatory instrument of the environment that can be imagined, participating as an exploitative agent in the ecocide of the strategic area of the so-called Orinoco Mining Arc in the Bolivar State, created precisely two weeks after the incorporation of said military company.[198]

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en manos de un militar los problemas económicos de Venezuela. El presidente venezolano puso a Hebert García Plaza al frente del Órgano Superior de la Economía, creado para enfrentar la emergencia," 13 de septiembre de 2013, *in* http://elcomercio.pe/mundo/actualidad/maduro-dejo-manos-militar-problemas-economicos-venezuela-noticia-1630919; *and the news report*: "Militares comandan economía en Venezuela," *in Agencia France Press*, 20 de enero de 2014, *in* http://www.em.com.br/app/noticia/internacional/2014/01/20/interna_internacional,489796/militares-comandam-economia-na-venezuela-afirmam-analistas. shtml. *See also*, Peter Wilson, "A Revolution in Green. The Rise of Venezuela's Military," in *Foreign Affairs*, 2014, *available at* http://www.foreignaffairs.com/arti-cles/142133/peter-wilson/a-revolution-in-green.

196 *See* Allan R. Brewer-Carías, *Crónica de una destrucción. Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y Degradación de la Industria Petrolera*, Colección Centro de Estudios de Regulación Económica-Universidad Monteávila, N° 3, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas, 2018, 730 pp.

197 *See* in *Official Gazette* No. 40,845, of February 10, 2016.

198 *See* Decree No. 2248 of February 24, 2016, creating the "Arco Minero del Orinoco" national strategic development zone. *See Official Gazette* No. 40855 of February 24, 2016

But militarism has not only manifested itself in the organization of the Administration, but also in the extraordinary military spending that has occurred in Venezuela in recent years, unsurpassed by any country in the region;[199] as well as by the progressive militarization of formerly administrative functions, such as the police, which was seen in particular, with extreme gravity from 2014, in the militarization of the repression of protests and not only student, but neighborhood and union protests.[200]

This fact of the militarization of the security forces and public order, has been particularly highlighted since 2019 in the Report of the United Nations High Commissioner for Human Rights Michelle Bachelet on the situation of human rights in Venezuela, containing an "overview of the human rights situation" from January 2018 to May 2019,[201] noting how the situation of state of emergency existing since 2016 and renewed every 60 days, had implied "an *increase in the militarization of State institutions"* (§ 31); and how:

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199 *See* Carlos E. Hernández, Venezuela tuvo el mayor crecimiento en gasto militar de Latinoamérica," in *Notitarde.com*, February 6, 2014, at http://www.notitarde.com /Pais/Venezuela-tuvo-el-highest-growth-in-military-expenditure-in-Latinamerica/ 2014/ 02/06/303181.

200 As the prominent political leader, Paulina Gamus, recently highlighted: "With Chávez, not only the militarization of the government is inaugurated, but also the politicization of the military world." "The inspiration for this model" *she added, is* "the cult of personality, the transformation of men-at-arms into the ruler's Praetorian Guard and the overwhelming presence of soldiers in public office, with a license to steal." *See in the article* "Mom, I want a cadet. The support of left-wing parties for the militarized governments of Chávez and Maduro in Venezuela is shameful," in *El País, Internacional*, July 14, 2014, at http://internacional.elpais. com/internacional/2014/07 /14/news/1405349965_980938.html.

201 *See* "Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Bolivarian Republic of Venezuela," July 4, 2019, at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documen ts/A_HRC_41_18_ ENG.docx. *The* "comments from the State" ("Comments on factual errors of the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Bolivarian Republic of Venezuela"), *can be consulted at* https://www.ohchr.org/EN/HRBodies/HRC/Regular Sessions /Session41/Documents/A_HRC_41_18_Add.1.docx

"The measures have been adopted with the stated purpose of preserving public order and national security against alleged internal and external threats, they have *increased the militarization of State institutions and the employment of the civilian population in intelligence and defense tasks*" (§76).

Finally, it should be noted how, in an absolutely contradictory way with the overwhelming militarism, in fact, and as a government policy, the Armed Forces, during these last decades, have nevertheless lost the monopoly of weapons and force, not only because of the creation of the so-called Militia, outside of its traditional components, but by the proliferation of weapons in the hands of all sorts of criminals and the supply of weapons to urban civilian groups (the Collectives) with criminal ties, outside the control of the military themselves and even the police.[202]

Regarding this, the Bachelet Report itself highlighted the "*armed collectives,*" described as "*pro-government civilian armed groups"* (§ 24), and how they have contributed to exercising "social control in local communities, supporting the security forces in the repression of demonstrations and dissent" (§ 32); and how the same, "also resorted to violence against protesters, often in coordination with the security forces. In many cases, these actions produced deaths and serious injuries" (§ 39); ultimately recommending that the State "*Disarm and dismantle pro-government civilian armed groups* (the so-called "armed collectives") and guarantee the investigation of their crimes" (§ 82), which has not occurred.

IV. THE VOIDING OF THE PRINCIPLE OF THE STATE OF JUSTICE, LEGALITY AND SUBMISSION TO LAW: GENERALIZED DELEGALIZATION

All this submission of the Judiciary to the political control of the National Executive, and the use of the Constitutional Judge by the latter as an instrument of authoritarianism, product of the concentration of

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202 *See* Fernando Ochoa Antich, "Violencia y más violencia," in *El Nacional*, October 12, 2014, at http://www.el-nacional.com/fernando_ochoa_antich/Violencia-violencia_0_499150202.html.

power, caused another catastrophic consequence in the distortion of the rule of law, which has been the *delegalization* or *dejudicialization* of the State and the entire country, as the citizen's right to judicially control the actions of public officials has been totally cancelled.

Since 2000 the Justices of the Supreme Tribunal and of its Constitutional Chamber have been progressively appointed among people fully committed to the official party, having publicly stated that their mission, rather than providing justice, is to contribute to the implementation of the socialist government policy.[203] Said controlled Supreme Tribunal is responsible for the appointment of the members of the Judiciary, made up by only provisional and temporary judges, totally dependent and politically controlled. Hence, in general, judges in Venezuela are not capable and cannot really deliver fair justice, particularly if they affect in some way some government policy or some public officer; knowing, as they do, that a decision of this type would mean their immediate dismissal. This has occurred many times in recent years, in some cases even with the imprisonment of judges who dared to issue a rulings that did not please the government.

It must be noted that since 1999, when judges started to be dismissed in large numbers and without guarantees of due process, [204] public competitions for the election of new judges have never been held, as provided for in the new Constitution establishing that they are due to enter a judicial career that, therefore, does not exist materially.[205] The

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[203] *See* the Order Speech of Judge Deyanira Nieves Bastidas, Opening of the Judicial Year 2014, at http://www.tsj.gov.ve/informacion/miscelaneas/DiscursodeOrden Apertura2014DeyaniraNieves.pdf.

[204] *See* my dissenting vote on the intervention of the Judiciary by the National Constituent Assembly in Allan R. Brewer-Carías, *Debate Constituyente, (Aportes a la Asamblea Nacional* Constituyente*)*, Tomo I, (8 agosto-8 septiembre), Caracas 1999; and the criticisms formulated to that process in Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela,* Universidad Nacional Autónoma de México, Mexico, 2002.

[205] As highlighted by the same International Commission of Jurists, in a *March 2014 Report*, which summarizes everything that has been denounced in the country on the matter, by giving an account of the lack of independence of justice in Venezuela, whereas it is highlighted that *"*the Judiciary has been integrated from the Supreme Tribunal of Justice (TSJ) with predominantly political criteria in its designation. Most of the judges are "provisional" and vulnerable to external

result has been that the Judiciary is filled with judges of temporary and provisional character,[206] with no guarantee of stability, with their dismissal at the discretion of an *ad hoc Commission* of the Supreme Tribunal of Justice; all of this with the endorsement of the Constitutional Judge.[207]

The result of this process has been the tragic dependency of the Judicial Power -as a whole- to the designs and political control of the Executive Branch,[208] ending up at the service of the authoritarian State, with the principles of judicial independence, legality and justiciability inserted in the Constitution remaining a mere formal declaration not to be fulfilled.

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political pressure, since they are freely appointed and discretionally removed by a Judicial Commission of the Supreme Tribunal itself, which, in turn, has a marked partisan tendency." *See at* http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf

206 In the *2003 Special Report* by the Commission on Venezuela, it also stated that "an aspect linked to the autonomy and independence of the Judiciary is that relating to the provisional nature of judges in the Venezuelan judicial system. Currently, the information provided by different sources indicates that more than 80% of Venezuelan judges are "provisional." *Report on the Situation of Human Rights in Venezuela 2003*, para. 161. *See* Allan R. Brewer-Carías and Asdrúbal Aguiar (Editores), *Informe sobre la Situación de los Derechos Humanos en Venezuela 2003*, párr. 161. *See* in Allan R. Brewer-Carías y Asdrúbal Aguiar (Editores), *Venezuela. Informes sobre violaciones grave de derechos humanos,* Iniciativa Democrática España América, Editorial Jurídica Venezolana, Miami 2019, 160 pp.

207 This was expressly resolved by the Constitutional Chamber through judgment No. 516 of May 7, 2013, on the continuation of the operation of said Commission with the "right" to remove judges without any guarantee of due process. Available at: https://www.tsj.gov.ve/decisiones/scon/Mayo/516-7513-2013-09-1038.html.

208 *See* Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía en independencia del Poder Judicial en Venezuela (1999-2004)", in *XXX Jornadas J.M. Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos,* Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005, pp. 33-174; *and* "La justicia sometida al poder [La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)]" *in Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid, 2007, pp. 25-57; "La demolición de las instituciones judiciales y la destrucción de la democracia: La experiencia venezolana," in *Instituciones Judiciales y Democracia. Reflexiones con ocasión del Bicentenario de la Independencia y del Centenario del Acto Legislativo 3 de 1910,* Consejo de Estado, Sala de Consulta y Servicio Civil, Bogotá 2012, pp. 230-254.

This has ultimately led to the *unjusticiability* of the State, being unimaginable to have, for example, the Contentious-Administrative Jurisdiction in Venezuela upholding citizens' rights and prosecuting the Public Administration and its officers as it should; as well as the protection of human rights violations by *amparo* proceedings is just dead letter within the totalitarian State.

The most serious set-back to legality has been the dependence of the Constitutional Chamber of the Supreme Tribunal to the Executive Branch, which through binding constitutional interpretations has mutated at large the Constitution. In fact, at the discretion of the Executive, for example, it has centralized powers that were assigned exclusively to the States of the Federation;[209] eliminated the principle of republican alterability giving way to indefinite re-election;[210] ensured financing of the electoral activities of the official party;[211] prevented the revocatory referendum of the President of the Republic mandate, transforming it into a ratification referendum;"[212] expanded the powers of the Constitutional Jurisdiction, as for example occurred in the matter of an abstract interpretation of the Constitution; [213]and even secured the absurd and

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209 *See* Allan R. Brewer-Carías, "La Ilegítima mutación de la Constitución y la Legitimidad de la Jurisdicción Constitucional: La "Reforma" de la forma federal del Estado en Venezuela mediante interpretación constitucional," in *Anuario No. 4, Diciembre 2010,* Instituto de Investigaciones Jurídicas, Facultad de Jurisprudencia y Ciencias Sociales, Universidad Dr. José Matías Delgado de El Salvador, El Salvador 2010, pp. 111-143.

210 *See* Allan R. Brewer-Carías, "El Juez Constitucional vs. La alternabilidad republicana (La reelección continua e indefinida), in *Revista de Derecho Público*, No. 117, (enero-marzo 2009), Caracas, pp. 205-211.

211 *See* Allan R. Brewer-Carías, "El juez constitucional como constituyente: el caso del financiamiento de las campañas electorales de los partidos políticos in Venezuela," in *Revista de Derecho Público*, No. 117, (enero-marzo 2009), Editorial Jurídica Venezolana, Caracas 2009, pp. 195-203.

212 *See* Allan R. Brewer-Carías, "El secuestro del Poder Electoral y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela 2000-2004", *in* Juan Pérez Royo, Joaquín Pablo Urías Martínez, Manuel Carrasco Durán, Editores), *Derecho Constitucional para el Siglo XXI. Actas del Congreso Iberoamericano de Derecho Constitucional,* Tomo I, Thomson-Aranzadi, Madrid 2006, pp. 1081-1126.

213 *See* Luis A. Herrera Orellana, "El recurso de interpretación de la Constitución: reflexiones críticas desde la argumentación jurídica y la teoría del discurso," in

unconventional "constitutionality control" of the Inter-American Court of Human Rights judgments, declaring them "unenforceable" in Venezuela.[214]

Through this *à la carte* constitutional interpretation the Constitutional Chamber has also amended laws, as was the case of the amparo proceeding[215] of the tax regulations in matters of income tax; [216] as well as the law on elections, that was expressed before, and all this, almost always at the initiative of the Attorney General.

With a Constitution that is malleable in this way, it is difficult to imagine a State of justice, unless it is one of justice only given to the measure of the State itself.

This, as I said before, has particularly affected the Contentious-Administrative Jurisdiction, which in the last twenty years ceased to be an effective system for judicial control of the legality and legitimacy of the

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Revista de Derecho Público, N° 113, Editorial Jurídica Venezolana, Caracas 2008, pp. 7-29.

214 *See* Allan R. Brewer-Carías, "La interrelación entre los Tribunales Constitucionales de América Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela," in Armin von Bogdandy, Flavia Piovesan y Mariela Morales Antonorzi (Coodinadores), *Direitos Humanos, Democracia e Integracao Jurídica na América do Sul*, Lumen Juris Editora, Rio de Janeiro 2010, pp. 661-701.

215 *See* Allan R. Brewer-Carías, "El juez constitucional como legislador positivo y la inconstitucional reforma de la Ley Orgánica de Amparo mediante sentencias interpretativas," in Eduardo Ferrer Mac-Gregor y Arturo Zaldívar Lelo de Larrea (Coordinadores), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México 2008, Tomo V, pp. 63-80. Published in *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público. Universidad Central de Venezuela, Caracas 2007, pp. 545-563.

216 *See* Allan R. Brewer-Carías, "De cómo la Jurisdicción constitucional en Venezuela, no sólo legisla de oficio, sino subrepticiamente modifica las reformas legales que "sanciona", a espaldas de las partes en el proceso: el caso de la aclaratoria de la sentencia de Reforma de la Ley de Impuesto sobre la Renta de 2007, *Revista de Derecho Público*, Nº 114, Editorial Jurídica Venezolana, Caracas 2008, pp. 267-276.

actions of the Public Administration, beginning its degradation when, after of a precautionary measure issued in 2003 by the First Court of Contentious-Administrative suspending the hiring of Cuban doctors to give preference to Venezuelan doctors,[217] the Executive, using the Constitutional Chamber of the Supreme Tribunal, hijacked the jurisdiction of said First Court and dismissed its Magistrates,[218] even closing the Court for more than ten months. The consequence has been that the contentious-administrative courts stopped applying administrative law, to control the Public Administration and to protect citizens against administrative action.[219]

This situation has led to the fact that instead of being a State of Justice, what actually exists in Venezuela is a State of injustice, where justice simply does not work to judge and punish those who violate the law. Impunity reigns and is absolute, for example, with respect to predators of public assets, leaving the Office of the Comptroller General of the Republic, as stated, only to investigate opposition leaders to polically disqualify them.[220]

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

218 The Judges of the First Court, dismissed in violation of their rights and guarantees, sued the State for violation of their judicial guarantees provided for in the Inter-American Convention on Human Rights, and the Inter-American Court of Human Rights condemned the State for said violations in a judgment dated August 5, 2008, (Case of *Apitz Barbera et al. ("First Court of Administrative Litigation") vs. Venezuela. See* at http://www.corteidh.or.cr/ Preliminary Objection, Merits, Reparations and Costs, Series C No. 182. Faced with this, however, the Constitutional Chamber of the Supreme Tribunal of Justice in judgment No. 1,939 of 18 December 2008 *(Gustavo Álvarez Arias et al. Case), declared said decision of the Inter-American Court unenforceable*. *See* at http://www.tsj.gov.ve/decisiones/scon/Diciembre/1939-181208-2008-08-1572.html.

219 *See* Antonio Canova González, *La realidad del contencioso administrativo venezolano (Un llamado de atención frente a las desoladoras estadísticas de la Sala Político Administrativa en 2007 y primer semestre de 2008)*, Funeda, Caracas, 2009.

220 *See*, for example, Allan R. Brewer-Carías, "La incompetencia de la Administración Contralora para dictar actos administrativos de inhabilitación política restrictiva del

Impunity is also the sign of injustice in terms of common crimes, in a country like Venezuela that has the world record for violence, kidnappings and street crimes,[221] being considered the most insecure country in the world since 2014,[222] with Caracas, the capital, as the most dangerous city on the planet,[223] where such crimes are not prosecuted and go unpunished. [224]

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derecho a ser electo y ocupar cargos públicos (La protección del derecho a ser electo por la Corte Interamericana de Derechos Humanos en 2012, y su violación por la Sala Constitucional del Tribunal Supremo al declarar la sentencia de la Corte Interamericana como "inejecutable"), *in* Alejandro Canónico Sarabia (Coord.), *El Control y la responsabilidad en la Administración Pública, IV Congreso Internacional de Derecho Administrativo*, *Margarita 2012*, Centro de Adiestramiento Jurídico, Editorial Jurídica Venezolana, Caracas 2012, pp. 293-371.

221 *See* Editorial de *Le Monde,* March 30, 2014, at http://www.eluniversal.com/nacional-y-politica/140330/le-monde-dedico-un-editorial-a-venezuela. *Since 2013 it reached the figure of 24,773 people murdered. See* César Miguel Rondón, "Cada vez menos país," in *Confirmado*, 8-16-2014, at http://confirmado.com.ve/opinan/cada-vez-menos-pais/.

222 *See* the *Gallup Poll report*, "Venezuela fue considerado como el país más inseguro del mundo," in *Notitarde.com*, Caracas 21 de agosto de 2014", at http://www.notitarde.com/Pais/Venezuela-was-selected-as-the-most-insecure-country-in-the-world / 2014 /08/21/347656.

223 After San Pedro Sula, Caracas is considered the second most dangerous city in the world. *See* the information in Sala de Información, Agencia de Comunicaciones Integradas. Información, opinión y análisis, 16-1-2914, at http://saladeinfo.wordpress.com/2014/01/16/caracas-es-la-segunda-ciudad-mas-peligrosa-del-planeta-2/. *See also the information in El País Internacional*, August 20, 2014, at http://internacional.elpais.com/internacional/2014/08/20/actualidad/1408490113_417749.html.

224 On the subject of "gangster activity" and impunity, Leandro Area has observed that: "it has become our bread and plan and teacher of every day, due to the malandro's success that is barely reflected in death and desolation in the press that remains and that is on the verge of extinction or because of the countenance that is shown on the face of everyone who is still alive and who must face the hardship of being kidnapped by an imposed reality. But the matter goes further. The legitimized concubinage between political power, common underworld, judicial power, police, armed forces and others, is not a mystery or an open secret. It is a plan turned into permanent action." *See* Leandro Area, "El 'Estado Misional' en Venezuela," in *Analítica.com*, February 14, 2014, at http://analitica.com/opinion/opinion-nacional/el-estado-misional-en-venezuela/.

For all these reasons, the Venezuelan State is not a State of justice, since the political practice of the authoritarian government that has taken over the Republic since 1999,[225] has given rise to a totalitarian State that, in addition to having impoverished the country, is not subject to the law, whose rules are not always fair and most of the time are ignored and despised, or mutated and molded at the discretion of the rulers; and that, furthermore, is not subject to any judicial control, due to the submission of the Judicial Power to the Executive and Legislative Powers.

V. THE VOIDING OF THE PRINCIPLE OF THE PRIMACY OF HUMAN RIGHTS AND THE DEHUMANIZATION OF THE STATE

To all of the above we must add the unusual process of dehumanization of the State, due to the fact that the very important provisions that enunciate human rights in accordance with the principle of progressivity, have been ignored in Venezuela with an unfortunate process of progressive violation and degradation of human rights aggravated during the last decade. This is why in the latest Reports of the United Nations High Commissioners for Human Rights on the situation of human rights in the country, beginning with the one signed by Michele Bachelet in 2019,[226] it has been highlighted what has been called: "patterns of violations that directly and *indirectly affect all human rights: civil, political, economic, social and cultural"* (§ 2). These patterns of conduct against all human rights have worsened in the last five years, to the point that in 2021 the International Criminal Court formally began an

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225 *See* Allan R. Brewer-Carías, *Authoritarian Government v. The Rule of Law*, *Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution*, Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014.

226 *See* "Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Bolivarian Republic of Venezuela," July 4, 2019, at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents /A_ HRC_41_18_ENG.docx . *The "comments of the State" ("Comments on factual errors of the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Bolivarian Republic of Venezuela"), can be consulted at* https:// www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session 41/Documents/A_HRC_41_ 18_Add.1.docx.

investigation for crimes against humanity against Venezuela, its officers and those who govern. The continuing of such investigation has been formally reiterated in 2023;[227] all of which is mentioned, for example, in the Report of the High Commissioner of United Nations of July 4, 2023 on the situation of human rights in Venezuela.[228]

This situation has affected -and continues to affect- all the rights declared in the Constitution. To make reference only to the initial Report of Commissioner of 2019, whose findings have not changed but worsened in recent years, in terms of social rights, stating that "there are reasonable grounds to believe that serious violations of economic and social rights, including the rights to food and health, have been committed in Venezuela" (§ 75); adding, for example, about freedom of information, that in recent years: "the Government has tried to *impose a communicationnal hegemony* by imposing their own version of the facts and creating an environment that *restricts the independent media*" (§ 28).

Regarding political liberties, the Report highlighted how numerous public law enforcement institutions, which have been militarized, have "*allowed the* Government *to commit numerous violations of human rights* " referring in particular to the fact that: "The authorities have *especially attacked certain people and groups, including members of the political*

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227 *See* the information in Florantonia Singer, La Corte Penal Internacional reanuda la investigación sobre las violaciones de derechos humanos en Venezuela. El Gobierno de Nicolás Maduro ha intentado disuadir a la CPI con varios recursos judiciales y asegura que el proceso en su contra está impulsado por Estados Unidos," *in El País*, 27 de junio de 2023, *available at:* https://elpais.com/internacional/2023-06-28/the-international-criminal-court-resumes-the-investigation -on-violations-of-human-rights-in-venezuela.html. *See* Ali Daniels, "Análisis de la histórica decisión de la CPI de continuar la investigación a Venezuela: una victoria de las víctimas," 27 de junio de 2023, in *Acceso a la Justicia*, available at: https://accesoalajusticia.org/historical-analysis-decision-cpi-continue-investigation -venezuela-victoria-victims/.

228 *See* Report of the United Nations High Commissioner for Human Right. A/HRC/53/54: Situation of human rights in the Bolivarian Republic of Venezuela - Report of the United Nations High Commissioner for Human Rights, *available at*: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Fhrbodies%2Fhrcouncil%2 Fsessions -regular%2Fsession53%2Fadvance-versions%2FA_HRC_53_54_AdvanceUnedited Version. docx&wdOrigin=BRO WSELINK

opposition and those considered to constitute threats to the Government due to their ability to articulate critical positions and mobilize others. This *selective repression manifests itself in a multitude of human rights violations*, which may amount to *politically motivated persecution*" (§ 77). As for the right to demonstrate, the *Report* found that, in recent years, security forces "*deliberately made excessive use of force, with the aim of instilling fear and discouraging* future demonstrations" (§ 39); and on the right to personal freedom, the Report placed special emphasis on the arbitrary deprivation of liberty of hundreds of people, for political reasons, highlighting that: "the Government has used *arbitrary detentions* as one of *the main instruments to intimidate and repress to political opposition and any expression of dissent*, real or presumed, since at least 2014" (§ 41).

When referring to the right to life, and mentioning the activities of one law enforcement unit, the Report qualifies it as a "death squad" or an "extermination group" (§ 47), being considered by "NGO reports," as those "responsible for hundreds of violent deaths" (§ 47), stating how "*they manipulated the crime scene and the evidence*. They would have *planted weapons and drugs and would have fired their weapons against the walls or in the air* to *insinuate a confrontation* and show that the victims would have "resisted authority" (§ 49).

The 2019 Bachelet Report was followed in 2020 by the Report and Conclusions of the independent international fact-finding Mission on the Bolivarian Republic of Venezuela,[229] whereas the conclusions of said Mission were presented "regarding extrajudicial executions, forced disappearances, arbitrary detentions and torture and other cruel, inhuman or degrading treatment, committed in the country since 2014," showing a picture of *horror*, certainly unimaginable, not only past but present - that *is* occurring -, made up of horror officials, horror police, horror

[229] *Report of September 15, 2020, presented to the United Nations Human Rights Council, in compliance with Council resolution 42/25, of September 27, 2019; available at:* https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP. 11_SP.pdf The Report was accompanied by "*Detailed Findings of the Independent International Mission to Determine the facts about the Bolivarian Republic of Venezuela (443 pp.).*

prosecutors, horror judges and horror custodians. The Report summarizes stating that the acts and conducts *described* in the same:

> "amount to arbitrary killings, including extrajudicial executions, torture and other cruel, inhuman or degrading treatment or punishment -including sexual and gender-based violence-, forced disappearances (often of short duration) and arbitrary detentions, in violation of national legislation and the international obligations of Venezuela. (par. 151).

To these facts and conducts the *Report* added the crimes of:

> "murder, imprisonment and other serious deprivations of physical liberty, torture, rape and other forms of sexual violence, forced disappearance of persons […] and other inhumane acts of a similar nature that intentionally cause great suffering or serious harm to the body or to mental or physical health"

The Mission considered these to be "crimes against humanity," and specifically some of them the crime against humanity of persecution, as defined in the Rome Statute (par 161).

In particular, many of these crimes were analyzed in the *detailed Conclusions* of the Report, including those related to *selective political repression* (Chapter III) and "violations in a *context of security or social control* (Chapter IV), that the Mission also considered "may also constitute the crime against humanity of persecution" (par. 2085). Those consisted of:

> "an intentional and serious deprivation of the following rights: the right to life, liberty and security of the person, the right not to be subject to cruel, inhuman or degrading treatment or punishment, the right not to be subject to rape and other forms of sexual violence, and the right not to be subject to arbitrary arrest or detention. Taken together, these violations may constitute acts of persecution, but they may also constitute different crimes against humanity" (par. 2085).

The most dramatic aspect of the Report was that the violations and crimes reviewed and analyzed by the *Mission* were part of *a State policy* "to *silence, discourage, and suppress opposition to the Government* of President Maduro, even extending to the people who, through various

means, demonstrated their disagreement with the Government or were perceived as contrary to it, and their family members and friends who were targeted for being associated with them" (par. 160).

When referring to its own responsibilities, the Mission concluded that:

> "has reasonable grounds to believe that both the President and the Ministers of Popular Power for Interior Relations, Justice and Peace, and Defense, ordered or contributed to the commission of the crimes documented in this report, and having the effective capacity to do so, they did not adopt preventive and repressive measures" (par. 164).

For all these reasons, two years ago the *International Criminal Court* initiated international criminal proceedings against Venezuela.

The foregoing shows, in fact, that in Venezuela human rights disappeared as an essential and primary value of the State, having produced a total dehumanization of it. To this, the work of the Constitutional Judge, who deconstitutionalized in 2003[230] the constitutional hierarchy of human rights declared in international treaties, and the guarantee of their direct and immediate application by all judges established in the text of the Constitution, can be added.[231]

Furthermore, later on, in 2011,[232] the Constitutional Chamber denied the universal value of human rights, proclaiming that a supposedly

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230 Judgment No. 1492 of July 7, 2003. *See Revista de Derecho Público,* No 93-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 136 et seq.

231 *See* Allan R. Brewer-Carías, "La ilegitima mutación de la Constitución por el juez constitucional mediante la eliminación del rango supra constitucional de los tratados internacionales sobre derechos humanos, y el desconocimiento en Venezuela de las sentencias de la Corte Interamericana de Derechos Humanos," in *Libro Homenaje al Capítulo Venezolano de la Asociación Mundial de Jóvenes Juristas y Estudiantes de Derecho*: *Recopilación de artículos que desarrollan temas de actualidad jurídica relacionados con el derecho público y el derecho privado*, Asociación Mundial de Jóvenes Juristas y Estudiantes de Derecho, Caracas 2015.

232 Judgment No. 1547 *(Case Estado Venezolano vs. Corte Interamericana de Derechos Humanos)* of October 17, 2011. *See* at http://www.tsj.gov.ve/decisiones /scon/Octubre/1547-171011-2011-11-1130. html. *See* Allan R. Brewer-Carías, "El ilegítimo "control de constitucionalidad" de las sentencias de la Corte Interamericana de Derechos Humanos por parte la Sala Constitucional del Tribunal

"absolute and suprahistorical system of principles cannot be placed above the Constitution,"[233] further ignoring the rulings of the Inter-American Court of Human Rights condemning the State for violations of human rights. Specifically, in 2008 the Constitutional Chamber[234] had already declared unenforceable in the country the judgment issued by the Inter-American Court of Human Rights that same year, whereas Venezuela had been condemned for violating the rights of due process of the magistrates of the First Court of Contentious Administrative Jurisdiction, who had been removed without judicial guarantees.[235]

Subsequently, along the same lines, the Chamber ruled that the decisions of the Inter-American Court of Human Rights were not immediately applicable in Venezuela, but that "*will only be enforced in the country, in accordance with what is established by the Constitution and the laws, as long as they do not contradict what is established in Article 7 of the current Constitution*," thus assuming the power to declare unenforceable in the country the rulings of the Inter-American Court, as

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Supremo de Justicia de Venezuela: el caso de la sentencia *Leopoldo López vs. Venezuela, 2011*," in *Constitución y democracia: ayer y hoy. Libro homenaje a Antonio Torres del Moral*. Editorial Universitas, Vol. I, Madrid, 2013, p. 1095-1124.

233 *Idem*. Where reference is made to a previous ruling No. 1309/2001.

234 Judgment No. 1,939 of December 18, 2008, issued in the *Case Abogados Gustavo Álvarez Arias y otros. See* in *Revista de Derecho Público,* No. 116, Editorial Jurídica Venezolana, Caracas 2008, pp. 88 ff.

235 The judgment of the Inter-American Court of August 5, 2008, in the *case Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela. See* Allan R. Brewer-Carías, "La interrelación entre los Tribunales Constitucionales de América Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela," *in* Armin von Bogdandy, Flavia Piovesan y Mariela Morales Antonorzi (Coordinadores), *Direitos Humanos, Democracia e Integraçao Jurídica na América do Sul*, Lumen Juris Editora, Rio de Janeiro 2010, pp. 661-70; and in *Anuario Iberoamericano de Justicia Constitucional,* Centro de Estudios Políticos y Constitucionales, No. 13, Madrid 2009, pp. 99-136.

has happened on several occasions, contrary to the binding nature that those rulings have for the States.[236]

For this purpose, the Constitutional Chamber "invented" accepting, within the framework of her roles as Constitutional Judge, a kind of "judicial review appeal" against the judgments of the Inter-American Court, whereas "the conformity of the judgment of the Inter-American Court of Human Rights with the Constitution" would be weighted; all at the request of the State's own lawyers, who sought to formalize how it failed to comply with the judgment of the Inter-American Court.

With these rulings, the Venezuelan State began the process of disassociating itself from the American Convention on Human Rights, and from the jurisdiction of the Inter-American Court of Human Rights, using its own Supreme Tribunal of Justice, which unfortunately turned out to be the main instrument, for the consolidation of authoritarianism in the country.[237] The conclusion of all this entire process was the formal denunciation of the American Convention on Human Rights by Venezuela on September 6, 2012.[238]

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236 As the IACHR itself resolved in the *case of Castillo Petruzzi et al. v. Peru* on September 4, 1998 (Preliminary Objections). *See* at http://www.corteidh.or.cr/docs/casos/articulos/seriec_41_esp.pdf.

237 *See* Allan R. Brewer-Carias, *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; *and* "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.

238 *See* Allan R. Brewer-Carías, "Los efectos de las presiones políticas de los Estados en las decisiones de la Corte Interamericana de Derechos Humanos. Un caso de denegación de justicia internacional y de desprecio al derecho," in *Revista Ars Boni Et Aequi* (año 12 n° 2), Universidad Bernardo O'Higgins, Santiago de Chile 2016, pp. 51-86.

VI. THE GENERAL DE JUDICIALIZATION OF THE STATE: JUDICIAL REVIEW NOT TO CONTROL THE CONSTITUTIONALITY OF STATE ACTS BUT TO ASSURE ITS UNCONSTITUTIONAL ACTIONS

The control exercised by the government over the Supreme Tribunal, in particular, transformed its Constitutional Chamber, from the guardian of the Constitution that it was,[239] into the instrument most used by the authoritarian regime to demolish the rule of law and its principles.[240] To this end, the Constitutional Judge even invented an endemic "autonomous proceeding of abstract interpretation of the Constitution"[241] that has

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239 *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. *See in general,* Allan R. Brewer-Carías, *El sistema mixto o integral de control de la constitucionalidad en Colombia y Venezuela*, Universidad Externado de Colombia (Temas de Derecho Público Nº 39) y Pontificia Universidad Javeriana (*Quaestiones Juridicae* Nº 5), Bogotá 1995; Allan R. Brewer-Carías, "La justicia constitucional en la Constitución de 1999", in *Derecho Procesal Constitucional*, Colegio de Secretarios de la Suprema Corte de Justicia de la Nación, A.C., Editorial Porrúa, Mexico 2001, pp. 931-961.

240 We have been dealing with this subject for several years. *See* for example*:* Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", in *Revista de Administración Pública*, Nº 180, Madrid 2009, pp. 383-418; "La ilegítima mutación de la Constitución por el juez constitucional y la demolición del Estado de derecho en Venezuela," in *Revista de Derecho Político*, Nº 75-76, Homenaje a Manuel García Pelayo, Universidad Nacional de Educación a Distancia, Madrid 2009, pp. 289-325. *See also*, Allan R. Brewer-Carías, "Los problemas del control del poder y el autoritarismo en Venezuela", in Peter Häberle y Diego García Belaúnde (Coordinadores), *El control del poder. Homenaje a Diego Valadés,* Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Volume I, Mexico 2011, pp. 159-188.

241 *See* Judgment No. 1077 of the Constitutional Chamber of September 22, 2000, *case: Servio Tulio León Briceño*. *See Revista de Derecho Público,* Nº 83, Caracas, 2000, pp. 247 et seq. *See* generally about this*:* Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación," in *VIII Congreso Nacional de derecho Constitucional, Perú*, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa,

allowed it to administer "a judicial review *à la carte*," at the request of the government and, in particular, of the Attorney General of the Republic, through which it has illegitimately and fraudulently modified and mutated the Constitution,[242] thus usurping even the powers of the original constituent power (the people).[243]

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septiembre 2005, pp. 463-489; and in *Revista de Derecho Público*, Nº 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7-27.

242 *See* on the illegitimate constitutional mutation by the Judge*:* Néstor Pedro Sagües, *La interpretación judicial de la Constitución*, Buenos Aires 2006, pp. 56-59, 80-81, 165 ff.

243 In addition to those published in the Revista de Derecho Público, Editorial Jurídica Venezolana, Caracas, all my studies on the rulings handed down by the Constitutional Chamber in Venezuela, can be found in the following books*:* Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, México 2002, 405 pp.; *La Sala Constitucional versus el Estado democrático de derecho. El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política*, Los Libros de El Nacional, Colección Ares, Caracas 2004, 172 pp.; *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas 2007; *Práctica y distorsión de la Justicia Constitucional en Venezuela (2008-2012),* Colección Justicia Nº 3, Acceso a la Justicia, Academia de Ciencias Políticas y Sociales, Universidad Metropolitana, Editorial Jurídica Venezolana, Caracas 2012, 520 pp.; *El golpe a la democracia dado por la Sala Constitucional (De cómo la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela impuso un gobierno sin legitimidad democrática, revocó mandatos populares de diputada y alcaldes, impidió el derecho a ser electo, restringió el derecho a manifestar, y eliminó el derecho a la participación política, todo en contra de la Constitución),* Colección Estudios Políticos Nº 8, Editorial Jurídica venezolana, Caracas 2014, 354 pp.; segunda edición, (Con prólogo de Francisco Fernández Segado), 2015, 426 pp.; *La patología de la Justicia Constitucional*, Tercera edición ampliada, Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014, 666 pp.; *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela,* Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014, 532 pp.; segunda edición, (Con prólogo de José Ignacio Hernández), Caracas 2015, 542 pp.; *La ruina de la democracia. Algunas consecuencias. Venezuela 2015*, (Prólogo de Asdrúbal Aguiar), Colección Estudios Políticos, Nº 12, Editorial Jurídica Venezolana, Caracas 2015, 694 pp.; 172. *La dictadura judicial y la perversión del Estado de derecho. El juez constitucional y la destrucción de la democracia en Venezuela* (Prólogo de Santiago Muñoz Machado), Ediciones El Cronista, Fundación Alfonso Martín Escudero, Editorial IUSTEL, Madrid 2017, 608 pp.; *La consolidación de la tiranía judicial. El Juez Constitucional controlado*

This role of the Constitutional Judge exacerbated from January 2016 until 2020, after a new National Assembly controlled by the opposition to the government was elected in 2015, causing a perverse collusion between the Executive Branch and the Constitutional Judge, who progressively deprived popular representation of absolutely all its powers and functions through an endless series of judicial excesses that no one could control,[244] many of which were carried out acting *ex officio*, violating the most important principles and elements of due process.[245]

The degradation of the Constitutional Justice manifested itself in extremis from 2016,[246] when the Constitutional Chamber of the Supreme

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por el Poder Ejecutivo, asumiendo el poder absoluto, Colección Estudios Políticos, Nº 15, Editorial Jurídica Venezolana International. Caracas / New York, 2017, 238 pp. *See also:* Carlos M. Ayala Corao y 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, 394 pp.; *Memorial de agravios 2016 del Poder Judicial. Una recopilación de más de 100 sentencias del TSJ,* 155 pp., investigación preparada por las ONGs: Acceso a la Justicia, Transparencia Venezuela, Sinergia, espacio público, Provea, IPSS, Invesp, *available at*: https://www.scribd.com/-document/336888955/Memorial-de-Agravios-del-Poder-Judicial-una-recopi-lacion-de-mas-de-100-sentencias-del-TSJ; and José Vicente Haro, "Las 111 decisiones inconstitucionales del TSJ ilegítimo desde el 6D-2015 contra la Asamblea Nacional, los partidos políticos, la soberanía popular y los DDHH, in *Buscando el Norte* July 10, 2017, at http:/josevicenteharo-garcia.blogspot.com/2016/10/ las-33-decisiones-del-tsj.html.

244 *See* Allan R. Brewer-Carías, "*Quis Custodiet Ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación", in *Revista de Derecho Público*, No 105, Editorial Jurídica Venezolana, Caracas 2006, pp. 7-27.

245 *See* Allan R. Brewer-Carías, "The Unconstitutional *Ex Officio* Judicial Review Rulings Issued by the Constitutional Chamber of the Supreme Tribunal of Venezuela Annulling all the 2019 National Assembly Decisions Sanctioned within the framework of the 2019 Transition Regime Towards Democracy and for the Restoration of the enforcement of the Constitution," in the book of the *VII Congreso de Derecho Procesal Constitucional 2021,* Universidad Monteávila, Caracas February 2021.

246 *See* on the process of degradation of constitutional justice during the last 20 years*:* Allan R. Brewer-Carías, *La ruina de la democracia. Algunas consecuencias. Venezuela 2015*, (Prólogo de Asdrúbal Aguiar), Colección Estudios Políticos, No. 12, Editorial Jurídica Venezolana, Caracas 2015; *La mentira como política de Estado. Crónica de una crisis política permanente. Venezuela 1999-2015***,**

Tribunal issued more than a hundred rulings declaring the unconstitutionality of all the laws sanctioned by the said 2015 National Assembly until 2019;[247] proceeded to "reform" the Internal Debates Regulations of the Assembly, subjecting the legislating function of the National Assembly to obtaining prior approval from the Executive Power;[248] stripped the functions of political control of the National Assembly over the government and the Public Administration, and imposed the prior approval of the Executive Vice President so that the Assembly could question a Minister, with questions that could only be formulated in

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Colección Estudios Políticos, No. 10, Editorial Jurídica Venezolana, Caracas 2015; *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela*, Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014, segunda edición, Caracas 2015; *La patología de la justicia constitucional*, Tercera edición ampliada, Fundación de Derecho Público, Editorial Jurídica Venezolana, 2014; *El golpe a la democracia dado por la Sala Constitucional (De cómo la Sala* Constitucional *del Tribunal Supremo de Justicia de Venezuela impuso un gobierno sin legitimidad democrática, revocó mandatos populares de diputada y alcaldes, impidió el derecho a ser electo, restringió el derecho a manifestar, y eliminó el derecho a la participación política, todo en contra de la Constitución),* Colección Estudios Políticos No. 8, Editorial Jurídica venezolana, Caracas 2014, 354 pp.; segunda edición, (Con prólogo de Francisco Fernández Segado), 2015; *Práctica y distorsión de la justicia constitucional en Venezuela (2008-2012),* Colección Justicia No. 3, Acceso a la Justicia, Academia de Ciencias Políticas y Sociales, Universidad Metropolitana, Editorial Jurídica Venezolana, Caracas 2012; *Crónica sobre la "in" justicia constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público, Universidad Central de Venezuela, No. 2, Caracas 2007.

247 *See* the comments in Allan R. Brewer-Carías, "La aniquilación definitiva de la potestad de legislar de la Asamblea Nacional: el caso de la declaratoria de inconstitucionalidad de la Ley de reforma de la Ley Orgánica del Tribunal Supremo de Justicia," 16 de mayo de 2016, available at http://www.allanbrewer-carias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20Aniquilaci%C3%-B3n% 20 %20Asamblea%20Nacional.% 20Inconstituc.%20Ley% 20TSJ% 2015-5-2016 .pdf.

248 *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 2015), Editorial Jurídica Venezolana, Caracas 2016, pp. 428-443.

writing;[249] it eliminated the possibility for the Assembly to disapprove the states of exception that were decreed, and the possibility for approval of votes of no confidence regarding the Ministers;[250] resolved that the President of the Republic presented his annual report, not before the National Assembly as constitutionally required, but before the Constitutional Chamber itself; and eliminated the legislative function in budget matters, converting the Budget Law that the Constitution regulates into an unconstitutional executive decree presented not before the Assembly, but in an unusual manner before the Constitutional Chamber himself.

The Constitucional Chamber, in addition, stripped the power of the National Assembly to even issue political opinions through Resolutions, annulling those it adopted; it further eliminated the power of the National Assembly to review its own acts and revoke them, as in the case of the flawed election of the Justices of the Supreme Tribunal carried out in December 2015; and last, it also eliminated the power to legislate from the National Assembly regarding an unconstitutional and permanent state

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249 *See* the comments in Allan R. Brewer-Carías, "Comentarios al decreto Nº 2.309 de 2 de mayo de 2016: La inconstitucional "restricción" impuesta por el Presidente de la República, respecto de su potestad de la Asamblea Nacional de aprobar votos de censura contra los Ministros," in *Revista de Derecho Público,* Nº 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 120-129.

250 *See* the comments in Allan R. Brewer-Carías, "El ataque de la Sala Constitucional contra la Asamblea Nacional y su necesaria e ineludible reacción. De cómo la Sala Constitucional del Tribunal Supremo pretendió privar a la Asamblea Nacional de sus poderes constitucionales para controlar sus propios actos, y reducir inconstitucionalmente sus potestades de control político sobre el gobierno y la administración pública; y la reacción de la Asamblea Nacional contra a la sentencia Nº 9 de 1-3-2016, *available at* http://www.allanbrewercarias.com/Content/449 725 d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer%20The%20attack%20Sala%20 Constitutional%20v.%20Asamblea%20Nacional.%20Sent-o.%209%201-3-2016). pdf; *and* "Nuevo golpe contra la representación popular: la usurpación definitiva de la función de legislar por el Ejecutivo Nacional y la suspensión de los remanentes poderes de control de la Asamblea con motivo de la declaratoria del estado de excepción y emergencia económica," in *Revista de Derecho Público,* Nº 145-146, (enero-junio 2016), Editorial Jurídica Venezolana, Caracas 2016, pp. 444-468.

of emergency that has lasted several years, starting even before the Pandemic.[251]

In other words, the Legislative Power vested in the National Assembly was totally neutralized and emptied of powers and functions, to the point that through a 2017 ruling, based on an alleged contempt of a decision of the Electoral Chamber of December 2015 to suspend the proclamation of four representatives from the State of Amazonas already proclaimed, the same Constitutional Chamber of the Supreme Tribunal went to the extreme of ordering the definitive cessation, *de facto*, of the National Assembly in the fulfillment of its constitutional functions as a body that integrates the representatives of the people, proceeding to annul, "all past and future actions of the National Assembly and of any body or individual against what was decided as null and void and devoid of all legal validity and effectiveness,"[252] even threatening to prosecute the representatives of the Assembly for contempt, revoke their popular mandate and imprison them.

All this constitutional chaos has been no other than a continuous *coup d'état* by the Constitutional Judge, reaching a high in March 2017, with the adoption by the Constitutional Chamber of two embarrassing rulings,[253] through which it usurped as Constitutional Judge *all the*

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251 *See* the study regarding these rulings in Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de Derecho*, Segunda Edición, (Presentaciones de Asdrúbal Aguiar, José Ignacio Hernández y Jesús María Alvarado), Nº 13, Editorial Jurídica Venezolana International, 2016; Spanish edition: Editorial IUSTEL, Madrid 2017.

252 Ruling No. 2 of January 11, 2017. *See at* http://historico.tsj.gob.ve/decisiones/scon/enero/194891-02-11117-2017-17-0001.HTML That decision was ratified by other rulings No 3 of January 11, 2017 (http://historico.tsj.gob.ve/decisiones /scon/enero /194892-03-11117-2017-17-0002.HTML), and No 7 of January 26, 2017. (*See* historico.tsj.gob.ve/decisiones/scon/enero/195578-07-26117-2017-17-0010.HTML.

253 *See* judgment No. 155 of March 27, 2017, *at* http://historico.tsj.gob.ve/decisiones/scon/marzo/ 197285-155-28317-2017-17-0323.HTML. *See* the comments on that judgment in Allan. Brewer-Carías: "La consolidación de la dictadura judicial: la Sala Constitucional, en un juicio sin proceso, usurpó todos los poderes del Estado, decretó inconstitucionalmente un estado de excepción y eliminó la inmunidad parla-mentaria (sentencia no. 156 de la Sala Constitucional), 29 de Marzo de 2017, *at* http:// diarioconstitucional.cl/noticias/actualidad-internacional/2017/03/31 /opinion-acerca-de-la-usurpacion-de-funciones-por-el-tribunal-supremo-of-

powers of the State, ordering the President to exercise certain functions in matters of international relations, unconstitutionally decreeing a state of emergency, eliminating parliamentary immunity, fully assuming all parliamentary powers of the National Assembly and delegating legislative powers -that it does not have-, without limits, to the President, further ordering him to reform laws and Codes at his discretion, and among them the Criminal Code and the Organic Code of Criminal Procedure.

The global scandal was such that the Secretary General of the Organization of American States, Mr. Luis Almagro, said that "stripping parliamentary immunities from the deputies of the National Assembly and assuming the Legislative Power in a completely unconstitutional manner are the last blows with which the regime subverts the constitutional order of the country and ends democracy,"[254] all of which led to the OAS Assembly to apply the Inter-American Democratic Chart to Venezuela.[255]

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venezuela-and-the-consolidation-of-a-judicial-dictatorship/. *See* ruling No. 156 of March 29, 2017, at http://historico. tsj.gob.ve/decisiones/scon/marzo/197364-156-29317-2017-17-0325.HTML. *See* the comments on that judgment in Allan. Brewer-Carías: El reparto de despojos: la usurpación definitiva de las funciones de la Asamblea Nacional por la Sala Constitucional del Tribunal Supremo de Justicia al asumir el poder absoluto del Estado (sentencia No. 156 de la Sala Constitucional), 30 de marzo de 2017, at http://diario constitucional.cl/noticias/actualidad-internacional/2017/03/31/opinion-acerca-de-la-usurpacion-de-funciones-por-el-tribunal-supremo-de-venezuela-and-the-consolidation-of-a-judicial-dictatorship/.

254 *See:* "Almagro denuncia auto-golpe de Estado del gobierno contra Asamblea Nacional," *El Nacional*, 30 de marzo de 2017", at http://www.el-nacional.com /noticias/mundo/almagro-denuncia-auto-golpe-estado-del-government-against-national-assembly_88094. *See the unusual statement on the subject by the former Attorney General of the Republic, who was then responsible for all political persecution in the country:* "Fiscal General de Venezuela, Luisa Ortega Díaz, dice que sentencias del Tribunal Supremo sobre la Asamblea Nacional violan el orden constitucional," in Redacción BBC Mundo, *BBC Mundo*, March 31, 2017, at http://www.bbc.com/ mundo/noticias-america-latina-39459905 *See* the video of the event at https://www. youtube .com/watch?v=GohPIrveXFE.

255 The most serious aspect of this chaos was that at the request of the Executive Power, the Council for the Defense of the Nation, "exhorted" the Supreme Tribunal of Justice to openly commit the illegality of " reviewing decisions 155 and 156 (*See* "National Defense Council urges the TSJ to review rulings 155 and 156, MonitorProDaVinci, April 1, 2017, *at* http://prodavinci.com/2017/04/01/actualidad/

FINAL COMMENT

All of the above shows that the case of Venezuela is an example and a case study in the Latin-American Continent. Despite everything the Constitution says about the democratic, decentralized and social rule of law and of justice State, it has turned out to be a big lie; having its content completely falsified, through the actions of an authoritarian government that has been installed in the country since 1999, when a group of failed military coup leaders, using the mechanisms of constitutional populism,[256] assaulted power, to control it.

Violations to the Constitution, as has been said, began to occur from the very moment the Constitution entered into force, beginning the distortion of all the essential elements and principles of the rule of law, as well as all the essential elements and components of democracy as a political regime, as defined in September 2001 by the Inter-American Democratic Charter.

New York, July 2023

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consejo-de-defensa-national-urges-the-tsj-to-review-sentences-155-and-156-monitor-pro davinci/). This is something a judge can never do, in any part of the world, except in Venezuela, where he did the next day, April 1, 2017, reforming and partially revoking said rulings through judgments Nos. 157 and 158, all in violation of the most basic principles of due process. *See at* http://historico.tsj.gob.ve/decisiones/scon/abril/197399-157-1417-2017-17-0323.HTML . *See* the comments on this rulings in Allan R. Brewer-Carías, "The new farce of the controlled Constitutional Judge : the unconstitutional and false "correction" of the usurpation of legislative functions by the Constitutional Chamber of the Supreme Tribunal (sentences No. 157 and 158 of April 1, 2017), New York April 4, 2017, at http://allanbrewercarias.net/site/wp-content/uploads/2017/04/151.-doc.-Brewer-Nueva-farsa-del-Juez-Constitucional.-Falsa-correcci%C3%B3n.-Sentencias-Sala-Constit.-157-y-158-.-4-4-2017.pdf: *See at* http: //Historico.Tsj .Gob.Ve/Decisiones /Scon/Abril/197400-158-1417-2017-17-0325.Html Also in Allan R. Brewer-Carías, "La nueva farsa del Juez Constitucional controlado: la inconstitucional y falsa "corrección" de la usurpación de funciones legislativas por parte de la Sala Constitucional del Tribunal Supremo (sentencias Nos. 157 y 158 de 1 de abril de 2017), New York 4 de abril, 2017, at http://allanbrewercarias.net /site/wp-content/uploads/2017/04/151.-doc.-Brewer-New-farce-of-Constitutional-Judge.-False-correction%C3%B3n.-Sentences-Sala-Constit.-157-_ _ y-158-.-4-4-2017.pdf.

256 *See* my study on the subject in Juan Carlos Cassagne and Allan R. Brewer-Carías, *Estado populista y populismo constitucional. Dos estudios,* Ediciones Olejnik, Santiago, Buenos Aires, Madrid 2020, 330 pp.

PART THREE

A PREDATORY STATE AT WAR AGAINST THE COUNTRY, ITS INSTITUTIONS, ITS INHABITANTS, AND ITS CITIZENS*

According to what has been said, in Venezuela, currently, like in other countries under authoritarian populist political systems, the problem of the State is not if there must be more or less State, as is sometimes discussed in a different context.

Rather, it is more basic but complex: the issue is the need to effectively have a State, more precisely to reconstitute and rebuild the State itself, as an institutional subjected to the rule of law, set to manage the government of the society, securing the well-being and free development of each individual's personality.

In other words, the challenge that the Venezuelan people have in the future is to transform the predatory State that settled since 1999, which has been -and is- at war against the citizens, the country and all its institutions, including those of the State itself; and to transform it into a Rule of Law Service State, that is, in terms of article 141 of the 1999 Constitution, into a State at the service of citizen.

The task that lies ahead in countries like Venezuela, therefore, is to put an end to the settled predatory and destructive State, led by a klepto-kakistocracy, from whose actions what has been left is a devastation similar to the one resulting from a fratricidal war between *enemy armies*. That is to say, of total destruction, in all orders, social, political, economic, institutional, of services, of infrastructure, similar to what occurs as a result of a warlike conflict between forces for mutual annihilation.

Although Venezuelans have not had a war between two armed groups, there has been a conflict led by and from the State and its

government, against society, that is, against the country, the Nation, institutions and citizens. It has been an asymmetric war that has left a devastation similar to that resulting from a conventional war between confronted armies.

That war that has been waged by the State and the *klepto-kakistocracy* leading it, has manifested itself in the following aspects: (i) A war against the State itself; (ii) A war against its own institutional foundations; (iii) A war against its own form of political decentralization; (iv) A war against the public economy and public services; (v) A war against the country and its inhabitants; and (vi) A war against democracy and the citizen.

I. THE WAR OF THE STATE AGAINST THE STATE ITSELF AND ITS OWN ESSENTIAL COMPONENTS

The first manifestation of the war has been against the State itself, that is, against its own most elementary components making it up, that are, in any part and moment in history: the territory, the population and the government institutions. These are the three elements making up the State, and it is over such elements that the State exercises its sovereignty.

In Venezuela, the war by the State against the State itself, has been carried out ferociously against these three sovereign components.

1. *War against the territory and its integrity*

The State's war against the national territory has been carried out, by allowing national and foreign groups, foreign *guerrilla* and criminal organizations, with the complicity of the State's bureaucracy and military components, to use the territory for drug trafficking, and to exploit minerals from the subsoil under any sort of State control.

The State has abandoned extensive areas in the borders with Colombia, Brazil and Guyana, and in particular extensive areas in the *Amazonia* and *Orinoquia*.

The State has granted to China and its state-owned corporations, without parliamentary control or the participation of any national authority, the largest research and survey on the riches of the subsoil in the Orinoquia and the Amazonia.

The State has carried out, as an active agent, the irrational exploitation of natural resources in the territory, particularly in the so-called "Orinoco Mining Arc" in Bolivar and Amazon States, causing an real and massive ecocide; promoted by the State itself and developed and conducted by public state-owned corporations, including in an outstanding way, military companies. The consequence has been that in twenty years hundreds of thousands of hectares of forests have been lost in the Amazonia.

Additionally, in that area the State has replaced all civil authority in the control of the occupation of the territory for the purpose of exploitation of natural resources, completely granting its management to military authorities and companies that are in charge of controlling these exploitations at the same time, generating an illegal and abusive conflict of interests.

The war against the territory has also manifested itself with the abandonment of the more than hundred-year-old claim that Venezuela has over the Essequibo Territory, which has shown an absent and doubtful State as to whether it should even appear at the trial Guyana filed against it before the International Court of Justice.

2. *War against the population and its integrity*

The war against the country led by the State has plunged the population into a misery situation never seen before, with Venezuela at the highest degree of misery in the world ranking, surpassed only by Cuba.

The war against the population has also been a war against the city and against man's right to the city. Cities have been turned into unsafe places, badly ordered from an urban point of view, and the State itself behaving as the greatest urban predator. This, for example, has led Caracas to be considered in 2023 the least recommended Latin American city to live in.

The war of the State against the population has also lead it to extreme poverty, demolishing the national soul, destroying social cohesion, dividing the population between enemies, and undermining essential values such as hope, dignity, kindness, tolerance, respect, morality, honesty and compassion.

The war against the population has put an end to the social security system, finding the sick, children and the elderly completely neglected and in misery. Wages and pensions have been swept away.

The State war has ended with the health services. Hospitals are destroyed, unable to provide assistance to the population.

The war has also been against public education services, which have resulted in extremely high levels of teacher incompetence and school dropouts, depriving the entire young population of the right to education. The result has been a public education system without resources, without trained teachers and without students.

The war against the population has meant that the State itself has caused what can be considered the largest exodus of population in the entire history of the Western hemisphere, which has taken place in Venezuela in the last two decades, having emptied the country of an essential part of its population, forced to live or survive abroad, with families abandoned.

The State's war against the population has also been particularly incisive against the most vulnerable population, and among them, the indigenous peoples, having provoked catastrophic levels of ethnocide and genocide both in Orinoquia and the Amazonía.

The war of the State against the population has affected, additionally and in particular, the citizens, that is to say, those individuals who have political rights, and who are the ultimate holders of sovereignty; affecting them, among other actions, through unconstitutional political disqualifications decreed administratively to prevent opposition leaders to participate in elections, or through the revocation of popular mandates to opposition leaders without a recall referendum, which is the only constitutional way to revoke them.

The war against citizens has manifested itself in a fratricidal war against political dissidence, having given rise to arbitrary arrests, forced disappearances, torture, all of which have not only been denounced as crimes against humanity committed by the government, before specialized international entities established for the protection of Human Rights like those of the United Nations, but has also given rise to an investigation by the International Criminal Court for these crimes, against the State and the high command of the regime.

The State, in its war against the population, has violated citizenship, having given it away in an uncontrolled manner. First, for electoral purposes, in 2004, millions of people who were in an illegal situation in the country were indiscriminately nationalized so as to increase the electoral roll so the votes in the recall referendum against Chávez would increase in favor of not revoking. Second, for political reasons or other illegitimate purposes citizenship, that is, Venezuelan identification (identity card and passport), was granted to people linked to criminal or terrorist organizations with no ties to the country, ; even nationalizing and illegitimately granting Venezuelan diplomatic status to foreigners, aiming to protect them against legitimate persecution carried on by other States, for their crimes.

The war against the citizenry has even led the State itself to relinquish all Venezuelan citizens data to Cuba, ceding the management of the national Identification and Immigration Services too.

3. *War against the position of the State itself in the international world*

The war of the State against the State itself has affected the position of the State in the international world, degrading the international standing that the country has always had before the world Community, which has always seen Venezuela in solidarity with the best causes of humanity.

Today, instead, after twenty years of war against itself, the Venezuelan State abandoned the Andean Community of Nations, which is the most important integration effort on the Continent, abandoned the Organization of American States, denounced the American Convention on Human Rights, and escaped from the jurisdiction of the Inter-American Court of Human Rights; and it has been relegated in the context of the United Nations, turning its back on the West, forming alliances with China, Russia, Iran and other countries farthest from the Western world.

In this way, the State itself has promoted the loss of its sovereignty and its own territorial integrity, leaving the country surrendered to foreign countries.

In other order, the standing of the country in the international community has been tarnished by the fact that the corruption scandal surrounding the state-owned oil enterprise (PDVSA) with ramifications and judicial processes all over the world; the government is under scrutiny by the International Court of Justice and the President of the Republic itself -as well as other high State officers- have been formally indicted before Federal Courts in the United States for drug trafficking.

4. *War against the State´s own institutions in the internal sphere*

The war of the State against the State itself has seriously affected the government itself, as the means through which the State power is controlled have been transferred to foreign States such as Cuba, a country to which the sovereignty of Venezuela has been submitted. This all began through an unconstitutional bilateral agreement signed -without the approval of the National Assembly-, by Chávez and Castro in 2000, through which the silent invasion of Venezuela by Cuban agents was formalized, and a good part of the oil wealth that is transferred to Cuba without compensation was compromised.

On the other hand, the war that the State has carried out against the State itself, has also affected the constitutional institutions that compose it, having succeeded in completely demolishing all the scaffolding of the Rule of Law that is regulated in the Constitution, as analyzed below.

II. THE WAR OF THE STATE AGAINST ITS OWN INSTITUTIONAL BASIS

The State's war against the State has been particularly devastating with respect to the principles of the Rule of Law, specifically manifesting itself as a war against the Constitution, against the separation of powers and against all State branches of government.

1. *War against the Constitution*

Since the sanctioning of the Constitution, in 1999, the State has unleashed a war against it and its supremacy, violating it openly and successively turning it into a malleable text, losing all character of a supreme text. The Constitution is violated and modified constantly and with impunity by all kind of public bodies, without anyone controlling it;

and rather, with the endorsement of the body called to control it: the Constitutional Chamber of the Supreme Tribunal of Justice, which turned into the most lethal instrument and weapon of the State's war against the rule of law.

The Constitution ceased to be a superior value of society and the country. Is guardian, the Constitutional Chamber of the Supreme Tribunal, controlled by the Executive Power, became its main offender, changing and mutating illegitimately the meaning of its provisions or endorsing its violations.

In particular, the Constitution is no longer a warranty of the separation of powers. Due to the war unleashed by the State, all the institutions have been seized, and their constitutional autonomy and independence granted pursuant to the said principle of separation of powers, has been totally demolished. The result has been total control, by the Executive Power, the government and the government party, of all the branches of the government.

2. *War against the independence and autonomy of the Judiciary*

One of the first objectives of those who assaulted Power using the Constituent Assembly since 1999, was the total intervention of the Judicial Power and the control of the Supreme Tribunal of Justice.

The war against the judiciary comprised a massive dismissal of judges, and their equally massive substitution with temporary and provisional judges without any guarantee of stability, leading to their ongoing total submission to the Executive power.

Since the Constitution's approval, there have been no contests for new admissions to the judicial career, which has disappeared. Judges are dismissible and are indeed dismissed arbitrarily, mostly when they decide matters that do not please the ruling bureaucracy. This situation has given rise to venal justice, where many of the disputes are not won with legal arguments and evidence, but with illegitimate payments, undermining the essence of Justice.

Since 2000 the justices of the Supreme Tribunal of Justice have been appointed by the National Assembly without complying with the constitutional provisions regarding the conditions to be a magistrate, nor

with those that regulate the Judicial Nominations Committee, that should be made up exclusively with representatives of the various sectors of society, and not with a majority of the political sector (deputies). Moreover, as part of the war against the autonomy and independence of the Supreme Tribunal of Justice, successive reforms of its Organic Law have provided for such Nominating Committee to be made up mostly of representatives to the National Assembly who control it, violating the Constitution with impunity.

As a consequence, justices have also been appointed without meeting the constitutional eligibility conditions, and also re-elected for two successive terms, when the Constitution expressly prohibits such re-election.

In particular, the Constitutional Chamber, controlled by the Executive Power, has been the most lethal instrument for the destruction of the rule of law, by shaping and interpreting the Constitution at the convenience of the Executive and by refraining from exercising constitutionality control (judicial review) against unconstitutional acts of State entities. The Constitutional Chamber has thus become, for instance, an agent for the unpunished confiscation of property and goods, for the intervention and confiscation of political parties, for the revocation of popular mandates, for the upholding of political disqualifications through administrative means, even usurping legislative power and delegating it to other State agencies.

The Constitutional Chamber, likewise, has systematically refrained from exercising the constitutionality control of challenged statutes when they regulate essential aspects of state policy (such as those of creation of the Communal State), applying against the appellants, due to their supposed inaction, a presumption of lack of interests, and curtailing their right to effective judicial protection and access to justice.

3. *War against the independence of the Legislative Power*

The State's war against its own institutions has also been pointed towards the Legislative Power, as an instance of popular representation, having exercised power only when it has been tightly controlled by the government party; in which case its representative character has been blurred, disappearing the constitutional principle of the representatives' vote pursuant to their conscience.

This war of the State against popular representation increased in 2015, when the government party lost the majority of the votes it had in the National Assembly, that became controlled by the opposition. The war against the National Assembly was then one of total annihilation, by means of a precautionary judgment by the Electoral Chamber of the Supreme Tribunal, within a trial that was never decided, removing the qualified majority that the opposition had achieved, and the Constitutional Chamber immediately afterwards, declaring the National Assembly itself, as an institution in "contempt" of the precautionary judgement, declaring null and void as of 2016, all the actions and decisions already made or to be made in the future, hence removing all of its inherent powers (to legislate - all statutes enacted were annulled by the Constitutional Chamber - and to exercise political and administrative control of the Executive Power).

Thus, a judicial dictatorship or tyranny was established, with a Constitutional Chamber governing in conjunction, but subject to the Executive Branch, which unconstitutionally delegated legislative power to the President of the Republic and even to the Supreme Electoral Council, that reformed the Statute regulating elections.

The war led to the total neutralization of the National Assembly, leading the Executive Power to repeatedly violating the Constitution, going as far as to unconstitutionally convene a National Constituent Assembly in 2017 to "legislate" in parallel to the neutralized National Assembly, usurping its functions.

4. *War against the Public Administration and its institutionalization as an instrument of government*

The war waged by the State against its own institutions has also led to the total dismantling of the Public Administration as an instrument of government. The administrative career itself and the search for levels of excellence, in terms of civil servant personnel, has disappeared.

The State commenced by declaring war on the best trained and prepared personnel of the Public Administration and state owned corporations, such as the employees of Petróleos de Venezuela SA (PDVSA), the majority of whom were forcibly dismissed by Chavez in 2002, emptying the state oil industry of the best trained and prepared personnel.

On the other hand, the war has led to a clientele bureaucratic inflation never seen before. The number of civil servants and government employees has raised to levels never envisaged, showing that public employment is a clientele mechanism and direct subvention to an amorphous mass of population that would otherwise be unemployed, as a consequence of the State's destructive policies of the country's productive apparatus. The war against the country thus turned the State into a huge employer, but without any criteria of efficiency.

Parallel to the bureaucratic rise, a process of organizational increase developed, multiplying in a way never seen before the number of Ministries, public institutes, public funds, foundations, associations and State companies. The so-called Missions add to the former, causing an administrative and budgetary disorder, without any fiscal discipline, and without control.

This has also given rise to widespread corruption at all administrative levels, turning the Public Administration into a venal administration where many of the regular actions public officers are to perform only take place if there are previous illegitimate payments, ot legal fees.

Organizational increase has also produced a process of deinstitutionalization of the Public Administration, as it is not capable of exercising regulatory and control functions to activities subject to it.

Additionally, in order to centralize everything, there has been war against all autonomy in the administrative organization, that is, against functional decentralization. In fact, the word "autonomy" was suppressed in all contexts and meanings from the Organic Law of Public Administration since the 2008 reform. The only institutional autonomy that the State -at war with its own institutions- has not managed to erase has been the constitutional autonomy of the official Universities, which however in practice has been undermined by the budgetary drowning to which they have been deliberately subject seeking their *de facto* extinction.

Another consequence of the war against the Public Administration has been the disappearance of all forms of internal control., For example, bidding or contractor selection processes have been replaced by direct contracting, normalizing the exception.

This worsened since the so-called Anti-Blockage Law of 2020 that formalized illegality by authorizing the Executive to discretionary decide the "disapplication" of laws, justifying the absence of controls; and all in a secret and reserved way.

5. *War against the Electoral Power*

The State's war against the State itself has also affected the Electoral Power, abolished its autonomy and independence, and make it dependent on the Executive Power. First, with the assistance of the official government party, the State achieved total control of the members of the National Electoral Council. Since the government party did not always have the qualified majority of the National Assembly required for the election of National Electoral Council members, the war tactic used was to resort to the Constitutional Chamber of the Supreme Tribunal, who made the appointments based on an alleged "abstention" of the legislative body to do so. In this way, the members of said body have been appointed disregarding the non-partisan principle that the Constitution defines, without paying attention to the provisions establishing the conditions for their appointment, and ignoring the rules about the Electoral Nominations Committee, to be integrated exclusively by representatives of the civil society.

The result has been that the National Electoral Council has always been controlled by the government party, which, as an instrument of the Executive Branch, has prevented free, fair, and verifiable elections from being held.

6. *War against the Public Ministry*

The war of the State against the Public Powers has also implied the seizure of the Public Ministry, which has been transformed into a mechanism of political persecution controlled by the Executive Power and an instrument to secure impunity for crimes committed by State agents. Consequently, both government dissidents and/or those who do not have the government´s favor are accused and persecuted; and any crime committed by government agents -or by those who enjoy their favors-, are not punished.

Moreover, when actions have been carried out, they are not convincing, as those publicly signed as wrongdoers either remain unpunished or have disappeared from public eye. Such has been the case, for instance, of the massive corruption around PDVSA recently revealed by the State, that suddenly became aware of it, although it has been in place for decades and was of public knowledge, having even being prosecuted by courts from other countries.

7. *War against the fiscal control body*

Another of the objectives of the State's war against the separation of powers in the State itself, has been the one carried out against the Comptroller General´s Office to secure the absence of control and the impunity of officers. The Comptroller's Office has been reduced to a body that has turned out to be the main accomplice of administrative corruption.

The Executive Branch controls the Comptroller's Office, securing the overall inaction of said body. Moreover, the only actions from this office are unconstitutional pronouncements of political disqualification of opposition leaders, to prevent them from participating in electoral processes.

A single piece of information puts in evidence this lack of control: Venezuela has the largest number of unfinished works initiated by Oderbrecht and is the only whereas no corruption prosecution has started, as if Odebrecht was not introduced to the country by Lula and Chávez, with freelance contracts without control.

8. *War against the Ombudsman*

Finally, the war of the State against the Public Powers has included the war against the Ombudsman. This body, established as part of the *penta* division of the government' branches by the 1999 Constitution, is no heard of, sees nothing, knows nothing, investigates nothing, and seems to have never existed.

In this case, the war has forced the law of silence or inaction on said body, producing lethal effects reducing it to non-existent. For example, the Ombusdman has not taken any action regarding the multiple allegations by the United Nations Human Rights Committee about the

commission of crimes against humanity by government officers. Neither has done anything about the investigation against the government of Venezuela for the same crimes carried out by the International Criminal Court.

9. *War of the State against the military institution*

The State has also unleashed war against the military, which has been denatured and degraded. The following aspects are evidenced of the former:

- It has ceased to be the guarantor of the integrity of the territory and of national sovereignty, relegating its defense functions.

- It has been bureaucratized, leading its components to take part in the State´s Civil Administration: leading officials, without any skill to do so, hold most of the high positions of Administration and State corporations, with the catastrophic results of inefficiency, institutional degradation and widespread corruption that have been becoming known despite the official secrecy and cover-up.

- The component of senior officers of the Armed Forces has increased so much that Venezuela has more generals and lieutenant colonels than many European countries combined. At the same time promotions based on academic merit have been abandoned. The best graduates are removed and the worst are exalted.

- It has denatured its functions, assigning business tasks to the Armed Forces, to the point that military companies have acquired a dimension never before imagined in the organizational structure of the State.

III. WAR OF THE STATE AGAINST POLITICAL DECENTRALIZATION

Just as the Constitution establishes the cardinal principle of the separation of powers for the organization of Public Power, which has been demolished by the State itself through a concentration of power policy, the Constitution also establishes the principle of the territorial distribution of Power through political decentralization between various autonomous territorial levels (States and Municipalities).

This principle has also been demolished by the State itself through a policy of total centralization of power.

1. *The war against the autonomy of the states of the federation*

It can be said that in the last twenty years the precarious autonomy of the States regulated by the 1999 Constitution has totally disappeared. The States are totally and exclusively dependent on national budget; that is, on the National Executive itself.

The national State has centralized all public powers, leaving nothing to the State´s level. The war of the national State has increased centralism by reversing all services´ decentralization that had taken place years ago. Indeed, the national government only talks about decentralization towards the States when they are governed by Governors who are supporters of the national regime; whereas opposition Governors end up having no function except executing a precarious budget to pay for a meager bureaucracy.

2. *The war against municipal autonomy*

The war against municipal autonomy, as local power is assigned to bodies elected by universal, direct and secret suffrage, has also been waged by the national State, not only by taking away powers from Municipalities, but also seeking their total elimination. Despite its 2007 rejection, though the rejection of the constitutional reform project promoted by Hugo Chávez, the government has insisted on replacing municipalities with Community Councils.

These Communal Councils were not conceived as representative bodies of the communities. Their members are not elected by direct and secret universal suffrage, but rather are appointed by Assemblies of citizens controlled by the government party, by show of hands, contrary to the democratic principle provided for in the Constitution. And although an announced reform of the Municipal Councils Law in 2023 reformed the method for electing of the "spokespersons" of the Communal Councils, to provide for direct and secret universal suffrage, strategically and revealingly the Law established that this would only come into force after three years.

The war against the municipality has also included emptying them of their powers. Municipalities are compelled to transfer their powers to said Communal Councils not democratically elected. Communes have also been created as the primary political unit of the country, seizing such character from Municipalities, that have it pursuant to the Constitution.

Through this process of structuring the Communal State or People's Power, as a parallel State to the Constitutional State, it can be said that the national State has decreed a merciless war against the Municipalities and their autonomy, with the objective of drowning and disappearing them.

The Communal State and its supposed "participation" mechanisms, and in particular, the Communal Councils as organizations that depend on the national Executive Power and are generally managed by the government party, have only aided to further centralize the Power of the State and to control the population, with the excuse of "participation" that has been reduced to receiving gifts and all forms of subsidies through Missions, that is, from the Executive Power.

IV. WAR OF THE STATE AGAINST PUBLIC ECONOMY AND PUBLIC SERVICES

1. *War of the State against economy*

The State has been at war against public economy, which has been totally destroyed and deranged, involving:

- The total abandonment of budgetary and fiscal discipline. The Budget has ceased to be the instrument for estimating income and the measure for public spending.

- The excessive and uncontrolled indebtedness, without any fiscal or budgetary discipline, leading to material bankruptcy of the Venezuelan State, both internally and in the international financial world.

- The generation of public debt derived from the irresponsibility of the State in expropriations and confiscations of foreign investments that later gave rise to dozens of lawsuits before arbitral tribunals whereas the State has been condemned for astronomical amounts.

- The loss of autonomy of the Central Bank of Venezuela.

- The absence of information about economic figures and indexes being the management of the public economy similar to a navigation essay in unchartered waters.

- Inflation, that is a historical world record, as well as the loss of the value of the local currency (Bolívar) in a way not experienced in any other country in modern history.

- The destruction of the nationalized oil industry, with the dismantling of PDVSA to which its monstrous indebtedness is added, as well as widespread corruption in the company and its international activities, and the abandonment of its facilities, that have been turned into scrap metal.

This destruction of the oil industry has implied the total destruction of the economy of entire regions of the country, sucha as the entire area around the Maracaibo Lakem in Zulia State, , turned into a junkyard, totally contaminated by oil spills.

And among the disastrous consequences of this situation, in a country with supposedly one of the largest oil reserves, there is simply no gasoline, not only for the inhabitants to be able to circulate freely in the territory, but also for the most elemental need of the peasants to be able to transport their harvest in the rural world.

- The destruction of basic industries, such as steel, aluminum and cement industries, whose facilities have also turned into scrap after being expropriated and confiscated.

2. *War of the State against public services*

The State has also unleashed war against public services to be provided to citizens, including but not limited to: health services and medical care, education, power supply both in cities and rural areas, drinking water, public land, air and sea transport; all of them, catastrophic.

None of the public services are provided in appropriate levels, let alone excellence levels. They are all deficient, and their management has been a source of corruption by the State itself.

V. WAR OF THE STATE AGAINST THE COUNTRY, ITS INHABITANTS AND AGAINST PRIVATE ECONOMY AND PRIVATE PROPERTY

1. *War of the State against private economy*

The State has also carried out an implacable war against everything in the private world and, especially, against the private economy, having involved, among other aspects:

- Indiscriminate expropriation, confiscation and seizure of industries, to further transfer and management to State bodies and their bureaucracy, all leading to their consequent bankruptcy and definitive closure.

- Persecution against social interest housing construction companies causing a colossal collapse in the construction industry.

- Expropriations and indiscriminate taking of agricultural lands and agricultural producers, which began to be managed by groups linked to the State, with the final abandonment of the fields.

- Regulations, price controls and supposedly fair prices fixing, by an incompetent bureaucracy, with the subsequent progressive drowning of the few private producers that have managed to survive.

- The total abandonment by the State of its role as promoter, to encourage private producers in their activities.

2. *The state's war against private property*

The State has declared total war to private property, which has manifested itself mainly in:

- The taking, confiscation and expropriation of private industries, farms and agricultural lands that have subsequently been abandoned by the new occupants assigned by the State itself.

- The confiscation of rural lands, unconstitutionally requiring owners to demonstrate ownership by providing registered titles from immemorial times, before the country's independence, that is, since the Colony.

3. *The State's war against private activities and institutions*

The State has also been at war against private initiatives and institutions, which is evidenced by the following aspects:

- It has intervened in all public corporations with private membership such as professional associations, trade unions and autonomous universities, hindering their operation, using lethal weapons such as the Constitutional Chamber of the Supreme Tribunal and the National Electoral Council, both controlled by the Executive, to annul, control, suspend and confiscate the elections of their boards by their members.

In the destruction, the State put an end to the trade union movement, since its first intervention in 2000, disappearing, for example, the Confederation of Venezuelan Workers and other worker groups, such as the Venezuelan Federation of Teachers, both once important worker movements.

- Has hindered the operation and financing of Foundations, Civil Associations and Non-Governmental Organizations, trying to control their operation.

-It has hindered the operation of political parties, controlling their internal elections, using the Constitutional Chamber of the Supreme Tribunal, controlled by the Executive Power, to cancel parties, to take them over, and appoint new Boards of Directors controlled by the strings of power, so that they appear to be from the opposition, without being so.

4. *The state's war against media*

During the last twenty years, the State has carried out a permanent and intense war against the private media, neutralizing, closing and confiscating television stations, as was the case or Radio Caracas Televisión resulting in a judgment against the State by the Inter-American Court of Human Rights. Moreover, the State as confiscated and acquired, both directly or/and through party officers, all print media, closed radio stations, so that currently there is no broadcasting media or print newspaper not controlled, silenced, or subject to the government.

5. *The war of the State against the people*

In the war against the country and its institutions, the war unleashed by the State against people stands out in all its harshness. Citizens' rights to personal liberty and physical integrity are continuously violated by the State, having re-emerged in the country the tragic figure of the forced disappearance of people, the extrajudicial execution of people at the hands of security forces, arbitrary detentions, torture and humiliation, all of which means the annihilation of all rights derived from human dignity. As a consequence the government is under process before the International Criminal Court for crimes against humanity, which have also been repeatedly denounced by the United Nations Human Rights Committee and the independent investigation units it has designated in recent years.

On the other hand, the State's neglect of citizen security has caused the country to be considered in 2023, in the world crime ranking, as the country with the highest crime rate in the world.

VI. WAR OF THE STATE AGAINST DEMOCRACY AND THE CITIZEN

1. *The State's war against the citizen's right to representative democracy*

The State has unleashed a systematic war against representative democracy, under the disguise of implementing a supposed "participatory democracy," which has manifested itself, among other things, in the following:

- An attempt has been made to eliminate representative democracy as a source of government through the exercise of universal, direct and secret suffrage by citizens, through a system of selecting "spokespersons" by show of hands in citizen Assemblies controlled by the government party. This has been the basis of the entire framework of the so-called Popular Power or Communal State, which also seeks to eliminate decentralized political entities (Municipalities).

- The Constitutional Chamber of the Supreme Tribunal has accepted this anti-democratic drift by having endorsed the legal elimination of the Parish Councils, which have constitutional rank, as entities with members

elected by suffrage, and their replacement by spokespersons for Communal Councils until now not elected by direct and secret universal suffrage.

- In other cases, the Constitutional Chamber has endorsed the elimination of universal, direct and secret suffrage in the election of indigenous representatives before the National Assembly, carried out by the "reform" of the Electoral Law "sanctioned" by the National Electoral Council by "delegation" that was unconstitutionally conferred by the Constitutional Chamber itself.

- In the case of elections through universal, direct and secret suffrage that are the basis of representative democracy, the political control over the National Electoral Council exercised by the Executive Power and the government party, prevents the possibility of having free, fair, clean, reliable and auditable or verifiable elections in Venezuela, affecting the essence of representative democracy.

- The right to passive suffrage has been seriously affected, as previously stated, by unconstitutionally allowing the Office of the Comptroller General of the Republic, which is an administrative (not judicial) body, to declare political disqualification of public officials, preventing them from participating as candidates in elections. This has repeatedly happened despite the condemnation of the State has been by the Inter-American Court of Human Rights.

-The Constitutional Chamber of the Supreme Tribunal, in addition, has infringed the right to hold elective positions, having unconstitutionally revoked the mandate of representatives and elected mayors, when only the people can decide such revocation through a referendum.

- Moreover, in 2013 the Constitutional Chamber accepted and recognized a government lacking democratic legitimacy, , as it occurred at the time of Chavez's decease, between December 2012 and march 2013, when the then Vice-President, who had not been popularly elected as President of the Republic, was instated as President.

- The functioning of representative democracy has also been affected by the elimination of the alternate government system established in the Constitution. By interpreting that alternate government is the same as "elective" government, the Constitutional Chamber green lighted

indefinite re-election violating the right to democracy. Furthermore, the constitutional amendment approved by referendum in 2009, illegitimately changed a stony principle.

2. *The State's war against the citizen's right to participatory democracy*

The war of the State not only has been against representative democracy, in the name of a supposedly participatory democracy, but also against all the means for participation provided in the Constitution, in particular, by:

- The denial of the right to political participation of citizens regulated by the Constitution in the Nominations Committees for the second degree election by the National Assembly of high officers of the Public Powers (Supreme Tribunal Magistrates, Attorney General and Comptroller General of the Republic, Rectors of the National Electoral Council and Ombudsman), ignoring that their member ought to be representatives of the various sectors of society. Conversely, a majority of representatives, who by essence are part of "political society," opposed to civil society, have been nominated to those Committees. The right to citizen political participation regulated directly in the Constitution, thus, has been kidnapped by the State itself, and the representatives have usurped the right of both citizens and society.

- The denial of the right to political participation through public consultation, by the National Assembly, in the Statutes discussion process, regulated by the Constitution, eliminated by the State using the Constitutional Chamber of the Supreme Tribunal as a lethal weapon. In fraud to the Constitution, the Chamber has provided: first, that popular consultation is not mandatory in the case of statutes enacted by decree laws issued by the President of the Republic, which in practice and in fact make up the vast majority of statutes that have been enacted in the country in the last twenty years; and second, that since it is not mandatory to follow any specific procedure to consult the organizations of society in the law making process , any simple notice or opinion received would accomplish the "popular consultation" constitutional requirement. In this case, the right to citizen political participation, regulated directly in the Constitution, has also been hijacked by the State itself, stripping citizens of its exercise.

- The denial of the right to political participation of citizens by recalling referendum, also regulated directly in the Constitution, through the unconstitutional regulatory manipulation by the National Electoral Council, which in practice has prevented citizens from being able to exercise said right in the twenty years that the Constitution has been in force. This occurred in 2003 and 2017. And although one presidential recall referendum was actually held in 2006, this took place only after the Constitutional Chamber, in fraud to the Constitution, "interpreted" the Constitution to allow the transformation of the presidential recall referendum into a "ratification" referendum, and after the government had increased the electoral register by giving citizenship to millions of illegal immigrants.

- The denial of the right to political participation of citizens in the call of Constituent Assemblies by means of a referendum by popular initiative, when the Government attempted to transform the Constitutional State into a Communal State in 2007 by means of a "reform of the Constitution," eventually rejected by the people in a referendum denying the approval of the reform.

- The taking of the right to political participation of citizens by the President of the Republic, in 2017, in the required call of the Constituent Assembly by means of a referendum call by popular initiative, when establishing the Constituent Assembly of 2017 by decree, so that it would serve, in fraud to the Constitution, only as a legislative entity in substitution of the National Assembly kidnapped by the Constitutional Chamber, by declaring it in contempt since 2016.

- The progressive deprivation of the functions and roles of both States and Municipalities, gradually stripped of their main character of being mechanisms for citizens political participation for the management and government of regional and local affairs.

3. *The State's war against the citizen's right to politically demonstrate*

In the State's war against citizens political rights, in addition to the war against the right to elect and be elected, and against the right of citizens to freely associate in political parties marked by political pluralism, the State has also unleashed a tremendously repressive war against the citizen's right to demonstrate, not only curtailing its exercise

by using the Constitutional Chamber of the Supreme Tribunal to fraudulently "interpret" the Constitution, creating the need for prior "authorizations" that are not regulated therein; but also by criminally repressing all sorts of public demonstrations. This has taken place since 2017, when many citizens were killed, giving rise to denunciations by the United Nations Human Rights Committee that have been recorded in his successive reports, as well as the commencement of investigations by the International Criminal Court for crimes against humanity.

VII. WAR OF THE STATE AGAINST HUMAN RIGHTS

All of the aforementioned has resulted in the *klepto kakistocracy* leading to the predatory State, fiercely attacking human rights of Venezuelans, none of which are guaranteed, nor can the inhabitants or citizens freely enjoy them.

None of the constitutional guarantees and rights of the people has full effectiveness, validity and enjoyment in the country, as has been widely stated by several Reports of the Inter-American Commission on Human Rights, the United Nations High Commissioner and its Independent Commissions, and the complaints made before the International Criminal Court, all of which results in broad lines as follows:

1. *The war against constitutional guarantees*

The war against constitutional guarantees has resulted in Public Power bodies having ignored the fact that the respect and guarantee of human rights, as well as the investigation of their violations, are among their priority duties, as set forth in articles 19 and 29 to 31 of the Constitution. They have rather become the most important agents of their destruction, intervening in all orders of the inhabitants and infringing the right of free development of personality.

The fundamental right to equality before the law (art. 21) has been underestimated by the State. For example, global preference has been given, in terms of social rights, to those who depend on the State as employees or beneficiaries of "missions," whose consciences are bought through subsidies.

Those who disagree have been politically discriminated, as occurred from an early time with the political persecution of the famous Tascón List, resulting in a judgment against the State by the Inter-American Court of Human Rights.

The open clause of rights and guarantees that are not enumerated in the Constitution (arts. 22, 27) has been ignored. Moreover, the Constitutional Chamber has denied the existence of superior values of humanity that guarantee human dignity (art. 22), as well as the constitutional rank the Constitution grants to international instruments on human rights and their immediate and direct application by all courts, without the intervention of the Constitutional Chamber of the Supreme Tribunal (art. 23). In addition, the State, in the face of all the violations committed against human rights, has never held responsible those who have committed human rights violations in his name (art. 25), ignoring the international judgments issued in several occasions by the Inter-American Court of Human Rights and by the UN Committee on Human Rights, thus ignoring the provisions of articles 25, 27, 30 of the Constitution.

The State has also violated the non-retroactivity of the law guarantee (art. 24), with a so-called Anti-Blockage Law of 2020 and, as the National Assembly has just done, an unconstitutional law to regulate the extinction of private property, or confiscation without criminal conviction.

The right of access to justice, in particular the right of individuals to promptly obtain a judicial decision (art. 26) has been affected due to the absence of independence and autonomy of judges; a situation that has de facto nullified the right to amparo (arts. 27, 28), particularly when the action is brought against State bodies or officers that the controlled Judiciary has made immune.

2. *The war against nationality and citizenship*

As previously argued, the State has declared war on the Venezuelan nationality itself (arts. 32 et seq.), granting it at its discretion to foreigners, for both political purposes and others of a criminal nature, affecting its own sovereignty. It has also denied and actually deprived citizenship to Venezuelans abroad, by denying them the right to renew their identification (art. 35, 42, 56).

Regarding the political rights of citizens, as has also been argued before, they have been affected by the State´s arbitrarily declaring political disqualification of citizens without a court ruling, inhibiting their rights to be elected (art. 39). The State, on the other hand, has granted citizenship to undesirable foreigners for political and criminal reasons, violating article 40 of the Constitution; affecting the equality of all Venezuelans (art. 41), and their exclusive right, including Venezuelans by birth, to hold certain public offices (art. 41).

3. *The war on civil rights*

The State and his agents have been particularly aggressive against the civil rights of individuals, as has been stated in all the international reports on human rights issued by the OAS and ONU bodies, in such a way that the right to life (art. 43) has ceased to be inviolable and has been violated, with political assassinations, forced disappearances and extrajudicial executions. In addition, the State has abandoned its duty to protect the lives of people who are in custody (art, 43).

Personal freedom has also ceased to be inviolable, with people at the mercy of being arrested, detained, imprisoned without judicial process, by officers who do not identify themselves, and without the possibility of communicating with relatives or lawyers, who are not informed on their whereabouts. Moreover, they are frequently subject to torture or cruel, inhuman or degrading treatment that threaten their physical, mental and moral integrity; all in all, against the provisions of articles 44 and 46 of the Constitution. In many cases, people have even continued to be detained after a judicial release order was issued (art. 45).

For the State and his agents, the domestic home ceased to be inviolable, being searched at large for political reasons without a judicial order (art. 47). In the same sense, private communications, for State agents, have ceased to be secret and inviolable under the terms of article 48 of the Constitution.

The political control that the State exercises over the Judiciary, after destroying its autonomy and independence, has meant that the right of due process has also been violated by the State. Rulings are issued without summoning the defendant or granting him the right to be heard and defend himself, all in violation of article 49 of the Constitution. This has even had international repercussions, as has recently happened even

with rulings by the Constitutional Chamber of the Supreme Tribunal issued in violation of due process that have not been recognized, for example, in the Courts of the United Kingdom for violating article 6 of the European Convention on Human Rights. For the rest, the presumption of innocence ceased to be an inviolable right in Venezuela, being constantly violated by all sorts of officials.

The right to freedom (art. 50) has been violated, by preventing citizens from leaving and returning to the country when they are denied the necessary identification to do so; and the right to move freely and by any means through the national territory, has in fact been affected by the lack of gasoline, the deterioration of the communication routes and the informal "tolls" that have to be paid to all imaginable military bodies to go through.

The right to petition guaranteed by article 51 of the Constitution has been affected, particularly by the absence of a timely and adequate response as the provision states.

The right of association for lawful purposes (art. 52) has been greatly affected, not only by the interference of State agents in the internal elections of many associations, but also by the permanent persecution and harassment by the State against associations (NGOs) for the protection of human rights.

The right to protection of personal security, by law enforcement bodies, has been disrupted by their irregular operation. Instead of protecting citizens against threats, vulnerability or risk to the physical integrity of people, their properties, the enjoyment of their rights and the fulfillment of their duties, in many cases, as evidenced by human rights protection agencies, they have acted threatening, violating and putting the physical integrity of people and their properties at risk. In addition, these bodies have frequently disrespected the dignity and human rights of peoplen to any principle of necessity, convenience, opportunity and proportionality, as required by article 33 of the Constitution.

The right to free expression of thought (art. 57) has also been violated. For example, journalists have been persecuted for their writings, the citizen's right to timely, truthful and impartial information has materially disappeared, due to the State's total control of the media, having also disappeared any vestige of a citizen´s right to reply and rectification when affected by inaccurate or offending information.

4. *The war against political rights*

As previously argued, the political rights of citizens have been affected by the predatory State, since by destroying democracy as a political regime, political rights have also been destroyed. This has happened, for example, with the right to political participation (arts. 62, 70), which has been affected in all its manifestations.

First, the right to vote, by preventing the agents of the predatory State from holding free, secure and verifiable elections and eliminating universal, direct and secret suffrage (art. 63) of the bodies that are part of the so-called Communal State, which seek to take without democratic legitimacy, the functions of constitutional local entities such as Municipalities and Parish Councils.

Second, the right to elect (art. 64), when the National Electoral Council manipulates the electoral registry and neglects its updating, to the point that it does not currently reflect the demographic reality and changes that have occurred in the country in the last decades.

Third, the citizen's right to public, transparent and periodic accountability reports issued by representatives on their management, pursuant to the program presented (art. 66), which has never been respected.

Fourth, the right of association for political purposes (art. 67) that has been violated with the closure, intervention and kidnaping of political parties by the National Electoral Council and by the Constitutional Chamber of the Supreme Tribunal, affecting the citizen's right to freely participate in electoral processes. This has also occurred with the different treatment to the government party, which is not required to select its candidates through internal elections, having the Constitutional Chamber assured their financing by the State, against the constitutional prohibition of financing associations for political purposes with funds from the State.

Fifth, the right of citizens to demonstrate peacefully and without weapons (art. 68), was kidnapped when the Constitutional Chamber created unconstitutional limitations on its exercise. It has also been violated by the law enforcement officers, who have ignored the prohibition to use firearms and toxic substances in the control of peaceful demonstrations, with the consequent murder of protesters by such law enforcement forces as has been documented since 2017 in the reports of international bodies for the protection of human rights.

Sixth, the right to referendums, which has been systematically buried. Regarding national, state and municipal consultative referendums (art. 71), their regulation has been established in such an inconvenient way that in twenty-three years it has never been possible to call one. Regarding recall referendums (art. 72), when after multiple regulatory problems a presidential recall referendum could be held in 2004, the Constitutional Chamber changed the Constitution to transform the recall referendum into a ratification one, after the electoral registration was extraordinarily increased with the regularization of residence and citizenship of millions of undocumented foreigners. Regarding the approval referendums for laws and treaties (art. 73), or repealing referendum for laws or decree laws (art. 74), their regulation has been established in such an inconvenient way that also in twenty-three years it has never been possible to call one.

5. *The war against social rights*

The State's war against its own institutions, and against the country, its population and its inhabitants, has provoked the migration of millions of people, leaving their families, affecting not only the economy of the country but the family relations, breaking the ties of solidarity, common effort, mutual understanding and reciprocal respect among its members, which the State is compelled to protect - not demolish - pursuant to the Constitution (art. 75). This has led the State to abandon his duties to create opportunities to stimulate the productive transition of adolescents towards adult life and, in particular, for training and access to the first job (art. 79); his obligation to guarantee the elderly comprehensive care and social security benefits that enhance and ensure their quality of life (art. 80); and his constitutional obligation to ensure that their retirement pensions are not less than the minimum wage.

The right to adequate, safe, comfortable, and hygienic housing, with essential basic services that include a habitat that humanizes family, neighborhood, and community relations guaranteed by the Constitution (art. 81) has not been addressed by the State, especially when it has turned the housing construction missions that have been developed with models foreign to the tropics, particularly those of Chinese origin, into mechanisms for urban disorder, denying people the right to private ownership of their homes.

The right to health, whose care is the obligation of the State (art. 83), has been totally forgotten. Policies have led to the neglect of health, as a priority task, whereas investment has ceased, resulting in the total deterioration of public health facilities, the exodus of professional doctors, and the invasion of practitioners who pose as doctors of Cuban or even national origin, leaving citizens totally unprotected, helpless, without the national public health system integrated into the social security system as required by the Constitution (art, 86), which prioritizes health promotion and disease prevention, ensuring the protection of the country's inhabitants in all contingencies (art. 84).

The right to work has also been neglected, as the State has abandoned his duty to guarantee the adoption of necessary measures so everyone can obtain productive employment providing a dignified and decent existence and guarantying the full exercise of this right (art. 87). The State has not ensured compliance with the prohibition of work by adolescents in tasks that may affect their integral development (art. 90), nor to ensure that the salary to which workers are entitled - which must be a minimum living wage that should be adjusted each year - is effectively sufficient to allow them to live with dignity and cover basic material, social and intellectual needs for themselves and their families (art. 91).

Within the framework of labor rights, the State, for more than twenty years, declared war on the trade union movement, seriously harming the right of workers to freely establish the union organizations they deem appropriate for the best defense of their rights and interests (art. 95), which in many cases have been persecuted, intervened and their leaders imprisoned, leaving the workers especially in the field of State own companies, neglected in any attempt at collective bargaining (art. 96), with strikes in many cases prosecuted (art. 97).

The right to comprehensive education that the State is compelled to guarantee (art. 103) has also been neglected by the State, which has not ensured the compulsory nature of education at all levels, nor has secured that it is taught in State institutions free of charge; institutions that have been abandoned due to the exodus of teachers, state disinvestment and replacement of teaching staff by people not trained to do so, without the recognized morality and proven academic suitability required by article 104 of the Constitution. Added to this is the very high school dropout rate.

6. *The war against economic rights and private property*

As previously mentioned, the State has unleashed an intense war against economic freedom (art. 112) and private property (art. 115), destroying the productive apparatus of the country through interventions, confiscations and takings of private companies.

7. *War against the rights of indigenous peoples*

As was also previously commented, the rights of indigenous peoples have not been protected (art. 119), but rather violated by the State itself with irrational mining operations conducted by its officials and the military that, on the contrary should be called upon to protect natural resources. Until now, no effort has been made in favor of indigenous peoples, as required by the Constitution (art. 119), for instance to demarcate and guarantee the right to collective ownership of their lands.

The State itself has been responsible, contrary to the provisions of the Constitution, for the use of natural resources in indigenous habitats, harming their cultural, social and economic integrity, and without prior information and consultation with indigenous communities (art. 120), as has occurred in the Amazonia and Orinoquia.

And as for the right to political participation of the indigenous peoples with representation in the National Assembly (art. 125), it has been the State itself that has violated it by taking away their right to exercise it through universal, direct and secret suffrage, substituting it for an election by show of hands in controlled Assemblies, through a reform of the Statute also carried out by an incompetent body such as the National Electoral Council.

8. *The war on environmental rights*

The State's war against the entire country, as we have also said before, has also comprised the illegal exploitation of natural resources the State performs directly, or has allowed them to be performed due to its inaction, violating his duty to protect the environment, biological diversity, genetic resources, ecological processes, national parks and natural monuments and other areas of special ecological importance (art. 127).

This has become evident with the irrational mining exploitations that are being carried out in Orinoquia and the Amazonia; without any attention to territorial development policies that may have been adopted (art. 128), without any consultation or citizen participation; and the required environmental and sociocultural impact studies (art. 129).

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From the aforementioned the resulting panorama is one whereas the war of the government and the State against the Nation and its citizens, including any opposition leader or organization that could be a threat to the regime, forces the citizens to be truly aware that Venezuela is currently, figuratively, in a situation similar to that of a post-war (but without the war having yet effectively ended), where everything that existed institutionally before the kakistocracy took power, has being destroyed or is not working.

All institutions have been totally demolished, destroyed and degraded. All: Legislative Branch; Public Administration (Ministries, autonomous entities, state companies, public foundations); Attorney General; General Comptroller; National Electoral Council, Public Ministry, Ombudsman; Armed forces. All !!!.

Never before, in our political history, had we been in a similar situation, not even after the Federal Wars (1863). For this reason, it is possible that the idea that I have mentioned several times before on what history teaches us about the length of political cycles, their crises, and the succession of regimes, being that of a time similar to a generation, perhaps does not fully apply to Venezuela, considering the current case of total destruction of the country.[1]

The reality is that comparatively in history, today we are not in the situation of breaking a cycle and its crisis, but in a situation similar to the

[1] *See* Allan R. Brewer-Carías, "Reflections on political cycles in the history of Venezuela and the "apoptosis" of a regime that "has its days numbered," in *Law and Society, Journal of the Faculty of Legal and Political Sciences of the Monteavila University*, No. 15, Caracas, 2019, p. 243-259; and in *Constituent Usurpation 1999, 2017. History repeats itself: once as a farce and the other as a tragedy***,** Colección Estudios Jurídicos, No. 121, Editorial Jurídica Venezolana International, 2018.

one that existed at the very beginning of the Republic, after the end of the Wars of Independence (1817-1821), when all the initial colonial and republican institutions had been destroyed, and a Republic had to be founded.

In other words, old institutions had to be rebuilt and new institutions established.

Of course, in such a situation this historical task would not seem to be solved just by electing a new President of the Republic, if it were possible to do so in the near future, in a freely and democratic way. In the current situation that is conditioned first, by the existence and presence of the current state apparatus, at war against the country, functioning; and second, due to the lack of true cohesion and unity of the opposition to the authoritarian regime, that free and fair election seems impossible. A new President, of the opposition, elected in such conditions, could do little and would be crushed in minutes by the current *kakistocracy*.

The task, evidently, is much broader and more complex and implies redoing, sweeping, founding and re-establishing the State and all its institutions; and it will imply, among other things, whether we like it or not, following a historical saga that has not abandoned us Venezuelans throughout our constitutional history:[2] a new "Constituent Assembly" seems to be already "written down" on the historical agenda for the future of the country. But of course, a Constituent Assembly not for the purpose of sanctioning a "new" Constitution, which would not be the objective (a new constitutional text solves nothing if a destructive *kakistocracy* continues to control power), but rather to re-establish and rebuild the country both politically and institutionally, on the basis of democratic consensus.[3]

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2 *See* Allan R. Brewer-Carías, "The Constituent Assemblies in the history of Venezuela," in *El Universal*, Caracas, September 8, 1998, p. 1-5; and in *Constitutional History of Venezuela*, 2 vols, Editorial Alfa, Caracas 2008.

3 *See*, for example, in a coincident sense, in Eduardo Fernández, "Reconstrucción," Caracas, July 7, 2023, at https://www. radarsystems.net:8080/ newsletters/ ifedec/ Opinion EF 07 07 2023.html; and Fernando Luis Egaña, "Reconstrucción", in *El Nacional,* July 8, 2023, available at: https://www.elnacional.com/opinion/reconstruccion-2/T

For this, in addition to really have a cohesive opposition to the regime, the first thing required is that the devastating war that we have and are suffering daily is effectively put to an end. This, as history teaches, can only be achieved either with a Capitulation or with an Armistice. It cannot be achieved with an isolated presidential election, nor with a loose opposition nor a Constituent Assembly. And even less if it is called before there is the aforementioned Capitulation or Armistice.

New York, July 14, 2023

PART FOUR

THE SUBJUGATION OF THE JUDICIARY*

I. DISMANTLING THE RULE OF LAW BY ERODING THE INDEPENDENCE AND AUTONOMY OF THE JUDICIARY

> "An independent and impartial justice system is essential to upholding the rule of law and ensuring the protection of human rights."

This was stated in the *Report of the Independent International Fact-Finding Mission on the Bolivarian Republic* of *Venezuela* submitted on September 16, 2021, before the Human Rights Council of the United Nations, which was almost entirely intended to analyse the situation of the Judiciary in Venezuela.[1]

Precisely for this reason, those who seized power in Venezuela in 1999 by convening a National Constituent Assembly that was not contemplated nor regulated in the Constitution, did so, from within and abusing a democratic instrument, to dismantle the rule of law and representative democracy and establish in its place an authoritarian regime with the fallacious cloak of a "participatory democracy."[2]

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* This Paper was included in the Legal Memorial filed before the Victim's Office of the International Criminal Court, in the case against Venezuela, 2022.

1 Available at: https://wwwohchr.org/Documents/HRBodies/HRCouncil/FFMV/A.HRC.48.69%20ES.pdf.

2 *See* Allan R. Brewer-Carías, *Golpe de Estado constituyente y fraude constitucional. Lecciones de la experiencia venezolana con la Asamblea Constituyente de 1999* [*Constituent coup d'état and constitutional fraud. Lessons from the Venezuelan experience with the 1999 Constituent Assembly*] Ed. Olejnik, Buenos Aires, Madrid 2021.

Consequently, the first political decision adopted by the National Constituent Assembly in August 1999 was to decree the assault and intervention of the Judiciary, overtly dismissing almost all the judges without any guaranty of due process and appointing provisional and temporary judges subjected to the Assembly's power.[3]

In this process of demolishing the independence and autonomy of the Judiciary, the first institutional victim was the former Supreme Court of Justice, and - as its Chief Justice Cecilia Sosa Gómez warned, when the Court validated the constituent intervention, that she said aimed "directly at ignoring the Rule of Law," implying the "self-dissolution" of the Supreme Court[4] as it precisely occurred.

For this reason, at that very moment Chief Justice Sosa resigned her chair at the Court and her warnings were confirmed barely four months later, when its justices were dismissed and new justices were appointed by the same National Constituent Assembly to form the new Supreme Tribunal of Justice, controlled by the regime, without even complying with the requirements that the new Constitution of 1999 had just established.[5]

This was the onset of the systematic process of demolition, dismantling or collapse - without pause - of the Judiciary that has been taking place in Venezuela since 1999, whereby its autonomy and independence have been swept away, this being today one of the signs of the institutional deterioration of the country resulting from

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3 *See* my opposition and criticism at the time of the constituent intervention of the Judiciary in Allan R. Brewer-Carías, "*Debate Constituyente (Aportes a la Asamblea Nacional Constituyente)*," [*Constituent Debate (Contributions to the National Constituent Assembly)],* Tomo I (8 agosto /8 septiembre), Editorial Jurídica Venezolana, 1999, pp. 57-74.

4 *See* my comments then regarding the unfortunate Supreme Court Resolution of August 23, 1999, decision, *Idem*, pp, 141 ss.

5 *See* my comments of that time on the Constitutional Transition Decree and the flawed appointment of the Justices of the new Supreme Tribunal, in Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela,* [*Coup d'état and constituent process in Venezuela*]*,* Universidad Nacional Autónoma de México, México 2002, pp. 350.

authoritarianism, there consequently being no rule of law.[6] The process to assure the political control of the Judiciary by controlling the Supreme Tribunal was subsequently consolidated, first in 2000, and after since 2004, through the Supreme Tribunal Organic Law which instead of providing as stated in the Constitution for a Committee for Proposing candidates for Justices exclusively integrated by representatives of civil society, has been composed by a majority of members of the National Assembly since then controlled by the official political party.[7]

That is why it can be said that the process of eliminating the judicial independence and autonomy in Venezuela is not a recent tragedy; rather, it has been in motion for more than twenty years, as has been progressively denounced since then,[8] which is why in the same *Report of*

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6 *See* what I have expressed in my books: Allan R. Brewer-Carías, *The Collapse of the Rule of Law and the Struggle for Democracy in Venezuela. Lectures and Essays (2015-2020),* Foreword: Asdrúbal Aguiar, Collection Annals, Mezerhane Endowed Chair on Democracy, Rule of Law and Human Rights, Miami Dade College, 2020, 618 pp.; and *Authoritarian Government v. The Rule of Law. Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution***,** Fundación de Derecho Público, Editorial Jurídica Venezolana, Caracas 2014, 986 pp.

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

8 *See* my comments in: Allan R. Brewer-Carías, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela *(1999-2004)*", [The progressive and systematic demolition of the autonomy and independence of the Judiciary in Venezuela (1999-2004)]," in *XXX Jornadas J.M Domínguez Escovar, Estado de Derecho, Administración de Justicia y Derechos Humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33-174; Allan R. Brewer-Carías, "El constitucionalismo y la emergencia en Venezuela: entre la emergencia formal y la emergencia anormal del Poder Judicial," [Constitutionalism and the Emergency in Venezuela: Between the Formal Emergency and the Abnormal Emergency of the Judiciary], in Allan R. Brewer-Carías, *Estudios Sobre el Estado Constitucional (2005-2006)* [*Studies on the Constitutional State (2005-2006)*], Editorial Jurídica Venezolana, Caracas 2007, pp. 245-269; Allan R. Brewer-Carías "La justicia sometida al poder. La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)" [*"*Justice subjected to power. The absence of independence and autonomy of judges in Venezuela due to the endless

the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela submitted on September 16, 2021, to the Council of Human Rights of the United Nations Organization, cited above, after appraising that in Venezuela "the erosion of judicial and prosecutorial independence has been accelerated in recent years," concluded its assessment by stating that:

> "the legal and administrative reforms that contributed to the deterioration of the independence of the system of justice took place over several years, at least since the adoption of the 1999 Constitution" (par. 14).[9]

II. THE INTERNATIONAL VERIFICATION OF THE DETERIORATION OF THE AUTONOMY AND INDEPENDENCE OF THE JUDICIARY

This situation of progressive erosion of the autonomy and independence of the Judiciary and, consequently, of the rule of law, democracy and human rights, was not ignored by international bodies in

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emergency of the Judiciary (1999-2006)], in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007,* Centro Universitario Villanueva, Marcial Pons, Madrid 2007, pp. 25-57; "Sobre la ausencia de independencia y autonomía judicial en Venezuela, a los doce años de vigencia de la constitución de 1999. (O sobre la interminable transitoriedad que en fraude continuado a la voluntad popular y a las normas de la Constitución, ha impedido la vigencia de la garantía de la estabilidad de los jueces y el funcionamiento efectivo de una "jurisdicción disciplinaria judicial") [On the absence of independence and judicial autonomy in Venezuela, twelve years after the enactment of the 1999 Constitution (Or on the endless transition status that, in continued fraud against the popular will and the norms of the Constitution, has prevented the enforcement of the guarantee of the stability of the judges and the effective functionning of a "judicial disciplinary jurisdiction*),* in *Independencia Judicial*, Colección Estado de Derecho, Tomo I, Academia de Ciencias Políticas y Sociales, Acceso a la Justicia, Fundación de Estudios de Derecho Administrativo (Funeda), Universidad Metropolitana (Unimet), Caracas 2012, pp. 9-10; "The Government of Judges and Democracy. The Tragic Situation of the Venezuelan Judiciary," in Sophie Turenne (Editor.), *Fair Reflection of Society in Judicial Systems - A Comparative Study*, Ius Comparatum. Global Studies in Comparative Law, Vol 7, Springer 2015, pp. 205-231.

9 Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A.HRC.48.69%20ES.pdf.

charge of protecting human rights. It was the case, for example, of the Inter-American Commission on Human Rights, which in its *Reports* has progressively warned about the issue over the last twenty years, as it was summarixed in one of the most recent *Reports on Admission,* in the case: *Nelson J. Mezerhane Gosen vs. Venezuela* (Report No. 312/21, Petiton 961-10, November 2, 2021), stating that:

> "*it has repeatedly noted the lack of judicial independence in Venezuela*. It happened, among others: in *Annual Report 2004* (Chapter IV, par. 138-207), in *Annual Report 2005* (Chapter IV, par. 214-370), in *Annual Report of 2006* (Chapter IV, par. 138-252), in *Annual Report 2007* (Chapter IV, par. 221- 315), (i) in *Annual Report 2008* (Chapter IV, par. 391-403), (ii) in *Annual Report 2009* (Chapter IV, par. 472-483), (iii) in *Annual Report 2010* (Chapter IV, par. 615-649), (iv) in *Annual Report of 2011* (Chapter IV, par. 447-477), (v) in *Annual Report 2012* Chapter IV, par. 464-509), (vi) in *Annual Report 2013* (Chapter IV, par. 632-660), (vii) in *Annual Report 2014* (Chapter IV, par. 536-566), (viii) in *Annual Report 2015* (Chapter IV, par. 257-281), (ix) in *Annual Report 2016* (Chapter IV, par. 57-87.), (x) in *Annual Report 2017* (Chapter IV, par. 13-21), (xi) in *Annual Report 2018* (Chapter IV.B, par. 30-57) (xii) in *Annual Report 2019* (Chapter IV.B, par. 30-48) y in *Annual Report 2020*. Also the subject was examined in details in (xiii) the el *Report on the Situation of Human Rights in Venezuela 2017* ("Institucionalidad democrática, Estado de derecho y derechos humanos en Venezuela", p. 45 ff.) and (xiv) the *IReport on Democracy and Human Rights in Venezuela 2009* (Part III, par. 180 -339).[10]

The Commission, in fact, since its Report rendered in 2002, considered that an essential aspect "linked to the autonomy and independence of the Judiciary is that pertaining to the provisional nature of judges," it found that:

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[10] *See* Comisión Interamericana de Derechos Humanos, *Caso Nelson J. Mezerhane Gosen vs Venezuela*, Informe de admisibilidad No. 312/21, Petición 961-10, 2 de noviembre de 2021, par. 33.

> "After almost three years of reorganization of the Judiciary, a significant number of judges are provisional, ranging from 60 to 90%, according to different sources. This affects the stability, independence and autonomy that should prevail in the judiciary."

For this reason, already in 2002, the Commission urged that a process be initiated "immediately in accordance with domestic legislation and the international obligations derived from the American Convention, aimed at reversing the provisional nature of most of the judges," which never happened, and has rather worsened.[11]

Furthermore, in the 2003 Special Report on Venezuela, the same Inter-American Commission again expressed its concern about the appointment of provisional judges in Venezuela,[12] noting that these officials:

> "do not enjoy the guarantee of stability in office and may be freely dismissed or suspended, which could imply subjecting the performance of these judges in the sense that they cannot feel protected against undue interference or pressure from within or outside the judicial system."[13]

In 2004, the Commission was even emphatic in affirming in its *Report to the OAS General Assembly* for that year how the "norms of the Organic Law of the Supreme Tribunal of Justice [of 2004] would have enabled the Executive Branch to manipulate the process of election of justices carried out in 2004;"[14] which in fact has occurred since then, being the sole exemption the appointment of Justices by the National

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11 *See* "Press Release" of 10-05-2000, *El Universal*, Caracas 11-5-2002.

12 *See* "Informe sobre la Situación de los Derechos Humanos en Venezuela" *[Report on the Status of Human Rights in Venezuela]*, OEA/Ser.L/V/II.118, d.C. 4 rev. 2, 29 of December of 2003, Para. 11, p. 3 ("The Commission has been informed that only 250 judges have been appointed by competitive examination in accordance with constitutional regulations. Of a total of 1772 positions of judges in Venezuela, the Supreme Tribunal of Justice reports that only 183 are incumbents, 1331 are provisional and 258 are temporary.").

13 *Ibid*., paragraphs 11, 12, 159.

14 *See* CIDH, Informe Annual [*Annual Report] 2004*, *cit.*, par. 180.

Assembly elected in 2016, controlled by the opposition, with the consequence of the persecution, incarceration and exile of all those that were appointed. [15]

The Inter-American Court on Human Rights has also ruled - at least on three occasions - against the system of provisional judges appointed and subject to discretionary dismissal by the organs of the Supreme Tribunal, declaring such provisional judge's system to violate the independence of the judiciary as provided in the American Convention on Human Rights. The Court has requested the Venezuelan state to end this system and respect the independence of judges.[16]

Nevertheless, Venezuela has not complied with any of these international judgments in open defiance of international law.[17]

III. POLITICAL CONTROL OF THE HEAD OF THE JUDICIARY AND ITS CATASTROPHIC EFFECTS ON THE ENTIRE JUDICIARY

A political control of the Supreme Tribunal by the Executive Branch, as already mentioned, made evident the latter's control over the entire Judiciary, to the point that in 2006, when the Supreme Tribunal ordered to "convert" temporary, provisional and accidental judges into permanent judges without complying with the public competitive procedures

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15 *See* the comments on that process in Allan R. Brewer-Carías, "La anulación anticipada por la Sala Constitucional, en "Juicio Sumario", de la elección de los Magistrados del Tribunal Supremo y el sometimiento de los mismo a juicio militar," in *Revista de Derecho Público,* No. 151-152, (julio-diciembre 2017), Editorial Jurídica Venezolana, Caracas 2017, pp. 424-429.

16 *See* I/A Court H.R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182; I/A Court H.R., *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197; and I/A Court H.R., *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011. Series C No. 227.

17 *See* Carlos Ayala Corao, *La "inejecución" de las sentencias internacionales en la jurisprudencia constitucional de Venezuela (1999-2009).* Fundación Manuel García Pelayo. Caracas, 2009.

established in the Constitution, [18] this was denounced before the Inter-American Commission on Human Rights as a new attack on the autonomy of the judiciary perpetrated fraudulently against the Constitution.[19]

The Inter-American Commission on Human Rights[20] in its *2008 Annual Report* described this situation of the provisional and temporary nature of judges as an "endemic problem" in the country that exposed the judges to their discretionary dismissal, for which purpose it called attention to the "permanent state of emergency to which judges are subjected."[21]

The same Commission, in its *2009 Annual Report*, ratified its opinion that "in Venezuela judges and prosecutors do not enjoy the guarantee of permanence in office that is necessary to ensure their independence in relation to changes in government policies,"[22] specifically referring in its 2010 Report to the lack of independence and autonomy of the Supreme Tribunal, it emphasised that:

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18 That is why it was even announced publicly, in all cynicism, that "by December 2006, 90% of the judges will be incumbents." *See* in *El Universal*, Caracas 11-10-2006.

19 *See* the complaint of Cofavic, Provea, Espacio Público, UCAB Human Rights Center, Unión Afirmativa and other non-governmental organizations before the Inter-American Commission of Human Rights, in Washington. *See* in *El Universal*, Caracas, 20 October 2006.

20 "Provisional or temporary judges lack stability in the respective positions and therefore, their appointments may be reviewed and annulled at any time, without the requirement to submit them to a prior administrative procedure, nor the obligation to argue the specific and legal reasons that gave rise to the removal, since it is due to purely discretionary reasons" *See* in: https://vlexvenezuela.com/vid/jose-luis-arocha-colmenarez-651885709. The Commission also added that "an aspect linked to the autonomy and independence of the Judiciary is that relating to the provisional nature of judges in the Venezuelan judicial system. Currently, the information provided by the different sources indicates that more than 80% of Venezuelan judges are 'provisional'. "*See Report on the status of Human Rights in Venezuela]*; OAS/Ser.LV/II.118. doc.4rev.2; 29-12-2003, paragraph 161, *in* http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm

21 *See Annual Report 20*08 (OEA/Ser.L/V/II.134. Doc. 5 rev. 1. 25/02/2009), par. 39

22 *See Annual Report 2009*, par. 480, in http://www.cidh.oas.org/annualrep/2009 eng/Chap.IV.f.eng.htm

> "the 49 justices elected (17 principal and 32 alternates) would be supporters of the government, including two new justices who were active parliamentarians in the pro-government majority of the National Assembly."[23]

In 2011, the same Commission reiterated the issue and, in the Report admitting the case *Allan R. Brewer-Carías v. Venezuela,* it recommended that Venezuela:

> "Adopt measures to ensure the independence of the judiciary, making reforms in order to strengthen the procedures for the appointment and removal of judges and prosecutors, affirming their stability in office and eliminating the provisional status of the vast majority of judges and prosecutors, in order to ensure the protection and judicial guarantees established in the American Convention."[24]

The result of all that situation was publicly summarized with all crudeness by a former President of the Criminal Chamber of the same Supreme Tribunal in 2012, declaring, once in exile that justice, particularly criminal justice, was imparted in Venezuela in accordance with the orders received from the Executive Branch and not in accordance with the provisions of the law: "the criterion for "imparting justice" being loyalty to the government and compliance with the orders received from it." He asserted, in essence, that "justice is not worth ...

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23 *See* IICHR, *Annual Report 2010*, OAS/Ser.L/V/II. Doc. 5 corr. 1, 7-3-2011. *See* the *Report on Venezuela* at: http://www.cidh.oas.org/annualrep/2010sp/CAP.IV.VENEZUELA.2010.FINAL.doc.

24 *See* No. 171/11, Case 12.724, Report on the Merits in Admitting the Case: *Allan R. Brewer Carías vs Venezuela,* adopted by the Commission at its meeting No 1891 held on 3 November 2011, OAS/Ser.L/V/II, 143, Doc. 55, 3 November 2011, 143rd regular session). It should be remembered that the decision to admit this case was one of the "reasons" that the government of Venezuela had to denounce the American Convention on Human Rights itself, thereby exerting unacceptable direct pressure on the Court. *See* the text by the letter of the then Foreign Minister of Chávez, Mr. Nicolás Maduro, dated September 6, 2012, in the report by José Insulza, "Venezuela, Letter of Denunciation of the American Convention on Human Rights, #1 125 of 6 September 2012". Available in: https://www.scribd.com/document/105813775/Carta-de-denuncia-a-la-Convencion-Americana-sobre-Derechos-Humanos-por-parte-de-Venezuela-ante-la-OEA

justice is a clay, I say clay because it can be modeled, for or against," concluding that there is no judicial independence whatsoever.[25]

For this reason, the president of the Inter-American Commission on Human Rights, in his Closing Arguments expressed on September 4, 2013, before the Inter-American Court of Human Rights, in the same case *Allan R. Brewer-Carías v. Venezuela,* set clear his opinion that:

> "Regarding the lack of institutional independence, for more than a decade the Commission has identified various threats to the principle of separation of powers in Venezuela, a significant example, among several others, was the appointment of justices of the Supreme Tribunal of Justice in 2000, which is still in effect, without complying with the respective constitutional safeguards to ensure the independence at the head of the judiciary with respect to the legislative and executive branches. As for the lack of personal independence, its clearest manifestation is the endemic temporary and provisional status in which the judicial authorities and the Public Ministry find themselves in Venezuela, as this Court has already been able to confirm in several cases."[26]

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[25] In the statement given to the journalist Verioska Velasco for a TV Program in Miami, USA (SoiTV). The text of the statement made by SoiTV, was published in *El Universal*, Caracas April 18, 2012; available at: http://www.eluniversal.com/nacional-y-politica/120418/historias-secretas-de-un-juez-en-venezuela. Se puede obtener el video en http://www.youtube.com/watch?v=uYIbEEGZZ6s. *See* also the text in the Paper I wrote for the Lecture:: Allan R. Brewer-Carías, "El desmantelamiento de la democracia en Venezuela durante la vigencia de la Constitución de 1999," given at the *Reunión de Medio Año de la Sociedad Interamericana de Prensa con ocasión del Bicentenario de la Constitución de Cádiz de 1812*, Palacio de Congresos, Cádiz, 22-25 abril de 2012. Disponible en: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,%201,%201047.%20SIP%20Cadiz%20bis.%20EL%20DESMANTELAMIENTO%20DE%20LA%20DEMOCRACIA%20EN%20VENEZUELA%201999-2012. .doc.pdf

[26] *See* the report in the book: Allan R. Brewer-Carías (Editor): Persecución política y violaciones al debido proceso. Caso CIDH *Allan R. Brewer-Carías v. Venezuela* ante la Comisión Interamericana de Derechos Humanos y ante la Corte Interamericana de Derechos Humanos. Denuncia, Alegatos y Solicitudes presentados por los abogados Pedro Nikken, Claudio Grossman, Juan Méndez, Helio Bicudo, Douglas Cassel y Héctor Faúndez. Con las decisiones de la Comisión y de la Corte Interamericana de Derechos Humanos como Apéndices*, [Political*

The following year, in March 2014, the *International Commission of Jurists* submitted a report in Geneva specifically referring to the structural problems of the Judiciary in Venezuela, entitled *Strengthening the Rule of Law in Venezuela,* whereby its Secretary General, Wilder Tayler, explained that:

> *"*This report gives an account of the lack of independence of the justice system in Venezuela, starting with the Public Ministry, whose constitutional function in addition to protecting rights is to direct criminal investigations and exercise criminal actions. Failure to comply with the internal regulations themselves has configured a Public Prosecutor's Office without guarantees of independence and impartiality of the other public powers and political actors, with the aggravating factor that prosecutors are almost entirely freely appointed and removed and are therefore vulnerable to external pressures and subject to higher orders.
>
> In the same regard, the Judicial Power has been integrated, starting from the Supreme Tribunal of Justice (TSJ), based on predominantly political criteria for its appointment. Most of the judges are "provisional" and vulnerable to external political pressures, since they are freely appointed and subject to discretionary removal by a Judicial Commission of the TSJ itself, which, in turn, has a marked partisan tendency. [...]."

After noting that "the report also refers to the State's restrictions on the legal profession," Mr. Tayler concluded his Presentation of the Report by categorically stating that:

> *"*A justice system that lacks independence, such as the Venezuelan, is proven to be inefficient for fulfilling its own functions. In this regard, in Venezuela, a country with one of the

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persecution and violations of due process. IACHR case of Allan R. Brewer-Carías v. Venezuela before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Denunciation, Allegations and Petitions submitted by lawyers Pedro Nikken, Claudio Grossman, Juan Méndez, Helio Bicudo, Douglas Cassel and Héctor Faúndez. With the decisions of the Commission and the Inter-American Court on Human Rights as exhibits] (Coordinador y editor) Colección Opiniones y Alegatos Jurídicos, nº 15, Editorial Jurídica Venezolana, Caracas 2016.

highest homicide rates in Latin America and no justice for the victims' families, this figure is close to 98% in cases of human rights violations. At the same time, the judiciary, precisely because it is subject to external pressures, does not fulfil its function of protecting people from abuses of power but, on the contrary, in many cases, is used as a mechanism for persecuting opponents and dissidents or mere critics of the political process, including party leaders, human rights defenders, peasant and trade union leaders, and students."[27]

IV. THE ABSENCE OF THE RULE OF LAW AS A RESULT OF THE POLITICAL CONTROL OVER THE JUDICIARY

The situation continued to be recognized by other international bodies, and for example, two years later, in 2016, the Secretary General of the OAS, Luis Almagro, in the *Report on the Situation in Venezuela in Relation to Compliance with the Inter-American Democratic Charter,* which he presented to the Permanent Council of the Organization on May 30, 2016,[28] in view of the "serious alterations to the democratic order" that had occurred in the country, he stated that:

"There is no clear separation and independence of the public powers in Venezuela, where one of the clearest cases of co-optation of the Judiciary by the Executive Branch is recorded."[29]

In addition, he further denounced:

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27 Available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf

28 *See* the letter of the Secretary-General of the OAS of 30 May 2016 with the *Report on the situation in Venezuela in relation to compliance with the Inter-American Democratic Charter*, p. 125. Available at: oas.org/documents/spa/press/OSG-243.es.pdf. *See* the text in Allan R. Brewer-Carías (Editor), *La crisis de la democracia en Venezuela, La OEA y la Carta Democrática Interamericana. Documentos de Luis Almagro (2015-2017) [The Crisis of Democracy in Venezuela, The OAS and the Inter-American Democratic Charter. Documents by Luis Almagro (2015-2017)],* Segunda edición, Iniciativa Democrática de España y las Américas (IDEA), Editorial Jurídica Venezolana International, Miami 2017.

29 *Idem*. p. 73. Available in oas.org/documents/spa/press/OSG-243.es.pdf.

"The continuity of violations of the Constitution, especially with regard to the balance of powers, functioning and integration of the Judiciary [...].[30]

The Secretary-General went so far as to request:

"a new structure of the Supreme Tribunal of Justice [...] given that the current structure is completely flawed both in the appointment procedure and by the political partiality of practically all its members." [31]

Dr. Almagro himself, on June 23, 2016, when summarizing his *Report,* further expressed before the Permanent Council of the Organization of American States with respect to the situation of the "alteration of the constitutional order," that in Venezuela:

"The Executive has repeatedly employed unconstitutional interventions against the legislature, with the connivance 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 [...]."[32]

Additionally, in September 2019, United Nations High Commissioner for Human Rights Michele Bachelet submitted to the United Nations her *Report on the Situation of Human Rights in the Bolivarian Republic of Venezuela*, with an "overview of the human rights situation" in Venezuela between January 2018 and May 2019,"[33] in which she highlighted what

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30 *Idem*, p. 128. Available in oas.org/documents/spa/press/OSG-243.es.pdf.

31 *Idem*, p. 127. Available in oas.org/documents/spa/press/OSG-243.es.pdf.

32 *See* the text of Secretary General Luis Almagro's presentation to the OAS Permanent Council, June 23, 2016, at: http://www.el-nacional.com/politica/PresentacindelSecretarioGeneraldelaOEAante_NACFIL20160623_0001.pdf.

33 *See* "Report of the United Nations High Commissioner for Human Rights on the status of human rights in the Bolivarian Republic of Venezuela," July 4, 2019, at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18_SP.docx. The "comments of the State" ("Comments on factual errors in the Report of the United Nations High Commissioner for Human Rights on the human rights situation in the Bolivarian Republic of Venezuela"), can be

she called: "patterns of violations that directly and indirectly affect all human rights: civil, political, economic, social and cultural" (§ 2);[34] referring in particular to the situation of the judiciary, justice and the citizen's right of access thereto, stating that:

> "For more than a decade, Venezuela has adopted and implemented a series of laws, policies and practices that have *restricted the democratic space, weakened* public institutions and undermined the independence of the judiciary*"* (§ 76).
>
> "The lack of independence and corruption of the judiciary are also major obstacles faced by victims in their quest for justice and reparation" (§ 56).

For its part, according to the *content of the Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela* submitted on September 15, 2020, to the United Nations Human Rights Council, in compliance with Council resolution 42/25 of September 27, 2019,[35] it has been noted how, against the Constitution:

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found at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18_Add.1.docx

34 *See* on the Report: Allan R. Brewer-Carías, *See*, "El informe Bachelet: Desahucio al régimen," *[*The Bachelet Report: Eviction of the Regime,]" in *Revista de derecho público*, No. 159-160, July-December 2019, Editorial Jurídica Venezolana. Caracas 2019, pp. 185-202; and in the book "Informes sobre violaciones graves a los derechos humanos en Venezuela" *[Reports on serious human rights violations in Venezuela]* (Editors: Allan R. Brewer-Carías, Asdrúbal Aguiar), Democratic Initiative of Spain and the Americas (IDEA), Editorial Jurídica Venezolana International, Miami 2019, pp. 12-46

35 Report of September 15, 2020, available at: https:// www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP.11_SP.pdf The Report was accompanied by "Detailed conclusions of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela" (443 pp.). *See* on Report: Allan R. Brewer-Carías, "Efectos del Informe de la Misión Internacional independiente sobre violaciones a los derechos humanos en Venezuela, en relación con el Estado de derecho y las elecciones" [Effects of the Report of the Independent International Mission on Human Rights Violations in Venezuela, in Relation to the Rule of Law and Elections], in *Revista de Derecho Público*, Nº 163-164, July-December 2020, Editorial Jurídica Venezolana Caracas 2020, pp. 265-274.

> "One of the elements contributing to specific violations and crimes ... is the lack of independence of the Judiciary*"* (par. 148, Report), [having] "the Supreme Tribunal ceased to function as control that is independent from the other branches of the State" (par.154), [and] "the Judiciary itself" has become "an instrument of repression*"* (par.165, Report).[36]

More recently, on 22 June 2021, the International Commission of Jurists again released a new Report entitled *Judges on the Tightrope. Report on the independence and impartiality of the Judiciary in Venezuela,*[37] wherein, exhaustively documenting the matter, she stressed the "control and political influence over the judiciary,*"* as well as the "the role played by the Supreme Tribunal of Justice (TSJ) in breaching the independence of judges throughout the country."

In this regard, the International Commission of Jurists categorically stated that:

> *"*Venezuela's judiciary has become a tool for the executive branch to politically control the country, rather than being a mechanism for the defence of the rule of law in the country. [...]

It is clear from the Commission's reasoning that:

> *"*In Venezuela, the right to justice is not guaranteed, to the extent that we do not have a system of independent and impartial judges."[38]

V. EFFECTS OF THE LACK OF JUDICIAL INDEPENDENCE REGARDING THE LACK OF PROTECTION OF HUMAN RIGHTS VIOLATIONS

The outlook described above, observed since the beginning of the authoritarian regime in Venezuela twenty years ago by all international

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36 On this, in particular, the Mission: "... documented cases in which members of the judiciary participated, by act or omission, in the perpetration of serious violations of rights Human....". (par. 164, Report).

37 Available at: https//www.icj.org/es/venezuela-un-poder-judicial-politizado-que-es-una-herramienta-de-represion-mas-que-un-defensor-del-estado-de-derecho/

38 Available at: https//www.icj.org/es/venezuela-un-poder-judicial-politizado-que-es-una-herramienta de-represion-mas-que-un-defensor-del-estado-de-derecho/

organizations with regard to this matter, as mentioned at the beginning, has been reiterated by *the Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela* of September 16, 2021, presented to the Human Rights Council of the United Nations.

That *Report*, for example, when referring to the procedures for the selection of Supreme Tribunal justices and judges, in general, which according to the Constitution ought to be based on principles for ensuring "a transparent, non-political and merit-based selection of officials," highlighted how:

> "[…] the progressive non-compliance with these rules has led to the deterioration of judicial independence, both internal and external, which affects the justice system. In particular, the political interference in the election of Supreme Tribunal justices has led to permanent changes in their ideological alignment. This has extended its effects to all the institutions of the judiciary" (par. 15).[39]

In particular, the *Report* highlighted how:

> "Over the past few decades, the National Assembly has passed laws that circumvent the constitutionally established process and increase the political influence on the selection of the Supreme Tribunal" (par. 16).

In the same vein, the *Report* highlighted:

> "The importance of these designations is evident given the level of almost total control that the Supreme Tribunal of Justice exercises over the other institutions of the Judiciary" (par. 19).

Finally, in the same month of September 2021, the world witnessed how at the meetings of the UN Human Rights Council in Geneva there was a call for the restoration of the independence of the Judiciary in the country. As expressed by the International Commission of Jurists and the Human Rights Institute of the International Bar Association, in welcoming "the report of the Independent International Fact-Finding Mission":

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[39] Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/A.HRC_.48.69%20ES.pdf

> "We condemn the continued and undue interference of the Executive Branch and the Legislative on the Judiciary, which is reflected in the appointment and arbitrary dismissal of Supreme Tribunal judges and in the pressure exerted on judges, in general, violating the principle of judicial independence."[40]

Before the same Human Rights Council, there was also heard the cry of the ambassador of the European Union to the Organization, Lotte Knudsen: "We ask Venezuela to restore the independence of the judicial system."[41]

In any case, what is important to retain from all this tragic situation of the Judiciary in Venezuela is that it is not a recent phenomenon, but as stated above, it is the result of a systematic and sustained process of destruction of the autonomy and independence of the Judiciary that began to be executed since Hugo Chávez Frías and a group of military who had failed in an attempted military coup d'état in 1992, seized power in 1999, this time through democratic path such as the convening of a Constituent Assembly, -in spite of it not being contemplated in the 1961 Constitution-, to destroy the rule of law and dismantle democracy.[42]

That Assembly set the tone for the permanent political intervention of the Judiciary, which, since then, has been carried out without pause in the country, resulting in the current situation of political control of the Judiciary that has been denounced in all instances and levels as the global characteristic of the authoritarian regime in Venezuela, and the most tragic cause of the demolition of the rule of law, which has led to the lack

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40 *See* "UN: ICJ and IBAHRI Highlight Urgent Need for Accountability for Serious Human Rights Violations in Venezuela," September 24, 2021, available at: https://www.icj.org/es/onu-icj-y-ibahri-destacan-la-necesidad-urgente-de-rendicion-de-cuentas-por-las-graves-violaciones-de-derechos-humanos-en-venezuela/

41 *See* in the report: "Europe denounced the lack of independence of the Venezuelan judicial system before the United Nations, in *El National*, September 24, 2021, available at: https://www.e lnacional.com/mundo/europa-denuncio-falta-de-independencia-del-sistema-judicial-venezolano-ante-las-naciones-unidas/

42 I referred to this as early as 2010 in the book: Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment,* Cambridge University Press, New York 2010, 418 pp.

of autonomy and independence of the Judiciary as a whole, which is also the greatest attack committed in the country against democracy, and against the protection of human rights.

Finally, even more recently, in the *Report of the Office of the United Nations High Commissioner for Human Rights* of November 16, 2021, prepared for submission and consideration by the Human Rights Council for consideration, Working Group on the Universal Periodic Review, Forty-ninth Session, from 24 January to 4 February 2022, the Office of the High Commissioner expressed its continuing concern

> "by the *lack of independence of the judicial system*, which was undermined by insecurity in the position of judges and prosecutors, lack of transparency in the appointment process, precarious working conditions and *political interference*, including *links between members of the Supreme Tribunal and the Government and the party in power*" (par. 30).[43]

For this reason, in the session of January 25, 2022 of the Universal Periodic Review (UPR) held with respect to Venezuela in that UN Human Rights Council, in Geneva, many countries expressed their concern about the *lack of judicial independence in Venezuela*, as for example was the case of the United Kingdom, whose representative expressed:

> "We are very concerned about reports of their use of the judicial system to undermine democracy."[44]

Finally, mention must be made to the *Final Report of the Electoral Observation Mission of the European Union* on the November 21, 2021 Regional and Municipal Elections in Venezuela, which was made public on February 22, 2022, in which the Mission said that most of its interlocutors:

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43 *See* the information of the meeting from January 24, 2022, in: https://www.ohchr.org/SP/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=28043&LangID=S

44 *See* the information in: "Reino Unido denunció en la ONU el uso del sistema judicial para "socavar la democracia" en Venezuela," in *Lapatilla.com*, January 25, 2022; available at: https://www.lapatilla.com/2022/01/25/reino-unido-denuncio-en-la-onu-el-uso-del-sistema/

"criticized the lack of independence of the Supreme Tribunal of Justice and its politically motivated decisions. According to the Report of the UN Independent International Fact-Finding Mission, the main problems of the judiciary are "political interference in the election of judges to the Supreme Tribunal" and that legal and administrative reforms have contributed to the "deterioration of the independence of the justice system." [45]

VI. THE INEFFICIENCY OF THE RECENT UNCONSTITUTIONAL REFORM OF THE SUPREME TRIBUNAL ORGANIC LAW (2022)

That is why, the High Commissioner on Human Rights of the UN, in her February 2022 *Report* also indicated how she had recommended "effective measures to restore the independence of the judicial system," but the truth is that the response obtained in Venezuela was the partial and unconstitutional reform of the Organic Law of the Supreme Tribunal of Justice sanctioned on January 19, 2022.[46]

With this reform the number of Judges of the Chambers was reduced, providing for the appointment of new Judges (allowing reelection of the current on office, which is not allowed in the Constitution), but continuing for such purpose with the same unconstitutional composition of the "Committee of Judicial Nominations" which was established since 2000, which allows the National Assembly, contrary to the provisions of article 270 of the Constitution, to have control of it by having as members of the Committee (which can only be composed of representatives of the various sectors of society) a majority of 11 members of the Assembly (of the 21 members) thus ensuring political control of the nominations, as has happened in the past; especially if the other 10 members of the Committee are also "pre-selected" by a "Preliminary Commission" composed only and also of 11 members of the Assembly (arts. 64, 65).

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45 *See* the information in: https://eeas.europa.eu/election-observation-missions/eom-venezuela-2021/111308/informe-final-moe-ue-venezuela-2021_es

46 *See* in *Gaceta Oficial* No. 6.684 of January 19, 2022

The reform has not been anything else but a "reform" so that everything remains the same.[47]

That is why, the Interamerican Commission on Human Rights warned that to change "the composition of the nomination committee of people who aspire to be magistrates of the TSJ, establishing that its majority will be composed of members of the National Assembly instead of other sectors of society […] tends to deepen the institutional crisis because the 2020 parliamentary elections did not enjoy minimum conditions to be considered free or fair," agreeing

> "with the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, promoted by the United Nations, when it points out that "the justice system has played a significant role in State repression of opponents of the government instead of providing protection to victims of human rights violations and crimes." In this regard, it urges the adoption of reforms truly committed to consolidating the independence of the Supreme Tribunal of Justice from the Executive Branch and rebuilding a system of checks and balances." [48]

In any case, this absence of independence and autonomy of the judiciary and in particular of the Supreme Tribunal of Justice, and of its Constitutional Chamber, which has become the most devious instrument of authoritarianism,[49] is the factor that has contributed most to the

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47 *See* the comments made by: *Acceso a la justicia.ong*, "Nueva Ley Orgánica del TSJ confirma la falta de voluntad política para construir una justicia independiente en Venezuela, January 21, 2022; available at: https://accesoalajusticia.org/nueva-ley-organica-del-tsj-confirma-la-falta-de-voluntad-politica-para-construir-una-justicia-independiente-en-venezuela/ *See* the comments made by the Nacional Academy of Political and Social Sciences, (Academia de Ciencias Políticas y Sociales), in "Pronunciamiento sobre la Reforma de la Ley Orgánica del Tribunal Supremo de Justicia," Caracas, January 2022.

48 *See* "La CIDH expresa preocupación por la reforma a la Ley Orgánica del Tribunal Supremo de Justicia de Venezuela," February 17, 2022; available at: https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2022/034.asp

49 *See* Allan R. Brewer-Carías, "El juez constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009)", en *Revista de Administración Pública*, No. 180, Madrid 2009, pp. 383-418; "El rol del Tribunal

demolition of the rule of law, being the greatest attack committed in the country against democracy, and against respect for and protection of human rights.

Therefore, it is incomprehensible that, in contrast, the authoritarian regime of Venezuela, through the person who acts as Attorney General of the Republic, expressed in 2021, not known whether with cynicism or mockery, that allegedly:

> "Justice is served in Venezuela. There is a justice system, with the limitations of any developing democracy, but with a higher standard than any other country in the Western Hemisphere. "[50]

This, of course, is not believed by anyone, neither inside nor outside the country, particularly after the twenty-year assault on the Judiciary and its political control has been denounced in all instances and levels as the global characteristic of the authoritarian regime in Venezuela, and the most tragic cause of the demolition of the rule of law, which has led to

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Supremo de Justicia en Venezuela, en el marco de la ausencia de separación de poderes, producto del régimen autoritario," en *Segundo Congreso Colombiano de Derecho Procesal Constitucional*, *Bogotá D.C., 16 de marzo de 2011*, Centro Colombiano de Derecho Procesal Constitucional, Universidad Católica de Colombia, Bogotá de Bogotá 2011, pp. 85-111. *See* also Caros Ayala Corao and Rafael Chavero, *El Libro negro de TSJ: del secuestro de la democracia y la usurpación de la soberanía popular a la ruptura constitucional 2015-2017*, Editorial Jurídica venezolana, 2017; Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de derecho*, Editorial Jurídica venezolana, 2016; 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; Allan R. Brewer-Carías, La consolidación de la tiranía judicial, Editorial Jurídica venezolana, 2017; available at: 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

50 *See* in the report: "The prosecutor of Chavismo said that justice in Venezuela works with "a higher standard than any other country in the Western Hemisphere." Tarek William Saab referred to the opening of an investigation into the judge who acquitted the sergeant who murdered young David Vallenilla during the 2017 protests. *Infobae*, 30 September 2021; available at: https://www.infobae.com/america/venezuela/2021/09/30/el-fiscal-del-chavismo-dijo-que-la-justicia-en-venezuela-funciona-con-un-estandar-superior-a-cualquier-otro-pais-del-hemisferio-occidental/

the lack of autonomy and independence of the Judiciary as a whole, which is also the greatest attack committed in the country against democracy, and against the protection of human rights.

Without independent and autonomous justice, there simply cannot be democracy, because there can be no control of the actions of the State, which means that, for example, within the framework of the provisions of the Inter-American Democratic Charter, whose twentieth anniversary was celebrated last year (2021), without judicial control by autonomous and independent judges, respect for human rights and fundamental freedoms simply cannot be guaranteed; neither can access to human rights and fundamental freedoms be guaranteed; nor that power and the exercise thereof will be subject to the rule of law; nor the holding periodic, free, fair elections based on universal and secret suffrage as an expression of the sovereignty of the people; nor the existence of a plural regime of political parties and organizations; nor the separation and independence of public authorities.

Furthermore, there is no guarantee of transparency in government activities, nor of probity and responsibility of Governments in public management, nor respect for social rights and freedom of expression and of the press, nor, of course, that the constitutional subordination of all State institutions to the legally constituted civil authority can be ensured, nor respect for the rule of law by all entities and sectors of society.

And that is precisely why, on February 15, 2022, on a Special meeting to discuss the situation of Venezuela, the United States, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, the European Union, France, Germany, Italy, Japan, New Zealand, Panama, Paraguay, Portugal, Spain, Sweden, and the United Kingdom, reaffirmed "their commitment to a Venezuelan-led negotiated solution to restore democracy," highlighting the need to restore "the independence of the judiciary" […] among the most fundamental conditions necessary for democratic institutions to flourish in Venezuela."[51]

New York, February 22, 2022

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[51] *See* US Department of State, Media Note, Office of the Spokesperson, "Readout of the High-Level Coordination Meeting on Venezuela," February 16, 2022; available at: https://www.state.gov/readout-of-the-high-level-coordination-meeting-on-venezuela/

PART FIVE

THE HARMFUL PROJECTION OF THE POLITICAL CONTROL OVER THE JUDICIARY ON THE INTER-AMERICAN JUDICIAL SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*

I. THE EXTENSION OF THE LONG ARM OF THE AUTHORITARIAN REGIME'S POLITICAL PRESSURES ON THE JUDICIARY INTO INTERNATIONAL JUSTICE

Unfortunately, the long arm of political pressure with which the authoritarian regime in Venezuela has exerted control over judges at a domestic level was also extended by Hugo Chávez to the international arena.

This happened, in particular, regarding the Inter-American Court of Human Rights, which was also reached, to the point that - at least in one case that I know well, international justice ceased to be blind, and on the contrary, it saw with eyes wide open the State that Chávez governed, falling under the pressures exerted by him together with his then foreign minister, Nicolás Maduro. On that occasion the Court decided, contrary to what all international instances had confirmed, that a justice system was fully functioning in Venezuela, to the point of deciding that the victim, who was under political persecution and had been convicted in advance - in violation of his due process right to be presumed innocent -, by all sorts of regime officials, including justices of its Supreme Tribunal, should

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* This text is part of the article; Allan R. Brewer-Carías, "Dismantling the Rule of Law by politically controlling the Judiciary in Venezuela and its harmful projection on the Inter-American judicial system for the protection of human rights," in *European Review of Public Law/Revue Européenne de Droit Public*, vol. 33, no 3, autumn/automne 2021 pp. 877-918.

"confidently" agree to undergo a criminal trial in Venezuela to try to exhaust instances and then, if he did not find justice, resort to the International Court, perhaps from the afterlife[1].

Indeed, the situation of deterioration of the Judicial Power of Venezuela described above as was explained for two decades by the competent international bodies, was the same that existed during the seven years, between 2007 and 2014, during which the international judicial process before the Inter-American Court in the case *Allan R. Brewer Carías v. Venezuela* evolved. In particular it brought before the Court the dramatic and crude confirmation of the situation of the Judicial Power in the country confessed by the former Chairman of the Criminal Chamber of the Supreme Tribunal of Justice, Mr. Eladio Aponte Aponte, who after moving to the United States in 2012, publicly expressed, with surprising audacity, various facets of his behaviour as a judge. What he said, -in addition to being in themselves repulsive-, revealed with extraordinary harshness the tragic situation of the subjection of the Judicial Branch to the Executive Branch, highlighting the crushing of the principle of the separation of powers that has occurred in the country under the force of the 1999 Constitution. In addition, he clearly expressed that justice, particularly criminal justice, was dispensed in Venezuela according to the orders received from the Executive Branch and not to what the law provides, since the criterion for "dispensing justice" was to be loyal to the government and to comply with the orders received from it. He basically stated that "justice has no value... justice is like modelling clay, I say modelling clay because it can be shaped for or against," concluding that there is no judicial independence[2].

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1 I/A Court H.R., *Case of Brewer Carías v. Venezuela*. Preliminary Objections. Judgment of May 26, 2014. Series C No. 278.

2 In the interview given to journalist Verioska Velasco for a television station in Miami, USA (SoiTV). The text of the interview is in the transcript made by the SoiTV, published *in: El Universal*, Caracas 18 April 2012, available at: http:// www.eluniversal.com/nacional-y-politica/120418/historias-secretas-de-un-juez-en-venezuela. The video is available at: http://www.youtube.com/watch?v =uYIbEEG ZZ6s. *See* the transcript of the interview in Allan R. Brewer-Carías, El desmantelamiento de la democracia en Venezuela durante la vigencia de la Constitución de 1999 [The dismantling of democracy in Venezuela during the validity of the 1999 Constitution], delivered at the *Reunión de Medio Año de la*

However, ignoring the case file that was before it, the Inter-American Court of Human Rights on May 26, 2014, in the case of *Allan R. Brewer Carías v. Venezuela*, issued its wrongful decision No. 277, which was signed by Judges: Humberto Antonio Sierra Porto, President and Rapporteur; Roberto F. Caldas, Diego García-Sayán and Alberto Pérez Pérez, with a very relevant and reasoned *Joint Dissenting Vote* of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot[3]. With this ruling, the Court, instead of being blind, rather saw very clearly the jaws of authoritarianism and did not dare confront it, and refused to judge the evidence that proved the situation of lack of autonomy and independence of judges in Venezuela, thus denying me (Allan R. Brewer-Carías) the international justice I was claiming, and instead protecting the State that was a predator of the internal judicial institutions.

As highlighted by Professor Antonio Filiu Franco of the University of Oviedo, the most worrying aspect about the decision was the coincidence:

> "between the accusations made by the Venezuelan Government in the case of Allan R. Brewer Carías v. Venezuela in the text submitted to the Secretary General of the Organization of American States to denounce the Pact of San José [American Convention on Human Rights], and the intention and form of the reasoning made by the Inter-American Court on Human Rights to support its decision to

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Sociedad Interamericana de Prensa con ocasión del Bicentenario de la Constitución de Cádiz de 1812, Palacio de Congresos, Cádiz, 22-25 abril de 2012. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,%201,%201047.%20SIP%20Cadiz%20bis.%20EL%20DESMANTELAMIENTO%20DE%20LA%20DEMOCRACIA%20EN%20VENEZUELA%201999-2012..doc.pdf

[3] Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_278_esp.pdf. Judge Eduardo Vio Grossi, on 11 July, 2012, as soon as the case was filed before the Court, very honorably excused himself from participating in it in accordance with Articles 19.2 of the Statute and 21 of the Rules of Procedure of the Court, recalling that in the eighties he had worked as a researcher at the Institute of Public Law of the Central University of Venezuela, when I was Director of the same, specifying that although this had happened quite some time ago, "I do not wish that this fact could provoke, if I participated in this case in question, any doubt, however minimal, about the impartiality" both his "and especially of the Court." The excuse was accepted by the President of the Court on September 7, 2012, after consulting with the other Judges, considering it reasonable to accede to the request.

accept the preliminary objection filed by the State regarding the non-exhaustion of domestic remedies and, consequently, to close the case file without analysing the substance of the case.

In other words, the majority criterion that determined the meaning of the judgment – which was harshly criticized in the joint dissenting vote of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot – *accepted the position advocated by the State to the detriment of the right of access to an independent and impartial justice claimed by Professor Brewer-Carías, in overt contradiction with the interpretation of the pro homine* principle mandated by Article 29 of the American Convention on Human Rights (ACHR). *Therefore, one cannot avoid thinking that the Inter-American Court of Human Rights has yielded, with inconsistent reasoning, in face of the sovereign claims of the Venezuelan State*. Undoubtedly, this is an alarming precedent in the jurisdictional actions of one of the main guarantors of Human Rights in Latin America: the Inter-American Court of Human Rights, which, by ordering the shelving of the case, has also factually condemned Professor Dr. Allan R. Brewer-Carías to the lacerating punishment of banishment in perpetuity, which, by the way, is expressly prohibited by Article 22.5 ACHR."[4]

The Inter-American Court, in fact, in its judgment did not decide on any of the allegations and evidence of massive violations of my rights and judicial guarantees (to my defence, to being heard, to the presumption of innocence, to be tried by an impartial and independent judge, to the due process of law, to follow a trial in liberty, to judicial protection) sanctioned in Articles 44, 49, 50, 57 and 60 of the Venezuelan Constitution and in Articles 1.1, 2, 7, 8.1, 8.2, 8.2.c, 8.2.f, 11, 13, 22, 24 and 25 of the American Convention on Human Rights, which had occurred in the parodic criminal proceeding initiated against me for the alleged crime of "conspiring to violently change the Constitution" (which was merely a media montage to persecute me politically). And, more

[4] *See* Antonio-Filiu Franco, "Un alarmante cambio en la doctrina de la Corte Interamericana de Derechos Humanos: El Caso *Brewer Carías v. Venezuela"* [An Alarming Change in the Doctrine of the Inter-American Court of Human Rights: The Case of *Brewer Carías v. Venezuela*], *in: Cuadernos Manuel Giménez Abad*, Nº 8, Diciembre 2014, Fundación Manuel Giménez Abad de Estudios parlamentarios y del Estado Autonómico, Madrid, pp. 85-91

notoriously, the Inter-American Court not ruling on the merits of the lack of an autonomous, impartial and independent judiciary, only decided to admit the preliminary objection brought by the State about an alleged lack of exhaustion of domestic remedies (which was not true, since I had exhausted the action for constitutional protection [*amparo*] that was the only one available when the international process began in 2007). The Court, thereby, protected the State, denying my right of access to justice, and shelving the case, it finally endorsed the flawed Judiciary that existed in the country. In this case the Court further ignored the basic principle of international human rights law: a victim is not requested to exhaust the domestic remedies in accordance with generally recognized principles of international law when:

> "a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
>
> b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
>
> c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."[5]

That was exactly what the Inter-American Court did in that case by accepting the exception of non-exhaustion of local remedies that did not exist. At the end, what it did was to take for good the rotten Judicial Power that existed, ultimately deciding that the victim should go to the country to surrender to his persecutors to supposedly make the process move forward and, after all his rights were definitively crushed, as I said, perhaps be able to claim international justice from the afterlife.

II. THE INTER-AMERICAN COURT'S REFUSAL TO JUDGE THE SITUATION OF THE JUDICIARY IN VENEZUELA IN 2014

With that ruling, the Court violated the victim's right of access to international justice, and instead protected the State, failed to perform the

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[5] American Convention on Human Rights, Art. 46.2.

conventional obligations it had to judge on the basis of the massive violation of my rights and guarantees, thus abandoning its most traditional and leading jurisprudence established since the case *Velásquez Rodríguez v. Honduras* of 1987[6]. Such jurisprudence imposed on it the obligation to hear the merits of the case when the complaints made against a State were for violations of judicial guarantees, such as violations of the rights to due process, to an independent and impartial judge, to the defense to the presumption of innocence, and to judicial protection.

In such cases, according to the Court's own case law, the objection of failure to exhaust domestic remedies cannot be decided without determining whether the judiciary is in fact reliable, suitable and effective for judicial protection. Therefore, as Judges Eduardo Ferrer Mac-Gregor and Manuel Ventura Robles warned "with concern" in their Joint Dissenting Vote on the judgment, "*for the first time in its history, the Court does not weigh the merits of the litigation and admits a preliminary objection of lack of exhaustion of domestic remedies*, which in this case is related to Articles 8 and 25 of the American Convention on Human Rights."

For all these reasons, in that judgment the Court decided, no more no less, as I said before, that I, as the victim, should return to Venezuela to surrender to my persecutors so that they could deprive me of my freedom and rights and, without any judicial guarantees, attempt to pursue from a prison a judicial process that was flawed from its inception. All this, despite the fact that the Court in its decision admitted - but without judging that situation - that in Venezuela there is "a structural problem that would affect the independence and impartiality of the judiciary and that would be synthesized in the subjection of the judiciary to the interests of the power of the executive branch." (par. 103).

Therefore, in my case (*Allan R. Brewer Carías v. Venezuela*), the rule of prior exhaustion of domestic remedies was not applicable, because there was no due process of law, because I did not have access to any really effective remedy, and because of the unjustified delay in resolving

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6 Case *Velásquez Rodríguez v. Honduras*. Preliminary Objections. Judgment of 26 June 1987. C Series No. 1.

the absolute nullity requested, which was the only available and theoretically effective remedy at the time of the beginning of the intermediate stage; which ultimately derives from the fact that there is no autonomous and independent judiciary in Venezuela.

In the case of persecution against me in Venezuela, not only was I "convicted" in advance by all sorts of officials in violation of the presumption of innocence, but I was prevented from using the remedies that should normally provide my defense within the criminal process, which were arbitrarily disregarded by the prosecution authorities and the judicial system, for the paralysis of the proceedings due to the inaction of the trial judge. As the Inter-American Court had said, in a similar situation, but that was ignored in this case:

> "resorting to these remedies becomes a formality that is meaningless. The exceptions in Article 46.2 would be fully applicable in such situations and would exempt the need to exhaust local remedies which, in practice, cannot achieve their purpose."[7]

This was precisely the conclusion reached by the Inter-American Commission on Human Rights in the case, expressed in the *Closing Remarks* formulated before the Court by Dr. Felipe González at the hearing of September 4, 2013, stating:

> "To date, the State has not provided an argument aimed at distorting the structural elements of this factual situation that has been in effect since the beginning of the criminal process that continues to this date and that has had very specific implications in the criminal prosecution of Mr. Brewer-Carías.
>
> [...] the structural deficiencies of the Venezuelan judiciary have not been carried out by the State and that they have had clear implications in Mr. Brewer-Carías' criminal proceeding, so the application of the exceptions with regard to the exhaustion of domestic remedies is even more justified."

The magnitude of the decay of the Venezuelan Judicial System was set forth before the Inter-American Court by my representatives in the

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[7] Inter-American Court of Human Rights, *Velázquez Rodríguez* case. Merits; *cit*., par. 68; Corte IDH, *Godínez Cruz* case. Merits; par. 71.

trial, my friends and prominent professors Pedro Nikken, Claudio Grossman, Juan Méndez, Helio Bicudo, Douglas Cassel and Hector Faúndez, who provided evidence of the endemic dependence of the Venezuelan Judicial System, particularly because of its vulnerability with respect to other spheres of power on which their permanence in office depends; having underlined in the case before the Court, that all the judges and prosecutors who acted in the case against me in Venezuela were *provisional.* The fear of reprisals against them, as provisional judges, originated, in the first place, in the numerous demonstrations of high officials of the State, which included the heads of the Judiciary and the Public Prosecutor's Office, in which they affirmed my guilt regarding the facts that were fallaciously attributed to me. Such expressions are the proof of many other violations of the presumption of innocence and impartiality that these officials had to observe. And in addition, it is also evident that they were intended as messages to the provisional prosecutors and judges, who dared not decide according to Law and to their conscience what they might imagine would be unfavourable to the government, if they wished to continue in their positions.

In any case, as has been noted by Professor Enrique Gimbernat, one of the most prominent specialists in criminal law in Spain, after studying the criminal charge filed against me by Luisa Ortega Díaz, the then Venezuelan Public Prosecutor, in that case all my rights and judicial guarantees were "*massively violated,*" especially my rights to the presumption of innocence and to defence. In explaining in detail the reasons for these violations, what professor Gimbernat expressed was his "*bewilderment and perplexity*" after reading the accusation made against me, indicating that he remained "*astonished and bewildered*" not only because the Public Prosecutor's Office attributed to me the participation in a punishable act based on "statements of alleged referential witnesses", failing to identify their source, but because, ultimately, none of such witnesses accused me of anything; but because:

> "said Public Prosecutor's Office, through an unreasonable and unreasonable discursive, illogical, incoherent process contrary to the rules of human criteria, transforms into inculpatory evidence what is unequivocally exculpatory evidence."

Professor Gimbernat's astonishment, bewilderment and perplexity is summed up in his general assessment that after having studied the imputation, he had been left with:

> "the impression of having entered *an upside-down world* where what are evidentiary elements of discharge become, for the Public Prosecutor's Office and as by magic, evidentiary elements of charge."[8]

All of the foregoing was ignored by the Inter-American Court, which limited itself to saying that "although it is true that in its arguments before this Court, the Inter-American Commission has insisted that 'the problem raised in this case is of a structural nature and results from a factual situation of the Judicial Branch that goes far beyond the abstract regulation of the criminal procedure, "in short, it limited itself to stating that "*it does not have elements*" *to judge* on the inadmissibility of the exception provided for in Article 46.1.a of the Convention," arguing that:

> "the direct application of the exception contained in Article 46.2.a of the Convention cannot be derived from an alleged structural context of provisional status of the judiciary, since this would imply that based on a general argument on the lack of independence or impartiality of the judiciary it would not be necessary to comply with the requirement of the prior exhaustion of internal remedies" (Par. 105).

On this decision, the *Joint Dissenting Vote* of Judges Ferrer Mac-Gregor and Ventura Robles was devastating, highlighting, in the first place, that the sentence totally omitted "in the chapter of the 'determination of the pertinent facts' the issue of the provisional status of prosecutors and judges in Venezuela, a central element that had been specifically debated between the parties, there being abundant material in the case file regarding the concrete facts on this matter."

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[8] *See* the Legal Opinions given by Professor Enrique Gimbernat in the case in 2005, in his book: Enrique Gimbernat, Presunción de inocencia, Testigos de referencias y conspiración para delinquir [Presumption of Innocence, Reference Witnesses and Conspiracy to Commit a Crime], Ediciones Olejnik, Buenos Aires, Madrid, 2021.

In the second place, the dissenting judges stressed that "*there is no doubt that this problem about the provisional status of judges and prosecutors in this country, which has already been addressed by the Court in the cases of Apitz Barbera et al.*[9]*, Reverón Trujillo*[10] *and Chocrón Chocrón*[11] *v. Venezuela, is intimately linked to the matter of judicial remedies in the domestic jurisdiction*," and that the Court had already determined "a series of proven facts in these cases in relation to the main aspects of the process of judicial restructuring in that country." Judges Ferrer Mac-Gregor and Ventura Robles rightly concluded that:

> "the right thing to do would have been to combine the study of the preliminary objection for the failure to exhaust local remedies with the analysis of the substantive arguments in the present case, as the Court has done on other occasions" (para. 69).

Due to all of the above, and after highlighting in detail all the decisions of the Inter-American Court itself on the matter in the judgments issued in the aforementioned cases (paragraphs 70-75), Judges Ferrer Mac-Gregor and Ventura Robles considered that it had been proven:

> "clearly that the study of the dispute arisen with respect to the exhaustion of domestic remedies, specifically that related to the exception contained in Article 46.2.a, is intimately linked to the problem of the provisional status of judges and prosecutors in Venezuela, which undoubtedly relates to Article 8.1 of the American Convention - the right to a competent judge or court, independent and impartial - taking into account that the allegations are credible and that, if proven, they could constitute violations of the Pact of San José. For this reason, we consider that the study of this matter cannot be separated from the analysis of the merits of the case and, therefore,

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9 Case *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 August 2008. C Series C Nº 182.

10 Inter-American Court of Human Rights. Case *Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 30 June 2009. C Series C Nº 197.

11 Case *Chocrón Chocrón v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. C Series No. 227.

the Court should have analysed the preliminary objection presented by the State jointly with the substantive arguments presented by the parties in this case, as the Inter-American Court had done according to its historical jurisprudence on the matter." (Par. 75).

However, the most unusual thing about the Inter-American Court's ruling was that in the case *Allan R. Brewer Carías v. Venezuela*, the State limited itself to pointing out a long list of alleged remedies that were impossible to exhaust, because in this case the judge never issued a judgment that could be subject to an appeal. In particular, the appropriate remedy available at the time was never decided, which was the petition for criminal protection (*amparo penal*) requesting the absolute nullity of the proceedings that I had filed. Therefore, there were no grounds for what the Inter-American Court claimed in its judgment, in the sense that "due to an alleged "*early stage*" at which the process supposedly was, although it did recognize "that various requests for nullity had been filed by Mr. Brewer Carías' defence" (Par. 97).

Without questioning in any way the effectiveness of these nullity petitions, nevertheless, the Court ruled to protect the State by stating that "the remedies that the State set forth as adequate were not filed, namely, the appeal established in Articles 451 to 458 of the Organic Code of Criminal Procedure, the cassation appeal referred to in Articles 459 to 469 of the Organic Code of Criminal Procedure, and the remedy of review set forth in Articles 470 to 477 of the Organic Code of Criminal Procedure" (paragraph 97).

Surely, these appeals were not filed because it was impossible to do so, since there were no judicial acts or decisions against which to file them because the process had not gone beyond the "early stage," in which stage it was according to the Court, due to the fault of the State itself, since the judge had never decided on the attempted appeal for nullity or protection. The Court accepted the State's enumeration of alleged remedies – in which it did not include the attempted petition for absolute nullity (*amparo*) – without any explanation of how these could have been exhausted, except by handing me over to my political persecutors without any guarantee that the process would move forward in accordance to the due process of law.

As judges Ferrer Mac-Gregor and Ventura Robles emphasized in their *Joint Dissenting Opinion*, "regarding the filed remedies for absolute nullity, the State did not say that these were not the adequate and effective remedies that should be exhausted, but, on the contrary, it merely noted the pending remedies that should be exhausted at later stages" (Par. 53), warning the dissenting judges in any case, that:

> "in the proceedings before the Inter-American Commission, in its admissibility stage, the State really did not in fact specify which were effective and appropriate remedies and limited itself to pointing out, in a generic manner, that there is still no first instance judgment that would enable the filing of appeals against the orders, appeal from a final judgment, revocation, cassation, review in criminal matters, amparo and constitutional review. *What the State actually does is to simply mention all the remedies available at the various stages of the proceedings, but it does not refer specifically to the remedies for annulment and whether these were the appropriate and effective remedies*" (Par. 36).

This allows to conclude that what the State purported was that for any decision to be issued in the process in Venezuela if with any luck it were issued, it demanded that I previously surrender myself to my persecutors and that I abdicate my freedom that protected me from them. It was, to the very least, an irony of bad taste, especially when the State had used the system of international protection in order to gain support for such an abject purpose. And none other resulted from the judgment No. 277 issued by the Inter-American Court of Human Rights, from which it was inferred that in order to seek international justice, I had to surrender to a system in which there was no justice and a lack of independence and autonomy of the judges, which the Inter-American Court, in protecting the State, refused to judge, thus making it impossible for me to obtain the justice sought.

As duly highlighted by Judges Ferrer Mac-Gregor and Ventura Robles in their Joint Dissenting Vote on the decision:

> "The interpretation made of Article 7.5 of the American Convention in the Judgment departs from the provisions of Article 29 of the Pact of San José, which establishes that no provision of the Convention may be interpreted as to allow any of the States Parties to *suppress or limit the enjoyment and exercise of the rights and*

freedoms recognized in the Convention. The majority criterion does not carry out its analysis of Article 7.5 of the Convention in light of Article 29 thereof, but decides, on the contrary, to make a restrictive and limiting interpretation of that article, leaving aside the *pro homine* nature that such an interpretation must carry in accordance with the aforementioned Article 29 of the Convention and the constant case law of the Court, in the understanding that involves the right to personal freedom. *To purport that Mr. Brewer Carías return to his country to lose his freedom and, under those conditions, personally defend himself in court, constitutes an inconsistent reasoning that restricts the right of access to justice, since the case has not analysed precisely the substantive aspects invoked by today's alleged victim pertaining to various violations of Articles 8 and 25 of the American Convention*, which in a consubstantial manner impose conditions on the interpretative scope of Article 7.5 of the Pact of San José regarding the right to personal liberty" (Par. 114) (our emphasis).

III. THE FLAGRANT POLITICAL PRESSURE EXERTED BY THE GOVERNMENT OF VENEZUELA AGAINST THE INTER-AMERICAN COURT

For all this incomprehensible situation and the incomprehensible decision of the Inter-American Court of Human Rights issued in the case *of Allan Brewer Carías v. Venezuela*, with all the allegations submitted by my lawyers, as well as in multiple *amicus curiae*, being ignored by the Inter-American Commission, in my opinion there is no other explanation than the *regrettable and illegitimate extension of the long arm of political pressure over the judges exercised by Venezuela's authoritarian regime, which has unfortunately reached beyond borders to the Inter-American Court of Human Rights*.

These pressures were expressly made public when the then Minister of Foreign Affairs of the Venezuelan regime, Mr. Nicolás Maduro, addressed to the Secretary General of the Organization of American States a letter formally denouncing the American Convention on Human Rights, referring to an alleged smear campaign against Venezuela by the

Inter-American Commission on Human Rights and by the Inter-American Court of Human Rights[12], and all this, indicating as part of the smear campaign, none less than a case then pending before the Court, which had not yet been decided, and was precisely the case *Allan R. Brewer Carías v. Venezuela*, thus exerting an inadmissible direct pressure before the Court, a fact that was even denounced by my lawyers[13].

In that letter, the government of Venezuela directly accused the Inter-American Commission and the Inter-American Court of being institutions "kidnapped by a small group of unscrupulous bureaucrats" that had prevented the necessary reforms to the "so-called" Inter-American System, and that had become "a political missile aimed at undermining the stability" of the country, "adopting an interventionist line of action against the internal affairs" of the government, which, the Foreign Minister affirmed, were unaware of the content and provisions of the Convention that he was denouncing, particularly the requirement that in order for the actions of these agencies to be admissible, it was necessary "to exhaust the State's domestic remedies," which, in the Opinion of the

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12 This decision, as highlighted by Carlos Ayala Corao, was not only made in bad faith in the face of international law, but in open violation of the express norms of the 1999 Constitution. *See* in Carlos Ayala Corao, Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela [Unconstitutionality of the Denunciation of the American Convention on Human Rights by Venezuela], *in: Anuario de Derecho Constitucional Latinoamericano 2013.*

13 *See* the arguments expressed at the trial in: ALLAN R. BREWER-CARÍAS (Editor): Persecución política y violaciones al debido proceso. Caso CIDH Allan R. Brewer-Carías v. Venezuela ante la Comisión Interamericana de Derechos Humanos y ante la Corte Interamericana de Derechos Humanos [Political persecution and violations of due process. IACHR case of Allan R. Brewer Carías v. Venezuela before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights]. Denuncia, Alegatos y Solicitudes presentados por los abogados Pedro Nikken, Claudio Grossman, Juan Méndez, Helio Bicudo, Douglas Cassel y Héctor Faúndez. Con las decisiones de la Comisión y de la Corte Interamericana de Derechos Humanos como Apéndices, Colección Opiniones y Alegatos Jurídicos [Complaint, Allegations and Requests presented by lawyers Pedro Nikken, Claudio Grossman, Juan Méndez, Helio Pointy, Douglas Cassel and Héctor Faúndez. With the decisions of the Commission and the Inter-American Court of Human Rights as Appendices, (Coordinator and editor) Collection of Opinions and Legal Allegations], nº 15, Editorial Jurídica Venezolana, Caracas 2015.

State, constituted "contempt for the domestic institutional and legal order of each of the States." All this, for the Foreign Minister, had been made by the Commission and the Court "as an exercise of flagrant and systematic violation" of the Convention, which as he indicated, was evidenced "in the cases that we set forth in detail attached to this Note" (including the case of *Brewer Carías v. Venezuela*) deemed to be instruments for "underpinning the international smear campaign" against Venezuela[14].

Specifically, regarding the case *Allan R. Brewer Carías v. Venezuela*, Foreign Minister Maduro explained to the Secretary General of the OAS that it had been "admitted by the Commission without the complainant having exhausted domestic remedies, violating the provisions of Article 46.1 of the Convention and urging the Venezuelan State to adopt measures to ensure the independence of the judiciary." The Foreign Minister added in his communication that this:

> "*irregular behaviour of the Commission,* ***unjustifiably*** *favourable to Brewer Carías, in fact produced, as of the mere admission of the cause, the underpinning of the international smear campaign against the Bolivarian Republic of Venezuela, by accusing it of political persecution*."[15]

All this irregular pressure was accurately summarized by Professor Antonio Filiu Franco, when analysing the decision, in his work on "*An alarming change in the doctrine of the Inter-American Court of Human Rights*," when highlighting the communication of the then Foreign Minister Maduro that:

> "The text in question – an authentic memorial of the alleged grievances on Venezuela as a result of the presidential mandate of Hugo Chávez – accuses both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights of having become:

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14 *Idem*.

15 *See* in José Insulza, Venezuela, Carta de denuncia de la Convención Americana de Derechos Humanos, nº 125 of 6 September 2012. Available at: https://www.scribd.com/document/105813775/Carta-de-denuncia-a-la-Convencion-Americana-sobre-Derechos-Humanos-por-parte-de-Venezuela-ante-la-OEA

> (...) a political missile aimed at undermining the stability of certain governments, and especially that of our country, by adopting an interventionist line of action against the internal affairs of our government, violating and ignoring basic and essential principles widely enshrined in international law, such as the principle of respect for the sovereignty of States and the principle of self-determination of peoples, going so far as to ignore the very content and provisions of the Inter-American Commission on Human Rights, (...), such as the necessary exhaustion of the State Party's domestic remedies in the Convention, which implies a lack of knowledge of the domestic institutional and legal order of each of the States that are parties to said International Treaty, and therefore, also another disrespect of their sovereignty; (...). -Cf. Ibid., p. 2-.

To this he adds the no less serious accusation that the aforementioned bodies that guarantee Human Rights in Latin America have offered coverage to call on and defame Venezuela "for reasons of a political nature, through unfounded denunciations lacking evidentiary substrate, coming from political sectors linked to actions that are contrary to the laws and the Constitution"; that is, it considers that the denunciations or claims for the violation of any of the rights enshrined in the ACHR presented to the IACHR against the Venezuelan State after 1999 are "clearly politicized and biased cases" that are tended to with suspicious speed, in his opinion (Cf. Ibid., p. 4).

As it could not be otherwise, within the inventory of grievances that are listed in the text under analysis there appears the case *Brewer Carías v. Venezuela*, stating that it was admitted by the IACHR "without the complainant having exhausted the domestic remedies," thus violating the provisions of Article 46.1 of the ACHR, while urging the Venezuelan State to adopt measures to guarantee judicial independence, "despite the fact that the criminal trial instituted against him for the crime of conspiracy to violently change the Constitution has not been able to be held whereas the accused is a fugitive from justice and Venezuelan criminal procedure legislation prevents him from being tried in absentia." For these reasons, the Commission's behaviour is said to be "irregular," and the Government of the Bolivarian Republic of Venezuela stands as the judge of the actions of the aforementioned IACHR, considering it "unjustifiably in favour of Brewer Carías," while proclaiming its

presumption of guilt with respect to Dr. Brewer, regarding whom he categorically affirms – despite the fact that he previously admits that he has not yet been tried – that "he participated in the authorship of the text of the decree of dismissal of the public powers, which was proclaimed by the de facto authorities that assaulted power after the coup d'état of April 11, 2002 in Venezuela." *Such an overwhelming affirmation clearly evidences the little value given by the Government that endorses these words to the right to the presumption of innocence recognized* in Article 8.2 ACHR. Even so, it does not fail to consider in this case the "irregular behaviour of the Commission (...), produced in fact, from the mere admission of the cause, the underpinning of the smear campaign against the Bolivarian Republic of Venezuela, accusing it of political persecution." (*Cf. Ibid.,* p. 6)."

From, the above, professor Filiu Franco concluded his remarks on this political pressure exerted against the Inter-American Court, stating that:

> "We are therefore facing an unequivocal text condemning not only the tutelary action of the IACHR and the Inter-American Court, but also, what is worse, of people who resorted to these supranational bodies in search of protection for considering that some of the rights recognized by the ACHR had been violated, as was the case of Professor Brewer Carías. This and other cases characterized in the text as 'shameful examples,' are the grounds on which the Venezuelan State bases its sovereign decision to denounce the Pact of San José."[16]

A greater direct pressure on the judges of the Inter-American Court could not be conceived, for those who already were incumbent and those newly appointed in June of that same year and who would begin to exercise their functions three months later, in January 2013, especially when the pressure referred to a case that was already before the Court,

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[16] *See* Antonio-Filiu Franco, Un alarmante cambio en la doctrina de la Corte Interamericana de Derechos Humanos: El *Caso Brewer Carías v. Venezuela* [An Alarming Change in the Doctrine of the Inter-American Court of Human Rights: The Case of *Brewer Carías v. Venezuela*], *in: Cuadernos Manuel Giménez Abad*, Nº 8, Diciembre 2014, Fundación Manuel Giménez Abad de Estudios parlamentarios y del Estado Autonómico, Madrid, pp. 85-91.

and not yet decided, and the mere admission of which, according to the Venezuelan government, would have been the "buttressing" of the alleged "international smear campaign" against Venezuela.

But the political pressure of the government of Venezuela on the judges of the Inter-American Court would also be exercised directly by the control that it then had over the majority of the votes in the OAS General Assembly[17], which appoints those judges. Regarding this fact, the former foreign minister of Peru Luis Gonzalo Posada, *two months before the judgment was issued* in the case *Allan R. Brewer Carías v. Venezuela*, in March 2014, expressed regarding the Inter-American Court, that it was "*an institution controlled through oil influence*" and the "sponsorship" of countries that protected the "authoritarian political model," in which no "substantive matter for the American countries" could be "considered if you do not have the acquiescence of Venezuela, which is the country that has controlled this institution for many years."[18]

This also coincided with a moment in the functioning of the Inter-American Court in which, in particular, the personal political interests of some judges began to become known, such as the announced candidacy of Judge Diego García Sayán to the General Secretariat of the Organization of American States, to which he aspired since 2013, that is, before the decision had been handed down in my case. That implied, undoubtedly, that during all that time he had to *court the electors to seek their votes, being such "electors" precisely the States that the judges*

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17 *See* Allan R. Brewer-Carías, Los efectos de las presiones políticas de los Estados en las decisiones de la Corte Interamericana de Derechos Humanos. Un caso de denegación de justicia internacional y de desprecio al derecho [The effects of the political pressures of the States on the decisions of the Inter-American Court of Human Rights. A case of denial of international justice and contempt for the law], *in: Revista Ars Boni Et Aequi* (año 12 n°2), Universidad Bernardo O'Higgins, Santiago de Chile 2016, pp. 51-86.

18 "Hoy se ha consumado un golpe de Estado chavista en la OEA. El ex canciller Luis Gonzales Posada aseveró que el organismo interamericano defiende los intereses del régimen venezolano"), [Today a Chavista coup d'état has been consummated in the OAS. Former chancellor Luis Gonzales Posada affirmed that the Inter-American Organization defends the interests of the Venezuelan regime], *in: Diario El Comercio*: Lima, 21 March 2014. Available at: http://elcomercio.pe/politica/internacional/hoy-se-ha-consumado-golpe-estado-chavista-oea-noticia-1717550

were called to judge, among them, Venezuela. His candidacy, being active judge, was authorized, behind the Court's back, by Judge Humberto Antonio Sierra Porto, President of the Court, and this caused Judges Eduardo Vio Grossi and Manuel Ventura to record and publish on August 21, 2014, a "Certificate of Dissent" questioning the decision of President Judge Sierra Porto, and demanding that *while Judge García Sayán was a candidate* to the OAS General Secretariat he not be allowed to participate in the deliberation *on judgments*[19].

The picture of the moment was pathetic, since the President of Colombia, Juan Manuel Santos, under whom Judge Sierra had served as a consultant before being appointed to the Court as a judge after having obtained the support of the Government of Venezuela therefor, had declared Chávez since 2010 as "his new best friend,"[20] making him an ally to the peace process in Colombia that he was in course. Under those circumstances, it was simply inconceivable that they would tolerate any decision condemning the Venezuelan State, much less in a case in which Allan R. Brewer-Carías was the plaintiff.

For all these reasons, the votes of Sierra Porto and Garcia Sayán were joined by those of judges Alberto Pérez Pérez and Roberto F. Caldas, from Uruguay and Brazil, two countries whose governments at the moment were part of the then political coalition led by Venezuela. Those were the four votes that approved the infamous sentence in my case, regarding which Judge Ventura addressed a letter to President Sierra in a letter on August 20, 2014, stating that considering that "the situation in which Judge García Sayán finds himself, due to being a candidate to the OAS General Secretariat, posed a matter of clear incompatibility with the

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19 *See* on this: Juan Alonso: Aspiraciones de un juez a la OEA dividen a la Corte IDH [Aspirations of a judge to the OAS divide the Inter-American Court], *in: El Universal*: Caracas. Available at: http://www.eluniversal.com/noticias/politica/aspiraciones-juez-oea-dividen-corte-idh_164737.

20 *See* "Mi nuevo mejor amigo", llamó Juan Manuel Santos a Hugo Chávez," ["My new best friend" Hugo Chavez was called by Juan Manuel Santos] *in: El Tiempo*, Bogotá, 7 November 2010, available at: https://www.eltiempo.com/archivo/documento/CMS-8302260

position of Judge of the Inter-American Court,"[21] which compromised the impartiality and image of the Court, adding that:

> "it was not necessary to wait long for the suspicion and the facts to be confirmed, when there was issued on May 26, 2014, precisely, precisely 'the sentence in the case *Allan R. Brewer Carías v. Venezuela*, in which it was made evident that the same group of four judges who had voted in favour of the case *Mémoli v. Argentina, formed a majority so that Venezuela would not be condemned in the aforementioned case*. Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor had voted against and cast a dissenting vote against the decision issued by the Court. Judge Vio Grossi excused himself from hearing the case because he had worked as an exile in Venezuela at the Central University of Caracas under the direction of Professor Brewer-Carías."[22]

Due to this entire situation, evidenced by the attitude of the four judges mentioned, as I expressed in 2016 regarding my case,

> "due to the pressure that Venezuela had been exerting before the Court itself, it was evident that it was difficult to be able to expect justice in that case, which was evidenced by the judgment itself, issued in the case a few months before those events, and during the time in which Judge García Sayán's aspirations as candidate to the Secretary General of the OAS was already well known."[23]

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21 *See* Manuel Ventura, La legitimidad de los jueces de la Corte Interamericana de Derechos Humanos [The legitimacy of the judges of the Inter-American Court of Human Rights], Lecture given at the Austral University of Buenos Aires 2016. Available at: http://www.allanbrewercarias.com/Content.aspx?id=449725d9-f1cb-474b-8ab2-41efb849fec2.

22 *Idem*.

23 *See* Allan R. Brewer-Carías, Los efectos de las presiones políticas de los Estados en las decisiones de la Corte Interamericana de Derechos Humanos. Un caso de denegación de justicia internacional y de desprecio al derecho [The effects of the political pressures of the States on the decisions of the Inter-American Court of Human Rights. A case of denial of international justice and contempt for the law,] *in: Revista Ars Boni Et Aequi* (año 12 n°2), Universidad Bernardo O'Higgins, Santiago de Chile 2016, pp. 51-86.

In my opinion, only that undue political pressure that the autocratic government of Venezuela openly exerted on the Inter-American Court at the time, may explain why said majority of judges in the Court would not have dared to judge the Judicial Power of the country, whose situation of lack of independence and autonomy was already very well known, having been denounced by all the relevant international organizations, and having been more than alleged and proven in the sense that it was particularly made up in its large majority by provisional judges. Even the Inter-American Court itself already knew about it, and had decided it condemning the State of Venezuela, as it occurred in the mentioned cases of: *Apitz Barbera et al.*[24], *María Cristina Reverón Trujillo*[25], and *Mercedes Chocrón Chocrón*[26].

However, in the *case Allan Brewer Carías v. Venezuela*, it was that same Judicial Branch which the same Court did not dare judge but rather decided to endorse, in succumbing to the political pressure exerted against it by those who then had become, unfortunately, the "great elector" of the judges.

And decided it in a sentence that lacked any reasoning, considering that such politically controlled Judiciary could actually arrive at correcting the massive violations committed in a criminal procedure that was tainted to its roots, and whose aim was, in addition, that of political persecution.

On the judgment of the Inter-American Court of Human Rights, my remembered friend, Professor Héctor Fix Zamudio, who in the past was a prominent judge of the same, wrote in 2016 that:

> "the petitions for annulment brought by Professor Brewer-Carías before the Court were filed on November 4 and 8, 2005, that is, many years ago, and they were not heard and, much less, decided by that court, there existing, therefore an excessive delay in the formalization

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24 *See* in the Inter-American Court of Human Rights, Case *Apitz Barbera and others v. Venezuela* (2008, C Series #1 182).

25 *See* in the Inter-American Court of Human Rights, Case Reverón Trujillo v. *Venezuela* (2009, Serie C No 197).

26 Inter-American Court of Human Rights, Case *Chocrón Chocrón v. Venezuela* (2011, Serie C No 227).

of the case, which was not taken into account by the majority of the judges of the Inter-American Court, who considered that this delay was not attributable to the State;"

adding:

"That is why it pains me that the Inter-American Court *has been unable to do justice* to one of our most distinguished jurists, whom an arbitrary and authoritarian government has unjustly persecuted and forced to precariously defend his rights in exile."[27]

On this, Judge Eduardo Ferrer Mac-Gregor himself, in an event that took place at the *Círculo de Bellas Artes* in Madrid on November 13, 2019, on the occasion of my 80th birthday, closed his comments by stating that:

"I do not do this as president of the Inter-American Court, but perhaps as the judge who authored the dissenting vote in the judgment in the case *of Allan R. Brewer Carías v. Venezuela,* that Professor Allan Brewer-Carías *is an undeclared victim* by the Inter-American Court of Human Rights. *Victims are victims, whether or not they are declared in the sentence.* I saved my vote; but I wanted to say, yes, that he *is a victim;* and that, as a victim, I express my greatest respects to him and share his anguish for all that he has suffered outside his beloved country."[28]

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27 *See* Héctor Fix-Zamudio, Universitario de vida completa. Memorias académicas y recuerdos personales [A college student for life. Academic memories and personal remembrances], Editorial Porrúa, Universidad Nacional Autónoma de México, México 2016, pp. 371- 373.

28 *See* Eduardo Ferrer Mac-Gregor, Palabras de Presentación [Introductory Words] in the book: Luciano Parejo Alfonso / León Henrique Cottin (editors), *Allan R. Brewer-Carías. Proyección de su obra en Iberoamérica. Jornada Académica celebrada en el Círculo de Bellas Artes de Madrid*, [*Allan R. Brewer-Carías. Projection of his work in Latin America. Academic Conference held at the Círculo de Bellas Artes in Madrid*], 13 de noviembre 2019, Cátedra de Estudios Jurídicos Iberoamericanos de la Universidad Carlos III de Madrid, Editorial Jurídica Venezolana International, Caracas / Nueva York / Madrid 2020, p. 24.

PART SIX

THE CONSTITUTIONAL JUDGE ACTING *EX OFFICIO* AS INSTRUMENT OF AUTHORITARIANISM: THE ANNULMENT OF ALL THE ACTS OF THE NATIONAL ASSEMBLY IMPLEMENTING THE 2019 TRANSITION REGIME TOWARDS DEMOCRACY*

The National Assembly of Venezuela elected in December 2015 (elections in which the Government lost the absolute majority control it used to have in such Assembly), on May, 22, 2018 declared the "reelection" of Mr. Nicolás Maduro held on May 20, 2018 as inexistent, and thus, null and void,[1] and proceeded in January 2019 to solve the

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∗ Paper presented with the title: "The Unconstitutional Ex Officio Judicial Review Rulings Issued by the Constitutional Chamber of the Supreme Tribunal of Venezuela annulling 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," at the *VII Congreso de Derecho Procesal Constitucional 2021*, organized by the *Universidad* Monteávila, Caracas February 2021. Published in the book: Gonzalo Pérez Salazar, Luis Petit García, María Auxiliadora Gutierrez ((Coordinadores), *Respuestas del Derecho Procesal Constitucional a los Desafíos de Hoy, VII Congreso Internacional de Derecho Procesal Constitucional. Homenaje a Héctor Fi Zamudio* Cedepco, Cidep, Caracas 2021.

1 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

political crisis arising from the unprecedented political event in Venezuela's history, derived from the declaration as inexistent of such election.

On January 10, 2019, in fact, due to such parliamentary decision, the country lacked a legitimately elected and recognized president who could be sworn in, and that could assume the office of the President of the Republic for the 2019-2025 term under article 231 of the Constitution. The National Assembly on February 5th, 2019, to resolve the constitutional situation, sanctioned a *Statute that governs the transition to democracy in* order *to reinstate the Constitution of the Bolivarian Republic of Venezuela,* adopting a series of political decisions implementing the functioning of an Interim Government lead by the President of the Assembly according to article 233 of the Constitution.

The reaction against the National Assembly decisions were not long in coming, and came not from Mr. Maduro who was sworn before the Supreme Tribunal and not before the National Assembly as provided in the Constitution, but from the Constitutional Chamber of the Supreme Tribunal of Justice which, acting *ex officio*, issued a series of rulings (among them, 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), as "*unilateral declarations,*" declaring the nullity of all the decisions approved by the National Assembly implementing the Transition Process towards democracy.[2] Those *ex officio* rulings, under the Venezuelan constitutional system of judicial review, have no validity whatsoever on matters of judicial review,[3] being all of them null and void, because they violate all the most elemental rules and principles of due process guaranteed in article 49 of the Constitution, and as established in article 25 of the same Text.

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2 *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.

3 *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 Jurídica,* N° 4, Centro de Investigaciones Jurídicas Dr. Aníbal Rueda, Universidad Arturo Michelena, Valencia, julio-diciembre 2006, pp. 13-40.

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 Constitution (Article 335), has a monopoly on constitutional interpretation.[5] However, the

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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.

5 *See* Néstor 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),

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 Tribunal 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.

Interpretación Constitucional, Universidad Nacional Autónoma de México, Editorial Porrúa, México 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.

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 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.

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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-juranicolas-maduro

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

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 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

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[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

[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).

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]

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

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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.

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."

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 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

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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

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

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 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]

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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*).

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,

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 foreign jurisdictions, like for instance, in the United States, where in order for a court to recognize

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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 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."

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 pronouncement[26] (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

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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/

repeal 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

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[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".

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 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.

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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

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 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 Tribunal 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

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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.

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 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

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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, Associaçào Brasileira de Constitutionalistas Democratas, ABCD, Malheiros Editores, São Paulo 2012, pp.13-29, available at http://allanbrewercarias.com/wp-content/uploads/2012/06/II-4-711.-THE-CITIZENS-ACCES-TO-CONSTITUTIONAL-JURSIDICTION-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.

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 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]

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[34] Text of the Resolution of May 22, 2018 available at http://www.asamblea nacional.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

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.

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[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, México 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]

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[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*

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]

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 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.

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 National Assembly, by considering all its actions null and void. In that context, Decision No. 3 of January 21, 2019[40] 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."

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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: http://allanbrewercarias.com/wp-content/uploads/2009/07/607.-599.-JUSTICIA-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.

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

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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.

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*

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 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]

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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 Teodulo López Méndez, *Siglo XXI. La Democracia del Siglo XXI,* available at: https://teodulolopezmelendez.Word press.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

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 formal reasons,[49] but for

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://allanbrewer carias.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.

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

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."

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warned that "the country will not accept" that now, *See*ing 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/marzo/185627-09-1316-2016-16-0153.HTML

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 REACTION OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME 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 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]

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50 Text available athttp://www.asambleanacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucion de-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-282LPRFIL20190205_0001.pdf

51 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-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."

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).

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

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[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."

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 Socials Sciences, in a Pronouncement issued on February 15, 2019, whereas it decided:

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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

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[56] Available at http://www.acienpol.org.ve/cmacienpol/Resources/Pronunciamientos/Pronunciamiento%20sobre%20Estatuto%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."

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, 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 od 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]

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;

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[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

[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.

(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 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

[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

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]

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,

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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/

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 REACTION OF THE CONSTITUTIONAL CHAMBER OF THE SUPREME 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

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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 Nº 6.210 of December 30, 2015, re-printed in *Official Gazette* Extra Nº 6.220 of March 15, 2016.

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

Boards of Directors Tin order to assume the management and administration of *public institutes, autonomous institutes, state 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 Petróleos 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 Petroleos 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, a*uthorizing 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 Petróleos 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 Guaidó, 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 Petróleos 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

[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.

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 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.

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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

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 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

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

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]

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

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[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: http://allanbrewer carias.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.

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, 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*

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

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 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

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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.asamblea nacional.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.

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.

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 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]

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

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

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 members[83] of the *Ad-Hoc* Administrative *Board of the Central Bank of Venezuela*, *tacitly repealing* the Decrees 3.474 of June 19, 2018[84] and No. 3.518 of 6 July 2018[85] of Nicolás Maduro, purporting to appoint the President and the Board of Directors of the Central Bank of Venezuela, which in addition were enounced and rejected as unconstitutional and illegal by the National Assembly on June 26, 2018[86] 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

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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

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

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 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

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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

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.

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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 Berríos 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 mean 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.

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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

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 "*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]

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[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)

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 recurse 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 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.

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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%A1n-Argentina-2008.doc.pdf

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

POST SCRIPTUM

THE NON-RECOGNITION OF THE 2019 VENEZUELAN CONSTITUTIONAL CHAMBER OF THE SUPREME TRIBUNAL JUDGEMENTS ANNULLING THE 2019 ACTS OF THE NATIONAL ASSEMBLY AND OF THE INTERIM GOVERNMENT ISSUED PURSUANT THE TRANSITION STATUTE FOR DEMOCRACY, BY THE *HIGH COURT OF JUSTICE. BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES. COMMERCIAL COURT (QBD),* IN ITS RULING OF 29 JULIO 2022.

The matter of the recognition of the Venezuelan Constitutional Chamber of the Supreme Tribunal annulling since 2019 all the acts issued by the National Assembly and the Interim Government in the framework of the Transition Statute issued in 2019, have been discussed before the United Kingdom Courts also since 2019 in the so-called *Case of the Venezuelan London Gold* which had as its main purpose to determine who between the Board of the Central Bank of Venezuela appointed by Nicolás Maduro (referred to in the British courts as the "Junta de Maduro") or the Ad-hoc Board of the Central Bank of Venezuela appointed by Juan Guaidó (referred to in the British courts as the "Junta de Guaidó"), had control of the international gold reserves of the Republic of Venezuela deposited with the Bank of England and another financial institution

More precisely, as expressed by the Supreme Court of the United Kingdom in its judgment of December 20, 2021, the issue has been which of the two aforementioned Boards had the right, on the one hand, to give instructions on behalf of the Central Bank of Venezuela (BCV) to depository financial institutions in the United Kingdom in relation to gold reserves of approximately US$ 1.95. billion that the Central Bank of Venezuela had deposited in gold bullion in the Bank of England; and on the other, to represent the Central Bank of Venezuela in an arbitration that began in said year 2019 before the Court of International Arbitration of London in relation to approximately US $ 120 million that Deutsche Bank AG. had in custody based on a gold exchange contract with the Central Bank of Venezuela, which were held by trustees appointed by the British court to hold them on behalf of the Central Bank.

It was undoubtedly the most important judicial case, in quantity, in which the Venezuelan State has been involved throughout its history, because as expressed by the High Court of Justice. Business and Property Courts of England and Wales. Commercial Court (QBD) (Commercial Court), in its judgment of July 29, 2022,[97] it essentially referred:

> "control of approximately half of the Republic of Venezuela's substantial gold reserves, worth about US$1.95 billion, which are held by the Bank of England and the sum of approximately US$120 million held by receivers appointed by the Court." (para. 1).

As the Supreme Court of Justice of the United Kingdom said, each of the two Boards, considered in the trials as "disputing plaintiffs" (the defendant, among others, being the Bank of England), was entitled to represent the Central Bank of Venezuela in relation to its assets in the jurisdiction of the United Kingdom, having been this what caused them to arise, *first*, before the British Supreme Court, fundamental issues of private international law, such as the recognition of a foreign Head of State and the doctrine of the "act of State", which were resolved in the aforementioned judgment of December 20, 2021; and then, before the High Court of Justice. Business and Property Courts of England and Wales. Commercial Court (QBD), the equally fundamental issue of the

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97 Available at: https://www.judiciary.uk/judgments/deutsche-bank-v-central-bank-of-venezuela-and-banco-central-de-venezuela-v-bank-of-england/

recognition of judgments of foreign courts in courts of the United Kingdom, in particular of judgments of the Constitutional Chamber of the Supreme Tribunal of Justice issued in 2019 and 2020, which was resolved in the judgment of July 29, 2022, which was confirmed in full by the Court of Appeal (Civil Division) in 2023.

Specifically, the Commercial Court, pursuant the instructions of the Supreme Court, issued its judgment on July 29, 2022, in which it directed its attention precisely to studying the judgments of the Constitutional Chamber of the Supreme Tribunal of Venezuela as required by the Supreme Court, whose recognition had been requested by the Maduro Junta, delimiting the issues to be considered (par. 131) as follows:

Issue 1: Whether the judgments of the Supreme Tribunal of Venezuela, whose recognition was sought, limited the application of the principle that the recognition by the Government of the United Kingdom of Mr. Juan Guaidó as interim President cannot be challenged by the British Courts, and:

> a) if they explicitly identify and declare prior Executive Acts {of Juan Guaidó] to be nullities (so-called "quashing decisions"); a" or
>
> b) by their reasoning and effect demonstrate and/or implicitly declare the Executive Acts to be invalid and nullities (par. 131).

Issue 2: In the event that the judgments whose recognition was requested were annulling executive acts, if they must be recognized:

> "pursuant to English rules of private international law, that is to say whether they are of a type which is capable of being recognised as judgments *in rem* i.e. made with "international jurisdiction" (par. 131).

In the event that the above answers were affirmative, in such a way that the sentences whose recognition was requested must be recognized, the Court had to determine if such recognition is excluded by any of the following defenses raised by the Guaidó Junta:

> a) by the operation of the "one voice doctrine" (**Issue 3**); and/or b) by principles of natural justice and/or the guarantee to a fair trial (**Issue 4**); and/or c) as a matter of public policy in circumstances where it is alleged that recognition would interfere with HMG's foreign policy (**Issue 5**) (para. 131).

On these issues, the Commercial Court specified that it was accepted by the parties that the Maduro Junta had the burden of proof in questions 1 and 2, and that the Guaidó Junta had the burden of proof on the defenses indicated in questions 3-5 inclusive (par. 132).

1. *On the annulment nature of the judgments*

As the Commercial Court said, at the center of the debate were the judgments of the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela whose recognition was requested by the Maduro Junta (par. 133), and among them, those that declared null the executive acts issued by Juan Guaidó as interim President regarding the appointment of the Special Attorney General (Judgments No. 74 of April 11, 2019, Judgment No. 3 of January 29, 2020, No. 59 of April 22, 2020), and the acts relating to the appointment of the Ad-Hoc Board of the Central Bank of Venezuela (Judgment No. 247 of July 25, 2019 and No. 67 of May 26, 2020) (par. 148).

2. *On the question of the recognition of judgments by their characteristics*

The Commercial Court then proceeded to consider the issue of recognition, referring to the question of whether the judgments were of an *in personam* or *in rem* character under English law (para. 151-153), a distinction that does not apply in Venezuelan law, since in Venezuelan constitutional law on matters of judicial review what is distinguished are the *inter partes* effects of judgments in cases of diffuse control of constitutionality, of *erga omnes* effects in judgments in cases of concentrated control of constitutionality. As expressed by the Commercial Court in its judgment, the *erga omnes* effects of the judgments issued by the Constitutional Chamber exercising concentrated control of constitutionality, which are general effects, can be said that "they are similar" to those produced by judgments *in rem* in English law, but as the Court ruled:

> "They are not however said to be *in rem* and the Guaidó Board submits (and this is not really in issue) that they fall outside the ambit of the categories of judgments which this court categorises as *in rem* judgments" (para. 153).

This concept of judgments *in rem*, from the Latin "against a thing," is used in English law basically n judgments on ownership of goods concerning the status of a certain generally immovable property, as analyzed by the judgment of the Commercial Court (para. 164), and which as such is considered to apply "for the whole world" in the literal sense, and not just for all people. The Commercial Court concluded by ruling out the application of the concept *in rem* to the *erga omnes* judgments of the Constitutional Chamber, considering that these were different concepts and that the concept of *in rem* judgments is not used in Venezuelan law (para. 169).

Based on the above, the Commercial Court rejected the argument of the Junta de Maduro that such status (*in rem*) should be recognized to the judgments of the Constitutional Chamber given the fact that they had been made of international knowledge (par. 171), a fact that the Commercial Court considered that nothing changed, since "a judgment has the status it has. A court or an executive cannot change its status by wide circulation; nor can it do so by desire." (par. 175).

On this point, Justice Cockehill considered that despite the possible similarities in the general effects of judgments *in rem* and *erga omnes* judgments, the fact is that there can be no substantive or procedural equivalence, since *erga omnes* judgments lack an important characteristic of *in rem* judgments (the one applied throughout the world). On the contrary, they have only general territorial effects (par. 176).

And to conclude, the Commercial Court specified that "a further distinction might be said to be that in general the judgments recognized as *in rem* are ones where interested parties are represented, *which is not the case here*" (para. 177), of which the Court concluded in its judgment affirming "that the *erga omnes* nature of the decision cannot give it *in rem* equivalence" (par. 178), thus rejecting the argument of the Junta de Maduro that the judgments annulling the State acts whose recognition had been requested should be recognized for allegedly having that status *in rem* (par. 183 -188), agreeing with Guaidó's Junta (par. 189).

3. *On the theme of "one voice"*

On the issue of recognition of foreign judgments and the "one voice" principle, the Commercial Court recalled the Supreme Court's instruction that:

> "the public policy of the forum will necessarily include the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state." [170] (para. 191).

On this issue, Judge Cockehill highlighted the lack of agreement between the parties in the case, in the sense that, on the one hand, the Maduro Junta considered that the non-recognition of Guaidó as President was not necessarily part of the reasoning of the sentences whose recognition was requested; and on the other, the Junta de Guaidó considered that the recognition of the sentences would conflict with the recognition of the British Government of Mr. Guaidó as President (par. 192).

The Commercial Court, in relation to this issue, stated at the outset that it had no doubt that the argument of the Junta de Guaidó was the correct one (par. 194, 195), rejecting any attempt by the lawyers of the Junta de Maduro to argue that in the sentences there were other reasonings besides the non-recognition of Mr. Guaidó as President (par. 196), which did not affect the essence of the issue which was that the sentences referred to executive acts of Mr. Guaidó (par 205), and declared null and void all the decisions of the National Assembly and of Guaidó as interim President (par. 206, 207).

The judgments did not recognize Guaidó as President of the Republic (par. 209), and in them, the "position of Mr. Guaidó and the position of the legislature which put him in that position is incapable of being distinguished or disentwined." (par. 210).

In short, as expressed by the Commercial Court in its judgment, the Supreme Tribunal of Justice "considers that Guaidó's acts are not valid because it does not consider him as interim President but as a private citizen; and considers him a private citizen because he does not recognize the acts of the National Assembly that, according to him, gave him that power."

In other words,

> "by impugning the National Assembly's actions, the STJ impugns Mr Guaidó's appointment which forms the basis of his recognition. And again the judgments are richly littered with statements which either state that Mr Maduro is President, or which assume that he is so (and that his appointments are valid)" (par. 211).

For all the above, the Commercial Court concluded that the judgments of the Supreme Tribunal of Justice of Venezuela that declared the acts of Mr. Guaidó null and void and whose recognition was requested to the English Courts, ignore his status as President of Venezuela and declare that he has usurped that position (par. 217(ii)), which is why "the court should not recognize them because to do so would be in conflict with the "one voice" doctrine" (par. 218).

4. *On the subject of respect for natural justice*

After considering that the judgments could not be recognized because, otherwise, the principle of "one voice" was contradicted, the Commercial Court in its judgment specified on the issue of natural justice, which in the case was raised:

> "that the proceedings in the STJ which led to those Judgments involved the clearest possible breaches of natural and substantial justice and a denial of a fair trial under Article 6 of the ECHR, in that:
>
> i) none of the Guaidó interests (i.e. interim President Guaidó, the members of the Guaidó Board and the successive Special Attorneys) were either formally served with or otherwise given prior notice of the STJ proceedings which culminated in the Judgments;
>
> ii) the Guaidó interests therefore knew nothing about the proceedings until after the Judgments were issued and were given no opportunity to be heard, despite the fact that their rights and obligations were directly affected;
>
> iii) the Guaidó interests were not represented and there was no argument before the STJ in support or defence of their positions; and
>
> iv) the breaches were compounded by the STJ's explicit encouragement to other State organs to take action against the Guaidó interests with a view to potential criminal liability" (par. 219).

The Commercial Court analyzed the various arguments put forward by the parties, considering that in the matter there was really no confrontation, and that in the case, "there was no prior service or notice of the proceedings, and that the Guaidó Board, the Special Attorney General and Mr. Guaidó had no opportunity to be heard before a final judgment was pronounced in any of the Judgments" being "common ground that the decisions in question had a very significant impact on the rights of the Guaidó" (par. 221). The Commercial Court added in its judgment, that in the case, "absolutely nobody" was allowed to participate in the proceedings (para. 225), rejecting the argument that the interested parties had "available recources" or could have participated "motu proprio" in the proceedings (par. 226).

The Commercial Court said quite clearly "the reality is that there was no route for Mr. Guaidó, or the Guaidó Board or the Special Attorney General, to challenge these judgments" […], "a summons or notification was not made in accordance with article 135 of the Organic Law of the STJ to allow the authorities that issued the annulled acts to participate in the proceedings and defend their actions, and to allow all other interested parties to appear" (par. 227).

The Commercial Court highlighted how, the argument purporting to defend the lack of notification to the interested parties, in the sense that if they had been notified "the court would not have regarded them as having any relevant status," was not only "bizarre," but as "telling evidence against any argument that other remedies existed" (para. 228). This, said the Court, was also reflected in the argument on the alleged possibility that under Article 252 of the Civil Procedure Code the interested parties could have requested corrections or clarifications to the judgments, when said norm – as highlighted by the Commercial Court – grants such a possibility to request clarifications "for parties […] but that does not extend to non-parties " in the proceeding (par 228); also rejecting the argument considering it as "no relevant to the point" that the interested parties could have invoked articles 26 and 51 of the Constitution (access to justice and right of petition) (par. 228),

On the contrary the Commercial Court considered that Article 49 of the Constitution establishes an "inviolable" right to legal assistance and defence, including the right to be heard. "This is then reflected in the procedural rights set out in for example Articles 135 to 151 of the LOTSJ

and also in the process whereby if an oral hearing is dispensed with in cases where there is no need for a fact finding stage interested parties are still enabled to file written submissions ("*acto de informes*") ((para. 229).

In short, the Commercial Court considered unacceptable "to decide such matters without any representation by or even notification to the main interested parties – or even one of them" (par 231) considering equally unacceptable the argument that the judgments had been issued in the same file No. 17 initiated in 2017 (par. 137) on the occasion of a popular action attempted against the act of installation of the National Assembly for the year 2017 and the act of election of its Board of Directors for that period of 2017; and that, therefore, the Supreme Court could allegedly act *ex officio* two years later, against other acts of the State totally different from those challenged in 2017, such as the Transitional Statute and the acts of execution thereof issued in 2019 and declared null and void in the judgments whose recognition had been requested (para. 232).

In short, the Commercial Court was emphatic in considering that "as a matter of Venezuelan law such an action (for "cases of "concentrated judicial review") must be commenced via a popular action, and cannot be commenced *ex officio*." which is evidently so, and implies, as the Court said, the need for notification (par 232), highlighting the only case in the Constitution (art. 336.6; and the Organic Law, article 25.6) authorizing the Supreme Court to initiate a concentrated review of constitutionality *ex officio* with respect to state of emergency decrees, which it considered not to apply in this case (para. 233).

The Commercial Court also mentioned the other case in which the Organic Law of the Supreme Court of Justice authorizes the Constitutional Chamber to initiate a concentrated judicial review control procedure *ex officio* in cases in which there has been a previous decision of diffuse control of the constitutionality of a law, which in any case has its roots in a process initiated by a party (para. 233).

For all the above, the conclusion of the judgment of the Commercial Court in this matter was that even if the judgments could have been recognized and were not contrary to the principle of a single voice – which had already been ruled out – the truth is that:

> "the failings in natural justice in each case are serious clear breaches of natural and substantial justice and a denial of a fair trial under Article 6 of the European Convention on Human Rights ECHR (in respect of which the label "flagrant" is appropriate) and would render it inappropriate to recognise them" (para. 239).

And hence the final decision of the judgment of the Commercial Court, that:

> "the Guaidó Board succeeds: that the STJ judgments are not capable of being recognised, and that if they were there are two good defences which would preclude their recognition" (par. 240).

Adding that "the judgments occurred in the context of a serious violation of natural justice, it follows that the judgments should not be recognized for this reason" (par. 254).

5. *Decision*

All the above, in relation to the issues that the High Court of Justice. Business and Property Courts of England and Wales. Commercial Court (QBD) had to resolve as instructed by the Supreme Court of Justice of the United Kingdom, the judgment of July 29, 2022, resolved:

First, to reject the Maduro Junta's allegation that the *erga omnes* effects of the judgments of the Supreme Tribunal of Justice of Venezuela, whose recognition was required by the English Courts, were of an equivalent nature to the *in rem* effects of English law, consequently rejecting the argument that the judgments should be recognized for allegedly having that status *in rem* (par. 183-188), agreeing with Guaidó's Junta (par. 189).

Second, to declare that the judgments of the Supreme Court of Justice declaring Mr. Guaidó's acts null and void ignore his status as President of Venezuela and declare that he has usurped that position (par. 217(ii)), which is why it rejected the request that they be recognized because to do so would conflict with the doctrine of "one voice" (par. 218).

> Third, to declare that the judgments of the Supreme Court of Justice whose recognition was requested could not be recognized by the British Courts because of the serious, clear and flagrant violations

of natural and substantial justice (due process) committed in each of them, which involved the denial of a fair trial under article 6 of the European Convention on Human Rights (para. 239).

The fundamental consequence of this decision of the High Court of Justice. Business and Property Courts of England and Wales. Commercial Court (QBD) of July 20, 2022, apart from the topics discussed, all of great interest, and from the fact that it was appealed, was that in relation to the central issue that originated the London Gold case, the Court did not recognized the 2019 Constitutional Chamber decisions annulling the acts of the National Assembly and of the Interim Government, thus recognizing that the Ad-hoc Board of the Central Bank of Venezuela appointed by Juan Guaidó ("Junta de Guaidó"), was the one that had control of the international gold reserves of the Republic of Venezuela deposited in the Bank of England and another financial institution, thus having the right to instruct, on behalf of the Central Bank of Venezuela, such financial institutions in the United Kingdom in relation to such reserves, and to represent the Central Bank of Venezuela in the arbitration initiated by Deutsche Bank AG. regarding the reserves it held in custody based on a gold exchange contract of the Central Bank, and that he had paid the trustees appointed by the British court to hold them on behalf of the Central Bank of Venezuela.

New York, August 2023

PART SEVEN

THE CONSTITUTIONAL JUDGE *VERSUS* CIVIL SOCIETY: THE CASE OF THE ILLEGITIMATE JUDICIAL INTERVENTION OF THE VENEZUELAN RED CROSS SOCIETY BY THE CONSTITUTIONAL CHAMBER OF THE SUPREME TRIBUNAL OF JUSTICE*

I. THE ILLEGITIMACY OF THE RED CROSS SOCIETY INTERVENTION

On August 4, 2023, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice issued judgment No. 1057,[1] admitting a complaint filed two days before (on August 2, 2013) by the General Prosecutor of the Republic of Venezuelan against the President (Mario Villaroel Lander) and other members of the Board of Directors of the

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* Text of the Presentation made before the *IX International Congress on Judicial review. Homage to Rafael Badell* (*IX Congreso Internacional de Derecho Procesal Constitucional. Homenaje a rafael Badell Madrid*), organized by the Universidad Monteávila and the Academy of Political and Socials Sciences of Venezuela, Caracas, November 2, 2023.

1 Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML. *See* the comments regarding this decision in Acceso a la Justicia, "La Cruz Roja Venezolana engrosa la lista de organizaciones civiles intervenidas por el TSJ", 5 August 2023. Available at: https://accesoalajusticia.org/la-cruz-roja-venezolana-engrosa-la-lista-de-organizaciones-civiles-intervenidas-por-el-tsj/; and José Ignacio Hernández, "La intervención de la Cruz Roja Venezolana por la Sala Constitucional: otro paso más del constitucionalismo autoritario-populista," 5 August 2023. Available at: https://www.joseignaciohernandezg. com/2023/la-intervencion-de-la-cruz-roja-venezolana-por-la-sala-constitucional-otro-paso-mas-del-constitucionalismo-autoritario-populista/

Venezuelan Red Cross Society. The complaint sought the protection of diffuse and collective rights, arguing the existence of:

> "abuses of power *against the volunteers and workers* of the body of that humanitarian organization, as well *as irregular actions in the use of the resources of that organization*, to the detriment of the most vulnerable sectors of Venezuelan society that depend on their humanitarian work."

In the petition´s admission ruling No. 1057, the Constitutional Chamber secured a precautionary measure ordering:

> *First*: "the immediate interruption of the President and the members of the Board of Directors of the Venezuelan Red Cross in their positions;"
>
> *Second*, "a broad and diverse restructuring of the Venezuelan Red Cross with the participation of sectors of Venezuelan society until the merit of the present claim based on collective and diffuse interests is decided;" and
>
> Third, "the establishment of an Ad Hoc Restructuring Board chaired by Ricardo Filippo Cusanno," assigning him, among others, the power to appoint the members of the Ad Hoc Restructuring Board of the institution," and for it: (i) to convene the internal election of the authorities of the Red Cross, "(iii) to evaluate and proceed to restructure the internal reorganization of the Red Cross within a period of one year, and (iii) to perform all the necessary attributions to guarantee the continuity of the service provided by the Venezuelan Red Cross, being compelled to report to the Constitutional Chamber of the Supreme Tribunal on the fulfillment of his attributions."

The complaint filed by the General Prosecutor was based exclusively on eight anonymous testimonies given by employees of the Red Cross Society, at his Office, in a criminal investigation that began a few days earlier (July 28, 2023), after the First vice president of the official Venezuelan United Socialist Party, PSUV, Diosdado Cabello, publicly accused Mario Villarroel, then President of the Venezuelan Red Cross Society, in his Radio Program *Con el mazo dando*, broadcasted in July 20, 2023 of abuse of power. As was informed in the *El Universal* newspaper:

"On Wednesday [July 19] Diosdado Cabello, first vice president of the United Socialist Party of Venezuela (PSUV), communicated a complaint for "abuse of power" to the Venezuelan Red Cross by the president of the organization Mario Villarroel.

Cabello, publicized this announcement during his program "Con el Mazo Dando", broadcasted by VTV, where he pointed out: "They use the institution to accumulate power and personal matters."

The leader of the ruling party added that Mario Villarroel has been "more than 40 years in office without elections without any renewal within the Red Cross, he manipulates many people in the world (...) it is a bad example, and, moreover, it conspires against the Bolivarian Revolution."

In addition, he said that "He has come to control magistrates of the TSJ (Supreme Tribunal of Justice), he goes around the world to speak in the name of the Revolution (...); there are no bylaws, those are put by him, and wants to leave his son in office, who has been accused of family violence.

Finally, the vice president of the party insisted that the Board of the Venezuelan Red Cross must have a representative of the Ministries of the Interior, Justice and Peace, of Defense and of Health."[2]

After the public allegation made by the Vice President of the Official party, the Venezuelan Red Cross Society reacted in a Communiqué published on July 27, 2023, whereas "categorically rejected the statements by Diosdado Cabello in the aforementioned programs, for not

[2] *See* the News Report "Diosdado Cabello denunció presunto "abuso de poder" en la Cruz Roja. Dio a conocer el anuncio durante su programa "Con el Mazo Dando" donde puntualizó: "Usan la institución para acumular poder y asuntos personales", in *El Universal*, July 20, 2023. Available at: https://www.eluniversal.com/politica/160083/diosdado-cabello-denuncia-a-la-cruz-roja-venezolana, In his following Radio Program, on July 26, 2023, Cabello stated that the issue of the Venezuelan Red Cross was a "State problem." *See* "Cabello: La Cruz Roja debe cumplir con las leyes y reconocer al Presidente Nicolás Maduro," in *Con el Mazo dando*, July 26 2023; available at: https://mazo4f.com/cabello-la-cruz-roja-debe-cumplir-con-las-leyes-y-reconocer-al-presidente-nicolas-maduro

conforming to the truth both in facts and law."[3] In addition, the VicePresident of the International Federation of the Red Cross, Mr. Miguel Ángel Villarroel expressed the following in a public statement:

> "With deep concern I have received the news that the government of the Bolivarian Republic of Venezuela intends to intervene the Venezuelan Red Cross in the coming hours and appoint an Ad Hoc Board of Directors. With the greatest respect, I request the President of the Republic, Mr. Nicolás Maduro, in light of the Geneva Conventions signed and ratified by the Bolivarian Republic of Venezuela with the commitment to assume and promote the fundamental principles of the Red Cross and Red Crescent signed by the Venezuelan State, and for the people of our country who benefit from the humanitarian services offered by the Venezuelan Red Cross; I ask [the President] to refrain from issuing such a decision and allow the Venezuelan Red Cross to take the reins for adopting the solutions that benefit the humanitarian work in favor of millions of Venezuelans. I ask [the President] in the most respectful way not to allow an arbitrary action by a State entity that stains the 128 years of life of the institution [...] I urge [the President] to go before the international bodies of the Red Cross and Red Crescent if he or anyone in the government has a concern about the actions of the Venezuelan Red Cross, and that those instances be able to use the internal mechanisms to resolve differences and that the principles of humanity, impartiality, neutrality and independence are preserved as a fundamental basis of the trust of the State of Venezuela and the International Red Cross [...] I ask [the President] with deep respect not to allow the intervention of the largest humanitarian body in the world. Venezuela does not deserve it and you do not deserve to stain humanitarian history."[4]

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3 *See* the full text of the Communiqué in the report: "Cruz Roja Venezolana rechaza acusación de "conspiración" hecha por Diosdado Cabello," in *NTN24*, July 28 2023; available at: https://www.ntn24.com/noticias-actualidad/cruz-roja-venezolana-rechaza-acusacion-de-conspiracion-hecha-por-diosdado-cabello-434154

4 *See* the full statement in the Video, in Jessica Herera, d*ivergentes.news*. Available at: https://www.tiktok.com/@divergentes.news/video/7263450354837310725. *See* the comments of the statement from the Vice President of the International Federation in the news report: "El Tribunal Supremo interviene la Cruz Roja

On the same day July 28, 2023, through his official tweeter account, the General Prosecutor announced the beginning of a *criminal* investigation on the "alleged *harassment and mistreatment" committed against volunteers and workers of the National Red Cross*, by its president, Mario Villaroel" further informing about the appointment of a Prosecutor "with national jurisdiction on human rights," to "investigate and punish the facts recently denounced about the *alleged harassment and mistreatment against volunteers and workers of the Venezuelan Red Cross* by Mario Villarroel and members of his team."[5]

In Venezuela there is no legal provision sustaining an administrative or judicial intervention of a given civil society, such as the Venezuelan Red Cross National Society, by any State entity; regardless of the problems it could be faced with and/or of any allegations about misconduct of their Directors, including harassment and mistreatments performed by personnel and administrative irregularities. Moreover, their *internal* conflicts are to be solved only pursuant the provisions of either the Civil Code or the Labor Organic Law.

This means that the General Prosecutor could have encouraged the employees and volunteers of the Red Cross Society to seek protection in face of the alleged harassment and mistreatment by filing a complaint before the competent Labor Courts. Alternatively if the General Prosecutor thought he had standing to act in that regard, he could bring the complaint before such Courts on behalf of the employees.

Rather, presumably for the sole purpose of achieving the immediate intervention of the Red Cross, the General Prosecutor chose to file a

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venezolana tras admitir demanda de la Fiscalía General," in *Associated Press*, 4 August 2023; available at: https://apnews.com/world-news/general-news-dbbb1926265820ee49a3c26671e81be6

5 *See* the references in the report: "Fiscalía de Venezuela abre investigación a presidente de la Cruz Roja nacional por "acoso", in *SW1 swissinfo.ch*, 28 julio 2023, available at: https://www.swissinfo.ch/spa/venezuela-cruz-roja_fiscalía-de-venezuela-abre-investigación-a-presidente-de-la-cruz-roja-nacional-por--acoso-/48698206u. *See* also the News report: "Investigan al presidente de Cruz Roja Venezolana por acoso y maltrato a personal," in *europapress/internacional*, 29 July 2023, available at: https://www.europapress.es/internacional/noticia-investigan-presidente-cruz-roja-venezolana-acoso-maltrato-personal-20230729140033.html

complaint before the Constitucional Chamber of the Supreme Tribunal, by-passing the provisions of the applicable law in the case (Civil Code; By-laws of the Society) alleging the purported protection of diffuse and collective interests - taking the powers of the People's Defendant of the Republic -. Just two days later the Constitutional Chamber issued the precautionary measure ordering the intervention of the Venezuelan Red Cross Society.

The aforementioned reveals that the judicial intervention of the Venezuelan Red Cross Society by the Supreme Tribunal, on the basis of a simple complaint against the leaders of the Society, founded on allegations made by some employees referred to labor rights and administrative irregularities in its management was an orchestated official action directed against a civil association that is not part of Public Administration and is not subject to any sort of administrative governmental intervention.

This judicial intervention of the Red Cross Society decided by the Constitutional Chamber of the Supreme Tribunal of Justice, is an illegitimate intervention by a State body against a civil society that is not subject to State control, because:

a. It violated the right to free association guarantied in article 52 of the Constitution, according to which, civil societies regulated in the Civil Code are not subject to State intervention except when an express provision of law so allows. Consequently, in this case, in addition to be illegal, the intervention of the Society was ordered by an incompetent State body.

b. It was pronounced within a procedure that could not have been admitted by the Chamber, since the petition did not comply with the conditions established by the same Chamber in her well-established case law, set forth since 2000, regarding actions for the protection of diffuse and collective rights.

c. The petition was also inadmissible because it was filed by the General Prosecutor, who lacks standing to file petitions for the protection of diffuse and collective rights, as the well-established case law set forth by the same Constitutional Chamber has long recognized since 2000.

d. The "preliminary measure" violated also the basic provisions of the Civil Procedural Code because the "measure" was not a "temporary" and eventually subject to reversion, but a "final", ordering the Society to have a new Board of Directors and new by-laws.

e. The supposed "preliminary measure" did not comply with the conditions established by the same Chamber, and other courts in the country in a well-established case law set forth since 2000, for the issuance of "preliminary measures."

f. The immediate effect of the "preliminary measure" is not the protection of any diffuse or collective interest, but to subject the Venezuelan Red Cross Society to the Constitutional Chamber, contrary to the legal provisions governing civil societies in Venezuela.

II. THE VENEZUELAN RED CROSS SOCIETY, AS A NATIONAL SOCIETY MEMBER OF THE INTERNATIONAL ORGANIZATION OF THE RED CROSS

The Venezuelan Red Cross Society is a National Society that along with all the other National Societies, is part of the International Red Cross and Red Crescent Movement, together with the International Committee of the Red Cross, and the International Federation of the Red Cross and Red Crescent Societies.[6]

Since the Geneva Conventions of 1864, the National Societies like the Venezuelan one is also conceived to act as "auxiliary to the public authorities in the humanitarian field." Thus, to act as part of the International Movement and within the respective State, they must have formal recognition by both the International Committee of the Red Cross and of the respective State.

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6 *See* Article 1, *Rules of Procedure of the International Red Cross and Red Crescent Movement* (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995). Available at: https://www.icrc.org/en/doc /assets/files/other/rules-of-procedure-int-mvt-rcrc.pdf

In the case of the Venezuelan Red Cross Society, it was incorporated in 1895 as a civil society, after Venezuela became part to the Geneva Conventions of 1864, once the latter was approved by the National Congress by means of legislative decree of May 21, 1894. Such approval was ratified a few weeks later by declaration of the Federal Executive of July 9, 1894.[7] After the incorporation of the National Society, both the by-laws and its character as Society part of the International Organization of the Red Cross were further recognized by the government of Venezuela by means of a Resolution of the Ministry of Internal Affairs, dated July 28, 1895.[8]

From the stand point of the International Red Cross and Red Crescent Movement, and as stated in article 3 of the *Rules of Procedure of the* International *Red Cross and Red Crescent Movement* (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995), National Red Cross and Red Crescent Societies "form the basic units and constitute a vital force of the Movement," being in charge of carrying out "their humanitarian activities in conformity with their own statutes and national legislation, in pursuance of the mission of the Movement, and in accordance with its Fundamental Principles."

As for the conditions provided in this *Rules of Procedure*, for the recognition of the National Societies by the International Committee of the Red Cross, as has been pointed out by Christophe Lanord, they "have no direct effect on the organization of a National Society" and "no model

7 *See* Aureo Yepez Castillo, *Origen y Desarrollo de la Cruz Roja Venezolana*, 1995, pp. 65-111. *See* also Ricardo de Sola Ricardo, *La Cruz Roja Venezolana. Historia*, 1995, pp. 31-68; and Pedro Manrique Lander, Leoncio Pérez Magallanes, José Vásquez Zerpa, Nahir Castillo Natera, Katyana Álvarez Rivas, Pedro Zerpa Díaz, "Breve recuento histórico de la Cruz Roja Venezolana," in *Gaceta Médica de Caracas*, ISSN 0367-4762, v. 114, Mo. 4, Caracas, diciembre 2005. Available at: http://ve.scielo.org/scielo.php?script=sci_arttext&pid=S0367-47622006000400007.

8 This is the reason for the wording of the provision of the current By-Laws of the Venezuelan Red Cross Society, stating: "Article 3. The Society has legal personality according to the resolution of the Ministry of Interior Affairs of 26 July 1895. Its domicile and siege is the city of Caracas and its duration is illimited."

whatsoever is provided for a Society's organization," adding that even, "in particular, they do not include any principle of democratic organization."[9]

In fact, in order to be recognized by the International Committee of the Red Cross, article 2 of the *Rules of Procedure of the International* Red *Cross and Red Crescent Movement* (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995) establish that the National Societies must be incorporated in each country, according to the following conditions:

> "1. Be constituted on the territory of an independent State where the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field is in force.
>
> 2. Be the only National Red Cross or Red Crescent Society of the said State and be directed by a central body whichshall alone be competent to represent it in its dealings with other components of the Movement.
>
> 3. Be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field.
>
> 4. Have an autonomous status which allows it to operate in conformity with the Fundamental Principles of the Movement.
>
> 5. Use a name and distinctive emblem in conformity with the Geneva Conventions and their Additional Protocols.
>
> 6. Be so organized as to be able to fulfil the tasks defined in its own statutes, including the preparation in peace time for its statutory tasks in case of armed conflict.
>
> 7. Extend its activities to the entire territory of the State.
>
> 8. Recruit voluntary members and staff without consideration of race, sex, class, religion or political opinions.

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9 *See* Christophe Lanord, "The legal status of National Red Cross and Red Crescent Societies," in *International Review of the Red Cross*, No. 840, 31-12-2000; available at: https://www.icrc.org/en/doc/resources/documents/article/other/57jqt9. htm

> 9. Adhere to the present Statutes, share in the fellowship which unites the components of the Movement and cooperate with them.
>
> 10. Respect the Fundamental Principles of the Movement and be guided on its words by the principles of international humanitarian law."[10]

Additionally, pursuant to article 3 of the same *Rules of Procedure of the International Red Cross and Red Crescent Movement*, within every member State, the National Societies must "support the public authorities in their humanitarian tasks, according to the needs of the people of their respective countries."

Nonetheless, according to the same provision, for such purpose, within their own countries, National Societies are "autonomous national organizations providing an indispensable framework for the activities of their voluntary members and their staff," being in charge of cooperating "with the public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering by their own programs in such fields as education, health and social welfare, for the benefit of the community."

In addition, the same provision sets forth that the National Societies must:

> "organize, in liaison with the public authorities, emergency relief operations and other services to assist the victims of armed conflicts as provided in the Geneva Conventions, and the victims of natural disasters and other emergencies for whom help is needed. They disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect. They disseminate the principles and ideals of the Movement and assist those governments which also disseminate them. They also cooperate with their governments to ensure respect for international humanitarian law and to protect the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols."

Finally, based on guidelines for their bylaws approved in 2000 by the Governing Board of the International Federation of the Red Cross and

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10 *Idem*.

Red Crescent Societies, National Societies are compelled to submit any draft amendment to their bylaws to the International Committee of the Red Cross and to the Federation.[11]

In sum, each National Society is to choose, according to the national legal system, the most convenient legal form to incorporate the National Red Cross Society, so as to secure its functioning following always the basic principles of humanity, impartiality, neutrality and independence.

III. THE LEGAL STATUS OF THE VENEZUELAN RED CROSS AS A CIVIL SOCIETY UNDER VENEZUELAN LAW

In the case of the Venezuelan Red Cross Society, as mentioned, it was incorporated according to Venezuelan Law as a non-profit civil society, namely, as a legal person of private law subject to to the rules governing civil societies set forth by the Civil Code (Articles 19, 20; 1649-1684). This has been recognized by multiple national court's rulings.

For example, in a judgment dated February 7, 2013, the First Superior Labor Court seating in the city of Coro, hearing a labor lawsuit against the Red Cross Society, analyzed the by-laws of the Red Cross Venezuelan Society registered in the Registrar Office of the Federal District in 1957,[12] stating about its legal nature that it is a:

> "Non-profit Civil Society, inspired by altruistic purposes, aiming to "contribute to times of war to the health and assistance needs of the National Armed Forces. In peacetime, it will direct its activities towards public health; aiding the competent authorities in the event of national calamities or disasters affecting other countries; and seeking to foster the spirit of coexistence and cooperation among the men, women and children of the world" [...]

11 *Idem*.

12 "*Acta Constitutiva de la Sociedad Venezolana de la Cruz Roja, registrada ante la Oficina Subalterna de Registro del Segundo Circuito del Municipio Libertador del Distrito Federal, bajo el No. 417, folios 638 y 666, Segundo Trimestre del año 1957*."

> "the Venezuelan Red Cross Society, is a legal entity, with its own patrimony and legal personality, that is, it is capable of generating rights and duties. From the analysis of the corporate purpose declared in its Articles of Incorporation, it is clear that the purpose of the defendant is fundamentally health or is directed towards the matter of health, with an object oriented by altruistic values at the service of the community, providing a service of social nature." [13]

Notwithstanding the fact that it is a civil non-profit society of private law, the Venezuelan Red Cross Society as already mentioned, and was highlighted by the First Superior Labor Court of the State of Mérida in a judgment pronounced on February 12, 2009:

> "is a civil society that acts in accordance with the international conventions of the Red Cross and inspired by the postulates that make up the Declaration of Principles of the Red Cross"[14].

This means that the Venezuelan Red Cross Society is a civil society whose legal regime transcends the norms of the Venezuelan legal system regulating civil societies, since it has to act also within the framework of the provisions of the International Geneva Convention, whereas special measures were agreed to limit the barbarity of war by providing for the care of the wounded in war and for the protection of the relief corps. Consequently, the National Societies of the Red Cross were regulated, as voluntary aid societies in the various countries where they operate; being, as already mentioned, "auxiliary to the public authorities in the humanitarian field."

This explains why, as we have said, Red Cross National Societies, in addition to being incorporated pursuant to the provisions of the internal legal system of each country, and being recognized by the government of the respective States as forming part of the Red Cross

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13 Available at https://vlexvenezuela.com/vid/xiomara-rujan-sociedad-roja-seccional-420143922

14 Available at: http://jca.tsj.gob.ve/DECISIONES/2009/ABRIL/1412-15-LP21-R-2009-000012-033.HTML

Organization, they must also be recognized as such, by the International Committee of the Red Cross.[15]

It was precisely taking into account all these aspects about the role of Red Cross National Societies, both in the international and national fields, that the Superior Labor Court of Merida State of Venezuela, regarding the Venezuelan Red Cross Society, in a ruling dated April 15, 2009, after explaining that the Geneva Convention has constitutional protection and rank under articles 22 and 23 of the Constitution, as well as article 118 referring to "associations, corporations and cooperatives, in all their forms;" considered that:

> "From the international point of view, being the National Society a member of the International Committee of the Red Cross CRC and of the International Federation of Red Cross and Red Crescent Societies, it is considered as an international organization of a private nature, not subject to any specific national law, nor is it governed by public international law, in a legal strict sense, although some provisions of the Geneva Conventions and the Additional Protocols confer rights or impose obligations on its members. Thus, this right is consistent with an international legal order of customary substance, governed by general principles common to the various domestic laws and public international law.
>
> The law of the Red Cross comes from an international agreement between the nations of the world through their respective secretaries of foreign affairs, which are part, since its origin, of the International Conference of the Red Cross, together with the representatives of the Red Cross of each country, this conference being the highest authority of the Institution.

15 According to the *Rules of Procedure of the International Red Cross and Red Crescent Movement* (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995), among the attributions of the International Committee of the Red Cross, is "to recognize any newly established or incorporated National Society, which fulfils the conditions for recognition set out in Article 4, and to notify other National Societies of such recognition" (art. 5.b). Available at: https://www.icrc.org/en/doc/assets/files/other/rules-of-procedure-int-mvt-rcrc.pdf

> The resolutions of this Conference have given rise to a legal order of vague boundaries that has not found a well-defined place in the classical structure of law and certainly never will.
>
> As we can see, due to its characteristics and legal nature product of its origin and historical evolution, the complexity of this institution makes it unique in the world and requires much study for its understanding, which adds an additional element to its complexity.
>
> Precisely for this reason, its board members, its volunteers, and other staff must have clarity of the its object, origin and nature, so as not to promote around the Institution situations difficult to resolve. Additionally, the organizations of the State, its judicial and labor institutions, just to mention a few, must possess a broader and deeper information than the basic or limited, since otherwise they would create problems impossible to solve and in many cases frank situations of injustice that transform it into a very weak organization legally speaking."[16]

The complexity of the legal status of the International Red Cross Movement and in particular of the National Societies, like the Venezuelan Red Cross Society, is confirmed by the principle that they must be duly recognized by the legal government of a given country, on the basis of both the Geneva Conventions, and the national legislation, as voluntary aid societies that are auxiliary to the public authorities in the humanitarian field.

Nonetheless, being private law persons, subject to private law in their organization and functioning and despite of such recognition, they are not subject to any sort of specific control by the authorities of the State. And although they are subject to certain provisions of public law, it is basically for the purpose of protecting their quality as humanitarian organizations, based on the principles governing the relations between States and National Societies.

Those principles, as set forth by Article 2 of the Statutes of the International Red Cross Movement, are the following:

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16 Available at: http://jca.tsj.gob.ve/DECISIONES/2009/ABRIL/1412-15-LP21-R-2009-000012-033.HTML

"1. The States Parties to the Geneva Conventions cooperate with the components of the Movement in accordance with the these Conventions, the present Statutes and the resolutions of the International Conference.

2. Each State shall promote the establishment on its territory of a National Society and encourage its development.

3. The States, in particular those which have recognized the National Society constituted on their territory, support, whenever possible, the work of the components of the Movement. The same components, in their turn and in accordance with, their respective statutes, support as far as possible the humanitarian activities of the States.

4. The States shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles."

5. The implementation of the present Statutes by the components of the Movement shall not affect the sovereignty of States, with due respect for the provisions of international humanitarian law."[17]

One piece of public law enacted in Venezuela following these principles, and forwarding strengthening the relationship between the State, the International Movement of the Red Cross and the Venezuelan Red Cross Society, was the *Statute on the Protection of the Name and Emblem of the Red Cross* of 2014,[18] regulating the conditions and means for the protection of the use of both the name "Red Cross" as well as the emblems of the Red Cross or distinctive signs used in units and means of international transport (Art. 1).

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17 Available at: https://www.ifrc.org/document/statutes-international-red-cross-and-red-crescent-movement. *See* the reference in Christophe Lanord, "The legal status of National Red Cross and Red Crescent Societies," in *International Review of the Red Cross*, No. 840, 31-12-2000, available at: https://www.icrc.org/en/doc/resources/documents/article/other/57jqt9.htm

18 *See Official Gazette*, No. 6207 Extra. dated 28 December 2015. Available at: https://www.icrc.org/es/document/venezuela-ley-proteccion-nombre-emblema-cruz-roja

This Statute defines the Red Cross emblem, stating that it "shall bear the nomenclature of the *Venezuelan Red Cross Society*" (art. 4) and provides that the Ministry of Defense shall guarantee the use of the protective emblem of the Red Cross among others by *the Venezuelan Red Cross Society* (article 6.4), who shall collaborate with the authorities to prevent any transgression or abuse of this Law, as well as report those who infringe the provisions of the Law to the competent authority (Article 11).

This is a statute that does not concern whatsoever the legal status of the Venezuelan Red Cross Society. In fact, the truth is that as it is also the case in many other countries, like for instance, in Spain, the important aspect regarding the legal status of the Venezuelan Red Cross Societies, is that as a non-profit civil society, it is a legal entity of private law, and hence:

> "is not a Public Law Corporation […]; it is not an Administration nor does it have delegated administrative powers, but privileges and prerogatives in exchange for an effort to cooperate in times of peace and war. It does not accomplish public-administrative functions but of general relevance. Its main characteristic is basic voluntariness."[19]

Not being part of the Public Administration and not being bound to State control, the Venezuelan Red Cross Society is not subject to any sort of intervention under Venezuelan Law. In particular, is not subject to judicial intervention pursuant to the Civil Code, whereas under public law, is not subject to any sort of administrative intervention either; as is the case, for instance, of banks and financial institutions, or insurance companies.[20]

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19 *See* Rosa Elena Muñoz Blanco, La naturaleza jurídica de la Cruz Roja española, Tesis, Universidad de Extremadura, 1996. *See* the reference in: Fundación Dialnet, available at: https://dialnet.unirioja.es/servlet/tesis?codigo=18737. The Thesis was also published as a book: Rosa Elena Muñoz Blanco, *Cruz Roja Española: Un Estatuto Jurídico Singular*, Editorial Tecnos, Madrid 1999.

20 *See* Allan R. Brewer-Carías, *Administrative Law in Venezuela*, Editorial Jurídica Venezolana Third edition 2021, pp. 405 ff. Available at: http://allanbrewercarias.com/wp-content/uploads/2013/08/9789803651992.txt.abc_.admlawven2.con-portada.pdf

Consequently, according to Venezuelan Law, as is the case in general regarding all civil societies, as a matter of principle the Venezuelan Red Cross Society is not subject to intervention through decisions issued either by administrative or judiciary State bodies.

Moreover, as a civil society, according to the Civil Code, as the *ONG Acceso a la Justicia* highlighted, "its associates must be the ones who make the decisions that prevent, if necessary, the occurrence of irregularities, and not through impositions of a board by the Venezuelan State."[21]

That is why, a group of more than three hundred (300) ONGs expressed in a public statement, their:

> "rejection of the judicial intervention of the Venezuelan Red Cross Society (hereinafter Red Cross), ordered by the Constitutional Chamber of the Supreme Court of Justice (TSJ), in a decision contrary to the most basic principles of the rule of law and due process. Furthermore, it violates the right to freedom of association in Venezuela, established as a civil and political right, recognized in international human rights covenants and whose guarantee is one of the fundamental basis of democratic freedoms."[22]

Thus, the judicial precautionary measure issued by the Constitutional Chamber of the Supreme Tribunal through the illegitimate and unorthodox use of a petition for the protection of "diffuse and collective rights," to materialize an intervention of the Red Cross Society, undermining such proceeding, due to the fact that was based only on allegations of violations not of diffuse or collective rights but of individual rights of employees and voluntaries of the Society, as well as misuse of its goods and assets, impacts the autonomy and independence

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21 *See* Acceso a la Justicia, "La Cruz Roja Venezolana engrosa la lista de organizaciones civiles intervenidas por el TSJ", August 5, 2023. Available at: https://accesoalajusticia.org/la-cruz-roja-venezolana-engrosa-la-lista-de-organizaciones-civiles-intervenidas-por-el-tsj/

22 *See* the text: "Comunicado conjunto con la intervención judicial de la Sociedad Venezolana de la Cruz Roja se agrava el patrón de violaciones contra la libertad de asociación en Venezuela," August 8, 2023; available at: https://www.wola.org/wp-content/uploads/2023/08/COMUNICADO-CONJUNTO-intervencion-Cruz-Rojas-9-de-agostodef-1.pdf

of a non-profit civil society infringing the constitutional right of free association guarantied by article 52 of the Constitution.

This is why the Inter-American Commission on Human Rights and the Special Rapporteur for Liberty of Expression of the Organization of American States in Press Release dated August 21, 2023 have rejected the recent "arbitrary" decision of the Venezuelan Supreme Court of Justice (TSJ) intervening the Venezuelan Red Cross because it is "contrary to," and "violates," "infringes" and "undermines freedom of association;" adding that the appointment of:

> "an "Ad Hoc Restructuring Board" with powers to reorganize it […] would be contrary to the organization's internal statutes with respect to its governance and would confer powers contrary to the incorporation agreement."[23]

A few days before, in the same sense, the members of the University Council of the Central University of Venezuela, representing the Professors of said University, after expressing their "concern about the participation of the academic vice-rector and, unofficially, the administrative vice-rector (of the Central University of Venezuela) in the intervening board of the Venezuelan Society of the Red Cross, ordered by the Constitutional Chamber of the Supreme Court of Justice," also stated that:

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23 *See* "CIDH y RELE *rechazan* ataques a la libertad de asociación en Venezuela," August 21, 2023. Available at: https://www.oas.org/es/CIDH/jsForm/?File=/es/CIDH/prensa/comunicados/2023/189.asp *See* also the News Report: ""Es preocupante": CIDH condena la intervención de la Cruz Roja y del Partido Comunista en Venezuela," in RYTN24, August 22, 2023, available at: https://www.ntn24.com/noticias-actualidad/es-preocupante-cidh-condena-la-intervencion-de-la-cruz-roja-y-del-partido-comunista-en-venezuela-438986. The Venezuelan Government reacted officially against the IACHR report, arguing that on the contrary the decision of the intervention of the Red Cross was a "legal decision issued by the competent courts and bodies" in a "clean action of the Public Powers." *See* the text of the Official Communiqué in "Régimen de Maduro califica a la CIDH de "mercenaria" de EEUU," in *Diario de las Américas*, August 22, 2023; available at: https://www.diariolasamericas.com/america-latina/regimen-maduro-califica-la-cidh-mercenaria-eeuu-n5341834

"the ruling of the Supreme Tribunal of Justice and the structuring of the board is a serious infringement of the right to freedom of association, the rule of law, due process and, in addition, is part of a systematic state policy of closing democratic spaces in the country.

"The ruling of the Constitutional Chamber of the Supreme Court of Justice intervenes a legal person of private law, dismisses its board without even listening to them and designates an external person, without any connection with the institution, to constitute an intervening board."[24]

Summarizing, the decision issued by the Constitutional Chamber of the Supreme Tribunal deciding the intervention of the Venezuelan Red Cross Society, violates the right to free association guarantied in article 52 of the Constitution, according to which, civil societies regulated in the Civil Code are not subject to State intervention except when an express provision of law so allows. In the case of the Red Cross Society no provision of law authorizes any sort of control by the State nor the possibility of the intervention of the Society by the State.

IV. GENERAL CONDITIONS FOR THE FILING OF PETITIONS OR COMPLAINTS SEEKING THE PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS OR INTERESTS

For the purpose of securing judicial protection of constitutional rights and guarantees, the Venezuelan Constitution provides for the amparo petition (article 27), a petition that must always be filed by the party suffering harm or infringement of her rights. This proceeding is similar to the Anglo-American civil rights injunction[25]. In addition to it, and as

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24 *See* in Albany Andara Meza, "Profesores de la UCV en desacuerdo con participación de autoridades en junta interventora de la Cruz Roja," August 17, 2023, available at: https://efectococuyo.com/la-humanidad/profesores-de-la-ucv-en-desacuerdo-con-participacion-de-autoridades-en-junta-interventora-de-la-cruz-roja/ Also available in El Nacional, August 18, 2023, at: https://www.elnacional.com/venezuela/profesores-rechazaron-participacion-de-autoridades-de-la-ucv-en-la-junta - ad-hoc-de-la-cruz-roja/

25 *See* Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. A Comparative Study of the Amparo Proceedings*, Cambridge University Press, New York, 2009, pp. 193 ff.

not all constitutional rights are individual rights, the Constitution also expressly recognizes and guaranties judicial protection of diffuse and collective rights or interests (Article 26).[26]

In fact, some constitutional rights are *collective* by nature, in the sense that they correspond to a -more or less defined- group of persons, so that their violations affect not only the personal rights of each of the individuals who enjoy them, but also, the whole group of persons or collective to which the individuals belong. It is the case, for instance, of the political right the voters have as a whole, that has been secured, for instance, through precautionary measures with *erga omnes* effects issued by the Constitutional Chamber, directed "both to the persons and organizations that have requested the constitutional protection and for all the voters as a whole."[27] In these cases, the petition for protection can also be filed by a group of people representing the whole, even if they do not have the formal character of a legal person.

As for the *diffuse* rights or interests, the Constitutional Chamber of the Supreme Tribunal has considered that "they are those that seek to ensure, in general, an acceptable standard of living, so that by affecting them, the standard of living of the entire community or society is harmed, as is the case regarding damages to the environment or to the consumers.[28] In other words, as decided by the same Constitutional Chamber, these *diffuse* rights or interests:

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26 *See* on this matter Allan R. Brewer-Carías, *Derecho de amparo y Acción de Amparo Constitucional*, Academia de Ciencias Políticas y Sociales, Editorial Jurídica Venezolana, 2021 pp.386-387; 590-593. Available at: http://allanbrewercarias.com/wp-content/uploads/2021/02/A.R.-BREWER-CARIAS.-DERECHO-Y-ACCION-DE-AMPARO-CONSTITUCIONAL.-con-Portada-2-2021.pdf

27 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 483 of May 29, 2000, Case: "*Queremos Elegir" y otros*, in *Revista de Derecho Público*, Nº 82, Editorial Jurídica Venezolana, Caracas 2000, pp. 489–491 (In the same sense judgment of the same Chamber No. 714 of July 13, 2000, Caso: *APRUM*.) Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-82-abril-junio-2000

28 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No 656 of June 30, 2000, case *Defensor del Pueblo vs. Comisión Legislativa Nacional*, quoted in ruling No. 379 of February 26, 2003, case *Mireya Ripanti et al. vs. Presidente de Petróleos de Venezuela S.A. (PDVSA*). Available at: http://historico.tsj.gob.

> "are those that guarantee the conglomerate (citizenship) in general an acceptable quality of life (basic conditions of existence), [when] the quality of life of the entire community or society in its various aspects is impaired, and an interest arises in each member of that community for the benefit of him and the other components of the community in which such deterioration does not happen, and in which if it has already occurred it is repaired." [29]

Regarding these *diffuse* rights or interests, in the ruling Nº 1057 providing for the precautionary measure concerning these comments, the Constitutional Chamber citing a previous decision of 2003, specifically stated:

> "*Diffuse Rights or Interests*: they refer to a good that concerns everyone (plurality of subjects), that is, to people who, in principle, do not make up an identifiable and individualized population sector, and who without a legal link between them, are injured or threatened with injury. Diffuse rights or interests are based on generic, contingent, accidental or mutating facts that affect an indeterminate number of people and that arise from subjects who owe a generic or indeterminate benefit, as to the possible beneficiaries of the activity from which such assistance derives, as in the case of positive rights such as the right to health, education or adequate housing, protected by the Constitution and the International Covenant on Economic, Social and Cultural Rights."[30]

The same Constitutional Chamber has stated that *collective* rights are "those referred to a determined (although not quantified) and identifiable population sector, made up of a group of people such as professional groups, neighborhood groups or unions."[31] In other words of the same

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ve/decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público*, N° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

29 *Idem*.

30 *See* ruling 1057 of August 4, 2023. Available at: Available at: http://historico. tsj.gob. ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML

31 *See* judgement by the Constitutional Chamber of the Supreme Tribunal No 656 of June 30, 2000, case *Defensor del Pueblo vs. Comisión Legislativa Nacional*, quoted

Constitutional Chamber, they are those that arise when the injury is specifically located in a group, determinable as such, although not quantified or individualized; like the inhabitants of an area of the country affected by an illegal construction that causes public services problems in the area.[32] These *collective* interests, said the same Constitutional Chamber, are:

> "referred to a determined population sector (although not quantified) and identifiable, although individually, within the group of people there is or may be a legal link that ties them. That is the case of injuries to professional groups, neighborhood groups, unions, inhabitants of a certain area." [33]

Regarding these *collective* rights or interests, ruling Nº 1057 of August 4, 2023, issuing the preliminary measures against the Venezuelan Red Cross Society, the Constitutional Chamber also quoted a previous decision of 2003, stating:

> "*Collective Rights or Interests:* they refer to a specific population sector (although not quantified) and identifiable, although individually, so that within the group of people there is or may be a legal link that ties them. Its harm is located specifically in a group,

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in ruling No 379 of February 26, 2003, case *Mireya Ripanti et al. vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)*. Available at: http://historico.tsj.gob.ve/decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público*, N° 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

32 *See* Allan R. Brewer-Carías, *Derecho de amparo y acción de amparo constitucional*, Academia de Ciencias Políticas y Sociales, Caracas 2021, p. 591. Available at: http://allanbrewercarias.com/wp-content/uploads/2021/02/A.R.-BREWER-CARIAS.-DERECHO-Y-ACCION-DE-AMPARO-CONSTITUCIONAL.-con-Portada-2-2021.pdf

33 *See* judgement of the Constitutional Chamber of the Supreme Tribunal No 656 of June 30, 2000, case *Defensor del Pueblo vs. Comisión Legislativa Nacional*, quoted in ruling No 379 of February 26, 2003, case *Mireya Ripanti et al. vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)*. Available at: http://historico.tsj.gob.ve/decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público*, N° 93-96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

determinable as such, such as professional groups, neighborhood groups, unions, inhabitants of a certain area, and so on. Collective rights must be distinguished from the rights of collective persons, since the latter are analogous to individual rights, since they do not refer to a group of individuals but to the legal or moral person to whom the rights are attributed. While legal persons act by organization, groups of individuals who have a collective interest act by representation, even if that interest is exercised by a group of persons, since the collective nature of the rights whose protection is invoked always exceeds the interest of the former." [34]

Summarizing, as the Constitutional Chamber stated in a 2003 ruling:

"the beneficiaries of collective rights are a group of subjectively indeterminate individuals who enjoy or can enjoy the satisfaction of a common interest. This means that collective rights obviously imply the existence of collective subjects, such as nations, people, joint-stock companies, political parties, trade unions, organized communities, but also ethnic, religious or gender minorities which, despite having an 'organizational, social or cultural structure', may not be legal or moral persons in the sense recognized by positive law.

In turn, diffuse rights or interests are objectively indeterminate, since the legal object of such rights is an indeterminate benefit, as in the case of rights set forth in positive norms, namely the right to health, education or housing, among others."[35]

Furthermore, the Constitutional Chamber of the Supreme Tribunal summarized the case law on the matter in judgment No. 1048 of August 17, 2000, stating that:

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34 Ruling quoted in judgment No 1057 of August 4, 2023. Available at: Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML

35 *See* judgment of the Constitutional Chamber of the Supreme Tribunal of February 6, 2003, Case: *Zoila Martínez de Pacheco y otros vs. Juzgado Superior en lo Civil y Contencioso-Administrativo de la Circunscripción Judicial de la Región Los Andes con sede en Barinas*, in *Revista de Derecho Público*, N° 93-94/ 95-96, Editorial Jurídica Venezolana, Caracas 2003, pp. 149-150. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

"The determination of the existence of diffuse or collective rights and interests requires for several factors to be combined:

1. That the one filing the petition does so based not only on his right or individual interest, but on the basis of the right or common interest or collective impact.

2. That the harmful act produces general damage to the common quality of life of all the inhabitants of the country or sectors of it, affecting the legal situation of all the components of society or its groups or sectors.

3. That the injured goods are not susceptible of individual appropriation by a subject.

4. That it is an indivisible right or interest that includes the entire population of the country (diffuse) or a sector or group of it (collective).

5. That there is a link, even if it is not legal, between the person who seeks the protection of the general interest of the society or a sector of it (common social interest) and the latter, arising from the damage or danger in which the community finds itself (as such).

6. That there is a need to satisfy social or collective interests, before individual ones.

7. That the obligor owes an indeterminate benefit, whose requirement is general."[36]

Through the cited case law the Constitutional Chamber has established the principles governing the basis for filling a petition seeking protection of diffuse and collective rights; and regarding the standing to do so, has established the sense and scope of the rights or interests to be protected, rejecting petitions, for instance, when not based on generic

36 Quoted in judgment of the Constitutional Chamber of the Supreme Tribunal No. 1814 of October 2007, Case: E*fraín Antonio Duin De La Rosa y otros*, in *Revista de Derecho Público* No. 112, Editorial Jurídica Venezolana, Caracas 2007, pp. 488-489. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-112-estudios-sobre-la-reforma-constitucional-octubre-diciembre-2007

facts, or when the benefit claimed is not nonspecific, that is, the petition is based on specific facts or the benefits claimed are specific benefits.

As was explained by the Constitutional Chamber regarding another claim:

> "in the case at hand we are not in the presence of a true and proper petition for collective interests, since from the facts stated, without further analysis, the existence of particular interests that fight for the elimination and control of the activities of the commercial premises located in the jurisdiction of the aforementioned Municipality can be evidenced, but not the encroachment of collective and diffuse interests, whose presupposition is the uniformity of interests, either of indeterminate subjects, or of specific social groups, in a single direction and with the same purpose, since otherwise, as seems to happen in the case sub judice, there could be a ruling that hurts the legal interest of another sector of society not represented by the plaintiff. The foregoing, in no way means that his claim cannot be satisfied judicially, but through other means that allow the containment of the interested party in the results of the trial and not through an action of this nature."[37]

In addition, specifically regarding the internal situation within civil societies, like the Red Cross Society, the Constitutional Chamber of the Supreme Tribunal has excluded any possibility of filing petitions for the protection of collective or diffuse rights or interests to solve society conflicts, stating that:

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37 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 279 of February 23, 2007, case: *Guillermo Tadeo Borges Ortega vs. Alcaldía del Municipio Turístico El Morro "Lic. Diego Bautista Urbaneja" del Estado Anzoátegui*, in *Revista de Derecho Público*, No 109, Editorial Jurídica venezolana, Caracas 2007, pp. 94 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-109-enero-marzo-2007. Also judgment of the Constitutional Chamber of the Supreme Tribunal No. 1322 of October 16, 2009, Case: *Valeriano González y otros*, in *Revista de Derecho Público*, No. 120, Editorial Jurídica venezolana, Caracas 2009, pp. 97-98. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-120-octubre-diciembre-2009.

> "Civil societies, as well as commercial companies, are legal persons usually constituted by virtue of the will of a multiplicity of persons. These entities express their will through the deliberation of a body that receives the name of assembly in which the members intervene with voice and vote.
>
> Notwithstanding the collective nature of the decisions of the assembly, insofar as they are taken by a group of individuals, this does not imply that such decisions are the expression of a diffuse or collective right or interest, in the terms that this Chamber has conceptualized the expression that is contained in article 26 of the Constitution of the Bolivarian Republic of Venezuela."[38]

On the other hand, regarding the jurisdiction of the Constitutional Chamber to decide claims for the protection of collective or diffuse rights or interests, according to article 146 of the Organic Law of the Supreme Tribunal of Justice, the claim must have "national significance," a condition that pursuant to the case law of the Chamber, is ascertained:

> "i) by the territorial scope, that is, when the constitutional complaint took place in one or more territories of the Republic, or alternatively in the whole of it (e.g. damage to the ozone layer, national epidemic, among others) with which there is a real incidence of geographical affectation that exceeds the territorial limits of a certain municipality and
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> ii) by the material scope, when the constitutional rights denounced as infringed are not limited to the protection of a one-dimensional relationship of the constitutional sphere of these (e.g. right to work, right to education) but when these have a multidimensional rank as a consequence of the alleged fact, act or omission which not only has a

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38 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 1814 of October 8, 2007, Case: *Efraín Antonio Duin De La Rosa y otros*, in *Revista de Derecho Público* No. 112, Editorial Jurídica Venezolana, Caracas 2007, pp. 488-489. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-112-estudios-sobre-la-reforma-constitucional-octubre-diciembre-2007

specific irradiating effect, but can also affect a multidimensional or indeterminate number of supra personal rights (e.g. simultaneous damage of the right to health, the environment, work, safety)" [39]

In the case of the claim pertaining ruling 1057 of 2023, none of the conditions for petitions seeking the protection of diffuse and collective rights set forth by the Constitutional Chamber were satisfied; as the petition was aiming at "abuses of power *against the volunteers and workers* of the body of that humanitarian organization, as well *as irregular actions in the use of the resources of that organization*, to the detriment of the most vulnerable sectors of Venezuelan society that depend on their humanitarian work."

V. STANDING REQUIREMENTS FOR PETITIONS OR COMPLAITS SEEKING PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS OR INTERESTS

The Constitutional Chamber of the Supreme Tribunal has also elaborated a very clear case law doctrine on the standing requirements to file petitions for the protection of collective or diffuse rights and interests, stating since 2000 that:

"any individual with legal capacity to bring suit, who is going to prevent a damage to the population or parts of it to which he belongs, is entitled to file a petition grounded in diffuse or collective interests, and where he had suffered personal damages, he can also claim for himself (jointly) such compensation.

This interpretation, grounded in Article 26, extends the standing to companies, corporations, foundations, chambers, unions and other collective entities whose object is the defense of the society, as long as they act within the boundaries of their corporate object, aimed at protecting the interests of their members regarding their object. …

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39 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No 946, of February 9, 2018, Case: *Yani Adrian Jaimes Gonzáles*, in *Revista de Derecho Público* No. 153-154, Editorial Jurídica Venezolana, Caracas 2018, pp 326-327. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-153-154-enero-junio-2018

When the damages harm groups of individuals that are legally bound or pertain to the same activity, the action grounded in collective interests, whose purpose is the same as the one of the diffuse interests, shall be brought to suit by the corporations that gather the damaged sectors or groups and even by any member of that sector or group as long as he acts in defense of that social segment …

Due to the foregoing, it is not necessary for whoever brings a suit grounded on diffuse or collective interests, if it is a diffuse one, to have a bond previously established with the offender. It is necessary that he acts as a member of the society, or its general categories (consumers, users, etc.), and invokes his right or interest shared with the others, since he participates with them in the damaged factual situation because of the infringement or detriment of the fundamental rights concerning the collectivity, which generates a common subjective right that despite being indivisible, may be enforced by anyone in the infringed situation, since the legal order acknowledges those rights in Article 26 of the Constitution. …

Even though it is a general right or interest enjoyed by the plaintiff, which allows various plaintiffs, he himself shall be threatened, shall have suffered the damage or shall be suffering it as a part of the citizenship, whereby whoever is not residing in the country, or is not damaged shall lack standing; this situation separates these actions from the popular ones.

Whoever brings suit based on collective rights or interests, shall do it in his condition of member of the group or sector damaged, therefore, he suffers the damage jointly with others, whereby he assumes an interest of his own giving him the right to claim the end of the damage for himself and the others, with whom he shares the right or interest. It shall be a group or sector not individualized, otherwise, it would be a concrete party. In both cases, if the action is admitted, a legal benefit will arise in favor of the plaintiff and his common interest with the society or collectivity of protecting it, maintaining the quality of life. The defense of society's interests is guaranteed. The plaintiff is given the subjective right to react against the damaging act or concrete threat, caused by the offender's violation of the fundamental rights of the society in general. Whoever is entitled to act shall always plea for an actual interest, which does

not terminate for the society in one single process. If an individual brings suit grounding his action in diffuse rights or interests, yet the judge considers that it is about them, he shall subpoena the Defender of the People or the entities established by law in specific subjects, and shall notify through an edict all the parties in interest, whether there are proceedings wherein the law excludes and grants representation to other individuals. All these legitimate interested parties shall intervene as third party claimants, if the judge admits them as such, taking into consideration the existence of diffuse rights and interests"[40].

This is the case, for instance, of the *amparo* action filed for the protection of electoral rights, whereas any citizen, invoking the general voters' rights, can file the petition.[41] In other words, and summarizing, the Constitutional Chamber has admitted that: "Any capable person that tends to impede harm to the population or sectors of it to which he appertains, can file actions in defense of diffuse or collective interests," extending the "standing to the associations, societies, foundations, chambers, trade unions and other collective entities devoted to defend the society,

40 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 656 of June 30, 2000, case: Defensor del Pueblo vs. Comisión Legislativa Nacional, quoted in ruling No 379 of February 26, 2003, case *Mireya Ripanti et al. vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)*. Available at: http://historico.tsj.gob.ve/decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público,* N° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

41 In these cases, the Chamber has even granted precautionary measures with erga omnes effects "to both individuals and corporations who have brought to suit the constitutional protection, and to all voters as a group." *See* ruling of the Constitutional Chamber Nº 483 of May 29, 2000, case: "*Queremos Elegir" y otros* in Revista de Derecho Público, Nº 82, 2000, Editorial Jurídica Venezolana, pp. 489–491. In the same sense, *See* the ruling of the same Chamber Nº 714 of July 13, 2000, *APRUM* case, in *Revista de Derecho Público*, Nº 83, Editorial Jurídica Venezolana, Caracas, 2000, pp. 319 ff. Available at: https://revistadederechopublicco.com/archivos/revistas/revista-de-derecho-publico-director-no-83-julio-septiembre-2000.

provided that they act within the limits of their societal goals referring to the protection of the interests of their members."[42]

In these cases the Constitutional Chamber has established as a general condition that the petition must be based "not only on the personal right or interest of the claimant, but also on a common or collective right or interest."[43] Consequently, in these cases, a bond or relationship must exist, "even if it is not a legal one, between whoever claims in the general interest of the society or part of it (social common interest), and the damage or danger caused to the collectivity."[44]

Although being of a personal character, even in cases of actions for the protection of collective and diffuse rights, it is generally accepted that some public officers have standing to file amparo petitions on behalf of the community or of groups of people. In Venezuela, before 1999 this traditionally was the case of the General Prosecutors and is now the case of the People's Advocate.

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42 The Chamber added that: "Those who file actions regarding the defense of diffuse interest do not need to have any previously established relation with the offender, but has to act as a member of society, or of its general categories (consumers, users, etc.) and has to invoke his right or interest shared with the population, because he participates with all regarding the harmed factual situation due to the noncompliance of the diminution of fundamental rights of everybody, which gives birth to a communal subjective right, that although indivisible, is actionable by any one placed within the infringed situation." Ruling of the Constitutional Chamber of June 30, 2000, Case *Defensoría del Pueblo. See* the reference and comments in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela,* Caracas, 2001, pp. 110–114.

43 That is, the reason of the claim or the petition for amparo must be "the general damage to the quality of life of all the inhabitants of the country or parts of it, since the legal situation of all the members of the society or its groups have been damaged when their common quality of life was worsened"; thus the damage "concerns an indivisible right or interest that involves the entire population of the country or a group of it." *See* ruling Nº 1948 of February 17, 2000, case: *William O. Ojeda O. vs. Consejo Nacional Electoral*. *See* the reference in Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. The Amparo Proceeding*, Cambridge University Press, New York 2009, p. 197.

44 *See* ruling Nº 1948 of February 17, 2000, case: William O. Ojeda O. vs. Consejo Nacional Electoral. *See* the reference in Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. The Amparo Proceeding,* Cambridge University Press, New York 2009, p. 197.

In fact, one important innovation of the Venezuelan constitutional system of protection of human rights and particularly regarding the standing to request *amparo*, was the establishment by the 1999 Constitution of a specific autonomous constitutional entity called the Advocate of the People (People's Advocate) with the specific purpose of protecting and seeking the protection of constitutional rights, particularly of diffuse and collective constitutional rights. Moreover, the People´s Advocate has been conceived as a separate branch of government.[45]

As is the case in many other Latin American countries[46] the general trend regarding these autonomous constitutional institutions for the protection of human rights (Ombudsman), as is the case of the Peoples' Advocate, is the power given to such officer to file petitions, particularly regarding the protection of diffuse and collective constitutional rights, having then the necessary standing to sue.

As was decided by the Constitutional Chamber of the Supreme Tribunal:

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45 The 1999 Venezuelan Constitution, in this regard, establishes a penta separation of powers, distinguishing five separated branches of government: Legislative, Executive, Judicial, Electoral and Citizens branches. Thr People's Advocate is part of the Citizens Power, along with the Public Prosecutor´s Office and the General Comptroller´s Office (Article 134). The People's Advocate was created for the promotion, defense and supervision of the rights and guaranties set forth in the Constitution and in the international treaties on human rights, as well as for the citizens' legitimate, collective and diffuse interests (Article 281). In particular, according to Article 281 of the Constitution, it also has among its functions to watch for the functioning of public services and to promote and protect the peoples' legitimate, collective and diffuse rights and interests against arbitrariness or deviation of power in the rendering of such services, being authorized to file the necessary petitions to ask for the compensation of the damages caused from the malfunctioning of public services. It also has among its functions, the possibility of filing petitions of amparo and habeas corpus. *See* Allan R. Brewer-Carías, *La Constitución de 1999. Derecho Constitucional Venezolano*, Academia de Ciencias Políticas y Sociales, Caracas 2022, pp. 554-555. Available at: http://allanbrewer carias.com/wp-content/uploads/2022/08/A.R.-BREWER-CARIAS.-CONSTITUCION -1999.-5a-edic.-2022-2022-port.pdf

46 *See* Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. The Amparo Proceeding*, Cambridge University Press, New York 2009, pp. 202 ff.

"*As a matter of law, the Advocate has standing to bring to suit petitions aimed at enforcing the diffuse and collective rights or interests*; not being necessary the requirement of the acquiescence of the society he acts on behalf of, for the exercise of the action. The Advocate of the People is given legitimate interest to act in a process defending a right granted to it by the Constitution itself, consisting in protecting the society or groups in it, in the cases of Article 281."[47]

It is the situation, for instance, of the protection of indigenous people's rights, the right to the environment and the citizens' right to political participation.[48] The main consequence of the establishment of

47 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 656 of June 30, 2000, caso *Defensor del Pueblo vs. Comisión Legislativa Nacional*, quoted in ruling No. 379 of February 26, 2003, case *Mireya Ripanti et al. vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)*. Available at: http://historico.tsj.gob.ve/decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público*, N° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

48 The Constitutional Chamber of the Supreme Tribunal of Venezuela admitted the standing of the Advocate of the People to file amparo petitions on behalf of the citizens as a whole, as was the case of the petition filed against the Legislative body pretension to appoint the Electoral National Council members without fulfilling the constitutional requirements. In the case, decided on June 6, 2001, the Constitutional Chamber, when analyzing Article 280 of the Constitution, pointed out that "the protection of diffuse and collective rights and interests may be raised by the Advocate of the People, through the amparo petition," adding the following: "As for the general provision of Article 280 eiusdem, regarding the general defense and protection of diffuse and collective interests, this Chamber considers that the Advocate of the People is entitled to act to protect those rights and interests, when they correspond in general to the consumers and users (6, Article 281), or to protect the rights of Indian people (paragraph 8 of the same Article), since the defense and protection of such categories is one of the faculties granted to said entity by Article 281 of the Constitution in force. It is about a general protection and not a protection of individualities. Within this frame of action, and since the political rights are included in the human rights and guaranties of Title III of the Constitution in force, which have a general projection, among which the ones provided in Article 62 of the Constitution can be found, it must be concluded that the Advocate of the People on behalf of the society, legitimated by law, is entitled to bring to suit an amparo petition tending to control the Electoral Power, to the citizen's benefit, in order to enforce Articles 62 and 70 of the Constitution, which were denounced to be breached by the National Legislative Assembly…(right to citizen participation).

this autonomous constitutional institution with standing to file these type of petitions, is the corresponding lack of standing of other State officers and institutions to do so.[49]

In this sense, the Constitutional Chamber of the Supreme Tribunal rejected a petition for the protection of collective or diffuse rights filed by a Governor of one of the federated States, ruling that the States and Municipalities cannot file actions for the protection of diffuse and collective rights and interests, except if a statute expressly authorizes them.[50] This case law was ratified in another ruling issued in 2001

Due to the difference between diffuse and collective interests, both the Advocate of the People, within his attributions, and every individual residing in the country, except for the legal exceptions, are entitled to bring to suit the petition (be it of amparo or a specific one) for the protection of the former ones; while the action of the collective interests is given to the Advocate of the People and to any member of the group or sector identified as a component of that specific collectivity, and acting defending the collectivity. Both individuals and corporations whose object is the protection of such interests may raise the petition, and the standing in all these petitions varies according to the nature of the same, that is why law can limit the petition in specific individuals or entities. However, in our Constitution, in the provisions of Article 281 the Advocate of the People is objectively granted the procedural interest and the capacity to sue." *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 656 of June 30, 2000, caso *Defensor del Pueblo vs. Comisión Legislativa Nacional*, quoted in ruling No. 379 of February 26, 2003, case *Mireya Ripanti et al vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)*. Available at: http://historico.tsj.gob.ve/decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público,* N° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

49 *See* Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America. The Amparo Proceeding,* Cambridge University Press, New York 2009, pp. 203.

50 Ruling of November 21, 2000. The Court ruled that the collective and diffuse rights and interests pursue to maintain an acceptable quality of life in all the population or sectors of it in those matters related to the quality of life that must be rendered by the State or by individuals. They are rights and interests that can concur with individual rights and interests, but that according to Article 26 of the Constitution and unless the statute denies the action, can be claimed by any person invoking a right or interest shared with the people in general or a sector of the population and who fears or has suffered a harm in his quality of life, being part of such collectivity. Now, being for the State to maintain the acceptable quality of life

whereas the Constitutional Chamber also denied the Governors or Mayors the standing to file collective actions, arguing that "*the Venezuelan State, as such, lacks [such standing], since it has mechanisms and other means to cease the damage caused to those rights and interests, specially through administrative procedures*"; concluding the ruling affirming that:

> "Within the structure of the State… *the only one who is able to protect individuals in matters of collective or diffuse interests is the Advocate of the People (in any of his scopes: national, state, county or special). The General Prosecutor, the Mayors, or the Municipal comptrollers lack both such attribution and the action* (unless the law grants them both).[51]

In the same judgment the Chamber decided that:

> "petitions in general grounded in diffuse or collective rights and interests may be filed by any Venezuelan person or legal entity, or by foreign persons residing in the country who have access to the judicial system through the exercise of this action…
>
> …but the population in general is entitled to bring them in the way explained in this ruling and those can be brought by the Advocate of the People, since as stated in Article 280 of the Constitution, the Advocate of the People is in charge of the promotion, defense and guardianship of the legitimate, collective and diffuse interest of the citizens.

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conditions, its bodies or entities cannot ask from it to render an activity; thus, within the structure of the State, the only institution that can file such actions is the People's Advocate, due to the fact that it represents the people and not the State, as well as other public entities when a particular statute gives him such capacity. *See* Case William Dávila. Gobernación Estado Mérida. *See* the comments in Rafael Chavero, *El nuevo régimen del amparo constitucional en Venezuela,* Caracas, 2001, p. 115.

51 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 656 of June 30, 2000, case *Defensor del Pueblo vs. Comisión Legislativa Nacional*, quoted in ruling No. 379 of February 26, 2003, case *Mireya Ripanti et al vs. Presidente de Petróleos de Venezuela S.A. (PDVSA)*. Available at: http://historico.tsj.gob.ve /decisiones/scon/junio/656-300600-00-1728%20.HTM. *See* also in *Revista de Derecho Público*, N° 93–96, Editorial Jurídica Venezolana, Caracas, 2003, pp. 152 ss. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-93-96-enero-diciembre-2003

> According to this Chamber, said provision does not exclude or prohibit the citizens the access to the judicial system in defense of the diffuse and collective rights and interests, since Article 26 of the Constitution in force sets forth the access to the judicial system to every person, whereby individuals are entitled to bring to suit as well unless a law denies them the action."[52]

Consequently, the States and Municipal authorities (governors and mayors) as well as the General Prosecutor, have been denied standing to file petitions seeking the protection of collective constitutional rights, when infringed by national authorities. In sum, pursuant to case law of the Constitutional Chamber of the Supreme Tribunal, after the People's Advocate was created by the 1999 Constitution, no other public officer in his official character, including the General Prosecutor, have standing to file petitions for the protection of collective or diffuse rights or interests.

Consequently, the plaintiff, that is, the General Prosecutor, in the case at hand, where the Constitutional Chamber illegitimately intervened the Venezuelan Red Cross Society, completely lacked the required standing set forth by the same Constitutional Chamber in its well-established case law to file such petition for the purported protection of diffuse and collective rights.

VI. THE PETITION BROUGHT BEFORE THE CONSTITUTIONAL CHAMBER BY THE GENERAL PROSECUTOR AGAINST THE INDIVIDUAL MEMBERS OF THE BOARD OF DIRECTORS OF THE VENEZUELAN RED CROSS SOCIETY

In the case of judgment, No 1057 of 2023, the Chamber admitted a petition filed by Tarek William Saab, "*acting in his capacity of Prosecutor General* of the Bolivarian Republic of Venezuela." It was not filed by Tarek William Saab in his personal capacity as member of the Venezuelan society, but in his capacity of public officer head of the Public Prosecutor Office, contrary to what has been the case law doctrine of the same Constitutional Chamber of the Supreme Tribunal.

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52. *Idem.*

Based on her own case law, the Constitutional Chamber was compelled to dismiss such petition, pursuant to the rule established among others, in judgment No. 1.395 of 21 November 2000 (case: "*William Dávila Barrios and others*"), whereas it determined:

> "with respect to which individual or collectivity, public or private, subjects are authorized or empowered pursuant to the constitutional norm to claim the effective protection of collective and diffuse rights and interests, that in the case of public subjects, that is, State organs or entities, *only the Office of the Peoples's Advocate has the power, based on articles 280 and 281.2 of the Constitution* of the Bolivarian Republic of Venezuela, to apply to the Courts of the Republic to request protection and effective protection of the collective rights and interests of persons living or residing in the territory of the Republic, without excluding the possibility of claiming the protection of the collective rights or diffuse interests of Venezuelans living or residing outside the territory of the Republic."[53]

Likewise, the Chamber revealed that such representation is not expressly assigned in the current legal system to any other State body or entity, and that the petition of its defense in jurisdictional headquarters "(...) correspond to a plurality of organizations with legal personality, whose object is intended to act in the sector of life where the activity of the collective entity is required, and which, in the opinion of the Court, constitutes a quantitatively important sample of the sector (...)" [54]

But contrary to her own doctrine, the Constitutional Chamber granted "standing" to the Prosecutor General to file the petition for the protection of the supposed "collective and diffuse rights and interests *of the employees and volunteers of the Red Cross*," admitting the

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[53] Quoted in judgment of the Constitutional Chamber of the Supreme Tribunal No. 2150 of November 14, 2007, Case: *Lorenzo Emilo Rondón vs. Presidente del Instituto Nacional de Investigaciones y de Ministro del Poder Popular para la Agricultura y Tierras*, in *Revista de Derecho Público*, N° 112, Editorial Jurídica Venezolana, Caracas, 2007, pp. 490-492. Available at: https://revistadederecho publico.com/archivos/revistas/revista-de-derecho-publico-director-no-112-estudios-sobre-la-reforma-constitucional-octubre-diciembre-2007

[54] *Idem.*

intervention of the Red Cross Society only with incidental reference to the right to health, as a consequence of the denounced situation in its operation.

Such admission of the petition was even made without considering what the Chamber had already established regarding the general possibility of a given citizen to file a petition for the protection of collective or diffuse rights, in the sense that the claimant:

> "*personally must fear the injury or have suffered it or be suffering it as part of the community in relation to his fundamental rights,* exercising such action in his capacity as a member or linked to the injured group or sector, so that anyone who is not domiciled in the country, or cannot be reached by the injury, will lack legitimacy,..." [55]

In the case subject to these comments as the General Prosecutor explained in his complaint, and judgment No. 1057 referred, he filed the petition due to:

> "[...] abuses of power *against the volunteers and workers* of the body of that humanitarian organization, as well as *irregular actions in the use of the resources of that organization*, to the detriment of the most vulnerable sectors of Venezuelan society that depend on their humanitarian work." [56]

That is, in the words of the General Prosecutor, he filed a petition that was not based on generic facts, related to indeterminate subjects. On the contrary, the petition was based on specific facts related to an equally specific group of people: the employees and volunteers of the Red Cross, regarding certain labor benefits; and against the members of the Board of Directors of the Red Cross Society, in which case, as the Constitutional Chamber said in another case, "there could be a ruling that hurts the legal

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55 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No. 1623, of October 29, 2008, Case: *Narciso Antonio Palacios y otros vs. Alcalde del Municipio Chacao del Estado Miranda*, in *Revista de Derecho Público* No 116, Editorial Jurídica Venezolana, Caracas 2008, pp. 106-113. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-116-octubre-diciembre-2008

56 Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML.

interest of another sector of society not represented by the plaintiff." As the same Chamber said: "The foregoing, in no way means that his claim cannot be satisfied judicially, but through other means that allow the containment of the interested party in the results of the trial and not through an action of this nature."[57]

As for the specific facts related to the *employees and volunteers of the Red Cross*, regarding determined labor benefits, they were even stated in the wording of the petition filed by the General Prosecutor, as it can be read in the transcription contained in ruling No. 1057:

> "The plaintiff explains that*:* "having regard to the complaints and interviews conducted in the investigation carried out by the Thirty-Fourth (34) National Prosecutor's Office Specialized in the Protection of Human Rights of the Public Prosecutor's Office, annexed hereto, which describe *workplace harassment* by the National Board of Directors of the Venezuelan Red Cross, chaired by citizen Mario Villarroel Lander, revealed through *mistreatment, threats and coercion of the working and volunteer personnel* of that humanitarian entity, which becomes the violation of fundamental human rights such as the right to human dignity, health and life, it is clear that the present lawsuit must be processed, since these constitutional violations seriously compromise *the collective rights of workers and volunteer personnel who are being affected by this action*."
>
> "That: "Equal importance to the collective interests of workers is the present Petition for Protection of Collective and Diffuse Interests, with regard to the alleged fraudulent actions in the elections of the

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57 *See* judgment of the Constitutional Chamber of the Supreme Tribunal No 279 of February 23, 2007. Caso: *Guillermo Tadeo Borges Ortega vs. Alcaldía del Municipio Turístico El Morro "Lic. Diego Bautista Urbaneja" del Estado Anzoátegui*. In *Revista de Derecho Público* No 109, Editorial Jurídica Venezolana, Caracas 2007, pp. 94 ss. Available at: https://revistadederechopublico.com /archivos/revistas/revista-de-derecho-publico-director-no-109-enero-marzo-2007, *See* also judgment of the Constitutional Chamber of the Supreme Tribunal No 1322, of October 16,2009, Case: *Valeriano González y otros*, in *Revista de Derecho Público* No. 120, Editorial Jurídica Venezolana, Caracas 2009, pp. 97-98. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico - director-no-120-octubre-diciembre-2009

members of the National Board of Directors of the Venezuelan Red Cross, chaired by citizen Mario Villarroel Lander, which has allowed them to remain in said positions for more than 40 years, despite the fact that by statutory mandate elections must be held every two (02) years, this to the detriment of the right to vote and political participation, in the terms established in article 63 of the Constitution of the Bolivarian Republic of Venezuela".

That: "(...), transcendental importance derives from the complaints related to the National Board of Directors of the Venezuelan Red Cross, chaired by citizen Mario Villarroel Lander, who does not consider the *complaints made internally by the workers*, *regarding the arbitrariness they are subject to*, as well as those referring to the *irregular use of resources* by the National or Regional authorities of the Venezuelan Red Cross; the *irregular use of new vehicles* that are assigned to some members of the board and used personally 'to go to the beach, restaurants, concerts', the alleged *wrongdoings in the selection of suppliers related to the food of workers and volunteers* of the Venezuelan Red Cross, and that *the resources assigned to the Venezuelan Red Cross, are used by the Board of Directors* "as a petty cash for all their cravings, forcing it through threats to the purchase of goods and payment for services that are not contemplated in the budget lines and coercing the actions and permanence of this office in the country if they do not comply with their requests."[58]

None of these allegations complies to the strict conditions established by the same Constitutional Chamber regarding petitions for the protection of collective and diffuse rights, in the sense that none refers togeneric facts or indeterminate subjects. On the contrary, they are based on specific facts attributed to the *Board of Directors* and high officers of the Red Cross Society (namely, among others, *Mario Villarroel Lander, Miguel Ángel Villarroel and Eester Pernía),* in detriment of an equally specific group of people who are the *employees and volunteers of the Red Cross*. This was corroborated by the same text of the complaint filed by the Prosecutor General when referring to the eight (08) written complaints that were allegedly received:

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[58] Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML.

"at the headquarters of the General Office for Human Rights Protection of the Public Ministry under my charge, referred to alleged *irregularities attributed to the President and the National Board of Directors* of the Venezuelan Red Cross, chaired by citizen Mario Villarroel Lander, namelly *acts of intimidation, threats, coercion and harassment at work to the detriment of the personnel working in this humanitarian association, either as permanent staff or volunteers*; *concealment of irregular facts, alleged violations of the right to vote, as well as anomalous acts regarding the administration of material resources* held by the Venezuelan Red Cross, to the *detriment of its workers* and the most vulnerable sectors of Venezuelan society to which it must attend, and which directly link their right to health." [59]

This is why, the Constitutional Chamber declared in its ruling that:

"As can be seen, the aforementioned complaints *involve the action of a manager*, which could affect a collective legal good as well as the national interest, since the right to health is involved, in addition to the risk or affectation of *rights and dignity of the group of workers* of the Venezuelan Red Cross. By denouncing alleged *abuses of power, harassment and undignified treatment that would affect volunteers, workers, as well as alleged irregular actions in the performance, use and management of the resources assigned to that agency* for the development of its humanitarian work, the fulfillment of the main objective within Venezuelan territory." [60]

In the text of the complaint filed by the General Prosecutor, and of the Constitutional Chamber´s ruling, this was the only incidental reference made -for instance- to the "right to health", without any argument whatsoever on how the collectivity was affected. Furthermore, neither of the eight (8) anonymous written complaints that formed the basis for the petition, all made by employees of the Red Cross working at the humanitarian organization in favor of the health of all those using its services, contains a single mention regarding any sort of malfunctioning

[59] Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML.

[60] Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML.

of the health services or the service rendered to the general public. In fact, the employees signing the anonymous complaints only asked for a change in the Red Cross Society ("*un cambio en la Cruz Roja Venezolana").*

Consequently, the purported petition for the protection of diffuse and collective rights filed by the General Prosecutor, without due standing, did not comply with the conditions set forth by the Constitutional Chamber in its well-established case law. Regardless of the foregoing, the Constitutional Chamber admitted the petition and issued the precautionary measure intervening the Red Cross Society.

VII. THE INTERVENTION OF THE RED CROSS SOCIETY BY THE CONSTITUTIONAL CHAMBER WITHOUT RESPECTING THE BASIC PROCEDURAL RULES REGARDING "PRECAUTIONARY MEASURES"

As said, the Constitutional Chamber admitted the petition filed by the General Prosecutor, ignoring her own case law doctrine in the sense that the General Prosecutor lacks the needed standing to file petitions for the protection of collective and diffuse rights; and also ignoring that in any case, to file a petition of this sort, the plaintiff has to claim that he has personally suffered harm in his rights, in addition to the general harm caused to the rights of the whole society, as well as contend only generic facts referred to collective rights of indeterminate subjects, and not, as in this case, specific facts attributed to the Board of Directors of the Red Cross Society, related to a specific group of people, namely the employees and volunteers of the Red Cross.

Thus, ignoring its own case law doctrine, the Constitutional Chamber considered that:

> "any member of the society, with capacity to act in court, can -in principle- act in protection of them, as these rights are related to the common good, which is why, from that perspective, in the opinion of this Constitutional Chamber, the plaintiff [the General Prosecutor] is entitled to exercise the present action, since he acts as the highest representative of the Public Ministry, not only in order to guarantee the protection of the criminal investigation in progress but to file the action in exercise of his duty to secure general interest and public order as well as to protect and preserve the full *exercise of*

> *constitutional rights and guarantees of both volunteers and workers belonging to the Venezuelan Red Cross* and the community in general, especially those in vulnerable situations to whom the health services and other benefits of this important organization are directed."[61]

Based on the foregoing, but without any arguments to sustain the assertion, the Constitutional Chamber affirmed that the matter considered was of "national importance," and ordered the "precautionary measure" of intervening the Red Cross Society, ceasing in a definitive way in their position all the members of the Board of Directors of the Society bypassing its bylaws. As a consequence of this definitive decision, the Chamber decided the appointment of an Ad-Hoc Board of the Red Cross Society, designating its President, to replace the Board of Directors:

> "not only in order to guarantee its effective functioning in accordance with the Constitution and the Law, but also to prevent the current National Board of Directors of that humanitarian entity *from continuing to violate dignity as a fundamental human right, given the level of mistreatment, harassment at work, threats and coercion that they exert on the persons in their care,* or obstruct the investigation in the criminal field carried out by the Public Prosecutor's Office." [62]

This ruling, from the standpoint of Venezuelan procedural law, was issued as a "*medida cautelar"* or "precautionary measure" but disregarding the rules governing the issue of such temporal, preliminary or provisional procedural measures set in the Venezuelan Civil Procedural Code, particularly the temporary nature.

For starters, because following article 585 of the Civil Procedural Code[63], as has been applied by case law, to issue "*medidas cautelares*" the Chamber was compelled to consider: first "the apparent existence of a

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61 Available at: http://historico.tsj.gob.ve/decisiones/scon/agosto/327890-1057-4823-2023-23-0802.HTML.

62 *Idem*.

63 "Article 585. The preventive measures established in this Title shall be decreed by the Judge, only when there is a manifest risk that the judgment will be illusory and provided that a means of proof is accompanied that constitutes a serious presumption of this circumstance and of the right that is claimed."

"good right" (*buen derecho*), second, the existence of a "situation of danger caused by the delay" (*periculum in mora*) on deciding, and third, "the adequacy of the petition to secure the effectiveness of the claim" (*periculum in dammi).*

These conditions have been defined by case law since long. In the Contentious Administrative Jurisdiction, for instance, the First Court on Contentious Jurisdiction has stated:

> "First, the need for "the appearance of the existence of a good right" (*fumus boni juris*), that is, the need for the petitioner to prove the existence of his constitutional right or guaranty as being violated or threatened.
>
> Second, the "danger posed by the delay" (*periculum in mora*), that is, the need to prove that the delay in granting the preliminary protection will make the harm irreparable.
>
> Third, the "danger of the harm" (*periculum in dammi*"), that is the need to prove the imminence of the harm that can be caused.
>
> And a fourth condition can be mentioned in order for the courts to issue preliminary measures, which is the need to balance the collective and particular interests involved in the case."[64]

These conditions have also long being established by the Political Administrative Chamber of the Supreme Tribunal, applicable to the Constitutional Chamber, considering that:

> "In order for an anticipated protective measure to be granted, due to its preliminary content it is necessary to examine the existence of three essential elements, always balancing the collective or individual interests; such conditions are:

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[64] As for instance has been ruled on March 1, 2001 by the Venezuelan First Court on Contentious Administrative Jurisdiction, *Video & Juegos Costa Verde, C.A. vs. Prefecto del Municipio Maracaibo del Estado Zulia* case, in *Revista de Derecho Público*, Nº 85-88, Editorial Jurídica Venezolana, Caracas, 2001, p. 291. Available at https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-85-88-enero-diciembre-2001

1. *Fumus Boni Iuris*, that is, the reasonable appearance of the existence of a "good right" in the hands of the petitioner alleging its violation, an appearance that must derive from the written evidence (documents) attached to the petition.

2. *Periculum in mora*, that is, the danger that the definitive ruling could be illusory, due to the delay in resolving the incident of the suspension.

3. *Periculum in Damni*, that is, the imminence of the harm caused by the presumptive violation of the fundamental rights of the petitioner and its irreparability. These elements are those that basically allow one to seek the necessary anticipatory protection of the constitutional rights and guaranties.[65]

These general conditions for issuing preliminary protective measures in Venezuela are very similar to the prerequisites tested by the United States' courts when issuing preliminary injunctions, namely: 1) a probability of prevailing on the merits; 2) an irreparable injury if the relief is delayed; 3) a balance of hardship favoring the plaintiff; and 4) a showing that the injunction would not be adverse to the public interest; all of which must be proven by the plaintiff.[66]

Nonetheless, in the case of the intervention of the Venezuelan Red Cross Society, none of these conditions were considered –nor met– in the judgment pronounced by the Constitutional Chamber, leading Professor Alí Daniels to state:

"the case of the judicial intervention of the Venezuelan Red Cross is very serious, because the highest court not only did not consider respect for the autonomy and freedom of this organization, but also violated due process by agreeing to a disproportionate precautionary measure without any constitutional guarantees."

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[65] *See* ruling No. 488 by the Político Administrative Chamber dated March 3, 2000, issued in the case: *Constructora Pedeca, C.A. vs. Gobernación del Estado Anzoátegui*, in *Revista de Derecho Público*, Nº 81, Editorial Jurídica Venezolana, Caracas, 2000, p. 459. Available at: https://revistadederechopublico.com/archivos/revistas/revista-de-derecho-publico-director-no-81-enero-marzo-2000

[66] *See* Allan R. Brewer-Carías, *Constitutional Protection of Constitutional Rights in Latin America. The Amparo Proceeding*, Cambridge University Press 2009, pp 314, *See* also William M. Tabb and Elaine W. Shoben, *Remedies*, Thomson West, 2005, p. 63.

Daniels considered that the facts denounced by the Prosecutor's Office "did not merit a measure as invasive and dangerous for an essential human right as freedom of association." [67]

The other infringement regards one of the most essential rules on interlocutory, preliminary and temporary orders -as the "*medidas cautelates"* are-; as the intervention of the Venezuelan Red Cross Society amounts to a definitive measure, since the effects are not be possible to revert.

It was issued contrary to Venezuelan Procedural Law regulating "*medidas cautelares*" as preliminary and temporary measures (contrary to final), and hence, issued pending the procedure; similar to "preliminary injunctions" issued by courts in the United States, which are also temporary or securing protection pending trial.[68]

This means that such temporary or protective measures or orders can essentially be reversed if the petition is eventually dismissed. In the case of the intervention of the Venezuelan Red Cross Society and the removal of its existing Board of directors, such a measure is, in fact, a final one, tending to the definitive (not temporal) election of a new Board of Directors.

As Professor José Ignacio Hernández has pointed out,

> "The precautionary measure issued violates procedural principles, since it is not a temporary and reversible measure. In reality, the precautionary measure issued solves the substance of the dispute, since it definitively decided the intervention of the Red Cross. This intervention was issued without consultation, outside due process.

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67 *See* Alí Daniels, "Con la intervención judicial de la Sociedad Venezolana de la Cruz Roja se agrava el patrón de violaciones contra la libertad de asociación en Venezuela," in Acceso a la Justicia, August 10, 2023, available at: https://accesoalajusticia.org/con-intervencion-judicial-sociedad-venezolana-cruz-roja-agrava-patron-violaciones-contra-libertad-asociacion-venezuela/

68 *See* Allan R. Brewer-Carías, *Constitutional Protection of Constitutional Rights in Latin America. The Amparo Proceeding*, Cambridge University Press 2009, pp 366-367; and John Bourdeau et al, "Injunctions", in Kevin Schoder, John Glenn and Maureen Placilla, *Corpus Juris Secundum*, Volume 43A, Thomson West, 2004, pp. 24 ff.

> …the Constitutional Chamber abused its precautionary power, to agree to the intervention of the Venezuelan Red Cross, which is an organization that is not integrated into the public sector."[69]

In the same sense, professor Alí Daniels has considered that:

> "Based on complaints and anonymous testimonies, the Supreme Tribunal of Justice has issued a precautionary measure that, in reality, constitutes an anticipated judgment on the merits, and that generates irreversible changes in the Red Cross, in violation of the right to defense, due process, the presumption of innocence and freedom of association."
>
> "… National legislation establishes solutions when an association has internal problems or irregularities in its management: in the case of crimes, those responsible must be duly charged and judged with respect for their human rights. And if there are administrative irregularities, the members, in their free and sovereign determination, must decide what the corrective measures are and apply them. In the case of the Red Cross, neither of these two solutions was used. On the contrary, an intervention was imposed by the State, through an individual, ignoring the will of the legitimate subjects of rights to make decisions on behalf of the intervened entity, violating its bylaws and Articles of Incorporation of the Red Cross (article 15)."[70]

Consequently, when the Constitutional Chamber issued the judgment intervening the Venezuelan Red Cross Society, the purported "preliminary measure", not only was not a "preliminary", but was in fact

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69 *See* José Ignacio Hernández, **"**La intervención de la Cruz Roja Venezolana por la Sala Constitucional: otro paso más del constitucionalismo autoritario-populista,**"** August 5, 2023; available at: https://www.joseignaciohernandezg.com/2023/la-intervencion-de-la-cruz-roja-venezolana-por-la-sala-constitucional-otro-paso-mas-del-constitucionalismo-autoritario-populista/

70 *See* Alí Daniels, "Con la intervención judicial de la Sociedad Venezolana de la Cruz Roja se agrava el patrón de violaciones contra la libertad de asociación en Venezuela," in *Acceso a la Justicia*, August 10, 2023, available at: https://acceso alajusticia.org/con-intervencion-judicial-sociedad-venezolana-cruz-roja-agrava-patron-violaciones-contra-libertad-asociacion-venezuela/

a "definitive" one – non reversible - eliminating the Board of Directors without complying with the conditions established both in the Civil Procedural Code and well-established case law thereto.

VIII. THE INTERVENTION AND THE RISK OF THE RED CROSS SOCIETY LOSING INDEPENDENCE VIS-À-VIS THE GOVERNMENT

The Constitutional Chamber´s intervention of the Red Cross Society, on the other hand, confirms that the petition filled by the General Prosecutor was not in fact for the protection of collective and diffuse rights in the terms defined by the Constitutional Chamber itself, but a specific petition filed by an incompetent public officer, lacking the needed standing, for the exclusive purpose of intervening it, and without complying with the essential conditions for granting it under Venezuelan Procedural Law. The purpose was to eliminate and substitute the Board of Directors of the Venezuelan Red Cross Society, by appointing a new Ad-Hoc Board, without any reference whatsoever to any sort of protection of generic rights of the collectivity, and with the factual excuse of the protection of individual labor rights of the employees and volunteers of the Red Cross Society, all covered by an alleged petition for the protection of collective and diffuse rights.

On the contrary, as expressed by Professor José Ignacio Hernández:

> "the Constitutional Chamber has used this remedy for the alleged protection of certain labor rights that would have been violated, according to complaints filed with the Prosecutor's Office.
>
> These alleged labor complaints were not channeled through ordinary mechanisms, nor have they given rise to procedures in which the right to defense of the persons denounced is guaranteed. Hence, these complaints are clearly insufficient to substantiate a petition for the protection of diffuse and collective rights."[71]

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[71] *See* José Ignacio Hernández, "La intervención de la Cruz Roja Venezolana por la Sala Constitucional: otro paso más del constitucionalismo autoritario-populista," 5 August 2023. Available at: https://www.joseignaciohernandezg.com/2023/la-intervencion-de-la-cruz-roja-venezolana-por-la-sala-constitucional-otro-paso-mas-del-constitucionalismo-autoritario-populista/

This intervention of the Venezuelan Red Cross Society, on the other hand, was also decided ignoring the principles that govern the International Movement of the Red Cross and Red Crescent, in particular the principle of independence of National Societies vis-a-vis the Governments. This explains the reaction of the International Federation of Red Cross and Red Crescent Societies (IFRC) expressing concern about the case of Venezuela, noting that:

> "*Any State intervention in our National Red Cross and Red Crescent Societies raises serious concerns* regarding their independence and principle-based humanitarian work of National Societies and will be treated with the utmost importance. IFRC has its own mechanisms to address situations when a member National Society might be considered breaching our fundamental principles and we encourage governments to facilitate the IFRC's own internal mechanism to address such situations."[72]

In the case considered, as was already mentioned, in her "preliminary" and supposedly "temporal" precautionary order, the Constitutional Chamber established "an *Ad Hoc* Restructuring Board chaired by Ricardo Filippo Cusanno," and assigned him, among others, the power to appoint the other members of the *Ad Hoc* Restructuring Board of the institution. This Ad Hoc Board, according to the judgment of the Chamber, must: (i) "convene the internal election of the authorities of the Red Cross" and (ii) "evaluate and proceed to restructure the internal reorganization of the Red Cross within a period of one year," and must also (iii) "perform all the necessary attributions to guarantee the continuity of the service provided by the Venezuelan Red Cross." The Ad Hoc Board, nonetheless, is compelled "to report to the Constitutional Chamber of the Supreme Tribunal on the fulfillment of its attributions." The latter meaning, in fact, the subjugation of the Board´s Society to State control through the Constitutional Chamber of the Supreme Tribunal.

The President of the Ad Hoc Board, announced the names of the other members of the Ad-Hoc Board, [73] and in a Communiqué dated

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[72] *See* IFRC, **"**Update on the Venezuelan Red Cross.**"** August 9, 2023. Available at: https://www.ifrc.org/article/update-venezuelan-red-cross

[73] It must be noted that perhaps because it is a non-profit civil society, the appointments made by Mr. Cussano of the new members of the Ad Hoc Board,

August 7, 2023, signed by all of them they expressed their intention to "ask the International Federation of Red Cross and Red Crescent Societies (IFRC) and the International Committee of the Red Cross (ICRC) to accompany the process" hoping to "have the participation of these bodies for the updating of the bylaws, the creation of transparency mechanisms, the integrity of volunteers and the holding of democratic elections within 12 months."[74]

In any case, such companionship by the Federation is, of course, required, among other reasons, because pursuant to the Rules of the International Movement of the Red Cross and Red Cresent, as was aforementioned, the change of bylaws of National Societies must get the approval of the Federation. In this process, as was expressed by Christophe Lanord, it is expected that the so-called "true Red Cross approach" will prevail, which i "the policy not to exclude any Society but instead to maintain a constructive dialogue [which] is better than ostracism."[75.]

In the near future, the International Federation of the Red Cross will really realize what, in fact, will be the impact and the extent of the State's intervention of the Red Cross, as well as the level of engagement of the Government on the Society. Currently we have to rely on what the International Federation expressed on August 9, 2023, about the intervention and "Supreme Court judgment regarding the reorganization of the Venezuelan Red Cross' leadership and board, and related actions," when informing that:

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although without direct relation with the volunteer activities of the Red Cross, are persons with distinguished carriers.

74 *See* Associated Press (Fiorella T.), "Cruz Roja Venezolana: ¿quiénes son los integrantes de la nueva junta tras su intervención? A través de sus redes sociales, el organismo internacional informó a la opinión pública cómo quedó compuesta la organización," August 7, 2023, in *El diario,* 18 Agosto 2023, available at: https:// eldiario.com/2023/08/07/cruz-roja-venezolana-integrantes-de-la-nueva-junta/ *See* also in Alberto News, August 7, 2023 available at: https://albertonews.com/principales/ cruz-roja-venezolana-confirma-los-nuevos-miembros-de-la-junta-reestructuradora-de-institucion-sepa-quienes-son-detalles/

75 *See* Christophe Lanord, "The legal status of National Red Cross and Red Crescent Societies," in *International Review of the Red Cross*, No. 840, 31-12-2000; available at: https://www.icrc.org/en/doc/resources/documents/article/other/57jqt9. htm

"The IFRC was dispatching senior officials to Caracas this week to join its permanent delegation in the country to deal with the ongoing developments; this will continue with the goal to better understand the scope of risks and ability to continue providing principle-based humanitarian services, and the level of government involvement, if any, going forward.

Our priority is to protect the critical role of the Venezuelan Red Cross and its volunteers and staff in the country: their neutral, impartial, and independent humanitarian action has been essential in saving lives.

We are currently closely monitoring the situation, assessing the best way forward, and we will inform on our next steps based on that analysis." [76]

The Federation was emphatic stating that:

"Any State intervention in our National Red Cross and Red Crescent Societies *raises serious concerns regarding their independence and principle-based humanitarian work of National Societies and will be treated with the utmost importance*. IFRC has its own mechanisms to address situations when a member National Society might be considered breaching our fundamental principles and we encourage governments to facilitate the IFRC's own internal mechanism to address such situations."[77]

In light of the aforementioned, thus, one of the main issues that need to be ascertained and solved, due to the intervention of the National Society made by a State body ignoring and by-passing what is provided in its bylaws, is the extent of control set forth in the ruling, by imposing the newly appointed Ad Hoc Board of the Society the duty to "*report to the Constitutional Chamber* of the Supreme Tribunal on the fulfillment of its

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[76] *See* "IFRC, "Update on the Venezuelan Red Cross," 09/08/2023, available at: https://www.ifrc.org/article/update-venezuelan-red-cross. *See* also "Federación Internacional de la Cruz Roja preocupada por intervención de Cruz Roja Venezolana", August 9, 2023, available at: https://morfema.press/destacada/federacion-internacional-de-la-cruz-roja-preocupada-por-intervencion-de-cruz-roja-venezolana/

[77] *Idem.*

attributions." This will be, without doubt, the main question regarding the effective neutrality, impartiality, and independence of the National Society, a concern that has already being discussed.

In this sense, for instance, Professor José Ignacio Hernández has expressed his opinion in the sense that:

> "The decision of the Constitutional Chamber violates that status and fundamental humanitarian principles. Specifically, the decision violates the principles of impartiality and neutrality, since the action of the *Red Cross is now controlled by an organ of the Venezuelan State*, such as the Constitutional Chamber. For all the above, under the conditions established in decision No. 1,057, the Venezuelan Red Cross *is unable to comply with the humanitarian mandate of the International Red Cross and Red Crescent Movement, becoming, in fact, one more instrumentality of the regime of Nicolás Maduro*."[78]

In addition, the appointment as members of the Ad Hoc Board of the Red Cross Association made by its President, pursuant to the decision of the intervention of the Society, of some professors of the Central University of Venezuela that are part of the governing body of the University, was rejected by members of the same University body, because considering that were made in violation of the Statute governing the Autonomous Universities.[79] In the opinion of the ONG *Acceso a la Justicia,* the appointment was contrary to two of the principles governing the activities of National Red Cross Societies, their "neutrality and independence," reinforcing:

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78 *See* José Ignacio Hernández, "La intervención de la Cruz Roja Venezolana por la Sala Constitucional: otro paso más del constitucionalismo autoritario-populista," August 5, 2023. Available at: https://www.joseignaciohernandezg.com/2023/la-intervencion-de-la-cruz-roja-venezolana-por-la-sala-constitucional-otro-paso-mas-del-constitucionalismo-autoritario-populista/

79 *See* in Albany Andara Meza, "Profesores de la UCV en desacuerdo con participación de autoridades en junta interventora de la Cruz Roja," August 17, 2023, available at: https://efectococuyo.com/la-humanidad/profesores-de-la-ucv-en-desacuerdo-con-participacion-de-autoridades-en-junta-interventora-de-la-cruz-roja/ Also available in *El Nacional*, August 18, 2023, at: https://www.elnacional.com/venezuela/profesores-rechazaron-participacion-de-autoridades-de-la-ucv-en-la-junta-ad-hoc-de-la-cruz-roja/

> "doubts about the charitable organization's ability to carry out its mission from now on in accordance with its fundamental principles of independence and neutrality."[80]

In fact, one can consider that the immediate effect of the Red Cross Society´s intervention through a "preliminary measure" issued by the Constitutional Chamber of the Supreme Tribunal, appointing a new President of the Society with the power to appoint the members of an Ad Hoc Board that must "report" to the Chamber about the accomplishment of their new attributions not established in the by-laws of the Society, is the subjugation to control by a State body of the Red Cross Society, infringing the legal provisions that govern civil societies in Venezuela.

CONCLUSION

Summarizing all the aforementioned, as was already said in the First Part, the judicial intervention of the Venezuelan Red Cross Society by the Constitutional Chamber of the Supreme Tribunal of Justice, is an illegitimate intervention by a State body against a civil society not subject to State control, because:

a. It violated the right to free association guarantied in article 52 of the Constitution, according to which, civil societies regulated in the Civil Code are not subject to State intervention except when an express provision of law so allows. Consequently, in this case, in addition to be illegal, the intervention of the Society was ordered by an incompetent State body.

b. It was pronounced within a procedure that could not have been admitted by the Chamber, since the petition did not comply with the conditions established by the same Chamber in her well-established case law, set forth since 2000, regarding actions for the protection of diffuse and collective rights.

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[80] *See* Acceso a la Justicia, "Dudas sobre la legalidad de la incorporación de la vicerrectora de la UCV a la junta ad hoc de la Cruz Roja Venezolana," August 23, 2023; available at: https://accesoalajusticia.org/dudas-legalidad-incorporacion-vicerrectora-ucv-junta-ad-hoc-cruz-roja-venezolana/

c. The petition was also inadmissible because it was filed by the General Prosecutor, who lacks standing to file petitions for the protection of diffuse and collective rights, as the well-established case law set forth by the same Constitutional Chamber has long recognized since 2000.

d. The "preliminary measure" violated also the basic provisions of the Civil Procedural Code because the "measure" was not a "temporary" and eventually subject to reversion, but a "final", ordering the Society to have a new Board of Directors and new by-laws.

e. The supposed "preliminary measure" did not comply with the conditions established by the same Chamber, and other courts in the country in a well-established case law set forth since 2000, for the issuance of "preliminary measures."

f. The immediate effect of the "preliminary measure" is not the protection of any diffuse or collective interest, but to subject the Venezuelan Red Cross Society to the Constitutional Chamber, contrary to the legal provisions governing civil societies in Venezuela.

New York, 23 August 2023

PART EIGHT

THE DESTRUCTION BY THE STATE OF ITS MOST IMPORTANT INSTRUMENTALITY; THE CASE OF PETRÓLEOS DE VENEZUELA S.A. (PDVSA)

Three stages in a relationship: from being a separate entity created to manage the nationalized Oil Industry (1975-2002), passing through being an *alter ego* of the State (2002-2019), turning again to be since 2019, particularly regarding its investments abroad, an instrumentality completely separate from the State.

INTRODUCTION

Petróleos de Venezuela S.A., PDVSA, the Holding of the Venezuelan nationalized oil industry, was created in 1975 as a state-owned enterprise or instrumentality of the Venezuelan State, in order to manage the Oil Industry once the Nationalization Organic Law of that year began to be enforced. The company was created as a commercial company in order to manage the Industry with autonomy from the Government, with the economic purpose of generated profits, without political interference, and only contributing economically to the State through income tax laws. This explains why 20 years later, in 1994, PDVSA was recognized as the second oil company in the world, and the biggest company in all sectors in Latin America.

This situation began to radically change since 2002, when the then President Hugo Chávez, defined his policy of taking over a direct and extensive control over PDVSA, provoking its complete politization. From being the successful business, it used to be, managed separately from the government, PDVSA was progressively transformed into a direct and controlled sort of agency of the Government, particularly for undertaking its social policies, abandoning in a complete way its business-minded

former character. For such purpose, a symbiosis was established during the government of Chávez since 2004, continuing during the government of Nicolás Maduro, enduring until 2019, according to which, the Minister of Petroleum, member of the National Executive Cabinet was always, simultaneously, the President of the Board of Directors of PDVSA, de facto transforming the enterprise into one depending to the Central government.

In 2019, this whole situation changed when the National Assembly of Venezuela decided to assume the transition process towards democracy, after the office of the Presidency of the Republic was usurped - since January 2019- by an officer (Nicolás Maduro) whose "reelection" in May 2018 was even rejected and declared non-existent by the same National Assembly, and in general by much of the international community. The National Assembly, in effect, on January 15, 2019, issued a "Resolution 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,"1 providing for "the declaration of the usurpation of the Presidency of the Republic by Nicolas Maduro Moros and the restoration of the validity of the Constitution," or "of the constitutional order pursuant to articles 5, 187, 233, 333, and 350 of the Constitution."

As a consequence of such Resolution, the National Assembly, exercising its legislative power according to article 187.1 of the Constitution, and based on its articles 7 and 333,[2] enacted the *Statute that*

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1 Text available at https://www.infobae.com/america/venezuela/2019/01/15/la-asamblea-nacional-de-venezuela-declaro-a-maduro-usurpador-del-presidencia/.

2 Text available at http://www.asambleanacional.gob.ve/documentos_archivos/estatuto-que-rige-la-transicion-a-la-democraciapara-restablecer-la-vigencia-de-la-constitucion de-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_LPRF IL20190205_0001.pdf. *See* comments to said Statute and its constitutional basis in Allan R. Brewer-Carias, Allan Brewer-Carías, "Some Constitutional and Legal Challenges posed by the process of transition towards democracy decreed by the National Assembly of Venezuela, since January 2019,"17 July 2019, pp 239-241. Available at: http://allanbrewercarias.com/wp-content/uploads/2019/07/1232.-Brewer.-Constitutional-challenges.-Process-Transcition-towards-Democracy.-FIA.-17-July-2019-1.pdf. *See* also Allan R. Brewer-Carias, *La transición a la democracia en Venezuela. Bases constitucionales y obstáculos usurpadores*, Iniciativa Democrática

governs the transition to democracy in order *to reinstate the Constitution of the Bolivarian Republic of Venezuela* (*Transition Statute)* on February 5th, 2019, which is a law (statute) aimed at "establishing the regulatory framework governing the democratic transition in the Republic" (article 1). According to the provisions of the Constitution, and as it is regulated in such *Statute*, the President of the National Assembly, Juan Guaidó Márquez, assumed the functions of President in charge of the Presidency of the Republic, or Interim President. As such, and pursuant to the provisions of the *Transition Statute,* the Interim President, constitutionally and legally appointed the members of the *Ad-hoc Board of Directors of Petróleos de Venezuela S.A.*, with all legal effects, in order, not only to assure the safeguard of the assets of the company abroad, but to guaranty the functioning of PDVSA as a separate entity from the Government, with the required autonomy for the accomplishment of its economic and business purposes.

Such *Transition Statute,* formally enacted by the National Assembly as a "normative act" adopted "in direct and immediate implementation of Article 333 of the Constitution of the Bolivarian Republic of Venezuela," is "of mandatory compliance for all public authorities and officials, as well as for individuals" (article 4).

Pursuant to articles 15 and 34 of such *Transition Statute,* after being authorized by the National Assembly, the Interim President of the Republic, appointed an *Ad-Hoc Management Board of Directors of PDVSA* and of its affiliates, to assume the management and administration of the company abroad, and to take the necessary measures for the control and protection of their assets abroad. The *Transition Statute* was precise in providing that "the *functional autonomy of those enterprises* and, in particular, of PDVSA" was to be ensured. For that purpose, Article 34.3 provided, in particular referring to *PDV Holding, Inc,* which is the subsidiary of PDVSA in the United States, that the "*autonomous management* of the commercial sector" of such enterprise and its subsidiaries "will meet commercial efficiency criteria, keeping

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España y las Américas, Editorial Jurídica Venezolana, Caracas / Miami 2019, pp. 242-251. 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

safe the control and accountability mechanisms exercised by the National Assembly within the framework of its powers, and the other applicable control mechanisms," reaffirming that:

> "*PDV Holding, Inc*. and its affiliates *shall have no relationship with those who currently usurp the Presidency of the Republic*. While such a situation of usurpation persists, *PDV* Holding*, Inc*. and its subsidiaries will not make any financial payments or contributions to PDVSA."[3]

Based on these provisions, in practice, it can be affirmed that since February 2019, there is a clear corporate separation between the Republic and PDVSA,[4] which has again being able to act as an instrumentality of the Republic, with the needed autonomy for the accomplishment of its economic functions, within the rule of separateness from the Government, not being no longer appropriate to pierce the corporate veil, and consider it in the USA as a *alter ego* of the Republic, as it was decided by the United States District Court, D. Delaware in the case *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (C.A. No. 17-mc-151-LPS) of August, 9, 2018.[5]

On the contrary, as was expressly recognized by the United States District Court for the *Southern* District of Texas Houston Division, in its judgement issued on May 20, 2020 (Case: *Impact Fluid Solutions LP; aka Impact Fluid Solutions LLC vs Bariven S.A*.) (Civil Action No. 4:19-CV-00652), "the National Assembly has barred those appointed [on the Board of Directors of the subsidiaries of PDVSA] by former-President Maduro from exercising any power over PDVSA or its affiliates," also recognizing that with the appointment of the Ad-Hoc Board of Directors of PDVSA by the National Assembly, the possible "rights and powers of the Ministry responsible for hydrocarbons" in Venezuela regarding the company, have been "suspended."

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3 Reference is here made to the *usurped* PDVSA, that is, the one whose´s Board of Directors has been appointed by the usurping government of Nicolás Maduro Moros.

4 Conversely, this refers to PDVSA as directed by the *Ad-Hoc Management Board of Directors* appointed by Juan Guaido, as authorized by the National Assembly under the *Transition Statute*.

5 Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10 190. pdf

That is why, in such decision, the United States District Court for the Southern District of Texas Houston Division, concluded that by means of the appointment of the Ad-Hoc management Board of Directors of PDVSA, "the National Assembly stripped all management power from the previous regime and vested it in the Ad-Hoc Management Board. Therefore, any actions taken by the board of directors appointed by Maduro to PDVSA are null and void..." (p. 11).[6]

The decisions adopted by the National Assembly within the Transition towards democracy process, according to the provisions of the *Transition Statute*, as well as the decisions issued by the Interim President of the country, Juan Guaidó, were recognized worldwide by more than 50 States, including the United States of America. Nonetheless, the Constitutional Chamber of the Supreme Tribunal of Venezuela, which is completely lacking of any sort of autonomy and independence required by any court of justice in a rule of law state -being, on the contrary, since 2000 completely controlled by the Government -, has purported to annul the *Transition Statute*, the decisions of the National Assembly and of the Interim President. This has been done through a series of unconstitutional decisions, adopted *ex-officio*, which of course are constitutionally and legally forbidden in Venezuela, violating all the most elemental rules of due process and the right to defense guaranteed in article 49 of the Constitution.

Therefore, those decisions have to be considered null and void pursuant to article 25 of the same Constitution, not having any effect. Additionally, those decisions, not being issued by an independent court of justice, following a proceeding developed *"according to the course of a civilized jurisprudence,"* are judicial rulings that no court of justice can recognize as a comity, as has been decided by the US Supreme Court since 1895.

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6 Available at: https://www.courtlistener.com/recap/gov.uscourts.txsd.1640090/gov.uscourts.txsd.1640090.55.0.pdf

I. THE STATUS OF PDVSA AS AN INSTRUMENTALITY OF THE VENEZUELAN STATE TO ACCOMPLISH COMMERCIAL ACTIVITIES IN THE OIL SECTOR

As a consequence of the decisions adopted since January 2019 by both the National Assembly and the Interim President within the framework of the *Transition Statute Toward Democracy*, and taking into account the United States District Court D. Delaware judgement issued on August 9, 2018 in the case *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (C.A. No. 17-mc-151-LPS);[7] it can be said that the state owned Venezuelan enterprise Petróleos de Venezuela S.A. PDVSA, represented by the *Ad-Hoc management Board of Petróleos de Venezoela S.A*. PDVSA appointed by the Interim President of Venezuela, Juan Guaidó, authorized by the National Assembly, through Decree of February 8, 2019 amended by Decree No. 3 of April 10, 2019,[8] is a company that functions separately from the Maduro's regime (who nonetheless could exercises "*de facto* control" over the company in Venezuela), but also – and more relevant - from the legitimate Government of Venezuela recognized by the United States, leaded by Juan Guaidó as Interim President of the Country, who exercise the "*de jure control*" over the company, particularly abroad.[9]

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7 333 Federal Supplement, 3d Series, pp. 380-426. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10190.pdf

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

9 I am using the distinction made by the United States District Court for the Southern District of Texas on May 20, 2020, case *Impact Fluid Solutions LP; aka Impact Fluid Solutions LLC (Plaintiffs), VS. BARIVEN S.A., et al.:* "*De jure* control refers to the control that arises as a matter of right. On the other hand, *de facto* control refers to control that arises as a matter of fact, without respect to whether a right to such control exists." The Court in his decision stated that "it appears the Maduro regime still may possess *de facto* control over Defendants (Bariven S.A., a subsidiary of PDVSA), but adding that "To begin, the Court finds that Special Attorney General Hernández and the Ad-Hoc Management Board of PDVSA clearly possess *de jure* control over the Defendants,"

This means that since February 2019, PDVSA[10] cannot be considered a company over which the Venezuelan Government exercises "extensively control" in its day-to day operations, to the point that a relationship of principal and agent exists, as was considered by the United States District Court D. Delaware in the aforementioned decision, as well as by the United States Court of Appeals, Third Circuit in its decision of April 15, 2019, *Case Crystallex International Corporation v. Bolivarian Republic of Venezuela Petróleos de Venezuela S.A*. (Nos. 18-2797 & 18-3124, No. 18-2889).[11] This is why, since February 2019, under the Transition Regime lead by Juan Guaidó, PDVSA cannot be considered as an *alter ego* of the Republic of Venezuela.

The PDVSA managed by the *Ad-Hoc management Board of Petróleos* de *Venezuela S.A* appointed since February 2019 by Interim President Juan Guaidó, with the authorization of the National Assembly, works as a government instrumentality according to the rules set forth when she was created pursuant to the provisions of the *Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons,* 29 of August 29, 1975.[12]

This means that it is a company managed by its board of directors appointed by the government consistent with what is established in the Law, as a separate juridical body from the Government and its Central Administration, with the power to hold and sell property and to sue and be sued, being responsible for its own finances, and being run as a distinct economic entity, not subjected to the same budgetary requirements as the National Executive, and not having the members of its board of directors nor the rest of the personnel the status of public employees.

This is how PDVSA was originally created in 1975, as an economically-driven commercial company for the purpose of generating profits, and as such is that it operated so that twenty years later, in 1994, it

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10 Again, I am referring here to PDVSA as directed by the *Ad-Hoc Management Board of Directors* appointed by Juan Guaido, duly authorized by the National Assembly under the *Transition Statute*

11 932 Federal Reporter 3d. Series, pp. 126-152. Available at: https://www.leagle.com/decision/infco20190729051

12 *See Official Gazette* No. 1769, Aug. 29, 1975.

was ranked the second largest oil enterprise in the world,[13] and the biggest enterprise in any field in Latin America.[14]

This situation endured up to 2002, when, according to the policy defined by the then President Hugo Chávez, in order "to take complete control of PDVSA, it was necessary to annihilate its technical autonomy,"[15] and consequently, "clear the way for politicization in the national oil industry."[16]

Chávez, himself, expressed his goal in a message before the National Assembly, about how important was for his political purposes the need to "take such hill that was PDVSA," confessing that for such purpose he

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13 *See* "Pdvsa, Segunda petrolera más grande del mundo. La empresa estatal Petróleos de Venezuela (PDVSA) es la segunda corporación petrolera más importante del mundo, según la última clasificación de la publicación especializada *Petroleum Inteligence Weekly* (PIW),"in EFE, *El Tiempo*, Bogotá, 12 diciembre 1994, available at: https://www.eltiempo.com/archivo/documento/MAM-263571

14 *See* José Toro Hardy, "Sobre la tragedia de la industria petrolera," forward to the book: Allan R. Brewer-Carías, *Crónica de una destrucción*. *Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y degradación de la Industria petrolera*, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas 2018, p. 20. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/06/9789803654276-txt-Cr%C3%B3nica-destrucci%C3%B3n-ARBC-PAGINA-WEB.pdf

15 *See* José Ignacio Hernández, "La apertura petrolera o el primer intento por desmontar el pensamiento estatista petrolero en Venezuela," forward to the book: Allan R. Brewer-Carías, *Crónica de una destrucción*. *Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y degradación de la Industria petrolera*, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas 2018, p. 52. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/06/9789803654276-txt-Cr%C3%B3nica-destrucci%C3%B3n-ARBC-PAGINA-WEB.pdf

16 *See* the reference in Henry Jiménez Guanipa, "La destrucción y la ruina de Venezuela. ¿cómo legamos a este punto?, forward to the book: Allan R. Brewer-Carías, *Crónica de una destrucción*. *Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y degradación de la Industria petrolera*, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas 2018, p. 68. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/06/9789803654276-txt-Cr%C3%B3nica-destrucci%C3%B3n-ARBC-PAGINA-WEB.pdf

expressly provoked the crisis of the industry,[17] initially by firing not only the top executive of PDVSA but in just a few hours 23.000 of its employees, among them, 12.371 professionals, technicians and supervisors.[18]

The consequence was that PDVSA progressively and excessively began to be controlled by the Government, a process under which, the Government began to use PDVSA's assets as its own; ignored the separate status of the company by reforming its by-laws and appointing a minister of the National Executive as President of its Board; deprived PDVSA of its independence, assuring a close political control similar to an organ of the Central Public Administration; subjected the company to obtain approvals for ordinary business decisions from the Executive; and diverted the activities of the company from the oil sector, to execute governmental social policies, acting directly on behalf of the Executive. As Eddie Ramirez explained: "Until 2002 PDVSA and its subsidiaries were efficiently managed as a business," and since then it "went from being a company that was in the hydrocarbons business, to being a company whose mission is social, which has activities related to hydrocarbons." [19]

Conversely, since January 2019, and due to the decisions adopted by the Transition government lead by the National Assembly and the Interim President Juan Guaidó, PDVSA and its affiliates, regarding its assets abroad, is acting again as an instrumentality of the Venezuelan state with the separateness needed in order to preserve its autonomy and economic purposes, conducted by the new Ad-Hoc Management Board of Director assuring total separation from the Maduro regime.

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17 *Idem*

18 *See* the reference in Eddie A. Ramírez, "Años de desatino (2002-2018)," forward to the book: Allan R. Brewer-Carías, *Crónica de una destrucción*. *Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y degradación de la Industria petrolera*, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas 2018, p. 37. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/06/9789803654276-txt-Cr%C3%B3nica-destrucci%C3%B3n-ARBC-PAGINA-WEB.pdf

19 *Idem*, pp. 38, 41.

II. THE ORIGIN OF PDVSA AS A SEPARATE INSTRUMENTALITY OF THE STATE

Initially, as was expressly stated in the *Report for the nationalization of the Oil Industry* discussed in the Venezuelan Congress in 1975, drafted by the Presidential Commission on the Oil Reversion of 1974, PDVSA was conceived for the task of assuming the management of the Oil Industry, once nationalized, as "an independent entity different to the [Central] Public Administration, subject to the directives inserted by the State as expressed in the Nation Plan." The *Report* insisted in affirming that the intention was to "keep the Oil Administration out of bureaucratic rules and practices conceived for public bodies and not for modern and complex entities devoted to large-scale production for large and frequent transactions." In fact, the Oil Management Organization to be created was conceived as a "vertically integrated organization, multi-company and directed by a Holding exclusive and sole property of the State," with companies that were to be "capable of acting with full efficiency in the commercial field," acting with "self-sufficiency and capacity for the renewal of its management cadres."[20]

It was in accordance with these recommendations that on August 29, 1975, Congress enacted the *Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons,*[21] whereas to continue with the performance of the reserved activities (developed up to that moment by foreign private companies), Article 5 provided that "the State" was to perform them "directly by the National Executive or through entities of its own property."

For such purpose, Article 6 of the same Organic Law set forth that the National Executive was to create "with the legal form it considers convenient, the enterprises it deems necessary to perform regular and

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[20] *See* the references to the *Report*, in Allan R. Brewer-Carías, "Consideraciones sobre el régimen jurídico-administrativo de Petróleos de Venezuela S.A.," in *Revista de Hacienda*, No. 67, Año XV, Ministerio de hacienda, caracas, 1977, p. 80. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II.4.107.%20CONSID.REG.JUR.ADMIN.PETROLEOS%20VZLA%201977.pdf

[21] *See Official Gazette* No. 1769 Aug. 29, 1975.

efficiently" the reserved activities. The provision also authorized the National Executive to "assign one of the enterprises the functions of coordination, supervision and control of the activities of the others, assigning the ownership of the shares of any of such enterprises." According to Article 7 of the same Organic Law, such enterprises "will be governed by the Organic Law and its Regulations, by its own by-laws, by the disposition enacted by the National Executive and by the ordinary law that could be applied." That is, the state-owned enterprises were to be governed preponderantly by private law, although not exclusively because being a state-owned enterprise, they were also subject to public law.[22]

Accordingly, the day after the enactment of such Nationalization Organic Law, the President of the Republic issue Decree No. 1123 of August 30, 197523 creating as "a state-owned enterprise, with the form of commercial corporation (*Sociedad anónima*), that will fulfill and execute

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[22] *See* Allan R. Brewer-Carías, "Consideraciones sobre el régimen jurídico-administrativo de Petróleos de Venezuela S.A.," in *Revista de Hacienda*, No. 67, Año XV, Ministerio de hacienda, caracas, 1977, pp. 83-84. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content/II.4.107.%20CONSID.REG.JUR.ADMIN.PETROLEOS%20VZLA%201977.pdf. In this regard, the Constitutional Chamber of the Supreme Tribunal in its decision No. 464 of March 3, 2002, has define the state owned enterprises like PDVSA, as "state persons with the legal form of private law," which implies, as a consequence, that "the legal regime applicable to them is a mixed regime, both of public law as well as private law, even when it is predominantly private law, due to its form, but not exclusively, since their intimate relationship with the State, subjects them to the mandatory rules of public law dictated for the best organization, operation and control of execution of the Public Administration, by the organs that are integrated to it or contribute to the achievement of its tasks." (Case: *Interpretación del Decreto de la Asamblea Nacional Constituyente de fecha 30 de enero de 2000, mediante el cual se suspende por 3 días la negociación de la Convención Colectiva del Trabajo),* in *Revista de Derecho Público,* N° 89-92, Editorial Jurídica Venezolana, Caracas 2000, pp. 218, 219. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/2002-REVISTA-89-90-91-92.pdf.

[23] *See* Allan R. Brewer-Carías, "Consideraciones sobre el régimen jurídico-administrativo de Petróleos de Venezuela S.A.," in *Revista de Hacienda*, No. 67, Año XV, Ministerio de Hacienda, Caracas, 1977, pp. 83-84. Available at: http://allanbrewercarias.net/Content/449725d9-f1cb-474b-8ab2-41efb849fea8/Content /II.4.107.%20CONSID.REG.JUR.ADMIN.PETROLEOS%20VZLA%201977.pdf. (Citing *Official Gazette* No. 1770 of August 30, 1975).

the policy dictated by the National Executive, through the Ministry of Mines and Hydrocarbons on matters of hydrocarbons" (Art. 1). 24 As a consequence, as I expressed in 1985, there is no doubt that the:

> "intention of the Legislature was to organize the Nationalized Oil Administration, through state-owned enterprises (entities or State persons), with the form of commercial corporations and therefore with a mixed regime of public law and private Law."[25]

Therefore, as I also wrote in 1985:

> "PDVSA is a state enterprise, wholly owned by it and responding to the policies that it dictates, and as such, is integrated within the general organization of the State Administration, as a decentralized administration entity, but with the form of a commercial corporation, that is, of a person of private law."[26]

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24 That is why the Constitutional Chamber of the Supreme Tribunal has explained that PDVSA and its subsidiaries are state owned enterprises with private law form. *See* decision No. 464 of March 3, 2002 (Case: *Interpretación del Decreto de la Asamblea Nacional Constituyente de fecha 30 de enero de 2000, mediante el cual se suspende por 3 días la negociación de la Convención Colectiva del Trabajo),* in *Revista de Derecho Público,* N° 89-92, Editorial Jurídica Venezolana, Caracas 2000, pp. 218, 219. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/2002-REVISTA-89-90-91-92.pdf

25 *See* Allan R. Brewer-Carías, "*El* carácter de Petróleos de Venezuela, S.A. como instrumento del Estado en la industria petrolera,*"* in *Revista de Derecho Público*, N° 23, Julio-Septiembre 1985, Editorial Jurídica Venezolana, Caracas 1985, pp. 77, 80. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/rdpub_1985_23.pdf.

26 *Idem.* at 81. Therefore, pursuant with the Venezuelan Constitution and relevant statutes, PDVSA and its subsidiaries, as was also affirmed in decision No. 464 of March 3, 2002 (Case: *Interpretación del Decreto de la Asamblea Nacional Constituyente de fecha 30 de enero de 2000, mediante el cual se suspende por 3 días la negociación de la Convención Colectiva del Trabajo),* of the Constitutional Chamber of the Supreme Tribunal, are part of the National Public Administration, observing that: "although [PDVSA] is a company incorporated and organized in the form of a public limited company, it is beyond doubt, and reaffirmed as such by the Constitution of the Bolivarian Republic of Venezuela, that it is framed within the general structure of the National Public Administration . . ." [Case: Interpretation of the Decree of the National Constituent Assembly dated January 30, 2000, by which the negotiation of the Collective Labour Convention is suspended for 3 days], *See* in *Revista de Derecho Público,* N° 89-92, Editorial Jurídica Venezolana, pp. 219.

In Venezuela, Public Administration is comprised of the "Central Public Administration" and the "Decentralized Public Administration." According to the Venezuelan Constitution (Article 242) and the Organic Law on Public Administration (Articles 59-61), the National Central Public Administration directed by the National Executive, consists of the organs of the government itself, such as the various Ministries.[27] The National Decentralized Public Administration, on the other hand, consists of entities such as public corporations and state-owned commercial enterprises like PDVSA and its subsidiaries, which are not part of the government itself, being nonetheless attached to the corresponding government Ministry.[28] That is why, the Constitutional Chamber of the Supreme Tribunal with regard to the legal regime applicable to PDVSA and its subsidiaries, has explained that it "allows them to be clearly differentiated, not only from the centralized Public Administration and autonomous institutes, but also from other state owned enterprises."[29]

In any case, as all state-owned enterprises, PDVSA and its subsidiaries are subject to rules of public law. For instance, in addition to the provisions of the Organic Law on Public Administration, to the provisions of the Public Contracting Law (Article 3)[30] and the Organic Law of the General Audit Office (Article 9).[31] As a decentralized entity of

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Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/2002-REVISTA-89-90-91-92.pdf

27 *See* Articles 160, 174, 236.20 of the Constitution; *See also* Allan R. Brewer-Carías, *Administrative Law in Venezuela*, Editorial Jurídica Venezolana, Second Edition, 2015, p. 52; available at: http://allanbrewercarias.com/wp-content/uploads/2013/08/9789803651992-txt.pdf.

28 *See* Articles 142; 300.

29 *See* Constitutional Chamber of the Supreme Tribunal decision No. 464 of March 3, 2002 (Case: *Interpretación del Decreto de la Asamblea Nacional Constituyente de fecha 30 de enero de 2000, mediante el cual se suspende por 3 días la negociación de la Convención Colectiva del Trabajo),* in *Revista de Derecho Público,* N° 89-92, Editorial Jurídica Venezolana, Caracas 2000, pp. 218, 219. Available at: http://allanbrewercarias.com/wp-content/uploads/2007/08/2002-REVISTA-89-90-91-92.pdf

30 *See Official Gazette* N° 6.154 Extra., November 19, 2014. Available at: http://www.mindefensa.gob.ve/COMISION/wp-content/uploads/2017/03/LCP.pdf.

31 *See Official Gazette* N° 37.347, December 17, 2001. Available at: http:// www.oas.org/juridico/spanish/mesicic3_ven_anexo23.pdf

the National Public Administration is of course subject to all the general regulations and principles related to the functioning of Public Administration included in the Organic Law (in particular Title II. Principles and basis of the functioning and organization of Public Administration: articles 3-28, 33-43), as well as in other laws referred to the organs and entities of the Public Administration, like the Organic Law of Administrative Procedure; the Organic Law on Public Assets (Article 4);[32] and the Financial Management of the Public Sector Organic Law (article 6).[33]

State owned enterprises are also part of the "Public Sector" as defined in Article 5 of the Financial Management of Public Sector Organic Law, which specifically encompasses:

> "8. Commercial companies in which the Republic or other persons referred to in this Article have a shareholding equal to or greater than fifty per cent of the share capital. This also includes the wholly state-owned companies, whose role, through the holding of shares of other companies, is to coordinate the public business management of a sector of the national economy [...]"[34]

In addition and following the sense of the provisions of the 1975 Nationalization Law, PDVSA was constitutionalized in Article 303 of the 1999 Constitution, which directly assigs it what it already had, "the management of the oil industry." According to the article 2 of its by-laws, PDVSA, in fact, was established since 1975 to fulfill its corporate purpose implementing the national policy on matters of hydrocarbons; that is, to generate profits as an economic enterprise in such sector. Such was the "national policy to be implemented."[35] Therefore, it is not correct to say that "PDVSA was created by presidential decree not to generate

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32 *See Official Gazette* N° 39.952 of June 26, 2012.

33 Article 5. *See Official Gazette* No. 6210 Extra., December, 2015, available at: http://historico.tsj.gob.ve/gaceta_ext/diciembre/30122015/E-30122015-4475.pdf#page=1

34 *See Official Gazette* No 6.210 Extra., December 30, 2015. Available at: http://www.bod.com.ve/media/97487/GACETA-OFICIAL-EXTRAORDINARIA-6210.pdf.

35 *See* for instance the By-Laws of PDVSA, reformed by Decree No. 2184, *Gaceta Oficial No. 37.588* (Dec. 10, 2002).

profits but as a national company to implement national policy on hydrocarbons" as was affirmed in the United States District Court D. Delaware, (*Crystallex International Corporation v. Bolivarian Republic of Venezuela* of 9 August 2028), accepting the statement made of Crystallex (p. 402). On the contrary under the Nationalization Law and to the decree of creation, PDVSA was to generate and that was the "national policy to be implemented."

Despite of the public law provisions regulating PDVSA, the fact is that PDVSA, according to the aforementioned, was incorporated as a private commercial law company, registered in the Commercial Registrar following the rules of the Commercial Code, and providing in its by-laws that the members of the Board of Directors of the company, although appointed by the President of the Republic, were to perform their activities in a full time character (article 20), not having the status of public officials, and thus, being regulated by Labor Law.

This implied that no Minister, members of the National Executive or any other public officer could be appointed as member of the Board of Directors of PDVSA. On the contrary, the Minister of Energy and Petroleum was only to be a member of the Shareholders Meeting of the company (article 7 and 11), not having any direct involvement in the management of the company, and much less any control on the day-to-day operations of the company. In particular article 29 of the By-Laws of PDVSA set forth the following:

> "Clause Twenty-nine. The Ministers of the Executive, the members of the Supreme Tribunal of Justice, the Attorney General of the Republic and the Governors of the States, and the Federal District may not be members of the Company's Board of Directors during the exercise of their positions. Nor can be members of the Board of Directors of the company, persons related to the President of the Republic or the Minister of Energy and Mines in fourth degree of consanguinity or second of affinity."[36]

[36] *See* for instance the By-Laws of PDVSA dated 2002, modified by Decree N° 2.184 of December 10, 2002, in *Gaceta Oficial* N° 37.588 of December 10, 2002.

III. THE INSTITUTIONAL FRAMEWORK OF THE PROCESS OF ERASING THE EFFECTIVE SEPARATION BETWEEN THE GOVERNMENT AND PDVSA (2002-2019)

This effective separateness status of PDVSA regarding the Central Public Administration that existed when PDVSA was created, and that was carefully preserved by all democratic governments for more than 25 years, was the key factor contributing to the development of PDVSA as a commercial company, managed independently from any political control or interferences, which acted for the purpose of generating profits as the State entity managing the oil industry, only economically contributing to the State through the income taxation system.

This was the status of PDVSA until 2002, when unfortunately, all this separateness began to be changed after the then President Hugo Chavez decided on July 2002, to appoint Rafael Ramírez as Minister of Energy and Mines, in order to assure the political intervention of PDVSA,[37] for the creation of what was later so-called the "new PDVSA," completely controlled by the Government, at the service of the "Venezuelan revolution."[38] For such purpose, Chávez previously reformed the by-laws of PDVSA in May 2001, creating a "Council of Shareholders" to "advise the National Executive" -that is- the Ministry of Energy and Mines, "in the formulation and monitoring of compliance with the guidelines and policies that, through the Ministry of Energy and Mines, must establish or agree in accordance with the Second Clause of this Articles of the By-Laws" (article 38, 39), allowing the Minister to intervene in the functioning of the company.[39]

Two years later, in November 2004, President Chávez achieved his goals of intervening directly in the management of PDVSA, by appointing his Minister of Energy and Mines, Rafael Ramírez,

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37 *See Official Gazette* No. 37.486, July 17, 2002, pp. 32.628 and 324.629

38 *See* "La nueva PDVSA es la institución de la revolución Venezolana," November 2006, available at: http://www.pdvsa.com/index.php?option=com_content&view=article&id=1845:3184&catid=10&Itemid=589&lang=es

39 *See* Decree N° 1.313 of May 29th, 2001 in *Official Gazette* No. 37.236, July 10, 2001, pp. 318.941

simultaneously as President of PDVSA,[40] ignoring the prohibition established in the by-laws of the company for Ministers to be members of the Board of the company (clause 29). The open violation of the By-Laws of PDVSA with this appointment provoked a new ex post facto reform of the By-Laws of the company, in order precisely to allow the Minister of Petroleum to be appointed in the Board as President of the company.[41]

A new amendment to the By-Laws was passed through Executive Decree on 2008,[42] whereby it was expressly stated that, in achieving her purpose, PDVSA was to follow the guidelines and policies of the National Executive established -or made in accordance with applicable laws-, "through the Ministry of Popular Power of Energy and Petroleum" (Second Clause as modified). Furthermore, an addition was made to allow the President of the Republic to authorize either the President of PDVSA or any of the members of the Board of Directors, to be directors or political organizations while in office; an activity otherwise –and until such amendment- expressly forbidden (Thirtieth Clause, as amended).[43]

The By-Laws of PDVSA were reformed again in 2011, now in order to allow, in addition of the Minister of Energy and Mines who was at the same time President of the company, the appointment two additional Ministries in the Board of PDVSA, the Minister of Finances and Planning, Jorge Giordani, and the Minister of Foreign Relations, Nicolás Maduro. For such purpose, with this reform, the aforementioned clause 29 of the Bylaws was abrogated.[44] Therefore, since 2011, three members of the National Executive Cabinet were acting members of the Board of Directors of PDVSA. In addition, the Deputy Minister of Energy and Mines (Bernard Mommer) was also member of the Board of Directors of PVDSA.

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40 *See Official Gazette* No. 38.082, December 12, 2004, p. 336.308

41 *See* amendment to the Twenty Ninth Clause on Decree N° 3.299 dated December 7th, 2004, in *Official Gazette* No. 38.081, December 7th, 2004, pp. 336.271

42 *See* Decree N° 6.234 of July 15th, 2008 in *Official Gazette* No. 38.988, August 6th, 2008, pp. 363.187

43 *See* comments about this amendment on https://www.analitica.com/economia/desde-pdvsa-hasta-psuvsa/

44 *See* Decree No 8.238, in *Official Gazette* 39681, May 25, 2011

After the election of Nicolas Maduro as President of Venezuela in April 2013, Rafael Ramírez continued to be President of PDVSA, and on April 22, 2013, was simultaneously ratified as Minister of Petroleum and Mining in the new government,[45] positions that he held until September 2014. This means that during ten continuous years, Rafael Ramírez, the Minister of Petroleum in Venezuela, was at the same time the President of PDVSA, and responsible for the dismantling of the original independence and autonomy that the oil company had since its creation in 1975.[46]

Such practice of having the Minister of Petroleum being at the same time the President of PDVSA involved in the day-today operations of the company, continued after Ramirez, so on September 2014, the then President Maduro appointed Eulogio Del Pino (who was President of Corporación Venezolana del Petróleo, an affiliate of PDVSA, and also a former member of the Board of Directors of PDVSA) as President of PDVSA,[47] and in August 2015, he appointed him simultaneously to be Minister of Petroleum and Mining.[48]

This symbiosis was briefly interrupted only for a few months, when on August 24, 2017, Euliogo Del Pino was reappointed as Minister of Petroleum,[49] but Nelson Martínez was appointed President of PDVSA.[50] Both held such positions until November 4, 2017, when they were

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45 *See Official Gazette* No. 40151, April 22, 2013, p. 400.835

46 *See* in general on this process: Allan R. Brewer-Carías, *Crónica de una destrucción. Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y degradación de la Industria petrolera*, Universidad Monteávila, Editorial Jurídica Venezolana, Caracas 2018. Available at: http://allanbrewercarias.com/wp-content/uploads/2018/06/9789803654276-txt-Cr%C3%B3nica-destrucci%C3%B3n-ARBC-PAGINA-WEB.pdf

47 *See Official Gazette* No. 40.488, September 2nd, 2014, p. 414.654

48 *See Official Gazette* No. 40.727, August 19, 2015, p. 422.884. Asdrubal Chavez, also former member of the Board of Directors, was briefly appointed as Minister of Petroleum and Mining prior to Eulogio Del Pino, *See Official Gazette* No. 40.488, September 2nd, 2014, p. 414.652

49 *See* Decree No. 3.042 of August 24, 2017 in *Official Gazette* No. 41.221, August 24, 2017, p. 437.327

50 *See* Decree No. 3.043 of *Official Gazette* No. 41.22, August 24, 2017, p. 437.328

detained under criminal corruption charges.[51] Martinez died while in detention in December 2018.[52]

Their substitution took place on November 26, 2017, when Manuel Quevedo, a general of the National Guard, was appointed by Maduro simultaneously as Minister of Petroleum[53] and as President of PDVSA,[54] positions that he kept into Maduro's usurpation of the Presidency, until 27 April 2020.[55] On that date, Nicolás maduro appointed Asdrúbal José Chávez Jiménez as Interim President of PDVSA.[56]

IV. THE REINSTATEMENT OF PDVSA AS AN INSTRUMENTALITY OF THE STATE MANAGED SEPARATELY FROM THE GOVERNMENT, DURING THE TRANSITION TO DEMOCRACY REGIME OF 2019 REGARDING ITS FOREIGN ASSETS

The aforementioned institutional situation of PDVSA where a Minister was at the same time President of the company, allowing the government to intervene in the management of the company and to have a hand in its day-to-day operations, radically changed since February 2019, under the transition to democracy process undertaken by the National Assembly elected in 2015, in the absence of a legitimately elected President for the period 2019-2025. In fact, as I have already explained, in these circumstances the National Assembly assumed the process of transition towards democracy, having the President of the Assembly, Juan

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51 *See* the information in https://www.lapatilla.com/2017/11/30/saab-confirma-detencion-de-eulogio-del-pino-y-nelson-martinez/; https://www.noticiascandela. Informe25.com/2017/12/en-detalles-la-detencion-de-del-pino.html

52 *See* the information in: https://elpais.com/internacional/2018/12/13/america /1544721965_258574.html; https://www.elnacional.com/venezuela/politica/reuters-fallecio-nelson-martinez-presidente-pdvsa_263171/

53 *See* Decree No. 3.177, November 26th, 201 in *Official Gazette* No. 6.343 Extra., November 26, 2017.

54 *See* Decree No. 3.178 dated November 26th, 2017. *Official Gazette* No. 6.343 *Extra,* November 26, 2017.

55 *See Official Gazette* No. 6.531 *Extra,* April 27th, 2020.

56 *See* Decree No. 4.191 Dated November 27, 2020. *Official Gazette* No. 6.531 *Extra* of April 27th, 2020.

Guaidó assuming the functions of Interim President of the Republic, all of which has been ratified by the aforementioned *Statute that governs the transition to democracy in* order *to reinstate the Constitution of the Bolivarian Republic of Venezuela,* issued by the National Assembly of Venezuela on February 5th, 2019.[57]

Based on such *Transition Statute* the same 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 Corporatio*n."[58]

After the establishment of the Transition government lead by the President of the National Assembly, Juan Guaidó, as Interim President of the Republic, which was recognized by more than 50 States and, in particular, by the United States; an after the appointment of the *Ad-hoc Management Board of PDVSA*, the rule of separateness between the Government (Venezuela) and the company and its subsidiaries, as instrumentalities of the Republic, is again in place, acting the company with the needed autonomy for the accomplishment of its economic functions.

As it was expressly recognized by the United States District Court for the Southern District of Texas Houston Division, in its decision issued on May 20, 2020 (Case: *Impact Fluid Solutions LP; aka Impact Fluid Solutions LLC vs Bariven S.A*.) (Civil Action No. 4:19-CV-00652):

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

58 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.

"the National Assembly has barred those appointed [on the Board of Directors of the subsidiaries of PDVSA] by former-President Maduro from exercising any power over PDVSA or its affiliates. Under article six of the Resolution:

> 'As long as the usurpation of the Presidency of the Republic exists and in accordance with the Statute that Governs the Transition to Democracy to Restore the Validity of the Constitution of the Bolivarian Republic of Venezuela, all rights and powers which correspond to the Shareholders Meeting, the Board of Directors and the Presidency of Petróleos de Venezuela, S.A. (PDVSA) and its affiliates incorporated in Venezuela, existing or appointed after January 10, 2019 as well as those rights and powers of the Ministry responsible for hydrocarbons and, in general any other ministry, body or entity that may act on the Republic's name or behalf at the Shareholders' Meeting of Petróleos de Venezuela, S.A. (PDVSA) and its subsidiaries incorporated in Venezuela are hereby suspended.'

[…] In doing so, the National Assembly *stripped all management power from the previous regime and vested it in the Ad-Hoc Management Board*. Therefore, any actions taken by the board of directors appointed by Maduro to PDVSA are null and void, including its appointment of GST for legal representation here." (p. 11).[59]

The recognition of the legitimacy of the National Assembly and of the process it has undertaken since January 2019, to reinstate democracy in Venezuela extends to the decisions issued by the Interim Presidency of the Republic of Juan Guaidó up to December 2022. It follows that those acts legally performed, such as the appointment of the *Ad-Hoc Board of Directors of PDVSA*, are to be held valid and effective and, from them, no other conclusion can be reached, but the one supporting that PDVSA, as directed by such *Ad Hoc Board of Directors* is separated from the Government. This PDVSA conducted by such *Ad Hoc Board of*

[59] Available at: https://www.courtlistener.com/recap/gov.uscourts.txsd.1640090/ gov.uscourts.txsd.1640090.55.0.pdf

Directors, as an instrumentality of the Venezuelan State is not subject to da-to-day control by the National Assembly or any of its bodies, and in to way can be considered as an *alter ego* of the Republic based on the control that Nicolás Maduro, usurping the Presidency of the Republic, has over the Board of Directors of PDVSA that controls its assets in Venezuela, over which his government continue to be involved in the day-to-day affairs.

New York, January 2021

PART NINE

DEMOCRACY, CORRUPTION AND TRANSPARENCY*

One of the most important topics of the functioning of the States in the contemporary world is that of corruption, which is corroding them, as a phenomenon that originates, among many other factors, from the lack of transparency in their conduct, and which is directly affecting the very operation of democratic regimes, whose foundations are affected by it. Therefore, these notes aim to analyze precisely the issue of corruption and transparency in the general framework of constitutional democracy.

And to try to manage the same ideas, we understand by "corruption" the action or effect of corrupting, that is, "causing a body or organic substance to decompose, so that it smells bad or cannot be used." That is to say, corruption is "to deprave" or "to spoil something;" synonymous with decomposition, rottenness or putrefaction;[1] a process that not only

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* This text has its origin in the Presentation made on the Panel on "Corrupción y Transparencia" in the *XIV Congreso Iberoamericano de Derecho Constitucional*, Instituto Iberoamericano de Derecho Constitucional, Buenos Aires, 23 May 2019. The was published with the title "Democracia, corrupción y transparencia," in Antonio María Hernández y Diego Valadés (Coordinadores), *La Constitución y el combate a la corrupción,* Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Instituto de Estudios Constitucionales del Estado de Querétaro, México 2022, pp. 301-329. An English translation was published in the book of Diego Valades (editor), *The Constitution and the Fight against Corruption*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, México 2022, available at: https://biblio.juridicas.unam.mx/bjv/detalle-libro/7027-the-constitution-and-the-fight-against-corruption#191560

1 According to the *Diccionario de la Lengua Española*, of the Royal Spanish Academy, the term corrupt is related to the idea of altering, disrupting the shape of something, spoiling, depraving, damaging, bribing the judge, or any person, with

occurs with organic substances but also with the institutions themselves, in particular with the institutions of the State, and with democracy itself, which can also be depraved, decomposed and corrupted.

As for "transparency," we understand by it, the characteristic of a body when "it allows light to pass through and allows what is behind to be seen through its mass;" synonymous with the lucid, sharp, clean or diaphanous; the opposite of the closed, mysterious or inexplicable, which is what feeds dark ends, and prevents corruption from being detected. In other words, transparency is an expression of what is open and accessible, of what can be known and rationalized, which is what allows the sensation of tranquility and serenity to develop, contrary to the feeling of anguish and disturbance caused by what is mysterious and unknown.[2]

For this reason, when referring to transparency in the State Administration, more than eighty years ago, Judge Louis Brandeis of the Supreme Court of the United States synthesized it in the well-known phrase that "sunlight is the best disinfectant,"[3] along the same lines as the representation of the Public Administration as the "glass house" (*la maison de verre*)[4], in the sense that it must be visible and affordable, where freedom of information and the citizen's right of access to information public are privileged, contrary to opacity and secrecy.[5]

And by "democracy," in order to be clear in a common notion and not unnecessarily complicate ourselves with incomplete definitions, we

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gifts or otherwise, defining corruption as the action or effect of corrupting or becoming corrupted.

2 *See* Jaime Rodríguez-Arana, "La transparencia en la Administración Pública," in *Revista Vasca de Administración Pública*, No. 42, Oñati 1995, p. 452.

3 *See* Louis Brandeis, "What publicity can do?" in *Harper's Weekly December 20, 1913.*

4 In the sense of what was said by the President of Costa Rica, Luis Guillermo Solís Rivera, "I want the Government – starting with the Presidential Office itself – to function as a great showcase or "glass house," which allows the citizen to examine and scrutinize the performance of those of us who administer the State," in Forums, "Una casa de cristal," Extract from the speech of the President of the Republic, La Nación, San José, May 9, 2014, in https://www.nacion.com/opinion/foros/una-casa-de-cristal/6XAPU3J2PBDMDAGOMX26R2GWKA/story/

5 *See.* Jaime Rodríguez-Arana, "La transparencia en la Administración Pública," in *Revista Vasca de Administración Pública*, N° 42, Oñati 1995, p. 452.

understand that it is, as specified in the Inter-American Democratic Charter, the political regime where it is guaranteed: (i) that the power of the State is organized according to a system of separation and independence of powers; (ii) that access to power and its exercise be carried out subject to the rule of law, (iii) through periodic, free, fair elections based on universal and secret suffrage, as an expression of the sovereignty of the people, (iv) carried out in a plural regime of political parties and organizations; (v) where human rights and fundamental freedoms are respected and protected, in particular, social rights, and freedom of expression and of the press (Art. 3); where it is also guaranteed: (vi) the transparency of government activities; (vii) the probity and responsibility of the government in public management; (viii) and the constitutional subordination of all State institutions to the legally constituted civil authority; that is, finally, (ix) where respect for the rule of law by the government and by all entities and sectors of society is guaranteed (Art. 4).

That is democracy, and the important thing about conceiving it according to these nine elements and components, which are nothing more than expressions of old and new political rights of citizens, is that, with them, as a whole and ultimately, what is seeks to ensure the possibility that the exercise of political power is subject to effective controls, both by citizens and by the organs of the State itself.

That is what democracy is about, the exercise of power on behalf of citizens through elected representatives, and the right of those both to control and to demand that said exercise be controlled, which not only imposes the need for a functioning system of separation of powers, but that citizens can participate in the exercise of control.

This democracy, thus defined, as a political regime to ensure control over the exercise of power, must be based on transparency, which only exists when the citizen's right of access to administrative information is guaranteed and, furthermore, the right of access to Justice to be able to exercise, claim and defend their rights, and in particular, to be able to demand judicial control over government management, which is only possible if it is done before autonomous and independent judges.

In this sense, transparency can be considered the most powerful antidote against corruption, so that it can be said that when there is corruption it is due to a lack of transparency, and because, ultimately,

there is no real democracy. This, therefore, does not materialize only if the Constitutions of the States are formally full of principled statements and qualifications about it, and less, if they are contradicted by the political practice of the government.

The deficiencies of democracy and the absence of transparency are, therefore, the main cause of corruption, generating a vicious circle, as Patricia Moreira, Director of Transparency International, has highlighted in the latest International Report issued this month, in the sense that "when democratic institutions undermine corruption, these, weak, are less capable of controlling it"[6] in the two aspects in which it occurs, both as administrative corruption, as institutional or political corruption.

The first, administrative corruption, which is undoubtedly the one that most attracts the attention of opinion, is the one that derives from the flawed management of public goods and resources and, in general, the one that derives from the flawed management of the thing. public, particularly when officials, due to lack of controls and transparency, dispose of said resources at the service of their own interests or of individuals who illicitly enrich themselves at the expense of the State.

The second, political or institutional corruption, which is more serious, since it is generally the main cause of the previous one, is the one that results from the dismantling of democracy, and from the perversion of the functioning of State institutions, putting them, not at the service of the citizens, but rather at the service of personal political biases or projects of the rulers, or of the bureaucracy itself, diverting the functions of the State, and turning citizen rights into vain illusions.

As summarized by a former rector of one of the prestigious Venezuelan private universities, José Ignacio Moreno León, today, corruption is not only a problem of the Administration, but has:

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6 *See* "How corruption weakens democracy," *Transparency International Survey,* January 29, 2019. In the same document, Delia Ferreira Rubio, head of Transparency International, is quoted: "Our research makes a clear link between having a healthy democracy and successfully fighting public sector corruption. Corruption is much more likely to flourish where democratic foundations are weak and, as we have *See*n in many countries, where undemocratic and populist politicians can use it to their advantage." *See* https://www.transparency.org/news/feature/cpi_2018_global_analysis

> "affected the structures of the States, harming their efficiency and credibility; it has affected, above all, the Judiciary with serious damage to the rule of law; it has penetrated the armed and police forces, weakening their role as guarantors of national security and peace; it has appeared in the legislative power, sowing doubts in the objectivity and efficiency of the law-making process; it has influenced the electoral power; it has seriously damaged democratic institutions; and finally, it has affected the state control entities, promoting impunity for crimes against public affairs and the loss of transparency in public management."[7]

Whoever profits from public affairs corrupts, but whoever disrupts the institutional functioning of the State for personal benefit or that of a group or party also corrupts; whoever allows stealing from within the Administration corrupts, but whoever perverts democracy to destroy it also corrupts. That is to say, corrupt, is the one who, in his management of public affairs, enriches himself illegitimately and allows or encourages others to enrich themselves illegitimately; but it is also corrupt who undermines the institutions of the State to put them at their service and obtain ends other than those for which they were conceived.

In both cases, those who thus act under the protection of power, when leaving the government have in common that they will never be able to say that they left it in the same way as they entered; They will never be able to say how Sancho Panza did at the end of his governorship of the Barataria island - in the fine and figurative pen of Cervantes -, that he had been born naked, that he was naked, that he had entered the government naked of money and that he also left it, this being the best proof, he said, that he had "governed like an angel."[8]

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7 Véase José Ignacio Moreno León, "La corrupción en América Latina: amenaza a la gobernabilidad democrática," in *Pizarrón Latinoamericano*, Universidad Metropolitana, Center for Latin American Studies Arturo Uslar Pietri, Year 7, Vol. 9, p. 19.

8 Sancho Panza said: "I was born naked, I find myself naked; I neither lose nor win; I want to say that I entered this government without a penny, and without it I leave," adding, regarding the rendering of accounts that was asked of him that "when more than going out naked, how do I go out, no other sign is needed to imply I have ruled like an angel. *See* Cervantes, *Don Quijote de la Mancha*, Chapter LIII, "Del fatigado fin y remate que tuvo el gobierno de Sancho Panza," in http://www.

To govern like an angel, in the sight of all, that is, with transparency, and not immersed in the darkness of the secrets of the bureaucracy; enter the government without money and leave the same as entered; and render accounts of the public management carried out in such a way that its results can be verified, seem to be the essential eternal rules of a government management, "quite the other way around," as Sancho Panza also warned at the time, "of how they usually come out the governors of other islands," which unfortunately continues to happen today in so many parts of the world.

Contrary to ruling like angels, in these times it seems that getting rich in power is the tragic desideratum of so many, as is the abusive exercise of power by misusing it, with the consequent perversion of the institutions of the State and the control mechanisms,[9] and very particularly the depravity of the Judiciary, which is the greatest of all political corruptions, since it ends up guaranteeing impunity.

The subject, of course, is nothing new, and although it is true that today it affects all the States of the contemporary world, and is present in all countries, it had already led Simón Bolívar in 1824 to decree the death penalty that should be applied - he said - "irremissibly" to officials who take part in fraud against public finances, "either intervening as principal, or knowing the fraud and not revealing it."[10]

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cervantesvirtual.com/obra-visor/el-ingenioso-hidalgo-don-quijote-de-la-mancha--0/html/fef04e52-82b1-11df-acc7-002185ce6064_19.html

[9] For example, José Ignacio Moreno León, former rector of the Metropolitan University of Caracas, Venezuela, defined corruption as "abusive conduct, in relation to the patterns and legal norms of behavior with respect to a public function or a resource to achieve, in irregularly an unjustified benefit;" or as "conduct that transgresses social norms, undertaken by a person or by a group of people." *See* José Ignacio Moreno león, "La corrupción en América Latina: amenaza a la gobernabilidad democrática," en *Pizarrón Latinoamericano*, Metropolitan University, Center for Latin American Studies Arturo Uslar Pietri Year 7, Vol 9, pp. 11 and et seq.

[10] *See* the text of the Decree of March 18, 1824, issued by Simón Bolívar, Liberator President, in Lima, Peru, in Luis Alva Castro, *Bolívar en la Libertad*, Victor Raul Haya de la Torre Institute, Lima 2003, pp. 67 and 68, in http://www.comunidad andina.org/bda/docs/CAN-CA-0001.pdf. Then, through the decree of January 12, 1825, Bolívar also established the death penalty both for officials who committed

If these types of measures were applied in our times, without a doubt our countries would already be decimated, without civil servants or Administration, because we well know that today corruption is, as the president of the World Bank recognized a few years ago, a problem in "every one of the countries in the world,"[11] coming to qualify the phenomenon as the "number one public enemy" of the developed world,[12] but that in the developing world already has the characteristics and effects of a pandemic.[13]

Therefore, what is really new about the phenomenon is that it now has a global character,[14] as "an evil phenomenon that occurs in all

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acts of corruption in the government and for judges who allowed impunity. *See* in "Documento 10062 Decreto del Libertador" issued in Lima on January 12, 1825, by means of which it establishes the measures aimed at the eradication of the squandering of national funds, practiced by some public officials, in: Http://www.archivodellibertador.gob.ve/escritos/buscador/spip.php?article8279. Also *See* in https://cavb.blogspot.com/2012/06/decretada-pena-de-muerte-para.html

11 That said by the President of the World Bank, Jim Yong Kim, in "World Bank Will Track own Funds as "Corruption is Everywhere", Published: Friday, April 20, 2018 17:39, in Jelter Meers, in https://www.occrp.org/en/27-ccwatch/cc-watch-briefs / 7980-world-bank-will-track-own-funds-as-corruption-is-everywhere

12 The President of the World Bank himself, Jim Yong Kim, also said this in "Corruption is "Public Enemy Number One" in Developing Countries, says World Bank Group. president Kim, December 19, 2013, in http://www.worldbank.org/en/ news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim

13 For this reason, the president of the World Bank in 2013, when referring to the pernicious effects of corruption in developing countries, stated that "every dollar that a corrupt official or a corrupt businessperson puts in their pockets is a dollar stolen from a woman in labor who needs medical assistance; to a girl or boy who deserves an education; or to communities that need water, streets and schools. "Corruption is "Public Enemy Number One" in Developing Countries, says World Bank Group. president Kim," December 19, 2013, in http://www.worldbank.org/ en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim

14 Estimates from the International Monetary Fund in 2016 indicate that corruption in the public sector cost the global economy that year more than US$1.5 trillion (that is, 1,500 millions of million dollars: US$1,500,000,000,000). *See* in "World Bank Will Track Own Funds as "Corruption is Everywhere", Published: Friday, April 20, 2018 17:39, in Jelter Meers, in https://www.occrp.org/en/27-ccwatch/cc-watch-briefs/7980-world-bank-will-track-own-funds-as-corruption-is-everywhere

countries, large and small, rich and poor," even though "with especially devastating effects in the developing world," affecting "infinitely the poorest," as recognized by the Secretary General of the United Nations in 2003, the approval of the United Nations Convention on Corruption, "because it diverts the funds intended for development, undermines the ability of governments to offer basic services, fuels inequality and injustice and discourages investment and aid foreign."[15]

Hence, even, the also "transnational" nature of corruption, in the sense that "it is no longer an isolated evil, circumscribed to certain countries or regions of the planet," but now it is also linked to other "criminal activities such as drug trafficking, money laundering, and other perverse acts, generally related to criminal organizations with branches in several countries."[16]

It is not surprising, therefore, that corruption has caused so many recent scandals, which in so many countries have come to destabilize governments and democratic institutions, to the point that in our Latin America we can say that we have a record of accused heads of state and persecuted for corruption.

Corruption, therefore, as the Secretary General of the United Nations also warned, as soon as the aforementioned United Nations Convention on Corruption was signed in 2003:

> "It is an insidious plague that has a wide spectrum of corrosive consequences for society. It undermines democracy and the rule of law, gives rise to human rights violations, distorts markets, undermines quality of life and allows organized crime, terrorism and other threats to human security to flourish."[17]

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15 *See* Kofi A. Annan, "Prefacio, "*Convención de las Naciones Unidas contra la Corrupción*, United Nations Office on Drugs and Crime, Vienna, United Nations New York, 2004, p. 3.

16 *See* José Ignacio Moreno León, "La corrupción en América Latina: amenaza a la gobernabilidad democrática," en *Pizarrón Latinoamericano*, Metropolitan University, Center for Latin American Studies Arturo Uslar Pietri, Year 7, Vol. 9, p. 19

17 *See* Kofi A. Annan, "Prefacio", *Convención de las Naciones Unidas contra la Corrupción*, United Nations Office on Drugs and Crime, Vienna, United Nations New York, 2004, p. III.

That was also what was expressed last year (2018) by the President of Peru, Martín Vizcaya (appointed as a result of the resignation of the previous president precisely for facts linked to acts of corruption), referring to "systemic corruption" as "the new threat to democratic governance in the region," noting that "corruption and impunity are two sides of the same coin" that form "a disastrous combination that threatens governance, " to which he concluded by stating that transparency was "one of the most powerful and effective antidotes against the expansion of the corruption system, in addition to being a fundamental pillar of his government."[18]

And precisely because of the global and transnational nature of the phenomenon of corruption in the contemporary world, it is impossible for us, in a forum like this, not to refer to the most notorious recent cases of global corruption on the continent, both administrative corruption and of political corruption, which have undermined the very foundations of our democracies.

In relation to administrative corruption, it is impossible not to mention the largest transnational corruption operation that has been set up politically in our countries, such as the one carried out by the Brazilian company Odebrecht, in the shadow of the very State of its headquarters, and of many other states.

Seen globally, the phenomenon can only be explained because it obeyed a well-defined global public policy, conducted by the government of a State, using a private company, and through it, using governments; which allows us to think that in said company, in addition to the technical management necessary for the design and execution of public works in materially all Latin American countries, it has also come to structure another kind of specific "management", destined to plan the payment of commissions and dole out bulk money to public officials and candidates for public office in every conceivable election to secure construction contracts. Only in this way can the global scale of the phenomenon be understood.

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18 *See* what was declared by Martín Vizcarra, president of Peru, in the review "Cumbre de las Américas es una respuesta contra la corrupción, afirma Vizcarra," April 13, 2018, in http://www.viiicumbreperu.org/cumbre-de-las-americas-es-una-respuesta-contra-la-corrupcion-afirma-vizcarra/

In other words, there is no other way to explain the magnitude of this "company" of administrative corruption, if not understood as a planned policy that was developed around the activities of said construction company, even within the framework of international "cooperation" agreements. , as was the one signed between Venezuela and Brazil,[19] that allowed in my country to formally ignore all the laws on bidding and selection of contractors, in addition to having contributed to the financing of political campaigns.

In Venezuela, and we refer to the case – with all regret – because it is our country, the institutional corruption that affects it is of such a nature, that despite the administrative corruption scandals that have materially involved all the countries of the Continent, taking the highest officials with them into the darkness of the dungeons or tombs, however, in Venezuela, a country that has the tragic record of occupying the first place in the corruption perception index in the entire American Continent[20], the issue Odebrecht paradoxically is not even mentioned;[21] the situation of impunity is such that it would seem that said company had never worked in Venezuela,[22] when the evidence is in sight, in the largest

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19 *See* Jean Manzano*, "*Las obras pendientes de Odebrecht en Venezuela," in *El Estímulo*, 03/27/2018, in http://elestimulo.com/elinteres/infografia-las-obras-pendientes -de-odebrecht-en-venezuela/

20 *See* information from Transparency International, at https://www.transparency.org/news/pressrelease/el_indice_de_percepcion_de_la_corrupcion_2017_muestra_una_fuerte_presencia

21 Only a group of Magistrates who had been appointed to the Supreme Tribunal, and who, persecuted in the country, are in exile, have been the ones who have referred to the case of corruption caused by Odebrecht, coming to issue a condemnatory opinion against the president of the Republic. *See* the report: "TSJ en el exilio ordena 18 años y tres meses de prisión para Maduro por corrupción. La sentencia del Tribunal Supremo en el exilio indica que el gobernante Nicolás Maduro deberá cumplir su condena en la cárcel de Ramo Verde. Además, le obliga a resarcir al país por 35.000 millones de dólares" in Diario Las Américas, August 15, 2018, at https://www.diariolasamericas.com/america-latina/tsj-el-exilio-ordena-18-anos-y-tres-meses-prision-maduro-corrupcion-n4160164

22 *See* Jorge González, *Odebrecht. "La historia completa.: Los secretos de un escándalo de corrupción que desestabilizó a América Latina",* and Francisco Duran, Oderecht. "*La empresa que capturaba gobiernos"*, Kindle edition, at: https://www.amazon.com/s/ref=nb_sb_noss_1?__mk_es_US=%C3%85M%C3%85%C5%BD%C3%95%C3%91&url=search-alias%3Dstripbooks&field-keywords=

iron and concrete cemetery composed of monumental works, all unfinished,[23] but certainly paid,[24] that today can be seen throughout the national territory.

In any case, the globalization of the phenomenon of administrative corruption, a product of institutional corruption and the collapse of democracy, evidenced, among others, by the Odebrecht case, was what captured the attention of our continent when in 2018 it was held in Lima the *Octava Cumbre de las Américas,* whose central theme was, precisely, the "Democratic governance against corruption,"[25] recognizing that "prevention and combat" against it is the key piece "for the strengthening of democracy and the rule of law in our countries."

There, the Heads of State recognized that:

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odebrecht. It is not surprising, therefore, the decision of the Administrative Court of Cundinamarca, in Colombia, adopted in December 2018, condemning the company to a multi-million dollar fine (800,000 dollars), disqualifying the company for 10 years from contracting with public entities in Colombia. *See* the information in "Odebrecht es inhabilitada en Colombia y la multan con $251 millones," in *tvnNoticias*, December 13, 2018, in https://www.tvn-2.com/mundo/suramerica/Odebrecht-inhabilitada-Colombia-multan-millones_0_5190231014.html

23 *See* for example "Maduro: Obras inconclusas de Odebrecht en Venezuela serán terminadas," in *El Impulso*, March 26, 2018, in http://www.elimpulso.com/featured/maduro-obras-inconclusas-odebrecht-venezuela-seran-terminadas

24 *See* Diego Oré, "Lista de las obras inconclusas de Odebrecht en Venezuela," in *La Razón*, in https://www.larazon.net/2017/06/lista-las-obras-inconclusas-odebrecht-venezuela/

25 *See* in *El Comercio,* April 14, 2018, https://elcomercio.pe/politica/cumbre-americas-paises-compromiso-lima-noticia-512110. In 2018, in the same line of action, the Heads of State and Government meeting at the 30th Assembly of the African Union in Addis Ababa, Ethiopia launched a new campaign with a single and important purpose, which was to fight corruption through of the African Continent. *See* Samuel Kaninka, "The African Union kicks off 2018 with an anti-corruption campaign," in https://voices.transparency.org/the-african-union-kicks-off-2018-with-an-anti-corruption-campaign-b4c233eab262; and at http://www.viiicumbreperu.org/compromiso-de-lima-gobernabilidad-democratica-frente-a-la-corrupcion/

> "Corruption weakens democratic governance, citizen trust in institutions, and has a negative impact on the effective enjoyment of human rights and the sustainable development of the populations of our hemisphere, as well as in other regions of the world."

In this global scenario, therefore, it is not surprising that, during 2018, presidential candidates such as Luis Manuel López Obrador in Mexico, had focused their campaign speech on the purpose of "eradicating corruption and impunity," to that "there be transparency" – he said - ,[26] adding in his speech, however, an affirmation that in my opinion is totally wrong, considering that corruption was supposedly the "result of the "neoliberal" political regime," even stating that: "the hallmark of neoliberalism is corruption,"[27] and that in neoliberal regimes corruption is "the main function of political power"[28].

These statements, which initially appeared as referring to the heat of an electoral campaign in the specific context of the Mexican political process at the time, however, in April 2019 President López Obrador himself took it upon himself to generalize them, when he made reference to the unfortunate death of the president. Alan García from Peru, linking him to the Odebrecht case [29] and again linking corruption with liberalism.

With this we think that the president of Mexico took the wrong point when conceptualizing the phenomenon of corruption in the world, since in my opinion it can in no way be considered as the product of a specific government economic policy, and even less, of any "neoliberal" policy,

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[26] *See* the various speeches by Andrés Manuel López Obrador in 2018, at https://www.google.com/search?q=lopez+obrador+discurso+zocalo&rlz=1C1CHBD_enUS787US787&oq=lopez+obrados+discursos+&aqs=chrome.3.69i57j0l5.11798j0j8&sourceid=chrome&ie=UTF-8

[27] *See* in https://adnpolitico.com/presidencia/2018/12/01/este-es-el-discurso-integro-de-lopez-obrador-al-tomar-posesion. Similarly, in https://www.lapagina.com.sv/internacionales/el-neoliberalismo-es-la-corrupcion-andres-manuel-lopez-obrador-al-asumir-como-presidente-de-mexico/

[28] *Idem*.

[29] *See* the news report: "López Obrador toma el suicidio de Alan García para criticar corrupción y neoliberalismo" in *proceso.com.mx*, April 18, 2019, at https://www.proceso.com.mx/580259/lopez-obrador-toma-el-suicidio-de-alan-garcia-para-criticar-corrupcion-y-neoliberalismo

understood as the one that advocates the development of the economy based on the free play of its market forces, product of the exercise of economic freedom, without interference or determining participation of the State.

Administrative corruption -and today the former candidate already in power, very possibly must already be realizing it, is the result of institutional or political corruption, which corrodes the States, as a result of the malfunctioning of democracy when the control mechanisms are erased, turning what should be the "glass house" into an iron barracks, where transparency is replaced by opacity.

Attributing the phenomenon of corruption in a simplistic way to certain economic policies such as neoliberal policies could erroneously state, in contrast, that a statist economic policy based on State intervention in the economy as regulator and owner of the means of production, would then be the best antidote against corruption and impunity.

This would be nothing more than a deductive fallacy, and to prove it, it is enough to remember what happened after 2000, in view of the entire contemporary world, precisely in Venezuela, where the largest and most depraved scheme and public system of corruption was developed that it has flourished throughout the history of the world (ancient, modern or contemporary), due to its magnitude and the bizarre levels of wasted public resources; precisely in a country in which, far from having developed neoliberal policies, what, on the contrary, has been developed during the last 20 years, was a statist, socialist, populist and militarist economic policy, where the State assumed total leadership of the economy , eliminated private initiative and destroyed private production, which materially does not exist today, turning the country's economic system into a totally public economy, led by a bureaucratized, amorphous, inefficient and corrupt mass, and which in twenty years squandered an oil income of more than 850,000 million dollars.[30]

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[30] *See* the information from a few years ago, in the report by Ángel Bermúdez, "Cómo Venezuela pasó de la bonanza petrolera a la emergencia económica" in *BBC Mundo*, February 25, 2016, at https://www.bbc.com/mundo/noticias/2016 /02/ 160219_venezuela_bonanza_petroleo_crisis_economica_ab

Among those resources squandered by corruption, it is impossible not to mention, for example, what happened to the oil industry, turning the country that several decades ago was the largest oil exporter in the world, and that today continues to have the largest reserves oil companies in the world, in a country that does not even produce to supply local consumption,[31] there is already today a shortage of gasoline for cars. Today there is already a shortage of gasoline for cars. Nor can we fail to mention, for example, the 40,000 million dollars that were supposedly earmarked a few years ago for an electrical emergency plan, which was ignominiously squandered, plunging the country into total darkness, because of the blackout of several days that occurred in March of this year (2019),[32] which today has the country in a situation of electricity rationing.

That statist regime is, on the other hand, the only thing that explains why huge amounts of money, which were disposed of at random, coming from the income derived from the oil boom,[33] ended up openly financing electoral campaigns of presidential candidates and of another type, in almost all the countries of the continent; how far the dirty money traveled in suitcases and briefcases, on official planes, even to these southern lands.[34]

In short, this authoritarian political regime with a statist and centralized economy, a product of the institutional corruption of democracy, is also the only thing that explains, as announced in April

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31 *See* all the information in Allan R. Brewer-Carias, *Crónica de una destrucción. Concesión, Nacionalización, Apertura, Constitucionalización, Desnacionalización, Estatización, Entrega y Degradación de la Industria Petrolera,* Editorial Jurídica Venezolana, Caracas, 2018, p. 730.

32 *See* Allan R. Brewer-Carías, *Crónica constitucional de una Venezuela en las tinieblas 2018-2019,* Ediciones Olejnik, Santiago, Buenos Aires 2019.

33 It has been calculated in the National Assembly of Venezuela that in recent years the regime squandered between 300,000 and 400,000 million dollars. *See* the review, "Aseguran que régimen de Maduro robó al menos $300 mil millones," in Diario Las Américas, September 13, 2018, at https://www.diariolasamericas. com/ america-latina/aseguran-que-regimen-maduro-robo-al-menos-300-mil-millones-n41 62288.

34 *See* Carlos Tablante and Marcos Tarre, *El gran saqueo. Quienes y cómo se robaron el dinero de los venezolanos,* La hoja del Norte, Caracas 2015.

2019), that in a month - a single month - there would have been spent in a single agency of a state bank located in France (of the Development Bank of Venezuela), more than 6 million euros for the payment of cookies, food, and office supplies. This was alerted by the same French authorities.[35]

With this unpunished looting – these are but a few examples – the miracle of having converted one of the countries that twenty years ago was still one of the most prosperous and economically developed on the continent took place; in the most indebted and miserable country in the world,[36] which, as we indicated before, tragically occupies the highest level of corruption on the Continent, and among the most corrupt in the world.[37] And not precisely because of any neoliberal policy.

On the contrary, because of a policy that has led to everything, or almost everything, depending on the State and the actions of its Administration and its officials, which has developed an authoritarian political regime, with a perverted and distorted democracy, where no there is control between the powers, and lack of freedoms; where transparency disappeared, turning the Public Administration, for the citizen, into a great venal and blackmail center, before which, in order to receive the most minimal and elementary services, all citizens, starting with those on foot, have to pay in advance and immediately to receive the

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35 *See* in Maru Morales, "Bandes Francia pagaba 6 millones de euros al mes para galletas e insumos de oficina," in *CrónicaUno*, April 3, 2019, at http://cronica.uno/bandes-francia-pagaba-6-millones-de-euros-al-mes-para-galletas-e-insumos-de-oficina/

36 *See* the review "Venezuela tiene el mayor índice de miseria en el mundo, según Bloomberg," in Agencia Bloomberg, February 19, 2018, at https://gestion.pe/economia/venezuela-mayor-indice-miseria-mundo-bloomberg-227585

37 *See* the review "Venezuela, entre los 12 países más corruptos del mundo según Transparencia Internacional. Venezuela es el latinoamericano peor situado, en el puesto 169, al mismo nivel que Irak," in El Nuevo Diario, February 21, 2018, at: https://www.elnuevodiario.com.ni/internacionales/456471-venezuela-corrupcion-transparencia-internacional/. *See* also at: https://www.transparency.org/news/pressrelease/el_indice_de_percepcion_de_la_corrupcion_2017_muestra_una_ fuerte _presencia

most basic services,[38] and the most serious, sometimes renouncing the exercise of their freedom in exchange for receiving gifts.

More tragic could not be what happened in Venezuela where, for example, the provision of the most precarious and basic health care services has been subject to the degree of support for the government; reaching the extreme that in the illegitimate presidential reelection of May 2018, the delivery of food and other subsidies to the less favored population, only occurred in exchange for people voting for the government candidate.[39] On this, even, in March 2019, a group of Cuban doctors, among those hired during the last twenty years to work without a medical license in Venezuela in the regime's health care programs in popular areas, came to publicly denounce that they were ordered "only to provide medical services to those who voted for Maduro, and to deny such services to those who did not express support for the government."[40]

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38 *See* Allan R. Brewer-Carías, "De la Casa de Cristal a la Barraca de Hierro: el Juez Constitucional Vs. El derecho de acceso a la información administrativa," in *Revista de Derecho Público*, No. 123, (July-September 2010), Editorial Jurídica Venezolana, Caracas 2010, p. 197-206

39 *See* the news report by Jim Wyss and Cody Weddle, "Maduro usa el hambre como arma política a cambio de votos," in *El Nuevo Herald*, May 16, 2018. The report includes the assessments of Luis Lander who stated that: "in a country where the majority depends on subsidies to survive, the system has become a powerful and pernicious electoral tool," which "is clearly being used to threaten to voters," who fear "that if they don't vote, they could lose their government-subsidized food." Similarly, the assessments of Michael Penfold are collected, when he stated that the perverse mechanism "not only encourages government supporters to go to the polls, he says, but also intimidates opposition voters not to bite the hand that literally feeds," adding that while vote buying is as old as elections themselves, "this new form of clientelism is possibly the most developed and authoritarian in Latin America, and represents a colossal threat to the return of democracy in Venezuela." *See* at: https://www.elnuevoherald.com/noticias/mundo/america-latina/venezuela-es/article211236754.html

40 *See* Nicholas Casey, "Trading Lifesaving Treatment for Maduro Votes," in *The New York Times*, New York, March 17, 2019, p. 1 and 18. The report includes statements from 16 Cuban doctors, where they expose with all dramatism what happened, that is, "a system of deliberate political manipulation in which their services were used to strengthen the votes of the United Socialist Party of Venezuela (PSUV), often through coercion," using many tactics, "from simple reminders to vote for the government to denying treatment to opposition supporters

The causes of corruption, therefore, are very different from what President López Obrador pointed out, and they have to do, we insist, with the malfunction of the control mechanisms established in democratic regimes, because in authoritarian regimes they simply they disappear; that is to say, they have to do, precisely, with the malfunction of the aforementioned essential elements and components of democracy, among which the usual principle stands out, that of the separation of powers, and that of the independence and effective autonomy of the same, and among them, the Judiciary, whose absence and distortion is what leads to impunity; In short, they have to do with the limitations imposed on access to public information and the malfunctioning of systems to demand accountability of public management.[41]

And this was precisely what happened in Venezuela -and we cite our country as an example, so as not to get lost in theories-, a country that was once envied for the stability of its democratic institutions, where

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who have life-threatening illnesses." "Cuban doctors said they were ordered to go door to door in poor neighborhoods to offer medicine and warn residents that access to medical services would be cut off if they did not vote for Maduro or his candidates. Many said they were instructed by their superiors to make the same threats in closed-door consultations with patients *See*king treatment for chronic illnesses." *See* also the report in Spanish of Nicholas Casey, "Nicolás Maduro usó a médicos cubanos y a los servicios de salud para presionar a los votantes," in *The New York Times.es*, March 17, 2019, at https://www.nytimes.com/es/ 2019/03 /17/maduro-voto-medicinas-cuba/. On the same topic *See* the news report: "Votos a cambio de comida y medicinas, el método electoral de Maduro en 2018," in *el Periódico*, March 18, 2019, at https://www.elperiodico.com/es/internacional/20 190318/votos-comida-medicinas-metodo-electoral-maduro-7360323

41 For this reason, it was precisely that the Heads of State and Government of the American countries at the aforementioned *Octava Cumbre de las Americas de Lima*, in April 2018, committed to adopting institutional measures to "strengthen the democratic institutions for the prevention and combat of corruption in the Hemisphere," among which are the strengthening of "judicial autonomy and independence in order to promote respect for the rule of law and access to justice, as well as to promote and promote policies of integrity and transparency in the judicial system," the consolidation of "the autonomy and independence of the superior control bodies," and the promotion of "measures that promote transparency and accountability" in all orders related to the management of public resources. *See* in *El Comercio,* April 14, 2018, at https://elcomercio.pe/politica/cumbre-americas-paises-compromiso-lima-noticia-512110

there was a total depravity of State institutions,[42] which, once corrupted, denatured the principle of the democratic legitimacy of the representatives of the people; they distorted the electoral system; they neutralized or annihilated the principle of the separation of powers; they submitted the powers of the State to the control of the Executive; they disrupted the principle of political decentralization, centralizing power, and thereby eliminated the very possibility of citizen participation; they eliminated the right of access to information and any possibility for citizens to demand transparency in public management; they eliminated the autonomy of the Judiciary; and they turned the Constitutional Judge [43] into the most perverse instrument of authoritarianism [44]to mold and distort the Constitution. The Constitutional Judge, abandoning his essential role of preserving constitutional supremacy, went on the contrary to ensure impunity for his violations, after touching the regime, globally, in a paradoxical and bizarre "judicial dictatorship [45] to destroy [46] and corrupt democracy.

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42 *See* Allan R. Brewer-Carías, *Principios del Estado de derecho. Aproximación histórica*, Cuadernos de la Cátedra Mezerhane, Dade College, Miami, Editorial Jurídica Venezolana International, Miami 2016.

43 *See* Allan R. Brewer-Carías, *Práctica y distorsión de la justicia constitucional en Venezuela (2008 2012)*, Colección Justicia Nº 3, Acceso a la Justicia, Academy of Political and Social Sciences, Metropolitan University, Editorial Jurídica Venezolana, Caracas 2012; La patología de la Justicia Constitucional, Editorial Jurídica Venezolana, third edition, Caracas, 2015.

44 *See* Allan R. Brewer-Carías, *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público. Central University of Venezuela, Nº 2, Editorial Jurídica Venezolana, Caracas 2007; and "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, p. 383-418; and in *IUSTEL, Revista General de Derecho Administrativo*, No. 21, Madrid June 2009.

45 *See* about it Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de derecho*, Editorial Jurídica Venezolana, Caracas, 2016.

46 *See* Allan R. Brewer-Carías, *Dismantling Democracy. The Chávez Authoritarian Experiment*, Cambridge University Press, New York 2010; *Estado totalitario y desprecio a la ley. La desconstitucionalización, desjuridificación, desjudicialización y desdemocratización de Venezuela, Public Law Foundation*, Editorial Jurídica Venezolana, second edition, (With a prologue by José Ignacio Hernández), Caracas

This process even led the Supreme Tribunal, for example, to close any possibility of transparency, first, in 2010, by denying the citizen's right of access to the most elementary administrative information such as that relating to the remuneration paid to officials, nothing less that of the Office of the Comptroller General of the Republic, considering that in the face of such citizen right that was exercised, the right to privacy or "economic intimacy" of officials was the one that was unusually deprived;[47] and, shortly after, in 2015, to deny the citizen's right to know the country's economic indicators, freeing the Supreme Tribunal from the Central Bank of its obligation to publish them[48], thus making Venezuela,

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2015; Authoritarian Government v. The Rule Of Law. Lectures and Essays (1999-2014) on the Venezuelan Authoritarian Regime Established in Contempt of the Constitution, Public Law Foundation, Editorial Jurídica Venezolana, Caracas, 2014.

47 The Constitutional Chamber went so far as to argue that in Venezuela "there is no general law that requires that the salaries of government officials be made public, while in other countries, such as the United States of America or Canada, most salaries of high-ranking officials of the federal government are approved and set by law, which implies mandatory advertising. On the other hand, in our legal system, the information on the remuneration of public officials is indicated globally in the budget items that are included annually in the Budget Law, where the amounts assigned to each entity or body of the public administration for staff remuneration; or in the Manuals of Positions and Salaries, in which it is not distinguished to which official in particular the remuneration belongs to, since this is information that belongs to the intimate sphere of each individual. On the other hand, the reserved nature of the income tax declaration, or of the declaration of assets that public officials make before the Office of the Comptroller General of the Republic demonstrates that such information is not publicly disclosed data, since it is of information that is contracted to the private sphere or economic intimacy of officials." *V. Caso Asociación Civil Espacio Público,* judgment of the Constitutional Chamber of the Supreme Tribunal of Justice No. 745 of July 15, 2010, at http://www.tsj.gov.ve/decisiones/scon/Julio/745-15710-2010-09-1003.html. *V.* sobre dicha sentencia, Allan R. Brewer-Carías, "De la Casa de Cristal a la Barraca de Hierro: el Juez Constitucional Vs. El derecho de acceso a la información administrativa," in *Revista de Derecho Público*, No. 123, (July-September 2010), Editorial Jurídica Venezolana, Caracas 2010, p. 197-206.

48 *See* Judgment No. 935 of August 4, 2015 (Caso *Asociación Civil Transparencia Venezuela*), in http://historico.tsj.gob.ve/decisiones/spa/agosto/180378-00935-5815-2015-2015-0732.HTML. *V.* sobre dicha sentencia Allan R. Brewer-Carías, "Secrecy and lies as State policy and the end of the obligation of transparency How the Supreme Tribunal of Justice unconstitutionally freed the Central Bank of Venezuela from fulfilling its legal obligation to inform the country about economic

since 2015, a country in which simply there are no known official economic indicators.[49]

In this unrestrained process that we have just pointed out, developed against the express provisions of the Constitution, it was the Constitutional Judge himself who carried out a continuous *coup d' etat*,[50] in Venezuela, which also occurs when the organs of the State break against the Constitution.[51] And it was in this way that, in Venezuela, the Constitutional Chamber of the Supreme Tribunal of Venezuela, always acting under the control of the Executive Power, even came to arrogate all the power of the State, having assumed, in the midst of the most global institutional corruption, leadership in the process of depredation of the country's democratic institutions, entrenching authoritarianism.

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indicators, snatching from citizens their rights to government transparency, access to justice and access to administrative information," August 10, 2015, at http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea3/Content/Brewer.%20LO%20SECRETO%20Y%20LA%20MENTIRA%20COMO%20POL%C3%8DTICA%20DE%20ESTADO%20Y%20EL%20FIN%20DE%20LA%20OBLIGACI%C3%93N%20DE%20TRANSPARENCIA.pdf

49 It is enough to consult the prestigious magazine *The Economist*, to verify how on its last page, where the economic indicators of the countries of the world are always published, Venezuela ceased to exist for these purposes. At the end of May 2019, however, for the first time in several years, the Central Bank of Venezuela published some economic indicators, with which the catastrophe that had occurred in the country in recent years was confirmed. *See* the Forbes report, "Banco Central confirma hundimiento de la economía venezolana," in *Msn.noticias*, May 29, 2019, at https://www.msn.com/es-mx/noticias/otras/banco-central-confirma-hundimiento-de-la-econom%C3%ADa-venezolana/ar-AAC5k7k

50 *See* Allan R. Brewer-Carías, *El golpe a la democracia dado por la Sala Constitucional (De cómo la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela impuso un gobierno sin legitimidad democrática, revocó mandatos populares de diputada y alcaldes, impidió el derecho a ser electo, restringió el derecho a manifestar, y eliminó el derecho a la participación política, todo en contra de la Constitución)*, Colección Estudios Políticos No. 8, Editorial Jurídica Venezolana, second edition, (With a prologue by Francisco Fernández Segado), Caracas, 2015.

51 *See* Diego Valadés, *Constitución y democracia,* UNAM, México 2000, p. 35; and "La Constitución y el Poder" in Diego Valadés and Miguel Carbonell (Coordinators), *Constitucionalismo Iberoamericano del siglo XXI*, Chamber of Deputies, UNAM, Mexico 2000, p. 145.

All this increased two years ago, after the victory of the opposition in the parliamentary elections of December 6, 2015, from which the Constitutional Judge assumed the precise mission of preventing popular representation, embodied in the newly elected Assembly National, could come to exercise its constitutional functions.

Until then the authoritarian regime had been used to having total power, which is why it was obvious that its leaders could not tolerate the democratic opposition controlling the National Assembly. For this reason, as of 2016,[52] the regime defined as a strategy that the Supreme Tribunal be the one to annihilate the National Assembly, which it began to execute even before it was installed in January 2016, suspending the proclamation of the elected deputies in a State of the Republic (Amazonas), and thus break the qualified majority that the opposition had achieved in parliament. The Supreme Tribunal, months later, after said deputies were sworn in on July 28, 2016, declared, not only that said swearing-in was invalid, non-existent, and ineffective, but also that all "acts or actions that in the future I dictate the National Assembly" would also be null and void.[53]

This was followed by a successive series of rulings by the Constitutional Judge declaring in "contempt" not the deputies who allegedly failed to comply with a precautionary judicial measure, but the National Assembly *in toto*,[54] as an organization - which has no legal basis whatsoever -, and also nullified all his future actions, which was followed

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52 *See* judgment of the Electoral Chamber No. 260 of December 30, 2015, in http://historico.tsj.gob.ve/decisiones/selec/diciembre/184227-260-301215-2015-2015-000146.HTML. *See* comments on Allan R. Brewer-Carías, *Dictadura Judicial y perversión del Estado de derecho*, Ediciones Iustel, Madrid 2017, p. 154 and et seq.

53 *See* judgment of the Electoral Chamber No. 108 of August 1, 2016, in http://www.tsj.gov.ve/decisiones/scon/marzo/162025-138-17314-2014-14-0205. HTML. *See* comments in Allan R. Brewer-Carías, *Dictadura Judicial y perversión del Estado de derecho*, Ediciones Iustel, Madrid 2017, p. 33 and et seq.

54 Beginning with Judgment No. 808 of September 2, 2016. *See* http://historico.tsj.gob.ve/decisiones/scon/septiembre/190395-808-2916-2016-16-0831.HTML. *See* comments in Allan R. Brewer-Carías, *Dictadura Judicial y perversión del Estado de derecho*, Ediciones Iustel, Madrid 2017, p. 191 and et seq.

by the decision of the Executive Power to simply take the budget away from the National Assembly, denying it the resources for its operation.[55]

That is to say, through some one hundred judgments issued as of 2016, the Constitutional Chamber annihilated popular representation,[56] and produced a "serious alteration of the democratic order," as a result of the political or institutional corruption of the regime, against which it not only reacted the National Assembly itself,[57] but rather the Secretary

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55 *See* Yelesza Zavala, "Maduro: Si la AN está fuera de ley yo no puedo depositarle recursos," in NoticieroDigital.com, August 2, 2016, at: http://www.noticierodigital.com/forum/viewtopic.php?t=38621

56 Thus, successively, the Constitutional Chamber proceeded (i) to declare the unconstitutionality of all - if all - the laws passed by the National Assembly since it was installed in January 2016; (ii) to subject the legislating function of the National Assembly to obtaining an Approval by the Executive Power; (iii) to eliminate all political control functions of the National Assembly over the government and the Public Administration, and therefore, any hint of parliamentary control of administrative corruption; (iv) to eliminate the possibility of approving votes of censure against ministers; (v) to eliminate the obligation of the President of the Republic to present his Annual Report to the National Assembly, with the Constitutional Chamber itself assuming such function; (vi) to eliminate the legislative function in budget matters, converting the Budget Law into an executive decree to be presented, not before the National Assembly, but before the Constitutional Chamber, with which budgetary discipline was disregarded; (vii) to eliminate even the power of the National Assembly to issue political opinions as a result of its deliberations, annulling all the Agreements that were adopted; (viii) to eliminate the power of the Assembly to review its own acts and to be able to revoke them; and finally (ix) to eliminate parliamentary control over the declaration of states of exception. *See* the comments on all these sentences in Allan R. Brewer-Carías, *Dictadura judicial y perversión del Estado de derecho*, Editorial Jurídica Venezolana, Caracas 2016; *La consolidación de la tiranía judicial. el Juez Constitucional controlado por el Poder Ejecutivo, asumiendo el poder absoluto,* Colección Estudios Políticos, No. 15, Editorial Jurídica Venezolana International. Caracas/ New York, 2017.

57 Given all this, the National Assembly certainly reacted in May 2016 ("Acuerdo exhortando al cumplimiento de la Constitución, y sobre la responsabilidad del Poder Ejecutivo Nacional, del Tribunal Supremo de Justicia y del Consejo Nacional Electoral para la preservación de la paz y ante el cambio democrático en Venezuela," May 10, 2016, available at http://www.asambleanacional.gob.ve/uploads/documentos/doc_d75ab-47932d0de48f142a739ce13b8c43a236c9b.pdf) denouncing precisely the rupture of the constitutional and democratic order in the country, at the hands of the Constitutional Judge and the Executive Power, which,

General of the Organization of American States, Dr. Luis Almagro, who proceeded to request (in May 2016) the convening of the Permanent Council of the Organization to apply to Venezuela precisely the Inter-American Democratic Charter (art. 20).[58]

To this end, he denounced, even though by then it was nothing new,[59] that in the country there was no longer "a clear separation and

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corrupting the institutions of the State, disregarded popular sovereignty. (This Agreement of the National Assembly was specifically analyzed by the very important group of the 22 former Latin American presidents that make up the *Iniciativa Democrática de España y las Américas* (IDEA), in a Declaration dated May 13, 2016, in which they highlighted all the signs of corruption of the rule of law in the country, demanding to the President of Venezuela, to respect "without restrictions the mandate for democratic and constitutional change decided by the majority of the people of Venezuela on December 6, 2015," urging him not to use "the other powers of the State to prevent or hinder actions that constitutionally advances the National Assembly to resolve the serious crisis that afflicts the country," finally denouncing "the partisan political activism of the Supreme Tribunal of Justice," and in general, "the disregard by the National Executive and by the Supreme Tribunal of Justice, of the authority of the National Assembly, a representative body of the Venezuelan people, whose legitimacy derives from the majority expression of the electorate and of popular sovereignty," *See* IDEA, "Declaración sobre la ruptura del orden constitucional y democrático en Venezuela," May 13, 2016, available at http://www.fundacionfaes.org/es /preview/ noticias/45578). The legislative Agreement adopted, in any case, was ipso facto suspended in its effects by the Constitutional Judge himself (judgment No. 478 of May 14, 2016) when deciding a crazy action for constitutional amparo attempted by the State against the State, that is to say, by the lawyer of the Republic (Attorney General of the Republic), against the deputies of the National Assembly. *See* at http://historico.tsj.gob.ve/decisiones/scon/junio/188339-478-146-16-2016-16-0524.HTML.

58 *See* the communication of the Secretary General of the OAS of May 30, 2016 with the *Informe sobre la situación en Venezuela en relación con el cumplimiento de la Carta Democrática Interamericana*, at oas.org/documents/spa/press/OSG-243.es. pdf.

59 This, of course, is nothing new, as we already observed in 2002: Allan R. Brewer-Carías, *La crisis de la democracia venezolana. La Carta Democrática Interamericana y los sucesos de abril de 2002*, Los Libros de El Nacional, Colección Ares, Caracas 2002. *See* also a summary of the violations of the Democratic Charter until 2012 in Allan R. Brewer-Carias and Asdrúbal Aguiar, in Asdrúbal Aguiar, *Historia Inconstitucional de Venezuela. 1999-2012*, Editorial Jurídica Venezolana, Caracas 2012, p. 511-534.

independence of public powers" giving rise to "one of the clearest cases of co-optation of the Judicial Power by the Executive Power,"[60] with a Supreme Tribunal integrated in a manner "completely vitiated both in the appointment procedure and by the political bias of practically all its members."[61] Those were his words.

In this situation, as Secretary General Almagro himself expressed in August 2016, what was seen in Venezuela was simply "the unfortunate end of democracy," that is, "the end of the rule of law," considering - he said - that "no regional or subregional forum could ignore the reality that *today in Venezuela there is no democracy or rule of law*."[62]

And this was evident, because the global institutional corruption of the Venezuelan State had already had perverse effects in those international forums, particularly in the OAS, through the control of the votes of some States in exchange for the oil bill, particularly before the arrival of the Dr. Almagro to the General Secretariat.

In order not to speculate, it is enough to recall the explanations given in 2014 by the former Foreign Minister of Peru, Luis Gonzalo Posada,[63] touching on one of the most publicized secrets about the operation of the OAS, which, according to what he said then, at that time was that the body that "defended the interests of the Venezuelan regime," referring

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60 *See* the communication of the Secretary General of the OAS of May 30, 2016 with the *Informe sobre la situación en Venezuela en relación con el cumplimiento de la Carta Democrática Interamericana*, p. 73. Available at oas.org/documents/spa/ press/ OSG-243.es.pdf.

61 *Idem*, p. 127. Available at oas.org/documents/spa/press/OSG-243.es.pdf.

62 The text of the presentation by Secretary General Luis Almagro before the OAS Permanent Council, June 23, 2016, at: http://www.elnacional.com/politica/ PresentacindelSecretarioGeneraldelaOEAante_NACFIL20160623_0001.pdf; and the text of the open letter from Secretary General Luis Almagro to Leopoldo López, dated August 22, 2016, in *Lapatilla.com*, August 23, 2016, at; http://www. lapatilla.com/site/2016/08/22/almagro-a-leopoldo-lopez-tu-injusta-sentencia-marca-un-hito-el-lamentable-final-de-la-democracia-carta/.

63 *See* Rodrigo Cruz, "Hoy se ha consumado un golpe de estado chavista en la OEA. El ex canciller Luis Gonzales Posada aseveró que el organismo interamericano defiende los intereses del régimen venezolano", in: El Comercio, Lima March 21, 2014, in http://elcomercio.pe/politica/internacional/hoy-se-ha-consumado-golpe-estado-chavista-oea-noticia-1717550.

then to the shameful decision adopted a few days earlier, with the vote of 22 of the 38 countries that expressed themselves, which blindly followed the line of the Venezuelan government, rejecting the invitation that the government of Panama had asked the Venezuelan deputy María Corina Machado to speak about the political situation in the country and about the government's repression against students. That rejection was described by the former foreign minister of Peru as the consummation, in the OAS, of a "chavista coup d'état;" adding that - I quote -:

> "Today, Chavismo has demonstrated its immense power within the organization by managing the 17 Caribbean votes through cheap oil, in addition to that of its political partners [at the time] such as Argentina, Brazil, Uruguay, Ecuador and Bolivia. All of them as a whole make an absolute majority of 22 votes against 11 countries, which are not in that line.

From this, the Peruvian foreign minister added, he was "before an institution controlled through oil influence," which had - he said - "the patronage of 3 countries that are apparently committed to democracy, but that at the moment of truth they constitute a center of protection for an authoritarian political model."

He was referring "directly to Brazil, Argentina and Uruguay," adding that this was very serious:

> "because any substantive issue for the American countries cannot be dealt with if it does not have the approval of Venezuela, who has governed this institution for many years,"

All of this was denounced by the Foreign Minister of Peru in 2014, considering that the General Secretary at the time owed "his election to Chavismo," and affirming that the OEA had ended up being "an organization formed by a totalitarian regime," constituting it - he added - a "page of darkness that is being written in Latin America" that could not be "kept silent." [64]

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64 Rodrigo Cruz, "Hoy se ha consumado un golpe de estado chavista en la OEA. El ex canciller Luis Gonzales Posada aseveró que el organismo interamericano defiende los intereses del régimen venezolano", El Comercio, Lima March 21, 2014, at: http://elcomercio.pe/politica/internacional/hoy-se-ha-consumado-golpe-estado-chavista-oea-noticia-1717550.

This tragic panorama of international institutional corruption, which fortunately began to change as a result of the election of Dr. Luis Almagro as Secretary General of the Organization, at the time, however, had several consequences, among which was, for example, the election of some of the judges of the Inter-American Court of Human Rights in 2012,[65] who in some cases, unfortunately, did not know or did not want to become independent from the blackmail of the authoritarian regime that elected them.

This, in our opinion, occurred in at least one case that we know well, the case of *Allan R. Brewer-Carías vs. Venezuela*, decided in 2014,[66] with the votes of the judges from Brazil and Uruguay, countries that at that time, in the words of former Foreign Minister Gonzalo Posada (along with Uruguay and Argentina), had become "a center for the protection of a authoritarian political model" of Venezuela; who were joined by the judge from Colombia, a country that even though Gonzalo Posada did not include in the protection group of the Venezuelan authoritarian model, had Hugo Chávez as "his new best friend," in the middle of the peace process that President Santos was advancing under his mantle; [67] and in addition, the national from Peru, who at the time the decision was handed

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65 At the XLII OEA General Assembly held in Cochabamba, in addition to the distinguished and honorable Judge Eduardo Ferrer Mac-Gregor (Mexico), Sirs. Humberto Sierra Porto (Colombia) and Roberto de Figueiredo Caldas (Brazil) were elected as judges, who were added to the four judges who were in office, who were the honorable and distinguished judges Manuel Ventura Robles (Costa Rica) and Eduardo Vio Grossi (Chile), and Sirs. Diego García Sayán (Peru); and Alberto Pérez Pérez (Uruguay).

66 *See.* the ruling in http://www.corteidh.or.cr/docs/casos/articulos/seriec_278_esp.pdf

67 Expression used by the then candidate Juan Manuel Santos, and later president of Colombia in relation to the President of Venezuela, *See* the news report "Santos dice que Chávez es "su nuevo mejor amigo." Asegura además que, si bien ninguno de los dos ha sido "santo de la devoción" del otro, él decidió que de llegar a la presidencia debía mejorar las relaciones con su vecino, lo cual comenzó en agosto con el restablecimiento de los lazos diplomáticos," in Revista Semana, November 2010, at http://www.semana.com/mundo/articulo/santos-dice-chavez-su-nuevo-mejor-amigo/124284-3 This link continued later, after the death of Chávez. *See*, for example, the news report "Colombia y Venezuela, de nuevo mejores amigos. Cancilleres y ministros de ambos países evaluaron las cooperaciones en seguridad, energía y comercio", Revista Semana2 August 2013, at http://www.semana.com/nacion/ar-ticulo/colombia-venezuela-nuevo-mejores-amigos/352865-3

down was nothing less than a candidate for the general secretariat of the OAS itself, and who, while judging the States, was in campaign soughting votes from the same States to support his candidacy. [68]

The issuance of that sentence also coincided with the exercise of the most open and undue political pressure that Venezuela exerted against the Inter-American Court of Human Rights itself, expressed by the then Foreign Minister, Nicolás Maduro in the text of the denunciation of the American Convention on Human Rights addressed in 2012[69] to the

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[68] In other words, the judge who was supposed to judge the States was campaigning to *See*k their support, beginning with Venezuela and its allies, which led to the issuance of a "Certificate of Withdrawal" by the honorable Judges Eduardo Vio Grossi and Manuel Ventura, expressing "their disagreement" with the misguided decision to allow the judge candidate for the OAS Secretariat to participate in the deliberations of the sentences.

[69] The complaint, formulated by means of communication No. 125 of September 6, 2012, was made in execution, even of the warrants that the Constitutional Chamber had made to the Executive both in 2008 (*See* the judgment of the Constitutional Chamber No. 1,939 of December 18 of 2008 known as: *Abogados Gustavo Álvarez Arias y otros*, and which should rather have been called the *Estado de Venezuela vs. Corte Interamericana de Derechos Humanos*, because Mr. Álvarez and the others, in reality, but the lawyers of the State (Office of the Attorney General of the Republic In it, the Chamber declared unenforceable in the country the ruling that the First Inter-American Court of Human Rights had issued four months earlier, on August 5, 2008, in the *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela*, in which the Venezuelan State had been condemned for violating the rights to due process of some judges of the First Court of Administrative Litigation, who had been removed from their positions without any judicial guarantees. *See* Allan R. Brewer-Carias, "La interrelación entre los Tribunales Constitucionales de América Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela," in Armin von Bogdandy, Flavia Piovesan and Mariela Morales Antoniazzi (Coordinators), Direitos Humanos, Democracia e Integraçao Jurídica na América do Sul, Lumen Juris Editora, Rio de Janeiro 2010, p. 661-70; and in Anuario Iberoamericano de Justicia Constitucional, Center for Political and Constitutional Studies, No. 13, Madrid 2009, p. 99-136); as in 2012 (*See* judgment of the Constitutional Chamber No. 1547 dated October 17, 2011 *Estado Venezolano vs. Corte Interamericana de Derechos Humanos*), in http://www.tsj.gov.ve/decisiones/scon/Octubre/1547-171011-2011-11-1130.html dictated on the occasion of another "unnamed action of control of constitutionality" that was tried again by the lawyers of the State against another sentence of the Inter-American Court of Human Rights, this time the one of September 1, 2011 dictated in the case

Secretary General of the OEA,[70] where he accused the Inter-American Commission and Court of being "kidnapped by a small group of unscrupulous bureaucrats" who had turned the Inter-American System into a "political weapon designed to undermine the stability" of the country, "adopting a line of interfering action in the internal affairs" of the government, and of ignoring, to decide the cases, that it was necessary "to exhaust the internal resources of the State."

And the most serious thing was that in order to substantiate that accusation against the Inter-American bodies, the then Chancellor insolently came to refer not only to several decided cases (*the Ríos, Perozo and other cases; Leopoldo López; Usón Ramírez; Raúl Díaz Peña*), but also to a case that at the time was pending decision before the Court, as was precisely the case mentioned above, *Allan R. Brewer-Carías v. Venezuela*.

Regarding that case, in particular, the then Foreign Minister Maduro, in his communication, falsely stated that the case had been "admitted by

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Leopoldo López vs. State of Venezuela, in which the Inter-American Court of Human Rights had condemned the Venezuelan State for the violation of the right to passive suffrage of former Mayor Mr. Leopoldo López committed by the Comptroller General of the Republic by administratively establishing a "penalty" of disqualification political, against the same, considering that said political right according to the Convention (art. 32.2) could only be restricted, by means of a judicial sentence that imposes a criminal sentence, ordering the revocation of unconventional decisions).

70 *See* the text in http://www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retiro-CIDH-Firmada-y-sello.pdf. *See*, among others, Carlos Ayala Corao, "Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela" in Revista Europea de Derechos Fundamentales, Institute of Public Law, Valencia, Spain, No. 20/2º semester 2012; in Constitutional Studies, Center for Constitutional Studies of Chile, University of Talca, year 10, No. 2, Chile, 2012; in Revista Iberoamericana de Derecho Procesal Constitucional, Ibero-American Institute of Constitutional Procedural Law and Editorial Porrúa, No. 18, July-December, 2012; in *Revista de Derecho Público*, No. 131, Caracas, July-September 2012; in the *Anuario de Derecho Constitucional Latinoamericano* 2013, Anuario 2013, Konrad Adenauer Stiftung: Rule of Law Program for Latin America and Universidad del Rosario, Bogotá, Colombia 2013 (available at: Fundación Konrad Adenauer www.kas.de/uruguay/es/publications/20306/ and at Virtual Legal Library of the UNAM Institute of Legal Research, Mexico: www.juridicas.unam.mx/publica/rev/cont.htm?=dconstla)

the Commission without the complainant - referring to Allan R. Brewer-Carías - having exhausted domestic remedies," which was false, and that the Commission had urged the Venezuelan State to "adopt measures to ensure the independence of the judiciary" that was already degraded, accusing the Commission and the Court of having - we quote - an "irregular and unjustifiably behavior favorable to Brewer Carías," which - said the then Foreign Minister - from "the mere admission of the case, underpinned the international smear campaign against Venezuela, accusing it of political persecution."

The message of the elector State of the newly elected judges, against the plaintiff Allan R. Brewer-Carías, against the case before the Court and against the judges themselves, could not be clearer, warning them about the "important" and "serious" which was the Brewer-Carías case, particularly in relation to the issue of the exhaustion of domestic resources.

In this situation, it is not difficult to imagine what happened two years later, when the ruling was issued (No. 277 May 26, 2014) in the aforementioned case *Allan R. Brewer-Carías vs. Venezuela*,[71] in which, with the joint negative vote of the honorable Judges Manuel E. Ventura Robles (Costa Rica) and Eduardo Ferrer Mac-Gregor Poisot (Mexico), which is the only good thing about the ruling, the Inter-American Court, ignoring their most traditional jurisprudence established since 1987 in the case of *Velásquez Rodríguez v. Honduras,*[72] simply ordered the filing of

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[71] *See* the sentence in http://www.corteidh.or.cr/docs/casos/articulos/seriec_278_ esp. pdf. *See about this sentence*: Allan R. Brewer-Carías, *El Caso Allan R. Brewer-Carías vs. Venezuela ante la Corte Interamericana de Derechos Humanos*. *Estudio del caso y análisis crítico de la errada sentencia de la Corte Interamericana de Derechos Humanos No. 277, May, 2014,* Colección Opiniones y Alegatos Jurídicos, No. 14, Editorial Jurídica Venezolana, Caracas 2014

[72] *See* Caso *Velásquez Rodríguez Vs. Honduras* Preliminary Exceptions. Judgment of June 26, 1987. Series C No. 1. In said Velásquez Rodríguez case, the Court considered the following: "91. The rule of prior exhaustion of domestic remedies in the sphere of international human rights law has certain implications that are present in the Convention. Indeed, according to it, the States Parties are obliged to provide effective judicial remedies to victims of human rights violations (art. 25), remedies that must be substantiated in accordance with the rules of due process of law (art. 8.1), all within the general obligation of the States themselves, to guarantee the free and full exercise of the rights recognized by the Convention to all

the file, ignoring that Brewer-Carías had exhausted the only domestic remedy then available, which was the request for annulment or criminal protection or "amparo penal"[73], denying him his right of access to international justice; and instead protecting a corrupt State,[74] which had

persons under their jurisdiction (art. 1). Therefore, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the inexistence of due legal process, not only is it being argued that the aggrieved party is not obliged to file such remedies, rather, the State involved is being indirectly accused of a new violation of the obligations contracted by the Convention. In such circumstances, the issue of domestic remedies is appreciably close to the merits." Therefore, ultimately, as Professor Héctor Faúndez observed, when I refer to the case *Allan R. Brewer-Carias v. Venezuela*, "Curiously, the judgment of the Inter-American Court, departing from its previous practice, failed to examine this preliminary objection together with the merits of the dispute, in order to determine whether, in fact, the alleged victim had been the object of the arbitrary exercise of public power, without there being effective remedies available to remedy that situation, or without the victim having access to those remedies. As the dissenting judges very well observe, this is the first time in the history of the Court that it does not enter to know the merits of the litigation to decide if a preliminary objection is admissible due to lack of exhaustion of internal remedies*." See* Héctor Faundez Ledesma*,* "El agotamiento de los recursos de la jurisdicción interna y la sentencia de la Corte Interamericana de Derechos Humanos en el caso: Brewer-Carías (Sentencia n° 277 May, 26 2014)," in *Revista de Derecho Público*, No. 139, Editorial Jurídica Venezolana, Caracas 2014, p. 216

73 Judges Ferrer Mac Gregor and Ventura Robles, in their Joint Negative Opinion, were clear and emphatic in considering that "In the present case, Mr. Brewer's representatives used the means of challenge provided for in Venezuelan legislation – appeals for absolute annulment – in order to guarantee their fundamental rights in criminal proceedings" (para. 50).

74 With the favorable vote of Judges Humberto Antonio Sierra Porto (Colombia), President and Speaker; Roberto F. Caldas (Brazil), Diego García-Sayán (Peru) and Alberto Pérez Pérez (Uruguay). *See* the sentence in http://www.corteidh.or.cr/docs/casos/articulos/se-riec_278_esp.pdf. Judge Eduardo Vio Grossi, on July 11, 2012, as soon as the case was presented before the Court, very honorably excused himself from participating in it in accordance with articles 19.2 of the Statute and 21 of the Rules of Procedure, both of the Inter-American Court, recalling that in the 1980s he had worked as a researcher at the Public Law Institute of the Central University of Venezuela, when Brewer- Carías was its Director, specifying that although this had happened quite some time ago, "I would not want that This fact could cause, if it were to participate in this case in question, some doubt, however minimal, about the impartiality," both his "and very especially that of the Court." The excuse was

also systematically flouted the Court's own decisions. This, in its decision, however, refrained from judging what was more than proven,[75] which was that in Venezuela there was no autonomous and independent Judicial Power or Public Ministry.[76] In this situation, ordering the victim to go to his country, to lose his freedom, in order to then from a prison try

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accepted by the President of the Court on September 7, 2012, after consulting with the other Judges, considering it reasonable to agree to what was requested.

75 Two months before the sentence was handed down, regarding the situation of the judiciary in Venezuela, completely corrupted due to lack of independence and autonomy, the International Commission of Jurists reported "the lack of independence of justice in Venezuela, beginning with the Public Ministry" that act "without guarantees of independence and impartiality from other public powers and political actors. In http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf

76 *See, among other works: Allan R. Brewer-Carias*, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004*,"* in *XXX Jornadas J.M Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Institute of Legal Studies of the Lara State, Barquisimeto, 2005, p. 33-174; "La justicia sometida al poder [La ausencia de independencia y autonomía de los jueces en Venezuela por la interminable emergencia del Poder Judicial (1999-2006)]" in *Cuestiones Internacionales. Anuario Jurídico Villanueva 2007, Villanueva University Center*, Marcial Pons, Madrid 2007, p. 25-57, y en *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Metropolitan University, Year II, No. 11, Caracas, September 2007, p. 122-138. Published in *Crónica sobre la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Colección Instituto de Derecho Público. Central University of Venezuela, No. 2, Editorial Jurídica Venezolana, Caracas 2007, p. 163-193; "Sobre la ausencia de independencia y autonomía judicial en Venezuela, a los doce años de vigencia de la constitución de 1999 (O sobre la interminable transitoriedad que en fraude continuado a la voluntad popular y a las normas de la Constitución, ha impedido la vigencia de la garantía de la estabilidad de los jueces y el funcionamiento efectivo de una "jurisdicción disciplinaria judicial", in *Independencia Judicial*, Colección Estado de Derecho, Volume I, Academy of Political and Social Sciences, Acceso a la Justicia org., Fundación de Estudios de Derecho Administrativo (Funeda), Universidad Metropolitana (Unimet), Caracas 2012, p. 9-103; "The Government of Judges and Democracy. The Tragic Situation of the Venezuelan Judiciary," in *Venezuela. Some Current Legal Issues 2014, Venezuelan National Reports to the 19th International Congress of Comparative Law, International Academy of Comparative Law, Vienna, 20-26 July 2014*, Academy of Political and Social Sciences, Caracas 2014, p. 13-42.

to "exhaust those recourses," as the Court itself had decided countless times, was nothing more than "a formality that makes no sense."[77]

That decision, as expressed by the magistrates of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, host country of the Inter-American Court will weigh "like a shadow on the trajectory and jurisprudence of the Inter-American Court,"[78] as who writes, personally he will not stop remembering it whenever he can, especially since with it

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77 *Case Velásquez Rodríguez Vs. Honduras. Preliminary Exceptions*. Judgment of June 26, 1987. Series C No. 1, para. 68. As the Inter-American Court itself interpreted it on another occasion, "those remedies that, due to the general conditions of the country or even due to the particular circumstances of a given case, turn out to be illusory cannot be considered effective," which occurs "when their uselessness has been demonstrated by practice, because the Judiciary lacks the necessary independence to decide impartially." *See*: Corte IDH: *Garantías judiciales en estados de emergencia* (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9; 24. Likewise, I/A Court HR, Case of Bámaca Velásquez v. Guatemala. Bottom. Judgment of November 25, 2000. Series C No. 70; 191; Inter-American Court, Case of the Constitutional Court vs. Peru. Fund, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, p. 90; Inter-American Court, Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, p. 102; Inter-American Court, *Case Reverón Trujillo Vs. Venezuela*. Preliminary Exception, Substantiation, Repairs and Costs. Judgment of June 30, 2009. Series C No. 198, 61; Inter-American Court, *Case Usón Ramírez Vs. Venezuela* Preliminary Exception, Substantiation, Repairs and Costs. Judgment of November 20, 2009. Series C No. 207, p. 129; Inter-American Court. *Case Abrill Alosilla y otros Vs. Perú.* Substantiation, Repairs and Costs. Judgment of March 4, 2011. Series C No. 223, p. 75.

78 Opinion of Judges Jinesta Lobo, Castillo Víquez, Rueda Leal, Hernández López and Salazar Alvarado, expressed in a separate Note to Judgment No. 2015-11568 of July 31, 2015; sentence, issued in the habeas corpus trial in favor of the citizen Dan Dojc, in the extradition process that was followed in Costa Rica at the request of the Venezuelan State. V. the text of the sentence in http://jurisprudencia.poderjudicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&nValor1=1&nValor2=644651&strTipM=T&strDirSel=directo&_r=1. *V.* the press release on said sentence in http://www.nacion.com/sucesos/poder-judicial/Sala-IV-extradicion-cuestiona-Venezuela_0_1504049615.html

a corrupt State was protected to the core,[79] and justice was denied to the victim, without any legal reason.[80]

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79 Idem. In the Note attached to the communication denouncing the Convention, the then Chancellor was more explicit regarding the political pressure campaign that Venezuela itself was exerting against the Court in relation to this case not yet decided, which precisely caused the withdrawal of Venezuela, where the following was indicated: "*Case Allan Brewer Carías contra Venezuela*. On September 8, 2009, the Commission admitted the petition filed on January 24, 2007 by a group of lawyers, in which it was alleged that the Venezuelan courts were responsible for the "political persecution of the constitutionalist Allan R. Brewer Carías in the context of a judicial proceeding against him for the crime of conspiracy to violently change the Constitution," in the context of the events that occurred between April ll and 13, 2002." / It should be noted that the aforementioned Mr. Brewer Carías was trial continues in Venezuela for his participation in the April 2002 coup d'état, for being the drafter of the decree by which a de facto President was installed, the National Constitution was abolished, the name of the Republic was changed, all the State institutions; all members and representatives of the Public Powers were dismissed, among other elements. / Upon admitting the petition, the IACHR urged the Venezuelan State to "Adopt measures to ensure the independence of the judiciary" with which he prejudged that said independence did not exist. / On March 7, 2012, the Commission informed the Venezuelan State that the case would be taken to the Court, even though it would not. domestic remedies had been exhausted. This example is more serious, due to the fact that the criminal trial against Allan Brewer could not be carried out in Venezuela, due to the fact that our criminal procedural legislation does not allow the trial to be carried out in the absence of the accused, and it is the case that the accused Brewer Carías fled the country, as it is publicly known, finding himself a fugitive from justice to date." Apart from the fact that I did not participate in any conspiracy, nor did I write any decree, nor did I escape in any way, and that the aforementioned process had been extinguished since December 2007 by an Amnesty Law issued by the President of the Republic through legislative delegation on the events that occurred between April 11 and 13, 2002, which the Venezuelan Foreign Minister did not realize, when he accused the Commission of having prejudged the lack of judicial independence in Venezuela, when he urged the State upon admitting the complaint to adopt the necessary measures "to ensure the independence of the judiciary;" is that the State itself, in this communication addressed to the Inter-American Court in relation to a case pending decision, prejudged the facts that gave rise to the political persecution and blamed the victim for what he was unjustly accused of, violating himself again their right to the presumption of innocence.

80 The sentence was considered by the honorable Judges Ferrer Mac Gregor and Ventura Robles in their Joint Negative Opinion, as contradictory with: "the jurisprudential line of the Inter-American Court itself in its more than twenty-six years of contentious jurisdiction, since its first resolution on the subject of

And if there is no justice, as Quevedo wrote centuries ago: "If there is no justice, how difficult it is to be right!"

Fortunately, new winds are blowing in the Inter-American Court, as the previous controlled majority remains in an absolute minority; being the Court now led by its honorable President, Eduardo Ferrer Mac Gregor, who together with the then Judge Manuel Ventura, honorably signed the negative Vote in our case.

All the previous situation of national and institutional political corruption, developed both at the national level and at the global and transnational level that we have wanted to exemplify with the specific case of Venezuela, occurred, not as a consequence of some neoliberal economic policy, nor because of the lack of constitutional, legislative and conventional regulations, since we have all the imaginable ones to be able to implement the necessary control mechanisms over the State Administration to fight against corruption, but also for the degradation of democratic institutions.

In our American Continent there is no country that does not have anti-corruption laws with severe sanctions; that does not have a Comptroller General or Court of Accounts to monitor the disposition of money, assets, income and public spending; that it does not have laws on the protection of public assets; or that it does not have laws on transparency and access to information; or that it has not adhered to the international Conventions against Corruption, such as the United Nations Convention of 2003 and the Inter-American Convention of 1996. In other words, in all our countries we have specific regulations to define policies and practices for the prevention of corruption; to create the organs of prevention of the same; to establish mechanisms to ensure accountability; to ensure probity in public contracting to prevent corruption; in short, to ensure transparency, administrative procedures and public information, and the participation of society, in the fight against corruption.

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exhaustion of domestic remedies, as in the *case of Velásquez Rodríguez vs. Honduras*, thus creating a worrying precedent contrary to its own jurisprudence and the right of access to justice in the inter-American system" (paragraph 47). / Considering, furthermore, said judges that the decision was "a setback that affects the inter-American system as a whole," with "negative consequences for the alleged victims in the exercise of the right of access to justice."

In other words, we cannot ask for more rules or procedures; We must point the other way, and convince ourselves that if a political regime is not established in which the institutions of the State and its Administration really respond to the principles of a democratic regime, subject to controls, [81], as postulated by the Inter-American Democratic Charter, nothing it can be achieved against corruption; a political regime in which effectively "power can limit power,"[82] because ultimately, it is only by controlling power that all the fundamental elements and components of democracy can materialize, and among them, administrative transparency in the exercise of government; accountability by the rulers; and access to administrative information and Justice, which must be in charge of autonomous and independent judges who can ensure that there is no impunity.

And all this, in a regime led by political parties that are determined, individually and jointly, to ensure that the control mechanisms work.

If there is no democratic regime, and if there is no such commitment within it, on the contrary, all the constitutional, legal, and conventional norms that may exist will become a dead letter in the fight against corruption, and we will return, Congress after Congress, meeting after meeting, to keep dealing with this same issue repeatedly, as if it were something new, which it is not.

Buenos Aires 2019 / New York 2022

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81 *See* on this what is stated in Allan R. Brewer-Carías, *Constitución, Democracia y Control del Poder*, Centro Iberoamericano de Estudios Provinciales y Locales (CIEPROL), Consejo de Publicaciones/Universidad de Los Andes/Editorial Jurídica Venezolana. Mérida, October 2004.

82 As stated by Charles Louis de Secondat, Barón de Montesquieu, *De l'Espirit des Lois* I, Book XI, Ch. IV, p. 162-163 (ed. G. Tunc, Paris 1949).

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