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I. THE PRINCIPLE OF SEPARATION OF POWERS IN MODERN CONSTITUTIONALISM AND IN THE VENEZUELAN CONSTITUTIONAL TRADITION

The principle of separation of powers in modern constitutionalism has its origin in the constitutions of the former Colonies of North America where, for instance, in the Constitution of Virginia of June 29, 1776, it was set forth that:

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> The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time . . .[1]

This provision and the similar ones that were incorporated after 1776 in the other constitutions of the former Colonies of North America,[2] have their theoretical backgrounds in the writings of John Locke,[3] Montesquieu[4] and J. J. Rousseau,[5] which were the most important weapons used during the Eighteenth Century American and French Revolutions in the battle against the Absolute State: in North America, to fight against the sovereignty of the British Parliament; in France, to fight against the sovereignty

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1. VA. CONST. of 1776 § 3, *now codified at* VA. CONST. art. III, § 1. This constitutional provision has been considered as "the most precise statement of the doctrine which had at that time appeared." M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 118 (1st ed. 1967).

2. Since 1780, the Constitution of Massachusetts contained the following categorical expression:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. part 1st, art. XXX.

3. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350, 371, 383-85 (Peter Laslett ed., Cambridge Univ. Press 1967) (1689).

4. It is always adequate to remember the famous proposition of Montesquieu, that "it is an eternal experience that any man who is given power tends to abuse it; he does so until he encounters limits . . . In order to avoid the abuse of power, steps must be taken for power to limit power." MONTESQUIEU, DE L'ESPRIT DES LOIS [SPIRIT OF THE LAWS] 162-63 (G. Truc ed., Paris 1949) (1748). That is why, in the well-known Chapter VI of Volume XI of his *De l'Ésprit des Lois*, he formulated his theory of the division of power into three categories:

> Legislative power, power to execute things which depend on international law, and power to execute things which depend on civil law the first case, the prince or magistrate makes laws for a period of time or for ever. In the second case, he makes peace or war, sends or receives ambassadors, establishes security, takes measures against invasion. In the third case, he punishes crimes, or settles disputes between individuals. The latter we shall call the power to judge, and the other simply the executive power of the state.

Id. at 163-64.

He added:

> When legislative power and executive power are in the hands of the same person or the same magistrate's body, there is no liberty . . . Neither is there any liberty if the power to judge is not separate from the legislative and executive powers . . . All would be lost if the same man, or the same body of princes, or noblemen or people exercised these three powers: that of making the laws, that of executing public resolutions and that of judging the wishes or disputes of individuals.

Id. at 164.

5. *See* J. J. ROUSSEAU, DU CONTRAT SOCIAL [THE SOCIAL CONTRACT] 153 (Ronald Grimsley ed., Oxford Univ. Press 1972) (1762).

of the Monarch. The consequence of both Revolutions was the replacement of the Absolute State by a Constitutional State, subject to the rule of law, based precisely on the principle of the separation of powers as a guaranty of liberty, even though with different trends of government: the presidential system of government in the U.S. resulting from the American Revolution, and—decades after the French Revolution—the consolidation of the parliamentary system of government in Europe.

Thus, the principle of separation of powers became the most important and distinguished principle of modern constitutionalism,[6] in the sense that, absent such a principle, according to Madison:

> The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of Tyranny.[7]

That statement explains the provision of Article 16 of the French Declaration of Rights of Man and Citizen (1789), according to which:

> Every society in which the guarantee of rights is not assured or the separation of powers not determined has no Constitution.

All these principles inspired the first modern constitution adopted in Latin America, the "Federal Constitution of the States of Venezuela," sanctioned on December 21, 1811, by an elected General Congress, even before the Constitution of the Spanish Monarchy of Cádiz of 1812 was sanctioned.[8] In this Constitution, the principle of separation of powers was adopted, setting forth in the Preamble that:

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6. *See* ALLAN R. BREWER-CARÍAS, REFLEXIONES SOBRE LA REVOLUCIÓN NORTEAMERICANA (1776), LA REVOLUCIÓN FRANCESA (1789) Y LA REVOLUCIÓN HISPANOAMERICANA (1810-1830) Y SUS APORTES AL CONSTITUCIONALISMO MODERNO [REFLECTIONS ABOUT THE AMERICAN REVOLUTION (1776), THE FRENCH REVOLUTION (1789), AND THE HISPANIC-AMERICAN REVOLUTION (1810-1830) AND THEIR CONTRIBUTIONS TO MODERN CONSTITUIONALISM] (2d extended ed. 2008).

7. THE FEDERALIST NO. 47, at 336 (James Madison) (B.F. Wright ed., 1961).

8. *See* Allan R. Brewer-Carías, *El paralelismo entre el constitucionalismo venezolano y el constitucionalismo de Cádiz (o de cómo el de Cádiz no influyó en el venezolano)* [*The Parallelism Between Venezuelan Constitutionism and Cádiz Constitutionalism (or How Cádiz Constitutionalism Influenced Venezuelan Constitutionalism)*], *in* LIBRO HOMENAJE A TOMÁS POLANCO ALCÁNTARA [TRIBUTE BOOK TO TOMÁS POLANCO ALCÁNTARA] 101 (2005).

> The exercise of authority conferred upon the Confederation never could be reunited in its respective functions. The Supreme Power must be divided in the Legislative, the Executive and the Judicial, and conferred to different bodies independent between them and regarding its respective powers.

To this proposition, Article 189 of the 1811 Constitution added:

> "The three essential Departments of government, that is, the Legislative, the Executive and the Judicial, must always be kept separated and independent one from the other according the nature of a free government, which is convenient in the connection chain that unites all the fabric of the Constitution in an indissoluble way of Friendship and Union."[9]

Consequently, since the beginning of modern constitutionalism, the principle of separating constitutional power also was adopted in Venezuela. In particular, Venezuela granted the Judiciary specific powers of judicial review, in accordance with the trends of the presidential system of government inspired by the check and balance idea. The power of judicial review, according to the objective guaranty of the 1811 Constitution established in Article 227, requires that "[t]he laws sanctioned against the Constitution will have no value except when fulfilling the conditions for a just and legitimate revision and sanction [of the Constitution]." Additionally, Article 199 notes that any law sanctioned by the federal legislature or by the provinces contrary to the fundamental rights enumerated in the Constitution "will be absolutely null and void."

Since 1811, all the constitutions in Venezuelan history have established and guarantied the principle of separation of powers—particularly between the three classical Legislative, Executive, and Judicial branches of government (powers)—in a system of check and balance and always given the Judiciary the judicial review power. For the check and balance purpose, the independence and autonomy of the branches of government have been the most important aspects regulated in the constitutions, particularly during the democratic regimes, due to the fact that the principle of separation of powers in contemporary constitutionalism has become one of the basic conditions for democracy to exist, and for the

9. ALLAN R. BREWER-CARÍAS, *LAS CONSTITUCIONES DE VENEZUELA* [THE CONSTITUTIONS OF VENEZUELA] (1997) (contains the text of the 1811 Constitution and all other Venezuelan Constitutions) (quotes in original).

possibility of guarantying the enjoyment and protection of fundamental rights.

II. SEPARATION OF POWERS AND DEMOCRACY

Democracy requires many more essential elements and components beyond popular election of government officials—as is now formally recognized in the Inter-American Democratic Charter (*Carta Democratica Interamericana*),[10] adopted by the Organization of American States in 2001 after Latin America suffered so many antidemocratic, militarist, and authoritarian regimes that disguised themselves as democracies because of their electoral origin.

The Charter, in effect, enumerates the *essential elements of the representative democracy*. Among those elements are: (1) periodical, fair, and free elections; (2) universal and secret voting rights; (3) "respect for human rights and fundamental freedoms"; (4) access to power and its exercise with subjection to the rule of law; (5) acceptance of multiple political organizations and parties; and (6)—what is the most important of all—"*the separation of powers and independence of the branches of government.*"[11] But besides the essential elements of democracy, the Inter-American Democratic Charter also defined the following *fundamental components of the democracy*: (1) the transparency of governmental activities; (2) integrity; (3) "responsible public administration on the part of governments"; (4) the respect of social rights; (5) freedom of speech and press; (6) "[t]he constitutional subordination of all state institutions to the legally constituted civilian authority"; and (7) "respect for the rule of law" by all people and institutions within a society.[12]

The principle of separation and independence of powers is so important, as one of the "essential elements of democracy," that it is the one that can allow all the other "fundamental components of democracy" to be politically possible. To be precise, democracy, as a political regime, can only function in a constitutional rule-of-law

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10. *See* ALLAN R. BREWER-CARÍAS, LA CRISIS DE LA DEMOCRACIA VENEZOLANA. LA CARTA DEMOCRÁTICA INTERAMERICANA Y LOS SUCESOS DE ABRIL DE 2002 [THE CRISIS OF VENEZUELAN DEMOCRACY: THE INTER-AMERICAN DEMOCRATIC CHARTER AND THE APRIL 2002 EVENTS] 137 *et seq.* (2002) (commenting on the Inter-American Democratic Charter).

11. Organization of American States, Inter-American Democratic Charter art. 3, Sept. 11, 2001, *available at* http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm.

12. *Id.* at art. 4.

system where the control of power exists; that is, check and balance based on the separation of powers with their independence and autonomy guarantied, so that power can be stopped by power itself.

Consequently, without separation of powers and the possibility of control of power, any of the other essential factors of democracy cannot be guarantied—because only by controlling power can free and fair elections and political pluralism exist; only by controlling power can effective democratic participation be possible and effective transparency in the exercise of government be assured; only by controlling power can there be a government submitted to its constitution and its laws, that is, the rule of law; only by controlling power can there be effective access to justice functioning with autonomy and independence; and only by controlling power can there be a true and effective guaranty for the respect of human rights.[13]

The constitutional situation in Venezuela since the National Constituent Assembly that took place in 1999—which resulted in the complete takeover of all powers of the State and the sanctioning of the current 1999 Constitution—unfortunately has been of a very weak democracy, precisely because of the progressive demolishing of the principle of separation of powers. A process of concentrating powers has taken place, first with the 1999 Constituent Assembly itself, which effectively suspended all branches of government before sanctioning the new Constitution, and afterwards, due to the provisions of the 1999 Constitution, which do not guaranty the effective independence and autonomy of the branches of government.

III. CONCENTRATION OF POWERS AND AUTHORITARIANISM IN THE DEFRAUDATION OF THE CONSTITUTION

The result has been that, currently, Venezuela has an authoritarian government, although not being the result of a classical Latin American military *coup d'état*, but of a systematic process of destruction of all the basic principles of democracy and of the Constitution. This process began with the 1998 election of Hugo Chávez Frías as President of the Republic, a position that—ten

13. *See* Allan R. Brewer-Carías, *Democracia: sus elementos y componentes esenciales y el control del poder* [*Democracy: Essential Elements and Components and the Control of Power*], *in* DEMOCRACIA: RETOS Y FUNDAMENTOS [DEMOCRACY: CHALLENGES AND FUNDAMENTALS] 171 (Nuria González Martín ed., 2007).

years later—he still holds, being, since 2008, the president with the longest continued tenure in all of Venezuelan constitutional history.

Without doubt, in 1998, Chávez was elected in a free democratic election process, as an anti-party candidate, precisely during the most severe political crisis the country has had during the democratic period of the country, which began in 1945. This crisis was the result of the collapse of the political parties that have controlled the political life of the country for more than 40 years.[14] Chávez was the one that filled the vacuum left by those parties and their leadership. During the electoral campaign, he blandished the populace with his main political proposal: a promise to address the obvious need for change that the country had by convening a National Constituent Assembly in order to change the Constitution.[15]

This constitution-making procedure was not established in the 1961 Constitution then in force, so to elect such an Assembly in 1999, a previous constitutional reform was needed—unless a proper and constitutional judicial interpretation of the 1961 Constitution allows the election. That exception was precisely what the Supreme Court of Justice created in a very diligent—although very ambiguous—way in January 1999,[16] trying to resolve the then-existing dilemma between expressed popular sovereignty and

14. *See* ALLAN R. BREWER-CARÍAS, PROBLEMAS DEL ESTADO DE LOS PARTIDOS [PROBLEMS ON THE STATE OF THE POLITICAL PARTIES] (1998); Allan R. Brewer-Carías, *La Crisis de las Instituciones: Responsables y Salidas [The Crisis of the Institutions: Accountability and Outcomes]*, 11 REVISTA DEL CENTRO DE ESTUDIOS SUPERIORES DE LAS FUERZAS ARMADAS DE COOPERACIÓN [J. ON SUPERIOR STUD. ARMY FORCES COOPERATION] 57-83 (1995).

15. *See* ALLAN R. BREWER-CARÍAS, ASAMBLEA CONSTITUYENTE Y ORDENAMIENTO CONSTITUCIONAL [CONSTITUENT ASSEMBLY AND CONSTITUTIONAL ORDER] 53 (1999) (detailing Chávez's 1998 proposals).

16. *See* Allan R. Brewer-Carías, *La configuración judicial del proceso constituyente en Venezuela de 1999 o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción [The judicial configuration of the 1999 Venezuelan constituent process, or how the Guardian of the Constitution opened the path for its violation and, moreover, its own extinction]*, No. 77-80 REVISTA DE DERECHO PUBLICO [PUB. L.J.] 453 (1999) (Venez.); ALLAN R. BREWER-CARIAS, PODER CONSTITUYENTE ORIGINARIO Y ASAMBLEA NACIONAL CONSTITUYENTE (COMENTARIOS SOBRE LA INTERPRETACIÓN JURISPRUDENCIAL RELATIVA A LA NATURALEZA, LA MISIÓN Y LOS LIMITES DE LA ASAMBLEA NACIONAL CONSTITUYENTE) [ORIGINARY CONSTITUENT POWER AND NATIONAL CONSTITUENT ASSEMBLY (COMMENTARIES ON JURISPRUDENTIAL INTERPRETATION REGARDING THE NATURE, MISSION AND LIMITS OF THE NATIONAL CONSTITUENT ASSEMBLY)] 296 (1999) (commenting on the Supreme Court of Justice's 1999 ruling).

constitutional supremacy,[17] eventually deciding in favor of the former.

The Constituent Assembly was then elected in July 1999 after a consultative referendum that took place in April 1999. The Assembly was completely controlled by Chávez supporters, who held more than 95% of its seats.

This Assembly, far from dedicating itself to writing a new constitution, was the main tool that the newly-elected President used to assault and control all the branches of government, violating the same 1961 Constitution whose interpretation helped to create the Assembly.[18] Consequently, the elected Constituent Assembly technically directed a *coup d'état*,[19] unfortunately with the consent and complicity of the former Supreme Court of Justice, which—as always in these illegitimate institutional complicity cases—was inexorably the first victim of the authoritarian government that it helped to grab power. Just a few months later, that Supreme Court was erased from the institutional scene.[20]

The 1999 Constituent Assembly was thus the instrument used by the President to dissolve or suspend all branches of government (particularly the Judiciary) and to dismiss all of the public officials that had been elected just a few months before (in 1998)—namely, the representatives to the National Congress, the States' Legislative Assemblies, and the Municipal Councils, as well as the State Governors and municipal Mayors. The sole exception to this intervention was the President of the Republic himself, precisely the author of the constitutional fraud. In addition, the Constituent Assembly suspended all other branches of government, among them, and above all, the Judiciary, whose autonomy and inde-

17. *See* Allan R. Brewer-Carías, *El desequilibrio entre soberanía popular y supremacía constitucional y la salida constituyente en Venezuela en 1999 [Unbalance Between Popular Sovereignty and Constitutional Supremacy and the Venezuelan Constituent Assembly of 1999]*, 1999-3 REVISTA ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL [YEARLY J. IBERO-AMERICAN CONST. JUST.] 31 (2000) (Spain).

18. *See* ALLAN R. BREWER-CARÍAS, DEBATE CONSTITUYENTE (APORTES A LA ASAMBLEA NACIONAL CONSTITUYENTE) [CONSTITUENT DEBATE (ENDOWMENTS TO THE NATIONAL CONSTITUENT ASSEMBLY)] (1999).

19. *See* ALLAN R. BREWER-CARÍAS, GOLPE DE ESTADO Y PROCESO CONSTITUYENTE EN VENEZUELA [COUP D'ÉTAT AND CONSTITUENT PROCESS IN VENEZUELA] (2002).

20. *See* ALLAN R. BREWER-CARÍAS, LA CONSTITUCIÓN DE 1999 [THE CONSTITUTION OF 1999] (2000) (a study about the effects of the December 1999 Transitory Regime established by the Constituent Assembly after the approval, by popular referendum, of the Constitution of 1999); 2 ALLAN R. BREWER-CARÍAS, LA CONSTITUCION DE 1999—DERECHO CONSTITUCIONAL VENEZOLANO [THE CONSTITUTION OF 1999—VENEZUELAN CONSTITUTIONAL LAW] 1150 (4th ed. 2004).

pendence was progressively and systematically demolished.[21] The result has been tight Executive control over the Judiciary, particularly in regards to the newly-appointed Supreme Tribunal of Justice, as its Constitutional Chamber is the most ominous instrument for the consolidation of authoritarianism in the country.[22]

After defrauding the Constitution to reach power and once all the State branches of government were controlled, the Venezuelan government began another defraudation process, this time of democracy, using representative democracy for the purpose of incrementally eliminating it and supposedly substituting it with a "participative democracy" based on the establishment of popular councils of a new Popular Power controlled by the Head of the State.

This centralizing and concentrating framework of the State was the one that was pretended to be constitutionalized in the constitutional reform proposal that fortunately was rejected in the last December 2007 referendum.[23] The intention, as was announced by the then-Vice President of the Republic in January 2007, was to install "the dictatorship of democracy."[24] Of course, his statement contradicts itself because, in democracy, no dictatorship is

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21. *See* 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 Judicial Powers in Venezuela (1999-2004)*], *in* XXX JORNADAS J.M. DOMINGUEZ ESCOVAR, ESTADO DE DERECHO, ADMINISTRACIÓN DE JUSTICIA Y DERECHOS HUMANOS [XXX SYMPOSIUM ON THE RULE OF LAW, JUSTICE AND HUMAN RIGHTS HONORING DR. J.M. DOMINGUEZ ESCOBAR] (2005).

22. *See* Allan R. Brewer-Carías, *Quis custodiet ipsos custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación* [*Who watches the watchmen: From the constitutional interpretation to the unconstitutionality of the interpretation*], *in* CRÓNICA DE LA "IN" JUSTICIA CONSTITUCIONAL. LA SALA CONSTITUCIONAL Y EL AUTORITARISMO EN VENEZUELA [CHRONICLES OF CONSTITUTIONAL "IN" JUSTICE: THE SUPREME TRIBUNAL CONSTITUTIONAL CHAMBER AND AUTHORITARISM IN VENEZUELA] § 2 (2007).

23. *See* ALLAN R. BREWER-CARÍAS, HACIA LA CONSOLIDACIÓN DE UN ESTADO SOCIALISTA, CENTRALIZADO Y MILITARISTA. COMENTARIOS SOBRE EL ALCANCE Y SENTIDO DE LAS PROPUESTAS DE REFORMA CONSTITUCIONAL 2007 [TOWARD THE CONSOLIDATION OF A SOCIALIST, CENTRALIZED, AND MILITARIST STATE: COMMENTARIES ON THE SCOPE AND IMPLICATIONS OF THE CONSTITUTIONAL REFORM PROPOSAL OF 2007] (2007); *see also* 43 ALLAN R. BREWER-CARÍAS, LA REFORMA CONSTITUCIONAL DE 2007 (COMENTARIOS AL PROYECTO INCONSTITUCIONALMENTE SANCIONADO POR LA ASAMBLEA NACIONAL EL 2 DE NOVIEMBRE DE 2007) [THE VENEZUELAN CONSTITUTIONAL REFORM OF 2007 (COMMENTARIES TO THE PROJECT, UNCONSTITUTIONALLY SANCTIONED BY THE NATIONAL ASSEMBLY ON NOVEMBER 2, 2007)] (2007).

24. In January 2007, Vice President Jorge Rodríguez was quoted by a Venezuelan newspaper as saying what translates to: "Of course we want to install a dictatorship, the dictatorship of the true democracy and the democracy is the dictatorship of everyone, you and us together, building a different country. Of course we want this dictatorship of democracy to be installed forever." EL NACIONAL (Venez.), Feb. 1, 2007, at A-2.

acceptable, whether of democracy or "of the proletariat," as was proposed over ninety years ago (1918) in the Soviet Union through the same sort of "councils" then called "soviets" of soldiers, workers, and countrymen.

But even without succeeding in the proposed constitutional reform, the fact is that, in defraudation of democracy, a new model featuring an authoritarian State of a supposed Popular Power has taken shape in Venezuela, having its immediate origin in popular elections, providing the regime with "constitutional" and "elective" camouflage, but designed for the destruction of the representative democracy itself.[25] In order to install a dictatorship, all of the aforementioned essential elements of democracy have unfortunately been ignored or fractured in Venezuela over the past decade, in the name of a supposed participative democracy.

There have never been more violations of human rights in Venezuela, as can be deducted from the numerous recent petitions filed before the Inter-American Commission on Human Rights. The access to power has been achieved contrary to the rule of law, by violating the separation and independence of the Judicial, Citizens, and Electoral powers,[26] and the last political reforms, which created the Communal Councils, tend to substitute electoral representation with supposed citizen assemblies and councils whose members are not elected, but appointed, from the summit of the Popular Power controlled by the President of the Republic.[27] The plural regime of parties has been destroyed, and an official single socialist party has been created by the State itself, completely imbricate in its apparatus and controlled by the President of the Republic. Because everything depends on the oil-rich State, only

25. *See* Allan R. Brewer-Carías, *Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience*, 19 LATEINAMERIKA ANALYSEN [LATIN AM. ANALYSES] 119 (2008) (F.R.G.).

26. *See* Allan R. Brewer-Carías, *La Sala Constitucional vs. el Estado Democrático de derecho: el secuestro del Poder Electoral [The Constitutional Chamber v. The Democratic State: The Confiscation of the Electoral Power]*, *in* CRÓNICA DE LA "IN" JUSTICIA CONSTITUCIONAL. LA SALA CONSTITUCIONAL Y EL AUTORITARISMO EN VENEZUELA [CHRONICLES OF CONSTITUTIONAL "IN" JUSTICE: THE SUPREME TRIBUNAL CONSTITUTIONAL CHAMBER AND AUTHORITARISM IN VENEZUELA] § 6 (2007).

27. *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 [The Beginning of the Destruction of Municipalities in Venezuela: The Manipulation of the Citizen's Branch of Government to Eliminate Decentralization, Representative Democracy, and Popular Participation at the Local Level]*, [2007-1] REVISTA DE LA ASOCIACIÓN INTERNACIONAL DE DERECHO ADMINISTRATIVO [J. INT'L ASS'N ADMIN. L.] 49 (2007) (Mex.).

people who are part of the United Socialist Party are able to have a political, administrative, economic, and social life.

And this entire institutional distortion has been established without the existence of separation or independence between the public powers, not only in their horizontal division, due to the control that the Executive Power has over them, but also in their vertical distribution, where the Federation has been progressively dismantled. Consequently, the federated states and the municipalities have been minimized, as the national government eliminated every trace of political decentralization, that is, of autonomous entities in the territory, preventing any real possibility for democratic participation.

Additionally, all of the fundamental components of democracy have also been ignored or fractured: the governmental activity undertaken by the rich and suddenly wealthy State has ceased to be transparent, due to the lack of any sort of check and balance. It is not possible to demand any kind of accountability or responsibility from the government on behalf of the public interest, so rampant corruption has developed in a way never seen before. In addition, the freedom of speech and press has been systematically threatened, resulting—in many cases—in self-censorship, for reporters and dissidents are persecuted.[28]

The consequence has been that all of the essential elements and fundamental components of democracy have been progressively dismantled during the past years in Venezuela, particularly the separation of powers. What the country is facing is an excess of concentration and centralization of power, as it occurs in any authoritarian government, despite the electoral origin they can have. In such cases, as history has shown, an inevitable tendency toward tyranny develops, particularly when there are no efficient controls over those who govern, and, even worse, when they have—or believe they have—popular support.

In the case of Venezuela, the authoritarian government, which has taken root during the last decade against the principle of separation of powers, has led to the concentration of all powers in

28. *See, e.g.*, Allan R. Brewer-Carías, *El juez constitucional en Venezuela como instrumento para aniquilar la libertad de expresión y para confiscar la propiedad privada: el caso RCTV* [*The Constitutional Judge in Venezuela as an Instrument to Annihilate Freedom of Expression and Confiscate Private Property: The RCTV Case*] (pt. 1), GACETA JUDICIAL [JUD. REV.], May 2007, at 24 (Dom. Rep.) (the case of the shutdown of *Radio Caracas Televisión*).

the hands of the Executive, who controls the National Assembly and, consequently, all of the other branches of government.

IV. THE CONSTITUTIONAL PROVISIONS ON SEPARATION OF POWERS AND THE ORIGIN OF THE DEPENDENCY OF THE BRANCHES OF GOVERNMENT

The 1999 Constitution, if it is read in a vacuum, ignoring the political reality of the country, can mislead any reader. It is the only constitution in the contemporary world that has established not merely a tripartite separation of powers between the traditional Legislative (*Asamblea Nacional* [National Assembly]), Executive (President of the Republic, Executive offices), and Judicial (Supreme Tribunal of Justice, courts) branches of government, but a pentapartite separation of powers, adding two more branches of government to the tripartite system: the Electoral Power, attributed to the National Electoral Council, which is in charge of the organization and conduction of the elections, and the Citizens Power, attributed to three different State entities, which are the *Fiscalía General de la República* [Prosecutor General of the Republic (State's Attorney)], the *Contraloría General de la República* [General Comptroller of the Republic], and the *Defensor del Pueblo* [People's Defender (Ombudsman)].[29] In any case, this pentapartite separation of powers was the culmination of a previous constitutional process initiated in 1961. In that 1961 Constitution, State agencies were consolidated into branches of government with constitutional rank independent from the classical powers, leading to the creation of, *inter alia*, the Prosecutor General, the Council of the Judiciary, and the General Comptroller.[30]

In spite of this pentapartite division of powers, the autonomy and independence of the branches of government is not completely and consistently assured in the 1999 Constitution. On the contrary, its application leads to a concentration of State powers in the National Assembly, and through it, in the Executive power.

In effect, in any system of separation of powers—even one with five separate branches of government (Legislative, Executive, Judicial, Citizens, and Electoral)—the independence and autonomy among them must be assured in order to allow check and balance

29. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZ.] art. 136 [hereinafter 1999 CONST.].

30. *See* ALLAN R. BREWER-CARÍAS, LA CONSTITUCIÓN DE 1999 [THE CONSTITUTION OF 1999] 106 *et seq.* (2000).

for such separation to be effective. The safeguard used to limit and control power is power itself. This aspect was not designed as such in the 1999 Constitution, and—notwithstanding the aforementioned pentapartite separation of powers—an absurd distortion of the principle was introduced by giving the National Assembly the authority not only to appoint, but also to dismiss, the Judges of the Supreme Tribunal of Justice, the Prosecutor General, the General Comptroller, the People's Defender, and the Members of the National Electoral Council—in some cases, even by simple majority of votes.[31] This appointment-and-dismissal power was even proposed to be included in the rejected 2007 constitutional reform referendum, in a form that would have eliminated the guaranty of the qualified majority of the members of the National Assembly for such dismissals.[32]

It is simply impossible to understand (1) how the autonomy and independence of separate powers can function and (2) how they can exercise mutual control of the government when the tenure of the head officials of the branches of government (except the President of the Republic) depend only upon the political will of another branch of government, that is, the National Assembly. The mere possibility that the National Assembly can dismiss the head of the other branches makes futile the formal consecration of the autonomy and independence of powers because the high officials of the State are aware that they can be removed from office at any time, precisely if they effectively act with independence.[33]

Unfortunately, this exercise of dismissal power has been used in Venezuela during the past decade when there have been minimal signs of autonomy from some State officeholders who dared to adopt their own decisions, distancing themselves from the Executive will. For instance, in 2001, the People's Defender and the Prosecutor General—originally appointed in 1999 by the National Assembly—were separated from their positions[34] for failing to follow the dictates of the Executive power. Some Judges of the Supreme Tribunal who dared to vote on decisions that could question

31. 1999 CONST. arts. 265, 279, & 296.

32. *See supra* note 23.

33. *See* MANUEL ARAGÓN, CONSTITUCIÓN, DEMOCRACIA Y CONTROL DE PODER [CONSTITUTION, DEMOCRACY, AND BALANCE OF POWERS] 240-41 (2004).

34. In the case of the Prosecutor General, appointed in December 1999, he thought that he could initiate a criminal impeachment proceeding against the then-Minister of the Interior. The People's Defender thought that she could challenge the "special law" of the 2001 National Assembly, which allowed the appointment of judges to the Supreme Tribunal in contravention of the constitutional requirements. Both officials were dismissed in 2001.

the Executive's action were immediately subjected to investigation.[35] Some of the investigated Judges were removed or duly "retired" from their positions.

The result of this factual "dependency" by the State agencies upon the National Assembly has been the total absence of fiscal or audit control of all State entities. The General Comptroller Office has ignored the huge and undisciplined disposal of the oil wealth that has occurred in Venezuela, which was not always in accordance with budget discipline rules. Thus, Venezuela is classified among the world's lowest ranks on the issue of government transparency.[36] Nonetheless, the most important decisions made by the General Comptroller have been the ones to disqualify many opposition candidates from the November 2008 regional and municipal elections, based on "administrative irregularities."[37] Although the 1999 Constitution establishes that the constitutional right to run for office can only be suspended when a final judicial affirmation of a *criminal conviction* is rendered,[38] the Constitutional Chamber of the Supreme Tribunal has rubber-stamped the General Comptroller's administrative-based disqualifications.[39]

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35. Vice President of the Supreme Tribunal of Justice Franklin Arrieche delivered the decision of the Supreme Tribunal of 08-14-2002, regarding the criminal process against the generals who acted on April 12, 2002, declaring that there were no grounds on which to charge them because, on said occasion, no military coup took place. President [Judge] Alberto Martinez Urdaneta, Judge Rafael Hernandez, and Judge Orlando Gravina, all of the Electoral Chamber of the Supreme Tribunal, signed Decision No. 24 of 03-15-2004 (Case: *Julio Borges, Cesar Perez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón Jose Medina and Gerardo Blyde vs. the National Electoral Council*), which suspended the effects of National Electoral Council Resolution No. 040302-131, dated March 2, 2004. The Council Resolution had stopped the realization of the presidential recall referendum, so the suspension of the Resolution allowed the referendum to take place. All of the aforementioned judges were investigated by entities under the direction of the Executive.

36. *See generally* Transparencia Venezuela [Transparency Venezuela], http://www.transparencia.org.ve (last visited May 25, 2009).

37. In October 2008, the European Parliament approved a Resolution asking the Venezuelan government to end with these practices (political incapacitation to make the presence of opposition leaders in the regional and local elections more difficult) and to promote a more global democracy with complete respect of the principles established in the 1999 Constitution. EUR. PARL. RES. P6_TA-PROV(2008)0525 (Oct. 23, 2008), *available at* http://www.europarl.europa.eu/document/activities/cont/200901/20090112ATT45918/20090112ATT45918EN.pdf.

38. 1999 CONST. arts. 39, 42, & 65.

39. Teodoro Petkoff has noted that, with this decision, "[t]he authoritarian and autocratic government of Hugo Chávez has clearly shown its true colors in this episode[,]" explaining that:

> The political right to run for office is only lost when a candidate has received a judicial sentence that has been upheld in a higher court. The recent sentence by the Venezuelan Supreme Court, upholding the disqualifications, as well as the constitutionality of Article 105 [of the Organic Law of the General Comptroller Office], constitute a defrauding of the Constitution and the way in which the decision was handed

The People's Defender has been perceived more as a defender of State powers than of the people's rights, as the Venezuelan State never before has been denounced by the Inter-American Commission on Human Rights so many times in comparison to the past decade. Finally, the Executive-controlled Prosecutor General has used its powers to persecute any political dissidence by prosecuting citizens in a discriminatory way before the Executive-controlled Judiciary.

V. THE DEFRAUDATION OF POLITICAL PARTICIPATION IN THE APPOINTMENT OF HIGH GOVERNMENTAL OFFICERS

The process of concentration of powers that Venezuela has experienced during the past decade has also been the result of ignoring the limits the Constitution established to reduce the discretionary power of the National Assembly in the process of appointing the heads of the different branches of government. Independently of the constitutional provisions—and their distortions—regarding the possible dismissal of the heads of the non-elected branches of government by the National Assembly, one of the mechanisms established to assure the heads' independence was the provision in the Constitution that special collective bodies called Nominating Committees, which must be "integrated by representatives of the diverse sectors of society," participate in the heads' appointments by the National Assembly.[40] Those Nominating Committees are in charge of selecting and nominating the candidates, guarantying the political participation of the citizens in the appointment process. Consequently, the appointments of the Justices of the Supreme Tribunal, the Members of the National Electoral Council, the Prosecutor General, the People's Defender, and the General Comptroller can only be made among the candidates proposed to the National Assembly by the corresponding Nominating Committees. These constitutional provisions sought to limit the discretionary power the political-legislative organ traditionally had to appoint those high officials through political party agreements by assuring citizenship participation.[41]

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down was an obvious accommodation to the president's desire to eliminate four significant opposition candidates from the electoral field.

Teodoro Petkoff, *Election and Political Power*, REVISTA: HARV. REV. LATIN AM., Fall 2008, at 11, *available at* http://www.drclas.harvard.edu/revista/articles/view/1125.

40. 1999 CONST. arts. 264, 279, & 295.

41. *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*

Unfortunately, these exceptional constitutional provisions have not been applied because the National Assembly—in violation of the Constitution—has deliberately "transformed" the said Committees into simple "parliamentary Commissions," reducing the civil society's right to political participation.[42] The Assembly, in all the statutes governing such Committees and the appointment process, has staffed each Nominating Committee with a majority of parliamentary representatives, who, by definition, cannot be representatives of the "civil society." Additionally, those statutes provide for the incorporation of some other Committee members chosen by the National Assembly itself from strategically selected non-governmental organizations.[43]

The result has been the Assembly's complete control of the Nominating Committees and the persistence of the discretionary and partisan way of appointing the heads of the non-elected branches of government. This practice even sought constitutionalization in the rejected constitutional reform referendum of 2007, with the proposal being to formally establish exclusively parliamentary Nomination Committees, instead seating representatives of the various sectors of civil society.[44]

VI. THE CATASTROPHIC DEPENDENCE AND SUBJECTION OF THE JUDICIARY

The effects of the dependency of the branches of government subjected to the Legislative branch—and, through it, to the Executive—have been particularly catastrophic with regard to the Judiciary, which, after being initially suspended by the National Assembly in 1999,[45] continued to be impaired with the unfortunate consent and complicity of the Supreme Tribunal of Justice itself. In this matter, in the past decade, the country has witnessed a permanent and systematic demolition of the autonomy and independence of the judicial power, aggravated by the fact that, according to the 1999 Constitution, the Supreme Tribunal—which is completely controlled by the Executive—is in charge of adminis-

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políticas [The Citizens' Participation in the Designation of Non-Popularly-Elected Public Officers in Venezuela and Their Political Vicissitudes], 5 REVISTA IBEROAMERICANA DE DERECHO PUBLICO Y ADMINISTRATIVO [HISP. AM. J. PUB. & ADMIN. L.] 76 (2005) (Costa Rica).

42. *See id.*

43. *See id.*

44. *See supra* note 23.

45. *See* 1 BREWER-CARÍAS, *supra* note 18; *see also* BREWER-CARÍAS, *supra* note 19.

tering the entire Venezuelan judicial system, particularly by appointing and dismissing judges.[46]

The demolition began with the appointments, in 1999, of new Magistrates of the Supreme Tribunal of Justice in contravention of the constitutional conditions. These appointments were made by the National Assembly itself, via a Constitutional Transitory regime sanctioned after the Constitution was approved by referendum.[47] From there on, the process of eroding the Judiciary's power continued up to the point that the President of the Republic has politically controlled the Supreme Tribunal of Justice and, through it, the complete Venezuelan judicial system.

To achieve that control, the constitutional conditions needed to be elected Magistrate of the Supreme Tribunal and the procedures for a candidate's nomination, which required the participation of representatives of the different sectors of civil society, were violated since the beginning. First, as previously discussed, in 1999, the National Assembly itself dismissed the previous Justices. The Assembly then appointed new ones without receiving any nominations from any Nominating Committee; furthermore, many of appointees took office without complying with the conditions set forth in the Constitution to be a Magistrate. Second, in 2000, the newly-elected National Assembly sanctioned a Special Law in order to appoint the Magistrates, in a transitory way, without complying with those constitutional conditions.[48] Third, in 2004, the National Assembly sanctioned the Organic Law of the Supreme Tribunal of Justice, increasing the number of Justices from 20 to 32, and distorted the constitutional conditions for appointment and dismissal, allowing the government to assume absolute con-

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46. *See* Brewer-Carías, *supra* note 21; *see also* 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 Enslaved to Power (The Absence of Independence and Autonomy of the Judges in Venezuela by the Endless Emergency of the Judicial Power)*] 2007 CUESTIONES INTERNACIONALES. ANUARIO JURÍDICO VILLANUEVA [INT'L ISSUES: VILLANUEVA LEGAL Y.B.] 25 (2007) (Spain).

47. *See generally* BREWER-CARÍAS, *supra* note 19, at 345 *et seq.* (comments regarding this Transitory regime).

48. Citing the Special Law and its effect in its *2003 Report on Venezuela*, the Inter-American Commission on Human Rights observed that the appointment of Judges to the Supreme Court of Justice did not adhere to the Constitution, so that the constitutional provisions calling for the election of these authorities to establish the guaranties of independence and impartiality were not used in this case. *See* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, 2003 REPORT ON VENEZUELA ¶ 186 (2003), *available at* http://cidh.oas.org/countryrep/Venezuela2003eng/toc.htm (follow "Chapter I . . . A. . . . 2. The Composition of the Supreme Court of Justice and Citizen's Branch" hyperlink).

trol of the Supreme Tribunal—in particular, its Constitutional Chamber.[49]

After this successful 2004 court-packing scheme, the final selection of new Justices was subjected to the President of the Republic's will, as was publicly admitted by the President of the parliamentary commission in charge of selecting the candidates for Magistrates of the Supreme Tribunal of Justice. The Commission President, who later was appointed Minister of the Interior and Justice, said the following in December 2004:

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted, and his opinion was very much taken into consideration . . . . Let's be clear; we are not going to score auto-goals. In the list, there were people from the opposition who complied with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, but they did not want to. We are not going to do it for them. There is now no one in the group of candidates that could act against us . . ."[50]

This configuration of the Supreme Tribunal, which is highly politicized and subjected to the will of the President of the Republic, has eliminated all autonomy of the Judicial Power and even the basic principle of the separation of powers. As noted previously, however, the Magistrates can be dismissed by the vote of a qualified majority of the National Assembly when grave faults are committed, provided that the Assembly follows a prior qualification by the Citizens Power.[51] This qualified two-thirds majority was established to avoid leaving the existence of the heads of the Judiciary in the hands of a simple majority of legislators.[52] Unfortunately, this provision was also distorted by the 2004 Organic Law of the Supreme Tribunal of Justice, in which it was estab-

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49. *See* ALLAN R. BREWER-CARÍAS, LEY DEL TRIBUNAL SUPREMO DE JUSTICIA [LAW OF THE SUPREME COURT OF JUSTICE] 14 *et seq.* (2004) (comments on the statute increasing the number of seats on the Supreme Tribunal).

50. EL NACIONAL (Venez.), Dec. 13, 2004, at D-1 (quotes in original). Based on these statements, the Inter-American Commission on Human Rights suggested in its 2004 Annual Report to the General Assembly of the Organization of American States that "these provisions of the Organic Law of the Supreme Court of Justice also appear to have helped the executive manipulate the election of judges during 2004." *See* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, ANNUAL REPORT 2004 ¶ 180 (2004), *available at* http://www.cidh.oas.org/annualrep/2004eng/toc.htm (follow "Chapter V . . . Venezuela" hyperlink).

51. 1999 CONST. art. 265.

52. *Id.*

lished in an unconstitutional way that the Magistrates could be dismissed by simple majority when the "administrative act of their appointment" is revoked. This distortion, contrary to the independence of the Judiciary, also sought partial constitutionalization during the rejected 2007 constitutional reform referendum, via a proposal to establish that the Magistrates of the Supreme Tribunal could be dismissed only in the case of grave faults, but just by the vote of the majority of the members of the National Assembly.[53]

The consequence of this political subjection is that all the safeguards tending to insure the independence of judges at any level of the Judiciary have been suspended. In particular, the Constitution establishes that all judges must be selected by public competition for the tenure and that the dismissal of judges can only be made through disciplinary trials carried out by disciplinary judges.[54] Unfortunately, none of these provisions have been implemented. On the contrary, since 1999, the Venezuelan Judiciary has been composed by temporal and provisional judges,[55] lacking stability and being subjected to political manipulation, altering the people's right to an adequate administration of justice. The disciplinary jurisdiction of the judges has not yet been established, as—with the authorization of the Supreme Tribunal—a "transitory" Reorganization Commission of the Judicial Power, created in and sitting since 1999, has continued to function, removing judges without due process.[56]

The worst of this irregular situation is that, in 2006, there were attempts to solve the problem of the provisional status of judges by means of a "Special Program for the Regularization of Ten-

53. *See supra* note 23.

54. 1999 CONST. arts. 254 & 267.

55. The Inter-American Commission on Human Rights reported that "[t]he Commission has been informed that only 250 judges have been appointed by opposition concurrence according to the constitutional text. From a total of 1772 positions of judges in Venezuela, the Supreme Court of Justice reports that only 183 are holders, 1331 are provisional and 258 are temporary." INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, INFORME SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN VENEZUELA [REPORT ON THE SITUATION OF HUMAN RIGHTS IN VENEZUELA], OAS/Ser.L./V/II.118. d.C. 4rev, ¶ 11 (2003). The same Commission also noted that "an aspect linked to the autonomy and independence of the Judicial Power is that of the provisional character of the judges in the judicial system of Venezuela. Today, the information provided by the different sources indicates that more than 80% of Venezuelan judges are 'provisional.'" *Id.* at ¶ 161.

56. *See* Allan R. Brewer-Carías, *La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)* [*Justice Enslaved to Power and the Endless Emergency of the Judicial Power*], 2 DERECHO Y DEMOCRACIA. CUADERNOS UNIVERSITARIOS [LAW AND DEMOCRACY: UNIVERSITY NOTEBOOKS] 122 (2007) (Venez.).

ures," addressed to accidental, temporary, or provisional judges, which would bypass the entrance system constitutionally established by means of public competitive exams.[57]

VII. THE SUPREMACY OF THE EXECUTIVE AND THE ABSENCE OF CHECK AND BALANCE

While the supremacy of the National Assembly over the Judicial, Citizens, and Electoral Powers is the most characteristic sign of the implementation of the 1999 Constitution during the last decade, the distortion of the separation-of-powers principle—now transformed into a concentration-of-powers system—derives from the supremacy that the Executive Power has over the National Assembly.

In the Constitution of 1999, the Executive Power was strengthened, among other factors, because of the extension to six years of the presidential term,[58] the grant of an ability to the President to run for re-election for a single consecutive term,[59] and the requirement of election by simple majority.[60] In the rejected referendum of 2007, the term of the President was proposed to be extended to seven years; additionally, the indefinite re-election of the President was one of the main proposals contained in it.[61] With this presidential model, where—in exceptional cases—the President of the Republic may dissolve the National Assembly,[62] the president's power has been reinforced without adding any check and balance; for instance, the Senate was eliminated in 1999.

Also, the president's role has been strengthened with other reforms, like the provision allowing the legislature to authorize the President of the Republic—by means of "delegating statutes" (enabling laws)—to issue decree-laws—and not only in economic and financial matters.[63] The fundamental legislation of the country sanctioned during the past decade has been contained in these decree-laws, which have been approved without constitutionally-

57. 1999 CONST. art. 255.
58. *Id.* art. 230.
59. *Id.*
60. *Id.* art. 228.
61. *See supra* note 23. [A Constitutional Amendment approved by referendum in February 2009 established the possibility for the continuous and indefinite re-election of the President of the Republic.]
62. 1999 CONST. arts. 236 & 240.
63. *Id.* art. 203.

required public hearings that must take place before the sanctioning of all statutes.

In order to enforce this constitutional right of the citizens to participation, the Constitution specifically set forth that the National Assembly must submit draft legislation to the general public, asking the opinion of citizens and organized society.[64] This public review is the concrete way by which the Constitution tends to insure the exercise of the political-participation right in the process of drafting legislation. The President of the Republic, of course, must also comply with this constitutional obligation when a legislative delegation takes place. Nonetheless, in 2007 and in 2008, the President, following the same steps he took in 2001, extensively legislated without any public hearing or consultation. In this way, in defraudation of the Constitution, by means of legislative delegation, the President has enacted decree-laws without holding the obligatory public hearings, violating the citizens' right to political participation.[65]

VIII. THE RUPTURE OF THE RULE OF LAW AND THE REJECTED 2007 CONSTITUTIONAL REFORM

As deducted from the aforementioned events, in order for the rule of law to exist in a truly democratic State, the declarations contained in constitutional texts on separation of power are not enough. The *effective* check and balance between the State powers is indispensible. This reality is the only way to assure the enforcement of the rule of law, the democracy, and the effective enjoyment of human rights.

The check and balance—and control—of State powers in a democratic rule-of-law State can only be achieved by dividing, separating, and distributing public power, either horizontally, by protecting the autonomy and independence of the different branches of government to avoid the concentration of power, or vertically, by distributing or spreading decentralized power within the territory to create autonomous political entities with representatives elected by votes. Concentrations of power, as well as its centralization, then, are essentially antidemocratic state structures.

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64. *Id.* art. 211.

65. *See* Allan R. Brewer-Carías, *Apreciación general sobre los vicios de inconstitucionalidad que afectan los Decretos Leyes Habilitados* [*General Appreciation of Unconstitutionality That Affects Decree-Laws*] *in* LEY HABILITANTE DEL 13-11-2000 Y SUS DECRETOS LEYES 63-103 (2002).

The problems of the formally-declared democracy in Venezuela—whose deformation lays in the same constitutional text of 1999—rest in the institutional framework established in the Constitution that encourages authoritarianism and allows the possibility of a power seizure by the Executive. Small gaps in the institutional structure have permitted the centralization of power, provoking the dismantling process of federalism and municipalism. Furthermore, a few key constitutional provisions—subject to abuse—destroy the possibility of effective political participation, in spite of the direct democracy mechanisms established in various other provisions throughout the same document.

This process of centralization of powers was proposed to be constitutionalized in 2007, by means of the rejected constitutional reform proposed by President Hugo Chávez and sanctioned by the National Assembly. The intention was to transform the democratic and decentralized social state established in the 1999 Constitution into a Socialist, centralized, repressive, and militaristic State,[66] grounded in a so-called "Bolivarian doctrine," which was identified with "XXI Century Socialism" and an economic system of State capitalism.[67]

In spite of its refusal by the people through referendum, one important aspect to be stressed regarding this constitutional reform proposal is that it was submitted by the President and sanctioned by the National Assembly, evading the procedure established in the 1999 Constitution for such fundamental changes. Thus, the reform itself was proposed in defraudation of the Constitution, having been sanctioned through a procedure established for other purposes, in order to deceive the people.[68]

A change of the nature of the one that was proposed required the convening and election of a National Constituent Assembly.[69] The constitutional re-write could not be undertaken by means of a mere government-proposed referendum, which is exclusively reserved for a partial revision of the Constitution and a substitution of one or several of its norms without modifying the structure and

66. *See supra* note 23.

67. *Id.*

68. *See* Allan R. Brewer-Carías, *Estudio sobre la propuesta de Reforma Constitucional para establecer un Estado Socialista, Centralizado y Militarista (Análisis del Anteproyecto Presidencial, Agosto de 2007)* [*A Study About the Proposal for Constitutional Reform to Establish a Socialist, Centralized, and Militaristic State (Analysis of the Presidential Draft Proposal, August 2007)*], 7 CADERNOS DA ESCOLA DE DIREITO E RELAÇÕES INTERNACIONAIS DA UNIBRASIL [UNIBRASIL J. SCH. L. & INT'L REL.] 265 (2007) (Braz.).

69. 1999 CONST. art. 347.

fundamental principles of the Constitutional text.[70] Yet, to achieve substantial constitutional changes, the President and the National Assembly in 2007 tried to repeat the political tactic that has been a common denominator in the actions of the authoritarian regime installed since 1999—acting fraudulently with respect to the Constitution.

As was ruled in another matter by the Constitutional Chamber of the Supreme Tribunal of Justice in Decision No. 74 of January 25, 2006, a defraudation of the Constitution (*"fraude a la Constitución"*) occurs when democratic principles are destroyed "through the process of making changes within existing institutions while appearing to respect constitutional procedures and forms." The Chamber also ruled that a "falsification of the Constitution" (*"falseamiento de la Constitución"*) occurs when "constitutional norms are given an interpretation and a sense different from those that they really possess: this is in reality an informal modification of the Constitution itself." The Chamber concluded by affirming that "[a] Constitutional reform not subject to any type of limitations would constitute a *de*fraud*ation of* the constitution."[71] Thus, a defraudation of the Constitution occurs when the existing institutions are used in a manner that appears to adhere to constitutional procedures in order to proceed, as the Supreme Tribunal warned, "towards the creation of a new political regime, a new constitutional order, without altering the established legal system."[72]

As noted earlier, a defraudation was precisely what occurred in February 1999, with the use of a consultative referendum on whether to convene a Constituent Assembly when that institution was not prefigured in the then-existing Constitution of 1961. Another defraudation occurred with the December 1999 "Decree on the Transitory Government of the Public Powers" with respect to the Constitution of 1999, issued by the then-Constituent Assembly, which was never the subject of an approbatory referendum. The illegitimate reforms continued to occur in the subsequent years with the progressive destruction of democracy through the exercise of power and the sequestering of successive constitutional

70. *See supra* note 23.
71. *See supra* note 22.
72. *Id.*

rights, all supposedly done on the basis of legal and constitutional provisions.[73]

In the case of the 2007 constitutional reform attempt, constitutional provisions were, once again, fraudulently used for ends other than those for which they were established. The reigning government tried to introduce another radical transformation of the State, which would have disrupted the civil order under the rule of law and converted the democratic State into a centralized, repressive, and militarist State. In the proposed new State, representative democracy, republican alternation in office, and the concept of decentralized power would disappear, and all power would be concentrated in the decisions of the Chief of State.[74]

This reformation attempt was constitutionally prohibited. As the Constitutional Chamber of the Supreme Tribunal of Justice noted—referring by analogy to another famous case—in its aforementioned Decision No. 74 of January 25, 2006, the attempted reformation occurred "with the fraudulent use of powers conferred by martial law in Germany under the *Weimar* Constitution, forcing the Parliament to concede to the fascist leaders, on the basis of terms of doubtful legitimacy, plenary constituent powers by conferring an unlimited legislative power."[75] Nonetheless, in the case of the constitutional reform of 2007, the Supreme Tribunal deliberately refused to review the unconstitutional procedure that was followed by the President of the Republic, the National Assembly, and the National Electoral Council.[76]

In any case, the popular rejection of the 2007 constitutional reform has been a very important step away from the authoritarian government of President Chávez. However, the President of the

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73. *See supra* note 25; *see also* ALLAN R. BREWER-CARÍAS, *El autoritarismo establecido en fraude a la constitución y a la democracia y su formalización en Venezuela mediante la Reforma Constitucional. (De cómo en un país democrático se ha utilizado el sistema eleccionario para minar la democracia y establecer un régimen autoritario de supuesta "dictadura de la democracia" que se pretende regularizar mediante la Reforma Constitucional)* [*Authoritarism Established by Fraud to the Constitution and to the Democracy and Its Formalization in Venezuela by Means of Constitutional Reform: Use of an Electoral System to Undermine Democracy and Establish an Authoritarian Regime Supposedly Called a "Democratic Dictatorship," Pretending to Ratify It Through Constitutional Reform*], in TEMAS CONSTITUCIONALES PLANTEAMIENTOS ANTE UNA EVENTUAL REFORMA [CONSTITUTIONAL SUBJECTS: APPROACHES BEFORE AN EVENTUAL REFORM] 13, 13-74 (2007).

74. *See supra* note 23.

75. *See supra* note 22.

76. *See* Allan R. Brewer-Carías, *El juez constitucional vs. la supremacía constitucional* [*The Constitutional Court v. Constitutional Supremacy*], 112 REVISTA DE DERECHO PUBLICO [PUB. L.J.] 661 (2007) (Venez.).

Republic has announced his intention to still seek the imposition of the rejected constitutional reform. According to the Constitution itself, the proposed reform cannot be formulated again in the current constitutional term of the government; nonetheless, President Chávez has suggested that—to assure the possibility of his indefinite re-election—he will propose a recall referendum of himself, seeking to convert the eventual rejection of that referendum into a plebiscite for his re-election.[77]

During July and August 2007, the President of the Republic—under the powers to legislate by decree that were delegated to him by his completely controlled National Assembly on January 2007—sanctioned 26 very important new statutes with the intention of implementing—of course in a fraudulent way—all the constitutional reform proposals that were rejected by the people in the 2007 December referendum.[78] Unfortunately, those Decree Laws—each being unconstitutional—have been enacted and will be applied without any possibility of judicial review. The President is sure that no Constitutional Chamber judicial review decision will be issued, being that the Chamber is a wholly-controlled entity—proven to be his most effective tool for the consolidation of his authoritarian government.

This situation of near-invincibility is the only explanation we can find to understand why, as a Head of State in our times, President Chávez can say, in Venezuela, challenging his opponents at a political rally held on August 28, 2008, the following:

I warn you, group of stateless, putrid opposition.

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77. *See* EL UNIVERSAL (Venez.), Jan. 27, 2008, at 1-1. [As mentioned in note 61, *supra*, a Constitutional Amendment was approved via referendum in February 2009, creating the possibility for the continuous and indefinite re-election of the President of the Republic.]

78. Regarding these 2008 Decree Laws, Teodoro Petkoff has pointed out that:

> In absolute contradiction to the results of the December 2, 2007, referendum in which voters rejected constitutional reforms, in several of the laws promulgated the president presents several of the aspects of the rejected reforms almost in the same terms. The proposition of changing the name of the Venezuelan Armed Forces to create the Bolivarian National Militia was contained in the proposed reform; the power given to the president to appoint national government officials over governors and mayors to, obviously, weaken those offices and to eliminate the last vestiges of counterweight to the executive in general and the presidency in particular, was also contained in the rejected reform; the redefinitions of property were contained in the reform; the recentralization in the national executive branch of powers that today belong to the states and decentralized autonomous institutes was part of the reform; the enlargement of government powers to intervene in economic affairs was contained in the reform. To ignore the popular decision about the 2007 proposal to reform the constitution in conformity with the will and designs of an autocrat, without heed to legal or constitutional norms, is, stricto sensu, a tyrannic act.

See Petkoff, *supra* note 39, at 12.

> Whatever you do, the 26 Laws will go ahead! And the other 16 Laws . . . also. And if you go out in the streets, like on April 11 [2002] . . . we will sweep you in the streets, in the barracks, in the universities. I will close the coup-favoring media; I will have no compassion whatsoever . . . This Revolution came to stay, forever!
>
> You can continue talking stupid things . . . I am going to intervene all communications, and I will close all the enterprises I consider to be of public usefulness or of social interest! Out [of the country], contractors and corrupt people of the Fourth Republic!
>
> **I am the Law . . . I am the State!!!"**[79]

This rally was not the first time that the President of the Republic used this expression. In 2001, when he approved more than 48 Decree Laws—also via delegated legislative power—he said, **"The law is me. The State is me."**[80] This phrase is attributed to Louis XIV; even as King, he never publicly delivered the line.[81] Hearing these words publicly expressed by a Head of State of our times is enough to realize and understand the tragic institutional situation Venezuela is currently facing—a situation precisely characterized by a complete absence of separation of powers and, consequently, of a democratic government.[82]

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79. Yo soy la Ley . . . Yo Soy el Estado. [I am the Law . . . I am the State.] http://lasarmasdecoronel.blogspot.com/2008/10/yo-soy-la-leyyo-soy-el-estado.html (Oct. 15, 2008, 03:36 GMT) (emphasis added).

80. *La ley soy yo. El Estado soy yo.* [*The Law Is Me. The State Is Me.*], EL UNIVERSAL (Venez.), Dec. 4, 2001, at 1,1 & 2,1.

81. YVES GUCHET, HISTOIRE CONSTITUTIONNELLE FRANÇAISE (1789–1958) [FRENCH CONSTITUTIONAL HISTORY (1789-1958)] 8 (1990). This famous phrase was uttered by Louis XIV in 1661 when he decided to govern alone after the death of Cardinal Mazarin, despite never being pronounced by the Cardinal. *Id.*

82. This situation was summarized by Teodoro Petkoff, editor and founder of *Tal Cual*, one of the important newspapers in Caracas, as follows:

> Chávez controls all the political powers. More than 90% of the Parliament obey his commands; the Venezuelan Supreme Court, whose numbers were raised from 20 to 32 by the Parliament to ensure an overwhelming officialist majority, has become an extension of the legal office of the Presidency with this judicial ruling. The Attorney General's Office, the Comptroller's Office and the Public Defender are all offices all held by "yes persons," absolutely obedient to the orders of the autocrat. In the National Electoral Council, four out of five members are identified with the government. The Venezuelan Armed Forces are tightly controlled by Chávez. Therefore, from a conceptual point of view, the Venezuelan political regime is autocratic. All political power is concentrated in the hands of the president. There is no real separation of powers.

See Petkoff, *supra* note 39, at 12.