VENEZUELA 2009 REFERENDUM ON CONTINUOUS REELECTION: CONSTITUTIONAL IMPLICATIONS[1]

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I. THE VENEZUELAN NON REELECTION TRADITION AND THE PRINCIPLE OF REPUBLICAN "*ALTERNABILIDAD*"

Since the beginning of the Republic, the general restriction for elected officials to be reelected in a continuous way, without limits, has been a tradition in the Venezuelan Constitutional history, having Venezuela adopted since 1811, as occurred in all Latin America countries, the presidential system of government.[2] The restriction to presidential reelection was first established in the 1830 Constitution, as a reaction to continuity in office (*continuísmo*), precisely in order to confront individuals' anxieties to perpetuate themselves in power, and to avoid the advantages that public officials in office could have in electoral processes.

The reaction against continuity in power was clearly expressed by Simón Bolívar in his famous Angostura Speech (1819) when he said:

> " The continuation of the authority in the same individual has frequently been the end of democratic governments. Repeated elections are essentials in popular systems, because nothing is more dangerous than to leave for a long term the same citizen in power. The people get used to obey him, and he gets used to command them; from were usurpation and tyranny is originated….Our citizens must fear with more than enough justice that the same Official, who has governed them for a long time, could perpetually command them."[3]

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[1] Paper for the Panel Discussion on "**Venezuela Referendum: Public Opinion, Economic Impact and Constitutional Implications**," (Panelists: Luis Vicente León, Alejandro Grisanti, Allan R. Brewer-Carías; Moderator: Christopher Sabatini), **Americas Society/Council of the Americas,** New York, February 9, 2009.

[2] Restrictions to presidential reelection are traditional in the presidential system of government, and not in the parliamentary system of government mainly followed in Europe. 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*, Universidad Externado de Colombia, Bogotá 2008, pp. 106 ff.

[3] "La continuación de la autoridad en un mismo individuo frecuentemente ha sido el término de los gobiernos democráticos. Las repetidas elecciones son esenciales en los sistemas populares, porque nada es tan peligroso como dejar permanecer largo tiempo en

This principle of limiting the term of elected Officials called in Venezuelan constitutional law as the principle of "*alternabilidad,*" from the Latin word "*alternatium*," which means "interchangeably" or "by turns." In Spanish it has the same meaning and when referring to public offices or public positions means the idea that elected public offices must be occupied by turns, and not continuously by the same elected person. It is in this same sense that the Supreme Tribunal of Justice of Venezuela in a decision of 2002 issued by its Electoral Chamber, said that *alternabilidad* means "the successive exercise of public offices by different persons" (Decision No. 51 of March 18, 2002.)[4] The principle, consequently, is not the same as the "elective" principle or to be elected for public offices. To be elected is one thing, and another is to occupy public offices by turns.

The principle has always been establishing in a "rock like" or immutable constitutional clause (*Cláusula pétrea*), in the sense that it must never be changed. That is why Article 6 of the Constitution says: "The government of the Republic and of its political entities **is and will always be"** *alternativo***,** in addition to **"**democratic, participatory, elective, decentralized, responsible, plural and of repeal mandates*,"*[5] which mean that it cannot be changed.

The principle has been included in almost all the Venezuelan Constitutions since 1830 (1830, 1858, 1864, 1874, 1881, 1891, 1893, 1901, 1904, 1909, 1936, 1845 and 1947),[6] establishing a general prohibition for the immediate reelection of the President of the Republic for the next term. In the 1961 Constitution the prohibition for reelection was extended up to two terms (10 years), and it was in the current 1999 Constitution that the provision was made more flexible, by establishing for the first time in more than a century

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un mismo ciudadano el poder. El pueblo se acostumbra a obedecerle y él se acostumbra a mandarlo; de donde se origina la usurpación y la tiranía. … nuestros ciudadanos deben temer con sobrada justicia que el mismo Magistrado, que los ha mandado mucho tiempo, los mande perpetuamente." See in Simón Bolívar, *Escritos Fundamentales*, Caracas, 1982.

[4] Quoted in the Dissenting Vote to the Constitutional Chamber of the Supreme Tribunal of Justice Decision No. 53, of February 2, 2009 (*Interpretation of articles 340,6 and 345 of the Constitution* Case), in http:/www.tsj.gov.ve/decisions/scon/Febrero/53-3209-2009-08-1610.html

[5] "Article 5. El gobierno de la República Bolivariana de Venezuela y de las entidades políticas que la componen es y será siempre democrático, participativo, electivo, descentralizado, alternativo, responsable, pluralista y de mandatos revocables".

[6] See the text of all the Constitutions in Allan R. Brewer-Carías, *Las Constituciones de Venezuela,* 2 vols., Academia de Ciencias Políticas y Sociales, Caracas 2008.

the possibility for the immediate reelection of the President, but only once, for the next term (article 230).

The fact is that in Venezuelan history, the only Constitutions not providing for the prohibition for presidential reelection was the short lived 1857 Constitution, the authoritarian Constitutions of the period of Juan Vicente Gómez (1914-1933), and the 1953 Constitution of Marcos Pérez Jiménez, who were two of the dictators we had during the last century.

On the other hand, another fact to bear in mind is that each time that the principle of non reelection has been changed through disputed constitutional reforms, the outcome has been a political crisis ending in the overthrow of the government. It occurred in 1858 with the pretension of continuity of President José Tadeo Monagas, who after reforming the Constitution in 1857 was outset a few month later by the Julián Castro March Revolution. It happened in 1891 when President Raimundo Andueza Palacios also reformed the Constitution in order to allow him to be reelected, being overthrown the next year in 1892 by the Joaquin Crespo Legalist Revolution. It also occurred, although in another context, in 1945, with the constitutional reform promoted by President Isaías Medina Angarita that failed to establish the direct presidential election, allowing the continuation of the indirect presidential election of the government candidates by, Congress, a fact that contributed to the 1945 October Revolution. And, finally, it occurred in 1957 when Marcos Pérez Jiménez convened a referendum (plebiscite) to approve his own reelection, which led, the next year, to the Democratic Revolution of 1958.[7] This shows that nor always the countries follow the lessons of history, and frequently the result has been the unwanted repetition of similar facts.

In any case, the restriction established in the current 1999 Constitution for the reelection of the President of the Republic (article 230); and the similar provisions establishing reelection restrictions in the cases of Governors and Mayors and of representatives to the National Assembly and to the State Legislative Councils (articles 160, 162, 174, 192), are the ones that have been proposed to be changed through a Constitutional Amendment that the Venezuelan people are going to vote on next Sunday February 15, 2009.

II. THE LIMITS IMPOSED BY THE CONSTITUTION REGARDING THE CONSTITUTIONAL REVIEW MEANS

The 1999 Constitution establishes three institutional mechanisms for constitutional review, distinguishable according to the importance and

[7] See Allan R. Brewer-Carías, *Historia Constitucional de Venezuela*, 2 vols., Editorial Alfa, Caracas 2008.

magnitude of the changes proposed, which includes the "Constitutional Amendment," the "Constitutional Reform," and the National Constituent Assembly. The "Constitutional Amendment" procedure is established for the purpose of adding or of modifying one or more provisions to the Constitution without altering its fundamental structure (article 340); and the "Constitutional Reforms", is designed for partial revisions of the Constitution and for the substitution of one or several provisions but also without modifying its structure and fundamental principles (article 342). Both procedures, have in common that they need to be approved by referendum, and cannot be used to change fundamental constitutional principles or the structure of the Constitution. Only through a National Constituent Assembly the Constitution can be reviewed in order to "transform the State, to create a new legal order, and to write a new Constitution" (Articles 347).

On the other hand, the Constitution establishes the effects of the popular rejection of a "constitutional reform," in the sense that a similar proposal cannot be filed again before the National Assembly in the remainder of the constitutional term (Article 345). Nothing is established in the Constitution regarding the effects of the rejection of "constitutional amendments," and also, nothing is established regarding the possibility to file the same rejected "constitutional reform" proposal, through the procedure of a "constitutional amendment," as it is now occurring.

The case is a matter of interpretation and of determining the intention of the Constituent power, which in my opinion was to establish a limit regarding the possibility of repeatedly asking the direct expression of the will of the people by referenda. That is, once the people have express their popular will through a referendum, it is not possibly to asked the people again and again, without limits, on the same matters in the same constitutional term.

The matter of the continuous presidential reelection was already proposed through a "constitutional reform" draft formulated by the President of the Republic in 2007 and was rejected by the people in the Referendum held on December 2007.[8] Nonetheless, at the suggestion of the same President of the Republic, one year later, the National Assembly voted last month (January 15th, 2009) a modification of the Constitution, using now the "Constitutional Amendment" procedure, initially intended to establish the possibility for the indefinite and continuous reelection of the President of the Republic, which was later extended to all elected public offices.

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[8] See Allan R. Brewer-Carías, *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Editorial Jurídica Venezolana, Caracas 2007.

III. THE BINDING CONSTITUTIONAL INTERPRETATION ISSUED BY THE SUPREME TRIBUNAL

Two questions with constitutional implication result from this new "amendment" proposal that have been the object of endless constitutional discussions and legal contention in the country:

First, the possibility to use a "constitutional amendment" procedure through which no fundamental constitutional principle can be changed, in order to alter and change the principle of *alternabilidad* of the government that is a fundamental republican principle formulated in article 6 of the Constitution; and

Second, the possibility to use the "constitutional amendment" procedure to include the continuous election of the President of the Republic, changing the limits imposed in the Constitution (reelection only once, for the next period), which was a proposal already submitted to referendum in December 2007, and rejected by the people.

It has been on these matters that the Constitutional Chamber of the Supreme Tribunal of Justice issued last week (February 3, 2009), two decisions (No. 46 and 53)[9] in which a binding interpretation of the Constitution has been established:

First, regarding the possibility of submitting to popular vote a modification of the Constitution via "constitutional amendment" on the same matter already rejected by the people in a "constitutional reform" procedure held during the same constitutional term. The Constitutional Chamber has argued that the limit imposed in the Constitution was directed only to the National Assembly to discuss again a constitutional reform on the same subject once rejected by the people, without considering the substantive aspect of the prohibition regarding the limits to ask again and again the people, to express in an endless way their will, through referenda.

Second, regarding the possibility of using the "constitutional amendment" procedure in order to change the fundamental principle of

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[9] See the Constitutional Chamber of the Supreme Tribunal of Justice Decision No. 53, of February 3, 2009 (*Interpretation of articles 340,6 and 345 of the Constitution* Case), in http:/www.tsj.gov.ve/decisions/scon/Febrero/53-3209-2009-08-1610.html. See the comments on that decision in Allan R. Brewer-Carías, *El Juez Constitucional vs. La alternabilidad republicana. Notas sobre la sentencia de la Sala Constitucional de 03-02 2009 que declara constitucional el proceso de Enmienda Constitucional 2008-2009 que altera el principio de alternabilidad del gobierno, al establecer la reelección indefinida de cargos electivos y que se someterá a referendo el 15-02-2009*, in www.allanbrewercarias.com, Section I, 2 (Documents), 2009.

alternabilidad in government, which means that public offices must be occupied by turns, and not continuously by the same elected person, the Constitutional Chamber has said that what the principle of *alternabilidad* imposes "is for the people as sovereign to have the possibility to periodically elect their representatives," confusing "*gobierno alternativo*" with "*gobierno electivo*" that is, the principle that elected public offices must be occupied by turns, with the principle of election of representatives, considering that the principle of *alternabilidad* can only be infringed if the possibility to have elections is impeded.

With these decisions, what the Supreme Tribunal has made, in addition to resolving the constitutional challenges to the February 15th referendum is, through a constitutional interpretation, to modify or mutate the text of the Constitution, changing the sense of the prohibition of subsequent calling for referendum on the same matters, and also changing the sense of a constitutional principle like the principle of *alternabilidad* in government considering it alike to the principle of elective government, ignoring the difference established in the Constitution (article 6).

IV. THE REMAINING CONSTITUTIONAL IMPLICATIONS

Finally, one constitutional implication of the February 15th 2009 Referendum remains unsolved and it is the one resulting from the question itself as has been proposed to the people, in which it is difficult to find its clear intention to establish the possibility of continuous reelection in public offices.

The proposed question, in effect, has been formulated as follow:

> *"Do you approve of the amendment of articles 160,162,174,192 and 230 of the Constitution of the Republic prepared by initiative of the National Assembly, which extends the political rights of the people in order to allow any citizen in exercise of a public office by popular election to become a candidate to the same office for the constitutionally established term, his or her election depending exclusively from the popular vote?*[10]

If the purpose of the constitutional amendment is to eliminate the restriction for reelection of all elected public officials and representatives

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[10] "¿Aprueba usted la enmienda de los artículos 160, 162, 174, 192 y 230 de la Constitución de la Republica tramitada por iniciativa de la Asamblea Nacional, que amplia los derechos políticos del pueblo con el fin de permitir que cualquier ciudadano o ciudadana en ejercicio de un cargo de elección popular pueda ser sujeto de postulación como candidato o candidata para el mismo cargo por el tiempo establecido constitucionalmente, dependiendo su elección exclusivamente del voto popular?".

established in the five articles of the Constitution, to allow them be reelected without limits in a continuous and indefinite way, why this is not clearly stated? In other words, why the words "reelection," "indefinite" or "continuous" reelection are not used?

On the other hand, in any case of constitutional amendments, if approved, it must be published as a continuation of the Constitution without altering the original text, but the amended articles must have a footnote referring to the number and date of their amendments. The question in this case of next Sunday referendum, if the constitutional amendment is approved, is to know exactly how the texts of the five amended articles are going to be written, or if the matter is going to remain forever to be subject to interpretation. With the question as it has been formulated, the result will be to eliminate the limits imposed in articles 162 and 192 of the Constitution regarding the representatives to the State Legislative Councils and to the National Assembly to be reelected only for up to two terms; and in articles, 160, 174, and 230 regarding the President of the Republic, the Governors of the States and the Municipal mayors to be reelected only once for an immediate new term.

These are in my opinion some of the constitutional implications of the Referendum of next Sunday in Venezuela. The President of the Republic has considered it as a process "vital for the revolution,"[11] consequently what now remains are for the people to also consider it a process vital for the future of our democracy. The result of the voting will show us the response.

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[11] In his weekly program *Aló President*, January 11, 2009.