# SEPARATION OF POWERS AND AUTHORITARIAN GOVERNMENT IN VENEZUELA[*]

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I also want to begin my talk by thanking Professor Barker and Duquesne University for the invitation I have received to participate once more, in these exceptional Seminars on the basic constitutional issues in the Americas. I have had the privilege to participate in the previous two Seminars, and now in this one. The work done by Professor Barker organizing them, has already produced an exceptional set of lectures and documents that I think he must now think in publishing in a Collective book, on *Constitutionalism in the Americas and Abroad*. All constitutional and comparative lawyers and scholars would thank him for the publication of such book.

And now, I want to refer to the principle of Separation of Powers in Venezuela, which currently and unfortunately, must to be analyzed within the framework of the authoritarian government existing in the county, a situation which is a contradiction in itself regarding such principle.

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

As in all Latin American countries, and directly inspired in the constitutional principles derived from the XVIII century American and French Revolutions,[1] since 1811, the principle of separation of powers has been an essential part of Venezuelan constitutional system and history.

But in contrast with the United States Constitution, as was pointed out this morning by Judge Smith –in which no enunciation of the principle can be found –because all the Constitution is devoted to implement it- , in the Preamble of the 1811 Federal Constitution for the States of Venezuela, the first of all Latin American Constitutions, the principle of separation of powers was enunciated, in similar way to what was established in article III of the Constitution of Virginia of 1776, as follows:

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

To this provision, article 189 of the same Constitution added that:

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[1] 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,* 2ª Edición Ampliada, Serie Derecho Administrativo No. 2, Universidad Externado de Colombia, Editorial Jurídica Venezolana, Bogotá 2008,

"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 others, according the nature of a free government, to the convenient connexion chain that unite all the fabric of the Constitution, in an indissoluble Friendship and Union way."2

These provisions were incorporated in the Constitution due to the same observation that Thomas Jefferson made two hundred years ago –as quoted by Professor barker in hid Welcome Letter to this Seminar- in the sense that "the concentration of all governmental powers in the same hands is the very definition of despotism."

Accordingly these same enunciations were included in many of the Constitutions we have had in Venezuela during the past two hundred years.

Nonetheless, the principle not always has been really implemented in constitutional practice, mainly because not always the necessary guaranties for the independence and autonomy of the branches of government have been assured. In other words, not always the country has had a democratic regime, which is the only political system that can guaranty the possibility of check and balance between the different branches of government.[3]

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[2] See the text of the 1811 Constitution and all of the other Venezuelan Constitutions in Allan R. Brewer-Carías, *Las Constituciones de Venezuela*, Academia de Ciencias Políticas y Sociales, Caracas, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 2000.

[3] See Allan R. Brewer-Carías, "Democracia: sus elementos y componentes esenciales y el control del poder", in Nuria González Martín, (Compiladora), *Grandes temas para un observatorio electoral ciudadano, Tomo I, Democracia: retos y fundamentos,* Instituto Electoral del Distrito Federal, México 2007, pp. 171-220

That is why in the Venezuelan constitutional history, the principle, in fact, has only been effectively applied during the four decades of democratic governments the country had during the second half of last century, between 1958 and 1998. That experience ended abruptly when the National Constituent Assembly that was elected in 1999 assaulted all State powers, intervening and concentrating all branches of government,[4] including the Judiciary, whose autonomy and independence has been progressively and systematically demolished.[5] The result of this intervention has been the subsequent Executive control over the Judiciary, particularly over the Supreme Tribunal of Justice, being its Constitutional Chamber the most ominous instrument for the consolidation of authoritarianism in the country[6].

During the functioning of the 1999 Constituent Assembly, which was completely controlled by the then and current President of the Republic, Hugo Chávez Frías, after concentrating all State powers, it developed a constitution–making process that concluded with the sanctioning of the 1999 Constitution, currently in force. It is a very

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[4] See Allan R. Brewer-Carias, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico 2002; Guayaquil, 2006.

[5] See Allan R. Brewer-Carias, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)", in *XXX Jornadas J.M Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pgs 33-174.

[6] See Allan R. Brewer-Carias, "Quis Custodiet ipsos Custodes: De la interpretación constitucional a la inconstitucionalidad de la interpretación", in *VIII Congreso Nacional de derecho Constitucional*, Peru, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pgs. 463-489; and in Allan R. Brewer-Carías, *Crónica de la "In" Justicia Constitucional. La Sala Constitucional y el autoritarismo en Venezuela*, Caracas 2007.

extensive text, full of provisions regarding the rule of law, constitutional values and human rights, but which in practice is more or less the type of the "Semantic Constitutions" that Professor Gamas Torruco mentioned this morning, o perhaps of a "malleable" Constitution that has been changed or mutated through improper manipulative judicial review decisions of the Constitutional Jurisdiction.

In this 1999 Constitution, the principle of separation of powers was also established not only between the three classical branches of government that almost all countries in the world have, but between five branches, by adding to the Legislative, Executive and Judicial, two new ones, the Electoral and the Citizens branches, declaring their independence and autonomy, as the culmination of a previous constitutional process and tendency that initiated in 1961 with the consolidation in the Constitution of State organs with constitutional rank not dependents from the classical powers, as was for instance, the Public Prosecutor, the Council of the Judiciary, the Comptroller General.[7]

But in spite of all those separate branches of government, what the Constitution has established in fact, is an implicit system of concentration of powers in the National Assembly, which has allowed for an authoritarian government to be consolidated in the country in

[7] See the comments in Allan R. Brewer-Carías, *La Constritutión de 1999*, Caracas 2000, pp. 106 ff..

defraudation or perversion of the Constitution and of democracy,[8] by using and distorting other provisions of the Constitution.

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

As aforementioned, the Venezuelan Constitution is the only one in contemporary world that has established the principle of separation of powers between five different branches of government, that is, the Legislative, the Executive, and the Judiciary, and in addition the Electoral Power, exercised by the National Electoral Council, in charge of the organization and conduction of the elections; and the Citizens Power, attributed to three different bodies: the Prosecutor General Office (*Ministerio Público*), the Comptroller General Office and the Peoples' Defendant (article 136).

But as mentioned, in spite of this *penta* division of powers, the fact is that the autonomy and independence of the branches of government is not completely and consistently assured in the Constitution, its application leading on the contrary, to a concentration of State powers in the National Assembly, and through it, in the Executive power.

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[8] See Allan R. Brewer-Carías, "Constitution Making in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy. The Recent Venezuelan Experience", en ***Lateinamerika Analysen***, 19, 1/2008, GIGA, Germa Institute of Global and Area Studies, Institute of latin American Studies, Hamburg 2008, pp. 119-142.

In effect, in any system of separation of powers, even with five separate branches of government (Legislative, Executive, Judicial, Citizen and Electoral), in order for such separation to become effective, the independence and autonomy among them has to be assured in order to allow check and balance, that is, the limitation and control of power by power itself. This was the aspect that was not designed as such in the 1999 Constitution, and notwithstanding the aforementioned penta separation of powers, an absurd distortion of the principle was introduced by giving the National Assembly the authority not only to appoint, but to dismiss the Judges of the Supreme Tribunal of Justice, the Prosecutor General, the General Comptroller, the People's Defendant and the Members of the National Electoral Council (Articles 265, 279 and 296); and in some cases, even by simple majority of votes. This latter solution was even proposed to be formally introduced in the rejected 2007 Constitutional reform proposals, seeking to eliminate the guarantee of the qualified majority of the members of the National Assembly for such dismissals.[9]

It is simply impossible to understand how the autonomy and independence of separate powers can function and how can they exercise mutual control, when the tenure of the Head officials of the

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[9] 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*, Editorial Jurídica Venezolana, Caracas, 2007; and *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.

branches of government (except the President of the Republic) depend on the political will of one of the branches of government, that is, the National Assembly. The sole fact of the possibility for the National Assembly to dismiss the head of the other branches, makes futile the formal consecration of the autonomy and independence of powers, being the High officials of the State aware that they can be removed from office at any time precisely if they effectively act with independence[10].

And unfortunately, this has happened in Venezuela during the past decade, so when there have been minimal signs of autonomy from some holders of State institutions, who have dared to adopt their own decisions distancing themselves from the Executive will, they have been dismiss. This occurred, for instance, in 2001 with the People's Defendant and with the Prosecutor General of the Republic, originally appointed in 1999 by the Constituent National Assembly, who were separated from their positions[11] for failing to follow the dictates of the Executive power; and this also happened with some Judges of the Supreme Tribunal who dared to vote decisions that could question the

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[10] See "Democracia y control del poder", in Allan R. Brewer-Carias, *Constitución, democracia y control de poder*, Centro Iberoamericano de Estudios Provinciales y Locales. Universidad de Los Andes, Mérida 2004.

[11] It the case of the General Prosecutor of the Republic, appointed in December of 1999, he thought he could initiate a criminal impeachment proceedings against the then Minister of the Interior; and the People's Defendant, also thought that she could challenge the Special Law of the 2000 National Assembly on appointment of Judges of the Supreme Tribunal without complying with the constitutional requirements. They were both duly not ratified in 2001.

Executive action, who were immediately subjected to investigation and some of them were removed or duly "retired" from their positions[12].

The consequence resulting from this factual "dependency" of the State organs regarding the National Assembly, has been the total absence of fiscal or audit control regarding all the State entities. The General Comptroller Office has ignored the results of the huge and undisciplined disposal of the oil wealth that has occurred in Venezuela, not always in accordance with Budget discipline rules, which has provoked the classification of Venezuela in one of the lowest ranks on Government transparency in the world.[13] Nonetheless, the most important decisions taken by the Comptroller General have been those directed to disqualify many opposition candidates from the November 2008 regional and municipal elections, based on "administrative irregularities," although the Constitution establishes (that the constitutional right to run for office can only be suspended when a judicial criminal decision is adopted articles 39 and 42);[14] but

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[12] It was the case of Franklin Arrieche, Vice-President of the Supreme Tribunal of Justice, who 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 to judge them due to the fact that in said occasion no military coup took place; and that of Alberto Martini Urdaneta, President of the Electoral Court, and Rafael Hernandez and Orlando Gravina, Judges of the same Court who undersigned decision N° 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*), that suspended the effects of Resolution N° 040302-131, dated 03-02-2004 of the National Electoral Council which, in that moment, stopped the realization of the presidential recall referendum.

[13] See http://www.transparencia.org.ve

[14] In October 2008, the European Parliament approved a Resolution asking the Venezuelan government to end with these practices (political incapacitation in order to difficult the presence of

which the Constitutional Chamber of the Supreme Tribunal has uphold in defraudation of the Constitution.[15]

Regarding the People's Defendant, it has been perceived more as a defendant of State powers than of the peoples' rights, even if the Venezuelan State never before has been denounced so many times as has happened during the past years before the Inter American Commission on Human Rights. And finally, the Public Prosecutor has been characterized by using its powers to prosecute, using in a indiscriminate way the controlled Judiciary as a tool to persecute any political dissidence.

## III. THE DEFRAUDATION OF POLITICAL PARTICIPATION IN THE APPOINTMENT OF HIGH GOVERNAMENTAL OFFICERS

But the process of concentration of powers that Venezuela has experienced during the past decade has also being the result of a process of defraudation or perversion of the Constitution, particularly

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opposition leaders in the regional and local elections) and to promote a more global democracy with complete respect of the principles established in the 1999 Constitution. See http://venezuelanoticia.com/archives/8298

[15] Teodoro Petkoff has pointed out that with this decision "the authoritarian and autocratic government of Hugo Chávez has clearly shown its tru colors in this episode", explaining that "The political rights to run for office is only lost when a candidate has receive 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 Comptroller General Office], constitute a defraudation of the Constitution and the way in which the decision was handed down was an obvious accommodation to the president's desire to eliminate four significant opposition candidates from the electoral field". ". See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition," in *Revista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp.11.

by ignoring the limits the Constitution has established to reduce the discretional power of the National Assembly in the process of appointing the Heads of the different branches of government.

In effect, independently of the constitutional provisions regarding the possible dismissal by the National Assembly of the Heads of the non elected branches of government, and its distortions, one of the mechanism established in order to assure their independence, was the provision in the Constitution of a system to assure that their appointment by the National Assembly was to be limited by the necessary participation of special collective bodies called Nominating Committees that must be integrated with representatives of the different sectors of society (arts. 264, 279, 295). Those Nominating Committees are in charge of selecting and nominating the candidates, guaranteeing the political participation of the citizens in the process.

Consequently, the appointment of the Justices of the Supreme Tribunal, of the Members of the National Electoral Council, of the Prosecutor General of the Republic, of the People's Defendant and of the Comptroller General of the Republic, can only be made among the candidates proposed by the corresponding "Nominating Committees," which are the ones in charge of selecting and nominating the candidates before the Assembly. These constitutional previsions seek to limit the discretional power the political legislative organ

traditionally had, to appoint those high officials through political party agreements by assuring political citizenship participation. [16]

Unfortunately, these exceptional constitutional provisions have not been applied, due to the fact that the National Assembly during the past years, also defrauding or perverting the Constitution, has deliberately "transformed" the said Committees into simple "parliamentary Commissions" reducing the civil society's right to political participation. The Assembly in all the statutes sanctioned regarding such Committees and the appointment process, has established the composition of all the Nominating Committees with a majority of parliamentary representatives (whom by definition cannot be representatives of the "civil society"), although providing, in addition, for the incorporation of some other members chosen by the National Assembly itself from strategically selected "non-governmental Organizations."

The result has been the complete control of the Nominating Committees, and the persistence of the discretional political and partisan way of appointing the officials head of the non elected branches of government, which the provisions of the 1999 Constitution intended to limit, by a National Assembly that since 2000 has been complete controlled by the Executive.

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[16] See Allan R. Brewer-Carias, "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 Publico y Administrativo*. Year 5. N° 5-2005. San José, Costa Rica 2005. pp. 76-95.

This practice even pretended to be constitutionalized through the rejected Constitutional Reform of 2007, with the proposal to formally establish exclusively parliamentary Nomination Committees, instead of being composed of representatives of the various sectors of civil society.[17]

## IV. THE CATASTROPHIC DEPENDENCE AND SUBJECTION OF THE JUDICIARY

The effects of the dependency of the branches of government subjected to the Legislative Power and through it to the Executive, have been particularly catastrophic regarding the Judiciary, which after been initially intervened by the Constituent National Assembly in 1999[18], continued to be intervened 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 process 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

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[17] 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*, Editorial Jurídica Venezolana, Caracas, 2007; and *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.

[18] See Allan R. Brewer-Carias, *Debate Constituyente, (Aportes a la Asamblea Nacional Constituyente)*, Volume I, (August 8-Spetember -), Caracas 1999.

the Executive, is in charge of administering all the Venezuelan judicial system, particularly, by appointing and dismissing judges.[19]

The process began with the appointment, in 1999 of new Magistrates of the Supreme Tribunal of Justice without complying with the constitutional conditions, made by the National Constituent Assembly itself, by means of a Constitutional Transitory regime sanctioned after the Constitution was approved by referendum.[20] From there on, the intervention process of the Judiciary 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.

For that purpose, the constitutional conditions needed to be elected Magistrate of the Supreme Tribunal and the procedures for their nomination with the participation of representatives of the different sectors of civil society, were violated since the beginning. First, as aforementioned, in 1999 by the National Constituent Assembly itself once it dismissed the previous Justices, appointing new ones

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[19] See Allan R. Brewer-Carias, "La progresiva y sistemática demolición de la autonomía e independencia del Poder Judicial en Venezuela (1999-2004)", in *XXX Jornadas J.M. Dominguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto, 2005. pgs. 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.

[20] See the comments regarding this Transition Regime in Allan R. Brewer-Carias, *Golpe de Estado y proceso constituyente en Venezuela*, Universidad Nacional Autónoma de México, Mexico 2002, pp. 345 ff.

without receiving any nominations from any Nominating Committee, and many of them without compliance with the conditions set forth in the Constitution to be Magistrate. Second, in 2000, by the new elected National Assembly by sanctioning a Special Law in order to appoint the Magistrates, in a transitory way, without compliant with those constitutional conditions.[21] And third, in 2004, again by the National Assembly by sanctioning the Organic Law of the Supreme Tribunal of Justice, increasing the number of Justices from 20 to 32, and distorting the constitutional conditions for their appointment and dismissal, allowing the government to assume an absolute control of the Supreme Tribunal, and in particular, of its Constitutional Chamber.[22]

After this 2004 reform, the final process of selection of new Justices was subjected to the President of the Republic will, as was publicly admitted by the President of the parliamentary Commission in charge of selecting the candidates for Magistrates of the Supreme Tribunal Court of Justice, who later was appointed Ministry of the Interior and Justice. On December 2004, he said the following:

> "Although we, the representatives, have the authority for this selection, the President of the Republic was consulted and his

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[21] For this reason, in its 2003 *Report on Venezuela,* the Inter-American Commission on Human Rights, observed that the appointment of Judges of the Supreme Court of Justice did not apply to the Constitution, so that "the constitutional reforms introduced in the form of the election of these authorities established as guaranties of independence and impartiality were not used in this case. See Inter-American Commission of Human Rights, 2003 *Report on Venezuela*; paragraph 186.

[22] See the comments to this statute in Allan R. Brewer-Carias, *Ley del Tribunal Supremo de Justicia*, Editorial Jurídica Venezolana, Caracas 2004.

> opinion was very much taken into consideration." He added: "Let's be clear, we are not going to score auto-goals. In the list, there were people from the opposition who comply with all the requirements. The opposition could have used them in order to reach an agreement during the last sessions, be they did not want to. We are not going to do it for them. There is now one in the group of postulates that could act against us…". [23]

This configuration of the Supreme Tribunal, as 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 the corner stone of the Rule of Law and the basic of all democratic institutions.

On the other hand, as aforementioned, according to article 265 of the 1999 Constitution, the Magistrates can be dismissed by the vote of a qualified majority of the National Assembly, when grave faults are committed, following a prior qualification by the Citizens Power. 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. Unfortunately, this provision was also distorted by the 2004 Organic Law of the Supreme Tribunal of Justice, in which it was established in an unconstitutional way that the Magistrates could be dismissed by simple majority when the "administrative act of their

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[23] See in *El Nacional*, Caracas 12-13-2004. That is why the Inter-American Commission on Human Rights suggested in its Report to the General Assembly of the OAS corresponding to 2004 that "these regulations of the Organic Law of the Supreme Court of Justice would have made possible the manipulation, by the Executive Power, of the election process of judges that took place during 2004". See Inter-American Commission on Human Rights, 2004 *Report on Venezuela*; paragraph 180.

appointment" is revoked (article 23,4). This distortion, contrary to the independence of the Judiciary, also pretended to be constitutionalized with the rejected 2007 Constitutional reform, which proposed to establish that the Magistrates of the Supreme Tribunal could be dismissed in case of graves faults, but just by the vote of the majority of the members of the National Assembly." [24]

The consequence of this political subjection is that all the principles tending to assure the independence of judges at any level of the Judiciary have been postponed. 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 (articles 254 and 267). Unfortunately, none of these provisions have been implemented, and on the contrary, since 1999, the Venezuelan Judiciary has been composed by temporal and provisional judges,[25] lacking stability and

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[24] 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*, Editorial Jurídica Venezolana, Caracas, 2007; and *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.

[25] The Inter-American Commission on Human Rights said: "The 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", *Informe sobre la Situación de los Derechos Humanos en Venezuela*; OAS/Ser.L/V/II.118. d.C. 4rev. 2; December 29, 2003; paragraph 11. The same Commission also said 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

being subjected to the political manipulation, altering the people's right to an adequate administration of justice. And regarding the disciplinary jurisdiction of the judges, it has not yet been established, and with the authorization of the Supreme Tribunal, a "transitory" Reorganization Commission of the Judicial Power created since 1999, has continued to function, removing judges without due process.[26]

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 Tenures", addressed to accidental, temporary or provisional judges, by-passing the entrance system constitutionally established by means of public competitive exams (article 255), by consolidating the effects of the provisional appointments and their consequent power dependency.

## V. THE SUPREMACY OF THE EXECUTIVE AND THE ABSENCE OF CHECK AND BALANCE

But if the supremacy of the National Assembly over the Judicial, Citizen and Electoral Powers is the most characteristic sign of the implementation of the Constitution of 1999 during the last decade, the distortion of the separation of powers principle transformed into a

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Venezuela. Today, the information provided by the different sources indicates that more than 80% of Venezuelan judges are "provisional". Idem, Paragraph 161.

26 See Allan R. Brewer-Carías, "La justicia sometida al poder y la interminable emergencia del poder judicial (1999-2006)", en *Derecho y democracia. Cuadernos Universitarios*, Órgano de Divulgación Académica, Vicerrectorado Académico, Universidad Metropolitana, Año II, No. 11, Caracas, septiembre 2007, pp. 122-138

power concentration system, also derives from the supremacy that, from a political-party's point of view, the Executive Power has over the National Assembly.

In the Constitution of 1999, the presidential system has been reinforced, amongst other factors, because of the extension to six years of the presidential term; the authorization of the immediate reelection for an immediate period of the President of the Republic (article 203), and the maintaining of it election by simple majority (article 228). In the rejected Constitutional Reform of 2007, the term of the President was even proposed to be extended up to seven years, and the indefinite reelection of the President of the Republic was one of the main proposals contained in it.[27]

With this presidential model, to which the possibility of the dissolution of the National Assembly by the President of the Republic is added even though in exceptional cases (Articles 236,22 and 240), the presidential system has been reinforced not even finding any check and balance, for instance in the Senate, which in 1999 was eliminated.

Also, the presidential system has been reinforced with other reforms, like the provision for legislative delegation to authorize the President of the Republic, by means of "delegating statutes" (enabling

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27 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*, Editorial Jurídica Venezolana, Caracas, 2007; and *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.

laws), to issue decree-laws, and not only in economic an financial matters (article 203). In a certain way, the idea mentioned by Professor Rosenn referring to the Brazilian system, of a Legislator that in fact is not a legislator has been constituionalized in Venezuela. That is why, according to this provision, the fact is that the fundamental legislation of the country sanctioned during the past decade has been contained in these decree-laws, which have been approved without assuring the mandatory constitutional provision for public hearings, established to 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 is compelled to submit draft legislation to public consultation, asking the opinion of citizens and the organized society (article 211). This is the concrete way by which the Constitution tends to assure the exercise of the political participation right in the process of drafting legislation. This constitutional obligation, of course, must also be complied by the President of the Republic when a legislative delegation takes place. But nonetheless, in 2007 and in 2008, the President of the Republic, following the same steps he took in 2001, has 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 complying

with the obligatory public hearings, violating the citizens right to political participation.[28]

The last case occurred just two months ago, during July and August 2008, when the President of the Republic, according to the powers to legislate by decree that were delegated upon him by his completely controlled National Assembly on January 2007, has 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.[29]

Unfortunately, even being all unconstitutional, those Decree Laws have been enacted and will be applied without any possibility of control or judicial review. The President is sure that no Constitutional

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[28] See the comments in Allan R. Brewer-Carías, "Apreciación general sobre los vicios de inconstitucionalidad que afectan los Decretos Leyes Habilitados" en *Ley Habilitante del 13-11-2000 y sus Decretos Leyes*, Academia de Ciencias Políticas y Sociales, Serie Eventos Nº 17, Caracas 2002, pp. 63-103

[29] 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 reforms; the power given to the President to appoint national government officials over the 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 reforms; the recentralization of the national executive branch of powers that today belong to the states and decentralized autonomous institutes was also part of the reforms: the enlargement of government powers to intervene in economic affairs was also 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 Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition", in *Revista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp.12.

Chamber judicial review decision will be issued, being such Chamber a wholly controlled entity that has proved to be his most effective tool for the consolidation of his authoritarian government, completely contrary to what Chief Justice Richard explained this morning regarding the Canadian constitutional system and the role of the courts preserving the rule of law.

In contrast, only the complete subjection of all branches of government to the Executive will, can explain why a Head of State of our times, as is the case of President Chávez in Venezuela, can say challenging his opponents in a political rally held two months ago, on August 28, 2008, the following:

> "I warn you, group of Stateless, putrid opposition.
>
> 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 opposition media; I will have no compassion whatsoever …This Revolution came to stay, forever !
>
> You can continue talking stupid thinks … I am going to intervene all communications and I will close all the enterprises I consider that are of public usefulness or of social interest! Out [of the country] contractors and Forth Republic corrupt people !
>
> **I am the Law … I am the State** !! 30

Nonetheless, this was not the first time that the President of the Republic has used this expression. In 2001, when he approve more

[30] "*Yo soy la Ley…, Yo soy el Estado!!*" See the referente in the Blog of Gustavo Coronel, *Las Armas de Coronel*, 15 de octubre de 2008: http://lasarmasdecoronel.blogspot.com/2008/10/yo-soy-la-leyyo-soy-el-estado.html

than 48 Decree laws, also via delegate legislation, he also said, although in a different way: "**The law is me. The State is me**."[31]

I am sure that in a Forum like this one we have today, full of distinguish constitutional lawyers, it is enough to hear this last and sole expression from a Head of State, which although attributed to Luis XIV he never said it,[32] to realize and understand the tragic institutional situation Venezuela is currently facing, precisely characterized by a complete absence of separation of powers and consequently, of a democratic government, all achieved through a process of defraudation of the Constitution and of democracy.

In a similar way to the situation of Nicaragua described this morning by Renaldy Gutierrez , the situation of Venezuela has also been a process of perversion of democracy and of the rule of law, with no precedent whatsoever in our constitutional history.

Anyway, for those who doubt about the possible circumstantial effectiveness of the principle of separation of powers in any country, the case of Venezuela is a useful one in order to really understand what mean to not to have that principle effectively in force. As has been recently summarized by Teodoro Petkoff, editor and founder of *Tal Cual*, one of the important newspaper in Caracas:

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31 "*La ley soy yo. El Estado soy yo*". See in *El Universal,* Caracas 4–12–01, pp. 1,1 and 2,1..

32 This famous phrase was attributed to Louis XIV, when in 1661 he decided to govern alone after the death of Cardinal Mazarin, but was never pronounced by him. See Yves Giuchet, *Histoire Constitutionnelle Française (1789–1958)*, Ed. Erasme, Paris 1990, p.8

"Chavez controls all the political powers. More that 90% of the Parliament obey his commands; the Venezuelan Supreme Court, whose number 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… The Prosecutor General's Office, the Comptroller's Office and the Public Defender are all offices held by "yes persons," absolutely obedient to the orders of the autocrat. In the National Electoral Council, four of five members are identified with the government. The Venezuelan Armed Forces are tightly controlled by Chávez. Therefore, form a conceptual point of view, the Venezuelan political system is autocratic. All political power is concentrated in the hands of the President. There is no real separation of Powers."[33]

November 7th, 2008

[33] See Teodoro Petkoff, "Election and Political Power. Challenges for the Opposition," in *Revista. Harvard Review of Latin America*, David Rockefeller Center for Latin American Studies, Harvard University, Fall 2008, pp.11-12