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## The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime

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In December 1999, a new constitution was approved in Venezuela as a result of a constitution-making process developed during that year. A national constituent assembly elected that same year sanctioned the new constitution, which was submitted to a referendum held on December 15, 1999, and approved.<sup>1</sup>

This author was an elected member of the national constituent assembly, participating in all its sessions and constitutional discussions. Nonetheless, eventually he opposed the sanctioning of the constitution and was one of the leaders of the political campaign against approving the constitution in the referendum. This position was based on his multiple dissenting and negative votes in the constituent assembly and on his publicly expressed fear that the new constitution,<sup>2</sup> despite its advanced civil and political rights regulations,<sup>3</sup> was an instrument framed to develop an authoritarian regime. This fear was based on the Constitution's provisions allowing the possibility of concentration of

state power, state centralization, extreme presidentialism, extensive state participation in the economy, general marginalization of civil society in public activities, exaggerated state social obligations reflecting state oil-income populism, and extreme militarism.<sup>4</sup>

Unfortunately, the warning signs of 1999–2000<sup>5</sup> have become reality. The political system that arose from the 1999 constitution-making process has turned out to be the current authoritarian regime, led by former lieutenant-general Hugo Chavez Frías, one of the leaders of the failed 1992 coup d'état.<sup>6</sup> Chavez was elected president of the republic in the general elections of December 1998<sup>7</sup> and was reelected in December 2006.<sup>8</sup> After nine years of consolidating the existing authoritarian regime, in August 2007 he proposed to the national assembly a radical reform to the constitution to formally consolidate a socialist, centralized, and militaristic police state.<sup>9</sup> The assembly sanctioned the reforms on November 2, 2007; the people, however, rejected them in a referendum held

on December 2, 2007. In any event, these sorts of fundamental transformations of the State can only be sanctioned by a National Constituent Assembly,<sup>10</sup> and cannot be approved by a “constitutional reform” procedure under article 342 of the constitution, as the President proposed in contravention of the constitution. In 2009 one of the rejected “constitutional” reforms proposals of 2007, seeking to establish the possibility for the continuous reelection of the President of the Republic, was again submitted to referendum held on February 15th 2009, this time by means of a “constitutional amendment,” which was finally approved.<sup>11</sup>

The 1999 constitution replaced the previous 1961 constitution,<sup>12</sup> becoming the twenty-sixth such document in the history of the country.<sup>13</sup> The 1999 constitution-making process was not the first of its kind in Venezuelan constitutional history. Originally, the independent and autonomous state of Venezuela was created through two initial constitution-making processes. The first one took place in 1811, after the declaration of independence (July 5, 1811) of the Spanish colonies that were integrated in 1777 into the General Captaincy of Venezuela, creating the Confederation of States of Venezuela (1811 constitution). The second process occurred in 1830, after the separation of the provinces of Venezuela from the Republic of Colombia that had been created nine years earlier, in 1821, by Simon Bolivar, when he managed to integrate the ancient Spanish colonies established in what is today the territories of Ecuador, Colombia, and Venezuela (1830 constitution).

Seven later constitution-making processes were carried out in 1858, 1863, 1893, 1901, 1914, 1946, and 1953 through constituent assemblies or congresses, with as many resulting constitutions. In each case, the constitution-making process was the consequence of a *de facto* rejection of the existing

constitution, through a coup d'état, a revolution, or a civil war.<sup>14</sup>

The constitution-making process of 1999, in contrast, had a peculiarity that made it different from all the previous processes in Venezuelan history, and even from many similar processes that have occurred in other countries in the last decades: It was not the result of a *de facto* rejection of the previous constitution, through a revolution, a war, or a coup d'état. Rather, similar to the 1991 Colombian, 2006 Bolivian, and 2007 Ecuadorian<sup>15</sup> constitutional processes, the Venezuelan constitutional process of 1999 began as a democratic process that in its origins did not involve a rupture of the previous political regime.<sup>16</sup>

That said, the process did take place in the context of a severe political crisis<sup>17</sup> that was affecting the functioning of the democratic regime established in 1958.<sup>18</sup> The crisis had arisen from the lack of evolution from a system of overly centralized political parties,<sup>19</sup> which existed then and still exists to this day. The call for the referendum consulting the people on the establishment of the constituent national assembly, made by the then–newly elected Chavez through a decree issued on February 2, 1999, intended to ask the people their opinion on a constituent national assembly “aimed at transforming the State and creating a new legal order that allows the effective functioning of a social and participative democracy.”<sup>20</sup> This formal *raison d'être* of the constitutional process of 1999 is why, with few exceptions, it would have been difficult to find anyone in the country who opposed it. Few would argue against transforming the state and putting into practice a social, participative, and effective form of democracy. To accomplish this goal, undoubtedly, a political conciliation and participative process was necessary.

But unfortunately, Chavez did not formally conceive the constitutional process as

an instrument of conciliation aimed at reconstructing the democratic system and assuring good governance. That would have required the political commitment of all components of society and the participation of all sectors of society in the design of a new functioning democracy, which did not occur.<sup>21</sup> Instead, the constitutional process of 1999 facilitated the total takeover of state power by a new political group that crushed all the others, including the then-existing political parties. Almost all opportunities for inclusion and public participation were squandered. Moreover, the constitution-making process became an endless coup d'état<sup>22</sup> when the constituent assembly, elected in July 1999, began to violate the existing 1961 constitution by assuming powers it lacked under that text and under the terms of the April referendum that created it. As an independent nonpartisan candidate, this author was elected to the 1999 constituent assembly and participated in all its discussions; he dissented orally and in writing on all these unconstitutional and undemocratic decisions.<sup>23</sup>

The following sections trace the regime's seizure of power, beginning with the consultative referendum on the calling of a constituent assembly in April 1999, continuing through the election of the constituent assembly in July 1999 and the period from August 1999 to January 2000, during which the assembly exercised supraconstitutional power, and finally through the drafting, discussion, and approval of a new constitution by referendum in December 1999. The review shows that the 1999 constitution-making process failed as an instrument for political reconciliation and democratization.<sup>24</sup> With the benefit of hindsight, it is now clear that the stated democratic purposes of the process have not been accomplished. There also has not been an effective reform of the state, except for the purpose of authoritarian institution building, or the creation of a so-

cial and participative democracy, unless one can consider as democratic the election of a populist government that has concentrated all branches of government and crushed political pluralism. If political changes of great importance have been made, some of them have contributed to aggravating the factors that provoked the crisis in the first place. New political actors have assumed power, but far from implementing a democratic conciliation policy, they have accentuated the differences among Venezuelans, worsening political polarization and making conciliation increasingly difficult. The seizure of power that characterized the process has opened new wounds, making social and political rivalries worse than they have been for more than a century. Despite Venezuela's extraordinary oil wealth during the first years of the twenty-first century, the social problems of the country have increased.

### **The Political System, the Crisis of 1999, and the Need for Democratic Reconstruction**

To understand the failure of Venezuela's 1999 constitution-making process as an instrument aimed at reinforcing democracy, it is essential to analyze its political background. As previously mentioned, the process began in the midst of a crisis facing the political system established in Venezuela at the end of the 1950s. That system was established as a consequence of the democratic (civil-military) revolution of 1958, during which then-president of the republic General Marcos Pérez Jiménez, who had led a military government for almost a decade, fled the country.

The democratic revolution was led mainly by three political parties, the consolidation of which began in the 1940s: the social democratic Acción Democrática (AD), the Christian democratic Partido Social Cris-

tiano (COPEI), and the liberal Unión Republicana Democrática (URD) parties. The parties agreed to establish democracy in Venezuela through a series of written agreements, the most famous of which was the so-called Pacto de Punto Fijo (1958). That document constitutes an exceptional example in the political history of Latin America of an agreement among political elites to assure the democratic governance of a country.<sup>25</sup> The democratic political system consolidated during the 1960s and 1970s under that agreement featured a democracy of parties, centralism of the state, and a system of presidential government subject to parliamentary control.

#### *Party Domination and the Demand for Participation*

The political parties increasingly monopolized the political regime established from the 1960s as a representative and pluralist democracy. Though they had established the democracy, they did not understand that the effects of the democratization process required the system of governance to become more representative and participatory.<sup>26</sup>

Democratic representation ended up being an issue exclusively for parties themselves. The d'Hondt method of electing party representatives constituted a system of proportional representation, in which party representatives felt more and more accountable to their party rather than to their constituents or community. In addition, public participation became a monopoly of the political parties, which progressively penetrated all of civil society, from trade unions and professional associations to neighborhood organizations.

The proportional representation system was established directly in the 1961 constitution and applied to all representative elections at the national, state, and municipal levels, allowing only the possible establish-

ment by statute of a different system at the local level, which partially occurred in the 1980s and the 1990s.<sup>27</sup> The absolute dominance of the congress by representatives of two or three political parties with no direct relationships to their supposed constituencies provoked the progressive popular rejection of the parties and the congress, which was seen as an exclusive, partisan body and not as a house of representatives of the people. As a result, electoral support for the two main traditional parties, AD and COPEI, dropped from 92.83 percent in 1988 to 45.9 percent in 1993 to 36.1 percent in November 1998. In December 1998, when Chavez was elected president, support dwindled to 11.3 percent.<sup>28</sup>

At the beginning of the 1980s, the public began to make new and diverse demands for representation and political participation, but those demands were not met. Among other things, they called for a reform of the electoral system. In general, they wanted to make the democracy more participative. There was thus an urgent need for local government reform, as it was the only effective way to assure democratic participation. However, this was not generally understood.

Municipalities in Venezuela were and still are so disconnected from their citizens as to be of no benefit to them. They are not the primary political unit or the center of political participation, nor are they an effective instrument to manage local interests. They are accountable to no one; no one is interested in them except the political parties and they have become a mechanism of political activism and unpunished corruption.<sup>29</sup>

Thus, while not eliminating political representation, the 1999 reforms should have created mechanisms that would have allowed people to participate on a daily basis in their local affairs. This should have been one of the purposes of the constitutional process of that year.<sup>30</sup>

*State Centralism and the Crisis of Decentralization*

Venezuela has been a federal state since the Constitution of the Confederation of the States of Venezuela, dated December 21, 1811. Just as federalism was the only constitutional force uniting the previously independent thirteen colonies of the United States, in 1811 in Venezuela, it was the only constitutional means of bringing together the dispersed and isolated seven provinces that comprised the General Captaincy of Venezuela. Subsequently, Venezuelan political history has been marked by swings of the pendulum between centralization and decentralization:<sup>31</sup> In the early stages of the republic, despite the centralist orientations of Simon Bolivar (1819–21),<sup>32</sup> regionalist pressure led in 1830 to the formation of a mixed central-federal form of state, which became definitively consolidated as a federal system in 1864 when the United States of Venezuela was established.

However, the federation as it existed in the nineteenth century was abandoned in 1901, and throughout the twentieth century, the country experienced a process of political centralization.<sup>33</sup> Centralized governance was autocratic in its first phase, but beginning in 1935, it evolved into the more democratic form of the past decades. At the end of the twentieth century, Venezuela remained a centralized federation, with power concentrated at the national level and illusory delegations of power to the federal states. At the same time, the centralism of the state led to the centralization of the political system, as the political parties became dominated by party leaders and party organizations governed from the center (i.e., from Caracas).

With the regional and local *caudillo* leadership of the nineteenth century long over and the twentieth-century consolidation of the national state, the call for increased democratization and decentralization in the

modern era faced formidable challenges. Not only was it difficult to enhance the autonomy of local authorities, but there was resistance also to admit the need to devolve power even to intermediate levels of government. This state of affairs impeded the democratization of the country. Decentralization is a consequence of democracy and, at the same time, a necessary condition to its survival and improvement. It is an instrument to exercise power at the intermediate level in the territory, which should, in turn, link the activities of the center to regions and communities. There are no decentralized autocracies;<sup>34</sup> decentralization of power is only possible in a democracy. Consequently, the public outcry of 1989 called for the parties to accelerate state reforms related to political decentralization on the basis of provisions in the 1961 constitution. As a result of these demands, in 1989 state governors were directly elected for the first time in 100 years, and the introduction of direct elections of mayors superseded exclusive government by council on the local level.<sup>35</sup>

Without a doubt, the above democratic remedies breathed life into the system and allowed democracy to survive in the 1990s. Nevertheless, the decentralizing advances made as of 1993<sup>36</sup> were abandoned and the political system entered into a terminal crisis in the last years of that decade.<sup>37</sup> That crisis, as mentioned above, provoked the calling of a constituent assembly, the main objectives of which should have been to realize the decentralization of power and consolidate democracy.

*The Demand for Reform*

Latin American constitutionalism in recent decades has experienced an expansion of the traditional horizontal concept of separation of powers beyond the classic legislative, executive, and judicial powers. Many Latin

American states have introduced a series of constitutional and autonomous institutions outside of the three classical branches of government, such as general controller-ships, defenders of the people or of human rights, judiciary councils, and public ministries (or public prosecutors). In addition, to increase the participation of citizens in the democratic order, they have introduced new remedies to protect citizens' rights. These measures have included judicial review of the constitutionality of legislation and judicial guarantees of constitutional rights, together with improvement in citizens' abilities to use the action of *amparo*—a specific judicial remedy for the protection of constitutional rights<sup>38</sup>—all of which have required more judicial independence and autonomy. The reforms have significantly transformed the system of checks and balances regulating the traditional powers in those states. There were demands to institute similar reforms in Venezuela in the late 1990s, which would have required a transformation of the balance and counterbalance among the traditional state powers; accomplishing these reforms should have been the purpose of the constitution-making process of 1999.

There was a particular need for reform in Venezuela. Although the Venezuelan system, like other Latin American systems, has been characterized by presidentialism, it was moderated by a series of parliamentary controls on the executive. Paradoxically, the crisis of the Venezuelan system stemmed not from excessive presidentialism, but from excessive parliamentarism, which took the form of a monopolistic control of power by the political parties.<sup>39</sup> Criticisms of this control in the late 1990s focused in particular on the congress's appointments of the heads of the nonelected organs of public power—the Supreme Court, judicial council, general controller of the republic, general prosecutor of the republic, and electoral supreme council. Blatant partisanship was shown in these ap-

pointments, which also lacked transparency and participation of civil society.<sup>40</sup> The demands for reform called for both increased checks and balances to break the monopoly of the political parties and reduce partisanship, as well as increased judicial guarantees of constitutional rights to ensure greater citizen participation in the democratic order.

Thus, the calling of a constituent assembly in 1999 should have been used as a vehicle to include and reconcile all political stakeholders beyond traditional political parties<sup>41</sup> in the redesign of the democratic system. The constituent assembly should have focused on establishing a system that would guarantee not only elections, but also all the other essential elements of democracy, as were later set forth in the Inter-American Democratic Charter enacted by the general assembly of the Organization of American States on September 11, 2001. These elements include “the respect for human rights and fundamental freedoms, the access to power and its exercise subject to the rule of law, the making of periodic, free and fair elections based on universal and secret vote as an expression of the sovereignty of the people, the plural regime of parties and political organizations and the separation and independence of the public powers” (Article 3).

## The Process and Its Deformation

### *The Choice of a National Constituent Assembly*

Although the call for a constituent assembly materialized in 1999, the demand for such a body as a vehicle of conciliation or political reconstruction had actually arisen earlier: It had been proposed before and in the aftermath of the two attempted military coups of 1992,<sup>42</sup> which had been carried out, among others, by Chavez, then a lieutenant colonel. The subject was publicly discussed from 1992 on,<sup>43</sup> but the leaders of the main political parties failed to appreciate the magnitude

of the political crisis, and instead of attempting to democratize institutions, they tried to maintain the status quo. This response discredited the leaders and their political parties, creating to a leadership vacuum in a regime that had been previously characterized by the hegemony of the political parties and their leaders.

In the middle of the political crisis, in 1998, Chavez as a presidential candidate raised the issue of the calling of a constituent assembly, only a few years after criminal charges against him stemming from his 1992 attempted military coup were withdrawn. The proposal was disputed by some of the traditional political parties and rejected by others; all political elements rejected the idea that the congress elected in December of 1998 could take the lead in the constitution-making process.<sup>44</sup> Consequently, the calling of the assembly became Chavez's exclusive project<sup>45</sup> and remained so after he was elected president in December 1998, with an overwhelming majority of 60 percent of the cast votes. However, the call for a constituent assembly posed a seemingly insurmountable constitutional problem: The text of the 1961 constitution did not provide for the institution of such an assembly as a mechanism of constitutional reform. That text set out only two procedures for revising the constitution, one that would apply in the case of a simple amendment, and another that would apply in the case of a larger "general reform."<sup>46</sup> Both procedures required the vote of both houses of congress, with additional approval by popular referendum or by the majority of the states' assemblies, without any provision for the creation of a separate constituent assembly.

### *Legitimacy and the Rule of Law*

In December 1998 and January 1999, after Chavez's election and due to his commitment to the constituent assembly process, the political debate was not about whether or not

to call an assembly, but about the way to do it.<sup>47</sup> The question was whether the election of the assembly required a previous constitutional amendment or whether the concept of popular sovereignty justified the election of an assembly in the absence of preexisting constitutional authority. In short, it was a conflict between constitutional supremacy and popular sovereignty.<sup>48</sup>

In hindsight, considerations of rule of law should have resolved the debate. Viewed from this perspective, there is no doubt that a constitutional amendment was required. It was the only way that the issue could have been resolved without violating the text of the existing constitution.<sup>49</sup> On the contrary, violating the constitution for a constitution-making process, giving preference to the supposed will of the people (popular sovereignty) over the rule of law (constitutional supremacy), always leaves an indelible imprint of political legitimacy doubts, which eventually can serve as an excuse to revert the situation.<sup>50</sup>

However, buoyed by his popularity of the moment, the president-elect publicly pressured the Supreme Court to decide the question. Members of civil society had brought the issue before the court through a request for interpretation, which was available under the statute governing the court. On January 19, 1999, almost two weeks before the president took office, the court issued two decisions that failed to resolve the issue in an express manner.<sup>51</sup> The decisions acknowledged the possibility of calling for a consultative referendum to seek popular opinion regarding the election of a constituent assembly and presented a theoretical summary of the constitutional doctrine of constituent power. However, they said nothing about whether a constitutional amendment was required,<sup>52</sup> which was the main purpose of the request for interpretation.

That decision emboldened the president, in his first official act after assuming office

on February 2, 1999,<sup>53</sup> to issue a decree ordering a consultative referendum without constitutional authorization, in which he proposed to ask the people to authorize him, and him alone, not only to call the constituent assembly, but also to define its composition, procedure, mission, and duration. Thus, he purported to hold a referendum on an assembly in which people would vote blindly without knowing the procedure for its election, its composition, or the nature or duration of its mission.

It is hardly surprising that the constitutionality of Chavez's decree was challenged before the Supreme Court,<sup>54</sup> which ruled in a series of judicial review decisions that the manner in which the president had acted in calling for the referendum on the assembly was unconstitutional.<sup>55</sup> It also declared that the composition, procedure, mission, and duration of the assembly would have to be submitted to the people. It further ruled that there was no authority under the 1961 constitution to endow an assembly with "original"<sup>56</sup> constituent power, as the president's proposal had purported to do.

The members of the Supreme Court had been elected years before by the party-controlled congress, and it was that same court which, under tremendous political pressure from president-elect Chavez, issued the aforementioned ambiguous decision of January 1999, by which it allowed, without expressly deciding it, the possibility of the election of a constituent assembly. After having freed the political constituent forces of society as a means for participation, when the Supreme Court tried to control them by ruling that the assembly to be elected had to observe and act according to the 1961 constitution,<sup>57</sup> it was too late to achieve that goal. After its election in July 1999, the assembly crushed all the constituted powers, including the Supreme Court itself, violating the 1961 constitution then in force.<sup>58</sup>

### *The Electoral Rule*

Despite the Supreme Court's rulings and in the absence of any political negotiations among the various sectors of society, the president proceeded unilaterally with the consultative referendum on the calling of a constituent assembly on April 25, 1999. In a voting process in which only 38.7 percent of eligible voters cast their ballots—62.2 percent of eligible voters did not turn out to vote—the votes in favor obtained 81.9 percent of the vote and votes against captured 18.1 percent.<sup>59</sup> The approved proposal provided for the election of a 131-member constituent assembly: 104 members to be elected in 24 regional constituencies corresponding to the political subdivisions of the territory (states and the federal district); 24 members to be elected in a national constituency; and three members representing the Indian peoples, who comprise a very small portion of the Venezuelan population.

The referendum set up an electoral system in which candidates were to run individually. The 104 regional constituency seats were allotted according to the population of each state and the federal district. A list of all the candidates in each regional constituency was placed on the ballot in each constituency, and the voters had the right to vote for the number of candidates on their constituency's list corresponding to the number of seats allotted to their constituency. The elected candidates corresponding to the number of seats allotted were those receiving the highest number of votes. Voting proceeded in the same way on the national level for the 24 seats allotted, except that the voters were only allowed to choose 10 candidates from the list of those who were running.

The electoral system had no precedent in previous elections in Venezuela. It really amounted to a ruse by Chavez and his followers to assure their absolute control of the constituent assembly. In a campaign financed,

among others, as it was later known, by Venezuelan insurance companies and foreign banks,<sup>60</sup> the president appeared personally in every state of the country proposing his list of candidates to be elected in each constituency. On the national level, he proposed only 20 candidates for the 24 seats allotted; dividing the country in two, he proposed a list of 10 candidates to the voters of the eastern states of the country and a separate list of 10 to the voters of the western States. This was rather unusual in Venezuelan political tradition. After more than a hundred years of a nonreelection constitutional rule, Venezuelans were not used to having presidents directly involved in electoral campaigns, and any governmental involvement in elections had been considered illegitimate.

The election was carried out on July 25, 1999. Only 46.3 percent of eligible voters cast their ballots; 53.7 percent of eligible voters did not turn out to vote.<sup>61</sup> The candidates that the president supported obtained 65.8 percent of the votes cast, but the election resulted in control by his followers of 94 percent of the seats in the constituent assembly. All the president's supported candidates except one were elected, for a total of 123. Of the 104 candidates elected at the regional (state) level, only one belonged to the traditional parties (AD), and of the 24 candidates elected at the national constituency, only 4 independent candidates who opposed the president were elected without his support, perhaps because the president only proposed 20 candidates at the national level out of the 24 to be elected. The three elected Indian representatives were all followers of the president and his party.

As a result of the electoral scheme, instead of contributing to democratic pluralism, the election established a constituent assembly totally controlled by the very newly established government party and by the president's followers, in which all traditional

political parties were excluded. As mentioned, only one of the members out of 131 belonged to the traditional parties (one regional member) and four others were elected independently opposing the president.<sup>62</sup> Together, they instinctively became the opposition group in the assembly.

A constituent assembly formed by a majority of that nature was not a valid instrument for dialogue, political conciliation, or negotiation. It really was a political instrument to impose the ideas of a dominating group on the rest of society, totally excluding other groups.

#### *Seizure of Constituted Powers*

Before the election of the constituent assembly, not only Chavez but all the representatives to the national congress had been elected in December 1998, as per the provisions of the 1961 constitution. The governors of the twenty-three states, the representatives of the state legislative assemblies, and the mayors and members of the municipal councils of the 338 municipalities also had been elected in November 1998. That is to say, all the heads of the public powers set forth in the constitution had been popularly elected before the constitution-making process of 1999 began. In addition, the non-elected heads of the organs of state, such as the judges of the Supreme Court, the general prosecutor of the republic, the general controller of the republic, and the members of the supreme electoral council, had been appointed by the national congress, again in accordance with the 1961 constitution.

By the time the constituent assembly was elected on July 25, 1999, the constituted public powers elected and appointed only months before were functioning in parallel, with different missions. The constituent assembly was elected, according to the consultative referendum of April 1999 and to the

Supreme Court's interpretation, to design the reform of the state and establish a new legal framework institutionalizing a social and participative democracy, which was to be submitted to popular approval in a final referendum. It was not elected to govern or to substitute itself for or interfere with the constituted powers. Moreover, as the Supreme Court had declared, it had no original constituent authority.<sup>63</sup> However, in its first decision—adopting its own statute governing its functioning—the constituent assembly declared itself as “an original constituent power,” granting itself the authority to “limit or abolish the power of the organs of state” and setting forth that “all the organs of the Public Power are subjected to the Constituent National Assembly” and are “obliged to comply with its the juridical acts.”<sup>64</sup> In short, the constituent assembly declared itself as a state superpower, assuming powers that even the referendum of April 1999 had failed to grant. In this way, the constituent assembly, which functioned between July 1999 and January 2000, usurped public power, violated the 1961 constitution, and, in sum, accomplished a coup d'état.<sup>65</sup>

During the first months of the assembly's functioning, from August to September 1999, instead of conciliating and forming a new political pact for society, it usurped the role of the constituted powers elected in December 1998, which were functioning according to the 1961 constitution still in force. In August 1999, the assembly decreed the reorganization of all the public powers—that is, the three branches of government.<sup>66</sup> It encroached upon the judicial branch by creating a commission of judicial emergency to intervene in judicial matters, to the detriment of the autonomy and independence of existing judges.<sup>67</sup> It dissolved both the senates and the chambers of representatives of the national congress and the legislative assemblies of the states.<sup>68</sup> Finally, it suspended municipal elections.<sup>69</sup>

All the above actions were challenged before the Supreme Court, but in a decision of October 14, 1999, in contrast with its ruling in its earlier decision, the court upheld their constitutionality, recognizing the assembly as a supraconstitutional power.<sup>70</sup> This implied the attribution to the assembly of sovereign power, which it did not have, because the only sovereign power in a constitutional state is the people. However, the implication was the only way to justify the otherwise unconstitutional intervention of the constituted branches of governments, a confusion that was expressly pointed out by various magistrates' dissenting votes.<sup>71</sup> In issuing its decision, the court actually gave itself its own death sentence.<sup>72</sup>

The Supreme Court did not rule consistently with its previous decisions relating to the constituent assembly, even the ambiguous decision. The political pressure exercised upon it provoked this change, and the Supreme Court not only adopted a ruling in support of the constituent assembly's intervention in the judiciary, but also appointed one of its magistrates as a member of the commission of judicial emergency. In this situation, only the president of the Supreme Court resigned.<sup>73</sup> The others, by action or omission, submitted themselves to the new power, but only for two months, until almost all were sacked by the same assembly, using its supraconstitutional power to replace the court (see below).<sup>74</sup>

As a result, the initial period of the functioning of the constituent assembly was a period of confrontation and political conflict between the public power and the various political sectors of the country. The constituent process, in this initial phase, was not a vehicle for dialogue and consolidating peace or an instrument for avoiding conflict. On the contrary, it was a mechanism for confrontation, crushing all opposition or dissidence. The constituent assembly was thus subject to exclusive domination by one new

political party—Movimiento V República (MVR)—which was the party of the government, answering to the president. In this way, the constitution-making process was used to abolish the political class and parties that had dominated the scene in previous decades.

### *The Drafting Phase: Haste and Exclusion*

After the constituted powers had been either encroached upon or entirely usurped, the constituent assembly entered its second phase of work in September and October 1999. This involved the elaboration of the text of a draft constitution. The extreme brevity of this phase did not allow for any real public discussion or popular participation. The assembly rejected the method adopted in other constitutional processes whereby a broadly representative constitutional commission elaborates a draft that is later presented in a plenary session.<sup>75</sup>

Just before Chavez took office, he had informally created a constitutional council composed of independent political figures, but that council actually had devoted its time to the issues surrounding the election of the assembly. It never worked to develop a coherent constitutional draft, nor were its proceedings public or participative. It held no public meetings and met only with the president in the weeks before and after the installation of the Chavez government.

Thus, the constituent assembly began to work collectively without an initial draft. The president did submit to the assembly a document prepared with the assistance of the constitutional council he had appointed. Its intention was to propose ideas for the new constitution, but its contents were not completely coherent.<sup>76</sup> The assembly did not adopt the document as the draft constitution, but the drafting commissions used parts of it, particularly because their members in general had no expertise in constitutional studies. Also, two constitution drafts were

submitted to the assembly, one by a tiny left-wing party and another by a non-governmental organization (NGO) named *Primero Justicia*, which in 2002 became a center-right political party. Neither of these were adopted as drafts for the discussions and, due to their origins, they had no particular influence in the drafting commissions.

After two months of functioning, the constituent assembly began the process of elaborating a draft by appointing twenty commissions that dealt with the essential subjects of any constitution. Each commission was charged with coming up with a proposed draft for its respective subject area. This all occurred during only a few days, between September 2 and September 28, 1999. During this very short period, each commission acted in an isolated manner, consulting only briefly with groups the commission considered appropriate.<sup>77</sup>

Once the assembly had usurped all public power, the president urged it to complete the constitution drafting quickly, to end the political instability provoked by the constituent process and use the new constitutional framework to relegitimize the public powers through new elections. The timetable to finish the drafting of the constitution was not established by the referendum of April 1999, nor by the constituent assembly, but by its board of directors in response to presidential pressure.

By the end of September 1999, the twenty commissions sent their drafts to an additional constitutional commission of the constituent assembly, in charge of integrating the texts received. Collectively, the commissions' submissions included almost eight hundred articles. The commission was charged with forming a single draft. Unfortunately, the board of directors of the constituent assembly gave the commission only two weeks to integrate all the isolated drafts. The hasty process of elaborating the draft left no room for public discussion or for the participation

of civil society, whose input could have been incorporated into the discussions in plenary sessions.<sup>78</sup>

The draft that the constitutional commission submitted to the constituent assembly on October 18 turned out to be very unsatisfactory, as it was an aggregate or catalogue of wishes, petitions, and good intentions integrated into an excessively large text.<sup>79</sup> The draft followed many of the provisions of the 1961 constitution, with the addition of some portions of the president's proposed document. Some foreign constitutional provisions, particularly copied from the Colombian and Spanish constitutions,<sup>80</sup> were included in the draft constitutional text, and part of the text of the American Convention on Human Rights enriched the draft as well. Nevertheless, in the constituent assembly's process in general, no particular publicly known role was played by foreign experts<sup>81</sup> or governments, or by international or regional organizations. There was no time for that possibility.

The government imposed urgency in finishing the constitutional draft by requiring the constituent assembly to discuss and approve the draft in just one month, from October 19 to November 17, 1999, in order to submit the constitution for approval by referendum in December 1999. This schedule explains why only nineteen days were devoted to the first round of discussion sessions (October 20 to November 9) and three days to the second round (November 12 to 14), for a total of twenty-two days. During the discussions, this author intervened in all sessions, proposing drafts and expressing his opinions and dissenting votes,<sup>82</sup> and with the other opposition members of the assembly, led the political campaign for the vote against the constitution in the referendum because of its authoritarian content.<sup>83</sup> After one month of campaigning, the constitution was approved in the referendum of December 15, 1999.

Turnout was low: only 44.3 percent of eligible voters cast their votes (57.7 percent of eligible voters did not turn out to vote), with 71.8 percent voting for the constitution and 28.2 percent against it.<sup>84</sup>

However, the text approved did not conform to the operational language of the consultative referendum of April 1999. It failed to provide the new democratic and pluralistic vision the society required, nor did it define the fundamental principles required to reorganize the country politically or create a decentralized state based on participative democracy. Despite some good intentions and brief attempts at public education, the hastiness of the process rendered any effective public and political participation impossible. One of the twenty commissions of the constituent assembly was a participatory commission, but it was totally controlled by the president's followers, who developed explanatory activities related to the drafting process and to the content of the other commissions' drafts, including television programs. The sessions of the constituent assembly were also directly broadcast on television, allowing the public to follow the daily discussions. But the great debate that should have taken place in the assembly, on such issues as the monopoly of the political parties, decentralization and the power of local government, the expansion of institutional protections of human rights, or the basic mission of the constitution, never took place. There was no program of public education to encourage civil society groups and NGOs to submit proposals. The only minorities that can be said to have been offered an opportunity to participate were indigenous peoples, who, as mentioned above, were allowed three seats in the assembly. In the end, public participation was reduced to the votes cast by the public in the two referenda, in which the majority of eligible voters did not vote.

*The Prologue*

The ramifications of the departure from the rule of law entailed in the deformation of the constitutional process, described above, can be perceived not only in the events that immediately followed, but also in the crisis that continues to plague the political system.

In the week following the adoption of the constitution by popular referendum, the constituent assembly, without questioning the duration of its authority, adopted a new decree establishing a transitory constitutional regime<sup>85</sup> on December 20, 1999, which was not approved by popular referendum and which violated the newly adopted constitution, including its transitional provisions.<sup>86</sup> The 1999 constitution gives a very important participatory role to diverse sectors of civil society in appointing the heads of the branches of government not elected by universal vote—the judges of the supreme tribunal of justice, the general prosecutor of the republic, the general controller of the republic, the defender of the people, and the members of the national electoral council (Articles 264, 279, 295). The proposal for the appointments of such officials by the legislative body was due to be submitted by various nominating committees, the membership of which would include representatives of civil society. Under the terms of the new constitution, the national assembly was to appoint persons to these posts only on the basis of proposals submitted by the nominating committees. This innovation in the constitution was an attempt to reduce the power of political parties in the national assembly, which, as described above, had been making those appointments on the basis of patronage, in the absence of transparency.

As part of the unconstitutional transition set forth in the transitory constitutional regime decree, the constituent assembly ratified the president in his post and, in violation

of the new constitution and in the absence of any participation by civil society, directly appointed the members of the new supreme tribunal of justice, the members of the new national electoral council, the general prosecutor of the republic, the defender of the people, and the general controller of the republic, ending the tenure of those previously appointed. The constituent assembly, moreover, eliminated the congress definitively and created and appointed a new legislative national commission that had not been provided for in the 1999 constitution; until the new national assembly was elected to supplant the dissolved congress, this new commission assumed legislative power. This unconstitutional transitional regime was challenged on judicial review before the new supreme judicial tribunal created as part of the very same regime. Deciding in its own cause, the tribunal upheld the transitional regime's constitutionality, justifying it on the basis of the constituent assembly's supraconstitutional powers.<sup>87</sup>

Once the new national assembly was elected in August 2000, it adopted a special statute<sup>88</sup> that granted to it almost the same appointment powers that the dissolved congress had held and that the constituent assembly had exercised unconstitutionally during the transitional period: the power to appoint the judges of the supreme tribunal of justice, the general prosecutor of the republic, the general controller of the republic, the defender of the people, and the national electoral council. Before the newly elected assembly had a chance to make appointments under that special statute, an action challenging it was brought before the transitional supreme tribunal by the people's defender. Several other judicial actions were brought before the supreme tribunal against other actions the transitional authorities had taken, but all of them were upheld as constitutional.<sup>89</sup>

Of all the decisions the supreme tribunal made, the response to the challenge of the people's defender was perhaps the most startling, as it called upon the tribunal to be a judge and party in its own cause. It was a ruling on the constitutionality of its own appointment. Even though the supreme tribunal did not finally decide the action regarding the constitutionality of the 2000 special statute, in a preliminary decision, it accepted that the newly elected national assembly was also exercising transitional constitutional authority, and that the constitutional conditions to be elected member of the Supreme Tribunal did not apply to those signing the preliminary decision, because they were not to be "appointed" but to be "ratified."<sup>90</sup>

The subsequent statutes regulating the other constitutional branches of government also failed to respect the new constitution. Instead of forming the constitutionally required nominating committees, integrating representatives of the various sectors of civil society, the new national assembly established as vehicles for making appointments parliamentary commissions, which included only scattered participation by some members of civil society.<sup>91</sup>

But the transitional constitutional regime set forth in 1999 by the constituent assembly without popular approval fixed the general framework for the subsequent process of concentration of powers and the consequent development of the current authoritarian political regime. This regime, which unfortunately has enjoyed the support of the constitutional chamber of the supreme judicial tribunal, has taken shape in Venezuela as President Chavez envisaged when he came to power in 1998. Under it, the president completely controls all branches of government.<sup>92</sup> In particular, control of the supreme tribunal has led to a judiciary composed of more than 90 percent provisional or temporary judges;<sup>93</sup> it is thus without any autonomy or independence.<sup>94</sup>

## Process and Substance

The concept paper that forms the basis of this case study<sup>95</sup> refers to two substantive issues that are relevant to the 1999 constitution. One of those substantive issues relates to the so-called immutable principles found in many of the world's modern constitutions: Title I, Articles 1 and 3 of the 1961 constitution established the independence of the state and the republican and democratic form of government as immutable. Title I, Articles 1 and 6 of the 1999 constitution retain that feature. Apart from those very fundamental principles, no other immutable principles are to be found *expressis verbis* in either text.

Regarding the concept of the democratic form of government, however, the 1999 constitution, notwithstanding the immutable provision, breaks the essential democratic principles of separation of powers and of vertical distribution of state powers,<sup>96</sup> allowing the development of a centralized and plebiscitary system of government that is crushing democracy. This inconsistency within the text is a direct consequence of the successful effort by the president and his followers to use the constitution-making process to consolidate their power while at the same time maintaining a surface appearance of adherence to democratic norms.

The centralized and plebiscitary system that the 1999 constitution establishes is characterized, first, by the marginalization of the concept of political parties. In the constitutional text itself, even the expression *political parties* has disappeared. The 1999 constitution forbids public (i.e., state) financing of political organizations as well as the existence of party parliamentarian groups. It requires conscience voting by the members of the legislative assembly, forbidding any kind of voting instructions. Moreover, the constitution in principle limits the possibility of parties reaching agreement on the appointment of nonelected high public officials—such as justices of the supreme tribunal, general comp-

troller, public prosecutor, and members of the electoral council—by requiring the previously mentioned nominating committees to be formed only on the basis of representation of the various sectors of civic society.

However, not one of the above prescriptions is really in force. The president of the republic is the acting head of his own party, which completely controls the national assembly. He is the director of his party parliamentary group, in which he has imposed rigid party discipline. Through these mechanisms, he has intervened in the designation of the justices of the supreme tribunal and the members of the national electoral council, as well as the other nonelected high officials, disregarding the constitutional conception of the nominating committees, which have been converted effectively into extended parliamentary commissions firmly controlled by the government's party.<sup>97</sup>

Another aspect of such plebiscitary democracy that has been built under the new constitution is the progressive concentration of state powers, abrogating the principle of separation of powers among the branches of government. This has happened even though the 1999 constitution explicitly set forth a separation of powers among the executive, legislative, judicial, citizen,<sup>98</sup> and electoral branches of government. The constitution repeatedly specifies the independence of such branches of government, but in practice, this independence is undermined by the same text when it grants the national assembly (legislative branch) not only the power to appoint, but to remove the justices of the supreme judicial tribunal, the members of the national electoral council, the general comptroller, the public prosecutor, and the people's defender, in some cases by a simple majority vote.<sup>99</sup> That the heads of the nonelected branches of government can be removed from their offices by means of a parliamentary political vote—with no requirement of proof of misconduct or other objective grounds for removal, and

no procedural safeguards—is contrary to their independence, which has been corroborated in recent political practice.<sup>100</sup>

With the above provisions, the separation of powers framework has developed into a systemic concentration of powers, totally controlled by the president through the abovementioned control he exercises over the national assembly. In particular, the judiciary has lost its independence, confirmed by the fact that 90 percent of the judges are provisional or temporary judges and thus, by definition, political dependents. The mastermind of this system of concentration of powers has been the supreme tribunal itself—particularly its constitutional chamber, which by means of successive constitutional interpretation has cleared all the violations of the constitution committed by the other branches of government.<sup>101</sup>

Within this framework of concentration of powers, even more alarming is the unprecedented exaggeration of the power of the president that appears in the new constitution. As noted above, the excessive presidentialism that has characterized other Latin American systems has been traditionally checked in Venezuela by the powers of parliament. Nonetheless, several provisions of the new constitution reverse that tradition. First, the president continues to be elected by a relative majority, even though an absolute majority had long been recommended (Article 228).<sup>102</sup> Second, the president's term has been increased by five to six years (Article 230).<sup>103</sup> Third, for the first time in a century, the president could be elected for a consecutive additional term (Article 230),<sup>104</sup> a provision that in the 2009 "constitutional amendment" approved by referendum, has been eliminated allowing the possibility of the continuous and indefinite reelection of the President. Fourth, the national assembly may delegate lawmaking power to the president, and there is no limit on the powers that can be the subject of such a delegation (Articles 203 and

236.8).<sup>105</sup> Fifth, the president has the power to dissolve the national assembly after three votes of censure against the vice president (Article 236, Section 21), who nonetheless is conceived as an executive-branch official appointed by the president, with no parliamentary role. The parliamentary censure vote has a long tradition in Venezuela regarding cabinet ministers, but the provision concerning the vice president was an invention of the 1999 constitution.

Finally, and perhaps most significantly, the unprecedented increase in presidential power under the 1999 text has been accompanied by an equally unprecedented increase in the power of the military. For the first time in the history of Venezuelan constitutionalism, the new constitution exempts the military from all civilian control apart from that of the president himself.<sup>106</sup> The consequence has been the executive's progressive intervention in the armed forces, as well as the creation of militias (reserve forces)<sup>107</sup> tending toward the creation effectively of a military party.

The concept paper that guided preparation of this case study also refers to "certain fundamental issues, such as the power and status to be accorded to geographic subdivisions, and the centralization or devolution of power," and states that they "may be so integral to the construction of a stable peace as to be inseparable from an examination of the constitution-making process." This observation is particularly poignant in the Venezuelan case, as this is another area in which the deformation of the constitutional process described in the previous sections has resulted in an alarming incongruity between different portions of the text of the constitution. Article 4 of the 1999 Constitution defines the State as a "Federal decentralized State," and article 158 defines decentralization as a national policy, but other sections of the constitution make possible an entirely different reality. Those sections allow the centralization of powers at the national

level, progressively drowning any real possibility of political participation by the states of the federation and by the municipalities (local governments).<sup>108</sup>

Some historical analysis will help to underscore the incongruity. As noted above, before the establishment of the constituent assembly, there had been great public demand for reforms that would bring about the decentralization of the federal state. These reforms were to build upon those initiated in 1989, resulting in the direct election of state governors and the transfer of national powers to the states. However, in contrast to the general declaration of policy found in the text of Article 158, the new constitution has resulted in major setbacks to the prior reforms. First, Article 159 eliminates the senate and the bicameral nature of the legislature. This removes all possibility of equality among the federal states as a result of the unequal number of votes in the new single legislative chamber.<sup>109</sup> Second, the national government has been given authority in all tax matters not expressly delegated to the states and municipalities (Article 156, Section 12). Third, no tax power has been given to the states; even their power over sales tax has been eliminated (Article 156, Section 12). Fourth, Article 167, Section 5 provides that the states shall only have tax powers in matters expressly assigned by national law. Fifth, with the new text, powers that had previously been designated as exclusive to states have been subjected to the regulations of national legislation (Article 164). Sixth, even the exercise of concurrent powers has been made subject to the dictates of national law. Seventh, the autonomy of the states has been seriously limited by the constitutional provisions that allow the national assembly to regulate by means of statute, applicable throughout the federation by designation of the states' general comptrollers as well as the organization and functioning of the states' legislative councils or assemblies (Article 162).<sup>110</sup>

Clearly, despite the language of Article 158, the 1999 constitution has actually reversed the previous decentralizing reforms instead of building upon them.<sup>111</sup> This critical substantive development is a direct consequence of the manipulation of the constitution-making process by the president and his followers.

In particular, regarding the local governments (municipalities), in practice and in the constitutional text, they continue to be very far from citizens' reach, impeding any kind of real political participation.<sup>112</sup> Under the centralized and antiparticipatory democratic system of the 1999 constitution, the instruments for direct democracy have been deliberately confused with effective political participation. That is why local governments are gradually being replaced by newly created communal councils (2006) and citizens assemblies, all directed from the center, and without any electoral origin, creating the appearance that the people are participating.<sup>113</sup> In fact, to participate is to be part of, to appertain to, to be associated with, and that is only possible for the citizen when political power is decentralized and close to them. Thus, participative democracy, apart from elections, is only possible when effective decentralization of power exists. That is why only democracies can be decentralized.<sup>114</sup> Only with local governments established throughout the territory of a country can democracy be part of everyday life.<sup>115</sup> Nonetheless, in 2006 the national assembly sanctioned the Communal Council Law, creating such Councils as "participatory" institution directly depending from the President of the Republic, integrated with nonelected officials.<sup>116</sup>

It is certain is that the goal of participation cannot be achieved only by inserting instruments of direct democracy into a representative democratic framework, as has occurred in modern constitutionalism. Referenda can be useful instruments to perfect democracy, but by themselves cannot satisfy the aim

of participation. This can be understood by studying the 2002–04 process concerning the Venezuelan presidential recall referendum, which was converted into a ratification referendum of a plebiscitary nature.<sup>117</sup> A recall referendum is a vote asking the people if the mandate of an elected official must be revoked or not; it is not a vote asking if the elected official must remain or not in office. But in the 2004 recall referendum, the National Electoral Council, in giving the voting results, converted it into a plebiscite ratifying the president.

The result of the implementation of the 1999 constitution is that the Venezuelan democracy has been transformed, from a centralized representative democracy of more or less competitive and pluralist parties that alternated in government to a centralized plebiscite democracy, in which effectively all power is in the president's hands, supported by the military and by what amounts to a one-party system. The plebiscite democracy system has created an illusion of popular participation, particularly by means of the uncontrolled distribution of state oil income among the poor through governmental social programs that are not precisely tailored to promoting investment and generating employment.

Without a doubt, the plebiscite democracy is less representative and participatory than the traditional representative party democracy, which, notwithstanding all the warnings that were raised,<sup>118</sup> the traditional parties failed to preserve. All this is unfortunately contributing to the disappearance of democracy itself as a political system in Venezuela, which is much more than only elections and referenda, as has been made clear by the 2001 Inter-American Democratic Charter—a development that was intended to be furthered by the November 2, 2007 constitutional reforms, sanctioned by the national assembly but nonetheless rejected by popular vote in the December 2, 2007 referendum.

## Conclusion

The Venezuelan constitution-making process of 1999 failed to achieve its stated mission regarding political conciliation and improving democracy. Contrary to the democratic principle, instead of offering the participation sought by so many, the process resulted in the imposition of the will of one political group upon the others and upon the rest of the population. As an instrument to develop a constitutional authoritarian government, it can be considered a success. Undoubtedly, the democratically elected constituent assembly conducted a coup d'état against the 1961 constitutional regime, facilitated the complete takeover of all the branches of government by one political group, crushing the other political parties, and drafted and approved a constitution with an authoritarian framework that has allowed the installment of a government that has concentrated and centralized all state powers.

As the constitution did not result from a political pact among all the main political factions of the country, but rather from one group's imposition upon all the others, the new document is likely to endure for as long as those who imposed it remain in control. True reforms of the political system, founded in the democratization and political decentralization of the country, remain as pending tasks that the constituent assembly of 1999 could not accomplish.

On August 15, 2007, the president presented to the national assembly a constitutional reform proposal intending to consolidate a socialist, centralized, and militaristic police state, minimizing democracy and limiting freedoms and liberties.<sup>119</sup> The main purpose of the proposals could be understood from the president's speech at the presentation of the draft constitutional reforms,<sup>120</sup> in which he said that the reforms' main objective is "the construction of a Bolivarian and Socialist Venezuela."<sup>121</sup> This was intended, as

he explained, to sow "socialism in the political and economic realms,"<sup>122</sup> which the 1999 constitution did not do. When the document was sanctioned, said the president,

We were not projecting the road of socialism. . . . Just as candidate Hugo Chavez repeated a million times in 1998, "Let us go to a Constituent [Assembly]," so candidate President Hugo Chavez said [in 2006]: "Let us go to Socialism" and, thus, everyone who voted for candidate Chavez then, voted to go to socialism.<sup>123</sup>

Thus, the draft constitutional reforms that Chavez presented, according to what he said in his speech, propose the construction of "Bolivarian Socialism, Venezuelan Socialism, our Socialism, and our socialist model."<sup>124</sup> It is a socialism the "basic and indivisible nucleus" of which is "the community," one "where common citizens shall have the power to construct their own geography and their own history."<sup>125</sup> This was all based on the premise that "real democracy is only possible in socialism."<sup>126</sup> However, the supposed "democracy" referred to was one which "is not born of suffrage or from any election, but rather is born from the condition of organized human groups as the base of the population," as the president suggests in his proposed reform to Article 136. Of course, this democracy is not democracy; there can be no democracy without the election of representatives.

The president in his speech summarized all the proposed reforms in this manner:

on the political ground, deepen popular Bolivarian democracy; on the economic ground, create better conditions to sow and construct a socialist productive economic model, our model; the same in the political field: socialist democracy; on the economic, the productive socialist model; in the field of public administration: incorporate new forms in order to lighten the load, to leave behind bureaucracy, corruption, and administrative inefficiency, which are heavy burdens of the past still upon us like weights, in the political, economic and social areas.<sup>127</sup>

All the 2007 constitutional reform proposals were sanctioned by the national assembly on November 2, 2007 and rejected in the December 2, 2007 popular referendum, increasing the extreme polarization the country has experienced since 1999. The President and the National Assembly, nonetheless, announced that the rejected reforms were going to be implemented through legislation, which although in an unconstitutional way, it has occurred.<sup>128</sup>

No one should discard the possibility that, in the future, there will be a new demand for a new constituent assembly—a mechanism that the president and his supporters discarded in 2007—to be given the same challenge of serving as an agent of political conciliation and democratic reform. When the time comes, to succeed where the 1999 constituent assembly failed and reverse the tendency toward which the 2007 constitutional reforms were headed, in conceiving and electing such a body, Venezuela must bear in mind that it is always better to conciliate and achieve agreements before passing through the pain of civil strife than to arrive at the same agreements by means of a postconfrontation armistice, which never eliminates the wounds of civil conflict.

## Notes

1. See Allan R. Brewer-Carías, *La Constitución de 1999* (Caracas: Editorial Jurídica Venezolana, 2000); and *La Constitución de 1999: Derecho Constitucional Venezolano*, 2 vols. (Caracas: Editorial Jurídica Venezolana, 2004). See also Hildegard Rondón de Sansó, *Análisis de la Constitución venezolana de 1999* (Caracas: Editorial Ex Libris, 2001); Ricardo Combellas, *Derecho Constitucional: una introducción al estudio de la Constitución de la República Bolivariana de Venezuela* (Caracas: McGraw Hill, 2001); and Alfonso Rivas Quintero, *Derecho Constitucional*, (Valencia: Paredes Editores, 2002).

2. See the text of all this author's dissenting and negative votes in Brewer-Carías, *Debate constituyente (Aportes a la Asamblea Nacional*

*Constituyente*), vol. 3, October 18–November 30, 1999, Fundación de Derecho Público, Caracas, pp. 107–308ff.

3. See the proposal of this author in this matter in Brewer-Carías, *Debate constituyente (Aportes a la Asamblea Nacional Constituyente)*, vol. 2, September 9–October 17, 1999, pp. 76–155ff.

4. See Brewer-Carías, “Razones para ‘No’ firmar el proyecto” and “Razones para el voto ‘No’ en el Referéndum sobre la Constitución,” in *Debate constituyente*, vol. 3, pp. 311ff.

5. See this author's critical comments regarding the new constitution expressed immediately after its approval, in “Reflexiones críticas y visión general de la Constitución de 1999,” inaugural lecture on the Curso de Actualización en Derecho Constitucional, Aula Magna de la Universidad Católica Andrés Bello, Caracas, February 2, 2000; see also “La Constitución de 1999 y la reforma política,” Colegio de Abogados del Distrito Federal, Caracas, February 9, 2000; “The Constitutional Reform in Venezuela and the 1999 Constitution,” seminar on Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability, organized by the Faculty of Law, University of Texas, Austin, February 25, 2000; “Reflexiones críticas sobre la Constitución de 1999,” seminario internacional: El constitucionalismo latinoamericano del siglo XXI en el marco del LXXXIII aniversario de la promulgación de la Constitución Política de los Estados Unidos mexicanos, Cámara de Diputados e Instituto de Investigaciones Jurídicas UNAM, México, January 31, 2000; “La nueva Constitución de Venezuela del 2000,” Centro Internationale per lo Studio del Diritto Comparato, Facoltà di Giurisprudenza, Facoltà de Scienze Politiche, Università degli Studi di Urbino, Urbino, Italia, March 3, 2000; and “Apreciación general sobre la Constitución de 1999,” Ciclo de Conferencias sobre la Constitución de 1999, Academia de Ciencias Políticas y Sociales, Caracas, May 11, 2000. The text of these papers were published, respectively, in Diego Valadés, Miguel Carbonell, ed., *Constitucionalismo Iberoamericano del siglo XXI*, Cámara de Diputados, LVII Legislatura, Universidad Nacional Autónoma de México, México 2000, pp. 171–193; *Revista de Derecho Público*, no. 81 (January–March 2000), pp. 7–21; *Revista Facultad de Derecho, Derechos y Valores*, vol. 3, no. 5 (July 2000), pp. 9–26; and in *La Constitución de 1999*, Biblioteca de la Academia de Ciencias Políticas y Sociales, Caracas 2000, pp. 63–88.

6. Regarding the February 4, 1992 coup d'état attempt, see H. Sonntag and T. Maingón, *Venezuela: 4-F 1992: Un análisis socio-político* (Caracas: Editorial Nueva Sociedad, 1992); and Gustavo Tarre Briceño, *4 de febrero—El espejo roto* (Caracas: Editorial Panapo, 1994).

7. In the 1998 presidential election, Hugo Chávez Frías obtained the 56.20 percent of the cast votes, followed by Henrique Salas Römer, who obtained 39.99 percent of the votes. Approximately, 35 percent of the eligible voters did not turn out to vote. See the references in *El Universal*, December 11, 1998, p. 1-1.

8. In the 2006 presidential election, Hugo Chávez Frías obtained 62.84 percent of the cast votes, and the opposition candidate, Manuel Rosales, obtained 36.9 percent of the votes. Approximately 25.3 percent of the eligible voters did not turn to vote.

9. See *Proyecto de reforma constitucional: Elaborado por el ciudadano Presidente de la República Bolivariana de Venezuela, Hugo Chávez Frías*, (Caracas: Editorial Atenea, 2007). See the comments on the draft in Brewer-Carías, *Hacia la consolidación de un Estado Socialista, centralizado, policial y militarista: Comentarios sobre el alcance y sentido de la Reforma Constitucional 2007* (Caracas: Editorial Jurídica Venezolana, 2007); and *La Reforma Constitucional de 2007 (Sancionada inconstitucionalmente por la Asamblea Nacional el 2 de Noviembre de 2007)* (Caracas: Editorial Jurídica Venezolana, 2007). The reform was sanctioned by the national assembly on November 2, 2007 and was voted on in the referendum of December 2, 2007, where a majority of the people rejected it. The votes against comprised 51 percent (4.5 million) of the cast votes (9.2 million); approximately 44.11 percent of the eligible voters did not turn to vote.

10. This is now expressly set forth in the 1999 constitution (art. 347). See 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 electoral para minar la democracia y establecer un régimen autoritario de supuesta 'dictadura de la democracia' que se pretende regularizar mediante la reforma constitucional)," in *Temas constitucionales: Planteamientos ante una Reforma* (Caracas: Fundación de Estudios de Derecho Administrativo, 2007), pp. 13-74; and in Brewer-Carías, *Estudios sobre el Estado Consti-*

*tucional 2005-2006* (Caracas: Editorial Jurídica Venezolana, 2007), pp. 79ff.

11. Brewer-Carías, Allan R., "Venezuela 2009 Referendum on Continuous Reelection: Constitutional Implications," Paper written for 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. Available at <http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,%201,%20984.%20VENEZUELA%202009%20REFERENDUM%20ON%20CONTINUOUS%20REELECTION.%20New%20York%20coa.pdf> (accessed July 18, 2009).

12. See Brewer-Carías, *La Constitución y sus enmiendas* (Caracas: Editorial Jurídica Venezolana, 1991); and *Instituciones políticas y constitucionales, vol. 1 (Evolución histórica del Estado)*, (San Cristóbal-Caracas: Universidad Católica del Táchira and Editorial Jurídica Venezolana, 1996), pp. 455ff.

13. See the text of all the previous constitutions (1811-1961) in Brewer-Carías, *Las Constituciones de Venezuela*, (Caracas: Biblioteca de la Academia de Ciencias Políticas y Sociales, 1997). Regarding the constitutional history behind those texts, see this author's "Estudio Preliminar" in the same book, pp. 11-256.

14. See Elena Plaza and Ricardo Combillas, eds., *Procesos constituyentes y reformas constitucionales en la historia de Venezuela; 1811-1999*, vols. 1 and 2 (Caracas: Universidad Central de Venezuela, 2005); Brewer-Carías, "Las asambleas constituyentes en la historia de Venezuela," *El Universal*, September 8, 1998, p. 1-5; and Brewer-Carías, *Historia Constitucional de Venezuela*, Caracas: Editorial Alfa, 2 vols, 2008).

15. See Brewer-Carías, "El inicio del proceso constituyente en Ecuador en 2007 y las lecciones de la experiencia venezolana de 1999," in *Estudios sobre el Estado Constitucional 2005-2006* (Caracas: Editorial Jurídica Venezolana, 2007), pp. 766ff.

16. See Brewer-Carías, "Reflexiones sobre la crisis del sistema político, sus salidas democráticas y la convocatoria a una Constituyente," in *Los candidatos presidenciales ante la academia*, Ciclo de Exposiciones, Biblioteca de la Academia de Ciencias Políticas y Sociales, August 10-18,

1998, Caracas, pp. 9–66; also published in *Ciencias de Gobierno*, no. 4 (July–December 1998), Gobernación del Estado Zulia, Instituto Zuliano de Estudios Políticos Económicos y Sociales (IZEPES), Maracaibo, Edo. Zulia, 1998, pp. 49–88; and in Brewer-Carías, *Asamblea Constituyente y ordenamiento constitucional* (Caracas: Biblioteca de la Academia de Ciencias Políticas y Sociales, 1999), pp. 13–77.

17. See Brewer-Carías, *La crisis de las instituciones: responsables y salidas*, Cátedra Pío Tamayo, Centro de Estudios de Historia Actual (mimeo) Facultad de Economía y Ciencias Sociales, Universidad Central de Venezuela, Caracas, 1985; published in *Revista del Centro de Estudios Superiores de las Fuerzas Armadas de Cooperación*, no. 11 (1985), pp. 57–83; and in *Revista de la Facultad de Ciencias Jurídicas y Políticas*, no. 64 (1985), pp. 129–55. See also Brewer-Carías, *Instituciones políticas*, vol. 1, pp. 523–41.

18. Regarding the democratic political process after 1958, see Brewer-Carías, *Cambio político y reforma del Estado en Venezuela: Contribución al estudio sobre el Estado democrático y social de derecho* (Madrid: Editorial Tecnos, 1975).

19. See Brewer-Carías, *El Estado: Crisis y reforma* (Caracas: Biblioteca de la Academia de Ciencias Políticas y Sociales, 1982); *Problemas del Estado de partidos* (Caracas: Editorial Jurídica Venezolana, 1988).

20. See the text of the decree in *Gaceta Oficial* no. 36.634, February 2, 1999, and its modification in *Gaceta Oficial* no. 36.658, March 10, 1999. See the criticisms of the decree as a “constitutional fraud” in Brewer-Carías, *Asamblea Constituyente*, pp. 229ff.

21. See the 1998 political discussion regarding the necessarily inclusive character of the constitution-making process proposed, in Brewer-Carías, *Asamblea Constituyente*, pp. 38ff.

22. See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela* (México: Universidad Nacional Autónoma de México, 2002), pp. 181ff.

23. See the author’s dissenting votes in Brewer-Carías, *Debate Constituyente*, vol. 1 and 3, pp. 17ff and 109ff.

24. See Brewer-Carías, “El proceso constituyente y la fallida reforma del Estado en Venezuela,” in *Estrategias y propuestas para la reforma del Estado* (México: Universidad Nacional Autónoma de México, 2001), pp. 25–48; also published in

Brewer-Carías, *Reflexiones sobre el constitucionalismo en América* (Caracas: Editorial Jurídica Venezolana, 2001), pp. 243–53.

25. Regarding the Punto Fijo Pact, the origins of the 1961 constitution, and the political party system, see Juan Carlos Rey, “El sistema de partidos venezolano,” in *Problemas socio políticos de América Latina* (Caracas: Ateneo de Caracas, 1980), pp. 255, 338; Brewer-Carías, *Instituciones Políticas y Constitucionales*, vol. 1, pp. 394ff; Brewer-Carías, *Las Constituciones de Venezuela*, p. 201ff.; and Brewer-Carías, *La Constitución y sus enmiendas*, p. 13ff. The text of the pact was published in *El Nacional*, January 27, 1998, p. D-2.

26. See Brewer-Carías, *El Estado: Crisis y reforma*, pp. 7–89; and Brewer-Carías, *El Estado Incomprendido: Reflexiones sobre el sistema político y su reforma* (Caracas: Editorial Jurídica Venezolana, 1985).

27. See Brewer-Carías, “La reforma del sistema electoral,” in *Revista Venezolana de Ciencias Políticas*, no. 1 (December 1987), pp. 55–75; Brewer-Carías, *Ley Orgánica del Sufragio* (Caracas: Editorial Jurídica Venezolana, 1993); J.G. Molina and C. Pérez Baralt, “Venezuela ¿un nuevo sistema de partidos? Las elecciones de 1993,” *Cuestiones Políticas*, no. 13 (1994), pp. 63–99.

28. See the references in *El Universal*, December 11, 1998, p. 1-1.

29. See Brewer-Carías, “Municipio, democracia y participación: Aspectos de la crisis,” *Revista Venezolana de Estudios Municipales*, no. 11 (1988), pp. 13–30; and “Democracia municipal, descentralización y desarrollo local,” *Revista Iberoamericana de Administración Pública*, no. 11 (July–December 2003), pp. 11–34.

30. See in this regard one of the author’s proposals to the 1999 constituent assembly in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 156ff.

31. Regarding the Venezuelan Federation evolution, see Brewer-Carías, *Instituciones Políticas y Constitucionales*, vol. 1, pp. 351 and ss.; and vol. 2, pp. 394ff.

32. See Brewer-Carías, “Ideas centrales sobre la organización el Estado en la Obra del Libertador y sus Proyecciones Contemporáneas,” in *Boletín de la Academia de Ciencias Políticas y Sociales*, no. 95–96 (1984), pp. 137–51.

33. See Allan R. Brewer-Carías, “El desarrollo institucional del Estado Centralizado en Venezuela (1899–1935) y sus proyecciones con-

temporáneas,” en *Revista de Estudios de la Vida Local y Autonómica*, nos. 227 and 228 (1985), pp. 487–514 and 695–726; *Instituciones Políticas y Constitucionales*, vol. 1, pp. 351ff; and “La reforma política del Estado: La descentralización política,” in Brewer-Carías, *Estudios de Derecho Público (Labor en el Senado 1982)*, vol. 1 (Caracas: Ediciones del Congreso Nacional, 1983), pp. 15–39.

34. See Brewer-Carías, *Reflexiones sobre la Organización Territorial del Estado en Venezuela y en la América Colonial* (Caracas: Editorial Jurídica Venezolana, 1997), pp. 108ff.

35. See Brewer-Carías, “Los problemas de la federación centralizada en Venezuela,” *Revista Ius et Praxis*, no. 12 (1988), pp. 49–96; and “Bases legislativas para la descentralización política de la Federación Centralizada (1990: el inicio de una reforma),” in *Leyes y Reglamentos para la Descentralización política de la Federación* (Caracas: Editorial Jurídica Venezolana, 1994), pp. 7–53. See also Brewer-Carías, *Instituciones Políticas y Constitucionales*, vol. 2, pp. 394, ss.

36. See discussion of the 1993 last efforts to reinforce the decentralization process in Venezuela, in *Informe sobre la descentralización en Venezuela 1994*, Memoria del Dr. Allan R. Brewer-Carías, Ministro de Estado para la Descentralización, Caracas 1994.

37. See Pedro Guevara, *Estado vs. Democracia* (Caracas: Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, 1997); Miriam Kornblith, *Venezuela en los 90: Crisis de la Democracia* (Caracas: Ediciones IESA, Universidad central de Venezuela, 2002); Brewer-Carías, *Cinco siglos de historia y un país en crisis* (Caracas: Academia de Ciencias Políticas y Sociales y Comisión Presidencial del V Centenario de Venezuela, 1998), pp. 95–117; Brewer-Carías, “La crisis terminal del sistema político,” in *Una evaluación a estos cuarenta años de democracia*, *El Globo*, November 24, 1997, pp. 12–13; Brewer-Carías, “La crisis terminal del sistema político venezolano y el reto democrático de la descentralización,” in *Instituciones Políticas y Constitucionales*, vol. 3, pp. 655–678. See also Brewer-Carías, “Presentación,” in *Los Candidatos Presidenciales ante la Academia*, pp. 9–66, and Brewer-Carías, *Asamblea Constituyente*, pp. 15–85.

38. See Brewer-Carías, *Judicial Protection of Human Rights in Latin America. A Comparative Constitutional Law study on the Latin American Injunction for the Protection of Constitutional*

*rights (“Amparo” Proceeding)*, Privately Printed for the Exclusive Use of Students at the Columbia University School of Law, New York, 2007, 383 pp.; *El amparo a los derechos y garantías constitucionales (Una aproximación comparativa)*, Editorial Jurídica Venezolana, Caracas 1993; and in *Instituciones Políticas y Constitucionales*, vol. 5.

39. See Brewer-Carías, *Problemas del Estado de Partidos* (Caracas: Editorial Jurídica Venezolana, 1988), pp. 92ff.

40. Brewer-Carías, *Problemas del Estado de Partidos*.

41. See the author’s proposal regarding the convening off the 1999 constituent assembly in Brewer-Carías, *Asamblea Constituyente*, pp. 56–60.

42. See, e.g., Frente Patriótico, *Por una Asamblea Constituyente para una nueva Venezuela* (Caracas: 1991).

43. Regarding the initial 1992 proposals, see Brewer-Carías, “La democracia venezolana ha perdido legitimidad,” *El Nacional*, March 1, 1992, p. D-2, published in *Asamblea Constituyente*, pp. 30–34; Consejo Consultivo de la Presidencia de la República, *Recomendaciones del Consejo Consultivo al Presidente de la República* (Caracas: Presidencia de la República, 1992), p. 15; Oswaldo Alvarez Paz, *El Camino Constituyente* (Maracaibo: Gobernación del Estado Zulia, 1992); Ricardo Combellas, “Asamblea Constituyente: Estudio jurídico-político” and Angel Alvarez, “Análisis de la naturaleza de la crisis actual y la viabilidad política de la Asamblea Constituyente,” in COPRE, *Asamblea Constituyente: Salida democrática a la crisis*, Folletos para la Discusión no. 18, Caracas, 1992; R. Escovar Salom, “Necesidad de una Asamblea Nacional Constituyente,” en *Cuadernos Nuevo Sur*, no. 2–3 (July–December 1992), pp. 156–160; Frente Amplio Proconstituyente “¿Qué es la Constituyente?” *El Nacional*, June 30, 1994; Hermán Escarrá Malavé, *Democracia, reforma constitucional y asamblea constituyente* (Caracas: 1995).

44. See this author’s comments on November 1998 in Brewer-Carías, *Asamblea Constituyente*, pp. 78–85.

45. See his “Propuestas para transformar Venezuela” in Hugo Chávez Frías, *Una Revolución Democrática* (Caracas: 1998), p. 7.

46. See Brewer-Carías, “Los procedimientos de revisión constitucional en Venezuela,” in *I Procedimenti di revisione costituzionale nel Diritto Comparato*, Atti del Convegno Internazion-

ale organizzato dalla Facoltà di Giurisprudenza di Urbino, April 23–24, 1997, Università Degli Studi di Urbino, pubblicazioni della Facoltà di Giurisprudenza e della Facoltà di Scienze Politiche, Urbino, Italia, 1999, pp. 137–81; and in *Boletín de la Academia de Ciencias Políticas y Sociales*, no. 134 (1997), pp. 169–222. See also Brewer-Carías, *Asamblea Constituyente*, pp. 84–149.

47. See the author's 1998 proposal in Brewer-Carías, *Asamblea Nacional Constituyente*, pp. 56–69; see the position in contrary sense of Carlos M. Escarrá Malavé, *Proceso político y constituyente: Papeles constituyentes* (Maracaibo: 1999), pp. 33ff.

48. See Brewer-Carías, “El desequilibrio entre soberanía popular y supremacía constitucional y la salida constituyente en Venezuela en 1999,” in *Revista Anuario Iberoamericano de Justicia Constitucional*, no. 3 (2000), pp. 31–56. See also Brewer-Carías, *Asamblea Constituyente*, pp. 152ff.

49. See Brewer-Carías, “Comentarios sobre la inconstitucional de la convocatoria a Referéndum sobre una Asamblea Nacional Constituyente, efectuada por el Consejo Nacional Electoral en febrero de 1999,” in *Revista Política y Gobierno*, vol. 1, no. 1 (January–June 1999), pp. 29–92. See also Brewer-Carías, *Asamblea Constituyente*, pp. 229ff.

50. Among the authors who considered that the convening of the constituent assembly needed a prior constitutional provision establishing it was Ricardo Combellas, who in 1998 was head of the Presidential Commission on State Reforms. See Combellas, *¿Qué es la Constituyente? Voz para el futuro de Venezuela* (Caracas: Editorial Panapo, 1998), p. 38. The next year, after being appointed by President Chávez as member of the Presidential Commission for the Constitutional Reform, he changed his opinion, admitting the possibility of electing the assembly even without constitutional support. See Combellas, *Poder Constituyente*, presentación, Hugo Chávez Frías, Caracas 1999, pp. 189ff. In 1999, Combellas was elected a member of the constituent assembly from the lists supported by Chávez, but a few years later, he withdrew his support for the president, becoming a critic of his antidemocratic government.

51. See the texts in *Revista de Derecho Público*, no. 77–80 (1999), pp. 56–73; and in Brewer-Carías, *Poder Constituyente Originario y Asamblea Nacional Constituyente* (Caracas: Editorial Jurídica Venezolana, 1999), pp. 25ff.

52. See comments on the decisions in Brewer-Carías, “La configuración judicial del proceso constituyente o de cómo el guardián de la Constitución abrió el camino para su violación y para su propia extinción,” in *Revista de Derecho Público*, no. 77–80 (1999), pp. 453–514; Brewer-Carías, *Asamblea Constituyente*, pp. 152–228; Brewer-Carías, *Golpe de Estado*, pp. 65ff; Lolymar Hernández Camargo, *La Teoría del Poder Constituyente: Un caso de estudio: el proceso constituyente venezolano de 1999* (San Cristóbal: Universidad Católica del Táchira, 2000), pp. 53ff.; Claudia Nikken, *La Cour Suprême de Justice et la Constitution vénézuélienne du 23 Janvier 1961*, thèse docteur de l'Université Panthéon Assas (Paris II), Paris, 2001, pp. 366ff.

53. See the text in *Gaceta Oficial*, no. 36.634, February 2, 1999, and its modification in *Gaceta Oficial* no. 36.658, March 10, 1999. See the comments regarding the decree in Brewer-Carías, *Golpe de Estado*, pp. 113ff; and in Brewer-Carías, *Asamblea Constituyente*, pp. 229ff.

54. See the text of the challenging action this author brought before the Supreme Court in Brewer-Carías, *Asamblea Constituyente*, pp. 255–321. Regarding the other challenging actions brought before the Supreme Court, see Carlos M. Escarrá Malavé, *Proceso político*, exhibit 4.

55. See the text of the 1999 Supreme Court decisions of March 18, March 23, April 13, June 3, June 17, and July 21 in *Revista de Derecho Público*, no. 77–80 (1999), pp. 73–110; and in Brewer-Carías, *Poder Constituyente Originario*, pp. 169–98 and 223–51. See comments in Brewer-Carías, “Comentarios sobre la inconstitucional convocatoria a referendo sobre una Asamblea Nacional Constituyente efectuada por el Consejo Nacional Electoral en febrero de 1999,” *Revista Política y Gobierno*, vol. 1, no. 1 (January–June 1999), pp. 29–92; and in Brewer-Carías, *Golpe de Estado*, pp. 160ff.

56. Venezuelan constitutional law distinguishes between derivative and original constituent authority, the latter being the unlimited authority such an institution would have at the very moment of a new state's conception. The constitutional convention of the United States would be considered original in this sense.

57. In particular, see the 1999 Supreme Court decisions of April 13, June 17, and July 21, in *Revista de Derecho Público*, no. 77–80 (1999), pp. 85ff.

58. See the references to all those decisions in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 11–124.

59. See José E. Molina V. and Carmen Pérez Baralt, “Procesos Electorales: Venezuela, abril, julio y diciembre de 1999,” *Boletín Electoral Latinoamericano*, no. 22 (July–December 1999), pp. 61ff.

60. For which a few high former officials of the Banco Bilbao Vizcaya of Spain were criminally indicted on Feb. 8, 2006, by the Juzgado Central de Instrucción no. 5, Audiencia Nacional, Madrid (Procedure no. 251/02-N).

61. Molina and Pérez Baralt, “Procesos Electorales,” pp. 61ff

62. Allan R. Brewer-Carías, Claudio Fermin, Alberto Franchesqui, and Jorge Olavarría.

63. See the decision of April 13, 1999, in *Revista de Derecho Público*, no. 77–80 (1999), pp. 85ff; and in Brewer-Carías, *Poder Constituyente Originario*, pp. 169–98, 223–51.

64. See in *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, session of August 3, 1999, no. 1, p. 4. See the author’s dissenting vote in *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, session of August 7, 1999, no. 4, pp. 6–13; and in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 15–39.

65. See Brewer-Carías, *Golpe de Estado*, pp 181ff.

66. Decree of August, 12, 1999. See the text in *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre de 1999, session of August 12, no. 8, pp. 2–4, and in *Gaceta Oficial* no. 36.764 (August 13, 1999). See this author’s dissenting vote in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 43–56.

67. Decree of August 19, 1999. See the text in *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre de 1999, session of August 18, 1999, no. 10, pp. 17–22, and in *Gaceta Oficial* no. 36.782 (September 8, 1999). See this author’s dissenting vote in Brewer-Carías, *Debate Constituyente*, vol. 1, p. 57–73. See the comments in Brewer-Carías, *Golpe de Estado*, pp. 184ff.; and in Brewer-Carías, “La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999–2004,” in *XXX Jornadas J.M. Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pp. 33–174.

68. Decree of August 28, 1999. See the text in *Gaceta Constituyente (Diario de Debates)*, Agosto–

Septiembre 1999, session of August 25, 1999, no. 13. See this author’s dissenting vote in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 75–113.

69. Decree of August 26, 1999. See the text in *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, session of August 26, 1999, no. 14, pp. 7–8, 11, 13, 14; and in *Gaceta Oficial* no. 36.776 (August 31, 1999). See the author’s dissenting vote in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 115–22.

70. See the decision of October 14, 1999 in *Revista de Derecho Público*, no. 77–80 (1999), pp. 111–32. See the comments in Brewer-Carías, “La configuración judicial del proceso constituyente,” pp. 453ff.

71.

72. As predicted by the resigning president of the Supreme Court. See the comments in Brewer-Carías, *Golpe de Estado*, pp. 218ff.

73. See the Decree of Judicial Emergency in *Gaceta Oficial* no. 36.772, August 25, 1999, and in *Gaceta Oficial* no. 36.782, September 9, 1999. The Supreme Court issued a formal act accepting the assembly’s intervention of the judiciary, and later the new Supreme Tribunal upheld the decree in a decision of March 24, 2000, no. 659 (caso: Rosario Nouel), in *Revista de Derecho Público* no. 81 (2000), pp. 102–05. See the comments regarding the Supreme Court submission to the assembly’s Hill and its consequences in Brewer-Carías, *Debate Constituyente*, vol. 1 (1999), pp. 141–52.

74. See the decree of December 22, 1999 on the transitory constitutional regime in *Gaceta Oficial* no. 36.859, December 29, 1999.

75. Such a method was used in developing the 1947 constitution. See *Anteproyecto de Constitución de 1947: Elección directa de Gobernadores y eliminación de Asambleas Legislativas*, Papeles de Archivo, no. 8 (Caracas: Ediciones Centauro, 1987).

76. See Hugo Chávez Frías, *Ideas Fundamentales para la Constitución Bolivariana de la V República* (Caracas: Presidencia de la República, 1999).

77. This author was president of the Commission on Nationality and Citizenship. See the report of the commission in Brewer-Carías, *Debate Constituyente*, vol. 2, pp. 45–74.

78. This author was also a member of the constitutional commission. See the difficulties of

its participation in the drafting process in Brewer-Carías, *Debate Constituyente*, vol. 2, pp. 255–286.

79. See in *Gaceta Constituyente (Diario de Debates)*, Octubre–Noviembre 1999, session of October 19, 1999, no. 23.

80. See for instance Brewer-Carías, “La Constitución Española de 1978 y la Constitución de la República Bolivariana de Venezuela de 1999: algunas influencias y otras coincidencias,” in *La Constitución de 1978 y el Constitucionalismo Iberoamericano*, ed. Francisco Fernández Segado (Madrid: Ministerio de la Presidencia, Secretaría General Técnica, Centro de Estudios Políticos y Constitucionales, 2003), pp. 765–86.

81. All the suggestions made by this author to the board of directors of the constituent assembly to invite the most distinguished constitutional lawyers of Latin America and Spain to advise the constitution-making process were systematically denied. Nonetheless, after the constitution was approved, it was known that some teaching members of the University of Valencia, Spain helped the vice president of the assembly in the technical committee. See Roberto Viciano Pastor and Rubén Martínez Dalmau, *Cambio político y proceso constituyente en Venezuela (1998–2000)* (Valencia: Tirant lo Blanch, 2001).

82. See the text of all this author’s 127 dissenting or negative votes in Brewer-Carías, *Debate Constituyente*, vol. 3, pp. 107–308.

83. See the arguments in Brewer-Carías, *Debate Constituyente*, vol. 3, pp. 309–40.

84. See Molina and Pérez Baralt, “Procesos Electorales,” pp. 67–68.

85. See in *Gaceta Oficial* no. 36.859, December 29, 1999.

86. See the comments regarding this decree in Brewer-Carías, *Golpe de Estado*, pp. 354 ff.; and in *La Constitución de 1999: Derecho Constitucional Venezolano*, vol. 2 (Caracas: Editorial Jurídica Venezolana, 2004).

87. See the January 26, 2000 decision no. 4 (caso: Eduardo García), and the March 28, 2000 decision no. 180 (caso: Allan R. Brewer-Carías and others) in *Revista de Derecho Público*, no. 81 (2000), pp. 93ff, 86ff. See Brewer-Carías, *Golpe de Estado*, pp. 354ff.

88. Special statute for the ratification or appointment of the public officials of the citizen’s power and of the justices of the Supreme Tribunal of Justice for the first constitutional term, November 14, 2000, in *Gaceta Oficial* no. 37.077, November 14, 2000.

89. See, e.g., the decision of March 28, 2000, no. 179 (caso: Gonzalo Pérez M.), in *Revista de Derecho Público*, no. 81 (2000), pp. 81ff.

90. Decision of December 12, 2000 (caso: People’s Defender), in *Revista de Derecho Público*, no. 84 (2000), pp. 108ff.

91. Brewer-Carías, “La progresiva y sistemática demolición institucional,” pp. 33–174; *La Sala Constitucional versus el Estado democrático de derecho: El secuestro del poder electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política* (Caracas: Los Libros de El Nacional, Colección Ares, 2004); and “El secuestro del Poder Electoral y de la Sala Electoral del Tribunal Supremo y la confiscación del derecho a la participación política mediante el referendo revocatorio presidencial: Venezuela: 2000–2004,” in *Revista Costarricense de Derecho Constitucional*, vol. 5 (2004), pp. 167–312; and in *Revista Jurídica del Perú*, vol. 54, no. 55 (March–April 2004), pp. 353–96.

92. This has led President Chavez to affirm since 2001 that “*La ley soy yo. El Estado soy yo*” [I am the law. I am the state]. See *El Universal*, Caracas, December 4, 2001, pp. 1.1 and 2.1; see also Brewer-Carías, Allan R., “Venezuela under Chavez: Blurring between Democracy and Dictatorship?” Lecture given at the University of Pennsylvania Law School, Philadelphia, April 16, 2009, available at <http://allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,%201,%20989.%20VENEZUELA%20UNDER%20CHAVEZ.%20BLURRING%20BETWEEN%20DEMOCRACY%20AND%20DICTATORSHIP.%20Pennsylvania%20Law%20April%202009.%20l.pdf> (accessed July 19, 2009).

93. Almost two years after the constituent assembly’s intervention in the judiciary, some justices of the Supreme Tribunal acknowledged that more than the 90 percent of the judges of the republic were provisional. See *El Universal*, August 15, 2001. In May 2001, other justices recognized that the so-called judicial emergency was a failure. See *El Universal*, May 30, 2001, p. 1–4. See also *Informe sobre la Situación de los Derechos Humanos en Venezuela*, OAS/Ser.L/V/II.118. d.C. 4, rev. 2, December 29, 2003, para. 11, p. 3. It reads: “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.”

94. See Brewer-Carías, “La progresiva y sistemática demolición institucional,” pp. 33–174; and Rogelio Pérez Perdomo, “Judicialization in Venezuela,” in *The Judicialization of Politics in Latin America*, ed. Rachel Sieder, Line Schjolden, and Alan Angell (New York: Palgrave Macmillan, 2005), pp. 145ff.

95. See introduction to this volume.

96. See Brewer-Carías, “La opción entre democracia y autoritarismo,” in *Reflexiones sobre el constitucionalismo en América*, pp. 41–59; Brewer-Carías, *Constitución, Democracia y control del Poder* (Mérida, Centro Iberoamericano de Estudios Provinciales y Locales (CIEPROL), Universidad de Los Andes, Editorial Jurídica Venezolana, 2004).

97. See Brewer-Carías, “La progresiva y sistemática demolición institucional,” pp. 33–174; Brewer-Carías, *La Sala Constitucional versus el Estado democrático de derecho*; Brewer-Carías et al., (Rozana Orihuela G., María Alejandra Correa, Gustavo Briceño V., José Ignacio Hernández) *Leyes Orgánicas del Poder Ciudadano* (Caracas: Editorial Jurídica Venezolana, 2004); and Brewer-Carías, *La crisis de la democracia en Venezuela (La Carta Democrática Interamericana y los sucesos de abril se 2002)* (Caracas: Ediciones Libros El Nacional, 2002).

98. The citizens branch is composed of the general comptroller, the public prosecutor and the people’s defender.

99. This is also the case for the justices of the Supreme Tribunal. Article 23.4 of the Supreme Tribunal Organic Law refers to simple majority in the sense of more than 50 percent of those present and voting. See comments in Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia: Procesos y procedimientos constitucionales y contencioso administrativos* (Caracas: Editorial Jurídica Venezolana, 2004).

100. See the comments in Brewer-Carías, *Constitución, Democracia y control del Poder*.

101. See Brewer-Carías, *Crónica sobre la “In” Justicia Constitucional: La Sala Constitucional y el Autoritarismo* (Caracas: Editorial Jurídica Venezolana, 2007); in particular, “Quis custodiet ipsos custodes: de la interpretación constitucional a la inconstitucionalidad de la interpretación,” paper submitted to the VIII Congreso Peruano de Derecho Constitucional, Colegio de Abogados de Arequipa, September 22–24, 2005, pp. 47ff.

102. See this author’s dissenting vote in this regard in Brewer-Carías, *Debate Constituyente*, vol. 3, pp. 288ff.

103. In the 2007 constitutional reform draft proposals, the term is extended up to seven years. See *Proyecto de Reforma Constitucional. Elaborado por el ciudadano Presidente de la República Bolivariana de Venezuela, Hugo Chávez Frías* (Caracas: Editorial Atenea, 2007).

104. See this author’s dissenting vote in this regard in Brewer-Carías, *Debate Constituyente*, vol. 3, pp. 289ff. In the 2007 constitutional reform draft proposals, the indefinite possible reelection of the president is established. See *Proyecto de Reforma Constitucional*.

105. See the comments regarding this provision in Brewer-Carías, “Régimen Constitucional de la delegación legislativa e inconstitucionalidad de los Decretos Leyes habilitados dictados en 2001,” in *Revista Primicia*, Informe Especial, December 2001.

106. See this author’s dissenting vote in this regard in Brewer-Carías, *Debate Constituyente*, vol. 3, pp. 303ff.

107. In the 2007 constitutional reform draft proposals, a new component of the armed forces is proposed: the Popular Bolivarian Militia. See *Proyecto de Reforma Constitucional*.

108. See Brewer-Carías, *Federalismo y Municipalismo en la Constitución de 1999 (Alcance de una reforma insuficiente y regresiva)* (Caracas-San Cristóbal: Editorial Jurídica Venezolana, 2001).

109. See this author’s dissenting vote in this regard in Brewer-Carías, *Debate Constituyente*, vol. 3, pp. 286ff.

110. Brewer-Carías, “La ‘Federación Descentralizada’ en el marco de la centralización de la Federación en Venezuela: Situación y perspectivas de una contradicción constitucional,” in *Constitución, Democracia y Control el Poder*, pp. 111–43. See the author’s proposals to the constituent assembly regarding the political decentralization of the federation in Brewer-Carías, *Debate Constituyente*, vol. 1, pp. 155–70; and vol. 2, pp. 227–33.

111. In the 2007 constitutional reform draft proposals, Article 158 of the constitution and all the constitutional provisions referring to political decentralization are eliminated and changed to consolidate a centralized state. See *Proyecto de Reforma Constitucional*.

112. See Brewer-Carías et al., *Ley Orgánica del Poder Público Municipal*; and “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”, en *AIDA, Opera Prima de Derecho Administrativo: Revista de la Asociación Internacional de Derecho Administrativo*, Asociación Internacional de Derecho Administrativo, UNAM, México, 2007, pp. 49–67.

113. In the 2007 constitutional reform draft proposals, a new branch of government was proposed, the Popular Power, seeking to consolidate the power of communal councils, with members not elected by popular vote and dependent on the office of the head of state. See the comments in Brewer-Carías, *Hacia la consolidación de un Estado Socialista*; and in *La Reforma Constitucional de 2007*.

114. See Brewer-Carías, “Democracia municipal, descentralización y desarrollo local,” pp. 11–34.

115. See Brewer-Carías, “Democratización, descentralización política y reforma del Estado” and “El Municipio, la descentralización política y la democracia,” in *Reflexiones sobre el constitucionalismo en América*, pp. 105–41, 243–53.

116. See Ley de Consejos Comunales, *Gaceta Oficial*, no. 5806 Extra, April 10, 2006. See also Allan R. Brewer-Carías, “El inicio de la desmunicipalización en Venezuela: La organización del Poder Popular para eliminar la descentralización, la democracia representativa y la participación a nivel local”, in *Revista de la Asociación Internacional de Derecho Administrativo*, Universidad Nacional Autónoma de México, Mexico, 2007, pp. 49–67.

117. Brewer-Carías, “El secuestro del Poder Electoral,” pp. 167–312.

118. See regarding this author’s writings, Brewer-Carías, *El Estado: Crisis y reforma*.

119. See *Proyecto de Reforma Constitucional*. See the comments on the draft in Allan R. Brewer-Carías, *Hacia la consolidación de un Estado Socialista*.

120. “Discurso de Orden pronunciado por el ciudadano Comandante Hugo Chávez Frías, Presidente Constitucional de la República Bolivariana de Venezuela en la conmemoración del Ducentésimo Segundo Aniversario del Juramento del Libertador Simón Bolívar en el Monte Sacro y el Tercer Aniversario del Referendo Aprobatorio de su mandato constitucional,” Special session of August 15, 2007, Asamblea Nacional, División de Servicio y Atención legislativa, Sección de Edición, Caracas 2007.

121. “Discurso de Orden,” p. 4

122. “Discurso de Orden,” p. 33.

123. “Discurso de Orden,” p. 4.

124. See Brewer-Carías, “Reflexiones sobre la crisis del sistema político,” p. 34

125. Brewer-Carías, “Reflexiones sobre la crisis del sistema político,” p. 32.

126. Brewer-Carías, “Reflexiones sobre la crisis del sistema político,” p. 35.

127. Brewer-Carías, “Reflexiones sobre la crisis del sistema político,” p. 74.

128. See Lolymer Hernández Camargo, “Límites del poder ejecutivo en el ejercicio de la habilitación legislativa: Imposibilidad de establecer el contenido de la reforma constitucional rechazada vía habilitación legislativa,” in *Revista de Derecho Público*, no. 115 (Estudios sobre los Decretos Leyes) (Caracas: Editorial Jurídica Venezolana, 2008), pp. 51ff.; Jorge Kiriakidis, “Breves reflexiones en torno a los 26 Decretos-Ley de Julio-Agosto de 2008, y la consulta popular referendaria de diciembre de 2007,” in *Revista de Derecho Público*, no. 115, pp. 57ff.; and José Vicente Haro García, “Los recientes intentos de reforma constitucional o de cómo se está tratando de establecer una dictadura socialista con apariencia de legalidad (A propósito del proyecto de reforma constitucional de 2007 y los 26 decretos leyes del 31 de julio de 2008 que tratan de imponerla),” in *Revista de Derecho Público*, no. 115, pp. 63 ff.

