



*El observatorio  
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**Report on the National Constituent Assembly  
Its use as part of the institutional facade in Venezuela**

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## **Introduction**

This documentary work aims to be a description of what the National Constituent Assembly convened by presidential decree in May 2017 has meant for Venezuelan institutions and, above all, for the rights of the citizens in whom the sovereignty of the country resides.

In view of this, and without attempting to make an extensive list of the constituent process, it is proposed to demonstrate that the current process was imposed by the Executive Power to neutralize the opposition-controlled National Assembly and that it is the genesis of the main social problems, political and economic that in the last three years exist in Venezuela.

All this is framed within a policy of institutional façade, created since the origins of the regime, in which the institutions are shown as democratic and respectful of human rights, but in reality, they are distorted and manipulated to serve the accumulation of powers to the only true power of the country, the National Executive branch.

In fact, the National Constituent Assembly has not only become part of a parallel institutionalism but has also been incorporated as part of the regime's repressive machinery, directly participating in the persecution of dissidents.

Since its convocation, the Constituent Assembly has tried to obtain its legitimacy through a series of so-called "constitutional laws" or "constituent decrees", which are mandatory in the country, thereby seeking to have legitimate recognition. This has led to controversial regulations and designations that respond to the desire of the Government of Nicolás Maduro Moros, which, without a doubt, have been increasingly fragmenting the institutional system that was already broken before the installation of that unconstitutional body.

From this perspective, a study dedicated to addressing the operation of the Venezuelan State and in particular of the National Constituent Assembly is presented below, in eight sections, from its convocation in May 2017 to the work it is currently carrying out.

The first section is dedicated to presenting an overview of the State structure and organization in light of the Venezuelan Constitution. The second describes how this vision of the structure and organization of the State was distorted to establish a hegemonic power in the country. In the third, a review is made of the regulation of the National Constituent Assembly according to the Venezuelan constitutional text of 1999. The fourth section focuses on the antecedents of the 1999 Constituent Assembly. The fifth is dedicated to the context of the National Constituent Assembly of 2017. The sixth section offers a tour of the form, election, and installation of the National Constituent Assembly, with the aim of providing a diagnosis as established in the Venezuelan political charter; the seventh describes the functions that the



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Constituent Assembly has exercised to the detriment of other public powers. Finally, in the eighth, a balance is made of the performance of the entity and the conclusions to which it leads.

## 1. Structure and organization of the State in Venezuela

With the arrival of Hugo Chávez Frías to power, a new state organization was inaugurated in the country. His electoral victory opens the doors for the activation of the constituent process. In fact, after taking office as president, Chávez shows his intentions for changes, especially by calling the 1961 Constitution «moribund». From that moment, and driven by his victory in December 1998, Chávez, through Decree No. 3, published in Official Gazette No. 36.634 of February 2, 1999, proposes the convening of a National Constituent Assembly to prepare the project of a new constitutional text. An unprecedented process was articulated very quickly between February and December 1999, mainly thanks to the support of the Supreme Court of Justice, which upheld the constitutionality of a constituent process that was not provided for in the 1961 Constitution<sup>1</sup>.

Thus, to the detriment of the 1961 Magna Carta, the 1999 National Constituent Assembly lacked limits in its decisions, to such an extent that it was not subject to that text or to any of the State organs, it was even above the Constitution itself. The fact is that the new Venezuelan letter is approved by a referendum held on December 15, 1999, by 71.71% of the valid votes against 28.22% of negative votes, and an abstention that reached 55.22% of the members of the electoral registry.

It was the first time in Venezuelan history that a constitutional text was approved with the participation of citizens in a popular referendum. For the followers of the Chávez government, the constitutional proposal represented a kind of panacea, which the president himself defined by calling it «the best constitution in the world». On the contrary, those who questioned it, it was nothing more than a «tailored suit» that intended to give constitutional support to their aspirations for absolute power. Thus then, the new Constitution with the recognition of human rights and the establishment of a system of checks and balances paradoxically is now defended by those who criticized it at the time, by establishing a constitutional system, as we will see, totally different from the one actually implemented.

Hence, in general, in the midst of the serious crisis that Venezuela is experiencing today, the constitutional charter of 1999 appears as the shield to defend the democratic thread and the rule of law, which has been violated in different ways after arbitrary measures to be able to made by the Maduro government build a parallel system, such as the National Constituent Assembly, which functions as an illegitimate national parliament with supra-constitutional powers.

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<sup>1</sup> HERNÁNDEZ GONZÁLEZ, José Ignacio. The legal-state structure of the Venezuelan political system in the XXI century, pp. 157-158. In AA.VV. **Disassembling the model. The transformations of the Venezuelan political system since 1999**. Diego Bautista Urbaneja (Coordinator). Andrés Bello Catholic University, Caracas 2017.

Now, to a large extent, it is essential to be clear about the organizational structure of the Venezuelan State, taking into account the provisions of the 1999 Constitution, since the organizational distribution of power in Venezuela serves to guide the path of the situation of the constituent process ordered by President Nicolás Maduro Moros in 2017.

In this sense, it should be noted that a fundamental sign of the Constitution, approved on the threshold of the 21st century, is that the Venezuelan State undergoes a political-legal transformation after being conceived as a «decentralized federal» (Article 4), especially when it is organized in accordance with a system of vertical division of power in three levels: Republic, states and municipalities (Article 136) distributing for each territorial political level a set of competences, exclusive and concurrent, to be exercised among various bodies.

The Constitution, in fact, establishes in accordance with article 136 that the National Power (Republic) is divided (horizontal distribution of power) into Legislative, Executive, Judicial, Citizen, and Electoral. Within this design, it assigns the Legislative Power to the National Assembly; the Executive Branch to the President of the Republic, Executive Vice President, Ministers, Attorney General of the Republic, Council of State and other bodies established by law; the Judicial Power to the Supreme Court of Justice and other courts established by law; the Citizen Power to the Republican Moral Council, made up of the Office of the Ombudsman, the Public Ministry and the Comptroller General of the Republic; and the Electoral Power to the National Electoral Council.

The State Power is divided between a government and administration, a Legislative Power and a state comptroller (articles 160, 162 and 163); the government and administration corresponding to the governor, while the Legislative to a legislative council.

It should be noted that also at the municipal level, the constitutional charter establishes a government and administration, a body that exercises the legislative function and a municipal comptroller's office (articles 174, 175, and 176) so that the government and administration corresponding to the mayor and the legislative function to the municipal council.

The 1999 Constitution, in this context, designs a state model in which power is distributed vertically, which leads to a decentralized federal State, and also horizontally, from which it defines a division of power between several branches at the same territorial level (Republic).

The consequence of this distribution of power means that each territorial political level (national, state, and municipal), as well as the horizontal distribution of the National Power (Legislative, Executive, Judicial, Citizen, and Electoral), has guaranteed autonomy in the exercise of the powers that the Constitution assigns

them. Thus, in the case of a State with federal form, none of the levels is subject to a hierarchical relationship or dependency of a legislative or executive order.

By virtue of the aforementioned, the National Power, in principle, should not regulate the matters of the exclusive competence of the state and municipal powers, nor the State Power with respect to the Municipal, except for the limitations indicated by the Constitution, as part of the organization of State power.

The distribution of powers among the three territorial levels combine powers that are exclusive to each one, and others that are concurrent. It should be noted that the exclusive powers of the state level are scarce (article 164), unlike the national and municipal levels, which are numerous (articles 156 and 178). The National Power is assigned exclusive powers (Article 156), but they can be assigned by law to the states or municipalities for the purpose of promoting decentralization (Article 157).

Within this federative model designed by the Constitution, **political autonomy** is guaranteed, when it establishes the popular election of the legislative and executive authorities of each of the three territorial levels of Government. It also recognizes the **regulatory autonomy** through which each level has the competence to order the conduct of its citizens from the exercise of laws or regulations. **Organizational autonomy** by which each territorial level distributes organizational power according to its own criteria. The **financial and tax autonomy** allows you to have your own income that helps you finance your expenses.

The recognition of this autonomy (political, normative, organizational, financial and tax) is reinforced when the Venezuelan political charter establishes that the division of power, on which the state model is mounted in Venezuela, is governed, among other principles, by the of cooperation to achieve the aims of the State (article 4), also called collaboration of powers (article 136, in fine), that is, the bodies between which power is distributed are among themselves in a situation of hierarchical equality, in the sense that none is superior to another.

From this point of view, the Executive Power is not superior to the Legislative, nor is the Citizen Power inferior to the Judicial Power, and the Electoral Power is not superior to the Executive. There is between the organs of power, by express constitutional provision, a relationship of cooperation or collaboration, excluding the possibility of any relationship of subordination.

Likewise, the Constitution mentions territorial integrity, concurrence, solidarity, and co-responsibility as principles of the federative division, both in the Preamble and in Articles 1, 4, 15, 126, and 159. It highlights, in this regard, the principle of territorial integrity of the Republic, which reinforces the unity of the national territory, rejecting any intention or proposal of sedition on the part of the political entities that make up the Venezuelan State. In other words, the principle of integrity seeks to ward off any possibility of the dismemberment of the State; It is for this reason that the political charter obliges the territorial entities to behave as a bloc.

At the same time, the 1999 Constitution highlights the principle of interterritorial solidarity between each of the territorial levels, so that the duties of some of them that cannot be fulfilled do not exclude their assumption by the other entities. It is a manifestation of collaboration that must exist between the territorial entities of the power of the State.

In the 1999 *Magna Carta*, without a doubt, the distribution of power is conceived as that of a federal State. The insistence on this form also appears when, indeed, Article 6 establishes that the Bolivarian Republic of Venezuela is a State made up of political entities that make up the federal model.

Likewise, when the territorial political organization referred to in article 16 of the Constitution basically reveals that the national territory is divided into states, the Capital District, federal agencies, and federal territories, in addition to being organized into municipalities. In this regard, it is particularly important to indicate that the federal form of the State implies the establishment of a Capital District as the seat of the organs of the National Power (Republic), the capital of the federation is the city of Caracas.

However, it should be noted that after the entry into force of the 1999 Constitution, a legislative activity began to take place in the country aimed at specifying the provisions in it regarding the vertical division of power.

### **1.1. The National Power**

The Constitution regulates that the National Power (Republic) is distributed in Legislative, Executive, Judicial, Citizen and Electoral (Article 136). The political charter, in this regard, defines the composition and functions of each of these state powers at the national level that have their own autonomy and independence, but are subject to the rule of the Constitution and the laws (articles 7 and 137).

#### **1.1.1. Legislative Branch**

With regard to the national Legislative Power, it is highlighted that it is represented by the National Assembly, a body of representation and deliberation by nature, which represents the political plurality of the Republic.

It is a unicameral body made up of 167 deputies<sup>2</sup> elected in each federal entity by universal, direct, personalized, and secret ballot, which includes three deputies who

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<sup>2</sup> The composition of the National Assembly was recently modified by the National Electoral Council appointed by the Supreme Court of Justice, in the Constitutional Chamber, by virtue of judgment No. 68 of June 5, 2020. In fact, in the face of parliamentarians to be held in December 2020, the electoral referee decided to increase the number of positions to be elected by 66% from 167 parliamentarians to 277, that is, 110 more positions of deputies compared to the December 2015 elections. It should be noted in this regard that the National Electoral Council did not expose the criteria or the calculation base used to increase 110 seats. See: <https://www.accesoalajusticia.org/omision-legislativa-de-la-an-en-la-designacion-de-los-integrantes-del-cne/> and <https://www.accesoalajusticia.org/10-keys-on-the-electoral-system-approved-by-el-irrito-cne/>. The composition of the National Assembly was

must elect indigenous peoples in accordance with what is established by electoral law, respecting their traditions and customs; Each of the deputies will have an alternate who must be chosen in the process of electing the principals (Article 186 and Transitory Disposition Seven).

The deputies last five years in the exercise of their functions, they can be re-elected unlimitedly<sup>3</sup> and their mandate may be revocable under the conditions established in the Constitution, once half of the period for which they were elected has elapsed (Article 72). In the event that his mandate is revoked, he cannot run for popularly elected positions in the following period (Article 198).

With regard to parliamentary privileges, deputies are not responsible for the votes or opinions cast in the exercise of their functions (Article 199). Likewise, they enjoy immunity in the exercise of their functions from their proclamation to the conclusion of their mandates and the Supreme Court of Justice can only order the arrest and continue the trial of a deputy (Article 200).

As regards organization and powers, the National Assembly is presided over by a president and two vice-presidents, all elected from within and a secretary outside of it, for a period of one year (Article 194). In order to guarantee the exercise of its powers, Parliament will appoint permanent committees that can be ordinary or special, which cannot be more than fifteen. In addition, the national legislative body can create temporary commissions (Article 193). In general, parliamentary committees are the instances in which the legislative body carries out the detailed work that will make it possible to carry out its functions.

Regarding its operation, the National Assembly is dedicated to meeting in an ordinary way in two periods of the year. The first period begins on January 5, or the most immediate subsequent day possible, and lasts until August 15. The second period begins on September 15 and ends on December 15. It can also meet in extraordinary and emergency sessions. During the short recess of Parliament, the Delegate Committee made up of the president, the vice-presidents, and the presidents of the permanent committees will function.

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<sup>3</sup> Unlimited successive re-eligibility was a modification approved in 2009 after Amendment No. 1 of the Constitution was approved by referendum. However, it would be in 2007 when President Chávez proposed this change through an extensive constitutional reform (69 articles out of a total of 350), but it would be rejected by popular referendum.

Regarding the powers assigned to the National Assembly, article 156 establishes a wide universe of matters for the Republic (National Power) that, precisely, the parliamentary body must exercise through its legislative function (article 187, numeral 1). Likewise, the constitutional text provides in its article 187, numeral 3 that the National Assembly exercise political functions and control over the Government and the national public administration (Executive), in addition to an investigation that it deems appropriate in the matters of its competence (articles 223 and 224), directly or through its commissions.

### **1.1.2. Executive Branch**

The National Executive Power, according to the Venezuelan political charter, is made up of the President of the Republic, the Executive Vice President, the ministers, the Council of Ministers, the Attorney General's Office, the State Council, and the Federal Council of Government ( Articles 251 and 252), the latter body in charge of planning and coordinating all actions aimed at developing the decentralization process, as a political act of the federal democratic State (Article 185).

It is worth highlighting here the figure of the President of the Republic, who simultaneously represents the Head of State and Government - a mono-headed structure in the national Executive - (Article 228). He is elected by universal, direct, personalized, and secret ballot. The candidate who obtains the relative majority of valid votes, within a single round, is proclaimed president.

Regarding the eligibility conditions, the Constitution establishes that the president must be Venezuelan by birth, without any other nationality, over thirty years of age, and of secular status. In addition, it considers as a condition of eligibility that of not having been subjected to a conviction by means of a definitively final sentence (Article 227).

Article 233 of the Constitution expressly establishes the assumptions that constitute an absolute fault on the part of the President of the Republic, such as death, resignation, dismissal decreed by a judgment of the Supreme Court of Justice, permanent physical mental disability, certified by a medical board appointed by the TSJ.

On the other hand, the text of the Venezuelan constitutional charter also regulates the absence of the president due to a trip abroad, in which case only authorization by the National Assembly is required, when the presidential trip exceeds 5 consecutive days (Article 235).

Along with this, and as a complement to the regulation on the mandate of the president, the Constitution provides that the duration of the presidential office is six years, subject to revocation upon completion of half of the term, in the terms determined by the Constitution (Article 72). Likewise, he can be re-elected indefinitely, in accordance with Amendment No. 1 of the fundamental charter.

In addition to the aforementioned regulations, it is established that the president exercises a broad set of powers and obligations (Article 236), among others, the representation of the Venezuelan State; the direction of foreign affairs and defense of the country; issue decrees with the force of law, with prior authorization from the National Assembly by enabling law (article 236, numeral 8); competence to establish by decree the number, organization, and competence of the ministries and the Council of Ministers, an attribution that was previously reserved to the law (article 236, numeral 20).

In addition, it is responsible for promoting the high official status of the Armed Forces without any type of control by the parliamentary body (article 236, numeral 6), and, according to numeral 21, it can also dissolve Parliament. At the same time, the president has the initiative to call referendums (article 236, numeral 22), among others, the referendum to approve laws, abrogation of laws and consultative; It also has the initiative of constitutional reform in the terms of article 342, of a constitutional amendment (Article 341) and of the convocation of a National Constituent Assembly, in the terms of article 348.

It can be seen that there is an exaltation towards presidentialism within the legal structure of the Venezuelan State in the Constitution; An example of this is the power of the president to dissolve the National Assembly, as well as the expansion of control over the Armed Forces, by allowing him to decide on the promotion or promotion of his officers without parliamentary control (control that did exist in the previous constitution), with which the 1999 Constitution enables the president to exercise powers without any limits.

### **1.1.3. Judicial Branch**

The Judicial Power corresponds to the National Power, but at the same time, it configures the so-called Justice System, which is constituted by the Supreme Court of Justice, the other courts determined by law, the Public Ministry, the Public Defender's Office, the investigative bodies. criminal justice, auxiliary and justice officials, the penitentiary system, alternative means of justice, citizens who participate in the administration of justice, and lawyers authorized to exercise it (Article 253).

Within the Justice System, it is worth noting the relevance that the 1999 constituent gives to the Supreme Court of Justice (Article 262), the highest court of the Republic and that no recourse will be heard or admitted against its decisions. It enjoys functional, financial, and administrative autonomy.

In addition to the jurisdictional function, the Supreme Court of Justice is responsible for the government and administration of the Judicial Power, that is, the administration of justice and the organization and functioning of the country's courts and judges are unified in the highest court (Article 267), a function that will be in charge of the Executive Directorate of the Magistracy.

We then have that the Supreme Court of Justice assumes the representation of the Judicial Power, and it is the one who is responsible for preparing and executing the budget for this power, and it is also responsible for the inspection and surveillance of the courts of the Republic and the defense offices. public.

The entry and selection of magistrates of the Supreme Court of Justice are provided for in articles 263 and 264 of the Constitution. The aforementioned norms establish the minimum requirements that all aspiring magistrates must comply with, in addition to the procedure contemplated for the selection of candidates, which involves civil society, the National Assembly and the Citizen Power, but which are designated by Parliament to serve a single period of twelve years (article 264).

The procedure consists in that the Judicial Nominations Committee, which is made up periodically by eleven members, of which five will be elected from within the National Assembly and six from civil society, has the mission of preparing a pre-selection in accordance with a series of criteria collected in the corresponding scale, for subsequent presentation to the Citizen Power, who will make a second pre-selection and will draw up a final list that will be presented to the National Assembly, the body that will make the final selection<sup>4</sup>.

In the organizational part, the Supreme Court of Justice functions in a Full Chamber made up of all the magistrates of the Court, the Constitutional Chamber, made up of seven magistrates, the Political-Administrative Chamber, the Electoral Chamber, the Civil Cassation Chamber, the Chamber of Criminal Cassation and the Social Cassation Chamber (agrarian, labor, and juvenile cassation), made up of five magistrates each. The integration and number of magistrates are provided for in articles 7 and 8 of the Organic Law of the Supreme Court of Justice.

For its part, it should be noted that the Constitutional Chamber has a higher hierarchy than the other chambers of the Supreme Court of Justice, whose decisions are binding even for the other chambers of the high court (Article 335). From this normative registration, the Constitutional Chamber has used to promote the ignorance of the Legislative Power, just at the same moment in which the opposition was victorious in the parliamentary elections held in 2015. This endorsement is what has allowed the National Executive to dictate a battery of decisions that are

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<sup>4</sup> In 2016 the NGO *Acceso a la Justicia*, dedicated to monitoring the administration of justice and the rule of law in Venezuela, presented a report on the irregularities committed by the National Assembly, which was led by the ruling party in 2015, in the process of selection and appointment of various magistrates, in which the replacement was basically by political activists outside the judicial career, university teaching and academic circles. Indeed, after the parliamentary elections of December 6, 2015, the outgoing National Assembly proceeded to appoint thirteen justices through a procedure other than that provided for in the Constitution and in the Organic Law of the Supreme Court of Justice. See: <https://www.accesoalajusticia.org/wp-content/uploads/2016/03/informe-a-AN-3-2.pdf> Also, the note can be consulted: <https://www.accesoalajusticia.org/enterate-si-los-magistrados-expres-escogidos-en-el-2015-cumplen-o-no-con-los-requisitos-para-serlo/>.

absolutely contrary to the provisions of the Venezuelan charter, turning the Constitutional Chamber into legislator and reformer of the Constitution.

#### 1.1.4. Citizen Branch

The Citizen Power is represented by the Republican Moral Council, which in turn is made up of the heads of the organs of the Ombudsman's Office, the Public Ministry and the Comptroller General of the Republic (Article 273), and which is in charge of exercising the control of the administrative activity of the State and promote citizen training.

In fact, its functions include, among others, that of preventing, investigating, and punishing acts that violate public ethics and administrative morals; as well as ensuring the legality in the use of public assets and exercising compliance with the principle of legality in all administrative activity of the State (Article 274).

Likewise, the Republican Moral Council is responsible for the function referring to the classification of the serious offenses of the magistrates of the Supreme Court of Justice, for the purposes of their removal by the qualified majority of two-thirds of the members of the National Assembly, as stated provided for in article 265 of the constitution.

As for the Ombudsman's Office, it is the body that protects human rights and exercises control of the state administration. Its head is appointed by the National Assembly, for a single period of seven years (Article 280), and can be removed by the Assembly itself, after a ruling by the Supreme Court of Justice (Article 279, *in fine*).

The head of the Ombudsman's Office must be Venezuelan by birth, without any other nationality, over thirty years of age, with manifest and demonstrated competence in human rights matters. It is also required to comply with the requirements of good repute, ethics, and morals established by law (article 280, *in fine*).

The appointment of the ombudsman, as well as the prosecutor and general comptroller, corresponds to the National Assembly which, with the favorable vote of two-thirds of its members, will choose him from a shortlist that will be presented to him by a Committee for the Evaluation of Citizen Power Applications. This committee is made up of various sectors of society that, to choose the shortlist, will carry out a public process. Once the shortlist is presented to the National Assembly, it must choose, within a period of no more than thirty continuous days, the heads of the organs of the Citizen Power (Ombudsman's Office, Public Ministry and General Comptroller of the Republic), in accordance with Article 279 of the Venezuelan letter.

The Constitution also establishes that if after the period indicated there is no agreement in the National Assembly, the Electoral Power will submit the list to popular consultation, and in case the Committee for the Evaluation of Nominations

of the Citizen Power has not been convened, the National Assembly will proceed, within the term determined by law, to the appointment of the heads of the organs of the Citizen Power.

Regarding their removal, the National Assembly is the authorized instance, after a pronouncement by the members of the Supreme Court of Justice, in accordance with the provisions of the law and when there is a serious offense (Article 279).

On the other hand, the Constitution also indicates that gratuity, accessibility, speed, informality, and ex officio impulse are the principles that govern the activity of the Ombudsman's Office (Article 283), in addition to contemplating that the head of this body shall enjoy immunity in the exercise of their functions, so they may not be prosecuted, detained or prosecuted for acts related to the exercise of their functions (Article 282).

In this regard, a preliminary trial of merit is foreseen for their prosecution<sup>5</sup>, as well as for the heads of the Public Ministry and the General Comptroller's Office of the Republic (Article 282).

As regards the Public Ministry<sup>6</sup>, which although it is part of the judicial system, also belongs to the Citizen Power, it should be noted that it is assigned, among other functions, the criminal investigation of the perpetration of the punishable acts and the ownership of the criminal activity; it is also responsible for enforcing the responsibility (civil, labor, criminal, administrative, disciplinary, and military) of public officials (Article 285).

The Public Ministry is directed by the Attorney General of the Republic, elected for a period of seven years. To exercise this position, the same eligibility conditions are required for the magistrates of the Supreme Court of Justice (Article 284).

With respect to the Office of the Comptroller General of the Republic, according to the Constitution, it is responsible for the control, surveillance, and supervision of national income, expenses, and assets, as well as operations related to these activities (Article 287). Likewise, the controlling body exercises, among other functions, control over the public debt and management control (article 289).

Its holder, the Comptroller General of the Republic, requires to be Venezuelan by birth and without another nationality, over thirty years of age, and proven aptitude and experience in the matter (Article 288). His mandate will be for a period of seven years.

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<sup>5</sup> The preliminary judgment of merit is a privilege that high state officials have that prevents criminal cases from being brought against them if there is no prior express ruling from the Supreme Court regarding whether there are sufficient elements of judgment against them to proceed with a process before ordinary criminal courts.

<sup>6</sup> <https://www.accesoalajusticia.org/wp-content/uploads/2020/07/Informe-El-ministerio-Pu%CC%81blico-en-Venezuela.-Su-actuacio%CC%81n-y-percepcio%CC%81n-ciudadana-Acceso-a-la-Justicia.pdf>.

### 1.1.5. Electoral Branch

The 1999 Constitution includes the Electoral Power as part of the National Power, made up of the National Electoral Council, the body that heads it, as well as the National Electoral Board, the Civil Registry Commission and the Political Participation and Financing Commission, which are bodies subordinate to the first (article 292). Regarding the regulation of the structure and operation of each of the organs that make up this power, the Venezuelan political charter establishes that an organic law is the ideal instrument for its development.

The constituent bodies of the Electoral Power, the Constitution indicates, must be governed by the principles of organic independence, functional and budgetary autonomy, de-partisanship of electoral bodies, impartiality and citizen participation, decentralization of electoral administration, transparency and speed of the act of voting and scrutiny (article 294).

Impartiality and transparency are of interest as guarantees for the holding of competitive elections. For this, the Constitution imposes the non-partisanship of the electoral body, that is, the members that make up the National Electoral Council must not be linked to any political party, as is contemplated at the same time in article 9 of the Organic Law of the Electoral Power.

The National Electoral Council, the leading instance of the electoral administration, is made up of five rectors, from whose bosom its president and vice president are elected. The rectors, principals and alternates, will be appointed by the National Assembly, by the vote of two thirds of its members. The duration of their positions will be seven years and their election will be made separately. Thus, the three postulated by civil society are appointed at the beginning of each period of the National Assembly, and the other two at the middle of it.

The National Electoral Council has the responsibility of regulating the electoral laws and resolving the doubts and gaps that they raise, as well as the organization, administration, direction and supervision of all acts related to the election of the positions of popular representation of the powers, public and referendums, according to article 293 of the Constitution.

### 1.2. Statal Power

The State Power is divided into Executive and Legislative. The ownership of the Executive Power corresponds to the governor, who is elected by popular suffrage for a period of four years, by a simple majority of the voters, with the possibility of immediate and indefinite reelection, according to constitutional amendment No. 1. The governor is accountable for its management before the State Comptroller's Office and not before the state legislative body (Article 161).

The governor must be Venezuelan, not necessarily by birth, except the governors of the border states, over twenty-five years of age and of a secular state. It can be revoked by popular referendum, once half of its term has elapsed (Article 72).

With regard to the Legislative Power, the Constitution indicates that it is exercised by the legislative council, the body in charge of monitoring and supervising the state Executive Power. The legislative council is made up of no more than fifteen and no less than seven members, who proportionally represent the population of the state and the municipalities (Article 162). They exercise their functions for periods of four years and enjoy immunity in their territorial jurisdiction.

It corresponds to the legislative body of the state to legislate on the matter of state jurisdiction, in addition to sanctioning the state budget law and the others established by the constitutional text and the law.

### **1.3. Municipal Power**

The municipalities constitute the primary political unit of the national organization, which enjoy autonomy within the limits of the Constitution and the law, including, the same, the election of their authorities, who must form their own government that according to the Constitution it must be democratic and respond to the nature of local government (article 169).

In accordance with article 168 of the Constitution, the Municipal Power enjoys autonomy within the limits of the Constitution and the law. Likewise, article 2 of the Organic Law of Municipal Public Power also provides that municipalities "exercise their powers autonomously, in accordance with the Constitution and the law." In this sense, municipal autonomy includes the election of its authorities, the management of matters within its competence, and the creation, collection, and investment of its income.

Now, the Constitution indicates that the Municipal Power is composed of the Executive and the Legislative. The Executive Power corresponds to its exercise to the mayor, who must be Venezuelan, over twenty-five years old and of secular status. This official is elected by universal, direct, and secret suffrage by a relative majority of the voters. His mandate is for a period of four years, and he may be reelected indefinitely (article 174), in accordance with the constitutional amendment of 2009.

As regards the Legislative Power, the Venezuelan charter establishes that it corresponds to the municipal council, made up of councilors elected in accordance with the electoral system that combines the principle of personalization of suffrage and proportional representation (Article 63)<sup>7</sup>.

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<sup>7</sup> The 1999 Constitution recognizes two electoral systems, on the one hand, the so-called nominal or majority system (in which the candidate who obtains the absolute or relative majority is elected), for the election of executive positions (President of the Republic, governors, and mayors) and another,

The municipal council, as the head of the municipal legislative power, has the power to enact local laws, called ordinances, which are traditionally attributed the character of "laws" as acts of direct and immediate execution of the Constitution. The constitutional charter also details, in article 178, the municipal powers, among which the urban roads, the circulation and the organization of the transit of vehicles and people on the municipal roads stand out; protection of the environment; urban and home cleaning; drinking water, electricity and domestic gas service, sewerage, channeling and disposal of sewage; cemeteries and funeral services; justice of the peace, prevention and neighborhood protection; and municipal police services. The Constitution also establishes that the comptroller function at the municipal level corresponds to the municipal comptroller's office, apart from stating that the functions that correspond to the municipality in matters within its competence do not undermine the national or state competencies that are defined in the law in accordance with the Constitution (article 178).

## **2. Mutation of the Venezuelan constitutional State**

After the approval of the 1999 Constitution, the Government of Hugo Chávez Frías gradually introduced weighty modifications that we're imposing a normative structure parallel to that provided for in the Venezuelan charter, in some cases and in others, the adoption of interpretations contrary to the Constitution that allowed to evade the limits imposed by it, a policy that would also be reproduced by the Government of Nicolás Maduro Moros, after the physical disappearance of Chávez in 2013.

### **2.1. National Power**

Although it is true that Chávez promoted the design of the 1999 Constitution, which was aimed not only at modifying institutional rules but also at substantially increasing presidential powers, the reality was that the structure and organization of State Power provided for in the constitutional text it would be practically dismantled by the Chávez government itself, fundamentally with the idea of concentrating power and making its control in the country sustainable for several years.

This denaturation was carried out through various actions, especially by the so-called "legislative decrees," which consist of legal norms with the rank of law that

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called the mixed system, provided for the choice of deliberative bodies (National Assembly, legislative councils and municipal councils), which consists of the voter voting for one or more seats nominally, that is, by the name and surname of the candidate, and for others by a list presented by the political organization of their preference, resulting, in the latter case, the candidates are elected depending on the percentage of votes they obtain and their order in the list.

the national Executive can issue by virtue of an authorization issued by the National Assembly.

Between 1999 and 2012 Chávez governed without the counterweight of the National Assembly, since this body, controlled by the ruling party, had enabled him to exercise the legislative function based on four enabling laws. This practice would allow Chávez to issue more than two hundred legislative decrees that served him to dismantle the democratic institutions that had been enshrined in the Venezuelan constitutional text. So then, through these enabling laws, the Executive Power also served as Legislative.

In 2013, after the death of Chávez, Nicolás Maduro Moros, who would be elected as president after the holding of controversial elections, would continue with the destruction of the constitutional rule of law that his predecessor had undertaken, with the aim of maintaining the parallel model that it had been built, which would not find any practical difficulty, given that the Government dominated the National Assembly, the Supreme Court of Justice and the National Electoral Council.

The dismantling of the National Power would be accentuated at the end of 2015, after the triumph of the opposition in the parliamentary elections held in December of that year. Indeed, from the electoral defeat of the government party, Maduro would decide to undertake the consolidation of his personal hegemonic project, especially with the violation of the principle of the separation and independence of the public powers, the annihilation of the National Assembly, and the submission and subordination of all powers.

### **2.1.1. Legislative power**

The mission and functions of the legislative body have been distorted in light of the Venezuelan letter. One proof of this metamorphosis is the practical paralysis and annulment of its powers promoted by the National Executive with the support of the Supreme Court of Justice which, through a series of sentences, have annihilated the separation of powers to the detriment of the Legislative Power and, consequently, of the basic text.

Since the opposition gave a resounding defeat to the Maduro government in the legislative elections in 2015, the process of emptying the functions assigned to the National Assembly sponsored by the Supreme Court of Justice was revealed, at the cost of openly achieving the consolidation of a totalitarian structure, which has generated the collapse of the State and the serious institutional crisis currently being experienced in Venezuela<sup>8</sup>.

One of the techniques implemented in recent years, endorsed by the Supreme Court of Justice, was to permanently decree a state of exception. Thus, given the

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<sup>8</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2020/06/INFORME-ANUAL-DE-ACCESO-A-LA-JUSTICIA-2019.pdf>.

impossibility of the National Assembly granting it enabling laws, decrees of states of exception were issued to legislate through this medium.

In effect, since January 2016 the National Executive decided to declare that the country was subject to an exceptional economic emergency regime without any legal justification for it and, worst of all, without the approval of the National Assembly as ordered by the Constitution, in addition to Now the international community has not been notified about the guarantees that limit this regime of the state of exception, despite the fact that it has this obligation as provided by the Constitution itself when recognizing human rights treaties as part of its text (Articles 23 and 31).

But apart from the annulment of the National Assembly, which has been deepened by the regime imposed by the state of emergency, the deputies have also been ignored of the constitutional privileges that imply enjoying parliamentary immunity<sup>9</sup>. In an arbitrary manner, the National Executive Power has intimidated and repressed opposition deputies, in order to consolidate the annihilation of the legislative power, especially through the National Constituent Assembly, an aspect that will be developed in the sixth section of this report.

### 2.1.2. Executive power

The Executive Power comes to occupy the first position with respect to the rest of the powers from its horizontal distribution, displacing the Legislative, to such an extent that it is not subject to the law or less to the Constitution. An exacerbated presidentialism has practically been imposed that has been occurring after the triumph of the opposition in the National Assembly, taking into account the more than one hundred sentences that the Supreme Court of Justice has issued to favor in this way the hegemonic exercise of the powers of the National executive without any type of control by the Legislative Power.

Likewise, the concentration of power in the national Executive has increased as a result of laws, legislative decrees, administrative and judicial decisions that have ignored the distribution of exclusive powers in each of the powers of the State in order to increase the functions and powers in the holder of the Presidency of the Republic, who undoubtedly aspires to remain in power indefinitely, in contravention of the current constitutional order.

In general, in fact, a parallel State has been formed in Venezuela in which the presidential figure is above the Legislative, Judicial, Citizen, and Electoral powers, in addition to regional and local governments, which is absolutely incompatible with separation. of powers, to federalism and decentralization, principles proclaimed by the Venezuelan charter.

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<sup>9</sup> See: <https://www.accesoalajusticia.org/glossary/inmunidad-parlamentaria/>.

### 2.1.3. Judicial Power

Since the 1999 Constitution came into force and throughout these two decades, the rules and principles established by it on the Judicial Power have been unknown to a greater or lesser extent, to such an extent that currently, the country has a Supreme Court of Justice with a level of politicization never before seen in the Venezuelan constitutional history<sup>10</sup>.

And not only that but the Supreme Court of Justice, through the Constitutional Chamber, has also been assuming a position in which it classifies itself as the highest and last interpreter of the Constitution, which has established itself as the sole arbitrator. to define their powers, regardless of the provisions of the basic text itself and the laws.

From this position, it has drawn up a jurisprudence that on many occasions deviates from the values, principles and constitutional norms, and also modifies the wording of its content, thus contradicting the very essence of the Venezuelan political letter<sup>11</sup>, especially through a mechanism called «appeal autonomous interpretation of the Constitution», created by the Chamber itself and which has allowed it to interpret the Constitution in an abstract way, becoming a supreme body, exempt from all control, which is located, even above the charter itself<sup>12</sup>.

Another more serious situation from the perspective of non-observance of the Constitution is the appointment of the country's high judicial authorities, especially the magistrates of the Supreme Court of Justice, carried out through legal subterfuges, with the purpose of selecting magistrates related to the Government<sup>13</sup>. This has led to a situation of enormous vulnerability to judicial independence<sup>14</sup>.

### 2.1.4. Citizen Power

As with the selection of the magistrates of the highest court of the country, the appointment of the heads of the Public Ministry, the Office of the Ombudsman, and the Office of the Comptroller General of the Republic have been carried out outside the Constitution.

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<sup>10</sup> See: <https://www.accesoalajusticia.org/golpe-judicial/>.

<sup>11</sup> HERNÁNDEZ GONZÁLEZ, José Ignacio. Is the concentrated control of constitutionality justified in Venezuela? Some notes on the limits and risks derived from constitutional justice, 521-542. In AA.VV. **VI International Congress of Constitutional Procedural Law & IV Congress of Administrative Law**. Tribute to Professor Carlos Ayala Corao. Coordinator Gonzalo Pérez Salazar. Monteávila University, Caracas, 2017.

<sup>12</sup> See: <https://www.accesoalajusticia.org/la-sala-constitucional-cambia-la-constitucion-con-el-recurso-de-interpretacion/>.

<sup>13</sup> See: <https://www.accesoalajusticia.org/enterate-si-los-magistrados-expres-escogidos-en-el-2015-cumplen-o-no-con-los-requisitos-para-serlo/>.

<sup>14</sup> See: <https://www.accesoalajusticia.org/golpe-judicial/>.

From the moment the Venezuelan letter was approved, the selection procedure of the Citizen Power authorities began to be broken. An evident fact is when the National Assembly elected in 2000 dictates the Special Law for the Ratification or Designation of Civil Servants of the Citizen Power and Magistrates of the Supreme Court of Justice for the First Constitutional Period, which would allow it to proceed to designate the civil servants of the Citizen Power without the constitutional requirements to integrate it<sup>15</sup>.

This debatable appointment of the National Assembly would be overcome when in December 2014 the National Assembly, by simple majority, would appoint the attorney general and the ombudsman, in frank violation of the Constitution. The Legislative Power, in light of the constitutional precepts, had to elect the holders of the Citizen Power through the favorable vote of 2/3 of its members, in addition to choosing said authorities from among the candidates who were proposed in a shortlist presented by the Citizen Power Nomination Evaluation Committee, which inexorably had to be made up of representatives from various sectors of society.

These appointments would also be capriciously conducted in 2017 by the National Constituent Assembly, installed in August of that year, as will be explained in detail later. In any case, this route has been implemented in the interests of the Government, and not in accordance with what is constitutionally required.

#### **2.1.5. Electoral Power**

In the same way, the arbitrary appointment of the rectors of the National Electoral Council has been carried out without adherence to constitutional norms. The Venezuelan political letter indicates that the National Assembly is the competent body to appoint the new rectors of the Electoral Power through a Nominations Committee, made up of deputies and representatives of civil society, who are in charge of evaluating the candidates<sup>16</sup>.

In the last seventeen years, however, this —total or partial— designation process has been carried out on seven occasions, five of them by the Constitutional Chamber of the highest court of Venezuela (2003, 2005, 2014, 2016, and 2020), and only twice was the appointment made by Parliament (2006 and 2009)<sup>17</sup>.

In this context, it is not surprising that all the rectors currently in office in the National Electoral Council have been arbitrarily appointed by the Supreme Court of Justice<sup>18</sup>, on the grounds that the National Assembly omitted said process. The

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<sup>15</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2019/09/Informe-La-toma-absoluta-del-Poder-en-Venezuela.pdf>.

<sup>16</sup> Eidem.

<sup>17</sup> See: <https://lagranaldea.com/2020/02/18/en-20-anos-se-han-designado-7-directivas-del-cne-y-solo-una-se-hizo-apegada-a-la-ley/>.

<sup>18</sup> See: <https://www.accesoalajusticia.org/tsj-nombra-a-cne-expres/>.

reality is that the Maduro government and the highest court have ignored the powers of the National Assembly.

This mode of designation of the rectors outside the Constitution and, above all, the clear partisan ties of the current National Electoral Council directive, have diminished the trust, transparency, and freedom of vote in the electoral processes carried out in recent years in the country, especially the next parliamentarians to be held on December 6<sup>19</sup>.

## 2.2. Statal and Municipal Power

Since the beginning of the 1999 Constitution, a process in open contradiction with the constitutional declarations on federalism and decentralization has been established in the country. Through laws and a series of unconstitutional decisions, a process of concentration of power and centralization has been imposed, which ignores the autonomy of the state and municipal levels.

The central government has imposed through twisted interpretations of the Constitution and the laws from the Supreme Court of Justice, the use of violence, threats, and the manipulation of institutions, structuring an authoritarian regime with absolute centralism based on a single territorial entity which is the Republic and a State with all the power concentrated in the National Executive Power<sup>20</sup>, especially with the creation of an organization system around the idea of communes and the so-called communal State<sup>21</sup> for the management of the problems of the communities, a model of territorial political division contrary to the rules of the Venezuelan charter that violates the autonomy of the states and municipalities, the basic platform for decentralization<sup>22</sup>.

Additionally, it should also be noted that in cases where the ruling party has lost a mayoralty or a governor's office, although it formally recognizes the defeat in practice, this is not the case, since from that moment on it establishes a series of limitations to the exercise of the competencies of the elected incumbents and in all cases it imposes parallel authorities designated by the National Executive Power

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<sup>19</sup> See: <https://www.accesoalajusticia.org/golpe-electoral/>.

<sup>20</sup> The Venezuelan non-governmental organization *Acceso a la Justicia* produced a report that describes, analyzes and denounces how, slowly but surely, a totalitarian regime has been established in Venezuela, without the rule of law and in violation of human rights after the entry into force of the 1999 Constitution. See: <https://www.accesoalajusticia.org/wp-content/uploads/2019/09/Informe-La-toma-absoluta-del-Poder-en-Venezuela.pdf>.

<sup>21</sup> The predominant characteristic of the communal state is the dismantling of the federal state with the sole objective of promoting socialism, which had its origin in the constitutional reform project proposed by Hugo Chávez Frías in 2007, but which would finally be rejected by popular referendum. See: <https://www.accesoalajusticia.org/democracia-participativa-amenazada-por-las-comunas/>.

<sup>22</sup> SÁNCHEZ FALCÓN, Enrique. **Communal state and federal state in Venezuela. Are both forms of State constitutionally reconcilable?** Notebooks of the Manuel García-Pelayo Foundation N ° 18. Political Issues. Caracas, 2017.



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(called «protectors»), which are given resources to undertake activities that are proper to those legitimately elected.

### **3. Regulation of the National Constituent Assembly according to the 1999 Venezuelan constitutional text**

The National Constituent Assembly is a mechanism designed to radically change or modify the fundamental charter, which is submitted to the approval of the people by means of a referendum, and, in general, to transform the legal system.

Among the important aspects of the 1999 Constitution is the incorporation of the figure of the Constituent Assembly as a deliberative body of elected representatives, which is provided for in Article 347 of the Constitution, through which it is given the function of preparing A new Magna Carta that establishes the legal regime that is to govern the State.

The aforementioned provision, in effect, establishes that the people of Venezuela “are the depository of the original constituent power. In exercise of this power, it can convene a National Constituent Assembly in order to transform the State, create a new legal system, and draft a new Constitution. This is even so expressly established in Article 5 of the fundamental text, when it establishes that «Sovereignty resides non-transferable in the people, who exercise it directly in the manner provided in this Constitution and in the law, and indirectly, through suffrage, by the bodies that exercise Public Power».

The Venezuelan Magna Carta, however, does not present the procedure for convening this constitutional review mechanism. It is only limited to indicating who has the initiative to activate this process, which according to article 348 falls on both the national Legislative and Executive powers, as well as the Municipal Power, in addition to the electoral body through the participation of 15% of the registered voters in the electoral register (popular initiative).

The Venezuelan letter also omits the National Constituent Assembly's election procedure, that is, it does not regulate who would make up that instance, much less the methods or formulas that should be applied for the selection of its members. Nor does it regulate for how long a National Constituent Assembly would function. The reason for its absence would perhaps be based on the fact that this body, given the original nature attributed to it, would be the only one that could indicate its own regime and operation.

Another aspect that the Constitution does not define is the demand for the approval of the constitutional text sanctioned by the Constituent Assembly by the people, as happened in the 1999 process that gave rise to the current fundamental text.

Now, by virtue of the absence of each of these aspects by the Venezuelan Magna Carta, it is necessary to point out the following: the existence of the Constituent Power is not possible without the participation of the people, through democratic methods, as the holder of popular sovereignty. For this reason, as the holder of the Constituent Power, it has the right to exercise it directly to convene the process, as well as to elect its representatives on the basis of the principle of universal, direct,

secret, and equal suffrage, in addition to ruling on the approval or rejection of the new text of the constitution drawn up by the National Constituent Assembly.

Thus, even when the 1999 Constitution does not provide for the procedural aspects for the convocation, integration, and functioning of the Constituent Assembly, it must be interpreted that the people, as depositary and holder of popular sovereignty, are empowered to approve or not the convocation of this process, appoint their representatives, and above all have the last word to approve the new Constitution, as defined in Article 347 of the Venezuelan political charter.

Precisely, this was the interpretive position that was imposed in the convocation of the National Constituent Assembly held in Venezuela during 1999, after the defunct Supreme Court of Justice, in two historic decisions<sup>23</sup>, endorsed the holding of a referendum to consult the people about the convening of an instance that was not explicitly prescribed as a modality of constitutional review in the 1961 letter.

For the rest, in current times, the above interpretation also finds its basis in article 71 of the current Venezuelan charter, the text of which provides that matters of special national, state, municipal, and parochial significance may be submitted to a consultative referendum.

In this way, it is undeniable to hold a referendum to consult the people, as depositary and holder of popular sovereignty, whether or not to approve the convocation of a Constituent Assembly requested by the holders of that initiative (the National Assembly through a qualified majority, the President of the Republic in the Council of Ministers, 2/3 of the municipal councils and 15% of the voters registered in the electoral register), as happened in the constitutional process held in 1999.

It can also be said that the convocation of the National Constituent Assembly would be considered approved if in the consultative referendum the number of affirmative votes is greater than the number of negative votes. If the number of negative votes is higher, it would be considered rejected, and a new popular consultation could not be called in the same constitutional period, in accordance with the provisions of article 345 of the fundamental text, a provision that is closely linked to the constitutional modification and change of the legal order, despite the fact that the norm refers to the reform as a means of revision.

In this same sense, it seems reasonable, and it is implicit in the Constitution, that the people must be consulted to approve or reject the text of the new letter by means of a referendum. The approval of the new political text would require that the number of positive votes is higher than the number of negative votes, in accordance with article 345 of the Constitution, which is the same criterion used for convening the

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<sup>23</sup> AYALA CORAO, Carlos and CHAVERO GAZDIK, Rafael. **The National Constituent Assembly of Venezuela (2017-2019). The Leviathan of democracy.** Collection Series Studies number 119. Academy of Political and Social Sciences. Venezuelan Legal Editorial. Caracas, 2019, pp. 52-57.

National Constituent Assembly. Once the new Constitution is approved, its text will be published in the Official Gazette.

In the same way, it is observed that the Venezuelan letter establishes nothing about what are the material limits to which the National Constituent Assembly should submit. Despite this regulatory void, it should be noted that although article 349 of the Constitution establishes that the Legislative, Executive, Judicial, Citizen, and Electoral powers will not be able to impede the decisions of the Constituent Assembly, this does not mean that it has absolute and uncontrolled powers. , since it must be subject to democratic and republican values, in addition to international treaties and the progressive nature of fundamental rights.

This is particularly noticeable in Article 350 of the Constitution, which establishes the right to civil disobedience when it indicates that the Venezuelan people «will not recognize any regime, legislation or authority that violates democratic values, principles, and guarantees or undermines human rights». In this sense, the Constituent Assembly must submit to the parameters of human rights, to the democratic system expressed in several principles, among them, participation in the management of public affairs, either directly or through representatives, and the separation of powers. , as well as the limits coming from the international community, especially by the treaties and agreements that the State has ratified.

The National Constituent Assembly cannot evade the rules that are typical of any constitutional state of law, nor the norms imposed by international law. This is how it can create a new legal system and, therefore, develop a new Constitution, that is its only role, but in no case can its work be directed, in an absurd and arbitrary way, to ignore and exceed the rules and fundamental limits to the point of wanting to unlimitedly replace the rest of the public powers.

#### 4. Background of the 1999 National Constituent Assembly

It is important to point out that the constitutional norms enshrined in articles 347 to 349 were the product of the constitutional process that took place in the country during 1999.

As we have already indicated, this National Constituent Assembly arose in response to an institutional crisis that existed in the country<sup>24</sup>. At that time, the Venezuelan letter that was in force did not contemplate the possibility of convening said Assembly<sup>25</sup>, however, in order to fill that gap, an interpretation was requested from the Supreme Court of Justice, today the Supreme Court of Justice, in its character of the highest interpreter of the constitutional text of 1961.

With this intention, the Supreme Court of Justice, in the Political-Administrative Chamber, through rulings numbers 17 and 18, both of January 19, 1999, after resolving two proposed interpretation appeals on the doubt that arose whether a referendum Consultative was a sufficient mechanism to convene a Constituent Assembly not provided for in the Constitution, it expressly recognized that the Venezuelan people had the sovereign right to order such a procedure in order to obtain a new Constitution, and for this reason, it could be consulted through a popular referendum as it is a matter of national significance, in accordance with the provisions of article 4 of the 1961 Constitution and article 181 of the Organic Law on Suffrage and Political Participation.

Based on this jurisprudential thesis, which provided a legal platform in the country for the celebration of the constituent process without the need to previously modify the 1961 Constitution, the consultative referendum would be held so that the people could decide on the viability of convening a National Constituent Assembly, which

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<sup>24</sup> Between the election of Carlos Andrés Pérez in December 1988 and the coming to power of Hugo Chávez Frías in December 1998, a chain of serious events occurred in the country. The so-called Caracazo, a violent social outbreak that occurred in 1989; two coup attempts that were carried out on February 4 and November 27, 1992; the early departure from the presidency of Carlos Andrés Pérez under accusations of acts of corruption and the crisis in the financial system.

<sup>25</sup> For 1999, the 1961 Constitution only allowed two formal ways for its modification in accordance with the provisions of articles 245 to 248. The first based on the amendment, which only makes specific modifications that will not alter the fundamental structure of the Constitution. and a second under the figure of the constitutional reform, which was only about modifications that implied an important alteration of the letter. See: <https://cepaz.org/noticias/constituctado-de-1999-vs-constituctado-de-2017/>. For 1999, the 1961 Constitution only allowed two formal ways for its modification in accordance with the provisions of articles 245 to 248. The first based on the amendment, which only makes specific modifications that will not alter the fundamental structure of the Constitution. and a second under the figure of the constitutional reform, which was only about modifications that implied an important alteration of the letter. See: <https://cepaz.org/noticias/constituctado-de-1999-vs-constituctado-de-2017/>.

had been established by decree No. 3 dated February 2, 1999, issued by then-President Hugo Chávez Frías on the same day he took office<sup>26</sup>.

This presidential initiative to convene a Constituent Assembly was a promise that Chávez had presented during his electoral campaign as a candidate in the 1998 presidential elections<sup>27</sup>. The referendum would be held on April 25, 1999, with the participation of 4.137.509 voters, and an abstention of 62.2%, the votes in favor of Yes would reach 92.4%, while those of No obtained 7.6%.

In addition, and no less important, it should be noted that the Supreme Court of Justice during the constitutional process that took place in 1999 would specify, in order to guarantee the ownership of sovereignty to the Venezuelan people, that the rules should be submitted in the consultative referendum o electoral bases<sup>28</sup> necessary to define the electoral formula to elect the members of the National Constituent Assembly, as well as its operation, in the event that the call is approved. In the country, in effect, there was a debate on the content and, especially, on whether or not these electoral bases should be submitted to a referendum, which was intended to be established directly by President Chávez. In this regard, the country's high court, through its political-administrative Chamber, would decide in a judgment of March 24, 1999, that the bases should be approved by the people through popular consultation.

In fact, the Chamber pointed out that if the President of the Republic was authorized to establish through an act the bases of the electoral process related to the National Constituent Assembly (ANC by its acronym in Spanish), it was evident that «in no way is the examination of a specific matter being subjected to the criteria of the voters and specific, on the contrary, what is sought is that a single person is delegated the decision on that matter». This is how the electoral bases would be approved by the electoral body in the consultative referendum that had been called. After the referendum of April 25, the electorate pronounced in favor of the National Constituent Assembly and the electoral bases, the National Electoral Council, the body in charge of organizing the process, would proceed to convene for July 25, 1999, the election of the members of the Assembly.

The election of the constituents would be held with an abstention of 53.7% of the voters. The electoral victory would be awarded to the parties that expressed their support for former President Chávez, who had grouped themselves under the name of *Polo Patriótico*, after they reached 65% of the votes cast, which would allow them

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<sup>26</sup> Official Gazette No. 36.634 of February 2, 1999.

<sup>27</sup> On December 6, 1998, Lieutenant Colonel Hugo Chávez Frías, commander of the failed military uprising of February 4, 1992, would win the presidential election, obtaining 56.20% of the votes, over 40% obtained by candidate Henrique Salas, with an abstention of 36.24%.

<sup>28</sup> See: <https://www.accesoalajusticia.org/glossary/bases-comiciales/>.

to obtain more than 90% of the vote. the positions of the National Constituent Assembly.

On August 3, 1999, the Constituent Assembly would be installed in the Aula Magna of the Central University of Venezuela, and on August 8 it would begin its sessions with 131 members. The draft of the new Venezuelan charter would be sanctioned on November 17 and on December 15 it would be submitted to a popular referendum so that the people would rule on its approval. The popular consultation held widely favored the approval of the new constitutional text by 71.71% of the total votes cast against 28.22%, with an abstention that reached 55.22% of the voters.

It would be the interpretive thesis of the defunct Supreme Court of Justice, based on the sentences handed down during the process of convening and forming the National Constituent Assembly, which would design the legal framework that would later be incorporated into the 1999 Constitution, especially when in Article 347 contemplates that the people, as the possessor of popular sovereignty, is the only one entitled to convene a Constituent Assembly, a postulate that in turn would be reinforced in Article 5 of the fundamental text, after establishing that «Sovereignty resides non-transferable in the people, who exercise it directly in the manner provided in this Constitution and in the law, and indirectly, by means of suffrage, by the bodies that exercise Public Power».

In addition, the National Constituent Assembly, according to the thesis of the high court, could intervene on the existing public powers under the Constitution of 1961, which led to the concentration of functions in the Constituent Assembly, and that in a certain way would be reflected in the Constitution of 1999, after it established in the only section of article 339 that «constituted powers may not in any way impede the decisions of the National Constituent Assembly».

In sum, during its operation, the 1999 National Constituent Assembly was not only in charge of drafting a new Constitution but also involved all the other powers of the State, which had been democratically elected, which implied that the acts dictated by the Constituent Assembly were not subject to any control neither the Constitution nor the human rights treaties.

Unfortunately, this precedent would become the main weapon of inspiration so that the National Constituent Assembly, convened and installed in 2017, could do the same, that is, to dictate a cascade of decisions arbitrarily to favor the interests of the Maduro Government, while it drafted the new constitutional charter.

## 5. Context of the 2017 National Constituent Assembly

Since the victory of Hugo Chávez Frías in the 1998 presidential elections, as well as the presidency of Nicolás Maduro Moros after the elections of April 14, 2013, by winning the elections held after the death of Chávez, the country began to be governed Without any counterweight by the Legislative Power, which for more than a decade and a half was controlled by the political parties attached to the Government.

In this scenario, the parliamentary elections of December 2015 would take place, imposing the victory of the political organization *Mesa de la Unidad Democrática (MUD)*, an alliance of opposition parties. It was the first time in seventeen years of government rule in Venezuela that the opposition would control the National Assembly, a fact that undoubtedly represented for the national government the breaking of the absolute control it exercised over Parliament, and the first evidence that free elections They would no longer be favorable as in other elections.

The elected National Assembly was called to play a decisive role in the process of change or transformation of the political regime as the only legitimate, democratic and representative body. However, from this new composition of the Legislative Power, a series of events would emerge in the country that would trigger a long institutional crisis backed by the Supreme Court of Justice, in order to prevent the operation of the National Assembly<sup>29</sup>, controlled by the opposition.

In fact, a few days after the political triumph of the opposition, and before the new Assembly began its sessions, four indigenous deputies from the state of Amazonas would be challenged before the Electoral Chamber of the country's high court, on the grounds of the alleged fraud. election with evidence of dubious legality, as it was allegedly recorded telephone conversations without a court order.

Faced with this situation, the Chamber would decide to issue a precautionary measure by means of judgment No. 260 of December 30, 2015, from which it would provisionally suspend the proclamation of those deputies, despite the fact that they had already been proclaimed by the electoral authorities<sup>30</sup>.

This apparently unimportant decision because it set aside a small number of deputies, is actually fundamental, because it prevented the opposition from having a qualified majority of 2/3 before the new National Assembly was constituted, which would allow it, among other things approve organic laws, designate the holders of the Judicial and Electoral powers, as well as the possibility of reforming the constitutional text or calling a National Constituent Assembly.

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<sup>29</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2019/09/Informe-anual-2018-El-camino-a-la-dictadura-con-el-aval-del-Tribunal-Supremo-de-Justicia.pdf>.

<sup>30</sup> See: <https://www.accesoalajusticia.org/el-viacrucis-judicial-de-los-diputados-de-amazonas/>.

From that moment, the Supreme Court of Justice, whose majority of magistrates came from the ranks of the ruling party<sup>31</sup>, began to dictate decisions against everything that came from the National Assembly with slightly crazy approaches until constructing the thesis of contempt that prevented them from thinking about new arguments<sup>32</sup>, with the aim of justifying that any decision made would be null and void.

Indeed, under the pretext that the National Assembly had not complied with certain decisions of the Constitutional Chamber, the disqualification of the legislative body from acting and, consequently, hindering the exercise of its parliamentary duties will be justified<sup>33</sup>.

Today, almost five years later, that trial initiated by the Supreme Court of Justice has not ended in any sentence, highlighting its political connotation; The National Assembly has seen each and every one of the laws and other acts enacted by it be annulled, which highlights the purpose of preventing its legitimate operation.

In this way, the real institutional conflict between the Legislative, Executive, and Judicial powers begins<sup>34</sup>, which will manifest itself to such an extent that, even today, that is after almost five years since the parliamentary election, the attack continues with the most diverse declarations of unconstitutionality of draft laws or any decision of the National Assembly by the Constitutional Chamber of the Supreme Court of Justice<sup>35</sup>, in addition to a battery of arbitrary measures undertaken to attack and prosecute opposition deputies, among others, prosecutions without respect for their parliamentary immunity, disqualifications without prior procedure by the Office of the Comptroller General of the Republic and illegal detentions<sup>36</sup>.

This conflict would be further aggravated when the Maduro government in January 2016 decides to declare in the country a state of emergency of economic emergency<sup>37</sup>

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<sup>31</sup> See: <https://www.accesoalajusticia.org/informe-sobre-irregularidades-en-la-designacion-de-magistrados/>.

<sup>32</sup> See: <https://www.accesoalajusticia.org/desacato-de-la-an-por-la-incorporacion-de-los-diputados-por-el-estado-amazonas-suspendidos/>.

<sup>33</sup> See: <https://www.accesoalajusticia.org/datos-y-tipos-de-sentencias-del-tsj-vs-an/>.

<sup>34</sup> See: <https://www.accesoalajusticia.org/el-tsj-vs-la-an/>.

<sup>35</sup> From that questionable thesis until August 10, 2020, the Supreme Court of Justice has issued 138 sentences against the National Assembly, among which it has disrupted its organization and operation and, in general, the entire structure of Public Power to the detriment of the principle of constitutional supremacy, legality and separation of powers. See: <https://www.accesoalajusticia.org/datos-y-tipos-de-sentencias-del-tsj-vs-an/>

<sup>36</sup> See: <https://www.accesoalajusticia.org/persecucion-politica-a-diputados-de-oposicion-o-disidentes-en-venezuela/>.

<sup>37</sup> The Maduro government began to issue emergency decrees on the border with Colombia in mid-2015, which were justified as a defense measure against an alleged offensive of economic warfare. This had the effect of a prolonged closure of the border crossings and the expulsion of two tens of

without complying with the constitutional and legal parameters<sup>38</sup>. Since then, it would be repeatedly extended, for which there are more than twenty-eight extensions, a situation that has perpetuated in the country an exceptional regime to shield non-compliance with the Constitution<sup>39</sup>, and which has ensured the expansion of the functions of the executive power, apart from the elimination of the constitutional powers of the National Assembly<sup>40</sup>.

In this arbitrary way and covered with legality by the Supreme Court of Justice, a model of State would be imposed in the country parallel to the current constitutional framework and outside of the popular will after it ignored the democratic institutionality represented by the National Assembly.

### 5.1. Exhaustion of democratic channels by the opposition

Faced with these maneuvers, the opposition, through the Democratic Unity Table, would decide to initiate a campaign to activate the revocation of the presidential mandate of Nicolás Maduro Moros. Simultaneously, the National Assembly would organize itself to promote important actions with the aim of resolving the crisis that the country was beginning to suffer, despite the obstacles that loomed against the national legislative body.

On March 9, 2016, the Table of Democratic Unity would initiate the activation of a recall referendum<sup>41</sup> against Maduro's mandate, a mechanism recognized in Article 72 of the Venezuelan Charter. At the same time, the National Assembly would decide to approve in first discussion draft amendment No. 2 to the Constitution, which sought to reduce the presidential term that began on January 10, 2013, to four years, and to call elections for a new presidential term.

Faced with the initiative of the constitutional amendment by the legislative body dominated by the opposition, the Constitutional Chamber, in ruling No. 274 of April 21, 2016, would interpret that the amendment that proposed the reduction of the presidential term could not be applied to the current period<sup>42</sup>.

In the midst of this refusal, the recall referendum began to emerge as the only instrument to solve the democratic and institutional, economic, and social crisis, the

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thousands of Colombians. See: <https://www.accesoalajusticia.org/el-estado-de-excepcion-en-venezuela/>.

<sup>38</sup> See: <https://www.accesoalajusticia.org/venezuela-en-estado-de-excepcion-y-sin-constitucion/>.

<sup>39</sup> See: <https://www.accesoalajusticia.org/luego-de-28-decretos-y-4-anos-y-medio-se-mantiene-la-emergencia-economica/>.

<sup>40</sup> See: <https://www.derechos.org/ve/actualidad/acceso-a-la-justicia-el-eterno-e-inconstitucional-estado-de-excepcion>.

<sup>41</sup> On the regulation of the recall referendum in Venezuela, see: <https://www.accesoalajusticia.org/la-revocatoria-del-mandato-en-venezuela-un-procedimiento-innecesariamente-complejo/>.

<sup>42</sup> See: <https://www.accesoalajusticia.org/la-enmienda-no-te-vistas-que-no-vas/>.

product of the series of authoritarian events led by the National Executive Power and endorsed by the Supreme Court of Justice.

The activation of the recall referendum had to be presented to the National Electoral Council, the constitutional body in charge of processing the recall request. Now, it is important to note that since 2000 the National Electoral Council has been made up mainly of rectors related to the ruling party, apart from the fact that the appointment has been made unilaterally by the Supreme Court of Justice outside the constitutional block<sup>43</sup> instead of the Assembly National, a natural instance that is assigned that attribution.

This situation would indicate a serious threat to the opposition, which had decided to initiate the revocation consultation against Nicolás Maduro Moros before a body devoid of impartiality and independence. It was thus that the National Electoral Council would do everything necessary to obstruct and prevent the activation of the recall referendum, practically making use of delays that were protected by distorted interpretations of the Constitution and legislation.

The electoral arbitrator would create a set of obstacles in order to obstruct the exercise of the right of citizen participation. It would unjustifiably define the collection centers for manifestations of will; in addition to arbitrarily limiting the number and hours of operation of the collection centers, and requiring a *quorum* outside of what is established in article 72 of the constitutional text<sup>44</sup>.

Finally, there would be five criminal courts, without jurisdiction in electoral matters, which would have the task of neutralizing and destroying the hope of the Venezuelan citizens to resolve the crisis that the country was suffering. The courts of the states of Aragua, Carabobo, Bolívar, Apure, and Monagas will decide to annul the results of the first stage of requirements to activate the recall, which consisted of collecting the support of 1% of those registered in the electoral registry, for alleged fraud, despite the fact that it had been validated by the highest electoral authority.

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<sup>43</sup> It should be noted that since 1999 eight CNE directors have been appointed; In some cases, it has been the appointment of the five main rectors with their respective alternates and in other moments the appointment was limited to only some of the five main rectors. On four occasions the appointment of the National Electoral Council has been made by the Supreme Court of Justice (2003, 2005, 2014 and 2016), on one occasion the appointment was made by the ANC of 1999, and on another by the members of the Legislative Commission Nacional, an instance also created by the ANC in 1999, see: <https://efectococuyo.com/cocuyo-chequea/tsj-cuatro-directivas-cne/>.

<sup>44</sup> On the irregularities committed by the National Electoral Council during the process that the political organization *Mesa de la Unidad Democrática* had activated to revoke the mandate of Nicolás Maduro Moros, see HERNÁNDEZ G., José Ignacio. **The presidential revocatory referendum in Venezuela and the abuse of power.** Editorial Jurídica Venezolana International, Miami, 2017, available at: <https://static1.squarespace.com/static/5526d0eee4b040480263ea62/t/591dce45beba5f8df9c686/1495125578429/REFERENDO+REVOCATORIO+PRESIDENCIAL+++EN+VZLA+%28JOSE+IGNACIO+HERNANDEZ%29.pdf>.

Immediately after these judicial decisions, the National Electoral Council would decide that the process of collecting 20% of the manifestations of will, which was scheduled for October 26, 27, and 28, 2016, should be postponed at all the national territory until a new court order.

Given the arbitrary indefinite suspension of the recall process that the opposition had initiated against Maduro, in the country, the governance crisis unleashed after the triumph of the opposition coalition in the election of the National Assembly in December 2015, at the same time that repressive measures against political leaders and opposition deputies would intensify, a situation that was accelerating rapidly the social, political and economic deterioration.

In this complicated scenario, the National Assembly continued to be the focus of the attacks by the Maduro government, which, through the Supreme Court of Justice through its Constitutional Chamber, undermined its operation after a series of decisions that it systematically eliminated and gradually its powers of political control over the national government and the public administration, as well as its functions as a legislative and deliberative body, among others, exacerbating conflict and polarization.

## **5.2. The protests before the closure of institutional exits**

Faced with this climate of instability and the wave of protests<sup>45</sup> in the country due to the obstruction of the activities of the National Assembly<sup>46</sup> and the usurpation of functions by the other public powers dominated by the ruling party, on May 1, 2017, The Maduro government would announce that the conflict would be resolved by convening a National Constituent Assembly, a mechanism that according to Maduro himself would serve to contain the escalation of political violence and, in this way, guarantee peace and stability in the country.

After that announcement, Maduro would issue Presidential Decree No. 2.830<sup>47</sup> through which he would directly convene the constituent process to reform the State and draft a new constitution, clearly unconstitutional, inasmuch as he failed to consult the people previously whether or not he wanted to. a Constituent.

Next, it would issue decree No. 2.831<sup>48</sup> by which it established the creation of the presidential commission that would be in charge of preparing the proposal for the sectoral and territorial electoral bases, and the main aspects for the formation and operation of the National Assembly Constituent. The aforementioned commission

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<sup>45</sup> Between April 1 and July 31, 2017, the Venezuelan Observatory of Social Conflict recorded a total of 6,729 demonstrations throughout the country, equivalent to 56 daily protests.

<sup>46</sup> See: <https://cronica.uno/cuatro-meses-de-protestas-que-marcaron-el-2017/>.

<sup>47</sup> Official Gazette No. 6.225 extraordinary of May 1, 2017. Foro Penal, had counted 824 political prisoners between April and December 2017. See: <https://foropenal.com/foro-penal-2017-ano-record-represion-venezuela/>.

<sup>48</sup> Published in the same Official Gazette of the convocation of the National Constituent Assembly.

would be made up of fourteen members including ministers, governors, deputies, officials, and advisers, all of them linked to the ruling party.

After the issuance of these presidential decrees, Maduro would decide to issue on May 23, 2017 decree No. 2.878<sup>49</sup> that established the so-called electoral bases of the Constituent Assembly aimed at regulating its organization, the parameters of nomination, and the election system of its members. members, in addition to other general aspects for its structure and operation.

The circumstances surrounding the Maduro government's approach to convening a National Constituent Assembly would bring with it various criticisms, inside and outside the country, especially due to the serious breach of the rule of law that its convocation meant after it ignored the popular will.

The proposal to carry out the constituent process, as will be explained in the next section, did not comply with the parameters of the constitutional order discussed in section 3 of this report, above all because it marginalized citizen participation, which had to be consulted through a referendum to convene a National Constituent Assembly; at the same time, it denied the involvement of citizens in the approval of the electoral bases established by the national government to elect and conform to this instance at their convenience, beyond other irregularities that would be supported by the Supreme Court of Justice, as an arm executor of government decisions.

Despite the confrontation and conflict that reigned in the country, on July 30, 2017, the election of the members of the National Constituent Assembly would take place in Venezuela, under the organization of a completely biased National Electoral Council. Days later, on August 4, it would be installed at the headquarters of the National Assembly located in the Federal Legislative Palace, after electing the members of its directors' board<sup>50</sup>.

From that moment, the Constituent Assembly would carry out a shower of questionable and arbitrary decisions in light of the Venezuelan legal framework, which has been a key element for the Maduro Government to build engineering in order to dismantle the institutionality of the National Assembly, the only body legitimate in accordance with the current Constitution, and thus consolidate the absolute control of the powers of the State.

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<sup>49</sup> Published in Official Gazette No. 41.156 of May 23, 2017.

<sup>50</sup> Constituent agreement by which the members of the board of directors of the National Constituent Assembly were appointed, published in Extraordinary Official Gazette No. 6.320 of August 4, 2017.

## 6. Call, election, and installation of the 2017 National Constituent Assembly

Nicolás Maduro Moros, through decree No. 2,830 dated May 1, 2017, would convene a National Constituent Assembly outside of Article 347 of the Magna Carta, the text of which indicates that the person who can call for the activation of this mechanism is the people, as the sole holder of the original constituent power.

Although the President of the Republic has the initiative to promote a constituent process (article 348 of the Constitution), as explained in section 3, he has absolutely no powers to convene it directly without the people deciding on that convocation through a consultative referendum.

In fact, having the initiative to convene the Constituent Assembly does not imply that the exclusive character of the people as depositary of the original constituent power can be usurped, and that the President of the Republic can convene a Constituent without the popular vote expressed in a referendum. Therefore, the call made by Maduro would constitute an absolute unconstitutionality and usurpation of the will of the people.

But even more serious than this constitutional fraud would be Decree No. 2,878 of May 23, 2017, by which Maduro decided to unilaterally establish the territorial and sectoral electoral bases, on which «the convocation, formation and operation will be carried out. of the National Constituent Assembly», without consulting the people if they approved them or not, completely ignoring the popular sovereignty, holder of the original constituent power.

Given this initiative, the National Electoral Council, as the governing body of the Electoral Power and just two days after Maduro dictated the electoral bases, would announce that it had decided to accept them and set the date for the election of the constituents on July 30, 2020, decision electoral process that would be formalized in resolution No. 170607-119 issued on June 7 of that year.

The electoral bases that the President of the Republic had introduced without the approval by means of a consultative referendum of the people as the sole sovereign and holder of the original constituent power, undoubtedly configured a flagrant violation of the constitutional charter, since the initiative of the convocation of the National Assembly Constituent must be submitted to the approval of the Venezuelan people, by means of a consultative referendum.

But the seriousness of this unconstitutionality would be manifested even more when the decree of the electoral bases established that the members of the ANC would be elected at the territorial and sectoral level "through universal, direct and secret vote", without prejudice to the members. of the indigenous peoples who would be chosen according to their ancestral customs and practices. The sectors to which the bases referred, according to their first point included: 1) male and female workers; 2) male and female peasants and fishermen and women; 3) the students; 4) people with

disabilities; 5) indigenous peoples; 6) pensioners and pensioners; 7) businessmen and women; 8) communes and communal councils.

The electoral bases provided that the National Constituent Assembly would be made up of 364 members chosen territorially; 8 elected by indigenous peoples and sector constituents whose number would be obtained from the quotient between the electoral registry of each sector and the factor obtained to calculate the territorial constituents, that is, 1 sector constituent for every 83,000 voters in the sector electoral register.

Undoubtedly, the integration of the National Constituent Assembly by means of this form of territorial and sectoral voting, that is, by sectors chosen by the President of the Republic, represented a restrictive choice, as well as discriminatory, contrary to the provisions of Article 63 of the Constitution, which establishes that suffrage is a right to be exercised through free, universal, direct and secret voting<sup>51</sup>.

The electoral bases also indicated in their fifth point the use by the National Electoral Council of records of the sectors of official institutions, unions and associations, duly established, in order to group said records by areas of similar condition and distribute them according to the population base established in the bases. In the end, this implied that the National Electoral Council awarded each voter the sector to which they belonged, without there being a mechanism to challenge that unilateral decision.

Likewise, they contemplated that no voter could be in more than one sector registry and that the nomination of candidates could only be presented: (i) on their own initiative, if it has the support of 3% of the voters registered in the electoral registry of the municipalities for the election of territorial constituents; (ii) at the initiative of groups of voters; and (iii) at the initiative of the aforementioned sectors if they receive the support of the registry of the sector to which they belong.

Actually, these electoral bases established a rather atypical "dual" electoral system created by the National Executive through which it simultaneously municipalized and sectorized the vote of the electors. This electoral formula to elect the representatives of the National Constituent Assembly had been conceived to evade the system used in 2015 for the elections of deputies, and in which the ruling party was defeated. With this design, the Government did not want to lose again, so that would be the reason to facilitate more favorable conditions.

In fact, according to this formula, the constituents would be elected through the «territorial by municipality» system, and under the «sectorized» modality. The «territorial by municipality» consisted of the election of a constituent for each municipal entity in a nominal way (by names and surnames of the candidate) and

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<sup>51</sup> See: <https://www.accesoalajusticia.org/bases-comiciales-de-constituyente-desconocen-la-soberania-popular/>.

of two constituents for capital municipalities of each federal entity by list vote (proportional representation).

In this case, territorial representation would be an illogical and arbitrary assignment, since the same number of representatives was assigned in all the country's municipalities, regardless of their population. In other words, it made all municipalities equal, ignoring the volume of voters, with which municipalities with a higher electoral population had fewer constituents than those with a lower population, generating distortions in the principle of representation, since it was impossible for all electoral circuits to have exactly the same number of voters.

Regarding the sectoral election method, it would be an election by areas established by Maduro himself, that is, the distribution of eligible positions would be carried out by list vote and would depend on the sectoral areas (workers, peasants, fishermen, students, people with disabilities, indigenous peoples, pensioners, businessmen, communes and communal councils). In this case, the constituents had to be elected between sectors, so that voters could not postulate freely except through these, and that they could only choose between the postulates of the aforementioned sectors.

There was no doubt that this formula was also a violation of the right of nomination, which the political parties have constitutionally recognized in Article 67, after it prevented them from participating in these elections to nominate candidates as constituents.

Obviously, this electoral system that contemplated the electoral bases designed by the Maduro government constituted a constitutional fraud for greatly limiting the exercise of the right to universal and free suffrage, not only because it prevented voters from voting universally to integrate their representative bodies, but also for discriminating against the social body from running and freely electing the candidates of their choice, including excluding political parties from the nomination regime, violating article 67 of the Constitution, which gives all associations with political ends the right to attend electoral processes applying for candidates.

The imposition of the vote by municipalities and sectors violated the principle of proportional representation, explicitly provided in the aforementioned article 63 of the Constitution. In the same way, the electoral bases were unconstitutional when in its seventh point it established that only Venezuelans by birth without another nationality could be nominated as candidates for the National Constituent Assembly, excluding Venezuelans by naturalization and those with more than one nationality.

At this point, it should be noted that Article 39 of the Constitution establishes that all Venezuelans, without any distinction, exercise citizenship and consequently, are holders of political rights and duties, except only for politically disabled

Venezuelans, who are subject to civil interdiction and those who do not meet the age conditions set forth in the fundamental charter.

Given the criticism that would be raised against the inconsistent nature of the convocation and of the electoral bases of the Constituent Assembly, on June 4, 2017, the President of the Republic decides to issue decree No. 2,889 that urged the body to make the project of the Constitution that it drafted within it was submitted to a popular approval referendum, in the terms established in Article 70 of the Constitution of the Bolivarian Republic of Venezuela<sup>52</sup>.

Despite this complement that sought to legitimize the deceptive constituent process, in short, it was a decision that limited the sovereign will of the people, after it had been usurped by the President of the Republic, in addition to the risks pointed out by the electoral bases. that violated the democratic character of the right to vote and political pluralism.

This constitutional fraud in turn would be endorsed by the Supreme Court of Justice, through the Constitutional Chamber, with judgment No. 378 of May 31, 2017<sup>53</sup>, after it heard a constitutional interpretation appeal of articles 347 and 348 of the Venezuelan letter.

By means of this ruling, the high court judge would interpret that "there is no provision for a referendum on the initiative to call a National Constituent Assembly", and for this reason would hold that a prior consultative referendum was not necessary «or constitutionally binding for the convocation of a National Constituent Assembly, because this is not expressly contemplated in any of the provisions of Chapter III of Title IX».

Based on this interpretive decision, the Constitutional Chamber would defend the illegitimacy of the presidential decree that called the constituent process, in addition to the deficiencies of the electoral bases imposed by the President of the Republic.

With this, the judge was practically unaware of the letter and spirit of article 347 of the fundamental text, the cornerstone for the activation of the mechanism of the figure of the National Constituent Assembly, which recognizes that the people are the only holder of the original constituent power, apart from to violate articles 5 and 71, which respectively establish the sovereign character of the people and the power that this has to be consulted on matters of special national importance.

Faced with this ruling that validated the realization of the National Constituent Assembly in the country, the Public Ministry decides to present a letter to the Constitutional Chamber to clarify the content of the sentence, especially on the exercise of popular sovereignty against the ANC convened by the President of the Republic. The Chamber, in this case, would declare the request inadmissible due to

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<sup>52</sup> Published in Extraordinary Official Gazette No. 6.303 of June 4, 2017.

<sup>53</sup> See: <http://historico.tsj.gob.ve/decisiones/scon/mayo/199490-378-31517-2017-17-0519.HTML>.

the lack of legitimacy of the prosecutor Luisa Ortega Díaz, who at that time had separated from the ruling party.

Additionally, the Constitutional Chamber in judgment No. 455 of June 12, 2017<sup>54</sup>, would declare an appeal for annulment due to unconstitutionality that had been filed against decree No. 2.878 of May 23, 2017, which established the electoral bases. In the opinion of the Chamber, the convener of the Constituent Assembly, that is, the President of the Republic, was empowered to propose the electoral bases<sup>55</sup>; In any case, the only thing that had to be verified was that the electoral bases did not go beyond the limits contained in article 350 of the Constitution.

But the seriousness of this ruling would not be that it validated the constituent process, but that it expressly declared the constitutionality of the electoral bases, since according to the opinion of the Constitutional Chamber, those rules dictated by Maduro respected «the concept of participatory democracy and universal suffrage , direct and secret», that is to say that there was no violation of the constitutional principle of suffrage.

Ultimately, the Chamber decided to justify the assault on the popular will, and gave the green light to the presidential constituent process, without complying with the constitutional parameters for its celebration, in accordance with Article 347.

After this validation by the constitutional judge, and despite the great political and social tension that existed in the country, on July 30 the election of 537 members of the Constituent Assembly would take place. According to the official figures provided by the National Electoral Council, the elections had a participation of 8.089.320 voters, which would be equivalent to 41.53% of the electoral roll<sup>56</sup>.

The opposition, for its part, would decide not to participate, considering that this call was fraudulent. In fact, to challenge the initiative of the national Executive to impose a Constituent Assembly in the country, it would organize a popular consultation through the National Assembly that would be supported by members of opposition political parties, universities, unions, businessmen, the student movement, journalists and non-governmental organizations.

On Sunday, July 16<sup>57</sup>, the consultation would take place, which would have a participation of more than 7.1 million people, and more than 80% of those consulted would express their rejection of the convening of the National Constituent Assembly. Despite the overwhelming rejection, the Maduro government did not back down in its intention to elect its members, agreeing to carry out the election of

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<sup>54</sup> See: <http://historico.tsj.gob.ve/decisiones/scon/junio/199906-455-12617-2017-2017-0610.HTML>.

<sup>55</sup> See: <https://www.accesoalajusticia.org/constitucionalidad-del-decreto-de-convocatoria-a-asamblea-nacional-constituyente/>.

<sup>56</sup> See: [http://www.cne.gob.ve/web/sala\\_prensa/noticia\\_detallada.php?id=3551](http://www.cne.gob.ve/web/sala_prensa/noticia_detallada.php?id=3551).

<sup>57</sup> See: <https://www.accesoalajusticia.org/8-claves-para-entender-la-consulta-popular-del-16j/>.

the constituents on the scheduled date, a process marked by numerous protests, at the same time of serious violations of electoral guarantees<sup>58</sup>.

Among the violations denounced, the electoral advantage and the open bias in favor of the government by the electoral body stand out. Likewise, the fact that the National Electoral Council had stopped implementing twelve of the nineteen audits that electoral legislation imposes, even the few audits carried out had not control or citizen participation<sup>59</sup>.

In the same way, the illegal use of the *Carnet de la Patria*<sup>60</sup> during the electoral event, an identity document created by the Maduro Government<sup>61</sup> to facilitate access to social benefits (such as bags of food and vouchers), and was converted from that moment in a means of social control of the population, which was going to be required of voters when entering the voting centers in order to control and coerce the voters in the electoral process.

The *Carnet de la Patria* had its premiere, precisely in the process of electing the constituents when the national government would encourage voters to vote with this instrument. This strategy would be perfected in each of the following processes called by the Constituent Assembly. In this way, the Government had information on how many cardholders had attended the elections and how many had not.

Given the irregularities that undoubtedly surrounded the constituent process of 2017, from its convocation to the election of its members on July 30, the international community would express its rejection to such an extent that more than forty countries publicly stated that they would not recognize the legitimacy of the National Constituent Assembly convened by the Maduro government<sup>62</sup>, especially because the minimum electoral standards had not been met, and it was not representative of the democratic will of the citizens.

The foregoing would not prevent the Constituent Assembly from being installed at the headquarters of the National Assembly, in the Federal Legislative Palace, on August 4, 2017, and appointing the members of the board of directors<sup>63</sup>. Subsequently, on August 5, the instance would temporarily adopt as its operating

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<sup>58</sup> On the irregularities committed during the voting to elect the representatives of the National Constituent Assembly, see: [http://www.observademocracia.org/wp-content/uploads/2017/10/Informe\\_AsambleaNacionalConstituyente-2017-VE.pdf](http://www.observademocracia.org/wp-content/uploads/2017/10/Informe_AsambleaNacionalConstituyente-2017-VE.pdf).

<sup>59</sup> See: <https://oevenezolano.org/2017/06/cne-elimina-14-auditorias-y-debilita-el-sistema-electoral/>.

<sup>60</sup> See: <https://www.accesoalajusticia.org/coaccion-social-y-control-politico-a-traves-del-carnet-de-la-patria/>.

<sup>61</sup> See: <https://www.accesoalajusticia.org/regimen-institucionalizo-carnet-patria-para-intimidar-discriminar-poblacion/>.

<sup>62</sup> See: <https://www.europapress.es/internacional/noticia-mayoria-paises-region-niegan-reconocer-asamblea-constituyente-maduro-20170731104302.html>.

<sup>63</sup> Official Gazette No. extraordinary 6.320 of August 4, 2017.

statute the text that had been approved and used by the 1999 National Constituent Assembly<sup>64</sup> with some modifications, especially the duration of its functions, which would be extended, by the same assembly, for two years, that is until December 31, 2020<sup>65</sup>.

Since then, the Constituent Assembly has not put the aforementioned statute into practice. In the same way, after three years of existence, it has not dedicated itself to preparing a draft Constitution<sup>66</sup>, which will not hold discussions because the constituents will only vote on what has already been decided.

Indeed, to date, the publications of the agenda of the sessions are not known: basically, it meets when it is called for a particular act, especially when ordered by the Maduro government. Likewise, it is not known whether or not it meets the quorum to meet or approve its decisions.

In short, it is a political body that has aimed to dismantle and liquidate the functions of the National Assembly, legitimately elected by the people, apart from generating more institutional conflict in the complicated context of crisis that the country is experiencing, as of the assumption of absolute and unlimited powers outside the fundamental charter<sup>67</sup>.

## 7. Functions of the National Constituent Assembly

The objective of destroying the Legislative Power caused the Constituent Assembly to start up a systematic attack based on a set of decisions, in accordance with the interests of the government of Nicolás Maduro Moros. It is easy to see how that attack would show itself in each of the acts that it began to adopt after its installation on August 4, 2017.

Since its genesis, in which the people were not consulted whether or not they agreed with its convocation and also due to the undemocratic nature of the supposed elections in which the constituents were elected until today the Constituent

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<sup>64</sup> Statute of Operation of the National Constituent Assembly of 1999 published in the Official Gazette No. 36.786 of September 14, 1999.

<sup>65</sup> Official Gazette No. 41.636 of May 20, 2019.

<sup>66</sup> In September 2018, what was supposed to be the draft Constitution was circulating in some media, but it was not recognized, much less denied by the regime of Nicolás Maduro Moros. See: <https://www.accesoalajusticia.org/anteproyecto-constitucion-confirma-modelo-comunal-maduro/>. In August 2020, the president of the ANC, Diosdado Cabello announced to the country that the ANC "will not present a new Constitution", see: <https://efectococuyo.com/politica/anc-no-hara-una-nueva-constitucion-dice-diosdado-cabello/> and <https://www.elnacional.com/venezuela/cabello-dice-que-no-es-factible-que-la-anc-apruebe-una-nueva-constitucion/>.

<sup>67</sup> See: <https://www.accesoalajusticia.org/ocho-claves-sobre-la-fraudulenta-anc-y-el-cese-de-sus-funciones/>.

Assembly has been involved in serious violations of the Constitution that infringe the bases of the democratic State.

In effect, all the activity carried out by the Constituent Assembly does not conform to the configuration of the constitutional State of law and the separation of powers, especially when it says that its decisions are dictated on behalf of the people and that the instance itself has qualified as «constituent decree» or «constitutional law», but the truth is that they are not constitutional laws, much less.

Since its installation, **the ANC has called itself a supra-constitutional power**, and under this conception, it has tried to classify its acts in a higher rank than the Constitution, which is contrary to the Kelsen pyramid, since the Constitution is above laws and other legal acts, as established in Article 7, the text of which recognizes the so-called constitutional supremacy.

It is clearly unconstitutional because the decisions of the Constituent Assembly are not laws as they are not dictated by the parliamentary body, much less comply with the constitutional procedure for the elaboration of laws. Neither are they constituent decrees or constitutional laws since these figures do not exist in the Venezuelan legal order, in addition to violating the guarantees of the legal reserve and most of the fundamental rights of the Venezuelan charter.

There can be no doubt that the action of the ANC is a constitutional fraud by granting it the qualification of «constituent decree» or «constitutional law» to justify the supplantation of the powers that correspond to the legislative power, and thus avoid control judicial by the Constitutional Chamber of the Supreme Court of Justice.

The decisions of the National Constituent Assembly, as we will see in this section, inevitably have serious consequences on the functioning of the legal order and, especially, on its legitimacy, after their actions have prevented the functioning of the National Assembly and other bodies of the public power.

To justify this way of proceeding, the ANC would issue on August 8, 2017, a «constituent decree» by means of which it dictated the Norms to Guarantee the Full Institutional Functioning of the National Constituent Assembly in harmony with the Constituent Public Powers<sup>68</sup> in which it established that the ANC could «limit or decide the cessation of the activities of the authorities that currently make up the Public Power» (resolves 3), apart from imposing «the subordination of all the organisms of the Public Power to the ANC» (resolves 5).

Obviously, this decision would be adopted outside of the Magna Carta, and in ostensible violation of constitutional supremacy, only to defend the performance of the functions of the other powers of the State and, in particular, the constitutional powers of the National Assembly, to the purposes of ignoring its legitimacy and consolidating the hegemony of the national government from the Constituent.

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<sup>68</sup> Official Gazette No. 6.323 extraordinary of August 8, 2017.

In short, during these three years, the action of the instance has focused on dismantling the institutions of the rule of law and violating human rights in Venezuela. For this reason, we go on to review how the rosary of decisions made against the provisions of the Constitution has been.

### 7.1. Legislative functions

Since the installation of the National Constituent Assembly, it has assumed the functions of the National Assembly, based on its supposed supra-constitutional nature, in order to eliminate it. Let us see below the «constitutional laws» and «constitutional decrees» that, in the exercise of the legislative function, assigned to the national Parliament, would be dictated by the body, openly violating the democratic institutionalism, at the same time restricting, even more, the enjoyment of human rights.

#### a. Constitutional Law Against Hate, for Peaceful Coexistence and Tolerance<sup>69</sup>

According to the content of this regulation, several of the human rights established in the Constitution will be violated, among others, freedom of expression, opinion, and information; the right to demonstrate peacefully; the right to participate politically; and the right to vote, apart from being outside the Constitution because it would violate the separation of powers after it was dictated by the Constituent Assembly, usurping functions of the National Assembly and without following the procedure to discuss and approve a law<sup>70</sup>.

As indicated in its text, the «law» is intended to create the necessary conditions to promote and guarantee the recognition of diversity, tolerance, and reciprocal respect, as well as to prevent and eradicate all forms of hatred, contempt, harassment, discrimination, and violence, in order to ensure the effective enforcement of human rights, promote individual and collective development of the person, preserve public peace and tranquility, and protect the nation.

However, deep down it is configured as a weapon directed against dissent or criticism, at the same time that it encourages censorship and self-censorship; that it is an instrument against people's freedom of expression, which promotes the closure of media and stations, as well as the blocking of portals, whose content or opinions expressed are considered by the Government as critical of their position<sup>71</sup>.

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<sup>69</sup> Official Gazette No. 41.274 of November 8, 2017, reprinted due to faults in the originals in Official Gazette No. 41.276 of November 10, 2017.

<sup>70</sup> See: <https://www.accesoalajusticia.org/que-debes-saber-sobre-la-llamada-ley-constitucional-contra-el-odio/>.

<sup>71</sup> See: <https://www.accesoalajusticia.org/el-quebre-institucional-como-causa-de-la-emergencia-humanitaria/> y <https://www.accesoalajusticia.org/wp-content/uploads/2019/09/Informe-La-toma-absoluta-del-Poder-en-Venezuela.pdf>.

As if that were not enough, articles 20 and 21 of the Constitutional Law Against Hate, for Peaceful Coexistence and Tolerance, impose as a penalty between ten and twenty years in prison for whoever commits «incitement to hatred», a disproportionate penalty if it compares with the penalty that the Venezuelan Penal Code establishes for the commission of the crime of intentional homicide, which is twelve to eighteen years.

The aforementioned instrument also establishes that the service provider who broadcasts messages «in favor of war or apology for hatred» will be sanctioned with the revocation of the concession.

#### **b. Constitutional Law of the Commission for Truth, Justice, Peace and Public Tranquility<sup>72</sup>**

According to the text of this supposed «law», its main objective is to prevent and overcome acts of violence for political reasons and intolerance through its knowledge and scientific analysis. To do this, it would create the Truth, Justice, Peace and Public Tranquility Commission (CVJPTP at its acronym in Spanish), through a «constitutional law», which would also constitute a violation against popular sovereignty, since the National Constituent Assembly is not competent to enact laws, but rather to elaborate a constitutional text proposal.

The Constituent Assembly undoubtedly deviated from the function foreseen by article 347 of the fundamental text. In any case, it would be an instrument that did not conform to international standards of legality, but the most serious thing is that it was enshrined as a mechanism to persecute opponents or dissidents.

#### **c. Constitutional Law of Agreed Prices<sup>73</sup>**

It is another unconstitutional regulatory instrument that would seek to modify the centralized price control system that the national government has been implementing since 2003<sup>74</sup>, and that has only served to aggravate the shortage of basic products. In the country, price control has become a program of economic intervention on the population.

Indeed, the Constituent Assembly with the agreed price regulations-imposed control of maximum prices for sale to the public of certain products that the competent authority decided to establish, applying severe sanctions for those who did not comply with its provisions.

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<sup>72</sup> Extraordinary Official Gazette No. 6.323 of August 8, 2017.

<sup>73</sup> Official Gazette No. 6.342 extraordinary of November 22, 2017.

<sup>74</sup> See about price control in Venezuela: <https://www.accesoalajusticia.org/el-control-de-precios-como-herramienta-contra-el-pueblo/>.

The alarming thing is that this normative strategy would later be reinforced with the approval in January 2018 of the Constitutional Law of the Local Supply and Production Committee<sup>75</sup>, in which the Constituent Assembly will decide to institutionalize the distribution of subsidized food through the Local Supply and Production Committee. Production (CLAP at its acronym in Spanish), an instrument of state control that arbitrarily assigns a series of food and basic products to certain sectors of the population in exchange for them expressing their political support for the national government, especially during elections.

#### d. Constitutional Law of the Local Supply and Production Committee (CLAP)

In 2016 the CLAPs were created by the National Executive through decree No. 2323<sup>76</sup>, endorsed by the high court<sup>77</sup>, as a new form of popular organization for the distribution of food in order to defeat the so-called «economic war» and combat hoarding and the «*bachaqueo*»<sup>78</sup> of food<sup>79</sup>.

To this was added the political strategy of using the *Carnet de la Patria*<sup>80</sup>, an invention of the Government of Nicolás Maduro Moros, which has served until now for certain sectors of the population to obtain benefits, subsidies, and services from the Government. With this practice, Maduro ensured control over the election of the constituents, apart from the almost absolute victory of the ruling party in the elections of the governorships and mayors held in 2017, and as well as in the presidential elections of 2018<sup>81</sup>, ostensibly violating the free and voluntary character of suffrage.

What is serious about this «constitutional law» is that the Constituent Assembly would decide to «regularize» the distribution of food by the national government by arbitrarily establishing a centralized process, divorced from the economic

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<sup>75</sup> Official Gazette No. 41.330 of January 29, 2018.

<sup>76</sup> Official Gazette No. 6.227 extraordinary of May 13, 2016.

<sup>77</sup> Through judgment No. 638 issued by the Constitutional Chamber on September 20, 2018, see: <https://www.accesoalajusticia.org/el-presidente-insiste-en-el-estado-de-excepcion-permanente-pero-niega-que-haya-emergencia-humanitaria/>.

<sup>78</sup> Colloquialism with what is called the black market of products with regulated price.

<sup>79</sup> See: <https://www.accesoalajusticia.org/anc-pretende-institucionalizar-la-escasez-de-alimentos-en-venezuela-los-clap/>.

<sup>80</sup> In section 5 of this report it was explained that the *Carnet de la Patria* was a creation of the Maduro Government, which it implemented as a means of control and coercion of voters in the electoral process of the Constituent Assembly, which allowed it to have information on how many card holders had attended and how many had not.

<sup>81</sup> The use of this practice was recognized by Maduro himself during his 2018 presidential campaign by stating «The homeland protects you through the *Carnet de la Patria* and you protect the homeland with your vote. This is giving and giving», see: <http://efectococuyo.com/politica/maduro-ofrece-premio-a-beneficiarios-del-carnet-de-la-patria-que-voten-por-el/>.

principles and democratic values of the Venezuelan social state of law, enshrined in the 1999 Constitution.

In the same way, it is a fraudulent text inasmuch as the instance once again separates itself from the purpose foreseen in article 347 of the Constitution, which is, as has been said, to draft a new constitution, and which it actually uses to replace the National Assembly, emptying it of its functions.

**e. Constitutional Law of the Productive Councils of Workers<sup>82</sup>**

According to the text of this «law» each company, public, private or mixed, should install a Productive Council of Workers (CPT at its acronym in Spanish), as a parallel organization to the existing union organizations, in order to establish an internal system of surveillance over its production process, in order for it to participate in or report to the government entity any relevant information on production volumes, distribution, irregularities or stoppage of the production or marketing process<sup>83</sup>.

It would be an unconstitutional and illegitimate text, especially for wanting to pretend that «the working class exercises a controlling role in the management of the activities of production and distribution of essential goods and services in the country»<sup>84</sup>.

In the same sense, the «legal» document expressly provides that CPTs must «denounce the speculative resale of products, hoarding, usury, boycott, fraudulent price alteration, extraction smuggling, and other illegal acts, as well as any action contrary to the socioeconomic system that governs the country».

In turn, he points out that the CPTs should be made up of at least one woman, a young man between the ages of fifteen and thirty-five, and a company worker active in the Bolivarian Militia (that is, part of the Armed Forces), which, without a doubt, would reduce its impartiality, especially in view of the ideologization to which the militia is subjected. Obviously, this fact denoted the intention of the national government, through the Constituent Assembly, for these groups to be a kind of «business inquisitors» to guarantee control over company production by the political power.

Ultimately, this «law» seeks to ensure that workers control the production levels of private companies when the national government itself has been the architect of the policy to confiscate the country's productive apparatus, undermining private property through arbitrary expropriations, illegal occupations of establishments, among other techniques of state control.

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<sup>82</sup> Official Gazette No. 41.336 of February 6, 2018.

<sup>83</sup> See: <https://www.accesoalajusticia.org/ley-de-consejos-productivos-de-trabajadores-o-el-vano-intento-gubernamental-de-decretar-la-produccion/>.

<sup>84</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2019/09/Informe-anual-2018-El-camino-a-la-dictadura-con-el-aval-del-Tribunal-Supremo-de-Justicia.pdf>.

**f. Constitutional Law that creates the Tax on Large Assets<sup>85</sup>**

In mid-2019 the National Constituent Assembly instituted a new taxable tax in the country, modifying the tax legislation, a competence reserved to the legislator, in accordance with article 187, numeral 6, of the Venezuelan charter.

The tax obliges taxpayers qualified by the Integrated National Service of Customs and Tax Administration (*Seniat* at its acronym in Spanish) as special taxpayers, either legal persons that are owners or possess equity assets for more than 100.000 tax units (UT at its acronym in Spanish) or natural persons for more than 36.000 thousand UT, to pay from 0.25 to 1.5% of their assets, in the terms provided for in the «constitutional law» that created said tax.

The aforementioned tax would be caused annually on the value of the net worth at the end of each period for the portion of the equity that exceeds the amounts indicated.

Of course, it would also be an unconsulted and unconstitutional measure, which can currently be used as a dangerous weapon by the Maduro government to justify the attack and seizure against the property of the people who are classified as special taxpayers, in comparison with those who do not qualify as such.

**g. Constitutional Law of the Tax Regime for the Sovereign Development of Arco Minero<sup>86</sup>, and Constituent Decree by which the law that establishes the Value Added Tax is amended<sup>87</sup>**

The National Constituent Assembly, in addition to instituting the tribute to large estates in a completely unconstitutional manner, also decided to modify the rest of the country's tax regime. In effect, through this «law» it established a special tribute applicable to the enrichments obtained from the sale of gold extracted in the *Arco Minero del Orinoco*<sup>88</sup> national strategic development zone, a competence that only corresponds to the National Assembly given the importance of this mining exploration activity.

It is important to note that the *Arco Minero del Orinoco* is a controversial mineral extraction operation in the southern region of the country, denounced, by the way,

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<sup>85</sup> Official Gazette No. 41.696 of August 16, 2019, which reprinted the aforementioned «Constitutional Law» originally published in the Official Gazette No. 41.667 of July 3, 2019 by material error. See: <https://www.accesoalajusticia.org/impuesto-patrimonio-nueva-arma-persecucion-selectiva/> and <https://www.accesoalajusticia.org/ley-constitucional-impuesto-grandes-patrimonios-antes-despues/>.

<sup>86</sup> Official Gazette No. 41.310 of December 29, 2017.

<sup>87</sup> Official Gazette No. 6.396 extraordinary of August 21, 2018.

<sup>88</sup> On the exploitation of the *Arco Minero*, see: <https://es.mongabay.com/2018/02/arco-minero-de-venezuela-resumen/>.

in the report presented by the Office of the High Commissioner for Human Rights (OHCHR) during the 44th session of the Human Rights Council (document A/HRC/44/20)<sup>89</sup>.

Among the elements denounced by OHCHR, the pattern of labor exploitation that exists stands out, in which the miners «are forced to hand over a large percentage of the gold extracted to the various actors that control the mines».

In fact, it cautions that workers:

«In order to work in the mines, they are required to pay between 10 and 20 percent of the ore extracted to criminal groups or armed elements, and about 15 to 30 percent to the owner of the mill where the rocks are crushed for the gold mining».

Furthermore, «the miners have to pay high prices for food and water to vendors within the area, who in turn have to pay a fee to the criminal or armed groups that control the mines».

Likewise, it highlights that women are engaged in all kinds of tasks linked to various tasks related to mining, including extraction. He indicates that in several testimonies he noticed “the sharp increase since 2016 in prostitution, sexual exploitation and trafficking in mining areas, including of girls and adolescents. Prostitution is organized either in nearby towns or within mining areas. Prostitution, the report warns, is organized either in nearby towns or within mining areas in so-called «*currutelas*».

On the other hand, regarding the Constituent Decree by means of which the law that establishes the Value Added Tax is reformed, the National Constituent Assembly would decide to modify the Law of Value Added Tax, specifically eliminating paragraph 2 of article 19 and article 61 of the aforementioned legal text, with the purpose of increasing the percentage rate of collection for general transactions, at the same time granting the President of the Republic the power to set the rate of the tax for consumption in general and luxury consumption.

Both regulatory modifications are open violations of the principle of the legal reserve, as it is a competence reserved to the Legislative Power.

**h. Constitutional Law against economic warfare for rationality, uniformity, and acquisition of goods, services and public works<sup>90</sup>**

The object of the alleged legislation established:

<sup>89</sup>

See:

[https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/\\_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A\\_HRC\\_44\\_54\\_UnofficialSpanishTranslation.pdf&action=default&DefaultItemOpen=1](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_54_UnofficialSpanishTranslation.pdf&action=default&DefaultItemOpen=1)

<sup>90</sup> Official Gazette No. 41.318 of January 11, 2018.

«Basic rules of conduct for the Public Administration, at all levels, that promote honesty, participation, speed, efficiency and transparency in the processes of acquisition and contracting of goods, services, and public works. Facilitate the control mechanisms of such processes, and stimulate the balanced participation of all economic agents in investment and fair distribution of resources destined for public purchases» (Article 1).

In reality, the National Constituent Assembly fraudulently decides to partially reform the Public Procurement Law of 2014, at the same time eliminating any transparent process for the selection of contractors in public procurement, a competence reserved to the national legislator.

Another aspect of this «constitutional law» would be the establishment, as indicated in article 6, of «a unit of objective determination and simple arithmetic application, which will be called the Unit for the Arithmetic Calculation of the Maximum and Minimum Threshold (UCAU at its acronym in Spanish) », which would be used:

«As a single multiplier for the purpose of obtaining the amount in currency that corresponds to the maximum and minimum thresholds established by the legal system to delimit ranges of eligibility in public procurement processes, or for compliance with conditions or requirements related to these».

In other words, the National Constituent Assembly would carry out a modification in the taxing unit, a legal regime that only corresponds to be regulated exclusively by the Legislative Power, also violating the guarantees of the legal reserve.

- i. **Constituent Decree by means of which the liquidation of the Metropolitan Mayor's Office, the Metropolitan Council and the Metropolitan Comptroller's Office, all of these from the Metropolitan Area of Caracas and the Alto Apure District, their organs and attached entities is suppressed and ordered<sup>91</sup>**

The National Constituent Assembly would order through the aforementioned «constituent decree» the suppression of the Metropolitan Area of Caracas and that

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<sup>91</sup> Official Gazette No. 41.308 of December 27, 2017.

of the Alto Apure District<sup>92</sup> outside the Constitution<sup>93</sup>, setting up another measure of harassment issued against any person or institution that opposed the interests of National government<sup>94</sup>, especially because Antonio Ledezma, an opposition leader, was the one who held the position of metropolitan mayor of Caracas after he won the elections in 2008 and was reelected in the 2013 elections<sup>95</sup>; however, in 2015 he would be apprehended by officials of the Bolivarian National Intelligence Service (Sebin at its acronym in Spanish)<sup>96</sup>.

The elimination and liquidation of both instances, as constitutionally established political entities by the Constituent Assembly, would obviously configure ignorance of the Venezuelan Charter, but also of the character of popular representation without more<sup>97</sup>.

Article 18 of the Constitution, in fact, expressly establishes that the Metropolitan District of Caracas is the territorial political unit of the city of Caracas, which is completed with the provisions of the First Transitory Provision of the Fundamental Text, which empowered the National Constituent Assembly of 1999 to regulate the regime of the Metropolitan District of Caracas from a special law, which gave rise to the Mayor's Office and the Metropolitan Council.

For their part, article 16 and numeral 3 of the Third Transitory Provision of the Constitution, empowers the National Assembly to establish by means of a special law a special territorial regime referring to the municipalities José Antonio Paz and Rómulo Gallegos of the Apure state, which It was issued in 2000 under the title Special Law that Creates the Alto Apure District<sup>98</sup>.

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<sup>92</sup> The Metropolitan Mayor's Office of Caracas (also known as the Mayor's Office) coordinated the operation with the mayors of the five municipalities of Caracas: Libertador, Baruta, Chacao, El Hatillo and Sucre. For its part, the Alto Apure Metropolitan Mayor's Office coordinated the district operation of the Alto Apure Region made up of the José Antonio Páez and Rómulo Gallegos municipalities of the Apure State.

<sup>93</sup> See: <https://prodavinci.com/sobre-la-eliminacion-de-la-alcaldia-metropolitana-de-caracas-y-la-del-alto-apure-por-parte-de-la-anc/>.

<sup>94</sup> See: <https://www.accesoalajusticia.org/anc-vs-democracia-supresion-de-alcaldia-metropolitana-de-caracas-y-del-distrito-del-alto-apure/>.

<sup>95</sup> To try to ignore this electoral result that was favorable to a political leader of the opposition, in 2009 the National Assembly, which at that time was controlled by the ruling party, decided to create a government of the Capital District, whose governor would be appointed by the president of the Republic. To execute this decision, the metropolitan mayor, Antonio Ledezma, would be stripped of his headquarters and of several of his powers that had been conferred on him from the legislation that had created the Metropolitan District of Caracas, but that would be arbitrarily passed to the governor of the Capital District.

<sup>96</sup> On the case of Antonio Ledezma, see: <https://www.accesoalajusticia.org/cronologia-caso-antonio-ledezma/>.

<sup>97</sup> See: <https://www.accesoalajusticia.org/las-olvidadas-alcaldia-metropolitana-de-caracas-y-del-alto-apure/>.

<sup>98</sup> Official Gazette No. 37.326 of November 16, 2001-

Thus, it was evident unconstitutionality of the instance due to the vice of usurpation of functions, since it decided to modify the territorial political organization of the country enshrined in the Venezuelan letter. Likewise, this decision would violate the right to vote, the principle of popular sovereignty, and, above all, the popular will expressed by the voters in the municipal elections held in 2013, from which their legislative and executive authorities were elected<sup>99</sup>.

**j. Approval of the Budget Law, the Special Law of Annual Indebtedness, Annual Operating Plan, concerning the years 2018<sup>100</sup>, 2019<sup>101</sup>, and 2020<sup>102</sup> and Constituent Decree of Repeal of the Exchange Regime and its Illicit<sup>103</sup>**

The National Constituent Assembly would approve by means of a «constituent decree» the country's income and expenditure budget, as well as other related laws, corresponding to fiscal years 2018, 2019, and 2020, which had to be discussed and approved by the National Assembly, legitimately elected by the village.

The same situation would occur with the approval of the income and expenditure budget of the Central Bank of Venezuela, and the National Economic and Social Development Plan, which according to article 187, numeral 8, corresponds to the national Parliament.

It is important to note that since the opposition assumed the Legislative Power due to the overwhelming electoral victory in the parliamentarians on December 6, 2015, the National Executive would decide not to present the budget before that instance as indicated by the Constitution. In fact, in 2016<sup>104</sup> and 201<sup>1057</sup> it would be approved by the Constitutional Chamber of the Supreme Court of Justice due to the thesis of contempt<sup>106</sup> declared by the Constitutional Chamber itself in judgment No. 808<sup>107</sup>.

In the last three years, the budget has been sanctioned by the Constituent Assembly without anyone knowing it and not accounting for it, invoking the artificial «constituent decree» in which it argues that all organs of public power are subordinate to it, as an expression of the original and foundational power of the Venezuelan people<sup>108</sup>.

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<sup>99</sup> Since 2000, periodic elections had been held every 4 years to elect the holder of the post of metropolitan mayor, as well as the members of the metropolitan council, both from Caracas and Alto Apure.

<sup>100</sup> Official Gazette No. 41.293 of December 5, 2017.

<sup>101</sup> Official Gazette No. 41.549 of December 19, 2018.

<sup>102</sup> Extraordinary Official Gazette No. 6.495 of December 17, 2019.

<sup>103</sup> Official Gazette No. 41.452 of August 2, 2018.

<sup>104</sup> See: <https://www.accesoalajusticia.org/el-ts-j-usurpa-a-la-an-el-control-del-presupuesto/>.

<sup>105</sup> See: <https://www.accesoalajusticia.org/adios-al-estado-federal-y-descentralizado/>.

<sup>106</sup> This point was addressed in section 4 of this report.

<sup>107</sup> See: <https://www.accesoalajusticia.org/nulidad-de-todos-los-actos-de-la-an-hasta-que-cese-el-desacato-a-la-sala-electoral/>.

<sup>108</sup> Extraordinary Official Gazette No. 6.323 of August 8, 2017.

Undoubtedly, with this procedure, the Constituent Assembly also invaded the competences of the National Assembly for the discussion and approval of the budget bill, which is established in articles 137, numeral 6, and 311 to 315 of the Constitution.

This attack against the legislative competence of the National Assembly would also manifest itself through the approval of the so-called Constituent Decree for the Repeal of the Exchange Regime and its Illicit Acts after the National Constituent Assembly decided to repeal a set of norms related to exchange control, a restrictive regime that had been applied in the country since 2003<sup>109</sup>.

In fact, article 2 of this instrument establishes that the Decree with Rank, Value and Force of Law of the Exchange Regime and its Illicit is repealed; Article 138 of the Decree with Rank, Value and Force of Law of the Central Bank of Venezuela in what concerns exclusively the illicit one referred to the activity of negotiation and currency trading in the country; and all those normative provisions insofar as they conflict with what is established in the decree of the Constituent Assembly.

In this sense, without constitutional or legal support, the instance established in article 1 that the object of the repeal of the Exchange Regime and its Illicit Acts was «for the purpose of granting individuals, both natural and legal persons, national or foreign, the broadest guarantees for the performance of their best participation in the model of productive socio-economic development of the country».

However, it should be noted that behind those words an exchange system was left in total impunity that allowed billions of dollars to leak (at least 25.000 million according to a former minister of the regime<sup>110</sup>) and that was the breeding ground for one of the media. corruption in the history of the country. In this way, the Constituent Assembly not only stood in support of the authoritarian policies of the regime but also became an accessory to the largest corruption case in the country's history.

#### **k. Approval of the Constitutional “Anti-Blockade” Law for National Development and the Guarantee of Human Rights<sup>111</sup>**

Through the non-existent figure in the Venezuelan ordinance of «constitutional law», the National Constituent Assembly approved this regulation to:

«Counteract, mitigate and reduce, in an effective, urgent and necessary manner, the harmful effects generated by the imposition, against the Bolivarian Republic of Venezuela and its

<sup>109</sup> See: <https://prodavinci.com/lea-el-decreto-derogatoria-del-regimen-de-ilicitos-cambiaros-aprobado-por-la-anc/>.

<sup>110</sup> See: <https://transparencia.org.ve/project/y-que-paso-con-cadivi/>.

<sup>111</sup> Official Gazette No. 6.583 extraordinary of October 12, 2020.

population, of unilateral coercive measures and other restrictive or punitive measures, issued or dictated by another State or group of States».

From the reading of this «constitutional law» serious infringements of constitutional principles and rights are verified. Thus, the power that the country's judges have to de-apply legal norms when they contradict the constitution, known under the name of diffuse control of the constitution (article 334 of the same), is passed to the executive branch, which from the Publication of this norm may de-apply laws (Article 19 of the «law» that uses the term «de-apply») usurping an exclusive attribution of the judiciary.

Article 62 of the Constitution that establishes for all citizens the «right to freely participate in public affairs» is repealed as the «law» considers that «the procedures, acts and records carried out on the occasion of the implementation of any of the measures established in the second chapter of this Constitutional Law», which in practical terms implies that all those companies or societies that the Venezuelan State carries out with foreign investors, as well as matters relating to their administration and accountability, It will have a reserved nature and, consequently, outside the public scrutiny and the comptroller's office of institutions such as the National Assembly.

This also violates article 187.9 of the Constitution, which grants the National Assembly the power to approve «contracts of national interest, in the cases established by law», precisely because those laws that establish it may be «inapplicable» by the Executive power.

The foregoing, together with the non-application of legal regulations, implies that fundamental areas of the Venezuelan economy, such as the exploitation of oil and public services, can be totally or partially transferred to foreign investors, without knowing who they are, which they are the terms of the commercial agreements with them and, even more, how the resources obtained from them will be managed.

This «constitutional law» can have serious consequences for the management of public goods in the country, by subjecting them to an opaque and uncontrolled regime; undoubtedly opens the door for corruption, which is already widely spread in the Venezuelan State, to manifest itself once again, given the lack of controls and the discretion given to the Executive Power to dispose of public resources under the guise of combat unilateral sanctions.

## **7.2. Political functions**

Despite the legislative work carried out fraudulently by the National Constituent Assembly, there is also a significant number of acts carried out by the abusive exercise of its powers, in the evident usurpation of the parliamentary functions of a political nature assigned to the National Assembly.

This is the case of the appointments and removals of authorities of the public powers that, according to the Venezuelan constitution, are exclusively assigned to the Legislative Power, but that was carried out by the instance through «constituent decrees». Among these decisions, the following stand out:

1. Removal of Luisa Ortega Díaz<sup>112</sup> as General Attorney of the Republic<sup>113</sup>.
2. Appointment of Tarek William Saab <sup>114</sup> as General Attorney of the Republic<sup>115</sup>.
3. Ratification in the exercise of his constitutional functions of Tarek William Saab as General Attorney of the Republic and president of the Republican Moral Council; Manuel Galindo Ballesteros as general comptroller of the Republic; and Alfredo Ruíz Angulo as Ombudsman<sup>116</sup>.
4. Designation of Elvis Eduardo Hidrobo Amoroso, as General Comptroller of the Republic<sup>117</sup>, and approval of Manuel Galindo Ballesteros request for retirement<sup>118</sup>.
5. Ratification of Nicolás Maduro Moros as constitutional president of the Bolivarian Republic of Venezuela, head of State and Government, commander-in-chief of the Bolivarian National Armed Forces<sup>119</sup>.
6. Ratification in the exercise of their functions to the main magistrates of the Supreme Court of Justice<sup>120</sup>.
7. Ratification of Tibisay Lucena Ramírez, Sandra Oblitas Ruzza, Socorro Elizabeth Hernández and Tania D'Amelio Cardiet as principal rectors of the

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<sup>112</sup> See: <https://www.accesoalajusticia.org/la-telarana-juridica-del-tsj-contr-la-fiscal-general/> y <https://www.accesoalajusticia.org/nuevos-hilos-para-la-telarana-juridica-del-tsj-contr-luisa-ortega-diaz/>.

<sup>113</sup> Official Gazette No. 6.322 extraordinary of August 5, 2017.

<sup>114</sup> See: <https://efectococuyo.com/politica/el-estreno-de-tarek-william-saab-como-fiscal-designado-por-la-anc/>.

<sup>115</sup> Official Gazette No. 6.322 extraordinary of August 5, 2017.

<sup>116</sup> Official Gazette No. 41.216 of August 17, 2017.

<sup>117</sup> See: <https://supremainjusticia.org/2018/10/25/elvis-amoroso-aterriza-en-la-contraloria-tras-aspirar-al-tsj-y-a-la-fiscalia/>.

<sup>118</sup> Official Gazette No. 41.355 of March 7, 2018.

<sup>119</sup> Official Gazette No. 6.325 extraordinary of August 10, 2017.

<sup>120</sup> Official Gazette No. 41.214 of August 15, 2017.

- National Electoral Council<sup>121</sup>; and ratification of Luis Emilio Rondón as principal rector of the National Electoral Council<sup>122</sup>.
8. Designation of Beysce Pilar Loreto Duben, as deputy general attorney of the Bolivarian Republic of Venezuela, as person in charge<sup>123</sup>.
  9. Authorization of the designation of Calixto José Ortega as president of the Central Bank of Venezuela<sup>124</sup>.
  10. Designation of Carmen Marisela Castro Gilly as a general public defender of the Bolivarian Republic of Venezuela<sup>125</sup>.

Undoubtedly, the aforementioned acts were carried out by the National Constituent Assembly outside the 1999 Constitution and contrary to the fundamental rights protected in international treaties. Obviously, the authoritarian dismissal of Attorney General Luisa Ortega Díaz is striking, who was dismissed from her post after the Supreme Court of Justice approved the preliminary hearing that would lead to criminal proceedings and that could or could not end with a custodial sentence. against the official. This was a strictly political decision, inasmuch as it was wanted to do without this official after her loyalty to the regime changed.

However, the high court would start the criminal procedure at once so that the Constituent Assembly declared the cessation of its functions<sup>126</sup> without any procedure. In effect, with respect to this competence that was attributed by this instance, the Venezuelan political charter establishes that the attorney general and the other members of the Citizen Power will be removed by the National Assembly, following a pronouncement by the Supreme Court of Justice (Article 279).

In this way, the National Constituent Assembly, ignoring this procedure and supplanting the legislature legitimately elected by the people, decided to remove Ortega Díaz from his position<sup>127</sup>, which he held for ten years.

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<sup>121</sup> Official Gazette No. 6.326 extraordinary of August 11, 2017.

<sup>122</sup> Official Gazette No. 41,214 of August 15, 2017.

<sup>123</sup> Official Gazette No. 41.508 of October 23, 2018.

<sup>124</sup> Official Gazette No. 41.422 of June 19, 2018.

<sup>125</sup> Official Gazette No. 41.559 of January 8, 2019.

<sup>126</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2018/07/Informe-anual-Acceso-a-la-Justicia-2017.pdf>.

<sup>127</sup> The attack against the dismissed prosecutor intensified in mid-August 2017, when Tarek William Saab, the new prosecutor appointed by the Constituent Assembly, decided to request an arrest warrant from the Supreme Court of Justice against the deputy of the National Assembly and husband of Luisa Ortega Díaz, Germán Ferrer. Once again, the high court and the instance would violate the Constitution by disrespecting the parliamentary immunity of Deputy Ferrer, since it is Parliament

This situation of anarchy on the part of the Constituent Assembly would also be repeated in the appointment of the new attorney general, Tarek William Saab, in addition to the appointments of Manuel Galindo Ballesteros as comptroller general, Alfredo Ruiz Angulo as the ombudsman, and Carmen Marisela Castro Gilly as defender public.

However, the most alarming aspect of the exercise of political functions by the Constituent Assembly usurping exclusive powers of the National Assembly -- particularly because it would be endorsed by the Supreme Court of Justice--, is the lifting of parliamentary immunity to prosecute the elected representatives of the Legislative power.

Since its installation, the Constituent Assembly has carried out a myriad of arbitrariness to persecute deputies in opposition to the Maduro government, including approving the waiver of parliamentary immunity. In fact, in mid-August 2017, the Plenary Chamber of the high court would be in charge of activating this action after it ordered the arrest of Deputy Germán Ferrer<sup>128</sup> and requested the ANC to waive his immunity, bypassing the National Assembly, which, as indicated in article 200 of the Constitution<sup>129</sup>, was the one who was responsible for authorizing the waiver of parliamentary immunity.

From then until today the National Constituent Assembly, based on a chain of sentences drawn up by the aforementioned Chamber, has proceeded to pave the parliamentary immunity of numerous legislators. Only in 2019 did this prerogative break into twenty-two deputies<sup>130</sup>, consolidating itself as a **mechanism of systematic persecution that has allowed** the Maduro government to politically annul the

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and not the Constituent Assembly that should have lifted the prerogative that Ferrer enjoys due to her legislative functions. See: <https://www.accesoalajusticia.org/tsj-y-anc-insisten-en-usurpar-funciones-del-parlamento/>.

<sup>128</sup> See: <https://www.accesoalajusticia.org/%EF%BB%BFtitulo-la-sala-plena-declara-procedente-la-detencion-del-diputado-german-ferrer/>.

<sup>129</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2018/01/SP-N%C2%BA-66-16-08-2017.pdf>.

<sup>130</sup> Among the deputies for whom the Constituent Assembly has decided to waive parliamentary immunity are Juan Requesens, Gilber Caro, Gilberto Sojo, Renzo Prieto, Rosmit Mantilla, José Manuel Olivares, Gaby Arellano, Ismael García, Adriana D'Elia, Adriana Pichardo, Tomás Guanipa, Freddy Guevara, Julio Borges, Juan Guaidó Márquez, Simón Calzadilla, Mariela Magallanes, Richard Blanco, Henry Ramos Allup, Luis Florido, Edgar Zambrano, Carlos Paparoni, Miguel Pizarro, Freddy Superlano, Sergio Vergara, Juan Andrés Mejía, José Guerra and Juan Carlos García. See: <https://www.accesoalajusticia.org/la-injusticia-en-estado-puro-el-caso-requesens/>, <https://www.accesoalajusticia.org/gilber-caro-dos-anos-de-viacrucis-judicial/>, <https://www.accesoalajusticia.org/jose-guerra-y-tomas-guanipa-se-suman-a-la-lista-de-diputados-perseguidos-por-el-tsj/>, <https://www.accesoalajusticia.org/juan-pablo-guanipa-otra-victima-de-la-persecucion/>, <https://www.accesoalajusticia.org/cronologia-del-caso-de-gilber-caro/> y <https://www.accesoalajusticia.org/cronologia-del-caso-de-juan-requesens/>.

opposition deputies<sup>131</sup> and, at the same time, ignore the legitimate authority of the legislative power.

In this way, in Venezuela, the National Assembly has been dismantled and has ceased to exercise its fundamental functions, especially the most essential in a democratic system, such as legislating and politically supervising the national Executive, a situation that has allowed the Government of Maduro to unlimitedly concentrate all powers and any type of control, especially by the legislative body.

### 7.3. Electoral functions

Under the validity of the National Constituent Assembly, the Maduro Government would increase its hegemonic control of State institutions, especially thanks to the enactment of «constitutional laws» that expanded the number of its functions in various sectors, and that would reinforce the suppression of the National Assembly. As if that were not enough, and in order to enhance the interests of the regime, the instance would carry out a strategy that would guarantee the victory of the ruling party in the municipal, regional and presidential elections, which would be explained by the powers that this body was endowed with unconstitutionally, in addition to the way it exercised them.

Proof of this is that the Constituent Assembly would usurp the natural competences of the National Electoral Council, the governing body of the Electoral Power that, according to the 1999 Constitution, is assigned the function of carrying out the activities for holding the elections in the country (Article 293, numeral 5), contrary to the most elementary democratic rules and violating citizens' electoral rights, in order to favor the governing party as it might.

Next, the functions that the National Constituent Assembly would deprive the National Electoral Council are described, in order to openly favor the interests of the ruling party in the various electoral events that would be called during the years 2017 and 2018.

#### 7.3.1. Call for regional elections

On October 15, 2017, the elections of state governors would take place in Venezuela. These elections were widely questioned during the process and after it by political actors and organizations of organized civil society, among other reasons because the National Constituent Assembly was the body that unconstitutionally decided to convene this process<sup>132</sup>.

Only seven days after it was installed, on August 12, 2017, the Constituent Assembly would order the National Electoral Council to reschedule the regional elections to

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<sup>131</sup> See: <https://www.accesoalajusticia.org/wp-content/uploads/2020/06/INFORME-ANUAL-DE-ACCESO-A-LA-JUSTICIA-2019.pdf>.

<sup>132</sup> See: <https://www.accesoalajusticia.org/golpe-electoral/>.

hold them in October<sup>133</sup>, a process that had been scheduled for December by the decision adopted by the authority electoral during the month of June, and that during 2016 they had been suspended on two occasions.

In this way, the abuse of the body would initiate an electoral process outside the margin of the constitutional charter and electoral legislation, after invading the attributions assigned to the governing body of the electoral power. But, in addition, the National Electoral Council would not resist such usurpation, since it has always behaved in line with the interests of the regime, it simply chose, without anyone being surprised, to abide by the burdensome decision of the Constituent Assembly. In other words, instead of pursuing the protection of the rights of the voters, the National Electoral Council would join the violation of the Constituent Assembly that would render the results of those elections illegitimate.

In this sense, it should be noted that even when the ruling party would sweep the results of the governor's elections, the opposition would win five regional headquarters out of twenty-three, namely Anzoátegui, Mérida, Nueva Esparta, Táchira, and Zulia. Faced with this opposition victory, the Constituent Assembly would constrain the elected governors, without any legal grounds, to present an oath before it, in order to subordinate themselves to its mandate and, consequently, recognize its legitimacy as a constituent authority, given the Serious doubts that had been raised against him<sup>134</sup>.

On October 18, 2017, the National Constituent Assembly would issue a «constituent decree» by which it ordered the legislative councils of the states not to swear in those elected governors who did not subordinate themselves to it. This condition was an obvious violation of the rights of elected governors, especially the opposition, who were obliged to recognize the Constituent Assembly, in addition to showing contempt for citizens who had expressed their popular will by voting for these options.

The most alarming thing about this situation is that the proclaimed candidates who refused to present an oath before the Constituent Assembly would be prevented from taking possession of the positions for which they had been elected. This is how the candidate Juan Pablo Guanipa, who had won the governorship of the state of Zulia by the opposition coalition Mesa de la *Unidad Democrática*, would decide not to submit to take the oath before that instance, so he would be prevented from taking office, as to what is established by the instance itself.

As a consequence of this situation, the National Constituent Assembly would decide to declare the post of governor in the state of Zulia vacant and call new elections in the aforementioned regional entity with the consent of the National Electoral

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<sup>133</sup> Official Gazette No. 6.327 extraordinary of August 12, 2017.

<sup>134</sup> See: <https://www.accesoalajusticia.org/deben-juramentarse-los-gobernadores-electos-ante-la-anc/>

Council after it did not reject this measure. This constituted a violation of the political rights of Juan Pablo Guanipa, apart from not knowing the results of that regional election.

### 7.3.2. Call for municipal elections

As expected, after the results of the governor's elections, the Constituent Assembly would announce the repetition of the elections to choose the governor of Zulia state<sup>135</sup> and the election of mayors<sup>136</sup>. In fact, it would resolve to unconstitutionally call the repetition to elect the governor of that entity in December 2017, after declaring the absolute absence of Juan Pablo Guanipa and would decree the holding of elections for the municipal authorities.

The National Electoral Council would be subordinate to these mandates of the National Constituent Assembly and would immediately order that the election of mayors and the repetition of the elections for the governor of Zulia would take place on the same day. The convocation of the electoral body would be announced on October 27 through resolution No. 171102-327, published in the electoral gazette of November 2<sup>137</sup>. In the said resolution, the National Electoral Council formally established that the election of mayors would take place on December 10, although it excluded from the process the renewal of the representatives of the municipal councils.

The outlook would get worse when on October 30, the rector Tania D'Amelio, through her Twitter account, reported that the representatives of the metropolitan mayors of Caracas or Alto Apure would not be elected in the process called. At the end of 2017, the Constituent Assembly would formalize the elimination of these authorities, which constituted another clear violation of the 1999 Constitution.

In municipal elections, the Constituent Assembly would also extend, by means of a «constituent decree» of December 14, 2017, the effect of obliging the candidates who were elected to present an oath before the ANC in order to take office<sup>138</sup>, despite the fact that it was about a condition alien to the constitutional legal order and, specifically, to the Organic Law of Municipal Public Power, which establishes that this function corresponds exclusively to the municipal councils of each municipal entity.

In this case, the National Constituent Assembly would resolve through the aforementioned decree that the swearing-in of the elected mayors would be carried out before the constituents representing each municipality<sup>139</sup>. In fact, article 1 established that the «act of swearing-in of the proclaimed mayors and mayors must

<sup>135</sup> Official Gazette No. 41.265 of October 26, 2017.

<sup>136</sup> Official Gazette No. 41.265 of October 26, 2017.

<sup>137</sup> Electoral Gazette No. 870 of November 2, 2017.

<sup>138</sup> Official Gazette No. 41.300 of December 14, 2017.

<sup>139</sup> Official Gazette No. 41.300 of December 14, 2017.

be held jointly in each state before the constituents delegated for such purposes by the Board of Directors on behalf of the National Constituent Assembly».

The mayoral elections would accelerate the dismantling of the rule of law, after the cocktail of violations committed against the political rights of Venezuelans from the irregular convocation of that process by the Constituent Assembly; To this would be added the serious dismantling of the opposition political parties.

### **7.3.3. «Constitutional Decree» that outlaws opposition political parties**

In addition to this set of decisions, the National Constituent Assembly would decide a new regulation on the legalization of political parties in the country, after the main opposition political organizations announced their decision not to participate in the process that the Constituent Assembly had called. for December 10 for the election of mayors.

Against this background, the Maduro government would threaten to disqualify the parties that did not appear in the municipal elections. However, it would be after the announcement of the call for the presidential elections by the Constituent Assembly itself that this threat against the parties would crystallize. In effect, on December 27, 2017<sup>140</sup>, the instance, in clear usurpation of functions of the National Assembly and violation of the principle of legality and legal reserve, would decree that the parties that had not attended the previous elections - referring to the election of mayors - had to undergo a legitimation process organized by the National Electoral Council, otherwise, they would be disqualified.

With the implementation of this requirement to the opposition parties, the National Constituent Assembly would modify the Law of Political Parties, Public Meetings, and Demonstrations, which in no case establishes that non-participation in elections was considered an electoral offense or offense.

Likewise, it must be considered that between the months of March and August 2017, the Maduro Government, through the Supreme Court of Justice and the National Electoral Council, designed a strategy for the elimination of a considerable number of national parties<sup>141</sup>, therefore It would be a third legitimation process for the political awnings that decided not to stand for the mayors' election held on December 10, 2017.

As a consequence of this decision, *Acción Democrática*, *Mesa de la Unidad Democrática*, *First Justice Movement*, *Movimiento Primero Justicia*, *Puente*, and *Voluntad Popular* would have to undergo this renewal process to be able to register their candidates in the presidential election.

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<sup>140</sup> Official Gazette No. 41.308 of December 27, 2017.

<sup>141</sup> See: <https://www.accesoalajusticia.org/el-camino-a-la-eliminacion-de-los-partidos-politicos-de-oposicion-en-venezuela/>

In short, it would be a decree that would leave out the opposition parties to allow the Maduro government to gain a considerable advantage in the presidential elections to be held on May 20, 2018, in addition to the systematic violation of the exercise of the right to vote and other democratic guarantees.

#### 7.3.4. Call for presidential elections

The National Constituent Assembly would dictate on January 23, 2018, the decree by means of which it would decide to convene for the first four months of 2018<sup>142</sup> the electoral process for the election of the presidency of the Republic. To do this, I would urge the former president of the National Electoral Council, Tibisay Lucena Ramírez, to carry out what is necessary for the purposes of complying with the aforementioned act.

The decree would indicate as legal basis articles 347, 348, and 349 of the Constitution, as well as the Norms, to Guarantee the Full Institutional Functioning of the National Constituent Assembly in Harmony with the Constituted Public Powers. Likewise, it would establish as foundations of said convocation the realization of the «supreme values of the Republic of peace, freedom, equality, sovereignty, solidarity, the common good, integrity, and preeminence of human rights»; the subordination of the organs of the Public Power to the Constituent Assembly «as an expression of the original and foundational power of the Venezuelan People».

On May 20, 2018, the presidential elections corresponding to the 2019-2025 period would be held. It would be a process questioned due to the lack of minimum electoral guarantees, taking into account that they had been convened by the National Constituent Assembly in advance on a date that did not correspond to Venezuelan regulations.

The interference of the aforementioned instance in the electoral function, by being awarded the function of calling the presidential elections, would order a cascade of irregularities in violation of the Constitution and electoral laws, especially usurp the exclusive functions of the CNE (constitutional article 293.5), and Undemocratically manipulate the setting of the date of the process so that it would be carried out in the first four months of 2018 instead of the month of December (Article 42 of the Organic Law of Electoral Processes)<sup>143</sup>.

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<sup>142</sup> Official Gazette No. 6.361 extraordinary of January 23, 2018.

<sup>143</sup> The elections would be rejected by the Declaration of the Lima Group, who stated that they did not recognize "the legitimacy of the electoral process developed in the Bolivarian Republic of Venezuela that concluded on May 20, for not complying with international standards of a democratic process, free, fair and transparent. See: <https://www.observatoriodeconflictos.org.ve/derechos-humanos/grupo-de-lima-no-reconoce-la-legitimidad-de-la-jornada-de-votacion-desarrollada-en-venezuela-del-20-de-mayo> . This position would in turn be endorsed by the G7, which brings together the leaders of Germany, Canada, the United States, France, Italy, Japan and the United Kingdom, and the European Union. See:

In addition to the absence of democratic guarantees, and the disrespect for political rights, it should be noted that the Constituent Assembly and the electoral referee had established a series of decisions against political organizations, in order to outlaw them to reduce their participation in the presidential elections.

These outlaws would violate the Constitution and the legislation on political parties, which would facilitate a tailor-made process for Maduro's re-election. Obviously, these presidential elections would result in the country being in a governance crisis that has so far paralyzed relations between the Executive and the Legislature, beyond the economic and social crisis.

To all of the above, it must be added that the National Constituent Assembly itself would fail to fulfill the very functions that the Constitution imposes on it, in the sense that its mission is to prepare a draft constitutional text, which to date has not only not occurred. Rather, according to a statement by the president of that instance, Diosdado Cabello<sup>144</sup>, it will not happen (although «constitutional laws» would continue to be issued), thus confirming the suspicion that the Constitution was not convened with the purpose that the Magna Carta establishes it as a parallel body to the National Assembly.

Finally, what has been said is complemented by the statement made in August 2020 by Nicolás Maduro in the sense that the Constituent Assembly would cease its functions in December of this year<sup>145</sup>.

Thus, both the declaration that there would be no draft Constitution and that the instance would cease in December 2020 are objective elements that confirm the use of the figure of the Constituent Assembly for purposes unrelated to those required by the constitutional text. Therefore, we can say that it has been a constitutional fraud from its origin until its dissolution, taking with it the last traces of the rule of law that remained in the country.

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<https://www.canadainternational.gc.ca/venezuela/highlights-faits/2018/2018-05-23a.aspx?lang=spa>

<sup>144</sup> See: <https://efectococuyo.com/politica/anc-no-hara-una-nueva-constitucion-dice-diosdado-cabello/>

<sup>145</sup> See: <https://elpais.com/internacional/2020-08-18/la-constituyente-del-chavismo-cesara-en-funciones-en-diciembre-de-2020.html>

## 8. Conclusions

Since the installation of the National Constituent Assembly in 2017, the Maduro Government has had absolute control over the public powers. Indeed, after the constant legal modifications that the instance has arbitrarily incorporated in the country, a regime has been formalized in which the figure of Maduro is the one that is imposed and prevails, in contrast to the organizational structure and the planned separation of powers in the Venezuelan letter, added to the imposition of social control mechanisms that are used for electoral purposes, including the coercive use of food distribution programs.

The product of this is that the Constituent Assembly guaranteed the Maduro government more powers and, therefore, more power, with the aim of deepening the authoritarian presidential model and the dismantling of the text of the Constitution itself, a process that began during Chávez's presidency.

The fraudulent convocation of the Constituent Assembly has undoubtedly allowed the Maduro government not only to practically annihilate the operation of the National Assembly but also to ensure the running of the country without any type of control, especially the parliamentary.

The Constituent Assembly has focused on increasing the levels of power of the national Government, a power that is becoming increasingly evident both in the obstruction of free, fair, and transparent elections scheduled for the election of parliamentarians on December 6<sup>146</sup>, in the that it has imposed a tailor-made electoral process<sup>147</sup> and in the systematic repression and imposition of greater restrictions on opposition political parties and their leaders, as well as on any sector of the population that decides to demonstrate against government interests.

It is not surprising the authoritarian and quarrelsome nature of the National Constituent Assembly to consolidate and strengthen a «Parallel State» model, which has been imposed outside the constitutional postulates, and which only contributes to institutional confrontation. As if that were not enough, this situation does not favor the serious humanitarian crisis that Venezuela is going through; it only exacerbates it, generating greater instability and multiple violations of the human rights of Venezuelans.

The Constituent Assembly is a subordinate body to the Executive Power that has only shown so far that it does not attend to the budgets of the Constitution, much less to the democratic institutionality; applies a legal system developed from its own capricious decisions to give the final blow to the process of dismantling the constitutional State and Rule of Law.

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<sup>146</sup> See: <https://www.accesoalajusticia.org/parlamentarias-del-6d-son-un-ejemplo-de-todo-lo-que-no-debe-pasar-en-una-eleccion/> and <https://www.accesoalajusticia.org/acceso-a-la-justicia-denuncio-ante-la-cidh-las-parlamentarias-a-medida-de-maduro/>

<sup>147</sup> See: <https://www.accesoalajusticia.org/elecciones-a-la-medida/>