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This book deals with the dismantling of Venezuelan democracy from within that the country's authoritarian government has accomplished during the past decade using some democratic tools defrauding the Constitution.¹ This process began after the election of Hugo Chávez Frías as president of the Republic of Venezuela in December 1998, the result of which was the tragic setback to democratic institutions and standards. Venezuela had been one of the most admired Latin American countries because of its stable democracy, which had consolidated during the second half of the twentieth century. During the past decade, the country has experienced a continuous, persistent, and deliberate demolishing of institutions and destruction of democracy, which has never before occurred in the constitutional history of the country.

The first step to subvert democratic principles and values materialized in 1999, with the forced convening of a constituent assembly – not established in the Constitution as a valid means for constitutional reform – through a consultative referendum to impose the “will of the people” over the Constitution itself (peoples' sovereignty over constitutional supremacy). The result was the interference and takeover of all recently elected branches of government by the newly elected Constituent Assembly, completely controlled by the president of the republic. For the election of the Assembly, an electoral system was adopted without any sort of agreements, the Constitution was sanctioned without any sort of consensus, and conditions were established for the imposition of an authoritarian and centralized government, which has since eliminated any checks and balances and, consequently, the rule of law.

The remote antecedent of the use of the constituent assembly procedure, not established in the constitution, to draft a new constitution without the

¹ See, in general, Allan R. Brewer-Carías, “La demolición del Estado de derecho y la destrucción de la democracia en Venezuela (1999-2009),” in *La democracia en su contexto. Estudios en homenaje a Dieter Nohlen en su septuagésimo aniversario*, coord. José Reynoso Núñez and Herminio Sánchez de la Barquera y Arroyo, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Mexico City 2009, 477-517

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interruption of the constitutional rule can be found in Colombia, during the transition between the governments of President Virgilio Barco and President César Gaviria in 1990, after the Supreme Court of Justice expressly accepted the constitutionality of the process. The Constituent Assembly was elected with a pluralistic composition, after the political actors had agreed on the electoral system. The assembly drafted the 1991 Constitution, also based on negotiations and consensus, thus contributing to the further development of democratic institutions in the country.

However, it was after the 1999 experience in Venezuela that a new formula was developed in which the general bylaws for the election of a Constituent Assembly, also not established in the 1961 Constitution as a constitutional review method, resulted not from consensus and agreements among political actors but from those who took the initiative to convene the referendum. The result in this case was the establishment and development not of a democratic government but of a framework for developing an authoritarian government through democratic tools. In Venezuela, a popular consultation or consultative referendum was convened to subvert the Constitution itself, as President Chávez unilaterally defined the assembly in a way that impeded the configuration of a plural political body. In 2007, Ecuador's president Rafael Correa also implemented this "formula" to depart from the Constitution then in force, and in 2009, Honduran President Manuel Zelaya tried to implement it, but the Supreme Court of Justice of Honduras declared it unconstitutional.² Unfortunately, in Honduras, instead of waiting for the results of the judicial process initiated against the president, indicted for violating the Constitution, the military eventually expelled him unconstitutionally from the country. His expulsion led to an international uproar from the less democratic leaders of Latin America, including Hugo Chávez and Raúl Castro, supposedly to defend democracy and to impose the 2001 Inter-American Democratic Charter.³

In Venezuela, contrary to the Colombia in 1991 and Honduras in 2009 cases, the Supreme Court of Justice, though requested to issue a decision on the interpretation of the constitutionality of the convening of the assembly, refused to rule in a clear way and instead issued an ambiguous decision that ultimately allowed the president to impose his own rules for

²The formula has been referred to as the Chávez franchise or the Chávez brand because of his ostensible involvement in the political processes of the countries that have previously applied it, such as Ecuador. See, e.g., "The Wages of Chavismo" (Opinion), *Wall Street Journal*, July 1, 2009, A12.

³See, e.g., Moisés Naim, "Golpe en Honduras: Idiotas contra hipócritas," *El País*, Madrid July 5, 2009.

Cambridge University Press

978-0-521-14557-2 - Dismantling Democracy in Venezuela: The Chavez Authoritarian Experiment

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the convening of the Constituent Assembly. In 1999, the executive unilaterally designed a constituent process that not only sanctioned a new Constitution in the name of the popular will but also proceeded with an aggressive takeover of the legislative and judicial branches.

Although many of its drafters consider it among the best constitutional texts in contemporary Latin America, to allow the intended institutional destruction, the 1999 Constitution has also been constantly violated under the watch of its own product, the Supreme Tribunal of Justice. The tribunal, particularly its Constitutional Chamber, is completely controlled by the government, and it has molded and accepted as legitimate all the subsequent constitutional violations.

Now in Venezuela there is a complete lack of the essential elements of democracy as defined by the 2001 Inter-American Democratic Charter: access to power and its exercise subject to the rule of law, the performing of periodic free and fair elections based on universal and secret vote as an expression of the sovereignty of the people, the plural regime of political parties and organizations, the separation and independence of all branches of government, and respect for human rights and fundamental freedoms.

I have been writing on the Venezuelan constitution-making process and its consequences over the past decade, since the process began in 1998, and have produced a series of essays that study the subversion of democracy from within and the violation of the Constitution.⁴ This book is the result of those essays, mainly written from New York, where I have lived, able to continue my academic activities, since September 2005. My political opposition to Chávez's authoritarian government and the threats I received to my freedom unfortunately forced me to leave Venezuela in 2005.⁵ I had begun such opposition in 1998, when Chávez became

⁴The text of all my academic works and papers and almost all my published books and articles can be downloaded from my website: <http://allanbrewercarias.com/>

⁵I was unjustly accused of "conspiring to change violently the Constitution" because I had given a legal opinion, as a lawyer, in the midst of the political crisis originated by Chávez's resignation on Apr. 11, 2002. I gave that opinion at the request of the head of the brief provisional government, established after such resignation was publicly announced. On those facts, see Allan R. Brewer-Carías, *La crisis de la democracia venezolana: La Carta Democrática Interamericana y los sucesos de abril de 2002*, Ediciones El Nacional, Caracas 2002 (full text available at <http://allanbrewercarias.com/Content.aspx?id=449725d9-f1cb-474b-8ab2-41efb849fea5>). Although my legal opinion defended the democratic principle and was contrary to what the provisional government eventually announced in its constitutive decree, the government immediately reacted against me and publicly condemned me, without trial, and accused me of having written the decree, which I did not. All this was in violation of my constitutional guarantees, particularly my right to defense and the presumption of innocence, and based on interested, malicious journalists' opinions. Thus, the government, using the public prosecutor as a tool for political persecution, as well as newspaper clippings as the sole evidence, accused me in a process that allowed the head of the Prosecutor

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presidential candidate in the elections of that year after having led in 1992 a failed military coup against the democratic government. As president of the National Academy of Political and Social Sciences, I convened all the presidential candidates to explain their political projects for the state and the political system before the academy. When I introduced Chávez at an academy session on August 15, 1998, I stressed his “nondemocratic” way of entering the Venezuelan political arena and my opposition to his main electoral proposal of “convening the Constitutional Assembly without giving it constitutional basis by reforming the Constitution.”⁶ My opposition to that political project seeking the global take over of State power continued after his election as president, when in 1999 I personally went before the former Supreme Court of Justice to challenge his decree on the Constituent Assembly on the grounds of its unconstitutionality. After contributing to force the correction of the decree through judicial decisions, my opposition continued throughout the 1999 National Constituent Assembly, to which I was elected as an independent candidate. Myself and three other distinguished Venezuelan politicians and thinkers formed the very tiny but substantive minority opposition group of the assembly. I continued my opposition during the discussions on the draft 1999 Constitution because of the authoritarian trends it set forth to concentrate and centralize state powers. Since the approval of the Constitution, I have continued to denounce in books, essays, and speeches all the successive antidemocratic, centralistic, and militaristic decisions and measures taken by the government. This book and the essays that inspired it are part of that effort.

New York has been a formidable place to live, and being together with my wife, Beatriz, has helped us overcome the sadness of not having the

General's Office to violate my rights. See the letter I sent to the prosecutor general on the eve of my departure from Venezuela, on Sept. 28, 2005, in Allan R. Brewer-Carias, *En mi propia defensa*, Editorial Jurídica Venezolana, Caracas 2006, 573-90 (full text available at <http://allanbrewercarias.com/Content.aspx?id=449725d9-f1cb-474b-8ab2-41efb849fea5>). I could not have possibly expected a fair trial from the Venezuelan Judiciary. Consequently, in Jan. 2007, I filed a complaint against the Venezuelan State before the Inter-American Commission on Human Rights based on the violation of my due process, defense, presumption of innocence, and free expression rights, as established in the American Convention on Human Rights. The Commission admitted my petition in Sept. 2009 (Case: 12.724: *Inter-American Commission on Human Rights, Allan Brewer Carias/Venezuela*). Available at <http://www.cidh.oas.org/annualrep/2009eng/Venezuela84.07eng.htm>.

⁶It was my first and last personal encounter with Chávez. See my introduction to Allan R. Brewer-Carias, coord., *Los candidatos presidenciales ante la Academia: Ciclo de exposiciones 1998*, Academia de Ciencias Políticas y Sociales, Caracas 1998, 23, 38, 92, 95, 137, 138, 320. See my foreword to the same book: “A modo de presentación: Reflexiones sobre la crisis del sistema político, sus salidas democráticas y la convocatoria a una constituyente,” in id., 9-66.

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always very important direct contact with our family and friends. Beatriz, as always during the almost five decades we have been married, with all her generous love, has helped me in an unimaginable way in allowing me to continue with my writings. As always, I am very grateful to her for all her love, understanding, support, and loyalty.

Since our arrival in New York, good friends gave us companionship, helping us continue with our daily lives; and, most important, after having been in the academic life for fifty years, I immediately received the hospitality of Columbia University. As adjunct professor of law at the Columbia Law School, I have been able to continue teaching, giving over various semesters the course Judicial Protection of Human Rights in Latin America: A Comparative Constitutional Law Study of the Latin American Injunction for the Protection of Constitutional Rights (*Amparo Proceeding*). The text I wrote for the course was published in 2009.⁷

Of course, also from an academic point of view, New York has been an extraordinary launching pad that has allowed me to get in touch with many other universities in the United States and to continue, increasingly, my already well-established, long relations with universities and law professors in Europe and Latin America. This has allowed me to continue with my work and writings.

The truth is that if somebody in Venezuela at any moment considered that forcing me to leave the country would annihilate my academic work and life and press me to renounce my ideals and cease to diffuse them, they have noisily failed. It is enough to visit my Web site (<http://www.allanbrewercarias.com>) to appreciate the use I have made of my time in favor of freedom, of the rule of law and of democratic principles. In the end, they have allowed me to devote more time to continue analyzing the chaotic situation of Venezuela's constitutional and legal system that has resulted from the disorderly implementation of a supposedly "Bolivarian revolution," which, as Chávez confessed himself in January 2010, is no more than the phantasmagoric resurrection of the

⁷See Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of the Amparo Proceeding*, Cambridge University Press, New York 2009. The Appendix to the course, containing the text of all the *amparo* laws in force in Latin America, was also published in Mexico as *Leyes de amparo de America Latina*, 2 vols., Instituto de Administración Pública de Jalisco y sus Municipios, Instituto de Administración Pública del Estado de México, Poder Judicial del Estado de México, Academia de Derecho Constitucional de la Confederación de Colegios y Asociaciones de Abogados de México, Guadalajara 2009.

Cambridge University Press

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historically failed “Marxist revolution,” but led by a president who has never even read Marx’s writings.⁸

Nevertheless, on April 2010, the governmental United Socialist Party of Venezuela of which he presides, in its First Extraordinary Congress adopted a “Declaration of Principles” in which it officially declared itself as a “Marxist,” “Anti-imperialist” and “Ant-capitalist” party. According to the same document, the party’s actions are to be based on the “scientific socialism” and on the “inputs of Marxism as a philosophy of praxis,” in order to substitute the “Capitalist Bourgeois State” by a “Socialist State” based on the Popular Power and the socialization of the means of production.⁹

With these declarations it can be said that, finally, the so called “Bolivarian Revolution” has been unveiled; a revolution for which nobody in Venezuela has voted except for its rejection in the December 2, 2007 referendum, in which the President’s proposals for constitutional reforms in order to establish a Socialist, Centralized, Police and Militaristic state received a negative popular response.¹⁰

Allan R. Brewer-Carías
New York, August 4, 2010

⁸In his annual speech before the National Assembly on Jan. 15, 2010, in which Chávez declared to have “assumed Marxism,” he also confessed that he had never read Marx’s works. See María Lilibeth Da Corte, “Por primera vez asumo el marxismo,” in *El Universal*, Caracas Jan. 16, 2010, http://www.eluniversal.com/2010/01/16/pol_art_por-primera-vez-asu_1726209.shtml.

⁹See “Declaración de Principios, I Congreso Extraordinario del Partido Socialista Unido de Venezuela,” Apr. 23, 2010, at <http://psuv.org.ve/files/tcdocumentos/Declaracion-de-principios-PSUV.pdf>

¹⁰See on the constitutional reforms proposals, Allan R. Brewer-Carías, *Hacia la consolidación de un Estado socialista, centralizado, policial y militarista. Comentarios sobre el sentido y alcance de las propuestas de reforma constitucional 2007*, Editorial Jurídica Venezolana, Caracas 2007; *La reforma constitucional de 2007 (Comentarios al proyecto inconstitucionalmente sancionado por la Asamblea Nacional el 2 de noviembre de 2007)*, Editorial Jurídica Venezolana, Caracas 2007.

INTRODUCTION

DEFRAUDING DEMOCRACY THROUGH NONCONSENSUAL CONSTITUENT ASSEMBLIES

I

Democracy is much more than voting. It is a political regime in which, in addition to the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the following other essential elements are all ensured: respect for human rights and fundamental freedoms, access to and exercise of power in accordance with the rule of law, a pluralistic system of political parties and organizations, and separation of powers and independence of the branches of government.

This is what is set forth in Article 3 of the Inter-American Democratic Charter (*Carta Democrática Interamericana*), which members of the Organization of American States signed in Lima, Peru, on September 11, 2001 (the same day of the terrorist attacks in the United States). After so many antidemocratic and militarist regimes that have existed in Latin American history, and so many authoritarian regimes disguised as democratic that still have been developed there, adoption of a continental doctrine about democracy was an imperious necessity. That is why, in addition to the foregoing essential elements, Article 4 of the same charter included the following essential components of the exercise of democracy: transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, freedom of expression and of the press, constitutional subordination of all state institutions to the legally constituted civilian authority, and respect for the rule of law by all institutions and sectors of society.

For the purpose of adopting this charter, the General Assembly of the Organization of American States assumed that representative democracy is

Cambridge University Press

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indispensable for the stability, peace, and development of the region, its purposes being to promote and consolidate representative democracy with due respect for the principle of nonintervention; and considering that solidarity among and cooperation between American states requires that the political organization of those states be based on the effective exercise of representative democracy; and that democracy as well as economic growth and social development based on justice and equity are interdependent and mutually reinforcing. The General Assembly furthermore recognized the contributions of the organization and other regional and subregional mechanisms to the promotion and consolidation of democracy in the Americas, as well as the facts that a safe environment is essential to the integral development of the human being, which contributes to democracy and political stability; that the right of workers to associate themselves freely for the defense and promotion of their interests is fundamental for the fulfillment of democratic ideas; and that all the rights and obligations of member states under the organization's charter represent the foundation on which democratic principles in the Western Hemisphere are built.

Without doubt, the Inter-American Democratic Charter is the most important international instrument adopted in the contemporary world regarding democracy and democratic principles.¹ Article 1 recognizes and declares that the peoples of the Americas have a "right to democracy" and that their governments have an obligation to promote and defend that democracy, which is essential for the social, political, and economic development of the peoples of the Americas.²

Article 2 of the same charter states that the effective exercise of representative democracy is the basis for the rule of law and for the constitutional regimes of countries, which must be strengthened and deepened by the permanent, ethical, and responsible participation of the citizenry within a legal framework that conforms to a respective constitutional order. For such purposes, Article 5 of the charter considers that the strengthening of political parties and other political organizations is a priority for democracy; Article 6 declares that it is the right and responsibility of all citizens to participate in decisions relating to their own

¹The Member States of the African Union in its Eight Ordinary Assembly held in Addis Abeba, Ethiopia, on Jan. 30, 2007, have also signed the "African Charter on Democracy, Elections and Governance." Available at <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf>.

²See Asdrúbal Aguiar, *El derecho a la democracia: La democracia en el derecho y la jurisprudencia interamericanos: La libertad de expresión, piedra angular de la democracia*, Editorial Jurídica Venezolana, Caracas 2008. See also my foreword to that book "Sobre el derecho a la democracia y el control del poder" at 17-37.

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development because doing so is a necessary condition for the full and effective exercise of democracy; and Article 7 of the charter proclaims that democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility, and interdependence, which is embodied in the respective constitutions of states and in inter-American and international human rights instruments.

Consequently, democracy is not only a matter of voting and elections; it is a political system in which elections must be held with a pluralistic system of political parties, the principles of the rule of law are ensured, the separation of powers is guaranteed, and human rights and freedoms are protected. In this context, any violation of a country's constitution is undemocratic, and any constitution-making process that contravenes or defrauds³ an existing constitution is contrary to democracy.

II

Undemocratic constitution making is precisely what occurred in Venezuela in 1999. That year began the dismantling of democracy that Venezuela has suffered, with the convening of an illegitimate, unconstitutional constituent assembly for constitutional review; the imposition of new election rules adopted in a nonconsensual way and without the participation of the country's political forces; and the takeover of all branches of government by an exclusionist group aiming to destroy its opponents and impose its own political project.⁴ In 2009, attempts aimed to impose this method of assaulting power by using democratic tools but defrauding the Constitution, so successfully employed in Venezuela to destroy its democracy, were made in Honduras.

In effect, in the first half of 2009, inspired by the constitutional formula that President Hugo Chávez had used in Venezuela a decade earlier (in 1999), Honduras's President Manuel Zelaya decided to convene a consultative referendum to clear the way for the convening of the National Constituent Assembly, which the Honduran Constitution did not include as a

³I have used the word *defraud* (to cause injury or loss by deceit) in general, as it is used in civil law systems, referred not only to persons but also to institutions, in the sense that you can defraud the Constitution, you can defraud a provision of a statute, and you can defraud democracy itself.

⁴See, in general, Allan R. Brewer-Carías, "Constitution Making Process in Defraudation of the Constitution and Authoritarian Government in Defraudation of Democracy: The Recent Venezuelan Experience," in *Lateinamerika Analysen* 19, German Institute of Global and Area Studies, Hamburg 2008, 119-42; and "The 1999 Venezuelan Constitution-Making Process as an Instrument for Forming the Development of an Authoritarian Political Regime," in Laurel E. Miller, editor, *Framing the State in Times of Transition: Case Studies in Constitution Making*, United States Institute of Peace, Washington 2010, 505-32.

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valid way to reform the Constitution. The purpose of such a proposal, which was conceived without any political consensus or agreements between political parties and political actors of the country, was to reshape Honduras's constitutional principles, including the change of traditionally solid provisions, like the one establishing the absolute prohibition on presidential reelection.

The attorney general of the republic challenged Zelaya's attempt before the courts, requesting judicial review of the administrative action. The courts did issue preliminary judicial measures to suspend the presidential acts that had been challenged on grounds of unconstitutionality. The president ignored the judicial decisions and publicly insisted on achieving his proposal through de facto means. After his prosecution before the Supreme Court of Justice for contempt of court and for violating express provisions of the Constitution,⁵ Zelaya's detention was ordered. In Honduras, the president's actions provoked the functioning of the country's democratic checks-and-balances system (the Supreme Electoral Tribunal, the Supreme Court, the attorney general, the human rights commissioner, and the Congress declared the president's intentions unlawful); unfortunately, the Supreme Court's decision was not enforced as ordered. Instead, the same military in charge of detaining the president unconstitutionally expelled him from the country. With that action began the well-known international political crisis in which even the general assemblies of the United Nations and the Organization of American States intervened. Ironically, and suddenly, the crisis briefly converted the less democratic heads of state of Latin America, like Hugo Chávez and Raúl Castro, into political leaders defending democratic principles. That muddled many democratic leaders of the world in a discussion to qualify the events in Honduras as a coup d'état and resulted in the absurd dilemma of whether to impose international sanctions on a country in which the democratic institutions had worked – at least previous to the president's expulsion.⁶

⁵In Honduras, the Constitution expressly prohibits any public official, including the president of the republic, from proposing reforms to the Constitution to alter the principle of alternate government and to change the prohibition established for presidential reelection, which is considered an unchangeable, solid principle. The Constitution even establishes that any public officials who propose such reforms will immediately cease their public functions (art. 239). See, in general, Octavio Rubén Sánchez Barrientos, *Los extravagantes y el Caudillo que se sacó a sí mismo de la Presidencia. Un ensayo sobre la historia del Artículo 239 de la Constitución de la República de Honduras y del Principio de Alternabilidad en el Ejercicio de la Presidencia de la República* (forthcoming book), Tegucigalpa, June 2010.

⁶See Allan R. Brewer-Carías, "Reforma constitucional, asamblea nacional constituyente y control judicial contencioso administrativo: El caso de Honduras (2009) y el precedente venezolano (1999)," *Revista Mexicana Statum Rei Romanae de Derecho Administrativo: Homenaje de Nuevo León a*