DISMANTLING DEMOCRACY IN VENEZUELA

The Chávez Authoritarian Experiment

Since the election of Hugo Chávez Frías as president of the Republic of Venezuela in December 1998, and during the past decade, the country formerly envied for its democratic accomplishments over the second half of the twentieth century has suffered a tragic setback regarding democratic standards, suffering a continuous, persistent, and deliberate process of demolishing institutions and destroying democracy, which had never before been experienced in the constitutional history of the country. The 1999 Constitution, although considered by some of its drafters as one of the best constitutional texts in contemporary Latin America, has been constantly violated by all branches of government, and more seriously by the Supreme Tribunal of Justice and its Constitutional Chamber. The chamber, completely controlled by the executive, has molded and accepted as legitimate all the constitutional violations that have occurred. Worse, the process has been conducted by defrauding the Constitution and the representative democratic regime in the name of a “participatory democracy” designed to be controlled by the central government. The result has been the complete lack of all essential elements of democracy, as defined by the 2001 Inter-American Democratic Charter: namely, access to power and its exercise subject to the rule of law; periodic, free, and fair elections based on the universal secret vote as an expression of the sovereignty of the people; a plural regime of political parties and organizations; separation and independence of branches of government; and respect for human rights and fundamental freedoms.

This book covers the Chávez authoritarian experiment on dismantling democracy, which has influenced other countries, like Ecuador, Bolivia, and Honduras. It is based on a series of essays written as the facts were occurring during Venezuela’s decade of authoritarian government (1999–2009).

Allan R. Brewer-Carias has been Professor at the Central University of Venezuela since 1963. He also has been Simón Bolívar Professor at the Law Faculty of Cambridge University (1985–86), where he was Fellow of Trinity College; at the University of Paris II (1990); and at Columbia University, where he has been Visiting Scholar and Adjunct Professor of Law (2002–4, and 2006–7). He is Vice President of the International Academy of Comparative Law, and he is a member of the Venezuelan National Academy of Political and Social Sciences, where he served as President (1997–99); he was also Senator for the Federal District, Minister for Decentralization, and an elected member of the 1999 National Constituent Assembly.
DISMANTLING DEMOCRACY
IN VENEZUELA

The Chávez Authoritarian Experiment

Allan R. Brewer-Carías

Professor of Law, Central University of Venezuela
Academy of Political and Social Sciences, Venezuela
Vice President, International Academy of Comparative Law
CONTENTS

AUTHOR’S NOTE 1

INTRODUCTION

DEFRAUDING DEMOCRACY THROUGH NONCONSENSUAL CONSTITUENT ASSEMBLIES 7

PART ONE

THE POLITICAL ASSAULT ON STATE POWERS AND THE FRAMEWORK FOR AUTHORITARIANISM 33

Chapter 1

THE 1999 EXCLUSIONIST CONSTITUTION-MAKING PROCESS 35

I. THE 1999 NATIONAL CONSTITUENT ASSEMBLY 37


1. Party Domination and Demand for Participation 42

2. State Centralism and the Crisis of Decentralization 44

3. The Demand for Reform 46

III. THE CONSTITUTION-MAKING PROCESS AND ITS DEFORMATION 48

1. The Choice of a National Constituent Assembly 48

2. The Constitutional Debate Regarding the Election of the Constituent Assembly 50

3. The Electoral Rule for the Election of the Assembly 55

4. The Seizure of the Constituted Powers 57

5. The Drafting Phase: Haste and Exclusion 60

IV. THE PARALLEL TRANSITORY REGIME 64

V. THE DEMOCRATIC FAILURE OF THE CONSTITUTION-MAKING PROCESS 65
Chapter 2
THE ENDLESS AND ILLEGITIMATE TRANSITORY CONSTITUTIONAL REGIME

I. FAILED EFFORTS TO CREATE A CONSTITUTIONAL FRAMEWORK TO TRANSITION PUBLIC POWERS THROUGH AN APPROBATORY REFERENDUM 69

II. THE ILLEGITIMATE REGIME FOR THE TRANSITION OF PUBLIC POWERS 71
1. Elimination of Congress and Creation of the National Legislative Commission 73
2. Dissolution of State Legislative Assemblies and Creation of State Legislative Commissions 75
3. Control over Municipalities 75
4. Intervention of the Judiciary 76
5. Dismissal and Appointment of Officials of the Citizens’ Power 78
6. Dismissal and Appointment of Members of the National Electoral Council 79

III. JUDICIAL ACCEPTANCE OF A DOUBLE CONSTITUTIONAL TRANSITORY REGIME 79

IV. THE KIDNAPPING OF THE CONSTITUTION AND SUBJECTION OF THE JUDICIAL BRANCH TO THE GOVERNMENT 85

Chapter 3
THE 1999 POLITICAL CONSTITUTION AND THE REINFORCEMENT OF CENTRALIZATION 87

I. THE CONSTITUTION OF 1999: FRUSTRATION OF THE NECESSARY POLITICAL CHANGE 88

II. THE NEW “BOLIVARIAN” REPUBLIC AND ITS PARTISAN CHARACTER 91

III. THE PROBLEM OF A POLITICAL CONSTITUTION DRAFTED FOR CENTRALISM AND AUTHORITARIANISM 95

IV. THE DEMOCRATIC REGIME AND POLITICAL PARTICIPATION 100
1. Representative Democracy 101
2. The Mixed Electoral System and Its Distortion 103
3. Principles of Participative Democracy and Their Distortion 105
## CONTENTS

4. Direct Democracy Institutions, Referenda, and the Distortion of the Recall Referendum 110
5. Plural Political Parties and the Move toward a Single-Party System 116
6. Institutions of Government Accountability and Liability 121

V. THE SYSTEM OF GOVERNMENT AND THE SEPARATION OF POWERS 122
1. Presidential System and Its Reinforcement 122
2. Unbalanced Powers Due to Concentrated Power in the National Assembly 123
3. The State of Justice and Its Incongruence 126
4. The Constitutional Base for Militarism 130

Chapter 4
THE 1999 SOCIAL AND ECONOMIC CONSTITUTION AND ITS PROBLEMS 134

I. CONSTITUTIONAL VALUES AND DECLARATIVE PRINCIPLES 134

II. THE GENERAL FRAMEWORK ON MATTERS OF HUMAN RIGHTS 141
1. General Declarations 141
2. Social Rights and the Social State 147
3. Limits to the Exercise of Constitutional Rights That Can Only Be Established through Statutes 151
4. Freedom of Expression and Its Limitations 152
5. The New Indigenous People’s Collective Rights 155

III. THE PROBLEM OF AN ECONOMIC CONSTITUTION CONCEIVED FOR STATE APPROPRIATION (“STATIZATION”) OF THE ECONOMY 156
1. The Mixed Economic System 156
2. Reduced Property Rights and Economic Freedoms 158
3. The Almost-Unlimited Possibility of State Intervention in the Economy 160
Chapter 7
CONCENTRATION OF POWERS AND AUTHORITARIAN GOVERNMENT

I. THE SEPARATION OF POWERS IN MODERN CONSTITUTIONALISM AND THE VENEZUELAN CONSTITUTIONAL TRADITION 212
II. SEPARATION OF POWERS AND DEMOCRACY 215
III. DEFRAUDING POLITICAL PARTICIPATION IN APPOINTING OFFICIALS 217
IV. THE SUPREMACY OF THE EXECUTIVE AND THE ABSENCE OF CHECKS AND BALANCES 219
V. THE RUPTURE OF THE RULE OF LAW AND THE REJECTED 2007 CONSTITUTIONAL REFORM 220

Chapter 8
THE CATASTROPHIC DEPENDENCE AND POLITICAL SUBJECTION OF THE SUPREME TRIBUNAL OF JUSTICE 226

I. THE SUBJECTION OF THE SUPREME TRIBUNAL OF JUSTICE 226
1. The Confiscation of Civil Society’s Right to Participate in the Appointment of the Magistrates of the Supreme Tribunal in 2000 227
2. The Appointment of the Magistrates of the Supreme Tribunal of Justice 230
3. The Consolidation of the Commission on the Functioning and Restructuring of the Judicial System and the Complete Political Control of the Judiciary 231
4. The 2004 Reform of the Supreme Tribunal Organic Law and the Reinforcement of Executive Control over the Judiciary 236
II. THE SUPREME TRIBUNAL AS A TOOL TO DISTORT THE CONSTITUTION AND RECURSE FOR CONSTITUTIONAL INTERPRETATION 239

Chapter 9
STATE APPROPRIATION, NATIONALIZATION, EXPROPRIATION, AND CONFISCATION OF PRIVATE ASSETS 245

I. THE COMPULSORY ACQUISITION OF PRIVATE ASSETS 245
II. THE 2006–2007 STATE APPROPRIATION OF PRIVATE ENTERPRISES IN THE NATIONALIZED OIL INDUSTRY 250
CONTENTS

III. THE 2008–2009 NATIONALIZATION AND STATE APPROPRIATION 254

1. The Nationalization of the Iron and Steel Industry 254
2. The Nationalization of the Cement Industry 256
3. The State Appropriation of Assets and Services Related to Primary Hydrocarbon Activities 258
4. The Reservation to the State of Petrochemical Activities 261

IV. THE STATE APPROPRIATIONS OF RURAL LAND AND ALIMENTARY INDUSTRIES 261

PART THREE
CONSTITUTIONAL REFORMS DESIGNED TO CONSOLIDATE AUTHORITARIANISM 263

Chapter 10
THE FAILED ATTEMPT TO CONSOLIDATE AN AUTHORITARIAN AND ANTIDEMOCRATIC POLITICAL SYSTEM IN THE CONSTITUTION 264

I. A NEW FRAUD ON THE CONSTITUTION 264

II. PROPOSED CHANGES TO THE FUNDAMENTAL PRINCIPLES OF THE POLITICAL SYSTEM 271

1. Bolivarian Doctrine 273
2. The Substitution of the Social-Democratic State for a Socialist State 274
3. The Elimination of Decentralization as a State Policy 276
4. Fragmentation of Public Administration 277
5. The Abandonment of Budgetary Discipline and the Unity of the Treasury 279

III. PROPOSED CHANGES IN THE POLITICAL SYSTEM: FROM REPRESENTATIVE DEMOCRACY TO PARTICIPATORY DEMOCRACY 280

1. The Elimination of Representative Democracy at the Local Level 280
2. Elimination of Republican Alternation in Office by Establishing the Possibility of Indefinite Reelection of the President 283
3. The Contradictory Restrictions on Citizens’ Right to Political Participation 284
   A. The Elimination of the Civil Society’s Participation in Nominating State Officials 284
Chapter 11
THE FAILED ATTEMPT TO CONSOLIDATE A CENTRALIZED STATE IN THE CONSTITUTION

I. PROPOSED CHANGES IN THE STATE FORM: FROM CENTRALIZED FEDERATION TO CENTRALIZED STATE

1. The Destruction of the Federation
   A. Taking Away Territoriality from the Federation
   B. A Territorial Division of the Republic Tied to the Central Power
   C. The Capital City: No Political Autonomy or Democratic Government

2. Abandoning Vertical Distribution of the Public Powers

3. Nationalizing Federated States’ Competencies

4. Obligating States and Municipalities to Transfer Their Competencies to the Organs of the Popular Power

5. Eliminating the Constitutional Guarantee of Municipal Autonomy

II. PROPOSED CHANGES IN THE ORGANIZATION OF THE NATIONAL LEVEL OF GOVERNMENT

1. Proposed Reforms Regarding the International Activities of the Republic

2. Proposed Reforms to the Executive Power and Reinforcing the Presidential System
   A. The Extension of the President’s Term and Unlimited Reelection
   B. The New Executive Organs: Vice Presidents
   C. Extending the Powers of the President

3. Proposed Reforms Regarding the Legislative Power and Political Permeability
CONTENTS

4. Proposed Reforms Regarding the Appointing and Dismissing of the Head Officers of the Nonelected Branches of Government 306

III. PROPOSED CHANGES IN THE ARMED FORCES: FROM A CIVIL MANAGED STATE TO A MILITARIST STATE 307

Chapter 12

THE FAILED ATTEMPT TO CONSOLIDATE A SOCIALIST CENTRALIZED ECONOMIC SYSTEM IN THE CONSTITUTION 311

I. PROPOSED CHANGES ON MATTERS OF ECONOMIC FREEDOM AND PRIVATE PROPERTY 313

1. Eliminating Economic Freedom as a Constitutionally Protected Right 313

2. Eliminating Property as a Constitutionally Protected Right 315

3. The Elimination of the Latifundio 317

II. PROPOSED CHANGES ON MATTERS OF PUBLIC ECONOMY MANAGEMENT 318

1. The Regime Governing State Intervention in the Economy 318

2. Proposed Changes in the State’s Fiscal and Economic Regime 321

A. Eliminating the Autonomy of the Central Bank of Venezuela 321

B. Macroeconomic Policy at the Mercy of the National Executive 322

III. PROPOSED CHANGES IN MATTERS OF HUMAN RIGHTS 324

1. The Extension of the Principle of Equality 324

2. Proposed Changes in the States of Exception 325

A. The Expansion of States of Exception 325

B. The Elimination of the Duration of a State of Emergency 325

C. The Possibility of Suspending Constitutional Guarantees 326

D. Changes Regarding the Constitutional Guarantees of Human Rights That Can Be Suspended or Restricted in Situations of Exception 326

E. The Elimination of the Control Mechanisms of States of Exception 327

3. Proposed Changes in Education Rights: The Limits to University Autonomy 328

4. Proposed Changes in Labor Rights: A Useless Constitutional “Reform” 328
Chapter 13
THE IRREGULAR FRAUDULENT IMPLEMENTATION OF THE REJECTED CONSTITUTIONAL REFORM THROUGH LEGISLATION 329

Chapter 14
THE ILLEGITIMATE MUTATION OF THE CONSTITUTION THROUGH JUDICIAL CONSTITUTIONAL INTERPRETATION 335

I. THE ACCEPTANCE OF A TRANSITORY CONSTITUTIONAL REGIME NOT APPROVED BY THE PEOPLE 337
II. FROM REVOCATION REFERENDA TO RATIFYING REFERENDA 339
III. THE ELIMINATION OF THE CONSTITUTIONAL PRINCIPLE OF ALTERNATE GOVERNMENT AND THE LIMITS TO CONTINUOUS REELECTION 341
IV. LIFTING THE PROHIBITION ON REPEATING REFERENDA FOR CONSTITUTIONAL REVIEW 344
V. ILLEGITIMATE TRANSFORMATION OF THE FEDERAL SYSTEM 346
VI. THE LIFTING OF THE PROHIBITION ON GOVERNMENT FINANCING OF ELECTORAL ACTIVITIES 349
VII. THE ILLEGITIMATE ELIMINATION OF THE SUPRACONSTITUTIONAL RANK OF INTERNATIONAL HUMAN RIGHTS TREATIES 351
VIII. THE ELIMINATION OF JUDGES’ POWER TO IMMEDIATELY AND DIRECTLY APPLY INTERNATIONAL HUMAN RIGHTS TREATIES 354
IX. THE DENIAL OF THE PEOPLE’S RIGHT TO INTERNATIONAL HUMAN RIGHTS PROTECTION 355

Chapter 15
THE ALTERNATE PRINCIPLE OF GOVERNMENT AND THE 2009 CONSTITUTIONAL AMENDMENT ON CONTINUOUS REELECTION 359

I. THE REPUBLICAN PRINCIPLE OF ALTERNATE GOVERNMENT AND THE VENEZUELAN TRADITION OF NO REELECTION 360
II. THE LIMITS IMPOSED BY THE CONSTITUTION ON CONSTITUTIONAL REVIEW 362
III. THE BINDING CONSTITUTIONAL INTERPRETATION 364
CONTENTS

FINAL REFLECTIONS
THE RIGHT TO DEMOCRACY AND ITS VIOLATION BY VENEZUELA’S AUTHORITARIAN GOVERNMENT: SOME RELEVANT FACTS FROM THE PAST DECADE 367

I. REPRESENTATIVE DEMOCRACY AND THE VENEZUELAN AUTHORITARIAN GOVERNMENT 367

II. REPRESENTATIVE DEMOCRACY AND ITS DEFORMATIONS 371

III. PARTICIPATORY DEMOCRACY AND THE VIOLATION OF THE CITIZENS’ RIGHT TO PARTICIPATION 380

IV. DISRESPECTING HUMAN RIGHTS 386

V. ACCESS TO POWER AND ITS EXERCISE CONTRARY TO THE RULE OF LAW 392

VI. BROKEN REPRESENTATIVE DEMOCRACY 396

VII. WEAKENED DEMOCRACY DUE TO THE ABSENCE OF PLURALISM 398

VIII. VANISHING DEMOCRACY AND ABSENT SEPARATION OF POWERS 401

IX. DEMOCRACY AND PROBLEMS OF TRANSPARENCY 406

X. FEEBLE DEMOCRACY AND RESTRICTIONS ON FREEDOMS OF EXPRESSION AND THE PRESS 407

XI. DEMOCRACY AND SUBMISSION OF THE MILITARY TO CIVIL POWER 410

INDEX 413