The Constitutional Chamber and the Erosion of Democracy in Venezuela

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Abstract

This article analyses the role played by the Constitutional Chamber of the Supreme Court of Justice in the dismantling of democracy in Venezuela. The decisions of the Chamber are examined from the standpoint of their impact on the fundamental dimensions of constitutional democracy. For this purpose, the political-institutional context in which the Constitutional Chamber has acted is explained, and the successive packings to which it has been subjected since its installation are highlighted. Its performance is placed in a comparative perspective with respect to other constitutional courts or chambers that have participated in the erosion of democracy and the Rule of Law. All this reveals the key support that the Constitutional Chamber has provided to enhance the governmental power and diminish the political pluralism, at the expense of the counterbalances and institutional controls as well as the fundamental rights. Unlike the views that warn about the authoritarian advance of this Chamber in recent years, after a supposed initial phase of relative independence, this article intends to recognise lines of continuity in the jurisprudence that this Chamber has established since its creation regarding the undermining of constitutional democracy. After confirming the continuity of the authoritarian role of this Chamber, which has shown various facets as the circumstances have demanded, the article also focuses on the conceptual and procedural foundations on which the Constitutional Chamber based itself to fulfil that function. The work concludes reflecting on the task that a new Constitutional Chamber could carry out in a possible scenario of political transition in Venezuela.

I. Introduction

In recent times, academic interest in the functions of constitutional courts in the dismantling of the Rule of Law and democracy has increased. This forms part of the concerns about the processes of undermining democracy from within that have taken place and continue to do so in many countries. Democratic backsliding is increasing and the means through which this happens are becoming diversified. There exists a broad literature on this trend, notably with reference to populist leaders who were elected democratically but who, once in power, captured and adulterated the institutional

framework that enabled them to acquire their office.[1] In this context, it is important to question if and to what extent courts – and especially constitutional courts – can facilitate the erosion of democracy.

The significance attributed to constitutional courts or similar judicial organs for the protection of democracy and human rights made these institutions into a valuable and fruitful means for those interested in the degeneration of democracy from within. The visibility and authority gained by those courts in many countries was like an open invitation for would-be authoritarians to use these judicial bodies to hide and simultaneously strengthen their political programs or aims.[2] Victims of their own triumph, the constitutional courts and judicial review, reinforced by the constitutionalisation of the legal systems, attracted the attention of populist leaders and their allies determined to guarantee, accelerate, and legitimise their hegemony throughout the constitutional law and courts.

Valuable studies provide a theoretical and empirical basis for the significance of constitutions and courts in authoritarian regimes.[3] For the purpose of this article, such studies are insightful, because they reveal the results of the degradation of a hybrid regime towards authoritarianism and also help to understand this process. The evolution from a mixed political regime to an authoritarian one usually reflects a change in the meaning of the Constitution and in the role of the courts. The criteria of the functions of constitutions in such regimes are important for guiding the evaluation of constitutional features in a particular moment of political development towards authoritarianism; the same applies with respect to the courts. These functions and roles can partly coincide with those displayed in a democratic system, but all acquire a new meaning through authoritarianism. In retrospect, those

[1] *A. Arato*, Populism, Constitutional Courts, and Civil Society, in: C. Landfried (ed.), Judicial Power: How Constitutional Courts Affect Political Transformations, 2019, 318 et seq.; *S. Levitsky/D. Ziblatt*, How Democracies Die, 2019, 13 et seq.; *T. Ginsburg/A. Z. Huq,* How to Save a Constitutional Democracy, 2018, 35 et seq.; *J. Fomina,* Of "Patriots" and Citizens: Asymmetric Populist Polarization in Poland, in: T. Carothers/A. O'Donohue (eds.), Democracies Divided: The Global Change of Political Polarization, 2019, 126 et seq.; *M. A. Graber/S. Levinson/M. Tushnet* (eds.), Constitutional Democracy in Crisis?, 2018, 1 et seq.

[2] *T. Moustafa/T. Ginsburg,* Introduction: The Functions of Courts in Authoritarian Politics, in: T. Moustafa/ T. Ginsburg, Rule by Law: The Politics of Courts in Authoritarian Regimes, 2008, 1 et seq.

[3] *T. Ginsburg/A. Simpser*, Constitutions in authoritarian regimes, 2014, 1 et seq.; *T. Moustafa/T. Ginsburg* (note 2), 1 et seq.; *A. Di Gregorio,* Constitutional Courts in the Context of Constitutional Regression: Some Comparative Remarks, in: M. Belov (ed.), Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary, 2020, 209 et seq.

criteria also permit us to appreciate lines of continuity with incremental elements during the evolution of these hybrid systems.

Nonetheless, the role of the constitutional courts in unconsolidated democracies and its implication in the transition towards forms of authoritarian government had until recently not received sufficient attention, although this should be of great concern for the defence of democracy. Especially there, the courts can still boost the authority of the law and the impartial administration of justice that is prone to be used for weakening democracy in a veiled way. Therefore, from the perspective of such hybrid regimes, the principal question emerging is not why the rulers maintain the judicial review or a constitutional court, but how they envisage and to what extent use that jurisdiction for certain political aims. The present work focuses on the role of the Constitutional Chamber, which belongs to the Supreme Court of Justice of Venezuela, in the gradual establishment of the authoritarian regime currently present there. I will examine below the question as to whether the strengthening of the constitutional jurisdiction through the creation of the Constitutional Chamber in the Constitution of 1999 was already part of a long-term process towards authoritarianism.

Comparative studies also refer to the manipulation of legality and judicial power which can characterise hybrid systems and are a normal feature of authoritarian regimes.[4] Nevertheless, the performance of the aforementioned Constitutional Chamber represented to some extent a new phenomenon: the creation of a constitutional court or chamber in circumstances that were in principle democratic, although from its very inauguration it began to move toward a dismantling of democracy. Notably, the Constitutional Chamber did not conduct this process as a passive organ by the simple validation of official measures as some have stated,[5] but as a principal agent for the construction of hegemony. Such protagonism is difficult to find in other systems with similar debasement trends.

There is an increasing interest in identifying common patterns between originally democratic regimes that, under populist proposals or charismatic leadership or both, have been displaced by schemes of government which are to some extent authoritarian. Thus the regime of *Hugo Chávez* has become a mandatory reference in this field.[6] The same happened to the Vene-

[4] *K. Scheppele,* Autocratic Legalism, U. Chi. L. Rev. 85 (2018), 545 et seq.; *J. M. Maravall,* The Rule of Law as a Political Weapon, in: J. M. Maravall/A. Przeworski (eds.), Democracy and the Rule of Law, 2003, 261 et seq.

[5] *M. Taylor,* The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez, in: Journal of Latin American Studies 46 (2014), 231.

[6] *J. Corrales/M. Penfold,* Dragon in the Tropics: The Legacy of Hugo Chávez, 2015, 15 et seq.; *T. Ginsburg/A. Z. Huq* (note 1), 45 et seq.; *S. Levitsky/D. Ziblatt* (note 1), 13 et seq.; *D.*

zuelan constitutional chamber as scholars examined the role of constitutional courts in the erosion of democracy from a comparative perspective and offered relevant conceptual elements.[7] Some authors have also analysed the case law of the Chamber and its functions in the dismantling of democracy in Venezuela.[8] Specific investigations of the Venezuelan Supreme Court of Justice and its Constitutional Chamber have emphasised the capture of the Court in 2004-2005 and its consequences for the case law of the Chamber[9] and other researches have highlighted the transition from abusive judicial review in its weak version to a clearly strong version in recent years.[10] Nevertheless, these latest studies have not stressed the lines of continuity in the political subordination and the authoritarian elements of the Constitutional Chamber's jurisprudence from 2000.

This work starts from the existence in Venezuela of a regime which had a democratic basis when *Hugo Chávez* assumed power, from which one could theoretically presume that the Constitutional Chamber was able to defend democracy, remain passive while facing infringements of the Constitution, or actively engage in the advance of authoritarianism, notwithstanding the possibility of some combined judicial strategies. Therefore, it is important to ask which functions it assumed and why it leaned so quickly in the direction of judicial authoritarianism. This article comprises the constitutional and political context of the Constitutional Chamber (Chapter II) and the creation of the Constitutional Chamber, as well as the packing and quick purge of the Supreme Court of Justice (Chapter III); the main stages of its jurisprudence (Chapter IV); the institutional role of the Chamber in a comparative perspective (Chapter V); and the issues of the convenience of a constitutional court or chamber in non-consolidated democracies and in transitions to democracy (Chapter VI). This research on the Venezuelan Constitutional Chamber will also take into consideration other legal orders in which the introduction and capture of a constitutional court or chamber – or the curb or packing of an existing one – has been instrumental in undermining the democratic basis of a political system.

Landau, Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce, in: M. Graber/S. Levinson/M. Tushnet (note 1), 161 et seq.

[7] *D. Landau/R. Dixon,* Abusive Judicial Review: Courts Against Democracy, U.C.D.L. Rev. 53 (2020), 1313 et seq.

[8] *A. R. Brewer-Carías,* Dismantling of Democracy in Venezuela: The Chávez Authoritarian Experiment, 2010, 226 et seq.

[9] *R. A. Sánchez Uribarri,* Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court, Law & Social Inquiry 36 (2011), 854 et seq.

[10] *D. Landau/R. Dixon* (note 7), 1346 and 1365.

II. Constitutional and Political Context of the Constitutional Chamber

Without entering now into considerations about the theories and concepts of democracy, three key dimensions can be identified: free and fair elections and the rights of political participation in general, which also implies the protection of minorities and their possibility of becoming majorities; the civil rights that safeguard private autonomy and protect the outreach of individual liberties into the public sphere; and the Rule of Law.[11] The Constitution of 1999 enshrined similar dimensions of democracy although it introduced additional contents and emphases. The Constitution would vindicate a broader concept of democracy, in general to complement the former ones. The importance that it gives to the people's participation in public matters has led to the claim that the Venezuelan Constitution established a participative democracy,[12] which could lead to the idea that this system antagonises representative democracy and its liberal foundations. This might indeed imply tensions, but they are not sufficient to deny the grounds of liberal democracy. The Constitutional Chamber, although at first seemingly inclined in another direction, has theoretically declared that democracy as foreseen in the Constitution also is representative, but with results enriched by the mechanisms of direct or semi-direct participation.[13] The government of *Hugo Chávez*, nevertheless, took advantage of the proclaimed protagonist participation of the people to weaken the constitutional normativity and to erode democracy, and the corresponding measures have been explicitly or implicitly endorsed by the said Chamber.

It is difficult to assess the exact role played by the Constitutional Chamber during the last two decades without taking into consideration the political and institutional framework of its activity. The case of Venezuela is increasingly present in scientific works aimed at analysing the evolution from democratic systems towards authoritarian regimes. From the perspective of constitutional law or political science, special attention is paid to the erosion of democracy which has taken place there, to its explanatory causes, to the main features of the established political order and to its evolution. Depart-

[11] In a similar approach, *T. Ginsburg/A. Z. Huq* (note 1), 9 et seq.; *G. O'Donnell*, Democracy, Law, and Comparative Politics, Studies in Comparative International Development 36 (2001), 7 et seq.

[12] *M. López Maya/L. E. Lander,* Participatory Democracy in Venezuela: Origins, Ideas, and Implementation, in: D. Smilde/D. Hellinger (eds.), Venezuela's Bolivarian Democracy: Participation, Politics, and Culture under Chávez, 2011, 58 et seq.

[13] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 23 of January 22, 2003.

ing from a hybrid configuration with important democratic underpinnings, the regime established in 1999 progressively turned towards a different kind of government that has been subsumed under various categories.[14] Some scholars estimate that during the periods between 2003-2004 and 2016-2017, it represented a competitive authoritarianism and even "one of the world's most renowned cases of competitive authoritarianism".[15] That was the case until 2016-2017, when it began to acquire an openly authoritarian profile. One guiding thread of this debasement has been the denial of ideological pluralism, which started with the disqualification of opponents, went on to the curtailment of the freedom of expression and ended in the imposition of an ideological domination akin to the "moralised anti-pluralism"[16] frequent in populistic regimes.

Hugo Chávez assumed power democratically after failing to do so by a military coup. From the very beginning, his public discourse and electoral promises drew from revolutionary content and shaped the populist scenario[17] of a collective redemption that he wanted to lead after what he claimed to be decades of exploitation of social majorities helpless in the face of corrupt elites. The nascent political self-definition implied a rethinking of history and the vindication of the figure of *Bolívar*. There was no explicit rejection of the values and rules of the game of democratic constitutionalism, although the way in which he proposed and promoted the National Constituent Assembly endangered the Rule of Law and respect for minorities. Contrary to what some have asserted, the majority of voters did want a strong man at that time.[18] Despite all the warnings then given about the risks of such an electoral offer for these values and rules, the majority maintained an enthusiastic adherence to the emerging charismatic leadership and attributed little importance to the institutional arrangement it might bring. On the one hand, this attitude was nourished by the decomposition of the political system which was linked to the crisis of the traditional political

[14] *J. Corrales/M. Penfold* (note 6), 1 et seq.; *N. Arenas*, Venezuela: un caso de régimen populista, Revista Latinoamericana de Política Comparada 14 (2018), 57 et. seq.

[15] *J. Corrales,* Why Polarize? Advantages and Disadvantages of a Rational-Choice Analysis of Government-Opposition Relations under Hugo Chávez, in: T. Ponniah/J. Eastwood (eds.), The Revolution in Venezuela Social and Political Change under Chávez, 2011, 68.

[16] *J. Werner-Müller,* What Is Populism?, 2016, 31 et seq.

[17] *N. Arenas* (note 14), 57 et seq.

[18] *S. Levitsky/D. Ziblatt* (note 1), 24 et seq. The authors argue that the support to democracy was high according to studies on opinion, which is true. Nevertheless, they do not consider that the idea of democracy predominant in Venezuela is referred mainly to holding elections: *J. Virtuoso,* Qué democracia quiere Venezuela?, Revista SIC 73 (722) (2010), 73 et seq.; *M. Kornblith*, Crisis y transformación del sistema político venezolano : nuevas y viejas reglas de juego, Latin American Studies Association, XX International Congress, 1997, 1 et seq.

parties, to the incapacity to undertake profound institutional reforms and to the severe complaints of corruption. On the other hand, it was encouraged by unsatisfied social claims based on high levels of inequality and the deterioration of the economic situation. In addition, a non-consolidated democratic culture dominated a population which held the widespread conviction of the need to obtain legitimacy through elections but to a lesser degree of commitment to other essential components of democracy.[19] Not only popular sectors accompanied *Chávez'* rise to power, but also businessmen, some of the traditional media, political and academic personalities and centre-left political parties with a long history of opposition during the previous political cycle.

The point of departure of *Chávez's* cycle of power was in several ways a democratic one, but by virtue of a process that cannot be discussed in detail here the regime became increasingly authoritarian in its performance. It is important to note, however, that right from the beginning seeds favouring this deviation had been sown. The National Constituent Assembly of 1999, which has been studied as a prominent example of abusive constitutionalism,[20] tilted the playing field from the outset to benefit the Executive and the new political majority. After a referendum proposal by *Chávez* on the convening of this constituent body and the *ad hoc* electoral rules, the "Chavismo" party obtained almost all the seats in the election of the members of the National Constituent Assembly. Its candidates received only around 60 % of the popular vote but won this landslide victory, since the principle of proportional representation provided for in the previous Constitution and in the legislation had been deliberately set aside.[21]

Once installed, the National Constituent Assembly dictated measures espousing the concentration of power in the President of the Republic and adopted a Constitution crowded with internal tensions. This was because many currents of thought seeking to modify the classic model of the Rule of Law and liberal democracy – to enrich it with social State elements and ways for the direct participation of the people – clashed with those wanting to establish a new paradigm of revolutionary and popular protagonism. Furthermore, many of the positive aspects of the Constitution were undermined by the pro-government majority itself even before it was born, as we will see.

19 *J. Virtuoso* (note 18), 73 et seq.; *M. Kornblith* (note 18), 1 et seq.
20 *D. Landau,* Abusive Constitutionalism, U.C.D.L. Rev.47, 2013, 189 et seq.
21 *D. Landau* (note 20), 205 et seq.; *J. Casal H.,* El constitucionalismo venezolano y la Constitución de 1999, Revista de la Facultad de Derecho 56 (2001), 137 et seq.

The new Constitution approved by a referendum contained democratic principles and the Rule of Law and incorporated proposals that had been put forward in the fields of human rights, political participation, and the guarantee of the Constitution with the creation of a constitutional chamber or court. But it broadened presidential powers within an already existing presidentialism, extended the presidential term, allowed for immediate re-election, abolished bicameralism, eliminated parliamentary control over military promotions at the highest levels, and contained the advancement in decentralisation that had begun a decade before. Further, it banned public funding of political parties, introduced the basis for deeper State intervention in economic and social life and enshrined the military's concept of national security and its role in public life. The crisis of the judiciary, a subject of special attention in the 1990s, had as a consequence that the Constitution was endowed with mechanisms to safeguard the independence of the judiciary and other institutions by means of transparency, the supervision of citizens and the evaluation of professional merit in the appointment of members of the Supreme Court of Justice (Tribunal Supremo de Justicia), of judges in general and of other control authorities. But all this was broken when the Constituent Assembly approved a decree on the regime of transition of public power, which sought to justify accelerated appointments and facilitated the capture of the higher Judiciary and other constitutional bodies, which will now be addressed.[22]

III. The Creation of the Constitutional Chamber and the Packing and Prompt Purge in the Supreme Court of Justice

1. The Creation and Powers of the Constitutional Chamber

In the years prior to the drafting of the 1999 Constitution and the arrival of *Hugo Chávez* as President of the Republic, there were discussions in the country about the need to strengthen the constitutional jurisdiction. The system of constitutional justice existing in Venezuela before 1999 was of a mixed or hybrid nature in which the Supreme Court, in the Plenary Chamber, had the power to declare the unconstitutionality and nullity of laws or other dispositions of equal rank (concentrated element), while each court of the Republic could consider a law unconstitutional and inapplicable in the

[22] *A. R. Brewer-Carías* (note 8), 69 et seq.

specific case under examination (diffuse element). The exercise of judicial review by the Supreme Court of Justice, in the Plenary Chamber, had been criticised for the slowness of its pronouncements, based on draft judgements presented by judges who were overburdened with cases in the specific Chambers to which they naturally belonged, and for the lack of specialisation of the corresponding body.[23] The demand for reforms aimed at strengthening the constitutional jurisdiction had also been stimulated by the jurisprudential development of the writ of *amparo* since 1983, and this was later reaffirmed by the law on the matter in 1988.[24] This was because its deployment implied a vitalisation of the Constitution as a norm for guaranteeing rights and because the preponderant decentralisation of the respective judicial competences made some final attributions of jurisprudential harmonisation advisable. The rise of positions defending the interpretation of the laws according to the Constitution, the recognition of its normative force, the constitutionalisation of the legal order, and the strengthening of the judicial protection of the Constitution[25] also paved the way for the creation of the Constitutional Chamber in the new Magna Carta, preserving a mixed system of judicial review but with a specialised organ at the vertex of constitutional justice.

The establishment of a Constitutional Court had been proposed, but it seemed prudent to follow the model adopted in Costa Rica, the principal comparative reference in Latin America concerning the constitutional chambers. The option in favour of the Constitutional Chamber was mainly regarded as an intermediary solution between the scheme of prior non-specialised judicial review and that of the Constitutional Court,[26] not only with regard to its organic configuration but also to its powers.[27] However, since the beginning of its jurisdictional work, the Constitutional Chamber tended to profile itself functionally as a constitutional court.

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[23] *J. Casal H.,* Constitución y Justicia Constitucional, 2014, 79 et seq.; *J. Haro,* La justicia constitucional en Venezuela y la Constitución de 1999, Revista de Derecho Constitucional 1 (1999), 151 et seq.

[24] *C. Ayala/J. Casal H.,* La evolución político-institucional de Venezuela 1975-2005, in: Estudios Constitucionales 6 (2008), 466 et seq.

[25] Regarding these tendencies in Latin America, see *A. v. Bogdandy/E. Ferrer Mac-Gregor/M. Morales Antoniazzi/F. Piovesan/X. Soley*, Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism, in: A. v. Bogdandy/E. Ferrer Mac-Gregor/M. Morales Antoniazzi/F. Piovesan (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, 2017, 3 et seq.

[26] *A. Brewer-Carías,* Debate Constituyente (Aportes a la Asamblea Nacional Constituyente) II, 1999, 249 et seq.

[27] *A. Brewer-Carías,* El sistema de justicia constitucional en la Constitución de 1999, 2000, 9 et seq.

It has been argued that the introduction of the Constitutional Chamber in the 1999 Constitution and its important functions had the purpose, among others, of controlling an executive branch whose powers were being expanded in the new Constitution, which also eliminated the bicameral parliament.[28] Therefore, its creation would respond to the idea of checks and balances. Nevertheless, nothing indicates that this had been the intention of the constituents.[29] Furthermore, general legal opinions that refer to this creation mainly share the assumption that it was necessary to strengthen the judicial protection of the Constitution and especially of human rights, which certainly had to do with the exercise of control over the government, but did not refer specifically or separately to that issue. Moreover, the proposals for the creation of the Constitutional Chamber preceded the drafting of the 1999 Constitution and did not presuppose an extension of executive powers or the elimination of bicameralism.[30]

Nor would it be accurate to affirm that it was instituted to strengthen the executive branch in the deployment of its political programs, since various currents converged in the drafting of the Constitution: But in the performance of its functions, the Chamber was rapidly moving towards that role. It can be stated that the ambition of the judges of the Constitutional Chamber for rapidly imposing its primacy in comparison to other Chambers of the Supreme Court of Justice, is an unresolved matter in the constitutional text, and for setting itself up as a body endowed with broad or even boundless powers of constitutional guarantee, conveniently matched the interests of the rulers. The supporters of the government fostered the expansion of the powers of this Chamber, already largely confirmed, to facilitate control over the judiciary and constitutional interpretation. Notably, the Constitutional Chamber, partly on the basis of the Constitution but mainly of its jurisprudence, is called upon to carry out control, both in relation to the actions or omissions of the legislator, and in relation to ordinary judges, whose decisions may be submitted to the Chamber's examination by instruments such as the writ of *amparo* and the faculty to review the final judgements of any court that are relevant to constitutional interpretation. It is also worth highlighting that this Chamber has arrogated to itself the

[28] *R. A. Sánchez Uribarri* (note 9), 866 et seq.

[29] According to the Journal of Debates of the National Constituent Assembly, the main reasons for the creation of the Chamber were related to the universality of the judicial guarantee of the Constitution, the protection of fundamental rights and the better organisation of the constitutional justice system. See Records No. 10 of 18.8.1999; No. 41 of 9.11.1999, and No. 45 of 15.11.1999.

[30] *A. Brewer-Carías* (note 26), 249-250; *J. Casal H.* (note 23), 79 et seq.; *J. Haro* (note 23), 151 et seq.

competence to lay down binding interpretations of the Constitution through a legal claim of abstract character and with quasi-constituent effects, as the Chamber itself has declared.[31] This shift towards a more centralised scheme of judicial review is one of the strategies often employed in authoritarian contexts to contain the judiciary.[32]

A characteristic feature of the jurisprudence of the Constitutional Chamber since the beginning has been its inclination to expand its powers, broadening the scope of those effectively attributed to it or creating them altogether. These judicial incursions in competence matters were sustained by invoking the task of the constitutional courts to guarantee the supremacy of the Constitution, which had as a background and conceptual support the influence of the trend towards the constitutionalisation of the legal system and the strengthening of the judicial protection of the Constitution. The distinctive stamp of the Chamber's performance is that its demand for the unbounded judicial safeguard of the Constitution was not linked mainly to the need of preserving human rights or the division of powers in a specific case but was usually limited to the procedural sphere. This procedural activism generally devoid of substantive achievements paved the way for the illiberal jurisprudence that already was arising and would over time become prevalent.

Knowledge of this experience can help to identify other processes of degeneration of democratic constitutionalism leveraged by constitutional courts. If one observes that a constitutional court or chamber tends to creatively increase its competences without any concern for the defence of the principles of a constitutional democracy as they were outlined before in the Constitution, there is good reason to be alarmed. The propensity of that court or chamber to laxly attribute to itself powers that normatively have not been assigned to it, not even implicitly, can already elicit concern, but one must worry when it does so consistently outside such material foundations of the Constitution. Accordingly, it is important to pay attention to the way we understand the constitutionalisation of the legal order and the judicial guarantee of the Constitution. If we remain blinded by the gleam of the normative force of the Constitution and concentrate on ensuring the supremacy of its dispositions, without considering the substantial grounds of the constitutional order, constitutionalisation can easily be used to undermine democracy.

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[31] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1077 of 22.9.2000 and No. 1309 of 19.7.2001.

[32] *T. Moustafa/T. Ginsburg* (note 2), 19.

Another aspect that deserves to be highlighted is the restraint generally shown by the Constitutional Chamber in the protection of social rights against actions or omissions by the public authorities, with few exceptions.[33] This contrasts with the dominant trends in Latin America and with the constitutional framework of 1999, and would not seem to correspond with the ideas advocated by the ruling majority. But this is consistent with the position of this Chamber to support or at least not hinder the government's handling of social programs. This matter has been particularly sensitive for the incumbents, as it is linked to political clientelism and the reinforcement of ideological domination, and therefore the constitutional jurisdiction has established criteria that limit judicial intervention in this field.[34]

The Chamber's powers were also extended by the scope attributed to the binding effect of its interpretations of the Constitution. Article 335 of the Constitution established the basis for the binding effect of the jurisprudence of the Chamber, but the latter promptly showed its willingness to read this precept generously. It declared that to ensure the effectiveness of the new Constitution, it had to immediately assume functions of binding interpretation. To this end, it broadened the scope of the foreseen procedural instruments or constructed others.[35] In this way it considered itself authorised to render, in the abstract or in specific cases, binding interpretations of the Constitution, even with *erga omnes* effects.[36]

The binding force of the interpretation refers not only to what can be deduced from a judgement under the category of precedent, thus in light of the specific case, or to the key points of the judicial decision, but also to what has been expressly stated as imperative in the corresponding ruling or, commonly, to any of its arguments.[37] Its openness to the participation of regular judges in the adaptation or adjustment of its criteria was once rhetorically affirmed[38] but never met. The role of these judges in the interpreta-

[33] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1632 of 11.8.2006.

[34] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1002 of 26.5.2004.

[35] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1251 of 24.10.2000.

[36] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1309 of 19.7.2001.

[37] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1013, of 12.6.2001; *J. Casal H.,* Constitución y Justicia Constitucional, 2014, 266 et seq.

[38] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1309 of 19.7.2001.

tion of the Constitution and in the exercise of the diffuse judicial review contemplated in the Constitution was curtailed.[39]

The Constitutional Chamber used the binding force of its jurisprudence to bury under a stone slab the social controversies related to the scope of civil and political liberties and the distribution of power set down in the Constitution. As the authoritarian function of that Chamber turned into a more acute and indisputable one, and its fragile legitimacy was completely eroded, the social and political debate acquired a more rebellious and challenging character reflected in protests and similar civic actions that were met with a harsher form of repression that now counted on the backing of the ultimate interpreter of the Constitution. The issue turns out to be even more serious if we take into account that generally there is no longer an opportunity for those possibly affected by the upcoming ruling, including the social sectors interested in taking part in a dispute with collective implications, to participate in the corresponding process. This is an additional violation of the Constitution and of the applicable norms or precedents that the Chamber itself established at the beginning of its case law.[40]

2. The Packing and the Successive Purge in the Supreme Court of Justice

In any case, to understand the character of the Constitutional Chamber already in its inaugural phase, it is necessary to address the way its members were appointed. One of the topics intensively discussed in the years previous to the installation of the Constituent Assembly was the precarious judicial independence and the procedure of the selection of judges of the Supreme Court. There was ample social consensus about the need to end the domination of the judiciary by political parties, and various civil society organisations have proposed the establishment of an open and transparent procedure for the appointment of the judges of the Supreme Court, which would guarantee the fulfilment of the legal requirements for occupying the respective posts.[41] It found wide reflection in the constitutional text.

[39] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 833 of 25.5.2001.

[40] Among those precedents, see Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1077 of 22.9.2000; and among the decisions that ignored them, see Constitutional Chamber of the Supreme Court of Justice, Judgement No. 207 of 31.3.2014.

[41] Instituto Latinoamericano de Investigaciones Sociales, Derechos Humanos y Justicia: El aporte de las ONG a la Asamblea Nacional Constituyente, 2000, 1 et seq.

However, the Constituent Assembly ignored these principles at the end of December 1999, when it suddenly appointed – literally overnight – to the surprise of the citizens and with absolute opacity, all the judges of the Supreme Court, without support from the Constitution. This was done without an open call, parliamentary or social control, and serious verification of the constitutional requirements or publicity.[42] The Constitution and its transitory provisions approved in a referendum on 15.12.1999 did not refer to such fast-track or expedited appointments in the new Supreme Court. However, the members of the Constituent Assembly allied to *Hugo Chávez* issued, after the referendum and shortly before the promulgation of the new Constitution, a decree for a transitional regime between the old and the nascent constitutional order. This decree affirmed such accelerated and opaque proceedings to designate the heads of various constitutional bodies. All this meant a huge infringement of the foundations of the Constitution approved by the people but not yet enacted, and therefore, at birth it had already been violated.

According to the above-mentioned decree, these designations were of a provisional nature, since the definitive appointments were to be made by the new National Assembly, as foreseen in the Constitution, after its election and enactment of the Organic Law of the Supreme Court of Justice.[43] The installation of this Assembly took place in August 2000, and the National Assembly decided at the end of that year to replace some of the judges of the Supreme Court who did not always submit to the political interests of the regime and to ratify the others. These dissenting judges were replaced by means of a special or *ad hoc* law and a rushed procedure. Instead of first dictating the law of the Supreme Court of Justice[44] in order to allow compliance with the Constitution and initiating the proceeding of designation, it resolved not to enact this law but to impose an abridged one for the occasion not conforming to the Constitution and with the purpose of doing summary and partisan ratifications or substitutions. Leaving out the constitutional proceeding and with a reduced and biased social participation, the National Assembly proceeded to ratify several of the judges appointed in 1999, without determining whether they met constitutional requirements, and to replace those who had demonstrated certain autonomy toward the will of the rulers. In this way, the serious procedural irregularities and violations of constitutional principles committed with the expedited designations

[42] *A. R. Brewer-Carías* (note 8), 71 et seq.
[43] *J. Casal H.* (note 21), 137 et seq.
[44] This law was not dictated until 2004, when the ruling majority had interest in realising the second packing of the Court.

of 1999, which pretended to be justified by invoking their provisional nature and their strict connection to the needs of the transition, were arbitrarily validated and prolonged in December 2000, when all of the judges were appointed for twelve years.

All this announced clearly that anyone who dared to show any dissent toward the fundamental policies of the regime would be replaced.[45] Judicial independence had already been mortally wounded. Reports by international organisations manifested their concern with the infringement of judicial independence carried out from the end of 1999 and in December 2000 and caused by the irregular designations of the judges in the Supreme Court.[46] Comparative studies also show that repeated attempts to capture an apex court are an important sign of a movement from a "*populist* government" towards a "*populist* regime".[47]

The Constitutional Chamber upheld these unlawful measures and committed a further violation of the Constitution when it declared that the judges of the Supreme Court, appointed by the National Constituent Assembly – among whom there were members of the same Chamber – were not obliged to submit to an evaluation of compliance with the requirements of the Constitution in order to be ratified to hold their respective positions.[48] Those requirements had not been examined when the judges were designated by the National Constituent Assembly in 1999. The respective judges decided, therefore, in their own interests and for their own benefit.[49]

[45] The same happened to the Ombudsman and the Attorney General of the Republic because they dared to act with a certain degree of autonomy.

[46] Inter-American Commission on Human Rights, Annual Report 2003, para. 55; International Bar Association, Venezuela: Un informe sobre la situación del sistema de justicia, 2003, 20; International Bar Association, Venezuelan Justice System in Crisis. Executive Summary, 2003, 1 et seq.; *A. Aguiar*, Los golpes a la constitucionalidad en Venezuela y la Carta Democrática Interamericana, El Nacional, 2002.

[47] *A. Arato* (note 1), 320 et seq.

[48] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1562 of 12.12.2000.

[49] Regarding this matter, see the concurring opinion expressed in the previous judgement by *Judge Moisés Troconis*, who admitted that, "In view of the procedure for designations or ratifications currently under way, the Chamber had to keep the strictest distance".

IV. Main Stages of the Constitutional Chamber's Jurisprudence Relating to the Dismantling of Democracy

It is possible to identify lines of continuity as well as aggravating factors in the efforts of the Constitutional Chamber as salient agent of democratic erosion in Venezuela. It would be completely erroneous to assert that the loss of independence of the Chamber or its active role in the dismantling of democracy manifested itself after the elections of December 2015, when the opposition won a qualified majority of the National Assembly and the Constitutional Chamber started to hand down arbitrary judgements directed to block the exercise of the parliamentary functions. In fact, numerous qualified reports of international organisations dedicated to the promotion and protection of human rights, as well as decisions of the Inter-American Court of Human Rights had, at least since 2003, repeatedly and conclusively referred to the violation of the independence of judicial power or judicial impartiality and to the implication of the Constitutional Chamber in those actions.[50] In addition, it would be wrong to consider the legal reform enacted to increase the numbers of judges of the Supreme Court in 2004 and the following court-packing in the Supreme Court in 2005 as the starting point of the politicised performance of the Constitutional Chamber mediated by government interests.

This does not mean that one cannot recognise different stages in the evolution of the functioning of this Chamber and of the Supreme Court of Justice regarding the level of its subordination to the purposes of the executive power. Nevertheless, given the rise in comparative analyses of experiences of judicial implication in democratic regression, or of abusive judicial review, it is important in the case of Venezuela to reflect on precisely what happened in this matter. It is necessary to look at a continuum from the first capture of the Court in 1999-2000, through its packing in 2005 and up to the anti-parliamentary jurisprudence from 2016 on. Three stages will be outlined in accordance with this perspective.

[50] For example, see Inter-American Commission on Human Rights (note 46), para. 55; Inter-American Court of Human Rights, *Case Apitz Barbera and others (First Court of Administrative Disputes) v. Venezuela*, 5.8.2008; *Human Rights Watch,* Rigging the Rule of Law; Judicial independence under siege in Venezuela, 2004.

1. Initial Hybridity and Authoritarian Progression (2000-2004)

The hybridity of the political system that existed during the first years of the government of *Chávez*, was also present in the Supreme Court and the Constitutional Chamber. In any case, some judges of the Constitutional Chamber who were aware of the principles of democratic constitutionalism, preferred to follow the rest of the judges in decisions basically contrary to that concept, probably in the belief that it was possible to achieve compromises that did not go beyond certain boundaries. This standpoint was possibly reflected in the low numbers of dissenting opinions in the first years after the establishment of the Chamber,[51] although it was also a consequence of the exclusion of certain judges during the designations or ratifications of the members of the Supreme Court carried out in December 2000. The judges inclined to give dissenting opinions were not ratified.

In the long run, that accommodating attitude did not contribute to the prevention of the authoritarian process. This position had been already present since January 1999, when the former Supreme Court declared that it was valid to call a referendum to consult the people if they would like to exercise their original constituent power to adopt a new constitution, even though that kind of constitutional change was not provided for in the current Constitution. Leaving aside the debate about the admissibility of the exercise of constituent power by the people in such circumstances, this judgement settled the issue, so that it completely opened up the doors to the exercise of absolute power by the upcoming National Constituent Assembly.

On the contrary, the judges closely bound to the rulers or their ideology resolutely advanced towards a jurisprudence that expanded the competence of the Chamber. This was a principal factor in ensuring the concentration of powers in the Executive, as well as in imposing a certain understanding of rights of the role of the State in the economy and of the civil society.

Moreover, in its first years of operation, the Constitutional Chamber played a role in the institutional channelling of controversies on some matters, in spite of not being an independent organ.[52] Although some indexes on judicial autonomy had already detected a decrease in 2002-2003,[53] one

[51] *R. A. Sánchez Uribarri* (note 9), 877.

[52] See, for example, Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1563 of 13.12.2000 and No. 3343 of 19.12.2002; *R. Pérez Perdomo,* Judicialization and Regime Transformation: The Venezuelan Supreme Court, in: R. Sieder/L. Schjolden/A. Angell (eds.), The Judicialization of Politics in Latin America, 2005, 131 et seq.

[53] *M. Taylor* (note 5), 258; *D. Cingranelli/D. Richards*, CIRI Human Rights Data Project, 2011, available at: <https://web.archive.org>.

could state that there was a belief in certain margins for decisions which would avoid an open rupture with the democratic framework or the Rule of Law and which would redirect the government to a minimum of constitutionalism.

Once this Chamber was unmasked by its own decisions before the expansion of the Supreme Court in 2005, it was seldom able to channel conflicts of even minor institutional relevance. This resulted in a reduction of the litigiousness of constitutional matters before the Supreme Court,[54] especially after it became clear that the filing of legal complaints before it was not only useless to control measures of the government, but also that it enabled the Court, in particular its Constitutional Chamber, to steal the authority and the voice of justice in order to establish binding interpretative criteria at the expense of constitutional democracy. Already at this stage the Constitutional Chamber showed signs of lacking independence and played a decisive role in the move towards authoritarian rule. Hence, it is inaccurate to say that it preserved a certain degree of independence until 2004, or that it exercised a weak form of abusive judicial review until 2015, which took on a stronger form in December of that year.[55] It is certainly possible to recognise a progression in the authoritarian role of the Chamber, but as is evident from what followed, the issue is more complex.

Since its first judgement, the Constitutional Chamber, which had been integrated in an accelerated manner as mentioned before, decided to expand its sphere of competence. It based this expansion on the prevailing ideas about the scope of the judicial protection of the Constitution and specifically of its guarantee through a chamber or constitutional court. It must be noted that the rulings, which enabled new routes for judicial intervention by the Chamber, were in general not tied to the necessity to safeguard some right or constitutional principle in the concrete situation under judicial examination. In contrast, they were usually of merely formal or procedural nature and sought to legitimate the expansion of the powers that the Chamber would use later in a direction contrary to constitutional democracy.[56] This could suggest that there existed a comprehensive plan oriented toward enhancement of the competence of the Chamber to achieve authoritarian goals. Nevertheless, it is more likely that different trends ran together like the tendency towards constitutionalisation of the legal order and the in-

[54] *R. A. Sánchez Uribarri* (note 9), 873 et seq.

[55] As stated by *D. Landau/R. Dixon* (note 7), 1346 and 1365.

[56] Constitutional Chamber of the Supreme Court of Justice, Judgement 1 of 20.1.2000 and No. 7 of 1.2.2000. One exception to this tendency to mainly procedural activism can be seen in the *Asodeviprilara* Case, Judgement No. 85, of 24.1.2002, which combined procedural-judicial constructions and substantive aspects with consequences for finance institutions.

creased judicial guarantee of the Constitution combined with a rising ideology and political objectives. Not all judges were committed to the same extent to each of those courses.

With respect to the case law of the Constitutional Chamber, several of its jurisprudential lines contributing to the backsliding of democracy were introduced in this inaugural period. Together with the abusive expansion of the powers of the Chamber, principles were set, or decisions were taken that paved the way for the erosion of democracy.

a) The Postulates of the Constitutional Interpretation

An early manifestation of the ideological postulates that pretended to guide the jurisprudential constructions of the Chamber can be found in the judgement that established the core principles for the interpretation of the Constitution and also of the legal order in accordance with the Constitution. In case No. 1309 of 19.7.2001, the Chamber laid down the respective foundations which later had repercussions on many relevant constitutional issues. In this sense, it was affirmed that the interpretation of a Constitution should be subordinated to the "political project which it embodies by the will of the people".[57] With respect to the Venezuelan Constitution of 1999, this project would be based on the concept of the "Democratic and Social State of Law and Justice" in accordance with Article 2 of the Constitution,[58] which certainly foresees this category although not as a window onto a specific ideological system. This legal formula has to be understood systematically, that is, integrated into the whole Constitution, so that it can have an impact on the hermeneutic process without putting aside constitutional regulations. For the Constitutional Chamber, on the contrary, that formula permits obviation of the provisions of the Constitution in the name of a political project which the same Chamber defined.

Thus, by referring to the "axiological principles on which the Venezuelan Constitutional State rests", the Chamber gave a central position to the sovereignty of the State, dismissing the

> "interpretative ideological elections which privilege individual rights at any cost or which accept the primacy of international law order over the national law to the detriment of State sovereignty".

[57] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1309 of 19.7.2001.

[58] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1309 of 19.7.2001.

It added that "a system of principles supposedly absolute and supra-historic cannot be put above the Constitution" and that the theories pretending to limit the national sovereignty "under the pretext of universal validities, and self-determination" are unacceptable. The interpretation of the legal order in conformity with the Constitution implies for the Chamber

> "the safeguarding of the Constitution itself from any deviation from principles and from any deflection from the political project that it embodies by the will of the people".

This contraposition between the Constitution and the will of the people highlights the cracks that were opening up in the legal system. As a parameter for the recognition of this popular will, it appeals to "the tradition of living culture whose meaning and scope depend on the concrete and historical analysis of the values shared by the Venezuelan people".[59]

In this way, the Chamber established that in fulfilling the task of a binding interpretation of the Constitution it would submit itself neither to international norms nor to universal parameters comprising *inter alia* the proclamation and international guarantee of human rights. It further anticipated that the constitutional text would be malleable depending on the requirements of the political project underlying the Constitution. The Constitutional Chamber did not generally remain liberal in its language while undermining the foundations of the democratic order, as has been observed with respect to other courts in similar scenarios,[60] but instead conceptually challenged that order from the outset. This understanding of that "political project" and of its transcendence in the constitutional interpretation has been deployed in particular when it was intended to go beyond or against the text of the Constitution to achieve certain governmental aims.

b) The Regime of the Transition of Public Power

One of the salient lines of the Chamber's jurisprudence in this period concerns the decree on the regime of transition of public power. The supposedly provisional regulations linked to the transition to the new institutional order emerging from the Constitution were endorsed consistently by the Chamber, with the particularity that it lengthened the duration of the special regime which relaxed the application of the Constitution. When the

[59] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1309 of 19.7.2001 and No. 23, of 22.1.2003.

[60] *K. Scheppele* (note 4), 562.

moment approached at which, in accordance to this decree, it came to demand the full observance of the constitutional provisions, the Chamber added another requirement for the complete efficacy and strict implementation of the Constitution,[61] granting the rulers more time to continue managing it in a flexible or even lax way and taking advantage of the official positions that the National Constituent Assembly had occupied.[62] The prolongation of this transitional regime, which in some areas has not yet ceased,[63] was one of the factors that contributed to the early dismantling of constitutional normativity, opening up wide areas of political discretion and arbitrariness. In addition, the Chamber declared that the decree on the transitional regime could not be impugned, alleging that it violated the Constitution of 1999 because the former had been dictated prior to the enactment of the latter. Nor could it be called into question with reference to the previous Constitution of 1961, as the Chamber had maintained that these dispositions of the Constituent Assembly were at a higher level in the hierarchy than the aforementioned Constitution.[64] In the end, it was not possible to challenge the infractions of the new Constitution which were deliberately approved shortly before it came into force and whose consequences have lasted up to the present.

c) The Freedom of Expression, the Right of Access to Public Information and the Freedom of Association

Regarding the jurisprudential criteria that the Constitutional Chamber laid down in the field of human rights, one should mention the judgements in which it upheld a restrictive interpretation of freedom of expression and recognised judicial powers that impose censorship on the diffusion of certain information or messages. In particular, the chamber defined the implications of the principles of veracity and impartiality of information foreseen in the Constitution (Article 58) and declared the fulfilment of those princi-

[61] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 179 of 28.3.2000.

[62] A good example of that is the Commission for the Functioning and Reorganisation of the Judicial System, a provisional organ created by the National Constituent Assembly that kept functioning for more than 10 years, with the attribution of removal of judges. The members of this Commission were appointed by the Assembly and later on replaced by the Supreme Court of Justice.

[63] The Disciplinary Judicial Jurisdiction is still pending on the creation of the Judicial Electoral Bodies.

[64] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 180 of 28.3.2000.

ples as a pre-condition for the exercise of the right to information, whose compliance could be verified by judges through the writ of *amparo*. Also, the latter could be used to guarantee pluralism of information or opinion in the media.[65]

In that time, the majority of the mass media had taken up a critical position towards the government and the biased political nature of these abusive judicial powers was evident. In the same way, the Constitutional Chamber assumed discriminatory criteria contrary to journalists' invocation of the right to reply or correction, in a case where one well-known social leader had been criticised by *Hugo Chávez* in his dominical program.[66]

In regard to this restrictive approach to the freedom of expression it is important to mention the judgement of 2003 in which the Constitutional Chamber declared the constitutionality of the norms of the Criminal Code that defined as a crime the defamation or the so-called *desacato* against public authorities or institutions,[67] disregarding explicitly the reports of the Inter-American Commission on Human Rights[68] that had established the incompatibility of the *desacato* laws with the freedom of expression and that had been invoked by the claimant. By side-lining these recommendations of the Commission, the Chamber highlighted its commitment to the defence of State bodies ("the institutional framework of the country") against "the private economic power or the one of political groups" allied with "States or with foreign or transnational economic, political, religious or philosophic groups" and which may wish to weaken the State. In addition, it affirmed that criminal law protection for the honour or reputation of executive authorities, members of the National Assembly, or public officials was indispensable.[69] This conception has had an impact on criminal legislation for many years.

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[65] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1013 of 12.6.2001. See the considerations of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, Right to Freedom of Expression and Thought, 2003, para. 407 et seq.

[66] The argument of the Constitutional Chamber was that President *Hugo Chávez* had communicated an opinion but not disseminated information and that the right to reply would only apply to wrong information, justifying the dismissal of the writ of *amparo*. Nevertheless, the Chamber introduced in its judgement many other considerations with binding effects, restricting severely and arbitrarily the exercise of this right by journalists.

[67] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1942 of 15.7.2003.

[68] Inter-American Commission on Human Rights, Report on the Compatibility of "desacato" Laws with the American Convention on Human Rights, in: Inter-American Commission on Human Rights, Annual Report 1994.

[69] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1942 of 15.7.2003.

Another field in which a restrictive jurisprudential approach to human rights was developed was the right to freedom of association, in its projection on the possibilities of social participation in public life. The so-called "civil society" was another sector in which the government had faced resistance from the beginning. Also, since then the Constitutional Chamber has introduced limiting criteria to the exercise of freedom of association in connection with the right of participation in public affairs as foreseen in the Constitution.[70]

d) The Efficacy of International Human Rights Treaties and of Decisions Adopted by Corresponding Organs

In addition, on the basis of the delineated postulates of the constitutional interpretation and by referring to the Inter-American Human Rights System, the Chamber has effected an erroneous contraposition of, on the one hand, the international guarantee of human rights, which supposedly "gives pre-eminence to individual, civil and political rights within a regime of formal democracy", and is based on the American Convention on Human Rights that does not "have any provision for a model distinct from the democratic liberal one"; and on the other hand, the constitutional protection of social rights in the context of a participative democracy and a Social State of Law and Justice.[71] During later jurisprudential developments, as we will see, these foundations enabled the Chamber to sustain *a priori* or in abstract, the precedence of collective or general interests over individual rights in case of a clash and to discard as a hermeneutic maxim the principle ac-

[70] In 2000, the Chamber limited the rights of civil society organisations and disregarded legal entities aiming at political or other indoctrination, as well as those that were profit-oriented, by the Judgement No. 1395 of 21.11.2000. Only a small window had been let open for international sponsorship to the benefit of NGOs based in the country, referring to contracts to "realise studies" or to an economic support based on "collections derived from the human solidarity" but only when national representatives of these NGOs maintain autonomy of action. The Chamber determines when this window can be opened to these organisations. Provided these conditions are met, "this Chamber could consider them legitimate". A similar restrictive perspective had been held in the Judgements No. 656 of 30.6.2000 and No. 1050 of 23.8.2000.

[71] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1265 of 5.8.2008. The Constitutional Chamber should not have ignored either Article 26 of the American Convention on Human Rights, referring to the economic, social and cultural rights, or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador". This protocol was signed by Venezuela but not yet ratified, and the Chamber has not shown disposition to request the Executive to proceed with the ratification.

cording to which liberty is the rule and its limitation the exception. None of that conforms to what is contemplated in the Constitution, which, though reflecting to some degree a tension between liberal principles and others of a collectivist, communitarian, or participative nature, maintains itself within the framework of democratic constitutionalism, where it is essential both to limit public authority and control its exercise and also to find its source of legitimacy in popular sovereignty.

The aforementioned judgement, issued in 2003 by the Constitutional Chamber relative to the criminal laws of *desacato,* had likewise a profound impact with regard to the relation between national order and International Human Rights Law. In conjunction with substantive aspects regarding the freedom of expression, it must be stressed that the Chamber established in that judgement its general position on the significance of constitutional norms concerning human rights, treaties and the international protection of those rights.[72] Based once again on the sovereignty of the State as cardinal concept, and understood as absolute limitation on International Public Law, it then laid the foundations for the competence which it would arrogate to itself with the aim of declaring unenforceable the judgements of the Inter-American Court if they contradicted the interpretations of the Chamber. It also laid the groundwork for the processual mechanism which would later permit the Chamber to control the compatibility with the constitutional framework of the decisions of the Inter-American Court of Human Rights.[73] These postulates would also lead it to exhort the Executive to denounce the American Convention on Human Rights.[74]

It is important to emphasise that some of those criteria conform to the distinctive features attributed to the "radical constitutionalism", that would have been installed in Venezuela, Ecuador, Bolivia, and Nicaragua and which would have come to break the consensus existing in Latin America since the 1990s in favour of liberal constitutionalism and the effective implementation of the International Human Rights Law in the domestic sphere.[75] In regard to the last topic, that constitutionalism would be charac-

[72] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1942 of 15.7.2003.

[73] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1942 of 15.7.2003.

[74] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1939 of 18.12.2008.

[75] *J. Couso,* Back to the Future? The Return of Sovereignty and the Principle of Non-Intervention in the Internal Affairs of the States in Latin America's "Radical Constitutionalism", in: C. Crawford/D. Bonilla Maldonado (eds.), Constitutionalism in the Americas, 2018, 140 et seq.

terised precisely, especially within the first mentioned country, by strong vindication of the sovereignty of the State, by the principles of self-determination of the people and by non-interference in internal affairs.[76] It would not be pertinent here to enter into an examination of the category of radical constitutionalism. It is enough to note that even though national sovereignty and the principles mentioned have great significance in the Venezuelan Constitution (Preamble and Article 1), the latter also recognises the pre-eminence of human rights as of paramount value in the legal order, and whose international protection is explicitly assured (Preamble and Articles 2, 19 and 23).

e) Legal Reserve and Separation of Powers

This illiberal orientation was patent in the jurisprudence restraining the value and scope of the constitutional principle that reserves to the law the regulation of certain matters in the economic sphere. In order to justify the weakening of that principle, the Constitutional Chamber asserted that the economic freedoms and other related rights collide in their exercise "with aspects that involve the social function or the general interest", determining that this principle would thus lose its intensity.[77] That laxity would have a foundation, in the opinion of the Chamber, in the transition "from the Liberal State to the Social State of Law" and in the democratic legitimisation that has acquired the executive power in the contemporaneous constitutional States where the dualism of the European constitutional monarchies of the nineteenth century has been overcome.[78] It is not possible to analyse in this work the details of those postulates. It is sufficient to point out that studies and international sources, on the need of a legal basis for the regulation or limitation of fundamental rights or other essential matters in democratic systems, concur in underlining the importance of the parliament as the source of the law, even with executives elected directly or indirectly by the people.[79] At this stage, the judgements that expanded the field in which

[76] *J. Couso* (note 75), 143 et seq.

[77] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1613 of 17.8.2004 and No. 2164 of 14.9.2004.

[78] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1613 of 17.8.2004 and No. 2164 of 14.9.2004.

[79] *R. García Macho,* Reserva de ley y potestad reglamentaria, 1998, 237 et seq.; *L. Michael/M. Morlok,* Grundrechte, 2020, 283 et seq.; Inter-American Court of Human Rights, Advisory Opinion OC-6/86, The Word "Laws" in Article 30 of the American Convention on Human Rights, 1986, para. 12 et seq.

the President of the Republic can enact decrees with the force of law also stand out.[80]

f) The Right to Political Participation: The So-Called War Between the Chambers and the Presidential Recall Referendum

In this period, the so-called war between Chambers of the Supreme Court arose,[81] and its significance to the present work is that it implied clear overreach and partisan activity of the Constitutional Chamber directed at obstructing and delaying a recall of the President of the Republic being promoted by the electorate according to the Constitution. The National Electoral Council had arbitrarily invalidated the manifestations of will of around 800,000 citizens who had submitted a regular petition for the recall,[82] and the Electoral Chamber of the Supreme Court annulled in 2004 the respective resolutions of that Council and upheld these manifestations of will.[83] The political campaign commando supporting *Hugo Chávez*, in the face of this recall proposal, instituted proceedings before the Constitutional Chamber against the judgement of the Electoral Chamber and it was nullified.[84] All those electors then had to go through the cumbersome procedure of signing the petition once again. At this point the Constitutional Chamber favoured the governmental strategy of delaying as much as possible the conduct of the recall. Thereafter, the government allowed an initiative emerging from its own ranks to draw up a public access list of those who had signed the recall referendum, thus generating a massive practice of

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80 The Constitutional Chamber declared that these decrees could comprise matters that the Constitution reserves for organic laws, including issues related to the "development" of "constitutional rights", Judgement No. 1716 of 18.9.2001. Even crimes and penalties have been established through decrees with force of law, which has been rejected by the Inter-American Commission on Human Rights in its Report on the situation of human rights in Venezuela, 2003, para. 57. A similar expansion has occurred regarding the decrees with force of law that can be issued by the President with a previous legislative enablement or delegation, in subjects not exclusive of the organic law. See Constitutional Chamber of the Supreme Court of Justice, Judgement No. 740 of 13.7.2010.

81 *R. A. Sánchez Uribarri* (note 9), 869 et seq.; *A. Brewer Carías/R. Chavero/J. Peña Solís* (eds.), La guerra de las Salas del TSJ frente al Referéndum Revocatorio, 2004, 13 et seq.

82 *C. Ayala,* El referendo revocatorio: una herramienta ciudadana de la democracia, 2004, 21 et seq.

83 Electoral Chamber of the Supreme Court of Justice, Judgement No. 24 of 15.3.2004.

84 Constitutional Chamber of the Supreme Court of Justice, Judgement No. 442 of 23.3.2004.

discrimination against dissidents[85] never questioned by the Supreme Court of Justice.

That war between the above-mentioned Chambers was preceded by a split produced in the governing majority, notably on the occasion of the military coup attempt against *Hugo Chávez* in April 2002.[86] This was reflected in the Supreme Court as well because several of its judges were closely related to this movement. That break materialised when the Plenary Chamber of the Supreme Court dismissed criminal proceedings against the military officials of high rank who had been involved in the uprising against the *Chávez* government in April 2002.[87] It would not be relevant to examine this ruling here. It is only important to stress that the Constitutional Chamber was hardly affected by this political rupture in its commitment to the *Chávez* government, since the majority of its members maintained their support of the measures of the incumbents. This break had important consequences in other Chambers, especially in the electoral one and in a high court of the contentious-administrative jurisdiction.

The conflict between the Chambers and the break in the Supreme Court which had become apparent on 11.4.2002, subsequently led to governmental efforts directed at recovering and solidifying control over the Supreme Court. Among these efforts was the pressure exercised on judges of the Electoral Chamber who had made decisions during the conflict between it and the Constitutional Chamber, which prompted the denouncement of two of its judges by the political commando of *Hugo Chávez* because of alleged wrongdoing by them during the conflict. To evade removal or other measures, these judges applied for their pension in advance, eight years ahead of time. A similar but unveiled measure was the declaration of nullity of the appointment of a judge of the Civil Chamber who had helped draft the judgement rejecting the criminal accusations against military officials connected with the alleged rebellious actions of April 2002.[88]

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[85] Inter-American Court of Human Rights, Case *San Miguel Sosa and others v. Venezuela* of 8.2.2018, paras. 40 et seq.

[86] *R. A. Sánchez Uribarri* (note 9), 869 et seq.

[87] Plenary Chamber of the Supreme Court of Justice, Judgement No. 38 of 14.8.2002.

[88] Inter-American Commission on Human Rights, Follow-up Report on Compliance by the State of Venezuela with the recommendations made by the IACHR in its Report on the Situation of Human Rights in Venezuela, 2004, para. 179.

g) Judgements Possibly Demonstrative of a Certain Margin of Action of the Constitutional Chamber

Between 2000 and 2004, some decisions were dictated which suggested a certain margin of action of the Constitutional Chamber beyond the sphere of politically contested issues.

Still, the general meaning of the jurisprudence propagated by the Constitutional Chamber was directed at amplifying the field of action of the government and the powers of the Chamber to control the lower courts. The statistical analyses of the judgements issued by this Chamber in exercise of judicial review at this time[89] should therefore be complemented by a qualitative perspective considering the moment the norm was issued, the political or institutional relevance of the matter, and to what extent the goals of the government were affected.

In a case of November 2002, the Chamber exceptionally mitigated the effect of norms enacted by the Executive on a matter belonging to their political agenda. Thereby two articles of a decree with force of law regarding agrarian land and development were declared unconstitutional and were nullified as they breached the guarantee of just compensation in the event of deprivation measures comparable to expropriation and broadened the power of the public administration to recover land or farms occupied by peasants or private individuals. This was based on the argument that they were presumably idle or uncultivated. Furthermore, other articles of that decree were submitted to an interpretation according to the Constitution.[90] This judgement illustrates the coming evolution of the political process in a more authoritarian and illiberal direction, because in 2005 the corresponding decree was reformed by parliamentary majority with the aim, among others, of re-establishing the articles annulled in 2002. This was not questioned by the Chamber.

A couple of additional judgements can be cited in which the Chamber mitigated or postponed the effects of regulations issued by the Executive or Legislative, without, however, impairing the interests of the rulers.[91] Another judgement that apparently ran against *Chávez* was the decision through which the general elections scheduled for the end of May 2000 were sus-

[89] *R. A. Sánchez Uribarri* (note 9), 867 et seq.

[90] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 2855 of 20.11.2002.

[91] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1911 of 13.8.2002 and No. 91 of 2.3.2005.

pended.[92] In fact this represented a graceful way out for the National Electoral Council in the face of its failure in the organisation of these elections. They had been announced for 28.5.2000 but were suspended at the last minute due to already existing technical difficulties and were finally held on 30.7.2000. This was convenient for both the government and the opposition, as both parties favoured the suspension at that point.[93]

Contrary to what had been asserted,[94] the balance tipped in favour of the government when the Constitutional Chamber declared the omission of the National Assembly in the election of the Rectors of the National Electoral Council, thus permitting the Chamber itself to later appoint these Rectors and their alternates.[95] Important sectors both of the *chavismo* and the opposition were interested in unblocking the situation created by the impossibility to reach a qualified majority of Deputies in parliament to elect the members of the Council. Nevertheless, this intervention of the Constitutional Chamber has to be evaluated by considering that it had left the National Electoral Council with limited capacity of action in relevant topics through a prior judgement. This contributed to the necessity of renovating that Council and to the later deadlock in parliament.[96] This explains why the Constitutional Chamber had not declared the unconstitutionality of the possible conduct of the consultative referendum promoted by popular initiative, involving a request to *Chávez* to voluntarily resign as President.[97] Indeed, on the same date, the Electoral Chamber had stated, using a biased interpretation and bolstered by the regime's continuation of the transition of public power, that a qualified majority of votes was a prerequisite for the electoral organism to carry out such or other convocations in electoral processes. In practice this left the opposition without any options to boost such an initiative and blocked any other electoral ones in the future.[98] In its decision, the Electoral Chamber also ordered suspension of the convocation of that referendum, which had already been approved by the National Electoral Council. This sibylline way of dismissing the petition of a part of the electorate by virtue of the evidently coordinated action between these two

[92] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 483 of 29.5.2000.

[93] Regarding this judgement, see *M. Taylor* (note 5), 251.

[94] *M. Taylor* (note 5), 252.

[95] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 2073 of 4.8.2003.

[96] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 2186 of 18.11.2002.

[97] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 23 of 22.1.2003.

[98] Electoral Chamber of the Supreme Court of Justice, Judgement No. 3 of 22.1.2003.

Chambers of the Supreme Court under the guise of its being granted by the Constitutional Chamber was one of the most visible symptoms of the illness of the judicial body.

The judgements on the designation of the Rectors of the National Electoral Council were ultimately favourable to the government because the judicial declaration of the legislative omission enabled the Chamber to determine over time, in coordination with the National Electoral Council, whose members were appointed by it, a process which could lead to the recall of the President of the Republic. This had important future implications, since the Constitutional Chamber declared that a regulation was necessary for the popular initiative of that recall and authorised the National Electoral Council to issue it, given the absence of a law on the matter.[99] This subjected the future popular initiative of that and other forms of referendums provided for in the Constitution to the determination of the Council, since that law was never enacted. In the same way, the supposedly exceptional intervention of the Chamber in appointing the Rectors of the Council has become a rule. Moreover, the judicial and administrative blocking of the process of presidential recall increased the citizens' awareness that the instruments of direct democracy in the Constitution lacked efficacy and would have to face all kinds of barriers if opposed to governmental interests.

2. The Consolidation of the Authoritarian Role of the Constitutional Chamber (2005-2015)

In general, the Constitutional Chamber bolstered the authoritarian domination in a much more open manner in this period. In very few cases of general interest, judgements were passed for the protection of certain constitutional rights,[100] and judicial endorsement in matters of political significance for the incumbents was maintained intact. This was especially the case from 2007, when a change in the Presidency of the Tribunal was brought about and political commitment was more militant. The then appointed President of the Court – also a member of the Constitutional Chamber – stated that the separation of powers must be revised because that principle

[99] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 2073 of 4.8.2003.

[100] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1632 of 11.8.2006.

could weaken the State.[101] She was also the Executive Secretary of a Presidential Council advising *Hugo Chávez* in the elaboration of the project of constitutional reform of 2007.[102] Rulings that were highly detrimental to rights and liberties were presented in annual reports of the Supreme Court as jurisprudential landmark decisions since they supposedly formed part of a new constitutional paradigm.[103] It was difficult for the citizens to see the Constitutional Chamber as a judicial organ. The plaintiffs that still addressed the Chamber on public issues often did it for three reasons: to meet the requirement of exhausting domestic remedies before going to the Inter-American Human Rights System; impelled by past Rule of Law practice; or by the conviction that it was necessary to put on record that efforts had been made against arbitrary government measures. They never did it on the basis of confidence in the ability of that Chamber to settle the existing controversy reasonably. It should be pointed out that, simultaneous to the decline of the legitimacy of that organ, there was an increase in the number of judicial actions concerning political matters filed by public officials or persons linked to the government.[104]

a) The Second Packing of the Chamber and the Complete Takeover of the Judiciary

The Organic Law of the Supreme Court of Justice as dictated by the end of 2004 had the principal aim of increasing the number of judges in the Supreme Court from twenty to thirty-two and to accomplish thereby its complete capture. This second packing was even more severe or unilateral than the previous one and more harmful to democratic institutions, even though it was similar in nature to the one carried out in 1999-2000. The capture of the Court in 1999-2000 lost its force after the political breakup of the parties of the ruling majority which led the latter to undertake the second, more severe packing. From a comparative perspective, this was not about a second step directed toward the partisan occupation of an originally independent judicial organ which in a first step had been weakened by new

101 See Nación, "Jefa de máximo tribunal venezolano División de poderes debilita al Estado", 5.12.2009, available at: <https://www.nacion.com>.

102 Decree No. 5.138, Official Journal of the Bolivarian Republic of Venezuela No. 38.607 of 18.1.2007.

103 Supreme Court of Justice of Venezuela, Words of Opening of the Judicial Year, 2012, 22 et seq.

104 See, for example, Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1939 of 18.12.2008, No. 263 of 10.4.2014 and No. 276 of 24.4.2014.

rulers, such as what happened to Poland in its recent experience with populism.[105] In the Venezuelan case the two steps were in essence of the same nature, although the second represented a shameless takeover of the Supreme Court. Therefore, the enlargement of the Supreme Court in 2004-2005 was not a measure directed at weakening an initially strong court in order to neutralise it and eventually put it clearly into the service of the government.[106] The strategy of 1999-2000 worked well until the rupture within the Court in 2002. Then, after the war between the Constitutional and Electoral chambers in 2004, it was resumed with more homogeneity and harshness. It should also be remembered that the clear pro-government majority in the Constitutional Chamber could be maintained even after this rupture, in contrast to other Chambers of the Supreme Court.

Starting in 2005, the Constitutional Chamber turned into a more open protagonist in the demolition of constitutional democracy. It is important to note that together with the jurisprudential guidelines, which will be addressed later, the Supreme Court of Justice carried out accelerated removals of judges at different judicial levels without procedures and due process through a Judicial Commission composed of judges from each of its chambers. This generated a firm refusal by diverse international organisations.[107] When some of the affected judges challenged their removal before the Constitutional Chamber, it declared that the administrative provisions determining the definitive separation of a provisory judge from office require neither legal proceedings nor any specific motivation.[108] The provisory judges who were discretionally or arbitrarily removed were replaced in the same way, and the vulnerability of the judicial power to political pressure thus became immense. The National Constituent Assembly of 1999 had started to adopt intervention measures into the judicial power according to the declaration of judicial emergency approved then by this Assembly,[109] and this had an impact on later years. But the purge of the judiciary was resumed and thoroughly deployed from 2005 on.

105 *W. Sadurski,* Constitutional Crisis in Poland, in: M. Graber/S. Levinson/M. Tushnet (note 1), 257 et seq.

106 Nevertheless, see *R. A. Sánchez Uribarri* (note 9), 865 et seq.

107 Inter-American Commission on Human Rights, Annual Report 2005, para. 284 et seq.

108 Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1834 of 19.12.2013.

109 *D. Landau* (note 6), 165.

b) The Disregard of the Inter-American System of Human Rights, the Concentration of Power and the Ideological Hegemony

This position of the Constitutional Chamber, very harmful to the independence of the judiciary, eventually led to serious consequences on an international level. In 2008 the Inter-American Court of Human Rights condemned Venezuela's violation of the right of a fair trial, due to such measures of removal of judges, contrary to judicial independence.[110] The Constitutional Chamber, reluctant to modify the criteria which were set and implemented to control the whole judicial power and bound by the above-explained conception of the sovereignty of the State, declared unenforceable the judgements of the Inter-American Court and exhorted the Executive to withdraw from the American Convention on Human Rights.[111] The President of the Republic ended up announcing the country's withdrawal from that Convention in September 2012,[112] after reiterated non-compliance by the Venezuelan State with the judgements of that Court.

The judicial upholding of the summary removal of judges, the failure to comply with the judgements of the Inter-American Court of Human Rights, and the exhortation to withdraw the American Convention on Human Rights demonstrated the position of the constitutional jurisdiction as principal actor in the democratic backsliding. Other noteworthy cases and judgements in the period 2005-2015 exacerbated the violation of human rights in the form of discrimination and political persecution and promoted the centralisation of powers, unlimited re-election, and ideological domination. Seven issues have to be named: First, the Chamber's upholding of the governmental decision not to renew the broadcasting license of Radio Caracas TeleVisión (RCTV), a private television station with a critical perspective on the public administration, to take over RCTV's telecommunications equipment, its respective frequency, and to assign the station to a totally submissive public broadcast channel.[113] Second, the establishment of the foundation for the possible constitutional provision of unlimited re-election of authorities, in contravention of the Constitution's guiding principle on

[110] *Case Apitz Barbera and others (First Court of Administrative Disputes) v. Venezuela* (note 50).

[111] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1939 of 18.12.2008.

[112] Inter-American Commission on Human Rights, available at: <https://www.oas.org>. Deeply Concerned over Result of Venezuela's Denunciation of the American Convention, 10.9.2013, available at: <https://www.oas.org>.

[113] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 956 of 25.5.2007.

the rotation or alternation in power.[114] Third, the support given by the Chamber to the central government in regaining powers that the constitution had awarded to the states of the federation, in view of a possible opposition victory in the coming elections for state governors.[115] Fourth, the abdication of the functions of judicial review ahead of the project of constitutional reform in 2007,[116] containing norms contrary to unchangeable fundamental principles (entrenched clauses) of the Constitution of 1999, and the admission, after the popular rejection of this proposal through a referendum, of a second and objectionable intention in the same legislative period to modify the Constitution in order to introduce the possibility of the unlimited re-election of the President of the Republic.[117] Fifth, the endorsement of legislation regarding the so-called "popular power" or "communal State", contrary to the political pluralism and the federal and municipal structures of the Venezuelan Republic.[118] Sixth, the determination of the Chamber to rewrite the Constitution and the legislation in order to empower itself to impose sanctions of deprivation of personal liberty and dismissal of mayors of the opposition in the context of judgements enacted against social protests in various municipalities.[119] Seventh, the submission of the right of assembly to the anti-democratic and normatively unforeseen requirement of prior authorisation.[120] In line with these decisions, there is also the unconstitutional imposition of administrative sanctions of political disqualification directed at excluding leaders of the opposition from the electoral arena. This was condemned by the Inter-American Court of Human Rights for violating political rights.[121]

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[114] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1488 of 28.7.2006.

[115] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 565 of 15.4.2008.

[116] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 2201 of 27.11.2007.

[117] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 53 of 2.2.2009.

[118] When confirming the organic nature of laws that should not have it, see Constitutional Chamber of the Supreme Court of Justice, Judgements No. 1676 of 3.12.2009 and No. 1329 of 16.12.2010; and when using legal tricks not to decide an issue, see No. 1483 of 29.10.2013.

[119] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 263 of 10.4.2014.

[120] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 276 of 24.4.2014.

[121] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1266 of 6.8.2008. In this decision and others, see the dissenting opinion of the *Judge Pedro Rondón Haaz*.

In addition to these seven issues, others originating in the previous phase became more acute in the one under examination. These include unjustified restriction of the right to freedom of association; freedom of speech and the right of access to public information; permissibility toward the delegating of legislation and executive decrees with the force of law, organic or not; the downgrading of the rights to property and economic freedom; the placing of collective or public interests above the individual, including fundamental rights; and the weakening of the rights of the opposition in parliament.[122] Regarding this last point, the scope of parliamentary immunity was reduced and the suspension and political disqualification of opposition deputies and even their removal from parliament without prior judicial decision was validated.[123] The internal activity of the opposition in organising procedures for the election of its candidates, in primary elections, was also obstructed.[124] The Constitutional Chamber also annulled the ruling of the Supreme Court which dismissed criminal charges against high military officials accused of participating in an attempted uprising in 2002.[125]

c) Typical Decisions of Authoritarian Systems

In addition, the Chamber illustrated the kinds of roles a constitutional court can fulfil in authoritarian contexts with reference to the resolution of differences within the regime concerning the scope of the competences of its agents.[126] Other decisions were related to core aspects of support and political perpetuation of the regime. This was demonstrated on the one hand, when the Chamber upheld the practices of the Armed National Force of employing slogans tied to the ideology of the ruling party[127] in parades and

[122] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 745 of 15.7.2010; Judgement No. 1049 of 23.8.2009; No. 1158 of 18.8.2014.

[123] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 207 of 31.3.2014. See also the following decisions of the Plenary Chamber, whose rapporteur judges were from the Constitutional Chamber: Plenary Chamber of the Supreme Court of Justice, Judgements Nos. 58 and 59 of the Plenary Chamber, both of 9.11.2010.

[124] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 66 of 14.2.2012.

[125] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 233 of 11.3.2005.

[126] To deal with internal power struggle between different institutional entities, the Chamber ruled on the legal framework of the Public Defence, an organ established in the Constitution. See Constitutional Chamber of the Supreme Court of Justice, Judgement No. 163 of 28.2.2008.

[127] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 651 of 11.6.2014.

other public displays and of including the military in events with political purposes, all of which was promoted by *Hugo Chávez* and his civilian and military acolytes. The Chamber justified this by invoking, among other arguments, the civilian-military union favoured by the National Plan of Economic and Social Development, despite the fact that such practices and this concept are contrary to the constitutional design.

On the other hand, the Constitutional Chamber played an important role in the continuity of the regime by establishing that *Hugo Chávez* had not left the exercise of his office as President of the Republic, under the constitutional regulation of temporary absence, when he was out of the country from 8.12.2012 for medical treatment, despite the indisputable factual or even legal impossibility of continuing to perform his duties. This was also stated by the Chamber as a reason to argue that the swearing in of *Hugo Chávez* in January 2013 at the beginning of the new presidential period, corresponding to his second re-election, was unnecessary. The Chamber argued that this swearing-in was not imperative, as *Chávez* was in full exercise of his functions without interruption.[128] This allowed his Executive Vice-President, *Nicolás Maduro*, to continue in that office, although the swearing-in did not take place. The final stitch of the scheme woven with the aim of securing the perpetuation of political domination, was the establishment, by the means of a forced interpretation of the constitutional norm on the conditions of eligibility that *Maduro* could aspire to the office of the President without leaving his position of interim President. As Executive Vice-President, he had assumed this temporary office after the death of *Chávez* became known.[129] Once *Maduro* was proclaimed the winner by a small margin by the National Electoral Council, which had already lost any credibility given the partiality of the majority of its members, the opposition candidate filed a claim against the validity of the election before the Electoral Chamber in the face of the fraud that was being committed. However, the Constitutional Chamber declared these and similar claims inadmissible without permitting a corresponding judicial procedure in which supporting elements of the alleged fraud could have been collected, contradictory to consolidated jurisprudence.[130]

[128] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 2 of 9.1.2013.

[129] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 141 of 8.3.2013.

[130] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1115 of 7.8.2013.

An isolated case relating to the income tax law, revealed sharp tensions between the Constitutional Chamber and the ruling actors.[131] Nevertheless, in addition to exemplifying judicial review over the incumbents, it also manifested a difference in vision and perhaps also of interests between the judges of the Supreme Court and the majority of the National Assembly. In fact, the legal complaint enabling the decision of the Chamber was dismissed but the Chamber resolved to continue with a judicial review of the law in matters unrelated to those raised by the claimant, who was close to the opposition.

3. The Other Side of the Authoritarian Protagonism of the Constitutional Chamber (2015)

In December 2015, the expiring majority of the government in the National Assembly undertook a new packing of the Supreme Court of Justice.[132] In reality the purpose was not to substitute some judges with others more loyal to the government, but instead to stop the opposition in the Assembly from electing thirteen judges and twenty substitutes of the Supreme Court in December 2016. In other words, it was about re-packing a Court already captured. Since December 2015, the Supreme Court had dictated important decisions for impeding the functioning of the National Assembly, which had to be installed in January 2016. The Electoral Chamber of that Court arbitrarily suspended the effects of the proclamation of the Deputies elected in the state of Amazonas and the indigenous region of the South[133] with the intention of depriving the opposition of the qualified majority of two thirds of the members of parliament which would permit it to promote the convening of a National Constituent Assembly or to designate the Rectors of the National Electoral Council. This led in January 2016 to an early potential conflict between the Supreme Court and the National Assembly, which had implied that the latter, by virtue of a judgement of the Constitutional Chamber, would have been unable to exercise any of its constitutional duties.[134] This clash was initially avoided when the National Assembly

[131] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 301 of 27.2.2007.

[132] International Commission of Jurists, The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch, 2017, 3 et seq.

[133] Electoral Chamber of the Supreme Court of Justice, Judgement No. 260 of 30.12.2005.

[134] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 3 of 14.1.2016.

took a step backwards to allow the withdrawal of the incorporation of the Deputies of the opposition, who had been unduly suspended. Still, the Constitutional Chamber continued in the direction of dismantling the parliament, whose laws or other dispositions were systematically annulled by the Chamber's decisions without any true constitutional basis.[135]

Furthermore, the results of the parliamentary elections in 2015 alerted the rulers to the possibility of their removal from power and motivated them to identify the factors that had contributed to the victory of the opposition. One of them was the electoral platform that merged under the umbrella of the Democratic Unity Roundtable ("Mesa de la Unidad Democrática"), a political organisation that had been created a few years before to coordinate the parties of the Venezuelan opposition. This party helped to attract the vote of those rejecting the government, and to such an extent that the allied parties were able to obtain more than all the combined votes they would have received separately. In the face of this, the Constitutional Chamber reacted quickly in January 2016, ordering the National Electoral Council to verify the register of members of each political party with the aim of ascertaining whether there was a violation of the ban on dual membership set out in the respective judgement. At the same time, it reinterpreted the electoral legislation to facilitate the cancellation of parties that did not participate regularly in national elections.[136] The electoral body then organised processes to validate the registers of party members, which led to the loss of the registration of the main oppositional parties and the cancellation, without the right to defence, of the Democratic Unity Roundtable.[137]

This Chamber persisted in the same strong and active support of the rulers that it had exhibited in the immediately preceding period, but a change occurred when the efforts which were previously mainly intended to endorse the measures of the Executive or of the National Assembly began to be directed at hindering the exercise of the duties of parliament. The authoritarian judicial sword thereby displayed its two sides. This judicial assault on the National Assembly implied judicial obstructionism against a new national electoral majority.

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[135] For example, Constitutional Chamber of the Supreme Court of Justice, Judgement No. 253 of 31.3.2016. For an analysis of this and other judgements, see *J. Casal H.,* Asamblea Nacional: Conquista Democrática vs. Demolición Autoritaria. Elementos de la argumentación y práctica judicial autoritaria de la Sala Constitucional del Tribunal Supremo de Justicia, 2017, 23 et seq.

[136] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 1 of 5.1.2016.

[137] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 53 of 25.1.2018.

Previously the Constitutional Chamber had typically acted by pulling forcefully in the same direction as a government supported, at least until 2012, by the popular majority, sweeping away constitutional limitations. Since January 2016, however, the Chamber has challenged outright and with similar force an organ elected at the national level in order to break it down. There was an antecedent to this behaviour in 2008, when the Executive and Legislative bodies minimised the responsibilities of the Metropolitan Mayor of Caracas when the opposition reached this office. Further, in 2009, supported by the Constitutional Chamber, they had brought about the recentralisation of constitutional responsibilities of the federated states in the wake of the opposition's victory in various provinces. But at that time, the national government still counted on the support of the majority of the people, which did not justify such measures but had always been the grounds on which the rulers increased constitutional populism.

The polls of 2015 had made incontrovertible the government's loss of popularity, marking a turning point that would lead it to design strategies for retaining power without the support of the majority of the people, in an openly authoritarian manner.[138] In this way, the judicial review took on a character that was supposedly counter-majoritarian and unknown until then. The argumentative authoritarianism of the Constitutional Chamber reached its peak after those elections. It proceeded to reconstruct its precedents in an openly arbitrary way because they were in contradiction with its new jurisprudence, which was then directed towards hindering rather than facilitating the actions of the parliament.[139] It even totally ignored some provisions of the Constitution, if they were too categorical to be reinterpreted, as happened in regard to the prolongation of states of emergency, a power reserved for the National Assembly by constitutional dispositions.[140] This reasoning is in line with the abusive mode of conducting judicial procedures, in which the rules of due process have been breached, especially when acts or dispositions of the National Assembly have been annulled. This is because it normally does not have any opportunity to exercise its

138 *D. Landau* (note 6), 169 et seq.

139 See, for example, Constitutional Chamber of the Supreme Court of Justice, Judgement No. 9 of 11.3.2016, in which the precedent about the reform of the Organic Law of the Supreme Court of Justice, ruled in the Judgement No. 34 of 26.1.2004, was disregarded.

140 As when it overrode Article 338 of the Constitution, that reserves to the National Assembly the extension of the States of exception. Constitutional Chamber of the Supreme Court of Justice, Judgement No. 7 of 11.2.2016.

right of defence nor the possibility to have its own judicial representation.[141]

All laws sanctioned by the National Assembly after January 2016 and sent to the Executive for promulgation were declared unconstitutional and annulled by the Constitutional Chamber, with a politically explicable exception that confirms the rule, namely at the request of the President of the Republic. This preventive judicial review, foreseen in the 1999 Constitution and earlier in 1961 but minimally employed in practice, began to be systematically filed by the President of the Republic whose supposed objections of unconstitutionality were always accepted by that Chamber. The National Assembly could not initiate a single law related to the electoral promise of economic and social recovery and democratic restoration that had been responsible for its overwhelming victory in the parliamentary elections. This was due to the functional blockage imposed by the Constitutional Chamber for political reasons and without any legal or constitutional foundation.[142]

Hence, strictly speaking, this Chamber did not start a counter-majoritarian judicial review, but rather perverted this institution to besiege the National Assembly and deprive it of the functions that it had been discharging from the approval of the Constitution of 1999 until 2015 – and even before that –, from the promulgation of the 1961 Constitution.[143]

In regard to the binding effect of the jurisprudence of the Constitutional Chamber, we can find in this period additional manifestations of judicial authoritarianism reflected in the powers it has deployed to assure the execution of its judgements. The guarantee of the observance and enforcement of

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[141] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 473 of 14.6.2016.

[142] Law regulating the use of mobile telephony and the Internet inside prison establishments, Official Journal of the Bolivarian Republic of Venezuela No. 40.495 of 15.7.2016. Another law, regarding the recovery of the national economy, was approved by the National Assembly but, after the annulment of all laws by the Constitutional Chamber, the parliament decided to wait for a better moment for its promulgation to avoid the same fate as the other laws.

[143] This was the case, among others, with the following issues: the faculties of parliamentary control over the government; the powers of the National Assembly to appreciate the economic-financial viability of law projects and to legislate on all matters entrusted at national level of the federal structure, notwithstanding that the corresponding proposals did not emanate from the initiative of certain State organs; the competence of the National Assembly to approve or disapprove the declaration of a state of emergency with binding effects and to extend it; its attribution to have its own legal representation for the judicial defence of its norms and other dispositions; and finally the faculties of its Directive to resolve on the presence and action of the National Guard regarding the security in the Federal Legislative Palace. This functional vacuum was occasionally supported by the invocation of the 2013-2019 National Plan of Development, which became a fundamental parameter for assessing the validity of acts of public authority. See *J. Casal H.* (note 135), 57 et seq.

its judgements was becoming more central in its jurisprudence insofar as the Chamber departed more and more from the normal character of a judicial body.[144] In the face of the attempts of the National Assembly elected in 2015 to exercise its functions as well as the street protests of 2017, the obsession of executing what it had ordered became extreme. The Chamber was really only interested in compliance with its mandates; it usually did not matter whether their interpretation according to constitutional norms had been respected or whether a particular principle or right had been violated.[145]

Here, a constitutional court serving an increasingly authoritarian regime took on authoritarian characteristics in its ways of arguing and deciding and in the tools used to enforce its judgements. This observation helps to explain how a constitutional court or chamber can retain its influence and utility for an authoritarian regime despite having lost its legitimacy due to the evaporation of seeming independence. The Constitutional Chamber continued to be effective for the rulers even after having lost its democratic façade because as its authoritarian feature increased, the Chamber relied exclusively on its coercive powers, i.e., on its capacity to forcibly impose its decisions, rather than on its judicial authority.

a) The Judicial Construction of the Supposed *desacato* of the National Assembly and Other Outrages

The principal and aberrant sequence of judgements chaining down the parliament has been the judicial doctrine of *desacato* or failure to comply with judgements of the Supreme Court of Justice. It has been used as a legal ground for nullification of all dispositions adopted by the National Assembly and ultimately of the parliament itself. In September 2016, the Constitutional Chamber stated that parliament cannot dictate any valid act because it had disregarded some of its rulings and some of the Electoral Chamber.[146] According to this criterion, until it complies with the respective decisions, the capacity of the National Assembly to fulfil its constitutional functions is reduced to zero. This judicial situation is unacceptable in a democratic state governed by the Rule of Law since it would be one thing to annul provisions in contravention of specific judgements and another thing to annul or

144 *J. Casal H.* (note 21), 171 et seq.
145 *J. Casal H.* (note 21), 189 et seq.
146 Constitutional Chamber of the Supreme Court of Justice, Judgement No. 808 of 2.9.2016.

supress the ability of parliament itself to play its assigned role in a democracy. The incorrect application by the Constitutional Chamber of the notion of unconstitutionality through legislative omissions, as has been pointed out by some scholars,[147] has led the Chamber to authorise the substitution of the National Assembly in the exercise of some of its responsibilities. But this result is derived from the judicial position on *desacato* of judgements supposedly committed by the National Assembly with its general invalidating effect, as premise for falsely alleging, the existence of a legislative omission.

It is not possible to summarise here the various aspects of the case law of the Constitutional Chamber that has led to functional blockage of the parliament. As we have seen, that Chamber was already a pivotal instrument and agent of authoritarian domination before 2016, but since then it has carried out this role in a much more unashamed and cynical way. An example of this is the prolific though decontextualised citation of works by Venezuelan jurists close to the struggles of the opposition, which until then had generally been silenced in their jurisprudence, and the recurrent invocation of ideas such as the Rule of Law, in the conceptual platform of the opposition, in order to suggest that the latter was contradicting itself once it had power in its hands. Its judgements no longer had the intention of convincing a public forum with legal arguments or to provide reasons to justify certain measures to allies of the rulers, but were sarcastic invectives launched against a sworn enemy and were frequently accompanied by the threat of sanctions.[148]

The judicial construction of the alleged *desacato* of the National Assembly, sometimes backed by invocation of the state of emergency in force since January 2016 or the notion of unconstitutionality by omission, left the Assembly unable to fulfil its constitutional functions. This acquired greater severity when the Constitutional Chamber started to empower the executive branch to encroach on the competence of the National Assembly. It reached an outrageous level with the judicial endorsement of the elaboration and adoption of the national budget by the President of the Republic by decree with the force of law, with the approval of the Constitutional Chamber and without any participation by parliament, which according to the Constitution has a non-delegable responsibility in this matter.[149] This

147 *D. Landau/R. Dixon* (note 7) 1363 et seq.

148 See, for example, Constitutional Chamber of the Supreme Court of Justice, Judgement No. 156 of 29.3.2017.

149 Constitutional Chamber of the Supreme Court of Justice, Judgements No. 814 of 11.10.2016 and No. 1190 of 15.12.2016.

reached its peak when the Chamber dictated a couple of judgements establishing as a general doctrine the substitution of the National Assembly by an organ of its choice.[150] This was severely criticised by the then Attorney General as a coup against the Constitution, and causing a merely rhetorical rectification of that Chamber that left the practical scope of the judicial construction unaffected.[151] None of this can be regarded as simply hardball by *Maduro* and the Constitutional Chamber,[152] since the Chamber's rulings have here obviously gone beyond what is constitutionally admissible from any reasonable point of view.

b) The Presidential Imposition of a Supposed Constituent Assembly

To this phase correspond the judicial decisions that endorsed the convocation of a National Constituent Assembly by the President of the Republic, without the referendum required by the Constitution,[153] so that the people, as bearers and depositary of constituent power, would have a voice in the convocation and in the election, integration, and functioning of the said organ. This was aimed at completely dislodging the parliament and to tilt the playing field definitively in favour of the government. *Nicolás Maduro* imposed a so-called constituent assembly laying down rules for the selection of its members. This involved large-scale gerrymandering, infringed the constitutional principle of proportional representation, and broke the universality of suffrage by providing, alongside the universal vote foreseen for some districts, a selection by social sectors of a corporatist nature.[154] All this was done to ensure a governmental majority in the Assembly, counting only on the support of an outright electoral minority.

The installation of this alleged Constituent Assembly has implied the enthronement of arbitrariness, since it would have absolute power and involve the closing of the narrow electoral corridors that until then had remained.

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[150] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 155 of 28.3.2017 and No. 156 of 29.3.2017.

[151] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 157 and No. 158 both from 1.4.2017.

[152] As claimed by *Levitsky* and *Ziblatt*: *S. Levitsky/D. Ziblatt* (note 1), 134 et seq. Regarding the concept of hardball in constitutional law see *M. Tushnet,* Constitutional Hardball, J. Marshall L. Rev. 37 (2004), 523 et seq.

[153] Constitutional Chamber of the Supreme Court of Justice, Judgements No. 378 of 31.5.2017 and No. 455 of 12.6.2017.

[154] European Commission for Democracy Through Law (Venice Commission), Venezuela. Preliminary opinion on the legal issues raised by decree No. 2878 of 23.5.2017 of the President of the Republic on calling elections to a National Constituent Assembly, 21.7.2017.

The Constitutional Chamber of the Supreme Court was partly overshadowed in its authoritarian role since this Constituent Assembly began to operate, although the latter, usurping responsibilities of the National Assembly, and the Supreme Court as a whole acted in coordination to achieve the lifting of the immunity of numerous oppositional parliamentarians and in order to submit them to legal proceedings.[155] The so-called Constituent Assembly has even begun dictating laws and supposed constitutional laws, arrogating to itself legislative functions of the National Assembly as well as the power to change or modify the Constitution,[156] which according to the Venezuelan Constitution, cannot be exercised without the participation of the people through a referendum.

The Constitutional Chamber has remained completely blurred as a judicial body. It has become the dangerous watchdog of the rulers,[157] occasionally overshadowed, but not suppressed since 2017 by the demonstrations of all-embracing power by the allegedly flawed Constituent Assembly. Nevertheless, that Chamber has continued to play a relevant role. Some scholars have rightfully wondered how it has been able to maintain such a significant influence despite the loss of legitimacy associated with its dependence on the rulers.[158]

V. The Institutional Role of the Constitutional Chamber in a Comparative Perspective

Having addressed the mainstream positions of the relevant constitutional case law and considered its impact on democracy, it is of interest to introduce a comparative approach. It is relevant to relate the functioning of the Constitutional Chamber with the democratic past that preceded it, given that this is one of the aspects highlighted in comparative works on the role of the courts or constitutional chambers in the advance towards authoritarianism. I would also like to refer to comparative studies on the political struggles against systems with anti-democratic tendencies and the possible intervention of a constitutional court or chamber. I will try to frame the functioning of the Constitutional Chamber in a comparative view of other

155 Plenary Chamber of the Supreme Court of Justice, Judgement No. 55 of 12.8.2019.

156 For example, the Constitutional Law against Hate, for Peaceful Coexistence and Tolerance, published in the Official Journal of the Bolivarian Republic of Venezuela No. 41.274 of 8.11.2017.

157 Not a simple lapdog, as suggested by *S. Levitsky/D. Ziblatt* (note 1), 156.

158 *D. Landau/R. Dixon* (note 7), 1374.

experiences of political instrumentalisation of courts or constitutional chambers.

1. The Importance of the Democratic Past, the Extreme Polarisation and the Dilemmas of the Democratic Struggles in Hybrid Regimes

The Venezuelan case reinforces the conclusion reached by the doctrine on the relationship between previous democratic traditions and the propensity of would-be authoritarians to capture and use the courts, in particular the constitutional courts, as fundamental tools for undermining institutions.[159] The Venezuelan institutional tradition since the re-establishment of democracy in 1958 has influenced the way in which the political process has developed since 1999. Although the precarious independence of the judiciary had already been the object of concern and criticism before, the awareness of different political and social sectors, by assuming the Rule of Law as a paradigm, and the intensification of discussions, proposals, and efforts aimed at achieving the autonomous functioning of the judiciary in the 1990s, generated a set of ideas based on this principle. It should be noted that the idea of the Rule of Law as a component of democracy had only been present in certain spheres. The concept of democracy was spread within society mainly on its electoral side,[160] but in certain circles the Rule of Law was taking roots. The democratic past can give an increasingly authoritarian regime room for manoeuvre and opportunities that they would not deserve based on their own performance.[161] The expectation of the preservation of a certain minimal level of democracy and the commitment to it by the community or certain social groups allows would-be authoritarians to gain time in the implementation of their agenda.

With this background and in a context of polarisation,[162] the democratic opposition had to face a dilemma that could arise in the fight against regimes with authoritarian characteristics. The opposition can challenge the government, but it wants, above all, to keep it within the limits of democracy. Its strategies and means of struggle, and the principles behind them, are those of a system in which it is possible to channel conflicts institutionally, in accordance with the law. This is better than leaving the rulers to their

159 *D. Landau/R. Dixon* (note 7), 1317 et seq.
160 *J. Virtuoso* (note 18), 73 et seq.
161 *D. Landau/R. Dixon* (note 7), 1349 and 1372 et seq.
162 *J. Corrales* (note 15), 68 et seq.

own devices, so that they cross a line of no return in their antagonism to democratic constitutionalism because this marks the threshold beyond which the contest takes on an unknown or highly dangerous character. This represented a dilemma in regard to the Constitutional Chamber because on the one hand, going to court could legitimate it to some degree, while on the other hand, an outright dispute with the court to delegitimise it entirely as soon as there were signs of its lacking democratic commitment could lead to polarisation and bolster the regime's authoritarian tendencies as well as those of the judicial organ.

It has been argued that the Venezuelan opposition, during these first years, predominantly adopted a highly confrontational position regarding its goals and its methods of battle, which nurtured polarisation and reinforced extremist tendencies in the government, thus weakening the legitimacy of the opposition's struggles.[163] This strategy, perceived as failed, has been compared to the one deployed in Colombia against President *Álvaro Uribe* and his authoritarian tendencies, and it has been argued that the option of the Colombian opposition to use principally institutional and gradual mechanisms for containing the government has been, on the contrary, successful as is demonstrated by the judgement of the Constitutional Court impeding a second immediate re-election of *Uribe*.[164] The comparison is not fully appropriate as the institutional situation in Colombia when *Uribe* came to power was different to the one in Venezuela by 2000. One of the greatest differences is the fact that the latter did not count on independent control institutions which could have confronted the authoritarian advance. In particular, there were many doubts regarding the work of the Constitutional Chamber, and its actions did not clear them up. On the contrary, it promptly led to the emergence of a strong mistrust in its autonomy. In contrast, the Colombian Constitutional Court was not captured and had already in 2005,[165] on the occasion of a constitutional reform to allow a single immediate re-election of the President, established limiting criteria that would be resumed and expanded in 2010.[166] In any case, the strategy to remove *Chávez* from power as soon as possible, implemented on the part of many opposition sectors, intensified the political radicalisation fostered by the government and enabled the rulers to progress in their ideological project with less internal and fewer international objections.[167]

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163 *L. Gamboa,* Opposition at the Margins: Strategies against the Erosion of Democracy in Colombia and Venezuela, Comparative Politics 4 (2017), 457 et seq.

164 *L. Gamboa* (note 163), 461 et seq.

165 Constitutional Court of Colombia, Judgement No. C-1040/05 of 19.10.2005.

166 Constitutional Court of Colombia, Judgement No. C-141/10 of 26.2.2010.

167 *L. Gamboa* (note 163), 463 et seq.

The Constitutional Chamber could have played an important role in channelling the political conflict through judgements that, without accepting that the demands of the opposition or dissenting social groups conformed completely to the law, would have recognised some aspects of their claims on relevant constitutional issues. Within the narrow margins of autonomous decisions left by the partially authoritarian context, it could have assumed a certain function of resolving disputes but, as already mentioned, this did not happen. On the contrary, the foundation was laid for disregarding organisations of civil society as legitimate actors, human rights were encroached upon, and mechanisms for controlling and limiting power were weakened. There was not even a positive change in the behaviour of the Chamber when the opposition returned to the electoral path in 2006 and took up a strategy of partial advances after having been defeated in the manipulated referendum of 2004 and after having refrained from taking part in the parliamentary elections in 2005. Nor was there a change within the governmental leadership, and thus the regime continued its course of polarisation and its political extremism, which had earlier provided electoral rewards.[168] After 2007 this was no longer the case, but the existing structure of domination and the trajectory of unrestricted power (path dependence) pushed the official action in the same direction.[169]

Any constitutional chamber would have been affected in such a scenario of extreme polarisation as that in Venezuela after 2000. The aggravation of political confrontation and the deep division of a country in the midst of an existential fight have a foreseeable negative impact on the functioning of a constitutional court or chamber. The importance of considering the institutional context when evaluating the performance of courts has to be stressed.[170] The Constitutional Chamber may well have been overworked due to the radicalisation and the judicialisation of political conflicts. Nevertheless, it not only ended up trapped in the latter, but also did very little to mitigate it and in many ways, fuelled it. In 2003-2004, the Chamber ostensibly revealed its political partisanship on the occasion of the initiative for the presidential recall referendum, even though from the beginning of its jurisprudence it had opted for the imposition of paradigms generally outside of the Constitution as well as for the promotion of antagonism.

168 *J. Corrales* (note 15), 70 et seq.
169 *J. Corrales* (note 15), 84 et seq.
170 *R. Barros,* Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973-1990) and Argentina (1976-1983), in: T. Moustafa/T. Ginsburg (note 2), 156 et seq.

2. The Constitutional Chamber and the Move Towards Authoritarianism

The Constitutional Chamber has been an essential instrument of the regime in its move towards authoritarianism, a feature that it shares with other constitutional courts. However, it should be made clear that it has also taken on a life of its own in the sense of neither having been a mere enforcer of governmental orders nor having limited itself to the validation of official measures by purely rejecting actions brought against them before the Chamber. This new life is obviously not based on judicial independence, but rather on the kind of domination in which judicial power is inserted. This judicial power, especially its highest court, acquired during this period an antidemocratic reputation hitherto unknown in Venezuela, according to which the Supreme Court of Justice and above all its Constitutional Chamber were not organs of judicial control themselves, but were progressively degraded in such a severe way that they finally lost their judicial character. The traditional absence of interest in the study of the constitutional courts in authoritarian regimes even among political scientists, which is the result of the assumption that they lack independent influence in political life,[171] is challenged by the protagonism of the Constitutional Chamber.

It is also important to point out that the purpose behind the performance of the Constitutional Chamber and the beneficial role it has played for the governing factions was not always the same. For example, its aim was not always to evade proceedings for constitutional amendments or reforms because of the absence of a parliamentary majority for ratification of formal constitutional modifications, as occurred in Poland; nor because the rulers consider it politically inconvenient to follow these channels of constitutional change.[172] Scholars have categorised abusive constitutionalism with formal or informal changes in the Constitution that affect the core of democracy, primarily referring to processes in which the rulers use courts to elude the proceedings foreseen in the Constitution for its reform or substitution. They have also addressed abusive judicial review seeking to validate such illicit alterations to the constitutions.[173]

In the analysis of the performance of constitutional courts or chambers that help to move the political system towards authoritarianism, it is never-

171 *T. Moustafa/T. Ginsburg* (note 2), 1.

172 *G. Halmai*, The Making of "Illiberal Constitutionalism" With or Without a New Constitution. The Case of Hungary and Poland, in: D. Landau/H. Lerner (eds.), Comparative Constitution Making, 2019, 302 et seq.

173 *D. Landau* (note 20), 189 et seq.; *D. Landau/R. Dixon* (note 7), 1313 et seq.

theless significant to distinguish between the veiled or fraudulent modification of the Constitution and a straightforward violation of it. The first is also a violation of the Constitution, but it is convenient to treat separately the actions directly contradicting the Constitution from those which aim to establish a different constitutional framework. The Venezuelan Constitutional Chamber has often been able to support the government in achieving things that the latter didn't want to reach through constitutional reform. Still, when assessing its overall jurisprudence, it can be observed that a large part of its rulings, and especially those since December 2015, have not sought to incorporate norms or principles into the constitutional system for the formal adoption of which the government did not have the necessary majority. On the contrary, the judgements of the Chamber have often sought to fundamentally block, deactivate or annul democratic institutions or mechanisms, or also to take non-constitutional measures that the incumbents considered politically necessary, all without pretending to modify the constitutional design. In general, it is important to stress that the Venezuelan Constitutional Chamber has brought about in recent years what could be called the "freezing" or "hibernation" of constitutional institutions crucial to democracy.

Although the Constitution has certainly been undermined or dangerously eroded by these judicial decisions – altered in the heart of its democratic institutions – the aim of the rulers and the Chamber is not primarily to modify or replace the Constitution, but rather to set it aside in certain circumstances or in the face of specific actors. The problem, therefore, is not the arbitrary change to the Constitution, though the judicial acceptance of its violation somehow altered it, but that the Constitution could have been infringed in its fundamental democratic essence.

From a comparative view, the authoritarian protagonism of the Constitutional Chamber has certain characteristic traits resembling those of other constitutional chambers or courts in different systems with antidemocratic or illiberal trends. In regard to the method of placing the constitutional jurisdiction at the service of a regime with authoritarian tendencies, the Venezuelan experience has neither been the kind where a pre-existing constitutional court or chamber has been weakened and captured by the new rulers – as was the case in Poland[174] and Hungary[175]–, nor has it been confronted, packed, and strengthened in the scope of its powers as in *Erdoğan's* Tur-

[174] *W. Sadurski*, Polish Constitutional Tribunal Under PiS: From an Activist Court to a Paralysed Tribunal, to a Government Enabler, Hague Journal on the Rule of Law 11 (2019), 63 et seq.

[175] *G. Halmai* (note 172), 302 et seq.

key.[176] The Constitutional Chamber was created at a time that was generally democratic, but since the first appointment of its members and the initial application of its functions, it has been largely subordinated to the emerging political majority. In this way, it was profiled from the beginning as a support for the majority power. A similar use of the courts from the very foundation of the new constitutional order happened in Ecuador and partly in Bolivia, where the constituent processes of 2007-2008 and 2006-2009, respectively, also supported the rise of personalistic leaders, leading to the establishment of constitutional courts subordinated to the political majority.[177] It has been pointed out that political calculation and legitimacy issues explain why both Hungary and Venezuela have continued to have constitutional courts in the 2011 and 1999 constitutions respectively, but this does not apply to the Venezuelan case because the Constitutional Chamber had just been created.

Regarding the method used to control such courts, a distinction has been made between the capture of their members and the alteration of their powers, and it has been stated that capture would be preferred in presidential systems, while parliamentary regimes would be inclined to act in different dimensions at the same time.[178] However, the reason why the Venezuelan Constitutional Chamber has been packed since its foundation without resorting to the reduction of its jurisdiction is because the National Constituent Assembly has been used as a mechanism for rapid and simultaneous political occupation of the nascent institutions. This is not to deny that the activation of the constituent power in that way could be more probable in personalistic leadership scenarios, which are more akin to presidential systems.

There also exist analogies and shared patterns between the creation and action of the Venezuelan Constitutional Chamber and other instrumentalisation processes of constitutional courts in unconsolidated democracies or hybrid political systems. In relation to the cases mentioned above, an inter-

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[176] *H. Shambayati,* Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics, in: T. Moustafa/T. Ginsburg (note 2), 283 et seq.; *A. Arato* (note 1), 318 et seq.

[177] *R. Ortiz Ortiz,* Los problemas estructurales de la Constitución Ecuatoriana de 2008 y el hiperpresidencialismo autoritario, in: Estudios Constitucionales 16 (2018), 527 et seq.; *J. A. Rivera S.,* Justicia constitucional y derechos fundamentales en Bolivia. Avances y retrocesos, in: V. Bazán/C. Nash Rojas (eds.), Justicia Constitucional y derechos fundamentales Nº 4, Pluralismo jurídico, 2014, 105 et seq.; *A. Vargas Lima,* La reelección presidencial en la jurisprudencia del tribunal constitucional plurinacional de Bolivia. La ilegítima mutación de la constitución a través de una ley de aplicación normativa, Revista Boliviana de Derecho 19 (2015), 446 et seq.

[178] *A. Arato* (note 1), 319 et seq.

est of the incoming would-be authoritarian regimes in quickly capturing the constitutional courts can be observed, especially when these or equivalent organs of judicial power have acted to gain control over majorities in the past,[179] or when at least the conviction prevailed that courts should limit the powers of the government.

There is also a similarity in the methods applied to either neutralise or take active advantage of the collaboration of such courts. Undue removals, undertaken as direct measures of dismissal or annulment of designation, or covered up by changes in regulations on retirement age, non-ratifications, forced holidays or retirement under threat of prosecution, are some of the practices observed.[180] What has also played an important role are the norms of allegedly transitional character dictated shortly before the approval of a formal change in the Constitution, as seen in Venezuela and Hungary.[181] In addition to these relatively formalised methods, there are practices of softening, buying, extortion, or political persecution that pursue the same end.

The convergences in procedural and substantive aspects of the jurisdictional work go beyond what one could imagine. What can be observed is the manipulation of judicial functions and procedures to allow the judicialisation of certain political conflicts and to resolve cases when it is appropriate for the rulers. Poland and Venezuela offer notorious examples of this.[182] In these and other aforementioned countries, the lines of jurisprudence are characterised by the following: limitation of the right to protest; reinforced protection of the honour of the authorities or the good name of the institutions; indirect restrictions on freedom of expression; reduction of the rights of parliamentarians; validation of measures that hamper the engagement of the political opposition, Non-Governmental Organisations (NGOs) and other civil society entities; and support for the dismantling of judicial independence and the autonomy of other control bodies.[183] In some cases, the support of the constitutional court or chamber has been decisive in promoting the declaration of a state of emergency and the unconditional use of the respective powers.[184] In short, to a greater or lesser extent, all these process-

179 *W. Sadurski,* How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding, Sydney Law School Research Paper No. 18/01, 2018, 17 et seq.

180 *W. Sadurski* (note 179), 17 et seq.; *A. Arato* (note 1), 318 et seq.; *A. Di Gregorio* (note 3), 209 et seq.

181 *G. Halmai* (note 172), 302 et seq.; *L. Sólyom*, Rise and Decline of Constitutional Culture in Hungary, in: A. v. Bogdandy/P. Sonnevend (eds.), Constitutional Crisis in the European Constitutional Area, 2015, 5 et seq.; *A. Brewer-Carías* (note 8), 69 et seq.

182 *W. Sadurski* (note 179), 32 et seq.; Constitutional Chamber of the Supreme Court of Justice, Judgement No. 442 of 23.3.2004.

183 *W. Sadurski* (note 179), 32 et seq.

184 *A. Di Gregorio* (note 3), 209 et seq.

es demonstrate illiberal trends that favour political domination. "Constitutional sovereignism",[185] is another feature of the jurisprudence of some of these jurisdictions, which leads to restriction of the application of International Law and controls.

The tendency to contrast democracy with constitutionalism can also be seen,[186] because the political will of the majorities – conceived to coincide with that of the populist incumbent – prevails over the idea of constitutional normativity and the limits to the public powers that it contains. The legality is subverted by progressing in the direction plotted by the promoters of the hegemony. Sooner rather than later, the unconditional expansion of the majority will support the undermining of democracy itself. Such a pattern is well illustrated in the ruling of the Plurinational Constitutional Court of Bolivia, which broke down the foundational bases of its constitutional order. In effect, this Court ruled that President *Evo Morales* had an absolute human right to re-election, on the basis of which he could be re-elected without limit.[187] This was done even though the people had refused to modify the Constitution on that issue by referendum both in 2009 and in 2016, deciding that only one immediate re-election was possible.[188] A similar and even more serious damage to the democratic foundations emerged when the Venezuelan Constitutional Chamber gave permission to the President of the Republic in 2017 to convene a National Constituent Assembly, without conducting a referendum in which the people could have decided on the convocation and the rules that would apply.

From the perspective of the strategic decisions of the incumbents related to the functioning of constitutional courts or chambers, both similarities and differences can be identified. On the one hand, the establishment of the Venezuelan Constitutional Chamber with its ample powers and its extension by means of judgements does not correspond to the experience of systems in which certain majorities with lessening electoral support, choose to strengthen a high judicial instance, confronted with the prospect of soon being displaced from office.[189] Although the Chamber has not been an insurance policy against an uncertain political future, it did become an early instrument for the preservation of the government's power.

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185 *A. Di Gregorio* (note 3), 209 et seq.

186 *K. Scheppele* (note 4), 557 et seq.

187 Plurinational Constitutional Court of Bolivia, Judgement No. 0084/2017 of 28.11.2017.

188 See BBC, Bolivian Voters Reject Fourth Term for Morales, available at: <https://www.bbc.com>.

189 *T. Ginsburg/M. Versteeg*, Why Do Countries Adopt Constitutional Review?, Public Law and Legal Theory Research Paper Series 29, 2013, 2 et seq.

In this regard there are certain similarities with the Andean countries mentioned above and their respective constituent processes, as well as with Poland under the leadership of *Jaroslaw Kaczyński* and the control of the Law and Justice (PiS) Party where the Constitutional Court became an active collaborator of the rulers. In the Venezuelan situation, however, the operation of judicial entrenchment of political domination has been more severe. The increase in the jurisdiction of this Chamber has been tied to the function that it was called to fulfil in consolidating and making that domination irreversible.

On the other hand, there are examples of decisions being taken by the Constitutional Chamber that would be uncomfortable or more costly for the incumbents if they were taken in the political arena itself,[190] which is common in other regimes, including those that are partially authoritarian.

VI. Why a Constitutional Court or Chamber?

In view of the outcome of the constituent decision to introduce a Constitutional Chamber within the Supreme Court of Justice, which quickly emerged functionally as a constitutional court with robust powers, it is worth asking whether it was a mistake to have established it and whether it would make sense to keep it within the constitutional framework.

Certainly, under the old scheme of a Supreme Court of Justice with the core powers of judicial review exercised in the Plenary Chamber, the capacity of constitutional jurisdiction to harm democracy would have been less. This Court did not have a judicial body specialised in constitutional matters and did not have the ability to control unconstitutionality by omission or to centrally review judgements of *amparo* or other relevant constitutional rulings issued by regular courts. Moreover, its interpretations of the Constitution did not have a general binding effect.

However, it should be borne in mind that the main ideas behind the establishment of the Constitutional Chamber pointed in the direction of a broader guarantee of human rights and of the normative force of the Constitution. Its creation also represented the crystallisation of a jurisprudential trend that had begun in the early 1980s and which exemplified the role of judges in protecting fundamental rights against public or private interferences. The Supreme Court of Justice itself supported these developments

[190] Constitutional Chamber of the Supreme Court of Justice, Judgement No. 3342 of 19.12.2002. About this strategy of the ruling majority to delegate controversial issues to the courts, see *T. Moustafa/T. Ginsburg* (note 2), 9 et seq.

and did so by invoking international human rights instruments. Moreover, this was part of an increasing tendency in Latin America toward advocating the constitutionalisation of the legal system and linking it to the proclamation and international safeguard of human rights. The following is clear: what eventually happened with the introduction of a specialised body of constitutional jurisdiction was completely different from what was expected in academic, professional, and other circles.

From a comparative perspective or on the basis of other national experiences, reservations have been expressed about the adoption of robust judicial review bodies and particularly about constitutional courts in certain contexts.[191] Weak systems of judicial review are said to be advisable in new or unconsolidated democracies as they minimise conflicts between the judiciary and political actors. It is also argued that in precarious contexts the creation of a strong court may be like handling undemocratic adversaries a loaded weapon which, if the court is captured, can have devastating institutional effects.[192] It has also been argued that the visibility that a constitutional court acquires in exercising its powers, especially under a centralised model, in accordance with the corresponding regulation or the effective functioning of constitutional jurisdiction, exposes it to the political players, making it the focus of attacks or attempts to break it down as an independent body.[193]

These observations are relevant, although they do not fully clarify whether or not a constitutional court or chamber should be established. A weak system of judicial review, like those of several Commonwealth countries, could have negative consequences in some nascent or unconsolidated democracies, if for reasons of political culture, i.e. context, the holders of political power understand that the absence of a judicial review with possible invalidating force leaves the decision-making entirely up to them. On the other hand, avoiding a constitutional court for fear of its excesses also implies renouncing the benefits that such a body can have for human rights, democracy, and control of power,[194] as illustrated by the experience of the

191 *A. Di Gregorio* (note 3), 213 et seq.

192 *D. Landau/R. Dixon* (note 7), 1379 et seq.

193 *W. Sadurski,* Transitional Constitutionalism: Simplistic and Fancy Theories, in: A. Czarnota/M. Krygier/W. Sadurski (eds.), Rethinking the Rule of Law after Communism, 2005, 14 et seq.; *W. Sadurski* (note 174), 82 et seq.

194 About these contributions of the constitutional courts in said contexts, see *S. Issacharoff,* Fragile Democracies: Contested Power in the Era of Constitutional Courts, 2015, 17 et seq.

Colombian Constitutional Court.[195] Its exposure and performance have certainly made it a target of attacks, but the reliability it has gained in the eyes of the citizenry gives it an anchor that is difficult to undermine. This also corresponds to the function of that Court within the constitutional project of 1991.[196]

In analysing this issue, the context must be mentioned not only to differentiate between new or unconsolidated democracies and those that are supposedly entrenched, but also to understand that within one or another reality or nation there may be factors that help determine whether or not to establish a complete system of judicial review or a strong constitutional court. In this regard considerations relating to the system of government can also have an impact. It has been said, for example, that the presidential system offers a space for the development of strong constitutional courts,[197] as there is a powerful president and an independent legislature along with the consequent need for an impartial judge to coordinate the corresponding institutional interactions. But there are surely many other reasons for the adoption of these courts which explain their importance in various parliamentary systems. Moreover, the above-mentioned justification would not be applicable to many Latin American presidential systems that have such courts.

In any case, the key lies not so much in the name, organisational structure or position of the main jurisdictional body in charge of judicial review, but rather in the powers it holds and, above all, in the way in which it exercises them. The excessive activism of a constitutional court inaugurated at a time of transition to democracy whose basis in the social and political convictions of the majority is fragile – even more so those with post-sovereign constitutions of fragmented democratic legitimacy – may cause it to be vulnerable to attempts at neutralisation or political occupation and that its possible legacy may be prematurely destroyed.[198] While an adequate combination of the defence of the authority of the court and of the value of prudent application of the law in the resolution of conflicts of high political content is capable of bearing fruit in the short and medium term in the democratisa-

195 *N. Osuna*, El Sistema de justicia constitucional en Colombia, in: A. v. Bogdandy/J. Casal/M. Morales Antoniazzi/M. Correa Henao (eds.), La jurisdicción constitucional en América Latina: un enfoque desde el Ius Constitutionale Commune I, 2019, 193 et seq.

196 *M. J. Cepeda Espinosa,* The Judicialization of Politics in Colombia: The Old and the New, in: R. Sieder/L. Schjolden/A. Angell (note 52), 67 et seq.

197 *B. Ackerman,* The Rise of World Constitutionalism, Va. L. Rev. 83 (1997), 789.

198 *A. Arato,* Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, Now What?, SAJHR 26 (2013), 19 et seq.; *W. Sadurski* (note 193), 14 et seq.

tion effort,[199] the styles of adjudication are important and the court or constitutional chamber can adapt or administer them to gain authority.[200]

The powers of the constitutional court or chamber are equally important when assessing the relevance of its adoption, not only in terms of its magnitude as generically considered, but also in terms of its projection. A constitutional court whose powers concern exclusively or mainly the control of the constitutionality of laws, especially in an abstract way, will probably tend to come into frequent conflict with the legislator, causing it constant wear and tear that would be difficult to compensate for, or into a maximum self-restraint detrimental to its reliability as an instance of control and constitutional guarantee.[201] On the other hand, a constitutional court with knowledge of constitutional remedies for the alleged violation of fundamental rights or similar claims in concrete situations will be able to advance in the construction of its judicial doctrine and in the defence of the Constitution without always entering that confrontational field. Furthermore, the achievements it can make in the protection of individual rights will strengthen its authority as a judicial body and its community image, preparing it to face more challenging political disputes in the future. The resolution of jurisdictional disputes between the central or federal power and the federative or local entities endowed with constitutional autonomy is another factor that can broaden the functionality of a constitutional court.

Beyond the discussion on these and other aspects of institutional design, a lesson that deserves to be highlighted is that a constitutional court or chamber will hardly be able to fulfil its institutional mission if it is intended to act alone in defence of the Rule of Law and democracy. If there are no important means of institutional containment in the rest of the political system and the constitutional jurisdiction is overstrained as the only actor, then

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199 Regarding that issue, the experience of the German Federal Constitutional Court is illustrative in *C. Boulanger,* Hüten, richten, gründen: Rollen der Verfassungsgerichte in der Demokratisierung Deutschlands und Ungarns, 2013, 73 et seq.; *C. Boulanger,* Vergleichende Verfassungsgerichtsforschung: Konjunkturen verfassungsgerichtlicher Autorität am Beispiel Bundesverfassungsgericht und ungarisches Verfassungsgericht, in: R. v. Ooyen/M. H. W. Möllers (eds.), Handbuch Bundesverfassungsgericht im politischen System, 2015, 918 et seq. About the ways of building judicial authority in Germany and Italy, see *A. v. Bogdandy/D. Paris,* Building Judicial Authority: A Comparison between the Italian Constitutional Court and the German Federal Constitutional Court, MPIL Research Paper No. 2019-01, 2019, 1 et seq.

200 About the relevance of the style of adjudication, see *B. Ackerman* (note 197), 794 et seq.

201 *L. Sólyom* (note 181), 8 et seq.; *C. Boulanger*, Vergleichende Verfassungsgerichtsforschung … (note 199), 921 et seq.

there are serious risks for its healthy functioning or survival.[202] The constitutional design must favour vertical and horizontal checks and balances, allowing a constitutional court or chamber to better fulfil its jurisdictional functions.

In addition, the regulation and interpretation of the powers of a constitutional court or chamber should not be alien to the idea of moderation or limitation of public power. It would be a mistake to seek to limit it through an unrestricted jurisdictional power instead of doing so through a general legal framework that ensures institutional balance. The constitutional court or chamber should not have universal power of constitutional protection, but rather the powers that are considered reasonable and necessary, materialised in specific actions and processes. Likewise, it must avoid the self-assignment of competences. This does not exclude the recognition under certain conditions of implicit powers, but it does rule out a blanket clause of functions such as the one written by the Venezuelan Constitutional Chamber. Otherwise, the constitutional court or chamber will often come into conflict with the legislative branch or ordinary judges. In particular, the overstretching of the binding scope of their interpretations of the Constitution must be avoided and the participation of ordinary judges in the constitutional construction must be encouraged.[203]

If the constitutional court or chamber, in particular in mixed or hybrid schemes of constitutional justice, does not have the support of a judiciary that is also committed to safeguarding these principles, or if it carries out its activity without the contribution that ordinary judges can make in interpreting and guaranteeing the Constitution, the incentives for political capture of the constitutional jurisdictional leadership are increased.[204]

Here we can see again the importance of context, since in certain circumstances the constitutional court has been called to promote a different reading of legality guided by the Constitution and by the recovered democratic values as opposed to an ordinary judiciary still dominated by the views of an authoritarian political order that has been defenestrated. The transition scenarios, precisely, are an example of situations in which the constitutional courts are guardians or sometimes co-founders of the nascent constitutional system.[205] They have not always been successful in this endeavour, especially in stabilising democratising achievements, but in various situations they

202 *C. Boulanger*, Vergleichende Verfassungsgerichtsforschung … (note 199), 921 et seq.
203 *J. Casal H.* (note 21), 260 et seq.
204 *W. Sadurski* (note 174), 82 et seq.
205 *C. Boulanger*, Hüten, richten, gründen … (note 199), 47 et seq.; *C. Boulanger,* Role Theory, Democratization and Comparative Constitutionalism: Constitutional Courts as "Guardians", "Umpires" and "Founders ", Law and Society Annual Meeting, 2015, 1 et seq.

have contributed significantly to facilitating the transition to democracy.[206] Nevertheless, a constitutional court cannot always count on enough political and social support to fulfil that role.

Venezuela was not experiencing a transition to democracy in 1999, but the beginning of a cycle of uncertain outcome at a still democratic time. Proposals for reform that had been blocked since the early 1990s were taken up in 1999, including the creation of the Constitutional Chamber. But it was already difficult for changes to take place within the prevailing political order, given the breakdown of traditional parties and political leadership. The reforms came late and from those who, at least as a prevailing trend, were prepared to use them in a direction different from that for which they had been conceived.

Such a transition may occur, however, in the near future, and the Constitutional Chamber may be a key player in the reconstruction of democracy. The terms in which such a transition will be set out will probably lead to a scenario in which the Chamber must frequently exercise dispute resolution functions between diverse political and ideological factors, with an arbitral or sometimes articulating and composing role, along with occasional and progressive interventions of a foundational nature to illuminate the path towards the democratic government scheme claimed.

Judicial independence is a necessary condition for the Constitutional Chamber to perform relevant tasks in such circumstances. At the same time, and as empirical studies illustrate, the formal or organisational independence of the judiciary and the Constitutional Chamber is not sufficient[207] if it is pretended that they influence the functioning of political institutions on the basis of the principles of the Rule of Law and democracy. Awareness of the mission that a constitutional jurisdiction must fulfil is essential, and this is often linked to social expectations of the role it should play and the legitimacy that results from satisfying them. The experience of more than twenty years, since 1999, indicates that the preservation of political pluralism, the guarantee of the separation of powers and other elements of the Rule of Law, and the protection of human rights will be at the heart of the institutional agenda of the constitutional jurisdiction in Venezuela. Its success will depend to a large extent on strengthening the democratic culture which integrates the holding of periodic elections with the legal framework and political practices conducive to the alternation in power and respect for such rights.

206 *S. Issacharoff* (note 194), 137 et seq.
207 *T. Moustafa/T. Ginsburg* (note 2), 16 et seq.