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THE JUDICIAL BRANCH IN VENEZUELA &
THE LACK OF CHECKS AND BALANCES

by

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A thesis submitted in fulfillment of the requirements
for the Honors in the Major Program in International and Global Studies
in the College of Sciences
and in The Burnett Honors College
at the University of Central Florida
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Thesis Chair: Dr. Houman Sadri

ABSTRACT

Although the wave of democratization already took place in Latin America, Venezuela has experienced a reversal in the past decade. In earlier years, the higher courts (although independent) had no impact on society; the justice members only assumed a symbolic role with no real importance, but with time, this characteristic started to interchange and the Judicial branch began to get involved in issues regarding its civil society. Consequently, the elected President Hugo Chávez decided to neutralize the power of all branches of government, including the judiciary, by enacting a set of rules not commonly seen in a democratic country, which concentrated the majority of power in his hand, eliminating the concept of Checks and Balances.

This imbalance of power between the Executive and all other branches of government, has led to the deterioration, and almost elimination, of the independence within the judiciary. Therefore, the more the executive controls the judiciary, the less autonomy and less self-sufficiency it will have, thus eliminating the checks and balances in the Venezuelan government. In this negative relationship, the excessiveness of power exerted by the Executive branch is the main variable that controls the judicial branch. I will present valuable background information to this topic, and I will then suggest a concise solution to the problem of government imbalance between the branches in the Venezuelan government.

DEDICATION

For my beloved family, who listened to me whine and cry through this entire process. Thank you for your amazing support and motivation. Gracias Mami y Papi por siempre estar al otro lado del teléfono para calmarme y animarme. Y a Salito, mi querido hermano que siempre está ahí para escucharme.

For all my Committee members: Dr. Sadri, Dr. Farcau and Dr. López, who guided me through this entire process, and helped me achieve success.

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INTRODUCTION

Significance

The country of Venezuela presents an important example of the necessity of proper equality and independence within government branches. By maintaining boundaries, the management and quality of all levels of society are ensured, and depriving a government of such a right will unleash a series of problems, such as Human Rights violations and the creation of corruption. Based on the literature I found, one can infer that there is no notion of government transparency in Venezuela; the corruption and discrepancy within the government has led to all sorts of bureaucratic malfunctioning and the blurring of their chores, a matter that has an overall effect on the general population of the country.

In the case of Venezuela, it is important to notice how the judicial branch has become a puppet of the executive branch; it is no longer regarded as an institution capable of protecting its citizens and its constitution, but it is more like a slave at the mercy of the ruler. After several processes and law formulation, President Hugo Chávez has not only created a new Constitution that fits his presidential agenda, but has also transformed the judiciary into a branch with only a symbolic role, stripping it of the little capacity it had in the past.

Literature

According to the experts, there is a high correlation between the excessive power of the executive branch and the diminished independence of the judicial branch. According to John Martz and David Myers, the post 1959 era in Venezuela was characterized by a democratic reformist experiment.¹ In this time period, Venezuela broke from its traditional political pattern and became democratic under the leadership of Acción Democrática and Social Christian COPEI, the two democratic parties at that time.² However, Martz and Myers affirm that the policy choices of the parties were still wasteful attempts, exhibiting “a large margin of error” making the future of Venezuelan democratic system unpredictable.³ Rooted in the long history of scandals, Venezuelans believe that the courts have been rotted to the core for a long time; even in 1995, the courts were already believed to be influenced by “economic and political, family ties, party affiliations and romantic relations”.⁴ Experts from the *Journal of Interamerican Studies and World Affairs* attest that the challenges that Venezuela has been facing since the 1990’s are related to the decomposition, legitimacy, and governability of its democratic regime.⁵ They also indicate that the government entered a disequilibrium when the “habit, interests, or belief” in the legitimacy of the branches stopped creating submissiveness on the part of the governing parties, transferring the legitimacy to new institutions and rulers, in this case to the Executive branch under President Chávez.⁶ Furthermore, the literature shows that the judicial system already lacked cohesiveness and it was under constant threat of collapse before Chávez came into power in 1999; part of this problem originated from the lack of government funds to all court levels, deteriorating its ability to function and to organize itself.⁷ Additionally, the Supreme Court judges, originally appointed by Congress, were burdened with unmanageable loads of work and their efficiency and effectiveness was in turn affected gravely.⁸ In the compiled work *Lessons of*

the Venezuelan Experience, it is stated that the disconnect between the “civil society and politics” has transformed the Venezuelan crisis into a broad theoretical problem.⁹ Some of the concerns regarding the judiciary come from corruption among the judges, shown in their tendency to be influenced in deciding civil cases by their relationships with the defendants, instead of being based on the rule of law.¹⁰ The compiled work also states that the legal system is one of the weakest links in the “social policy” chain in Venezuela.¹¹

The Economist released an article in which The World Bank affirmed that the legal system in Venezuela is a “disaster-corrupt, politicized and grossly inefficient” where judges are constantly being persuaded by money.¹² This vicious circle of corruption constantly causes reforms to fail because the institutions and key players that are in charge of accepting them or denying them are illegitimate.¹³ The poor functioning of the justice department continues to be the major cause of the loss of legitimacy in spite of the attempt in 1992 to reform the judicial system layout in the Constitution.¹⁴ The judicial branch in Venezuela has been handicapped by the non-stop irregularities and its weakness in the face of pressure from the other branches of government.¹⁵ For these reasons some programs were implemented for a period of time to modify the judicial branch, but then in 1996 it faced a “judicial emergency” under the presidency of Caldera when it failed to achieve such changes.¹⁶ In 1999, after Chávez took charge of the presidency, a “judicial emergency commission” was set up to draft legal clauses for, yet again, a new constitution and to “evaluate the work both of judges and of the members of the Supreme Court;” all in hopes of fixing the crisis of the judiciary.¹⁷ Illustrating some of the issues faced by the judiciary was the fact that by 1999, 23,000 prisoners were still waiting to have their trial, even though new decrees were issued to “modernize” the judiciary and guarantee a speedy

trial.¹⁸ In the 1999 Bolivarian Constitution, procedures were included for the selection and training of judges in order to guarantee more effectiveness in the courts.¹⁹ Furthermore, the Bolivarian Constitution granted Chávez the power to enact the “Enabling Law” on November 7, 2000, which granted him the right to institute laws without the permission of the other branches of government, indicating the overstepping of the constitutional boundaries between the executive branch and the judicial branch.²⁰ This reveals with clarity that in Venezuela predominates a weak rule of law, a characteristic that is not usually part of a democratic regime that contributes to the instability of the political arena in the country.²¹

In 2004, a Constitutional law was enacted to regulate the functioning of Venezuela’s Supreme Court, including an increase in number of the Supreme Court Judges from 20 to 32, which allowed Chavez to “pack the court” with his most allied followers.²² Among other changes, the law included provisions that allowed for new nominees to be appointed by a simple majority vote if and when a two-thirds majority vote failed three times, and for the nominations of judges to be annulled if they did not fulfill all appointment requirements.²³ According to the Human Rights Watch, this constitutional law, also known as the new “Organic Law,” exacerbated the damage already done to judicial independence in Venezuela by stripping the Supreme Court of its autonomy.²⁴ The new law made the Supreme Court judges less autonomous and more prone to political persecution by parties, and forced them to make decisions based on their political convictions.²⁵ The Bolivarian Constitution completely modified and blocked the powers of the judicial branch by creating a new “Commission of Judicial Emergency”.²⁶ In Article 17 of the Transitory Regime one can find the decree that allowed the destruction of the Supreme Court of Justice and its three chambers (political-administrative, criminal, and civil

cassation).²⁷ Later, this would also establish the new Supreme Tribunal of Justice, with the new constitutional; political-administrative and electoral; and social, civil and criminal cassation chambers.²⁸ These new chambers of justice focus on the various differences between lawfulness and the rule of law, in most cases bringing the argument that the act of justice is as significant as the rule of law, a concept that fails to bring this concept forward.²⁹

The literature also shows the extreme decrees enacted by Chávez during his years as President. The decrees include laws such as the Law of Social Responsibility in the year 2005; which was meant to limit the freedom of expression in the social media.³⁰ This controversial law was highlighted with the closure of the Radio Caracas Television, Venezuela's oldest TV channel.³¹ Other decrees and laws will be discussed in later chapters to highlight the importance of Chávez's control over the judiciary.

There is extensive evidence that Venezuela has been transformed under the rule of power of President Chávez, and it will continue to be transformed in the years to come, affecting all aspects of civil society. In this research I will show a variety of transformations that Venezuela's political landscape has gone through over the last decade under the presidency of Chávez, constantly making a connection with the concept of checks and balances, and the lack of it in this specific case.

Gap in Literature

The literature on this subject area does not come up with any clear conclusion regarding the relationship between the neutralization of powers in the judicial branch, the elimination of checks and balances, and the increase of centralized power in the executive branch. Mostly, the

literature focuses on the changes in the constitution made by the executive leader in attempt to “restructure” the judiciary, but the literature does not talk about the implications of these changes, specially the violation of the checks and balances and the lack of equality between the branches of government. Furthermore, the majority of the literature and studies of Venezuela in the last decade, concentrate on the phenomenon known as “Presidentialism” focusing on President Chávez. This concentration of perspectives on one individual suggests that the President is in fact “Venezuela”; meaning that absolutely all of the issues happening in the country, from violence to poverty, can be traced back to an action done by Hugo Chávez. Although in a great number of instances this might be the case, there are other important factors and actors that affect public policy and take an important role in the functioning of the government. Therefore in this research, I will analyze a variety of variables ranging from the President’s executive orders to the constant changes in the constitution, that inevitably lead to a degradation of the judicial system in Venezuela and the close eradication of checks and balances in this country.

Research Design

My research will be composed of four parts. The first one will describe the Old Constitution and its major areas of impact, which will be later contrasted with the new Bolivarian Constitution of 1999 enacted under President Hugo Chávez. Next, there will be a section about the judicial branch, which explains the structure of the system and the history of the branch, including its characteristics prior and after Chávez’s presidency. The last section will explore the

Executive branch and its excessive control, covering a range of its radical executive orders and appointments under the presidency of Chávez.

All sections will finally come together in a conclusion and explain the consequences of such a lack of governmental checks and balances, especially between the executive and the judicial branch, and after a careful analysis, a possible solution will be offered to the problem currently present in Venezuela.

CONSTITUTIONS IN VENEZUELA PRIOR TO THE 1999 CONSTITUTION

Venezuela's political landscape can be characterized as a fluctuating graph: It has had periods of stability followed by periods of turbulence, in different degrees and in different lengths. It is because of this trait that the country's constitution has been a means to an end in the political arena, where it is constantly molded and adjusted to repair the problems experienced at the time of its ratification, or in some situations to fit the needs of its creator.³² This chapter will cover some of the key aspects of Venezuela's previous constitutions with an emphasis on the 1961 Constitution, which will serve as background information to understand the radicalism of the 1999 Bolivarian Constitution.

The first Constitution in Venezuela was drafted in 1811, following the 5th of July of 1811 the day the Declaration of Independence was signed, signaling the separation of Venezuela from its former ruler Spain.³³ The 1811 constitution was produced by the first Constitutional Assembly and it gave birth to the "Confederation of States of Venezuela".³⁴ Nineteen years later, Venezuela became an autonomous nation separating itself from the Republic of the Great Colombia, created by the former liberator Simón Bolívar; and the 1830 Constitution was drafted by a second Constitutional Assembly.³⁵

The years that followed were marked by a wave of political distress. In 1958, the Revolution of March took place and hundreds of people died across the country.³⁶ A series of wars known as the Federal Wars occurred as a result of the previous revolution.³⁷ Towards the

end of the Federal Wars, the 1958 Constituent Assembly united again, and created a new Constitution that year.³⁸ Other conflicts continued throughout, and in 1863 the fourth Constitution was drafted to implement the essence of a “federal state system” in the country.³⁹ A few years later, Guzmán Blanco became the President and successfully achieved the end of all Civil Wars by the year 1880.⁴⁰ Then in 1893, a fifth Constitution was formulated.⁴¹ In 1899, the “Invasion of the Seventies” took place and the country was attacked by Cipriano Castro Ruiz; a series of wars started as a result but were finalized in October with the “Revolución Liberal Restauradora” (Liberal Restoration Revolution), where Ruiz became Venezuela’s president.⁴²

Two years later, a new Constitution of 1901 that included new presidential mandates was created.⁴³ After the military regimes of Cipriano Castro Ruiz and Juan Vicente Gomez finally came to an end, a seventh Constitution was drafted in 1914, which lasted thirty two years.⁴⁴ Then in 1946, following the dissolution of President Isaías Medina Angarita’s government, another National Constituent Assembly was created along with a ratification for another constitution, which was established that same year.⁴⁵ Next, in December 1952 Marcos Pérez Jiménez became the president and the following year he drafted the 1953 Constitution, signaling another period of dictatorship in Venezuela.⁴⁶ Even though, the year of 1958 marked the longest period of relative political stability where Venezuela was finally able to grow as a nation and develop its economic sector.⁴⁷ The year 1958 was also the time when the Pact of Punto Fijo was created by the country’s three strongest political parties (Acción Democrática- Social Democratic Party, COPEI- Christian Democratic Party, and Unión Republicana Democrática- Liberal Party); with this pact the parties agreed to equally share the power of the government, ignoring the turnout in the elections.⁴⁸ As a consequence of this monopoly, the government became extremely corrupt

and fraudulent.⁴⁹ Thus, it is under this presidency that the most significant occurrence of political dissatisfaction begins, ultimately leading to the 1999 Bolivarian Constitution and Chávez's rise to power.⁵⁰

The discontent grew larger as a consequence of the “lack of evolution from a system of overly centralized political parties”.⁵¹ And in 1961 another Constitution was drafted to establish a system of proportional representation at all governmental levels.⁵² This initiative originated within the Congress, and it was fully supported by the main political parties, showing the abilities that Venezuela had gained as a democratic entity throughout the years, but also highlighting its lack of ability to address the dissatisfaction of the citizens.⁵³ With this constitution, the government was able to experience (up to some extent) concordance and validity.⁵⁴ Unlike the previous Constitutions, the 1961 one was drafted by a special Commission and not a Congressional Assembly; a political decision based on the fact that since the country was undergoing major political imbalance, making the process open for election would be dangerous, therefore decided to make the drafting a closed process.⁵⁵ The whole idea behind the new document was to finally restore the democracy in Venezuela through national consensus, but instead of making the process “participatory,” it was more legitimate and more supported by the parties.⁵⁶ This constitution was not able to solve all the problems, instead it continued to develop the political crisis that was already growing at the time. The political parties had created a “closed-block system” of voting where they exerted control over the elections and the citizens grew disconnected to their elected government.⁵⁷

It is at the height of the Venezuelan dissatisfaction that Chávez found an opening to bring forth his ideas. He preached to the people, and said the things they wanted to hear; his ideas were

convincing and in essence, brilliant. In the next section, the process in which the 1999 Constitution was created and adopted will be explained.

THE 1999 CONSTITUTION

As explained in the previous section, Hugo Chávez came into power at a time when the people of Venezuela were at great disapproval of their seating government. He used this in his advantage in order to promote his initial agenda which consisted in writing a new constitution; a process that had been done several times in the past, and that was actually rejected in the previous presidency. The new Bolivarian Constitution of 1999, contains several key aspects that make this Constitution entirely different from the rest, a characteristic that redefined Venezuelan politics in its entirety.

To have a better understanding and appreciation of what took place in Venezuela the moment the 1999 Constitution was adopted, I want to offer some background information of what characterizes politics and democracy in Latin America, and what sets Venezuela apart from the rest. Since the information in this section slightly touches the issue, I encourage the reader to get informed in this subject matter since it offers incredible insight about a region of the world so greatly intertwined with global politics.

Background of Latin American Politics

Generally speaking, democracy as an organization establishes an arrangement of power in the institutions of a society; but in Latin America this arrangement is weak, leaving the governmental institutions vulnerable and unstable, thus the reason why most of the countries in this region have a delegitimized democracy.⁵⁸ In a fully functioning democracy there lies a consensual relationship between the government and the people, and it is established by the laws

in a constitution.⁵⁹ With a well established constitution, all the procedures and institutions are strongly created and in return, it applies the concept of checks and balances, forcing the branches of government to follow the rule of conduct.⁶⁰ It is this very own concept that is missing in Latin American countries, more specifically in Venezuela: there is no such thing as a “social contract between the rulers and the ruled,” instead the constitution simply describes a society with no room for failure, leading to the constant need to create a new constitution in hopes of achieving change.⁶¹

When a country embarks in the process of transforming its constitution in order to redefine its sociopolitical aspects, it makes the process a “pre-eminent political act;” and in many cases, this redefining has a sole purpose of assembling a more forceful government.⁶² As it is the case in many Latin American countries, the constitutions have been created by political figures in order to fulfill a specific bureaucratic program (an example of a “pre-eminent act”), generally including a creation of new institution.⁶³ These young institutions have the goal of ensuring that certain services and laws will be in fact enacted and kept during future governments, but normally the laws that dictate how to create these institutions are extremely specific and untrustworthy, debilitating the overall process.⁶⁴ Thus, not only the new institutions are created under unsteady principles, but the adherence to the laws under the new constitutions also becomes difficult and an inevitable disparity between the law and the reality of the country takes root.⁶⁵ It is because of this reality-law gap, materialization of the conditions needed to bring into effect the legislature in the new constitution is almost impossible and unavoidably brings the whole process to a halt, as it is the case in Venezuela.⁶⁶

In Latin America, the mere existence of a mandate does not imply that it will be implemented or that it will have the resources to access them; the entire political system, especially the judiciary, is poor, inefficient, and corrupt.⁶⁷ The corruption stems from the excessive power in the hands of the executive, a trend known as “Presidentialism,” common in Latin America.⁶⁸ Presidentialism, converts the president into the biggest symbol of power in the country, rather than the government itself, leading to “legitimacy beyond the needs of democratic governance”.⁶⁹ Most of the presidents are allowed to formulate laws, outline the government’s budget, summon legislative sessions, obstruct with the rulings of the Supreme Court, and most importantly suspend the Constitution; thus, if desired, the entire bureaucracy can be redefined by the president, with an eye towards his personal agenda.⁷⁰ The aforementioned can be found in the current government of Venezuela. Since early in his presidency, President Chávez used the very thin separation of powers in his government in a strategic manner and he was able to achieve his ambitious agenda under the protection of supposed democratic processes, such as the referendum. This allowed him to achieve his goal of re-writing Venezuela’s 1961 Constitution in a very short period of time.

The 1999 Bolivarian Constitution

As mentioned before, in Venezuela there have been several Constitution-making processes in the years: 1858, 1863, 1901, 1946, 1953, and 1961, which happened for reasons such as a coup de tat, de facto rejection of the constitution, a civil war, or a revolution.⁷¹ Unlike

the others, the 1999 constitutional reform resulted from a “formal democratic process”, a complete novelty.⁷² This novelty was aided by the fact that Venezuela’s political system had been going through a political crisis for many years, in which the possibility of amending the constitution was highly considered, if the right idea was set forth.⁷³

As sources indicate, in 1984 the Presidential Commission for the Reform of the State (COPE) was formed to evaluate the constitution and recommend some reforms.⁷⁴ Some of the reforms included: “A fresh approach to the electoral funding, the development of internal party democracy, an overhaul of the electoral system, and a project of political decentralization,” and a new voting arrangement to disable the two main parties (AD and COPEI) that had previously maintained a monopoly of the government.⁷⁵ The reforms continued to be ignored and shut down, and in June 1989, after the crisis of the “Caracazo” (a series of riots that ended up in the death of over 500 people), COPE suggested a total reformation of the 1961 Constitution to establish a “New Republic,” where a Special Joint Chamber Commission for the Revision of the Constitution was created by Congress.⁷⁶ The Commission was to be directed by Rafael Caldera (President at the time) and composed by a majority of the old parties (Acción Democrática and COPEI), causing incessant gridlock.⁷⁷ The failure of this commission revealed the government’s institutional deterioration and its failure to answer to simple needs, made the people of Venezuela extremely dubious of the government.⁷⁸ A few years later, the coup d’état of 1992 took place, and the Special Joint Chamber Commission tried to advance once again the idea of a new constitution in order to find a way out of the institutional crisis created by all the military insurgencies.⁷⁹ The radical content of the Constitutional draft led to a halt of the process by August of that year.⁸⁰ Among some of the proposals, there was an amendment to open up more

channels for public participation and to confine role of political parties, with direct and semi-direct apparatuses for participation; all with the sole intention to break the chain of “the exclusively representative nature of Venezuelan democracy”.⁸¹ It was also included the concept of majority vote and proportional representation, a common characteristic in European governments.⁸² The main problem was that the Venezuelan people were afraid of any changes, since the credibility of the government and the political parties was at an all time low, leading to a futile attempt to draft a new constitution.⁸³ The only success that came out of this process was that some of the proposals were later adopted in the institutional reforms of 1999.⁸⁴

The next attempt to awaken the idea to rewrite the constitution was by former President Caldera who returned to the race for the presidential elections, but he also failed.⁸⁵ Before 1998, the concept of a new constitution was outside the scope of possibilities, since there was a severe problem of dependence on the “intellectual, political, and mobilizing capacity of the political parties, at a time when their legitimacy as leaders and representatives is seriously weakened and questioned” by the people.⁸⁶ The critics alleged that once the Venezuela’s condition at the time was taken into consideration, a referendum seemed to be polling the system as a whole, rather than the new constitution, thus making rejection and indifference a very likely effect.⁸⁷ Thus, it wasn’t until 1998 that Chávez was able to present the idea of a new constitution that was comforting enough for the people to accept.⁸⁸

After he won the elections, President Chavez gave an inaugural speech proclaiming that there would be a national referendum to settle the issue of whether or not there should be elections to choose the new Constitutional Assembly, who would then draft a new national constitution.⁸⁹ Chávez argued that the only way to provide “happiness, justice, and social

equality” to his people was by drafting an entirely new Constitution, and it was put up for a vote.⁹⁰ After the referendum results were in favor of the drafting, the elections were conducted in July 1999 to select the Constitutional Assembly, in which Chavez supporters won 91% of the seats.⁹¹ The Assembly was directed by Luis Manuel Miquilena as President, and Aristobulo Isturiz as Vice President, two of Chávez’s most devoted followers.⁹²

Under this new Constitutional Assembly, there were 21 special sub-commissions, each awarded a different section of the constitution; for example, one commission led by Hermann Escarra, was in charge of receiving the requests and suggestions from the people, such as what to do with the relationship between the new Assembly and the old Congress.⁹³ The year the new Constitution was drafted polls showed that the Constitutional Assembly was regarded as Venezuela’s “supreme authority,” and the Congress as being dependent on the Assembly.⁹⁴ And interestingly enough, this “supreme authority” was completely composed of Chavez’s most fanatic advocates, and it affirmed itself as a “super power” adopting powers beyond the scope of the new constitution.⁹⁵ It is here that the first example of a breach of separation of powers is found. Not only Congress loss its ability to dictate its own processes, but a separate institution came into play, composed of radical supporters of the new government.

The Constitutional Assembly became involved in the reformation of all the branches of government. First, it created the commission of “judicial emergency” in order to disintegrate the Supreme Court, which had 15 judges at that time.⁹⁶ The President of the Court Cecilia Sosa, greatly opposed this decree and resigned her post stating that “the country’s democratic system was in danger”.⁹⁷ According to this special commission, out of the country’s 1200 judges, approximately half of them were culpable of corruption and malpractice, and that the only

solution would be to replace the entire system.⁹⁸ Thus, the Constitutional Assembly created the Supreme Tribunal of Justice with new Chambers in order to replace the longstanding Supreme Court; these chambers were named the Constitutional Chamber, the Political-administrative chamber, the Electoral and Social chamber, and the Civil and Criminal Cassation chamber.⁹⁹ In order to replace the previous magistrates, the Constitutional Assembly was also in charge of assigning the new tribunal magistrates, but since the 1999 Constitution was yet to be established, some of the appointments did not hold to the criteria that were to be included in the newer constitution.¹⁰⁰ Thus, it is safe to assume that the Assembly appointed the new magistrates according to their political preferences and not according to their abilities to serve as protectors of the law. The Constitutional Assembly remained in charge of the “functioning and the restructuring of the judicial system” until the new Supreme Tribunal of Justice had organized every aspect of its branch, restricting the Tribunal from the main power it sought to attain and it was given to a commission whose members were selected by the Constitutional Assembly.¹⁰¹ The Constitutional Assembly constantly violated the rights of due process of law and the right to a “natural judge,” which were guaranteed by the 1999 Constitution that they drafted.¹⁰² This violation and constant control of the Assembly is another clear example of the breach of checks and balances that became deeply rooted in Venezuela once President Chávez took power.

Furthermore, two other mandates were established by the Assembly; the first one an inspector of the courts and its members was appointed to ensure the proper functioning of the system, and the second one authorized the appointment of the people’s defender.¹⁰³ All of these appointments were made without any participation of the citizens of Venezuela, as it was supposed to be according to Article 279 of the 1999 Constitution.¹⁰⁴ Then, the Constitutional

Assembly disintegrated the National Congress, the Senate and the State's legislative assemblies, and it suspended elections in the municipalities.¹⁰⁵ It also assigned the newest "National Electoral Council, the Prosecutor General, the People's Defender and the Comptroller General" and the new Legislative Constitution, which obtained all legislative power until another National Assembly was appointed years later.¹⁰⁶ The people questioned these appointments in the newly established Tribunal of Justice, but the decisions were upheld on the grounds that the Constitutional Assembly had Constitutional power to do so.¹⁰⁷

After every Constitutional Assembly commissions was set up, President Chávez decided to embark on a presidential tour around the globe; but when he came back he found a number of articles that opposed his personal goals. Notably, an article that addressed the issue of the freedom of the press and an article regarding abortion and the "right to life," which would cause tremendous tumult among the Catholic Church in Venezuela and the international media, and the fact that the Constitution Assembly had struck down the renaming of the country to "Bolivarian Republic of Venezuela".¹⁰⁸ After some discussions and agreements, the articles were accommodated to be less drastic, and the draft of the new Bolivarian Constitution was ready.¹⁰⁹ After a very short time, the new constitution was ratified December 1999, by 71% of the votes.¹¹⁰ With this constitution, Chávez managed to change a constitution that used to provide Congress with far-reaching powers, into a constitution that gave extensive powers to the executive branch.¹¹¹ Along with the ratification of the constitution, there was an agreement that the following year there would be national elections in which every elected official, including the president, would be under the scrutiny of the people.¹¹² In July 2000, the results were out and Chávez was elected once again as President of Venezuela, with an actual increase of the votes.¹¹³

Unlike the new Bolivarian Constitution of 1999, the 1961 Constitution included provisions for the Congress to “override the President’s suspensive veto [power] with a mere majority” and it excluded provisions that allowed the executive to introduce new policy.¹¹⁴ Furthermore, the previous Constitution also granted the power to draft and pass new legislation to the legislative branch, with a simple majority and without consulting the executive.¹¹⁵ And this was all transformed under the new constitution. In 2001, Chávez launched a set of 49 decrees under the Enabling Laws to fulfill the requirements of the Bolivarian Constitution, giving him the temporary power to make laws without the approval of the National Assembly.¹¹⁶ Some of the provisions allowed for the concentration of power in the executive, especially by the president.¹¹⁷ During this time Chávez was able to draft laws that covered topics such as the oil and fishing industry, the redistribution of land, and financial policies.¹¹⁸ One of his laws was the extension of the Presidential term beyond five years and also the right for immediate re-election, on the grounds that a restricted 5-year term was not sufficient for repairing Venezuela.¹¹⁹

Under the newly ratified Constitution, the country’s Senate was annulled and a unicameral National Assembly was created.¹²⁰ Furthermore, the National Electoral Commission and the People’s Branch (or Citizen Power branch) were the two new branches of government introduced in the ratified constitution.¹²¹ The Citizen Branch was created as a referee, in charge of making all other branches of government to comply with the Constitution; it was composed by the Comptroller General, the Attorney general, the People’s Defender.¹²² The National Electoral Commission was granted the power to oversee all aspects of all civil society elections, such as those for organizations.¹²³ The right for the people to invoke referendums with powers to “revoke legislation, and recall politicians including the president” was also a major aspect in the

constitution, with an original aim of making a more open democracy.¹²⁴ These branches allowed for the load of the political parties in the system to diminish, allowing new parties to participate in governmental affairs.¹²⁵

Additionally, all throughout the new document the power and independence of the executive branch and the military were reinforced. The powers of the president were broadened, with provisions such as the extension of the presidential term to six years and the right to immediate reelection, and the military received new rights such as voting and replacing the requirement of approval by Congress by the requirement of the approval by the president.¹²⁶ Now the decision-making authority lied within the executive branch, and all the other policy institutions were regarded as weak and unnecessary, which in turn made the Venezuelan citizenry more dependent on the President as a leader, pointing towards “the antithesis of democracy”.¹²⁷ In addition, the constitution served to redraw the political and administrative frame in order to curb the influence away from governors, mayors and local elected officials, towards the executive; most particularly the Law on Communal Councils which established the communal powers within society, that forever altered the traditional governing structure, by making the “state apparatus” superfluous.¹²⁸ The new Bolivarian Constitution supports the rule of law but within a new militaristic foundation, that was never present in any previous Constitution in Venezuela.¹²⁹ It makes the separation of power ambiguous, by making all other branches subject to the executive branch, establishing a “statized” economy.¹³⁰

The new 1999 Constitution completely transformed the Venezuelan political landscape.¹³¹ One of the most significant changes in the political structure that was supposed to take effect after the adoption of the new Constitution was the transition from a “centralized

federation of the past hundred years into [a] decentralized federation, with distribution of power towards states and municipalities”.¹³² But although the 1999 Constitution points towards this direction, it continues to be unapplied, since within the articles lays a paradox. On one hand, Article 4 and Article 158 of the 1999 Constitution state that Venezuela is a “federal decentralized state,” while other articles grant centralized powers at the “national level” completely cancelling out any progress made towards decentralization.¹³³ Furthermore, with the new Constitution and the Venezuela became the world’s only federal state that runs without a Senate, eliminating important powers that ensure equality between the states, and granting previously non-existing powers to other commissions.¹³⁴ Some of the new commissions were in charge of drafting legislation regarding the rights of the indigenous people of Venezuela, which had to be greatly considered since out of the 23 million people, around 316,000 are indigenous (including 26 different ethnic groups).¹³⁵ This was a breakthrough aspect of the new constitution, and at the inauguration ceremony of the constitution, Rigoberta Manchu from Guatemala, Nobel Prize winner and one of the greatest indigenous leaders of Latin America, arrived in Caracas and gave her “blessing to the changes relating to indigenous rights in the new constitution”.¹³⁶ Nonetheless, aspects like this put the stability and justice of the Venezuelan government at risk. Simple powers that were once exercised by the states are now regulated by “national legislation”, abolishing the independence of the states.¹³⁷ An example of this intervention is the administration of the legislative councils of every state by the National Assembly, eliminating the power of the state to interpret their own State constitution and regulate their “own branches of government”.¹³⁸ Furthermore, the distribution of taxes was another power taken away from the states and granted to the National Assembly, which sets up a national budget and allocates no

more than 20% of the “national public income” to each state.¹³⁹ This legislation was a breach of a standard of every country, since it took away the legislative power of states to ensure a separation of powers.¹⁴⁰

The citizens of Venezuela took notice of this situation and the opposition decided to exercise the right to a “general referendum” which was granted by the new Constitution in matters of paramount importance regarding the nation.¹⁴¹ The referendum was requested on the grounds that the possible dismissal of the President was a substantial reason, but all sorts of impediments were imposed by the government.¹⁴² The Tribunal of Justice declared the referendum illegal since a “recall referendum” had already happened in 2002; then in 2003, the opposition set up a nation-wide collection of signatures in order to call a referendum, but Chavez declared that the signatures were fake, thus invalid; the opposition once again called for the collection of signatures, and once again Chavez said that most of the signatures were invalid; in 2004, another round for the collection of signatures took place, and although the process was delayed, a referendum took place on August 2004.¹⁴³ Since the government requested to keep all of the signatures, thousands of Venezuelans were denied of their passports, university diplomas, lost their jobs, and in some instances were victims of violent acts by supporters of the government.¹⁴⁴

The 1999 Constitution was drafted as a political vehicle that seems to favor people’s demands but in reality it aids the active government to remain in power and in control. First of all, the Constitution limited the autonomy of the municipalities making it almost impossible for them to become representative of their people.¹⁴⁵ According to the expert Allan R. Brewer-

Carías, a former Professor at the Central University of Venezuela and the Vice President of the International Academy of Comparative Law:

What the 1999 Constitution created was a centralized, anticipatory democratic system that deliberately confuses the instruments of direct democracy with effective political participation. That is why the citizen's assemblies and the communal councils, have gradually replaced local governments, being in contrast, directed from the center, and without any general electoral representative origin. Nonetheless, they create the idea that the people are participating....In any case, the result is that the scheme of centralized federation of the Constitution of 1961 has been strengthened and aggravated in the 1999 Constitution and through its unconstitutional developments, despite it identifying the federation formally as a 'decentralized federation' (Article 4)"¹⁴⁶

All of this shows that the Venezuelan government extracts its authoritative power from the disfiguration of the separation of powers, which is mostly concentrated in a National Assembly that is controlled by the Executive branch.¹⁴⁷ The domination by the Executive planted the seed of authoritarianism in Venezuela, which has continued to grow and concentrate more and more power in the hands of this one branch of government.¹⁴⁸ This section reveals that President Chávez adopted the constitution as an instrument to further expand his personal agenda; he was successful at convincing his people that a new constitution was the only means to solve the political problems, and instead drafted a document that transformed all aspects of government including the long-standing institutions that now serve his purpose. Furthermore, the judicial system was transformed in such a way that it made it even harder to function and it made it easier for other institutions, such as the Constitutional Assembly to control it and maneuver it at its disposition. A fact that will be shown in the next section.

THE JUDICIAL BRANCH

The structure of a government rests upon three pillars: the executive, the legislative, and the judiciary. These pillars have distinct, but nonetheless crucial functions which together are able to maintain the system from crumbling down. When one of the pillars becomes disparate from the rest, either weaker or stronger, the entire framework is at risk. This illustration can be found in the case of Venezuela, where two branches have polar opposite strengths. Not only the executive branch is disproportionately strong, belonging to an abrasive and almost completely independent pillar, but also the judicial branch has miniscule power, serving as an instrument of manipulation of the strong. This implies that the Venezuelan government is extremely unbalanced and unreliable, and it is at risk of collapsing at any sign of a disturbance

This chapter will offer an in-depth description of the current problem that the judicial system in Venezuela is facing. From the executive orders of President Chávez, to the actions of the judges sitting in office, I hope to shed some light on the issue of the lack of independence of the Judiciary system in such an important player in global politics that is Venezuela.

The Background of the Judicial System

The judicial system in Venezuela for several has never been able to hold true independence from the other branches of government. The imbalance in the system is rooted in the exorbitant amount of power that the Parliament used to have in the country.¹⁴⁹ In the early 1990's, Parliament exercised a "monopoly" of appointments for almost every public policy official, including the body of the Electoral Supreme Council, the Comptroller General of the Republic, the Supreme Court Justices, the Judicial Council, and the General Prosecutor of the

Republic.¹⁵⁰ These appointments evaded election regulations and opinions from the people, and were a reflection of the political view point of the Parliament, which caused extreme uneasiness in the public- an issue already growing at the time.¹⁵¹

The public was commanding stronger protection from the judiciary to offer electoral participation, and also for the application of the principle of checks and balances to end the monopoly of the appointments by the political parties in the process.¹⁵² But at the same time that the public needed the most protection from the judiciary, the branch was experiencing a full-blown crisis caused by the Pact of Punto Fijo and the bureaucratic incompetence it brought with it.¹⁵³ In the early 1990's, the judicial system in Venezuela was already credited as one of the worst in the world , as reported by a United Nations survey, which indicated that it took approximately three years for a civil case and five years for a criminal case to get to court.¹⁵⁴ The report also revealed that in 1992 out of 21,000 jail convicts, 70% were still waiting for their trial.¹⁵⁵ This created a common perception among the people that the justice system was politically divided between the poor and the rich elite, regarding it as to be “above the law”.¹⁵⁶ Constant complaints about the inefficiency of judges were brought up, but were kept unrevealed by the Punto Fijo party.¹⁵⁷ Even by the year 1995, reports were issued regarding the corruption and ineffectiveness of the Supreme Court judges and the deterioration of the courts: by this year a report showed that the number of judges per citizen went from 1 per 3,333 in 1945 to 1 per 14,333, considering that the number recommended by the United Nations is 1 judge per 4,000 citizens.¹⁵⁸ Since the courts couldn't attend to the cases of the prisoners fast enough, the number of prisoners in the jail system also rose to exorbitant numbers- prisons that were meant to hold

15,000 inmates, by the 1990's would hold over 24,000 inmates leading to the death by murder or health related causes of many.¹⁵⁹

This decay of the judicial system affected Venezuela in various ways. It gave room to the worsening of a political crisis, characterized by the lack of legitimacy and the lack of a rule of law and it increasingly depended on brutal force and the abuse of human rights, since the legal system was so fraudulent.¹⁶⁰ An example of that was El Caracazo, in which over 500 people were killed during the riots.¹⁶¹ The judicial system was weak and corrupt at the local level, a trend that went up the ladder and it reached the Supreme Court.

The Episode that Changed the Judiciary

The overstepping of boundaries continued after Chávez took hold of the presidency. In February 1999, the day of his inauguration of office, Chávez evoked a referendum without any consent or permission from the constitution or of any of the branches of government.¹⁶² In any other democratic government, the “rule of law should have resolved the debate” but he violated the 1961 violation to start the process for the new constitution meanwhile violating the ruling of the Supreme Court about the issue.¹⁶³ Mr. Chávez proceeded to persuade the Court until they settled the issue in an “interpretative recourse on consultative referendums filed by a Non Governmental Organization, according to the statute governing the Supreme Court,” and announced two dubious decisions that completely ignored the real problem, basically signifying the end of the 1961 Constitution.¹⁶⁴ One of the decisions by the Supreme Court explained that the option of a referendum to obtain an opinion from the public on whether a Constituent Assembly should proceed to be elected and it then offered a hypothetical breakdown of the

Constitutional Doctrine of Constituent Power, but it avoided the topic of whether an amendment in the Constitution was in fact needed to proceed.¹⁶⁵

After this decision was brought forward, the President announced that the elections for the Constituent Assembly would offer no information regarding the number of representatives that were going to be put up for elections, how was the Assembly going to be set up, and for how long would this Assembly be in office for; according to Chávez, this was a Presidential decree and the people would have to accept it.¹⁶⁶ Once again, the Supreme Court tried to challenge this action and offered a number of judicial review decisions that proved that a Constitutional Assembly had to be put up for election following the structure offered by the 1961 Constitution, but the election still took place in July 1999, and with that defeated the Constitutional powers held by the Court.¹⁶⁷ As expected, the proposition to set up a Constitutional Assembly was accepted, and 131 members were appointed to the Assembly, which was in turn controlled by the president's supporters.¹⁶⁸ This control of the Assembly by Chávez's supporters showed that the long-time monopoly of the political parties of AD and COPEI was broken.

Time and time again, President Chávez proceeded with a variety of actions that completely ignored any attempt of the Supreme Court to follow the rule of law, and the referendum marked the beginning of the end of the judicial system in Venezuela.¹⁶⁹ The Constitutional Assembly announced itself as the new "superpower" and began to reorganize all government branches, focusing the most on the judicial branch.¹⁷⁰ Starting with the judiciary, it first created a special Commission of Judicial Emergency with the main goal to attain the "autonomy and independence of the existing judges".¹⁷¹ Under the supervision of Luis Miquilena, one of Chávez's main adviser, the "judicial Restructuring Commission" was set up,

which was assigned the duty to review all the appointed judges in the country and replace them when deemed necessary; since the previous judicial system was so highly disliked, this radical commission wasn't contested by the public.¹⁷² As a result more than 80% of all the judges were removed from their appointments in a very short period of time.¹⁷³ The Supreme Court attempted to contest these illegal activities, since they weren't included in the recent referendum, but they were upheld by the alleged constitutionality of the new Assembly.¹⁷⁴ Furthermore, the Assembly used this attempt by the court to gain new sovereign powers, not explicitly given to them before.¹⁷⁵ It is with this action that the Supreme Court signed its own execution- the court disappeared two months after.¹⁷⁶

The Supreme Court was under great political pressure, and the judges became desperate. They offered one of their judges to the Judicial Emergency Commission, and also put themselves to the mercy of the Assembly, but all efforts became futile.¹⁷⁷ Two months after the Supreme Court decision, the Constituent Assembly dissolved the court and replaced every judge using their new "supraconstitutional power".¹⁷⁸ The judges removed by the "Judicial Restructuring Commission" were replaced by provisional judges.¹⁷⁹ Furthermore, the Assembly proceeded to further violate the 1999 Constitution by appointing the members of the freshly set up Tribunal of Justice, National Electoral Council, Prosecutor General, People's Defender, and the Comptroller General and it also replaced the entire Congress by a new but temporary legislative commission.¹⁸⁰ Once again, the Supreme Court (now called the Supreme Judicial Tribunal) disputed the constitutionality of the appointments, but were upheld under the excuse that the Constituent Assembly had now the power to do so.¹⁸¹ The replacement of the judges and the new transitional legislation showed that the President now had authority over the entire structure of

his government, especially the judicial branch.¹⁸² After these actions, the Supreme Tribunal had over 90% temporary judges, none with any sovereignty.¹⁸³

Additionally, the President adopted a series of decrees- previously rejected by the citizens- justifying them with “ex post facto judicial interpretations issued by the Constitutional Chamber of the Supreme Tribunal,” that became composed with a majority of his supporters.¹⁸⁴ Among the decrees, it was specified the annulment of the previous Supreme Court to be replaced by a Supreme Tribunal of Justice which eliminated the previous chambers and judges and elected new ones.¹⁸⁵ The former chambers of justice- political-administrative, criminal, and civil cassation- were replaced by complete new chambers named: the Constitutional Chamber, the Political-Administrative Chamber, the Electoral and Social Chamber, the Civil and Criminal Cassation Chamber.¹⁸⁶

The new judges were also assigned to their positions, ignoring all requirements explicitly included in the new Constitution, and no explanation of their new powers was given.¹⁸⁷ These appointments were criticized by the Human Rights Watch and the US government, calling their action a “Court-packing law,” because it increased the number of Supreme Court judges from 20 to 32 giving the Chávez administration to pack them with strong supporters.¹⁸⁸ One of the reasons why the Assembly was able to ignore the opposition and carry out the unfair appointment of judges, was because of another new law provision that declared that a majority approval of two-thirds would only be required for the first three rounds of voting, if no majority was reached by the third round, a fourth vote could approve the new judge with a simple majority; thus the reason why twelve of the new judges were accepted by a simple majority and nominated by Chávez’s supporters in the Assembly.¹⁸⁹ After this, the independence of the courts

was gravely affected. By adding twelve new judges to the Tribunal of Justice, the Assembly was able to set up a very hazardous precedent.¹⁹⁰ The fact is that by doing so it showed that every time there is a set of judges in the Tribunal that the Assembly dislikes, it could add more judges if they wanted to have a majority in their favor once again; this move forever affected the balance of power in the court, and it made it almost completely “Chavista” (in support of Chávez).¹⁹¹

The situation of the past decade has led the judiciary to be unreliable. All the judges were assigned for a restricted amount of time and then dismissed at the disposition of the also-temporary-Commission eliminating the due process of law present in the Constitution.¹⁹² According to the 1999 Bolivarian Constitution, the use of judicial powers rests completely on the hands of the judges, and to give judicial power to any Commission violates the due process guarantee.¹⁹³ Thus, not only the Commission violated the due process of law present in the new Constitution but it also disregarded the implied right of having a “natural judge,” also in the Constitution.¹⁹⁴ Furthermore, on January 18, 2000 the Constituent Assembly by means of exercising their “sovereign power,” adopted two laws concerning judicial power; one decree related to the assignation of an inspector of the courts, and the other a commission to overlook the rebuilding and adequate performance of the courts, replacing the temporary Comptroller General and the temporary Prosecutor General with new substitutes.¹⁹⁵ A new People’s defender was also assigned, making it the only appointment by the Commission that was actually in accordance with the 1999 Constitution, but every appointment was still made without electoral participation (another fact included in the 1999 Constitution).¹⁹⁶ These actions were in clear violation of the separation of powers granted by the constitution. Furthermore, the powers given

to the new Comptroller General were not included in any decree or in the Constitution, making it illegal under the state and municipal powers expressed in the Constitution.¹⁹⁷ Also, the temporary members of the Supreme Electoral Council (a new chamber of the judicial branch) were removed and it assigned another set of temporary members that were also government supporters.¹⁹⁸

The Supreme Tribunal of Justice was involved once again. This time the complaint was brought up by former members of the Assembly (now considered from the opposition) and they attacked the “supraconstitutional” powers of the Constitutional Assembly and attempted to solve the issue through the judicial review of the “electoral statute of the public powers” which was previously accepted by the Assembly in the year 2000.¹⁹⁹ It was struck down by the Tribunal of Justice, stating that the powers adopted by the assembly were approved by the referendum that created them.²⁰⁰ The following was said about this decision:

The Supreme Tribunal of Justice, by deciding that the Electoral Statute sanctioned by the Constituent Assembly was of constitutional rank, enacted for the purpose of filling supposed gaps or vacuums in the transitory provisions of the 1999 Constitution, violated the people’s sovereign will as expressed in the referendum.²⁰¹

Without a doubt the Supreme Tribunal of Justice after this decision, established a precedent that indicated that the Assembly was free to enact laws and make changes in the constitutional hierarchy without consulting the other branches, or even worse, the people.²⁰² This violated the basic principle of a democracy and the rules approved by the referendum in 1999; it now accepted a power which was once deemed as supraconstitutional, as something acceptable.²⁰³ Furthermore, the Supreme Tribunal continued to reduce its own power by acknowledging the fact that a transitional Commission could enact changes , even if they were

not included in the new Constitution which was accepted by the people and created by the very own Assembly.²⁰⁴ By acknowledging this fact, the Tribunal gave the Assembly a power “analogous to the Constitution” and a status “parallel to the current 1999 Constitution”.²⁰⁵ As a consequence, the Tribunal gave up its duty as the protector of the Constitution.²⁰⁶

The Current Judicial Branch

The independence and autonomy of the judiciary was taken away once the Assembly adopted its “supraconstitutional powers”.²⁰⁷ There has been a predominant and abrasive process to make the judiciary succumb to the control of the executive, by constantly transforming and eliminating chambers of the branch.²⁰⁸ For example, the Judicature Council, created in 1961 to over look the judiciary, was replaced by the Supreme Tribunal who now governs and regulates the entire system, including the selection and elimination of judges, without the consent of the public, which makes the branch very unstable.²⁰⁹ In addition to that, the National Assembly is in charge of appointing the Supreme Tribunal Judges for a twelve year term, which can be terminated at their discretion.²¹⁰

The characteristic of stability is an essential element that the judges need in order to best serve their constituents and to guard the constitution; by not making the judges subject to the opinion and sanctioning by the public, they can become corrupt and only serve the interest of their party.²¹¹ This has been the situation experienced by the judges in Venezuela since 1999, where the judges are put through constant manipulation by the controlling party and haven’t been able to properly administer justice.²¹² Today, the entire judicial branch is too restricted and crippled compared to the other branches.²¹³ The branch is irregular and it is internally distorted,

which led it to become decrepit in moments of confrontation against outside powers, and slow, uneven and inefficient at all levels of the court.²¹⁴ Under the new Constitution, it was mandated that an established amount of the governmental budget would always have to go to the judiciary in order to avoid legislative pressure.²¹⁵ By giving the Assembly complete discretion of appointing and removal, the judges are under constant scrutiny and risk being fired at all times. The 2003 Annual Report of the Inter-American Commission on Human Rights revealed that the judges are under “permanent state of urgency,” and in some situations “judges were removed almost immediately after adopting judicial decisions in cases with a major political impact,” and that the “lack of judicial independence and autonomy vis-à-vis political power is, in the IACHR’ opinion, one of the weakest points in Venezuelan democracy”.²¹⁶

In a centralized government, such as the one created in Venezuela after the Constitution of 1999, political participation can signal your own death sentence, and the system becomes the tool of the authoritarian power.²¹⁷ The corruption in the judicial branch has damaged the economic expansion and growth in Venezuela, since the enforcement of the law is no longer predictable.²¹⁸ But, the element of predictability is essential to the development of an economic sector in a country since local and international businesses need to know what to expect from the rules and their enforcement, and without it bribery becomes common.²¹⁹ The judicial corruption in Venezuela is distinguished by the fact the public authority is able to take advantage of the court system and make the rules and processes to apply the law disappear.²²⁰ This type of corruption is known as Administrative Corruption, in which the members of the court constantly perform actions that violate the law for their private benefit, by paying bribes to changes the outcome of a sanction, or to delay a lawsuit as long as possible, scenarios which can be found in

the case of Venezuela.²²¹ Besides the growth of corruption within the judicial system, the issue of political reform of the judiciary is also essential.²²² Since no group of judges or any individual official has sufficient autonomy or legitimacy it has become impossible for them to achieve any absolute judicial reforms and restricting them to a vicious cycle of manipulation by the leading party.²²³ The judicial system is currently weak and the “mechanisms, institutions and actors that formerly resolve confrontation by peaceful means” are now the tools that threaten the democracy and lead the system to become unstable since there is no legitimate set of rules with trustworthy arbitrators.²²⁴ The absence of justice and the difficultness to access it has permanently undermined the Venezuelan democratic system and its rule of law.²²⁵

Overall, the Judicial branch that was born after the referendum and the creation of the Constituent Assembly was used to centralize the power in the executive, and to blur the separation of powers between the branches of government, and it forced the Tribunal of Justice to be at the mercy of Chávez, who used the “judicial review powers” to interpret his new Constitution as he wished.²²⁶ The result of this is the transformation of a democratic rule of law that had been taking root in Venezuela into an alleged democracy where the power is heavily concentrated on the head of state, which then raises the issue of whether Venezuela continues to be a democracy or not. If the separation of powers- which is a crucial guarantee of a democracy- continues to be ignored, democracy will not survive, and in turn it will give rise to an authoritarian government.²²⁷

PRESIDENT HUGO CHÁVEZ AND HIS EXECUTIVE ORDERS

The political history of Venezuela has always been a rocky one. From dictatorships to multiple versions of the constitution, Venezuela has seen it all, including a reverse in its democracy. As in every country, one thing led to another and the instability gave room to the rise of a revolutionary: Mr. Hugo Chávez Frías. He came at a time when not only the people, but the system itself needed a change, and that is exactly what he did. President Chávez gave the country a 360 degree change; some say for the best, but the evidence shows that it was for the worst.

Chavez's Rise to Power

First, let us start with a brief introduction to the background of the character that forever changed Venezuela's story. President Hugo Rafael Chávez Frías, was born the 28th of July of 1954 in a small rural town in Venezuela named Sabaneta, in the state of Barinas.²²⁸ In order to be able to chase his dreams, Hugo Chavez enrolled in military academy at the age of 17, where he graduated as an officer; he later continued to study political science at the University of Simón Bolívar in the capital of the country.²²⁹ Up until the early 1990's, President Chavez was very well known for expressing his sentiment towards the government, which he thoroughly opposed. The year of 1989, with Carlos Andres Perez as President, was a year of massive turbulence for the country. The famous "Caracazo" took place, in which President Perez demanded the army to discharge their weapons on civilians during a protest against his economic policies.²³⁰ It is after this date, that Chávez saw his window of opportunity to make his voice is heard. In 1992, Hugo Chavez organized a military group and attempted a coup against the government; this futile attempt was unsuccessful and Mr. Chavez was sent to jail where he spent two years.²³¹ Chavez

became a national hero, voicing the “deep seated hostility towards the political system.”²³² The reason for his release was the impeachment of President Andres Perez.²³³ Then, for the elections of 1998 Hugo Chavez decided to run for President, uniting several smaller parties into one big political campaign, quickly gaining popularity nationwide.²³⁴ In 1998, Hugo Chavez defeated the two political parties known as AD (Acción Democrática) and COPEI (Christian Democratic Party), which had a monopoly of Venezuela’s system since the end of the last dictatorship of Marcos Perez Jimenez in 1958.²³⁵ The AD and COPEI political parties remained in power all through 1958 as a result of the “Punto Fijo” arrangement, which after a long dictatorship and a new born democracy, established the rules of the game; it stated that the government and presidential appointments must be divided equally in order to share the power.²³⁶ The new democratic system was strengthened by the “Punto Fijo” arrangement during the decades of the 60s and the 70s, but it quickly worsened and the parties were at the mercy of the Parliament.²³⁷ This time period, in which the two main parties shared power became known as “Puntofijism”.²³⁸

The Punto Fijo period brought the levels of “corruption, clientelism, political demoralization” to record high levels, making it almost impossible for third parties to even have a fair chance in the elections.²³⁹ The political arena became extremely representative and pluralistic, where the public officials responded only to the parties themselves and not to their constituents.²⁴⁰ It is because of this monopoly that the public created a rejection of the Congress, therefore the previous support of AD and COPEI shifted towards Chavez in the elections of 1998.²⁴¹

Chávez as President

As soon as President Chávez took hold of the Presidency, he pushed for a change of the constitution in order to “promote popular participation as a way of deepening and extending democracy beyond elections”, and started promoting a referendum.²⁴² He strongly believed that in pursuance of justice and social equality, a completely fresh constitution was needed, since the previous one reflected the interests of the previous ruling class and their failures.²⁴³ And behind this political slogan, Chávez knew that in order to achieved all his political goals, he had to restructure and modify the legal code that would make way for his ambitious agenda.²⁴⁴ In order to change the constitution, the government needed to form a Constitutional Assembly, but in order to do so it had to be contested by the public. In April 1999 a national referendum took place in Venezuela to see whether or not such an Assembly could be put together.²⁴⁵ This referendum was announced without the consent of the Supreme Court, which was pressured after into saying that it was allowed according to the interpretative power of the constitution by the Court.²⁴⁶ And since the couple previous presidencies had brought the country an urgent need for change, the idea of a referendum seemed like the perfect solution. Thus, 71% of the constituents voted “Yes” on the proposal.²⁴⁷

Only three months later, the elections for the agents that would be members of the Constitutional Assembly in charge of writing the Constitution, took place and out of the 131 seats available, 125 were won by Chávez’s supporters.²⁴⁸ December that same year, there was another national referendum to accept or reject the new Bolivarian Constitution; the results were impressive: 88% of the 38% of the population that voted approved the new constitution.²⁴⁹ The President embraced the popular anxiety and disapproval because of the last political system to sell his idea of a new constitution, as if it would be the only practical solution.²⁵⁰

It is important to mention that all throughout Venezuela's history there has been several elected institutions in charge of writing a new constitution in the years of 1858, 1863, 1901, 1946, and 1953; the only difference is that the Constitutional Assembly elected in 1999 was not a result of a coup d'état, revolution, war, or de facto rejection (which is the case of all previous constitutional assemblies) but from a "formal democratic process".²⁵¹ And after the Constituent Assembly's election of 1999, all constitutional powers of the Supreme Court were overpowered, since the President decided to proceed with the referendum "unilaterally" and granted the Assembly powers not mentioned in the new constitution, contradicting the original Supreme Court ruling.²⁵²

Some of the changes under the new Bolivarian Constitution included that absolutely all government employees had to be subject to a "mega-election," set to take place in July of 2000 in which the people could decide to reelect or replace them; powered by his momentum and the urgent cry for change, Chávez won the majority of seats in the "mega-election".²⁵³ The new constitution became "non-androcentric" (meaning that a word could be used for both men and women) strongly indicating two options: that either women are not seen as powerful contestants in politics, or if they do manage to become part of the political process, they must be strong as man to remain in power.²⁵⁴ With the new constitution, he also introduced two new branches of government: the citizen branch, in charge of looking after the other branches making sure that they were following their constitutional functions, and the electoral branch, in charge of regulating correct electoral procedures (from state elections to organization elections).²⁵⁵

Furthermore, under the "Enabling Laws" granted to him in November 2000, Mr. Chávez proceeded to create 49 new legal orders without the approval of the National Assembly and into

effect immediately.²⁵⁶ The new decrees addressed included topics such as the petroleum industry, economic policy, land distribution, and the fishing industry and were put into implementation in November 2001.²⁵⁷ Within the Constitution, an arrangement that permits the “takeover of state power” in the executive branch were also included increasing the fear of presidentialism in the opposition.²⁵⁸ The Constituent Assembly also appointed the new members of the new Supreme Tribunal of Justice, the new National Electoral Council, the Prosecutor General, the People’s Defender, and the Comptroller General; all these appointments were in violation of the new Bolivarian Constitution. The judicial branch was completely modified and stripped of its powers, by creating a new “Commission of Judicial Emergency”; furthermore, it destroyed the senate and congress, eliminated the legislative assemblies of the states, and suspended municipal elections.²⁵⁹ Article 17 of the Transitory Regime that allowed the destruction of the Supreme Court of Justice and its three chambers (political-administrative, criminal, and civil cassation), which later became the new Supreme Tribunal of Justice, with the new constitutional, political-administrative, and electoral, and social, civil and criminal cassation chambers.²⁶⁰ This new constitution focuses in various ways on the differences between justice and the rule of law, meaning that the act of justice is as significant as the rule of law, a concept that will not bring justice at all.²⁶¹

In the year 2004, President Chávez volunteered himself to a national referendum to see whether or not he should remain in power since under article 72 of the new Bolivarian Constitution stated that all public officials were subject to revocation.²⁶² The results after much contestation showed that he should remain as President.²⁶³ In October that same year, regional elections took place and 82% of the coalitions supporting Chávez were victorious (334 majority

and 20 out of 22 state governorships) marking the end of the dominion by the opposition parties all throughout the country.²⁶⁴ Since he has been successful thanks to referendums and elections, the opposition and international forces declare that Hugo Chávez was elected democratically but governs undemocratically.²⁶⁵ Then, in 2005 the Law of Social Responsibility in Radio and Television was enacted, limiting the right basic human right of freedom of expression, setting limits on what the stations and TV channels are allowed to broadcast; the government even bought the majority of the media outlets known to oppose his views, and of course replaced “bad” reporters with good ones, and sent them to prison or trial.²⁶⁶ The event that marked the pinnacle of the Law of Social Responsibility was the slam down of Radio Caracas Television (RCTV), which was Venezuela’s oldest TV channel.²⁶⁷

In his second term as President in Venezuela, Chávez proposed further changes to the constitution. In August 2007, he also suggested that the state should become “socialist, centralized, militaristic police”.²⁶⁸ And to make this happen, certain economic “key sectors” must be nationalized; the oil production, telecommunications, and energy were the key sectors.²⁶⁹ Although the suggested reforms were rejected in another referendum, Chávez went ahead and implemented many of those reforms through the years of 2008 and 2009, by means of legislation, decrees, laws, and judicial interpretations of the Supreme Tribunal, violating the laws of the new Bolivarian Constitution, which took form under his own device.²⁷⁰ Furthermore, the National Assembly granted the President the power to create legislature, even without the support of his own party; this can be interpreted as the perpetuate implementation of “Enabling Laws”.²⁷¹ Like if that wasn’t enough, in the year 2008, using his power of the never-ending enabling law, changed the Organic Law of the Bolivarian Armed Forces and created a

“Bolivarian Militia”.²⁷² This militia, strictly under the mandate of the President, would be made up of a military reserve and a territorial militia, composed by both Venezuelan and non Venezuelan citizens.²⁷³ Besides the militia, the President also passed 26 decree laws regarding “agricultural and food-related sovereignty” and for the “erosion of private property”.²⁷⁴ Then, in 2009 Chávez issued another referendum, this time regarding his allowed number of times that he could run for President. As expected, he was victorious and is now able to run for President for eternity.²⁷⁵ His reason for this “eternal Presidency” is that one term is not enough time to amend Venezuela; and he has made it clear that the task of rebuilding Venezuela is his main goal, that is why he intends to run for reelection once again in December of 2012.²⁷⁶ These laws not only infringe his newly created Bolivarian Constitution, but they are a profanity to the main principle of any government in the world; a President should not be able to create legislation regarding to criminality, private property, and taxes which is clearly the responsibility of the legislative branch.²⁷⁷

The institutional changes that have been developed during Chávez’s presidency have been used to decentralize the government, concentrate the power in the executive branch, blur the separation of powers, and create a Supreme Tribunal of Justice at the mercy of the President, thus eliminating the concept of checks and balances in the Venezuelan government.²⁷⁸ It is safe to assume then that the executive has eliminated the “essence of rule of law,” which is only guaranteed in a democracy with the equal distribution of power among its branches.²⁷⁹

Another main characteristic of President Chávez’s control over his government that has a significant impact is his nepotism. Nepotism is referred to giving posts as public officials to friends and family. One predominant example is his family, which is known all throughout

Venezuela as the “Royal Family,” since it holds extremely large quantities of power.²⁸⁰ He has given his younger brother David Chavez the control of the Venezuelan Tax Revenue Office and the office of Customs at Venezuela’s main airport in La Guaira.²⁸¹ Chávez’s mother has also gained involvement in offices that would normally be given to the First Lady; for example, she was President of the Children’s Fund; furthermore, not only the President’s family has been able to hold offices in the Venezuelan government, but also his closest friends and allies.²⁸² First, Chávez’s closest ally Diosdado Cabello has been able to hold several offices throughout the President’s time in office, such as the post as Vice President and the Governor of the most populated state in Venezuela (the state of Miranda).²⁸³ Then another close ally is Jose Vicente Rangel, who also Chávez’s “Vice President, Minister of Defense, and Foreign Minister” nonetheless convinced him to make his son Mayor of Caracas.²⁸⁴ Chávez’s nepotism includes making military officers government officials, ever since he became president in 1999. Both active and retired military officers have been “ministers, vice-ministers, and heads of state-owned companies”.²⁸⁵ Since 1999, the government has had 61 ministers, and out of those 16 have been military officials, and in the 2004 regional elections 9 of the elected governors were retired military officers.²⁸⁶

President Hugo Chávez has transformed, and will undoubtedly keep transforming Venezuela as a whole. Not only did he change the code of law to fit his agenda, but he transformed all of his government’s pillars, even adding two more institutions against his government’s wishes. But, he has also altered the employment of the meaning of participatory democracy.²⁸⁷ According to him, every major decision is made according to the votes and wishes of his people, thus his government is sometimes seen as a democracy. But in reality, his

commands have slowly been transforming the government into an authoritarian regime, where only he has a say in the matter. As it is shown in this section, there are numerous variables that constantly undermine the dependency of the branches of government, and the ones that do function somewhat independently, do so in order to fulfill the president's executive orders. The concept of checks and balances has ceased to exist in Venezuela for over a decade, and it will take more than a new constitution to re-establish the concept and bring back the country to a fully functioning democracy.

CONCLUDING THOUGHTS

Over the last decade, Venezuela has been experiencing a transformation of its governmental structure. This change, as shown in the previous chapters, has been mostly for the detriment of the country in a variety of ways. When all the issues are set on the table and are looked at in an overall perspective, it leads us to the question of why is there no separation of powers in Venezuela? And what are the consequences of its absence? To answer this question, although it is not a simple task, one must look at the key factors that have had a direct involvement in the disappearance of separation of powers. These agents are: the Constitution, the Judicial branch, and the Executive branch.

To begin with, the Constitution has been used over the course of history as a manipulative tool. Both Parliament and the Executive have utilized this document to surpass the rule of law and serve their personal agendas. Under other circumstances, the Constitution is an icon of justice and protection; it signifies that no government is above the law, and that every person in the state is bound by the same set of principles of behavior. When those principles are exercised properly, the separation of power is clear and concise, and hard to defraud. Once the Constitution is tampered with, and it's constantly transformed, it becomes something temporary, something that it is easy to overcome. The Constitution is like the blueprint of a house, how many times can you modify the model until you make a mistake, or until you ultimately make a model that is weak in every aspect? Well, that is exactly the problem that Venezuela faces. The Constitution of 1999, proposed and developed by President Chávez had several new key aspects that ultimately helped him achieve his goals, but the basics are the same: a Constitution with

many loopholes easily justified by the decision makers. As a consequence, the people have no substantive protection by the law, and no instrument to support any sort of objection to the government, and the government institutions have an instrument with which they can justify any violation of the law, thus helping eliminate the separation of powers. For more information on this subject, please refer to the chapters on the Constitution on page eight and page twelve.

The next key factor is the Judiciary. A branch, that in theory should be the interpreter and arbitrate of the law, independent from every other branch of government, is weak and unresponsive. Over the course of history, the judiciary in Venezuela has shown no exceptional strength and abilities, but up to some extent it did have independence from the other branches, making judicial rulings on their own. However, with the Chávez administration, the institution completely succumbed to the mercy of the other decision makers and it was transformed into a branch incapable of making justice. The Judicial branch is composed and administered by Chávez's main supporters. The new divisions within the branch, are dysfunctional and serve no true purpose, and are regularly manipulated and controlled by the Constitutional Assembly and the Executive branch. They have no backbone and the Constitution offers them no solution or outline to follow. Most of the judges can be dismissed at the like of the Assembly, thus making the branch extremely unstable, and now the judges have no need to serve their constituents since they are elected and dismissed by another institution. Overall, the judicial branch is yet another tool for the Executive branch to take control of every aspect of life in Venezuela. The separation of powers in the Judiciary has been replaced by an adjudication of powers, where every aspect of the law is controlled by a mixture of elements that are all fanatics of Chávez. Once again, the

concept of checks and balances is defeated. For more information about this topic, please refer to the Judicial Branch chapter, located on page twenty-seven.

The last factor that has taken a role in the diminishing of separation of powers in Venezuela is the Executive branch. To be more exact: President Chávez's Executive branch. Since his democratic election, Chávez has been able to transform the political arena with a number of carefully planned executive orders. These decrees have surpassed the law, and every other institution in the country. He was able to pack the government institutions with his most devoted followers, change the name of the country, change the rules for presidential election, and many other laws that have aid him achieve his very capricious agenda. President Chávez is the main violator of the law, and has been able to get away with it because he masks his actions with a supposed support by the constitution- which he also happened to create. The problems that stem from his administration are far too numerous, and are leading Venezuela to an authoritarian regime, where every aspect of life is controlled by one player. Chávez came in time of despair and convinced the people that he was the only solution, and now the country is experiencing the constant violation of basic human rights, such as the right to a speedy trial, and the right to freedom of speech. The executive branch has made it its purpose to eliminate the separation of powers and the concept of checks and balances; the whole system is unbalanced and it leans towards one player. The concept of Presidentialism has taken root in Venezuela, and democracy has taken a back seat.

The various key players that have affected the separation of powers in Venezuela can be summed up by the following table.

Key players - Other factors	Political Culture	History/Tradition	International Factor
The Constitution	No Reliability	Weak, Constantly transformed	Does not follow any model
The Judicial Branch	Disconnected, lack of judicial review	Weak, Easily manipulated	Regional characteristic of impotence
The Executive Branch	Uncontested, hard to overcome	Autocracies, and then manipulation by Parliament	Regionally Idolized

Table 1. Factors Affecting Separation of Power

First, let us start with the Constitution and the other factors that have had an effect on the separation of powers. The political culture in Venezuela for the past few decades, I would even dare to say since the day of independence, has seen the constitution as an unreliable source. Since it has been constantly manipulated by the different administrations over the years, the citizens cannot and do not have confidence in the Constitution to protect even the most basic human rights. Freedom of expression, freedom of speech, freedom of political participation, all included in the 1999 Constitution, have been constantly violated, showing that the document does not stand above the rule of law. The political culture in Venezuela has been transformed over the years, and the Constitution in the eyes of the citizens is standing in quicksand, hastily been swallowed by the executive branch. Thus, the history of the Constitution reveals that it is not the same document that democracies around the world use to protect citizens from the strong hand of the government, and also not a document that dictates how the various institutions should behave, but it's a tool of manipulation that can be constantly violated and ignored by the various governmental agencies. In addition, I believe that the international arena has had a vis-à-vis relationship with Venezuela in determining the role of the constitution. When the wave of

democratization took place in South America, a significant improvement of the political systems took place in the region. Although still corrupt and relatively behind compared to the system in North America, the different branches of government started to move forward and develop a sense of identity, including in Venezuela. The constitution that was held the longest in Venezuela happened to coincide with a period of political stability in South America, showing that there was some sort of widespread growth in the systems. Then, President Chávez was elected and transformed the system of the country and the constitution. The 1999 Constitution does not resemble any other in the region, marking Venezuela as an innovator-an aspect that has been regarded both in a negative and positive way. In my opinion, with Cuba as a communist country in the region, Venezuela as a strong autocratic regime, Mexico's situation so unstable, Bolivia strongly supporting Venezuela, and the declining standard of living throughout South America might lead the region into a further reversal of democratization and an imitation of Venezuela's system, where the Constitutions are a simple document that contains dreams and hopes of the people, but that are actually never heard. Thus, Venezuela's Constitution must regain its identity and power in order to stop the spread of the anti-democracy disease that is spreading into every country in South America.

Next on the chart, is the Judicial branch. The political culture in Venezuela regards the judiciary as weak and as a puppet of the executive branch. Since the courts are very much packed with Chavez supporters, the judicial decisions are seen as a reflection of Chávez's opinions. When it comes to making decisions at the Supreme Court level, the judges are unable to apply judicial review, and justify the decisions on circumstantial evidence such as a referendum at the time of the trial, or according to a new law in the constitution. Furthermore, the history in

Venezuela reveals that the courts have been incapable of functioning independently from any other branch of government, and the structure itself contains several issues that continue to drag down the judiciary. For example, currently there are a number of new divisions in the courts adding more judges to the table that are appointed by another commission. Thus, the judges are unstable and act according to arrangements in order not to be removed from office. Furthermore, there is no legal base making it impossible for the judges to overcome their barriers and apply their right to judicial review. Throughout Latin America, the courts are characterized by their lack of judicial power and independence. Most of the courts are extremely corrupt, benefiting the rich while damaging the poor, which are the ever-growing majority. This marks another organization pattern found in Latin America, but the aspect that sets Venezuela apart is the fact that the courts are composed by a majority of the president's supporters, are appointed and removed by a Constitutional Commission, and it has an assortment of courts that are not found in any other country in the region. Making the Venezuela judicial system hard to predict and even more unstable than the rest in the region.

The last factor in the table is the Executive branch. In Venezuela, the President is the number one determinant in the violation of the separation of powers. President Chávez has managed to mold the entire political system according to his needs and desires. The political culture in Venezuela revolves around this one player that is uncontested and extremely powerful, which means that his decisions can ultimately signify the end of the Venezuelan government as we know it. As shown in the previous chapters, Chávez has gone to great lengths to surpass the different branches, violating the separation of power clause in the Constitution. Thus, with the branches not being able to act independently from each other and perform their basic duties, the

concept of checks and balances is almost completely eradicated from the country, bringing other sorts of problems to the entire population. In Venezuela, the history of the Executive branch has been an interesting one. As any other developing country, Venezuela experienced authoritarian regimes and then it welcomed democracy. For some decades, the political arena in Venezuela was controlled by the Parliament but not to the same extent as Chávez. As result of Chávez's radicalism, there has been a recent idolization of his acts around Latin America. He is admired by many and seen as an icon for the poor, opening an opportunity for other radical presidents in the region to rise and gain support, indicating that in the decades to come, several other countries might also experience a grand violation of the separation of powers.

The factors mentioned above play an important role in the development of the political system in both Venezuela and in the region. But, the number one determining factor in the case of Venezuela is the Executive branch. Currently, the President holds an exorbitant amount of power that has given the government a 180° degree turn for the worst. The natural resources in Venezuela have given President Chávez an extra kick factor that has enabled him to become a regional and even global power. If not contained, the situation in Venezuela can spread and affect other countries in the South American region in a similar way.

The research has shown that the cause for the lack of separation of powers, and thus the lack of checks and balances among the branches of government in Venezuela is the extraordinary amount of power that the Executive branch holds. This has led to an amount of issues that are affecting the political spectrum from top to bottom. The system is dysfunctional and unbalanced, and as a result the citizens are also being affected since the most basic human rights are been neglected. The question of what is the cause for such a scenario has been answered, but there are

still a number of other questions that must be answered in order to solve the Venezuelan paradigm, such as: What could be a reform to the Constitution that would make a significant difference in the political structure? And what kind of checks should be implemented on the Executive branch?

I would like to conclude by adding that it is my wish to continue to analyze the political situation in Venezuela but from the perspective of the school of law, and hopefully offer a solution to the problem. It is also my pleasure to invite any scholar to offer their insight on this situation, since it is an issue that threatens to affect a majority of us indirectly.

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