

Abusive Constitutionalism and Effective Judicial Protection. The Beginning of Institutional Shutdown in Venezuela

***Constitucionalismo abusivo y tutela judicial efectiva
El comienzo del quiebre institucional venezolano¹***

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Abstract

During the last two decades Venezuela has been subjected to a process of very important political changes. In this period, surged New the Constitution in 1999 and there have been different attempts to reform and amend it. In addition, its text has been interpreted through the different mechanisms of constitutional control that it foresees. In addition to the above, the Venezuelan Supreme Court of Justice has produced at least one hundred sentences in its different Chambers in which the powers of the National Assembly have been directly influenced. This investigation seeks to determine specifically if the judicial decision 001 of its Electoral Chamber of December 7, 2016 and those related to it constitute a case of the so-called abusive constitutionalism violating the judicial and effective protection of those who were the recipients. This article will argue the former by analyzing: (i) the background of the above-mentioned judicial decision; (ii) The subsequent violation of the following rights: to be heard, due process and effective judicial protection; (iii) If the judicial decision 001 (2016) is the starting point of “abusive constitutionalism” in Venezuela; (iv) The challenges of ‘abusive constitutionalism’ in the enhancement of Venezuelan democracy. Finally, the paper will end with a section of conclusions.

Keywords

Constitutional democracy, due process, autocratical regime, Supreme Court of Justice of Venezuela, right to be heard.

Resumen

En las últimas dos décadas Venezuela ha estado sometida a un proceso de cambios políticos muy importantes. En tal lapso se ha aprobado la Constitución de la República Bolivariana de Venezuela (1999) y luego han tenido lugar diversos intentos orientados a reformarla y enmendarla. Además, su texto ha sido interpretado mediante los diferentes mecanismos de control constitucional que ella prevé. Sin embargo, el Tribunal Supremo de Justicia venezolano desde el 2015 ha producido, en sus diferentes Salas, al menos cien sentencias en las cuales se ha influido progresivamente sobre las competencias o atribuciones del poder legislativo; es decir, la Asamblea Nacional. Este trabajo examinará si la sentencia 001 de la Sala Electoral del Tribunal Supremo de Venezuela, del 07 de diciembre de 2016 y sus subsecuentes resoluciones judiciales, configuran un caso del llamado ‘constitucionalismo abusivo’ que desembocó en una afectación sustancial al derecho fundamental a la tutela judicial y efectiva de las personas afectadas por el citado precedente constitucional. Así, el presente artículo se estructurará de la siguiente manera: (i) se examinarán los antecedentes de la referida sentencia judicial; (ii) la consecuente vulneración a los derechos al debido proceso, derecho a ser oído y derecho a la tutela judicial efectiva; (iii) La sentencia 001 como puntapié inicial del ‘constitucionalismo abusivo’ en Venezuela; (iv) Los retos que plantea el constitucionalismo abusivo para la consolidación democrática en Venezuela. Por último, el trabajo finalizará con un balance conclusivo.

Palabras clave

Democracia constitucional, debido proceso, régimen autocrático, Tribunal Supremo de Justicia de Venezuela, derecho a ser oído.

Introduction

It is important to highlight that this work is developed from the violation of the right to jurisdiction, the right to defense and due process of some deputies to the National Assembly of Venezuela, who were elected in December 2015. The historical evolution of the rights involved in such a case makes it possible to illuminate an answer to the challenging question: is the Venezuelan State a democratic regime? A solution to this question could be negative if the behavior of the Supreme Court of Justice of Venezuela was observed. In fact, that court seems to go through the path of the so-called “abusive constitutionalism”; that is, constitutional changes have been introduced - in this case through precedents of the highest Venezuelan court - that undermine the fundamental pillars of democracy (Landau, 2013).

What has been said above places us in a perspective that will allow us to understand not only how effective judicial tutelage is lived in the life of Venezuelan citizens involved in agonal politics, but also in the broadest level of all ordinary people. In this way, for example, any citizen who contracts according to civil law, or who obtains a public office by means of an opposition contest, another whose father or mother dies, are situations that attribute individual subjective rights. These factual situations generate an accumulation of rights that affect the fundamental core of the constitutional freedoms of each individual. Now, how fragile is their legal situation? Do people have appropriate or suitable procedural actions to demand compliance with their subjective rights? Although these issues are of the utmost importance for each individual, it is a point that acquires the highest institutional relevance when it comes to national deputies.

The National Assembly - legislative body - turns out to be, in essence, since more than three centuries ago, the epicenter of the politics of any State. In fact, whatever the system of government in question -i.e. presidential, semi-presidential, parliamentary, presidentialism; In all cases, parliamentarians have some characteristics and elements that are common to them. More specifically, the parliamentary immunity of members of the legislative branch is presented, with its various nuances or intensities, as a common feature of any minimally democratic political system. And, in general, the constitutional practices usually assign to that power of the State not only the work of dictating legal norms of a general nature, but also a function of control of the other powers. This is particularly reflected in the Venezuelan case.

In fact, the Constitution of the Bolivarian Republic of Venezuela assigns the National Assembly certain control functions over both the Judiciary and the Executive Power (Aguilar Blancas, 2017).

At the present time, it is considered that the democratic element of every State predominantly rests in the Legislative Power. And, when it presents imbalances, a sick legislative body ends up affecting the political health of the rest of the branches of public power (Aragón Reyes, 1986). Therefore, the sickness of a branch of state power is spread to the rest. The Venezuelan Republic, then, is seriously threatened precisely because its legislative body - National Assembly - has been severely curtailed in the capacity to exercise its constitutional powers through various Sentences of the Supreme Court of Justice. This has been another case of those named by the doctrine under the name of “abusive constitutionalism” (Zúñiga Urbina & Cárcamo Tapia, 2015).

Located in this context of ideas, the present investigation will address the study of one of the sentences of the Venezuelan Supreme Court of Justice, which refers to the electoral process by which deputies of the National Assembly were stripped of their status as parliamentarians in order to break the legislative majority in charge of opposition parties to the government of Nicolás Maduro. Indeed, it will be argued that the right to defense, due process and effective judicial protection would have been progressively disrupted which ended up impacting the heart of Venezuelan democratic institutions. More specifically, it is intended to show that the emergence of the aforementioned Sentence of the 2016 Supreme Court turns out to be the consequence of a progressive deterioration of Venezuelan democratic institutions. Finally, the main results of this work will be presented in a section entitled ‘conclusive balance’.

Background: Sentences of the Supreme Court of Justice that originate the unconstitutionality, object of study of this investigation

One of the antecedents of this investigation goes back to the year 2004, when the reform of the Organic Law of the Supreme Court of Justice published in Official Gazette No. 37,942 of May 20, 2004 was approved, of which the content of the article 2 stands out, which established the integration of that high court and divided it into different chambers according to various

subjects: Civil Cassation, Electoral, Constitutional, Social Cassation, Criminal Cassation, among others, seven in total of different composition. Thus, for example, the so-called Plenary Room is composed of all the magistrates of all the rooms; that is, it is composed of 32 magistrates, but the rest has five magistrates; except for the Constitutional Chamber that has 7 (Official Gazette No. 37,942, May 20, 2004).

On the aforementioned provision, from the constitutional point of view and from the perspective of democratic theory, there is a clear connection with the problem under study. Even so, the reasons for the modification in the number of magistrates that make up each chamber of the Supreme Court of Justice, although not explicit, rely on reasons that go beyond the technical or academic. Indeed, it is about the subjection of the political power of the judicial function through the control of the highest Court of the Republic. The objections to the aforementioned norm, then, are based on ethical or moral reasons that should not be discarded. In fact, the institutional relevance of this issue is evident by virtue of the fact that the number of magistrates has been expanded so that the incorporation of the new ones produces a favorable balance for the person making the appointment; that is, the National Executive Power.

A similar situation, which is also an antecedent of this investigation, occurred when on August 12, 2005, citizens Jesús Manuel Méndez Quijada and Henry Ramos Allup attempted a constitutional protection action (TSJ Venezuela, Constitutional Chamber, Sentence 2996/2005) who filed the aforementioned writ of protection argued that the violation of various articles of the Constitution (62, 63, 67 and 293) had taken place by the National Electoral Council (CNE) and its authorities. It was also argued that the nomination for deputies to the National Assembly was carried out in an electoral system called “the morochas” - which will be explained below - and that, in effect, such a system violated multiple constitutional provisions, which implied an Authentic constitution fraud.

More specifically, the writ of protection under study prompted a ruling on the challenge of a mechanism that was used in practice by all competing political parties in the legislative elections of December 2005 (opponents and officialism), called “the case of morochas”. The particularity of this system allowed to circumvent the constitutional mechanism to determine which legislators had been elected and which were not, but without mediating the application of an arithmetic operation of the so-called D’Hont system.

This also caused the rupture of the principle of proportional representation that was expressly recognized in the Constitution, in its article 63. At that time, the Constitutional Chamber of the Supreme Court of Justice held, in the presentation of magistrate Luis Velázquez Alvaray, that as there was no rule prohibiting this circumvention, since the departure from the electoral system d'Hont was legitimized. In other words, since the Constitution of the Bolivarian Republic of Venezuela does not expressly prevent the principle of proportional representation from being set aside, then such separation is allowed.

The ruling that resolves the writ of protection reduced the controversy to the absence of a legal provision prohibiting such conduct, therefore, it was allowed. The possibility of harmonizing the general principle of the law “everything that is not legally prohibited is legally permitted” had not been taken into account, on the one hand, and with the principle of proportional representation mentioned in article 63 of the constitutional text, on the other (Sánchez, 2014). This evidently violated not only the Constitution, but the fundamental postulates of the democratic system.

Because, in effect, it ended up reforming a central point of the Venezuelan constitutional regime - its electoral system - through an *ex nihilo* creation of its highest court. The sentence mentioned in this section was a true precedent that was consistently applied on several occasions during the decade from 2000 to 2011. Moreover, such events continued to be repeated after 2011, which led to the erosion of the values and principles embodied in the Constitution and the country's own democratic health.

Violation of due process, right to defense and justice: the beginning of the institutional debacle

The nature of the right to due process implies a set of legal acts aimed directly at the formation or application of legal provisions, whose purpose is based on the collaboration of interested persons together with one or more impartial persons such as the judge or a collegiate court (Carnelutti, 1989). The emergence of the process, in effect, is due to the need to solve problems among the people who make up the population of the State, in an orderly and fair manner. In fact, as Calamandrei states, the very heart of the science of procedural law is based on the right to due process, understood as one of

the most basic rights of ordinary citizens, while the end of the process demands going through a path to peacefully materialize justice in human co-existence (Calamandrei, 1962). In other words, the supreme realization of justice is the most important aspiration of the science of procedural law.

Moreover, the process is an instrument immediately ordered to the realization of justice, even higher yearning that allows the solution obtained through the process to seek peace in social relations by attributing the rights that correspond to each party. In fact, the development of due process in legal disputes between people manages to articulate the two fundamental material conditions - peace and justice - so that the political community is effectively ordered towards the common good. In this way, it is possible to ensure the set of conditions necessary for each of the members of the community to achieve their own goals, in accordance with their own life plan (Finnis, 2011).

Thus, both Carnelutti and Calamandrei's positions indicate that there is an intrinsic relationship between due process, right to defense and justice. In that sense, when referring to the right to defense we are assuming that it is one of the minimum necessary guarantees that are required before a judicial process, whatever its type -criminal, civil, administrative, labor, etc. - so that our dignity as human beings remains untouched and we have been able to counteract that of which we are accused or charged. In such a way that we are facing a right that implies demanding the possibility of being heard with due guarantees and within a reasonable period of time by a competent, independent and impartial judge or tribunal, established previously by law in the substantiation of any criminal accusation against someone or for the determination of his rights or obligations of civil, labor, fiscal nature, by case.

An additional issue that must be added to the right to defense and due process is its complement with the notion of effective judicial protection as regards administrative acts. In fact, making direct reference to the case under study, the original administrative action that gives rise to the sentence mentioned below, was the National Electoral Council - maximum electoral instance in Venezuela - that occurs after the legislative elections in December of 2015, since all the administrative acts in each of the phases of that electoral process concluded in the act of proclamation of the candidates for deputies of the Amazonas state (province). It should be clarified that we are facing a typical case of intervention of judicial control in administrative acts, since it is an administrative act in which recursive instances of an

administrative nature were exhausted, but whose final resolution affects the subjective legal sphere of individuals (Urosa Maggi, 2003).

In fact, in the language of Venezuelan administrative law, it should be pointed out that we are facing a “precautionary protection”; that is, a precautionary procedural measure; that is, a ruling aimed at preventing damage caused by the administrative activity of the State, in which a constitutional right is affected, which takes place while the judicial process aimed at expelling a certain administrative act from the existence of the Law is substantiated by a writ of annulment. The very meaning of this precautionary measure is that the main claim would be impossible if it were expected to substantiate the final Sentence upon which the lawsuit falls.

However, until the moment in which this investigation is carried out, several years have elapsed and the judicial process after the injunction has not been substantiated, nor has any decision been made regarding the merits of the matter. Moreover, there has only been that precautionary decision and no other procedural act. This in itself constitutes at first sight a transgression to the most basic procedural guarantees of those to whom the contested judicial decision is addressed.

Sentence 001 of the Electoral Chamber of the Supreme Court of Justice (07/01/2016): The annulment of proportional representation based on a “constitutional” decision

As has been said, the appeal that originates the decision under analysis was lodged against the voting act of the parliamentary elections held on December 6, 2015. Because according to the plaintiff there were vices of absolute nullity, being the product of the manipulation of the free and secret vote of the electors of the Amazon State and that, as a whole, resulted in a massive and structural fraud that would have affected the entire Venezuelan electoral system.

Once the appeal was filed there was a precautionary decision; that is, a judicial resolution prior to the process itself that seeks to protect any possible damage that may occur in advance. One of the foundations of such a precautionary decision argued that the principle of freedom of suffrage, understood as the absence of any conditioning, was violated by the delivery of

economic benefits in exchange for citizens voting for a particular political option. The latter was naturally alleged by the applicant for the “precautionary protection” and the Electoral Chamber accepted it.

In the sense previously expressed, the Chamber went on to pronounce itself asserting that it had been evidenced, through different means of proof, that the violation of the rights of the electors had taken place through the sale of votes and their respective payments. The Electoral Chamber, in effect, mentions the names of several people and states that held management positions in the governorship of the Amazonas state. However, the court also determines that the imprisonment of these officials for the aforementioned events turns out to be a notorious fact (National Assembly of Venezuela, 2015).

In fact, it follows that the only evidence that supports the precautionary measure turns out to be recordings disseminated through the media in which an “alleged official of the Amazon Governorate said she was buying votes and was paying for them.” Thus, one might ask: how was it determined that whoever speaks in the broadcast recordings was a government official in the Amazon? Well, it was not determined in any way and, in addition, it is not established how the recordings were made and where they emanated from. Consequently, facts based on a fairly weak probative reasoning in which they do not realize the premises that justify the reached conclusion are assumed to be proof.

In fact, the only factual support noted in the precautionary decision is based on the fact that the recording was disseminated by various media outlets. The latter alone was enough to configure the “notorious communicational fact”, which supported the probative plexus of the mentioned precautionary decision. And finally, it should be noted that the resolution contained in the precautionary decision was addressed to the National Electoral Council and its subordinate bodies, but not to the National Assembly. In accordance with the provisions of the Supreme Court of Venezuela, this prescribed the suspension of the totalization, adjudication and proclamation of the elected candidates, even when those acts had already materialized and those affected had their proclamation credentials, by virtue of the electoral acts that were intended to be suspended. In other words, such persons had already achieved their status as deputies and individual subjective rights had been generated.

Now, once a citizen reaches a subjective legal situation, the only way to deprive him of this situation is not with a precautionary measure, but with a final sentence that is the result of a judicial process in which a contentious

process has occurred, in which evidence, legal arguments are debated, by conducting a process by impartial magistrates, all in order to reach a final resolution. However, this never occurred. Therefore, the violation of the right to defense and effective judicial protection of deputies deprived of their investiture is relevant. We are, therefore, in the absence of a final decision or judicial sentence that is produced following the formal channels, respecting procedural guarantees and applying the substantive law that corresponds to the case, as the Constitutional Court of Colombia has held (Sentence C -426 of 2002 and Sentence T-599 of 2009).

The Venezuelan precedent that is commented, in effect, reveals the ineffectiveness of judicial control of administrative action. In fact, mere developments of a doctrinal, legislative or jurisprudential nature are no longer sufficient, but it is essential that the constitutional and administrative jurisdictions enjoy autonomy and independence, particularly due to the fact that their decisions always involve facing the current power, especially the executive power. Thus, as Brewer Carías maintains, “if that autonomy is not guaranteed nor independence is shielded, the best administrative contentious justice system will be nothing but dead letter” and that is precisely what is happening in the administrative contentious system in Venezuela, as it has been happening in recent years during the authoritarian government that has developed in the country since 1999 (Brewer Carías, 2015).

Although the sentence analyzed above produced the results that were studied, because the deputies had a declaration of proclamation that instituted them as such and created individual subjective rights, they took their oath in the legislative body. The first decision analyzed is complemented by a second decision dated January 11, 2016. On that occasion, decision number 260 of December 30, 2015 was reaffirmed, in order that it should be complied with by those against whom it is directed, but also adds an element when determining that the legislative body - National Assembly - was in contempt of the precautionary measure as well as the members of the Board of Directors of this body and the deputies against whom the decision with which such investigation was initiated (Supreme Court of Venezuela, Electoral Chamber, 2016). This judicial decision also prescribed that the National Assembly render the oath of deputies without effect and forced them to be disincorporated from the chamber, also affecting all those legislative actions in which they participated.

Everything said above contrasts with some articles of the Organic Law of Electoral Processes (2009), especially regarding the proclamation of elected candidates. In effect, Article 153 stipulates the following:

The National Electoral Council, the National Electoral Board and the corresponding Electoral Boards, as the case may be, shall proceed to proclaim the candidates who had been elected in accordance with the totalization and adjudication procedure, issuing the corresponding credentials.

The deputies who were subject to the precautionary measure in December 2015, received their act of proclamation and, consequently, as established in article 153, they were entitled to the right from of article 14; that is to say, they were invested with parliamentary immunity and, therefore, the applicable procedure was that established in article 266 of the Constitution of the Bolivarian Republic of Venezuela, which states, among others, the following attribution of the Supreme Court of Justice:

To declare whether or not there is merit for the prosecution of the Executive Vice President, of the members of the National Assembly or of the Supreme Court of Justice, of the Ministers, of the Attorney General (...).

The procedure outlined in the aforementioned legal provision was not applied in any case, even when it is current law in the Venezuelan legal system. Indeed, both sentences violate in a very significant way one of the most important functions of any Constitution in the world. More specifically, the function of parliamentary control is affected, also producing the consequent deprivation of one of the essential elements of democracy such as the separation of powers. Likewise, it is impossible for the Constitution to be materially carried out when the right to defense and due process of three legislators who would not be present in the voting of the decisions of the collegiate body and, above all, not if parliament is not present as an institution, it ends up being irremediably affected. So much so that the National Assembly was not and will not be the same after the judicial decision that fell on it.

Thus, the Electoral Chamber of the Venezuelan TSJ, when establishing the obligation to comply with this precautionary decision and consider the National Assembly in contempt, violates the letter of article 187, numeral 20, which states that:

Corresponds to the National Assembly: (...) Qualify its members and know their resignation. The temporary separation of a deputy may only be agreed by the vote of two thirds of the present deputies.

This means, without the need to elaborate complex interpretations, that if the citizens elected as deputies had, as it was, the act of proclamation, they had parliamentary immunity, and the only body with competence to qualify them as deputies was the National Assembly.

We are therefore faced with a situation that constitutes a manifest violation of the Constitution by the Electoral Chamber of the Supreme Court of Justice. Of course, after all this analysis, the importance of the Legislative Power in relation to democracy that requires bodies such as Parliament that are part of the democratic game through checks and balances and that, in addition, limit the possibility the exercise of power in an abusive manner.

Indeed, the National Assembly was stripped of political control over the other powers, one of the functions of the social and democratic State that modeled the last constitutionalist waves in Latin America. In fact, as Aragon maintains, at the present time “neither Parliament is already the power of management nor the government of mere execution. Now the essential distribution of the political functions of the State is quite different: Government directs the policy and the Parliament controls it” (Aragón Reyes, 2009). Thus, the principle of separation of powers, an essential element of all democracy, shines by its absence in Venezuela.

Abusive constitutionalism as a challenge of democracy

Venezuelan democracy is seriously affected by abusive constitutionalism. Indeed, democratic legitimation, as Sartori has pointed out at the time, limits power in situations of an autocratic regime (Sartori, 1993). More specifically, the aforementioned Italian author emphasizes that we are in the presence of “non-democracy”, when the degeneration of power reaches such a point that neither the dignity (*dignitas*) of the *auctoritas*, nor freedom is present. And it is here that it is noticed that the Venezuelan path that has been traveled to reach such an extreme has deployed abusive constitutionalism. Now, what does such constitutionalism mean? It is the increasingly widespread phenomenon by which mechanisms of constitutional change are

employed, whether these are channeled through formal or informal channels, to erode the democratic order (Landau 2013).

The sentences that have been commented on in this work fit into this concept of abusive constitutionalism. Indeed, through the jurisprudence of the Venezuelan TSJ, those constitutional changes that undermined the pillars of democracy took place. Such anti-democratic changes were made through the violation of effective judicial protection and the right to defense of the deputies, who are affected by the decision of the aforementioned court, who could not enforce their rights and the legislative body saw their conformation modified. Moreover, the decisions of the Supreme Court prescribed the invalidity of the decisions of the legislative body. We are, therefore, facing the closing of the parliament by force of resolutions of the Supreme Court of Justice of the Bolivarian Republic of Venezuela.

Thus, abusive constitutionalism is but a way of exercising a policy tinged with authoritarianism; that is, we are facing an autocratic regime of different political sign, which uses the tools of constitutional, traditional or nineteenth-century law and neo-constitutionalism to manipulate power and gain more public power (Zúñiga Urbina & Cárcamo Tapia, 2015). Indeed, it is a question of using the own tools of correction of constitutional law, which in different states has taken different channels - diffuse constitutional control or by way of action, constitutional sentences that imply binding precedents - in order to pervert the legal order and thereby achieve the purposes contrary to law and, more broadly, of constitutional democracy.

In fact, as Higuíta Peña points out, abusive constitutionalism affects the constitutional system particularly when it comes to presidentialist or, rather, hyper-presidentialist systems of government. The latter usually captures the entire political power through the extension of the presidential term (usually carried out through plebiscitary constitutional reforms). And from this, the nominating power of the president expands and, therefore, his interference in the formation of other organs or powers of the State, including those of political and judicial control (Higuíta Peña, 2017). In any case, whatever the definition of democracy or 'non-democracy' is adopted, the remarkable thing about linking the definition of democracy and abusive constitutionalism is that it highlights its intrinsic relationship with political power (Rojas Bernal, 2016). It is, therefore, a new version of a tyrannical regime that does not lack a pinch of originality to ideologically upset what protects the

human person, to turn against himself as is the order and control of constitutionality (García- Pelayo, 2009).

This modality of the exercise or practice of political power has at its starting point an important quota of legitimacy, but it ends up materializing through authoritarian, autocratic and abusive practices that use the mask of constitutional law. It is therefore imperative to encourage interpretive practices that apply the Constitution in a way that revises and uses those necessary remedies and corrects such distortions. In other words, it is essential to rethink constitutional practices that pervert the very reason of institutions such as the judicial control of constitutionality of decisions taken by other branches of public power.

Thus, it could be considered that what has been described in the previous narrative is not enough. Indeed, it is observable that the Judicial Power intervenes directly in the performance of the Legislative Power in Venezuela, first cutting off the right to effective judicial protection and the right to the defense of the deputies on whom the analyzed decisions fell and on the Venezuelan legislative body, specifically regarding its competences; this is why they have turned their system into ‘no democracy’. In fact, the Venezuelan Supreme Court of Justice has issued multiple sentences on issues such as states of exception, of February 11, 2016 (TSJ Venezuela, Constitutional Chamber, Sentence 0038/2016), the Venezuelan patrimonial economic regime (TSJ Venezuela, Constitutional Chamber, Sentence specifically in sentence 1269/2011), the Central Bank of Venezuela (TSJ Venezuela, Constitutional Chamber, Sentence 2016/0279).

Conclusive balance

According to our analysis, the decisions of the Venezuelan Supreme Court studied affect the minimum content of the right to effective judicial protection, the right to defense and due process. Therefore, the case in which Venezuelan deputies (2016) were stripped of their investiture represents a case of “abusive constitutionalism”. In effect, the aforementioned case involved a process in which initially the defendants did not have the opportunity to carry out the preliminary control of the evidence on which the precautionary decision was based; that is, the recordings disseminated by the media. This possibility of control, being a precautionary measure, did not

operate until after the order entered into force. However, the subsequent exercise of the right to defense was entirely unsuccessful. During the course of the process there was no response on the opposition to the precautionary measure, which leaves unanswered the exercise of the right to defense by the subjects to whom the decision was directed.

To recapitulate, it can be gathered that, until the date on which the results of this investigation are presented, a procedure that resulted in a final and firm decision was not substantiated. In fact, the only decisive procedural element with which it is counted regarding the factual analyzed situation was the precautionary protection measure that is still in force. The defendants carried out different means of defense and proceedings aimed at ensuring that their version of the facts and the law were embodied and exposed; however, it does not appear in the analyzed process how the Supreme Court dismissed these proceedings.

The aforementioned allows to establish that the human rights of those affected (deputies to the National Assembly) were violated, since the silence before the allegations and not taking into account their considerations and defenses was done to completely silence their voices. Also, situation of being “put to trial”, state in which the deputies subject to the analyzed sentences were placed, carries an additional meaning. The National Assembly would go from being the opposition to the ruling regime, to not having a qualified majority of two thirds. Such a majority is of the utmost importance for making major decisions, such as the call for a National Constituent Assembly provided for in article 348 of the Venezuelan Constitution currently in force.

The course of subsequent events demonstrates that these events were aimed at diminishing the legal and political powers of the National Assembly. Indeed, the aforementioned legislative body through other Sentences was completely decimated, without the possibility of carrying out any kind of legal or political control over the decisions of the other organs of the State. It ended up thus reaching the state of affairs to which abusive constitutionalism points through a violation of the fundamental right to effective judicial protection by deputies who had sworn before the National Assembly.

The chronology of the analyzed facts could be summarized as follows: at the beginning the Electoral Chamber produced a ruling against the National Electoral Council and prohibited its proclamation even though it had already been carried out. Then the National Assembly swears in the deputies affected by the decision and recognizes their subjective status as deputies,

by the way, qualifies them as such in compliance with the same Constitution as the National Electoral Council had already proclaimed them, and the Electoral Chamber of the TSJ, by this action, declares the National Assembly in contempt.

The situation affecting the deputies resulted in the national legislative body, in accordance with other decisions of the Supreme Court of Justice, that were also analyzed, losing its legitimacy. This caused, in turn, that actions in which the National Assembly was involved and that were part of its powers such as, for example, accountability by the Executive Branch, the process of formation of laws and many others were also affected.

Finally, powers were taken from the National Assembly through the sentences that have been studied and so far, the state of defenselessness is maintained, but now not only of the deputies, but of the organ. In this way, it can be affirmed that this work includes a single legal aspect referred to a specific situation as indicated by its course of work. An analysis that includes greater scope could determine that the Supreme Court of Justice not only violated the effective judicial protection and due process of the deputies, but also dismantled constitutional institutions of all kinds to derive, in broad terms, in a “non-democratic regime”.

In summary, in the Venezuelan State there is no democratic regime according to the analyzed definitions, because the separation of powers is lacking and human rights such as the right to effective judicial protection are not respected. These rights of the deputies elected by the popular vote were violated.

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