

# Democratization



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# Birth and evolution of two separated national legal systems in Venezuela

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In 2007, the reform of the Constitution of the Bolivarian Republic of Venezuela (CRBV<sup>1</sup>) was rejected through an approval referendum. According to the reasons for this project, the reform sought for the constitutional text to distance itself from the “bourgeois capitalist” model and rather constitutionalize the socialist economic system. The fact that it was an attempt to reform the CRBV might seem contradictory in principle, but there were in fact substantive aspects that sustained its unconstitutionality: the reform sought to establish a single economic model, socialist, proscribing other positions or models, contrary to the democratic principles and political plurality that the CRBV consecrates in an intangible way.

As a result of such rejection, the qualified majority of the National Assembly, which corresponded to the officialist party until 2010, approved a series of laws known as “People’s power laws”<sup>2</sup> in December of that same year whose general framework was established in the Organic Law of Popular Power (LOPP<sup>3</sup>).

The LOPP would be the Constitution of the new State model, which would be a Communal State created on the basis of forms

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1 Constitución de la República Bolivariana de Venezuela.

2 Leyes del Poder Popular.

3 Ley Orgánica del Poder Popular.

of community and communal self-government and, in conjunction with the other laws of the Popular Power, intended to end the division between civil society and State to “build the foundations of a socialist society”.

The postulates of the LOPP are specifically developed through other special laws, among which the following stand out: the Organic Law of Public and Popular Planning<sup>4</sup>, the Organic Law of Communes<sup>5</sup>, the Law of the Communal Economic System<sup>6</sup>, the Law of State Planning Councils and Coordination of Public Policies<sup>7</sup> and Law of Local Councils of Public Planning<sup>8</sup>.

Through this set of laws, the content of the CRBV would be progressively emptied of its republican, democratic and pluralistic character, while the conformation of the Public Power at the state and municipal level would be changed to gradually create a Communal State. The Laws of Popular Power constituted the first attempt to conform a new legal order, parallel to the one established in the CRBV, although its effects and scope have been very limited when compared with the objectives indicated above, which would be –in our opinion– due to its clear inoperativity, rather than the lack of political will to implement them.

Notwithstanding, and although with different immediate objectives, in 2017, the President of the Republic effectively initiated the creation of a new legal order parallel to the CRBV: the

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4 Ley Orgánica de Planificación Pública y Popular.

5 Ley Orgánica de las Comunas.

6 Ley del Sistema Económico Comunal

7 Ley de los Consejos Estadales de Planificación y Coordinación de Políticas Públicas.

8 Ley de los Consejos Locales de Planificación Pública.

unconstitutional convening and constitution of a Constituent National Assembly (ANC<sup>9</sup>).

The call for the ANC was unconstitutional because, in accordance with article 347 of the CRBV, the President of the Republic does not have the power to convene an ANC, only the Venezuelan electoral body can do so: it establishes that the Original Constituent Power corresponds to the people of Venezuela and, consequently, would be the only one that could call for an ANC. The President of the Republic only has the power to request the holding of a referendum in which the electoral body decides whether to approve the convening of an ANC.<sup>10</sup>

The call for the ANC had a different objective from the Laws of Popular Power, because more than developing the bases of the communal State or any other constitutional model, it has rather functioned as a mechanism to definitively and fraudulently substitute the National Assembly, an organ of the national Legislative Power, as well as to manipulate the electoral system and calendar in benefit of the ruling party.

The ANC has issued alleged “constitutional laws” or “constituent acts”, which were intended to be complied with within Venezuela, as a way to force its recognition by the national and international community and thus be legitimized. The main

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9 Asamblea Nacional Constituyente

10 Not only because of an interpretation of the constitutional text, it must be concluded that the electorate –on behalf of the Venezuelan People– is the only one that can call an ANC, but because of the fact that such a call constitutes a “constituent act”, meanwhile, the call for an ANC implies the decision to repeal the current Constitution, for which the ANC must prepare a draft constitutional text, which will be submitted to the electorate for its approval and definitive repeal.



actions that the ANC has carried out to date in that regard have been:

- Call for elections of governors, mayors (already held), and recently of the President of the Republic;
- Swearing in of elected officials to assume the charges, under penalty of “dismissal” in the event that they do not do so (as was the case in the State of Zulia);
- Constitutional Decree authorizing the appointment of the President of the Central Bank of Venezuela<sup>11</sup>.

The ANC has already even modified the CRBV, when it decreed the suppression of the Metropolitan Mayor’s Office<sup>12</sup>, the Metropolitan Cabildo<sup>13</sup> and the Metropolitan Comptroller’s Office<sup>14</sup>, as well as the District of Alto Apure, its organs and attached entities, thereby modifying the territorial political order of Venezuela.

The ANC has issued several decrees that contain “constitutional laws” to substitute the National Assembly as a result of the legislative functions it has assumed. Some of these constituent laws have been:

- Constitutional Law of the Tax Regime for the Sovereign Development of the Mining Arc<sup>15</sup>;

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11 Banco Central de Venezuela.

12 Alcaldía Metropolitana.

13 Cabildo Metropolitano.

14 Contraloría Metropolitana.

15 Ley Constitucional del Régimen Tributario para el Desarrollo Soberano del Arco Minero.

- Constitutional Law on Productive Foreign Investment<sup>16</sup>;
- Constitutional Law of the Productive Councils of Workers<sup>17</sup>;
- Constitutional Law Against the Economic War for Rationality and Uniformity in the Acquisition of Goods, Services and Public Works<sup>18</sup>;
- The Constitutional Law that creates the Great Estate Tax<sup>19</sup>.

The above demonstrates how a new legal system has begun to be formed by the ANC, which is invalid according to the CRBV suppositions and which intends to function parallel to and with preference over the legal system developed from this last constitutional text.

It is imperative to indicate that both legal systems have begun to be complemented by bodies or institutions that do not recognize each other, and that even have diverse recognition by other States. Thus, the National Assembly and an important part of the international community (represented by the European Union, the US and the so-called Lima Group) do not recognize the President of the Republic, the ANC, the National Electoral Council (CNE)<sup>20</sup>, the Supreme Court of Justice (TSJ)<sup>21</sup>, and the Attorney

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16 Ley Constitucional de Inversión Extranjera Productiva.

17 Ley Constitucional de los Consejos Productivos de Trabajadoras y Trabajadores.

18 Ley Constitucional Contra la Guerra Económica para la Racionalidad y Uniformidad en la Adquisición de Bienes, Servicios y Obras Públicas.

19 La Ley Constitucional que crea el Impuesto a los Grandes Patrimonios..

20 Centro Nacional Electoral

21 Tribunal Supremo de Justicia.

General of the Republic. And, on the other hand, the latter do not recognize the National Assembly nor its acts.

We are facing the formation of two parallel legal and state systems within the same territory, which are mutually exclusive and which do not recognize each other, a situation which deeply aggravates the Venezuelan institutional and social crisis.

As a result of this delicate situation, it has been evidenced that it is not feasible to solve it through the institutional channels of the rule of law, since, first, the ANC considers itself to be above the CRBV and not even subjected to judicial control, which even heeds its decisions in collusion with the Executive Power; and, secondly, since the Constitutional Chamber of the TSJ validated its call by the President of the Republic, without the need for a referendum, through its judgment number 378, dated May 31, 2017, on the occasion of the appeal of interpretation of articles 347 and 348 of the Constitution, filed by the citizen Leopoldo Pita Martínez.

In fact, the problem becomes even more complex due to the fact that each one considers the acts of the other to be practically non-existent legally and therefore disclaims them, and, thus, they function in parallel.

An example of this is the fact that, for the legal system founded in the CRBV and headed by the National Assembly, the election of the President of the Republic and its pending execution would still be non-existent, while for the other legal system led by the National Executive and the ANC, these elections would be valid.

Additionally, the situation is further complicated since, as paradoxical as it may seem, despite the fact that two legal systems

are being formed in Venezuela, it could be argued that there is no rule of law at present. In fact, it can be affirmed that within the dominant legal system (for its application in practice), which is the one propelled by the National Executive and the ANC, there has been an unfolding of the rule of law in which the State exists without being subject to it. This has happened because the control mechanisms to make this possible have become totally ineffective since the Executive Power has controlled the rest of the branches of the Public Power, even by its submission, as is the case of the Judiciary whose decisions are foreseeably favorable to the Executive Power regardless of what is provided by the legal system.

Consequently, the resolution of the situation has already ceased to be possible legally, since the law is totally insufficient and inoperative. Given that for each of the legal systems described the acts of the other are non-existent and that the bodies that make up each of them do not recognize each other, the solution does not lie in legal acts that may arise in one system or another. For that reason, the solution must necessarily be found in the political sphere and in the mechanisms it provides.

In that sense, we consider that there are two basic aspects that must be taken into account for a political solution to the crisis described: the first is that the solution must be framed in democratic principles and, therefore, subject to the consideration of the electorate, which must ratify or approve the solution proposed after the agreements that may be reached by the parties; and the second; precisely linked to the latter and which actually precedes it chronologically, is the need to reach an agreement in which the rule of law in Venezuela is restored through the reunification of the Venezuelan law system and which, most importantly, preserves national unity and peace in Venezuela.

For this last agreement to be possible, it must be kept in mind that it requires incentives that are better than the alternative of not negotiating for each of the parties, since nobody negotiates if they have a better alternative of not doing so. In this regard, the cornerstone of both positions is to obtain a balance between the legal risk that the official sector would face if it lost control of the government and the Judiciary Power especially, given the consequences that it would have to bear under the crimes allegedly committed, and the aspiration of democratic parties and sectors of bringing to term competitive elections and electoral guarantees that could allow them to become the new government.

## Conclusions

Lech Walesa, the first President of Poland after communism, offered a conference at the FAES Foundation on May 24, 2005. In his speech, he shared details about his political experience. In the Q&A session, a person from the audience asked about the differences between Francisco Franco's Spain and the USSR Poland. With the simplicity that characterizes him, the labor leader offered the following example: Imagine two fish tanks. In the first one, the water is cloudy, but the fish still swim. In the second, there is no water and the fish are suffocated. Spain was a fish tank with dirty water, so changing the water was enough for the fish to swim again. Poland was an empty fish tank, without oxygen. We, the fish, were dry.

The Walesa example clearly illustrates the main motivation of the first volume of *Democratization*. We dedicate our initial efforts to study the autocratic nature of the Bolivarian Revolution to know the situation of "our fish tank". We believe that this work is useful and necessary because it will allow us to identify two important aspects: 1. The starting point of an eventual political change in terms of pre-democratic conditions and 2. The reformist capacity that could exist –or not– within those who today lead the Bolivarian Revolution.

The conclusions presented below are divided into three parts. First, we will list the particular findings of each of the articles included in this volume. Next, we will offer general conclusions

and, finally, we will present the directions that our research will take in the future.

I.

The first issue of *Democratización* includes 4 articles. Below we list the main findings of each of them.

*El problema del nacimiento y desarrollo de dos ordenamientos jurídicos nacionales separados en Venezuela*<sup>1</sup>, by Dr. Miguel Monaco, is a description of the constitutional dismantling that Venezuela experienced as of 2007. His research yields three central conclusions:

1. *The Laws of Popular Power and “the constitutional emptiness”*. The constitutional reform proposal promoted by the Bolivarian Revolution in 2007 was defeated at the polls. However, before the electoral failure, their promoters decided to impose their political ends through the so-called “Laws of Popular Power.” In this way, *Chavismo continued*<sup>2</sup> progressively emptying the contents of the Magna Carta and advanced in the creation of a parallel legal system.
2. *The National Constituent Assembly and the emergence of a new factual and illegitimate legal system*. The unconstitutional call

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1 *The birth and development of two separate national legal systems in Venezuela*

2 We recommend seeing the chronological description offered by the Dip. Juan Miguel Matheus in his article included in this issue. The author specifies the constitutional and institutional irregularities that allowed the Bolivarian Revolution to repeal the 1961 Constitution and initiate the constitutional process of 1999. In this way, we identify that the “constitutional emptying” described by Dr. Mónaco is the extension of the progressive dynamic of democratic erosion that has marked the political performance of the Bolivarian Revolution.

of the National Constituent Assembly in 2017 constitutes the emergence of a new legal system that becomes dominant due to its factual application and coexists simultaneously with what survives of the 1999 Constitution.

3. *On the need for negotiation as a political solution to the conflict.* For the author, the optimal and least costly solution in human and political terms for the Venezuelan conflict is a negotiation and/or agreement between the parties involved.

*La tecnología como mecanismo de control social y opresión en Venezuela*<sup>3</sup>, written by Edward Pérez, describes the main technological measures used by the Bolivarian Revolution to dominate citizens. The author dwells in the case of the *captahuellas*<sup>4</sup> as an instrument to manipulate the vote and as a mechanism for obtaining information regarding the access of goods and services. Finally, it offers an analysis of the operation of the so-called *Carnet de la Patria*. Below we list their main findings:

1. *Technology as a mechanism of social control configures an environment in which suspicion and fear predominate.* The Bolivarian Revolution uses technology as a mechanism of social control, which generates an undemocratic environment marked by suspicion and fear. This situation could limit the political articulation capacity of democratic forces.
2. *Technological domination is leveraged in global autocratic solidarity.* Larry Diamond, in *Ill winds* (2019), describes the expansive nature of the autocratic modes of China and Russia from cooperation in military, economic and financial matters<sup>5</sup>. Technological assistance in surveillance,

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3 *Technology as a mechanism of social control and oppression in Venezuela*

4 fingerprint reader

5 Larry Diamond. *Ill Winds* (New York, Penguin Press, 2019)



communications and repression of these countries to the Nicolás Maduro regime contributes to the strengthening of their autocracy.

3. *Technological controls at the service of the rationing of goods and services favor the emergence of mafias.* Pérez accurately describes the operation of food and goods rationing through the *captahuellas*. It also emphasizes the emergence of mafias that control food distribution and the consolidation of powerful corruption networks. The description of these dynamics will correspond to future investigations related to the gangster state<sup>6</sup>.

*Configuración ideológica de la Revolución Bolivariana*<sup>7</sup>, a study conducted by Dip. Juan Miguel Matheus is an analysis of the ideology that guides the autocratization process initiated in Venezuela in 1999. Using philosophical and political science categories, the Doctor of Constitutional Law identifies the dynamism of the ideological configuration of autocratic systems and distinguishes two mobility modes: (i) Ideological reconfiguration and (ii) Ideological disfiguration.

After exposing the theoretical foundations of his study, the author identifies the six features that ideologically shape the regime inaugurated by Hugo Chávez in 1999: militarism, left-marxist language, Bolivarianist delirium, democratic instrumentality, internationalization and castro-communism, and populist constitutionalism. Next, the author examines the permanence or mutation of these features to determine if the ideological

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6 See Larry Diamond. *Ill Winds* (New York, Penguin Press, 2019). The chapter dedicated to kleptocracy describes the gangster dynamics of autocracies

7 *Ideological configuration of the Bolivarian Revolution*

identity of the Revolution has been subject to a process of reconfiguration or ideological disfiguration.

Finally, Matheus concludes that the terms of the ideological reconfiguration of the Bolivarian Revolution constitute an obstacle to advancing in a process of democratic transition either agreed or negotiated. His main findings include:

1. *Ideological configuration, capacity for internal reform and negotiated transition.* The author identifies that, currently, there is little capacity for internal reform in the Nicolás Maduro regime. Negotiated and/or agreed transitions are possible when the parties involved are able to minimize exit costs and open doors to the democratization process. In the Venezuelan case, we find that the aforementioned “exit costs” may be associated with intangible assets related to a conception of the world based on firm ideological positions that shape existential political positions. In this sense, the offers of a material nature or postponement of justice that could be negotiated in an eventual negotiation process could be insufficient to satisfy the regulatory preferences of the dictatorship actors.
2. *On populist constitutionalism and the dismantling of constitutional democracy.* The dismantling of constitutional democracy is channeled more quickly when promoted from a specific ideological configuration that serves as justification and framing of a supposed historical legitimacy.
3. *Political culture and democratization:* The democratic transition in Venezuela will be a cultural problem. Their concrete times and ways will necessarily be conditioned by the wounds of the ideological configuration that the

Bolivarian Revolution has left in the political soul of the Venezuelan nation.

*Revolución Bolivariana y desarrollo del Estado gangsteril en Venezuela*<sup>8</sup>, by Dr. Paola Bautista de Alemán, is a study that describes the emergence of the gangster state in Venezuela and identifies the challenges that this reality imposes on an eventual democratization process. The author offers a theoretical approach to the concept of a gangster state, then describes the entropic development of this phenomenon in the country and concludes that Venezuela is a gangster state of entropic nature that is currently in a state of collapse. Her main findings include:

1. *On the particularity of the entropic nature of the emergence of the gangster state in Venezuela.* After studying the development of these phenomena in other latitudes, the author states that the Venezuelan State was not colonized by international organized crime. On the contrary, organized crime emerged from the socialist state to guarantee political power.
2. *On the singularities of a process of political change agreed or negotiated.* Considering that the starting point for political change in Venezuela is multidimensional and includes the gangster dimension, she proposes that any process of negotiated change must be carried out in several bands or sides. While in the agreed transitions of the 20th-century negotiations were made between politicians who aspired democracy and politicians who exercised power away from justice, in this type of processes politicians seeking

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8 *Bolivarian Revolution and development of the Gangster State in Venezuela.*

democracy must deal and negotiate with criminals who have built a state according to their kleptocratic interests.

3. *On the compatibility between gangster State and constitutional democracy.* The gangster nature of the Bolivarian Revolution imposes unfair and illicit structures that make it incompatible with constitutional democracy. However, any process of negotiated or agreed political change involves concessions with the autocracy that seeks to open itself towards democracy. Considering this reality, the author asks if a political exit could be negotiated without intending to dismantle the gangster state. How to avoid restarting the vicious circle described by Hirschfeld<sup>50</sup> -State weakness, political instability, collapse and new gangster State- in this scenario.

## II.

After specifying the main findings of each of the articles, general conclusions will be offered with the purpose of contributing to the understanding of the political process that Venezuela is experiencing:

1. *Progressive autocratization dynamics.* The autocratization process that began the Bolivarian Revolution in 1999 has gained ground progressively using democratic instrumentality to empty the contents of the Constitution and to install in fact a supposed new legal order. Identifying the progressive dynamics of the Bolivarian Revolution can contribute to the understanding of the phenomenon of democratic erosion that Venezuela experienced and can provide inputs for current studies on populism. Given the performance of *Chavismo-Madurismo*, we can affirm that

the progressivity used as a political tool facilitates autocratic rebalancing and power adjustments that offer resilience to those who exercise power far from justice.

2. *The socialism of the 20th century is an anachronism and a syncretism.* The Chavista ideology is an anachronism and a syncretism. We can affirm that it is anachronistic because, in its aspiration of total domination, it is related to the totalitarianisms of the 20th century (communism, fascism, and Nazism) and, in that sense, it is a setback in the world of political ideas. On the other hand, we consider it a syncretism because it tries to reconcile highly technological modes of domination, typical of the 20th century, with aspirations of total domination that were thought defeated with the fall of the Berlin Wall. It is, therefore, appropriate to ask ourselves about the essential and the accidental in autocratic natures. Perhaps the desire for total domination corresponds to the former and the ways of executing them refer to the latter. That is to say: the nature of evil remains, while its forms advance with technology.
3. *Ideological reconfiguration is less susceptible to democratic reform than ideological deconfiguration.* We understand by ideological reconfiguration what was expressed by Deputy Matheus in his article. It is a partial mutation in the body of ideas that guides the autocracy where an ideological stronghold remains that is preserved with flexibility of action and adaptation to circumstances. The ideological disfiguration is different: it is a reset of the original framework and the emergence of a new ideological identity. The empirical reference of ideological reconfiguration is Cuban Castroism and that of ideological disfiguration is state capitalism in China. In the processes of ideological

reconfiguration, strong ideological principles that constitute obstacles for political change and limit the capacity for internal reform within the autocracy remain. On the other hand, although ideological disfiguration may allow a “reset to the original framework” of ideas, we do not mean a democratic easing. In both cases, it is an autocratic rebalancing.

4. *On the need and the real possibility of a negotiation process.*  
The Venezuelan situation is a source of imbalance for the entire region. The consequences of structural collapse are expansive and the American continent experiences the worst migration crisis in its history. National and international political actors have denounced the need to find a solution for this situation and when analyzing the possible ways out of the problem, a negotiation is presented as the most desirable option.

While a fruitful negotiation is the least costly path in human and political terms, it is worth asking whether the desirable can be real or possible. The exercise of identifying the main obstacles that separate us from the desirable -negotiation- has the purpose of discovering (or creating) mechanisms that allow us to remove or make them more flexible. The study that ends with these lines identifies that the firmness of the ideological commitment of the political actors that currently lead the Bolivarian Revolution, together with the gangster dynamics and the support of the autocracies of the world, are the main obstacles that prevent the development of a negotiation process that allows opening the doors to democracy.

We can affirm that these three conditions -ideological stubbornness, gangster dynamics, and autocratic solidar-

ity- are the pillars that feed the autocratic resilience of the Bolivarian Revolution.

### III.

The first edition of *Democratización* offers an analysis of the autocratic nature of the Bolivarian Revolution and its implications in an eventual process of political change. In the next installments, we will continue to fathom those variables that could influence the process of democratic liberation. In the immediate future, it will be necessary to dwell on the international dimension of the Bolivarian Revolution. As we observe in the development of the articles, the support of world autocracies is a fundamental element in the survival of the autocracy.