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The blockade of the legislative and comptroller functions of the National Assembly by the Supreme Tribunal of Justice: an introduction

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I. Introduction

Within the long-lasting Venezuelan political crisis, the National Assembly has become an exceptional protagonist since its opposition-backed election in 2015 to the present day. During these five years, the National Assembly has tried to be an institutional barrier against the abuse of Executive, Judicial and Citizen Power.

The National Assembly has become the place from where the Venezuelan opposition has politically confronted Nicolás Maduro's regime, even establishing a new President of the Republic under Article 233 of the National Constitution, as well as passing a statute that regulated the democratization process in order to reestablish the validity of the Constitution of the

Bolivarian Republic of Venezuela[1]. These actions constitute the political-constitutional route devised by the National Assembly for the political transition towards democracy.

However, the Supreme Tribunal of Justice has systematically issued decisions to impede the National Assembly from exercising its constitutional functions, such as annulling almost all laws dictated by the Assembly and persecuting dozens of its members. The institutional siege of the National Assembly began a few weeks after the election of its members in December 2015, and has continued ever since. Furthermore, the National Assembly has been subjected to institutional violence by an instance called the National Constituent Assembly, unconstitutionally convened and elected in 2017.

The purpose of this essay is to summarize how the blockade of the National Assembly by the Supreme Tribunal of Justice occurred, through different decisions that interpellated each of the typical constitutional functions of Parliament. Since the core of this unconstitutional blockade can be found in the decisions issued during 2016, the emphasis will be placed on that period.

This study is presented as an introduction to a case study for comparative constitutionalism: how a systematic judicial policy to block Parliament was established from the highest court. The focus of this introductory study will be the blocking of the legislative and the comptroller function of the National Assembly by the Supreme Tribunal of Justice.

1 *Estatuto que rige la transición a la democracia para restablecer la vigencia de la Constitución de la República Bolivariana de Venezuela*

II. The National Assembly in the Venezuelan constitutional system[2]

The National Assembly is one of the five organs of the National Public Power. Specifically, it constitutes the National Legislative Power (Article 136 of the Constitution). Its functions and modus operandi are provided for in the Constitution and in the Interior and Debate Rules of the National Assembly *(Reglamento de Interior y Debates de la Asamblea Nacional*)[3].

In accordance with what has been a constitutional tradition in Venezuela, the organization regime of the National Public Power in the Constitution starts with the regulation of Parliament, as one of the organs of the National Public Power. However, opposed to what had been tradition since the Constitution of 1811 –bicameral parliaments–, the structure of the Parliament established in the Constitution of 1999 is unicameral[4], which contradicts the

2 The following arguments derive from Carlos García Soto in *La Asamblea Nacional: lugar en el sistema constitucional y funciones* (Caracas: Universidad Monteávila-Editorial Jurídica Venezolana-Instituto de Estudios Parlamentarios Fermín Toro, 2016), 22-27.

3 "*Reglamento de Interior y Debates de la Asamblea Nacional*", Official Gazette N° 6014. extraordinary of December 23, 2010.

4 Cfr. Ramón Guillermo Aveledo, *Curso de Derecho Parlamentario* (Caracas: Universidad Católica Andrés Bello-Instituto de Estudios Parlamentarios Fermín Toro), 127. See also Allan R. Brewer-Carías, *La Constitución de 1999 y la enmienda constitucional N° 1 de 2009*, (Caracas: Editorial Jurídica Venezolana, 2011), 136; Manuel Rachadell, *Evolución del Estado venezolano 1958-2015: de la conciliación de intereses al populismo autoritario*, (Caracas: Editorial Jurídica Venezolana-FUNEDA, 2015), 136; and Gustavo Tarre Briceño, *Sólo el poder detiene al poder. La teoría de la separación de los poderes y su aplicación en Venezuela* (Caracas: Editorial Jurídica Venezolana, 2014), 235. Furthermore, the National Assembly provided for in the Constitution of 1999 cancelled the figures of "Senator for life" as well as additional deputies by quotient. See Ramón Guillermo Aveledo, *Curso de Derecho Parlamentario*, 127; María Amparo Grau, "La organización de los Poderes

federal form of the Venezuelan State (Articles 4 and 159 of the Constitution), as already indicated in the previous section.

The decision to have a unicameral National Assembly was justified in an explanatory statement of the Constitution of 1999 as follows: The National Legislative Power is exercised by a National Assembly with a unicameral structure that responds to the purpose of simplifying the procedure for the formation of laws, reducing the cost of operating the Parliament, eradicating the duplication of administration and control bodies, and the duplication of permanent commissions, among other things[5].

According to Article 186 of the Constitution, the National Assembly will be composed of deputies elected in each federal entity through a universal, direct, personalized and secret voting process with proportional representation according to a population base of 1,1% percent of the country's total population.

Additionally, each federal entity will also elect three deputies.

In the case of indigenous peoples, these will elect three deputies in accordance with the provisions of the Electoral Law, respecting their traditions and customs.

Públicos en la Constitución del 99: desarrollo y situación actual", in *El Derecho Público a los 100 números de la Revista de Derecho Público (1980-2005)*, (Caracas: Editorial Jurídica Venezolana, Caracas, 2006), 329; and Gustavo José Linares Benzo, "Las innovaciones de la Constitución de 1999", *Revista de Derecho Público*, N°81(enero-marzo, 2000).

5 "*El Poder Legislativo Nacional es ejercido por una Asamblea Nacional cuya estructura unicameral responde al propósito de simplificar el procedimiento de formación de las leyes, reducir el costo de funcionamiento del parlamento, erradicar la duplicación de órganos de administración y control y la duplicación de comisiones permanentes, entre otras cosas*".

The calculation of the population base implies that the exact number of members to be elected must be determined for each election process for National Assembly deputies.

To exercise some of its functions, the National Assembly may appoint permanent, temporary, ordinary and special Commissions. When it is in recess, it works through the Executive Committee.

The constitutional period of the Assembly, and therefore of its members, is five (5) years (Article 192 of the Constitution).

Deputies, as members of the National Assembly, are representatives of the people and of States as a whole, not subject to mandates or instructions, but only to their conscience. Their vote in the National Assembly is personal (Article 201 of the Constitution). They are not responsible for votes and opinions cast in the exercise of their functions. They will only answer to the electors and the legislative body in accordance with the Constitution and the Regulations (Article 199 of the Constitution).

Each deputy will have a substitute or an alternate, who will be chosen in the same process (Article 186 of the Constitution).

As will be seen further on, the National Assembly of the Constitution of 1999 wields a series of powers, derived from its own functions, which can be classified into (i) the representative function, (ii) the legislative function, (iii) the political function, (iv) the comptroller function, (v) the administrative function, and (vi) the jurisdictional function. In exercise of these functions, the activity of the National Assembly is judicially controlled by the Constitutional Chamber of the Supreme Tribunal of Justice.

In fact, under the Constitution of 1999, the National Assembly can exercise unusual control over the other Public Powers in comparison to contemporary Constitutional Law. This has even been described as a contradiction with the principle of the autonomy of the Judicial, Citizen and Electoral Power[6]. Therefore, despite what is commonly thought, the Constitution of 1999 established the primacy of the National Assembly over the other Public Powers[7].

This primacy of the National Assembly over the other Public Powers in the constitutional system of 1999 is manifested up to the point that the National Assembly has the power to remove members of the Public Powers who have not been elected. As will be seen when analyzing the content of the political functions of the National Assembly, the Constitution allows it to remove

6 Allan R. Brewer-Carías, *La Constitución de 1999 y la enmienda constitucional N° 1 de 2009* (Caracas: Editorial Jurídica Venezolana, 2011), 137. See his inicial critique in "Reflexiones críticas sobre la Constitución de 1999", *Revista de Derecho Público*, N° 81(enero-marzo, 2000): 13.

7 When referring to the Congress described in the 1961 Constitution, Ambrosio Oropeza stated: the Legislative Power, Parliament or Congress is the first of the superior organs that the Constitution discusses. According to the hierarchical order of the public powers, it is not characterized by its pre-eminence over the others, since the three classic powers that fulfill State functions are independent and autonomous, each endowed with specific powers. But although it is not hierarchically superior, the legislative power is the most important of the State organs, since it is has the exclusive faculty to dictate the law. Naturally, its fundamental mission is to establish the rules that preside over the social organization, the legal regime under which citizens must live, the orientation of politics in its broadest sense in order for the State to achieve the high ends of collective life. On the other hand, the executive and judicial powers have a role that is certainly fundamental, but more modest: executing, enforcing the laws, ensuring the effectiveness of the legal regime and the directives that determine legislative power. *La nueva Constitución venezolana de 1961* (Caracas, 1981), 405.

members of the Citizen Power, after a sentence by the Supreme Tribunal of Justice (Article 279); to remove the members of the National Electoral Council, after a sentence by the Supreme Tribunal of Justice (Article 296); and to remove the magistrates of the Supreme Tribunal of Justice –after a hearing granted to the interested party– in case of serious offenses already sanctioned by the Citizen Power (Article 265)[8].

III. The National Assembly and its role in the Venezuelan political crisis (2015-2020)

According to its role within the Venezuelan constitutional system hereby described, the National Assembly has been at the core of the fight for the restoration of democracy and the protection of citizens' rights.

This role undertaken by the National Assembly has been manifested through the exercise of its constitutional functions.

8 The primacy of the National Assembly over other Public Power organs has been criticized by Allan R. Brewer-Carías: It is contrary to the system of checks and balances, which, based on effective autonomy and independence among the powers, should fundamentally imply that the permanence of those who wield Public Powers should not be subject to the decision of other State powers, except with regard to the competences of the Supreme Court to prosecute high officials of the State: that is, except for these cases of prosecution, public officials designated as holders of Public Power organs should only cease their functions when their mandate is revoked by referendum; therefore, the holders of the unelected Public Powers should have the right to remain in their positions during their mandate. This had been the tradition of Venezuelan constitutionalism. "Prólogo. Sobre la Asamblea Nacional y la deformación de la institución parlamentaria", en Juan Miguel Matheus, *La Asamblea Nacional: cuatro perfiles para su reconstrucción institucional* (Caracas: Universidad Monteávila-Editorial Jurídica Venezolana-Instituto de Estudios Parlamentarios Fermín Toro, 2016), 28-29.

The National Assembly attempted to implement a legislative program, which was boycotted by the Constitutional Chamber. On the other hand, it attempted to exercise the typical functions of parliamentary control, a task that was besieged by the Constitutional Chamber. The exercise of the Parliament's characteristic political function was also blocked.

Since 2019, through the political transition route promoted since the interim presidency of the President of the National Assembly, Juan Guaidó, and the *Estatuto que rige la transición a la democracia para restablecer la vigencia de la Constitución de la República Bolivariana de Venezuela*, and the recognition of Guaidó as President by more than 50 countries.

IV. The National Assembly and the barriers imposed by the Supreme Tribunal of Justice

Introduction

The barriers around the National Assembly have manifested themselves through different rulings of the Supreme Tribunal of Justice that have blocked the exercise of the former's typical constitutional functions, as well as through dozens of decisions that have sought to "prosecute" opposition deputies, on quite a few occasions, with the alleged endorsement to remove parliamentary immunity by the so-called "National Constituent Assembly"[9].

The barriers around the National Assembly have been built and developed in a short period of time: in the first half of 2016, the Constitutional Chamber issued a set of decisions that limited all

9 See, e.g., Jorge Kiriakidis, "Notas sobre el asedio judicial a la inmunidad parlamentaria en Venezuela", *Revista de Derecho Público*, N° 155-156 (July-December, 2018).

constitutional powers of the National Assembly. Although other decisions have been made during 2017-2020, from an institutional point of view that sentence basically closed these barriers as of the first half of 2016[10].

These barriers began to be imposed days after the election of the members of the National Assembly on December 6, 2015, since when some members have sought to constitute a board of directors and an operating quorum outside of the Constitution and the Internal Regulations and Debates.

1. Sentences on the proclamation of the Amazonas deputies: the argument of "contempt"

The election of National Assembly members was boycotted a few days after it occurred through a set of decisions issued by the Electoral Chamber and the Constitutional Chamber that questioned the proclamation of three elected deputies in indigenous areas.

As members of the United Socialist Party of Venezuela (PSUV) alleged vote buying in the 6D elections, various electoral contentious appeals were made to the Electoral Chamber of the Supreme Tribunal of Justice to challenge some of the parliament member elections. One of those appeals was accompanied by a request of a precautionary writ of protection, and thus it was declared in place. Consequently, through sentence N° 260 of December 30, 2015, the Electoral Chamber ordered, provisionally and immediately, the suspension of effects of the acts of totalization, adjudication and proclamation regarding the candidates elected

10 See the critiques to the decisions issued by the Constitutional Chamber in that first half of 2016 in *Revista de Derecho Público*, N° 145-146, (January-June, 2016), 267-469.

by uninominal vote, vote list, and indigenous representation in the state of Amazonas.

Given this decision, in its regular session on January 6, the National Assembly decided to proceed to the swearing-in and incorporation of three of the deputies under the writ of protection: Nirma Guarulla, Julio Ygarza and Rommel Guzamana, an indigenous deputy.

On January 7, faced with this decision of the National Assembly, the appellant who had filed the contentious electoral appeal and a group of PSUV members presented, among other resources, a request for a declaration of contempt before the Electoral Chamber, on the occasion of the swearing-in that was held in the National Assembly on January 6.

The Electoral Chamber issued judgment N°1 of January 11, which decided (i) that the members of the Board of Directors of the National Assembly as well as the three sworn deputies had incurred in "contempt" of sentence N°260 of the Electoral Chamber of December 30, 2015; (ii) to ratify what was decided in sentence N°260; (iii) to declare the decisions dictated by the National Assembly as of the incorporation of the three deputies null and void, and therefore non-existent; (iv) to declare all future acts of the National Assembly as null while the incorporation of the three deputies was maintained; (v) to rescind the swearing-in of the three deputies; and (vi) to order their immediate removal.

Months later, through sentence N°108 of August 1, 2016, the Electoral Chamber again declared "contempt" of the judgments of Electoral Chamber N°260 dated December 30, 2015, and N°1 of the January 11, 2016, and reiterated the provisions of those previous decisions.

The argument of "contempt" has since been used by the ruling party to consider any decision issued by the National Assembly as null. Thus, it was a political argument to impede any action of the Assembly, as will be evidenced.

2. Blocking the legislative function

One of the key functions of the National Assembly is the exercise of the legislative function, by which it dictates, modifies or repeals laws.

As a manifestation of that function, as soon as the National Assembly was elected, the new majority devised a legislative agenda to be fulfilled during the first months of its first session. This legislative agenda addressed economic, social and political aspects.

However, the Supreme Tribunal of Justice blocked the scope of that legislative function in various ways. On one hand, the Constitutional Chamber declared various laws sanctioned by the Assembly as unconstitutional. On the other hand, it established criteria to be fulfilled by the National Assembly to exercise that function, which contradicted the Constitution, minimizing the scope of the legislative activity of the National Assembly.

A. The limitation of the legislative function in favor of the Executive Power

Sentence N°269 of the Constitutional Chamber of April 21, 2016, justified the blockade of the legislative function of the Assembly by the Supreme Tribunal of Justice, substantially limiting the legislative function of the National Assembly.

The sentence dictated a precautionary measure on the occasion of a nullity claim filed on March 9, 2011, five years prior, against some articles of the Internal Regulations and Debates of the National Assembly.

In regard to the exercise of the legislative function, with this precautionary measure the Constitutional Chamber ordered, among other aspects, the following: (i) the Assembly is required to consult each bill with the People's Power in order to "arrange" the Draft Law with said "Power"; (ii) the period for public consultations will be a minimum of twenty days, which can be extended for a similar period, at the request of the organizations that make up the People's Power; (ii) the report on the impact and budgetary and economic incidence, or in any case, the report of the Directorate for Economic and Financial Advice of the National Assembly that must accompany any bill, must be consulted on a mandatory basis by the National Assembly –represented by Directive– to the National Executive –through the Executive Vice President– in order to determine its economic viability, even those sanctioned by the date of publication of the sentence; (iii) for the President of the Republic to "comply" with any Law, verification of the viability of the Law is required, through the Ministers of the branch and the Vice President of the Republic.

Therefore, this decision limited the legislative power of the National Assembly by deferring it to the Executive Power, which was a form of usurpation of functions of the Executive Power over the National Assembly.

Based on the provisions of this decision, the Chamber declared the nullity of virtually all the laws the National Assembly has enacted.

B. Some examples of laws issued by the National Assembly declared unconstitutional by the Supreme Tribunal of Justice

The harassment of the Constitutional Chamber over the National Assembly was evidenced by decisions that declared the nullity of almost all Laws the Assembly has dictated[11]. This blockage of the legislative function was particularly important in 2016, when the National Assembly attempted to implement some of the most important laws in its legislative program. Some examples of these decisions are the following:

a. The sentence that declared the reform of the Law of the Central Bank of Venezuela unconstitutional

The first Law sanctioned by the National Assembly –*Ley de reforma de la Ley del Banco Central de Venezuela* (Law to reform the Law of the Central Bank of Venezuela)– was declared unconstitutional by the Constitutional Chamber of the Supreme Tribunal of Justice through sentence N° 259 of March 31, issued by request of the President of the Republic[12].

The sentence is based on the assumption that the National Assembly had acted with "misuse of power", to the extent that the alleged purpose of the reform had been to ensure political

11 One exception was the case of the *Ley que Regula el Uso de la Telefonía Celular y la Internet en el Interior de los Establecimientos Penitenciarios* (Law that regulates the use of cellular telephony and Internet within penitentiary establishments), published in the Official Gazette N° 6,240 extraordinary of July 15, 2016.

12 See the critiques to this decision in José Ignacio Hernández G., "Comentarios a la reforma de 2015 de la Ley del Banco Central de Venezuela y su defensa por la Sala Constitucional", *Revista de Derecho Público*, N° 145-146, (January-June, 2016).

control of the Central Bank of Venezuela (BCV) by the current majority of the National Assembly. Thus, among other aspects, (i) the power established in the sanctioned law that allowed the National Assembly to ratify the appointment of the President of the BCV was declared unconstitutional; (ii) the ability of the National Assembly to call upon the President of the BCV was declared unconstitutional, and (iii) the power of the National Assembly to appoint two members of the Board of Directors of the BCV was also declared unconstitutional.

Certainly, this position assumed by the sentence implies the restriction of the comptroller function of the National Assembly over other Public Powers, as will be specified further on.

b. The sentence that declared the Amnesty and National Reconciliation Law unconstitutional

Another of the laws included in the legislative agenda of the National Assembly was the *Ley de Amnistía y Reconciliación Nacional* (Amnesty and National Reconciliation Law).

On April 11, the Constitutional Chamber issued sentence N° 264, which declared the formerly mentioned law unconstitutional, namely for some of these reasons: (i) there were be no political budgets to grant amnesties; (ii) the Law allegedly included common crimes other than political crimes specific to amnesties; (iii) some articles of the Law supposedly violated the guarantees of legality and typicality provided for in article 49 of the Constitution; (iv) some articles allegedly violated the principles of justice and responsibility; (v) the amnesty on administrative infractions was supposedly unconstitutional; allegedly, (vi) it violated the principle of sovereignty; (vii) it violated the rights to

the protection of honor, privacy, own image, confidentiality and reputation, and (viii) it was unconstitutional due to its effects on society and the legal system.

The sentence thus declared amnesties unconstitutional on each and every one of the cases contemplated in the Law.

c. The sentence that declared the Food and Medicine Bonus Law for Pensioners and Retirees as constitutional, yet subjected it to verification of economic viability

Sentence N° 327 of April 28, 2016 declared that the *Ley de Bono para Alimentación y Medicinas a Pensionados y Jubilados* (Food and Medicine Bonus Law for Pensioners and Retirees) was adjusted to the Constitution, which was a socially-oriented proposal on the legislative agenda of the National Assembly.

However, the sentence subjected its enforcement to the economic viability that guarantees the fulfillment of the social purpose that the Law involves, in application of the criteria established by the Constitutional Chamber in sentence N° 269 of 21 of April 2016. Consequently, the sentence annulled the Single Final Provision of the Law, which ordered its enforcement as of its publication in the Official Gazette.

d. The sentence that declared the reform of the Organic Law of the Supreme Tribunal of Justice as unconstitutional

By means of sentence N° 341 of May 5, the Constitutional Chamber declared the unconstitutionality of the reform of the *Ley Orgánica del Tribunal Supremo de Justicia* (Organic Law of the

Supreme Tribunal of Justice) that had been sanctioned by the National Assembly on April 7.

The purpose of the Law reform was fundamentally (i) to increase the number of magistrates of the Constitutional Chamber from seven to fifteen magistrates, and (ii) to specify in greater detail the process to be followed before the Constitutional Chamber in the event that the President of the Republic poses to the Constitutional Chamber the unconstitutionality of one or more articles of a Law sanctioned by the National Assembly.

The reform was declared unconstitutional, basically for the following reasons: supposedly (i) the legislative initiative regarding organization and judicial procedures corresponded exclusively to the Supreme Tribunal of Justice; (ii) for the modification of any bill, the approval of two thirds of the members of the National Assembly present at the session had to be required; (iii) the increase in magistrates was not "reasonable" and lacked "logical justification", and (iv) the National Assembly was incurring in "misuse of power" when sanctioning the reform.

e. The sentence that declared the *Law to Grant Property Titles to Beneficiaries of the* Gran Misión Vivienda Venezuela *and Other Housing Programs of the Public Sector unconstitutional*

By means of sentence N°343 of May 6, the Constitutional Chamber declared the unconstitutionality of the *Ley de Otorgamiento de Títulos de Propiedad a Beneficiarios de la Gran Misión Vivienda Venezuela and Other Housing Programs of the Public Sector* (Law to Grant Property Titles to Beneficiaries of the housing project Gran Misión Vivienda Venezuela y Otros Programas

Habitacionales del Sector Público), which had been sanctioned by the National Assembly on April 13.

The sentence, in summary, concluded that the Law was unconstitutional because (i) it was supposedly contrary to the aims of the Democratic and Social State of Law by not guaranteeing that the progressive exercise of the right of families to decent housing does not yield to the right of property; (ii) it promoted the insertion of housing units into the speculative market, to favor those who exercise dominance over them, to the detriment of those who deserve reinforced protection by the State; (iii) for its sanction, the essential formalities of the procedure for the formation of laws provided for in the Constitution and in the Internal Regulations and Debates of the National Assembly had not been fulfilled, and (iv) the National Assembly would be usurping the President's functions by forgoing on the debts contracted by the beneficiaries.

f. The sentence that declared the Special Law to Address the National Health Crisis unconstitutional

Through sentence N°460 of June 9, 2016, the Constitutional Chamber also declared the unconstitutionality of the *Ley Especial Para Atender la Crisis Nacional de Salud* (Special Law to Address the National Health Crisis). The sentence declared the Law null and void because: (i) it allegedly usurped powers attributed to the President of the Republic in the matter of directing government action in the sphere of states of emergency, as well as in matters of international relations; (ii) it established parliamentary control mechanisms for the management of the National Executive other than those provided for in the Constitution; (iii) it failed to comply with the procedure for the formation of Laws provided for in the Interior and Debate Rules of the National Assembly, and (iv) it

obviated the binding criteria established by the Constitutional Chamber in sentence N° 269/2016, by failing to consult with the National Executive in order to determine the economic viability of law.

3. Blocking comptrollership

One of the key functions of the National Assembly is to exercise comptrollership over the other organs of the Public Power.

The Assembly's comptrollership is based on the Parliament's democratic and plural character. In contemporary societies, Parliament –in this case the National Assembly– is the body of popular representation in which political organizations represent the citizens' different political options.

Therefore, it is natural and necessary for this political forum of citizen representation to exercise comptroller functions over the actions of Public Power organs: the Executive, Judicial, Electoral and Citizen Power.

This function of the National Assembly, however, was questioned and restricted by the Supreme Tribunal of Justice from the very beginning of the legislature of the Assembly. As happened with the legislative function, the Constitutional Chamber issued a sentence that generally imposed boundaries on this function, a blockade that was later manifested through sentences on specific matters.

A. The bases of the limits to the exercise of the comptroller function

The justification to limit the comptroller function was established in sentence N° 9 of the Constitutional Chamber of the Supreme Tribunal of Justice of March 2, 2016.

The central argument of the sentence is that the comptroller power of the National Assembly can only be exercised over the Government and the National Public Administration, exercised by the National Executive Power, and cannot be applied to the actions of other Public Power organs (i.e. Judicial, Electoral and Citizen Power), nor to the organs of the Executive, State and Municipal Power. The sentence concludes: as is clear from the cited jurisprudence and doctrine, the political-parliamentary control provided for in Articles 187.3, 222, 223 and 224 of the Fundamental Text is fundamentally extended over the National Executive Power, and not over the rest of the Public Powers (Judicial, Citizen and Electoral), neither over the State nor the Municipal Public Power (with the exception of the provisions of Article 187.9 eiusdem), since the political control of those dimensions of Power will be exercised by the organs that the Constitution provides for this purpose, such as is interpreted in Articles 159 and following of the Constitution.

In practice, this has not been the intention of the Constitution. The second paragraph of Article 223 is particularly clear, which explicitly states, when referring to the comptroller power of the Commissions of the National Assembly, and without making distinctions, that all public officials are obligated, under the sanctions that the laws establish, to appear before said

Commissions and to provide the information and documents that they require for the fulfillment of their functions.

After this general restrictive position on the comptroller function of the National Assembly, the sentence specifies the scope of how it will be exercised over the National Executive Power, establishing the following criteria meant to prevent that control from affecting the National Executive's proper functioning, and, consequently, to avoid violating fundamental rights:

(i) The National Assembly must coordinate with the Executive Vice President the exercise of the comptroller function over any government official and the National Public Administration. Therefore, it is the responsibility of the Executive Vice President to centralize and coordinate everything related to communications issued by the National Assembly in the exercise of its comptroller function;

(ii) It is the responsibility of the Vice President of the Republic to consider the general political, economic and social circumstances that prevailed in the Republic at the time when said control is coordinated and exercised;

(iii) The National Legislative Power must consider that, especially in these circumstances, the insistence of petitions directed towards the National Executive Power, and even towards the rest of the public powers, could seriously hinder State operations, to the detriment of the full guarantee of citizens' rights, as well as the inalienable rights of the Nation;

(iv) The calls made by the National Assembly to officials must be addressed precisely to the officials and other persons subject to that control, must indicate the qualification and legal basis that supports it, the reason and the precise and rational scope of it (to ensure a process with all constitutional guarantees), and, finally, must be guided by the principles of utility, necessity, reasonableness, proportionality and collaboration between Public Powers (without intending to subrogate in the design and implementation of public policies inherent to the scope of power of the National Executive);

(v) Officials who appear, request and respond, if possible, in writing to the concerns raised by the National Assembly or its commissions, and even if they so request, should be heard in the plenary session of the National Assembly, in the opportunity that it provides (part of which is recognized, for example, in the aforementioned Article 245 of the Constitution); and

(vi) The exercise of the faculty of inquiry must be compatible with the autonomy of each organ and with the due understanding of the cardinal reserve of information that could affect the stability and security of the Republic, and, finally, compatible with the purposes of the State.

Finally, regarding the scope of the comptroller function of the National Assembly, the sentence is to be pronounced regarding the way of exercising parliamentary control over the National Bolivarian Armed Forces to warn that the control that can be exercised over it is carried out through its Commander-in-Chief and parliamentary control through the political control exercised over his Commander-in-Chief and supreme hierarchical authority,

limiting that control to what the President of the Republic considers in the annual message presented to the National Assembly within the days after the installation of the National Assembly, message provided for in Article 237 of the Constitution.

B. The blocking of the comptroller function exercised by the appearance of officials at the National Assembly

As a way of restricting the scope of control of the National Assembly over the organs of other Public Powers, sentence N°9 of the Constitutional Chamber of March 1, 2016, interpreted and applied various provisions of the (i) *Ley sobre el Régimen para la Comparecencia de Funcionarios y Funcionarias Públicos o los y las particulares ante la Asamblea Nacional o sus Comisiones* (Law On the Regime for the Appearance of Public Officials or Individuals before the National Assembly or its Commissions), and the (ii) *Reglamento de Interior y de Debates de la Asamblea Nacional* (Interior and Debate Rules of the National Assembly).

In reality, the Constitutional Chamber was incompetent to interpret that Law and the Regulations, since the appeal for interpretation on which the sentence was being heard could only rule on the interpretation of constitutional norms. In other words, it should not rule on norms of a lower rank than the Constitution, such as that Law and the Internal Regulations and Debates.

The first thing that the sentence recognizes is that, when this Law refers to officials, only those within the government and the National Public Administration are included, thereby unconstitutionally excluding the officials of other Public Powers, as already indicated.

On the contrary, as expressly stated in Article 12 of the Law On the Regime for the Appearance of Public Officials or Individuals before the National Assembly or its Commissions: The summons for the appearance of the members of the Citizen Power: Ombudsman, Attorney General of the Republic and Comptroller General of the Republic; of the Electoral Power: Directors of the National Electoral Council; of the the Judiciary: magistrates of the Supreme Tribunal of Justice; as well as of the Executive Power: Executive Vice President of the Republic; and of the Ministers, will be made prior knowledge of the Board of Directors of the National Assembly, for the purposes of their coordination.

Thus, according to Article 12 of the Law, officials of other Public Powers can be summoned to appear at the National Assembly.

The sentence, however, decided to expressly disregard that rule as it was considered unconstitutional. Thus, despite what is referred to in the law, for the Constitutional Chamber it was unconstitutional to apply the comptroller function to officials other than the Government and the National Public Administration.

The sentence also decided not to apply the rules of that Law on the sanctioning regime in cases of non-appearance before the invitations issued by the National Assembly and its Commissions (Articles 21 to 26), considering them unconstitutional.

In a similar sense, despite the fact that Article 113 of the Internal Regulations and Debates of the National Assembly expressly states that officials of the National, State and Municipal Power may be questioned and invited to appear by the National Assembly or its Commissions, without restricting the scope of that power to the officials of the Government and the National

Public Administration, the sentence also decided to not apply that norm, considering it unconstitutional.

Besides, the Chamber decided to initiate, *ex officio*, a process of control of the constitutionality of all those norms, in order to decide if they should be considered null and, therefore, as not in force. Likewise, and without this being the subject of the matter raised, it was pointed out that the President of the Republic was competent to issue Regulations on that Law.

Therefore, the Constitutional Chamber specifically restricted the scope of action in matters of control of the National Assembly, by not implementing the norms of the Law On the Regime for the Appearance of Public Officials or Individuals before the National Assembly or its Commissions and of the Interior and Debate Rules of the National Assembly[13].

C. The case of the Commission of inquiry of the National Assembly on the appointment of magistrates

Another example of how the Constitutional Chamber has prevented the exercise of comptrollership by the National Assembly was the case of the Commission of inquiry of the National Assembly on the appointment of magistrates.

One of the fundamental initiatives undertaken by the new majority in the National Assembly was the appointment

13 See the critiques to this decision in Allan R. Brewer-Carías, "Comentarios al decreto Nº 2.309 de 2 de mayo de 2016: La inconstitucional "restricción" impuesta por el Presidente de la República, respecto de su potestad de la Asamblea Nacional de aprobar votos de censura contra los Ministros", *Revista de Derecho Público*, N° 147-148, (July-December, 2016).

of a Special Commission to study the selection procedure for magistrates of the Supreme Tribunal of Justice, some of whom were appointed on December 23, 2015, that is, a few days before the previous National Assembly ceased to function. The power to appoint Special Commissions is a power of the National Assembly expressly recognized in Articles 193 and 223 of the Constitution.

As a consequence of what in the field of Public Law is called "power of self-protection", the power of the bodies of the Public Power to review their own decisions is recognized when it is considered that the decision taken has incurred in some material or procedural vice, which invalidates that decision. In other words, if an organ of the Public Power confirms that it incurred in a certain vice when making the decision, it can declare the decision null and void, and then make amends. Within the scope of the National Assembly, self-protection is recognized in Article 90 of the Interior and Debate Rules of the National Assembly in force at this time, according to which wholly or partly revoking decisions of a National Assembly required the vote of the absolute majority of those present. Likewise, in the cases in which, by mistake or due to lack of some non-essential formality, a decision had been taken by the National Assembly, once the error or lack has been confirmed, the decision may be declared invalid with the vote of the present majority.

In exercise self-protection, by which the National Assembly can review the acts that it has previously dictated, on March 1, 2016, the Assembly approved the report of the Commission, which questioned the way in which some magistrates had been appointed on December 23, 2015.

So, one of the aspects addressed in sentence N°9 of the Constitutional Chamber of March 1, 2016, was precisely the National Assembly's power to carry out inquiries into the procedure for appointing Supreme Court magistrates[14].

Supported on the general considerations established in sentence N°9 of the Constitutional Chamber, the Chamber specifically analyzed the assumption of the Commission appointed by the National Assembly to study the selection procedure of Supreme Court magistrates. It strictly indicated that, although the creation of a special commission for inquiries and study does not have, in principle, material limitations (except those derived, among others, from the principles of autonomy of the Public Powers and subjection of power to the Fundamental Text), when its objective is clearly unconstitutional and/or illegal, by seeking to review appointments of senior officials of another Power, outside of the CONTROL assigned by the Constitution to the National Assembly and the regime envisaged for their removal or destitution, it and any decision or the recommendation made by that or any commission is absolutely null and, consequently, non-existent, as well as any decision on the matter by the National Assembly, all based on Articles 7, 137, 138 and 139 of the Magna Carta.

14 See Allan R. Brewer-Carías, "La ratificación por la Sala Constitucional del Tribunal Supremo de su decisión de desconocimiento de la potestad de la Asamblea Nacional para revisar y revocar sus propios actos", in *Revista de Derecho Público*, N°147-148, (July-December, 2016) and José Ignacio Hernández G., "Comentarios a la sentencia de la Sala Constitucional N°614/2016 (19-7-2016). A propósito de la inconstitucional designación de magistrados del Tribunal Supremo de Justicia", in *Revista de Derecho Público*, N°147-148, (July-December, 2016).

Furthermore, the sentence insisted on such an argument, noting that the National Assembly participates in the complex and inter-institutional processes for the appointment and removal of Supreme Court magistrates, in accordance with Articles 264 and 265 of the Constitution. In this regard, its role in the balance between Public Powers culminates there to make the function of the State viable. Creating a different attribution, such as the ad infinitum review and a new "decision" on "decisions" assumed in the previous selection and appointment processes for magistrates, including the creation of a commission or any other device for this purpose, is obviously unconstitutional, as it undermines the autonomy of the Judiciary and constitutional supremacy, constituting a fraud towards the fundamental order that, following the most elementary moral guidelines, does not subordinate the composition of the Supreme Court of the Republic to the change in the correlation of political-partisan forces within the National Legislative.

Finally, it concluded that it is imperative for the Chamber to declare, as indeed it does through this sentence, the absolute and irrevocable nullity of the acts by which the National Assembly intends to promote the review of constitutionally excluded processes for the selection of magistrates and, therefore, of the actions by which the special commission designated to evaluate such appointments was created, as well as of all the actions derived from them, which are legally and constitutionally non-existent.

Thus, in accordance with the aforementioned sentence, the Constitutional Chamber concluded that the National Assembly could not exercise its natural power of self-protection when

reviewing the procedure by which it previously took the decision to appoint the mgistrates appointed on December 23, 2015.

* * *

This is then a summary of a serious case of institutional dismantling: the National Assembly elected in Venezuela in 2015 was stripped of its constitutional powers, mainly its legislative function and its comptroller function, by the body that is called, precisely, to protect the Constitution and to ensure that there was an institutional context that would allow the National Assembly to exercise its functions.

The case of Venezuela offers many political, institutional and constitutional lessons. Among them, the need for a correct constitutional design regarding the functions that the highest court should exercise in constitutional matters. For instance, not only is the constitutional design of the Constitutional Chamber of Venezuela inconvenient and dangerous, but due to its institutional practice, the Constitutional Chamber itself has expanded the already wide constitutional margin that delimited its powers.

Conclusions

To conclude the fifth issue of *Democratización* magazine, we offer three general considerations.

Firstly, the appearance of COVID-19 among the national and international political scene will affect Venezuela's path to freedom. In the academic and intellectual field, mechanisms that allow to know its real repercussions and to assess its political impact must be created. Overcoming the propaganda of the regime and recognizing the presence of the virus in the country are pressing challenges. In the political field, we consider it urgent to find actions that respond to Professor Cardozo's warning: "that the regime achieves a large margin of international permissiveness and the democratic cause, with little effective external support, remains in an extremely vulnerable situation". It greatly concerns us that the Chavista autocracy may be leveraged in the "good spirit" of a sector of the international community to settle deeper into power and to increase political repression with impunity.

Secondly, the National Assembly elected on December 6, 2015, emerged as the only independent power that had survived the autocratic expansion of the Chavista revolution. Thus, its outbursts were mainly focused towards it. Since its installation, it has been attacked, harassed and dismembered. Still, it remains an oasis in the middle of the desert we live in. Perhaps, the immediate judgment on its performance may be marked by political frustration. Many of us placed the hope of a peaceful and constitutional political change upon it, but that expectation was not met. Carlos García Soto's article offers a set of reasons that explain this. The author identifies and describes the institutional,

moral, and physical attacks against democracy. His analysis is a starting point, as it is an issue that demands in-depth studying. We trust that time will help to evaluate and let us see, with the peace that freedom offers, all the contributions of the members of the National Assembly for the democratic cause.

Thirdly, the regime of Nicolás Maduro relies on force. It is a fierce dictatorship that, although not military, leverages itself in the Armed Forces to cling to power. Pedro Pablo Peñaloza's article identifies the reasons behind the loyalty of the National Bolivarian Armed Forces: the partisanship of the Armed Forces, the presence of officers on the Executive, the creation of a military business network and excessive corruption. In future investigations, it would perhaps be convenient to delve into the first point and the importance of the ideological component. Regarding the reasons that encourage loyalty, we ask ourselves what is more influential: ideological stubbornness or personal enrichment?