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# The use and perversion of originating constituent power in Venezuela (1999-2019)

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**Abstract: The aim of the study is to examine the exercise of originating constituent power in Venezuela between 1999 and 2019, through the lens of the doctrine of constituent power and in order to examine its influence in this praxis. In particular, the study examines the 1999 constituent experience, and the activation of originating constituent power in 2017 by President Maduro, to finally arrive at the idea that the design of Art. 347 of the 1999 Constitution of the Bolivarian Republic of Venezuela could be at the root of the political-institutional dysfunction the country suffers from today, as it could serve a latent political temptation to reinvent the constitutional wheel.**

**Keywords: Venezuela; Constituent power; Constitution of Venezuela, constituent experience, Latin American constitutional law.**

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> "From the very moment in which that which must not be confused is separated – primarily: constituent power and constituted powers– a great problem of a human society will be successfully resolved aimed at the general wellbeing of those who make it up."
>
> Emmanuel Sieyès, *¿What is the Third Estate?,* 1789

## 1. INTRODUCTION

In December 2019, on the twentieth anniversary of the ratification referendum and subsequent promulgation of the Constitution of the Bolivarian Republic of Venezuela, it is worth reflecting on a key jurisprudential question in the origins of the constituent process that was positivized in this constitutional test, even though it has also been used as an illegitimate, fraudulent instrument of political pressure against opposition forces: the exercise of originating constituent power in Venezuela over the twenty years that this study examines. It has, without a doubt, shaped an authoritarian regime which has progressively degraded the country's socioeconomic situation and institutions.

The constitutional history of Venezuela has not been unscathed by constituent experiences since its founding. The 1999 experience, triggered by Hugo Chávez to create a new "Bolivarian" constitutional order, was the most recent to date, as we will see. The first foundational experience however, was in 1811, when on the 2nd of March, the Supreme Congress of Venezuela was inaugurated, with constituent power. It produced the 5th of July Act of Independence and the short-lived Federal Constitution for the States of Venezuela of the 21st of December 1811 (Brewer Carías 2008, 2013, 2019; Plaza and Combellas, 2005).

Although here we are concerned with the most recent constituent experience, in 1999, and the activation of originating constituent power by President Maduro in 2017, this study does not aim to produce a detailed examination of those processes. Instead, the aim is to examine those two moments through the prism of the doctrine of constituent power in order to assess its influence on the practice of the exercise of originating constituent power in Venezuela during that period of time. Precisely because of our analytical approach, it seems appropriate to dedicate some text to the key jurisprudential questions surrounding the theory of constituent power, the paradigm through which we approach the object of this study.

Finally, we explore the idea that the constitutional design of Art. 347 of the 1999 Constitution of the Bolivarian Republic of Venezuela could underlie the current political-institutional dysfunction of the country, as it is a latent political temptation to reinvent the constitutional wheel.

## 2. DOCTRINAL ORIGINS: THE SIEYÈS PARADIGM

Whenever one aims to explain a constituent experience such as the one which interests us here –which involves a break with a previous constitutional system to construct a new order– one cannot help but outline the classic distinction that underlies any process of this type. That is the difference between the power which allows the creation of the constitution (*constituent power*), and *constituted powers*, the powers that the constitution creates.

This doctrine –created in the context of the French revolution– conceived constituent power as an originating, pre-legal, unlimited power derived from the Nation. In fact, this doctrinal presupposition is thanks to the fundamental contribution of Emmanuel Sieyès (Bastid, 1978; Máiz, 2007), who published his classic pamphlet *What is the Third Estate?* which continued and expanded on his previous *Essay on privileges* (November 1788)

As noted above, Sieyès' doctrine clearly distinguishes between *constituent power* and *constituted power* in the following way in *What is the Third Estate?*

> "… Neither aspect of the constitution is the creation of the *constituted power*, but of the *constituent power*. No type of delegated power can in any way alter the conditions of its delegation. In this sense, and in this sense alone, are constitutional laws *fundamental*. Those which establish the legislative body are founded by the national will before any constitution has been established; they form the first stage of the constitution. Those which establish the executive bodies must similarly be the ad hoc product of a representative will. Thus all the parts of a government are interrelated and, in the last analysis, depend on the nation […] It is easy to understand how actual laws, those which protect citizens and decide on the common interest, must be the work of the legislative body formed and acting at all times within its constituent conditions." (Sieyès, 2007, pp. 132-133)

Sieyès' paradigm configures the state powers by taking the constitution as the axis of reference: constituent power (prior to and creator of the constitution), and constituted powers (posterior to and created by the key, highest law of the state system). In this idea, therefore, only the nation has supreme constituent power, as Sieyès notes:

> "At all times it must remain clear, however, that an extraordinary representation is in no way like the ordinary legislature, as they are clearly different powers. Thus, the ordinary legislature cannot move except in the ways and conditions that have been imparted to it previously. The other, constituent power, in contrast, is not subject to any particular form: it meets and forms agreements as the nation itself would if, being composed of a small number of individuals, it wished to give its state a constitution." (Sieyès, 2007, p. 137)

In line with Sieyès brilliant intellectual construct (Blanco Valdés, 2006; Fernández Sarasola, 2019; Requejo Pagés, 1998), his theory does two things: first, it implicitly contains the principle of the supremacy of the constitution, inasmuch as it considers powers created (constituted) by the constitution to be subordinate

to it. Secondly, it tries to explain the basis of validity of the constitution, a law which is valid because it is created by those who have the power to create it, as long as that constituent power is conceived as unlimited, which means that originating power is not subject to any rule. Precisely because of that, it is evident that this theory has most effect on those occasions in which a constitution is created in an unarguable break from the preceding constitutional order, that it will supplant.

The doctrine of constituent power is, in the words of Ignacio de Otto, "the formulation in terms of constitutional dogma of the principle of democratic legitimisation, in a similar way to the dogma of popular sovereignty, which constituent power is the highest expression of." (Otto, 1995, p. 53). That said, as professor de Otto notes, from a strictly legal point of view, the doctrine does not legitimise constituent processes begun following a break with the previous constitutional order, which aim to produce a new constitutional text following democratic routes, inasmuch as in some way the new law would be the result of a reform of the previous, a supposed legitimacy that in principle seems to be one of the aims of this theory that these types of processes refer to. These processes meet what is doubtless an essential requirement of this doctrine, that the constitution is created following democratic processes. Nevertheless, these processes would never result in originating or pre-legal activities, as they would be subject to the regulating rules of the required *ad hoc* electoral referendum processes, along with their respective convening rules. In other words, popular participation necessarily would be preceded by a preparatory stage -obviously before the constituent process in question- which would produce the rules regulating that participation. This preparatory stage could, rather than being the result of a democratic initiative, be the expression of an act of force that does not coincide with the popular will it claims to represent, which would clearly set a dictatorial stage.

Outlining these key doctrinal questions (see various positions and reviews on this doctrine in Martínez Dalmau, 2014; González Cadenas, 2018; and, Bernal

Pulido, 2018), we will see the influence of this paradigm in the exercise of originating constituent power in Venezuela over the years that this study covers: 1999-2019.

## 3. THE 1999 CONSTITUENT EXPERIENCE: THE CREATION OF THE NEW 'BOLIVARIAN' ORDER

In the final decade of the 20th century Venezuela experienced a deep political crisis in its party system (Rey, 1991; Viciano Pastor and Martínez Dalmau, 2000), which led to the need to trigger a reform of the democratic political system through a Constituent National Assembly. The stated aim of the project was to design a new state based on improving democracy. Nevertheless, the 1999 constituent process was unusual in that it was not the product of a physical break in constitutional continuity resulting from a coup d'état, a revolution, or a war, but was instead a process that occurred in a democratic context, albeit in the middle of a severe crisis of the political system that had been in place since 1958, and by arguably legal means. It is clear, nonetheless, that the institution of the Constituent Assembly was not a provision of the then-current 1961 constitution, which did provide in article 246 for its total reform, and in line with that, the creation of a new constitutional text by this procedural route.

Thus, the idea of redesigning how democracy would work and reforming the Venezuelan political system were the reasons why in the call for the non-binding referendum on the National Constituent Assembly made by the president of the republic on the 2nd of February –as we will see later– the electorate were asked to consider convening a national constituent assembly, "with the aim of transforming the state and creating a new legal system that would allow the effective functioning of a participative social democracy" (Decree Nº 3, 2nd of February 1999, in *Gaceta Oficial de la República de Venezuela*, Nº 36.634). This was the declared aim of the constituent process begun in Venezuela in 1999.

In this context of political crisis resulting from the deterioration of the party system –which led to a leadership vacuum– the ex-soldier Hugo Chávez Frias, a previous presidential candidate in 1998, triggered the convening of a national Constituent Assembly which became his exclusive political project.

As hinted at before, the execution of this project clashed with an insurmountable legal obstacle, the then-current 1961 constitutional text did not provide for the creation of a national Constituent Assembly as a mechanism of constitutional amendment, although it did regulate two procedures for constitutional reform: the amendment procedure (partial reform, Art. 245), and the aforementioned general reform procedure (total reform, Art. 246). Following the election of President Chávez the debate was not whether to convene a Constituent Assembly or not, but rather the method of convening it based on the following alternatives. First, reform the then-current constitutional text to add an assembly, and then choose it. Or second, do it through a non-binding referendum invoking the dogma of popular sovereignty. This raises an interesting theoretical question. What should prevail? The principle of constitutional supremacy, or popular sovereignty? (Brewer Carías, 1999). This was the problem facing the Venezuelan Supreme Court (Political-Administrative Court) in October and December 1998, to which it would respond in judgements 17, 18 and 19 of January 1999, given as rulings of appeal for interpretation of ordinary laws (Pace, 1999).

Without doubt, the most important ruling was number 17, on the 19th of January 1999 (Tribunal Supremo de Justicia, 2002, pp. 19-36), as number 18 in practice confirms its arguments. In judgement 17, the Supreme Court of Justice of Venezuela (SCJV hereinafter) endorsed the position proposed by Chávez, thus recognising –contentiously– the constitutional legitimacy of calling a non-binding referendum about instituting a Constituent Assembly despite the 1961 constitution being fully in force, and despite the fact that the constitutional text in Art. 246, as we have seen, had a procedure for its complete amendment. Nevertheless, the theoretical-practical importance of this ruling for Venezuela was unarguable,

insofar as the decision gave legal legitimacy to a legally questionable political position.

There are various factors of jurisprudential interest that we can examine in this judgement (Brewer Carías, 1999; Pace, 1999), but for the purposes of this study we will restrict ourselves to highlighting the way that the SCJV interpreted the doctrine of constituent power in its argument:

> "Originating Constituent Power is understood as the fundamental power of the political community to yield a constitutional and legal organisation. In this order of reasoning, the idea of constituent power presupposes national life as a unit of existence and decision. When we deal with an ordinary government, in any of the three branches its functions are distributed, we are in the presence of constituted power. In contrast, what legally organises, limits, and regulates the action of constituted powers is the function of constituent power. This should not be confused with the competence set out by the constitution for the amendment of some of its clauses. The competence of changing the non-essential provisions of the constitution, in accordance with its own text, is Instituted Constituent, or Constituted Power, and although it is extra-official, it is limited and regulated, unlike Originating Constituent Power, which is prior to, and superior to the established legal order." (SCJVJ, No. 17, 19th January 1999, Cap. V)

In fact, the SCJV apparently endorses here a jurisprudentially orthodox paradigm of constituent power, so it is notable that they do not reject the thesis defending the institution of the Constituent Assembly via a non-binding referendum, supporting that on the legally valid argument that Art. 246 of the 1961 constitution –by allowing its own complete revision– was the ideal procedural route for creating a new constitution without breaking the then current constitutional framework.

Perhaps exactly what was intended was to legitimise the staging of a constitutional break via the exercise of originating constituent power to remove the process of constructing the desired new order from the procedural limits of the old constitutional order. This hypothesis could explain the preference for an

unconventional Constituent Assembly rather than the regulated path provided for in Art. 246 of the 1961 constitution. The SCJV, in an illogical argumentative (and conceptual) high-wire act, ruled the constitutionality of a non-binding referendum on convening a Constituent Assembly, although it kept a cautious silence about the question of the constitutionality of such a call without there having been a prior constitutional amendment (SCJVJ, No. 17, 19th January 1999, Cap. VIII). At this point, no sooner had the President-elect assumed the presidency of the republic, on the 2nd of February 1999, than he confirmed his decision to convene a Constituent Assembly, without prior amendment of the 1961 constitution, as would have been legally appropriate to provide the necessary constitutional backing, and regulate how it could act and function at this high level.

In this way, President Chávez, on taking charge, ordered Decree Nº 3, of the 2nd of February 1999, calling a referendum for the people to decide on convening a national Constituent Assembly with the express purpose of reshaping the state and creating a new legal order that would have the central axis of "participative social democracy", at the same time as asking the people to empower him to set the rules of the electoral process that would determine the composition of the assembly. It stood out that this law lacked the necessary support of the constitution, as well as contradicting the then-current 1961 constitution, reasons that –among others– were the basis for it being brought (through various appeals for nullification) before the SCJV (Escarrá Malavé, 1999).

Following a complex judicial process of this and other legally controversial laws which had similar aims (Brewer Carías, 2001; Hernández Camargo, 2001, 2007), the SCJV –in what interests us here– in its judgement of the 13th of April 1999, ruled to remove the phrase attributing "originating power" to the national Constituent Assembly in the tenth electoral rule of the presidential decree of the 10th of March 1999, which established the rules for convening this body to be submitted to a referendum on the 25th of the following month. To put it another way, the SCJV attempted to fit President Chávez's excessive aspirations

to the framework of the state of law that was based on the 1961 constitution, dismissing the idea that the projected Constituent Assembly could be an "originating power" and in practice, have full power to reshape the Venezuelan constitutional system, making a blank slate of what came before, which was, let us not forget, in force at the time.

In this agitated context, the non-binding referendum was held on the 25th of April 1999. The Venezuelan electorate, by a majority of 71.73% of votes cast, with 55.62% of registered voters abstaining (Hernández Camargo, 2007, p. 237), approved convening the controversial national Constituent Assembly proposed by President Chávez, without a prior –and legally necessary– amendment of the then-current 1961 constitution. The members of the assembly were elected on the 25th of July 1999, and it was constituted on the 3rd of August 1999, beginning its session four days later.

Of course, one crucial question of that first debate was about the "originating power" of the assembly. Obviously, the legal doctrine constructed by the SCJV in that regard was put forward –albeit fruitlessly– which rejected the idea that the constituent body could have an "originating" nature. Nevertheless, and as already noted, eventually the majoritarian criteria was imposed that was ultimately positivized –in contrast to the legal doctrine of the SCJV– in the first article of the statutes of the National Constituent Assembly as follows:

> "The National Constituent Assembly is the custodian of the popular will and sovereignty with the attribute of originating power to reorganise the Venezuelan state and create a new democratic legal system. The Assembly, in using these inherent attributes, will be able to limit or decide on the removal of activities of those authorities making up Public Power.
>
> Its objective will be to transform the state and create a new legal system which will ensure the effective existence of participative social democracy" (*Gaceta Oficial de la República de Venezuela*, No. 36.786, 1999).

By considering the Assembly the expression of popular sovereignty, it assumes the nature of originating, unlimited power in order to reshape the state and, in consequence, create a newly constructed constitutional order configuring a model of "participative social democracy". It was, without any doubt, the most orthodox realisation of Emmanuel Sieyès' originating doctrine of constituent power, and of the aims expressed by President Chávez in Decree Nº 3, of the 2nd of February 1999.

Thus, in line with this assumed, supreme, unlimited, originating power, the Statutes of the Assembly also provided that all of the public powers would be subordinate to it, and consistent with that, would be subject to all of the rules it would produce (Art. 1 first paragraph). To put it another way, the Assembly placed itself above the still-current 1961 Constitution in the legal hierarchy, by stating that the constitutional text would remain in force insofar as it did not contradict the rules and decisions produced by the constituting body, which confirmed the supremacy of the Assembly and the laws it would produce (Art. 1 second paragraph).

The National Constituent Assembly thus set about a systematic, effective demolition of the 1961 constitutional system, and construction of the foundation of the rules of the new order, before focusing on the process of creating the new constitutional text which was its main aim (Brewer Carías, 2001; Hernández Camargo, 2007). Finally, after an intense, hurried phase of creation and argument which ended in the middle of November, the text was put to a referendum for ratification on the 15th of December 1999, and officially published two weeks later. In this way, the 1999 Venezuelan constituent experience created the new 'Bolivarian' constitutional system, the result of the exercise of originating constituent power as explained above, and expressly declared in the preamble to the 1999 Constitution of the Bolivarian Republic of Venezuela. It also declared the ultimate aim of "reshaping the republic to establish a self-reliant, participative, democratic society"

## 4. THE ACTIVATION OF ORIGINATING CONSTITUENT POWER IN 2017

Facing the adversity of profound political, institutional, economic and social crises, Venezuela once again invoked the exercise of originating constitutional power. However, this time in a demonstrably perverse manner by President Nicolás Maduro, who came to power as the successor to the late Hugo Chávez, after winning the April 2013 elections. We will examine how this process happened.

The country's institutional crisis deepened due to the legislative elections in 2015, when the opposition to Maduro gained a significant majority in the National Assembly (112 of the 167 possible seats; Lafuente, 2015), giving them control of this legislative body and a significant blow to the Bolivarian government. That triggered an open war waged by the executive to neutralise the opposition's legitimately won space in the legislature, although the fiercest attacks came from the judicial branch, which did everything possible to prevent the National Assembly from carrying out its constitutional duties, achieving what has been –rightly– called "a system of legal dictatorship" (Brewer Carías, 2017a). This was the beginning of an illegitimate process of blocking the legislative branch by a constitutional judiciary that has always favoured the Executive (Brewer Carías, 2017a, pp. 77 ff.).

Nonetheless, in his eagerness to dismantle and disempower the majority-opposition Venezuelan parliament, President Maduro came up with the risky strategy of convening a National Constituent Assembly (NCA) at a time of significant displays of citizen discontent. It was done via three presidential decrees: Decree Nº 2,830, 1st of May 2017, convening the NCA; Decree Nº 2,831, the same date, creating a presidential commission to propose the voting rules and main foundational aspects of composition of the constituent body and how it would work, and Decree Nº 2,878, of the 23rd of May 2017, which established the voting rules for the NCA.

In the explanatory text of Decree Nº 2,830, convening the NCA, President Maduro clearly defined the goals he sought with this decision: to preserve "the peace of the nation in the face of current social, political, and economic circumstances, in which severe internal and external, antidemocratic, unpatriotic threats hang over the constitutional system". Thus he believed it was an "historically unavoidable responsibility" to convene a National Constituent Assembly so that the Venezuelan people, as an originating constituent power, could express their will to defend "the sacred rights and social rights achieved", although it would be based on what he called the "Pioneering, foundational 1999 Constitution", which he now aimed to replace with a new constitutional text created by the NCA he convened.

But why convene a constituent assembly at such a convulsive time? Especially as the then-current 1999 Constitution of the Bolivarian Republic of Venezuela (CBRV) in Art. 342 provided the possibility of amending (partial revision) the constitution, as long as the structure and the fundamental principles were not changed. Certainly, the first of the objectives planned for the NCA in Decree Nº 2,830 noted the constituent process as an opportunity to have a national dialogue which would contain the surge in political violence the country was undergoing, "via mutual political recognition and a reorganisation of the state, which would recover the constitutional principle of cooperation between public powers, as a guarantee of the full functioning of the democratic, social state of law and justice (…)". Maybe this and the other eight planned objectives for the NCA in this decree could not be achieved through the constitutional amendment procedures in Arts. 342-347 CBRV? Was it necessary to reshape the Bolivarian constitutional order when President Maduro himself was recognised as the principal guardian of the political legacy –laid down legally in the CBRV– of his predecessor Hugo Chávez? Evidently, consideration of these questions drives inexorably towards the understanding that Maduro dismissed the constitutional amendment alternative precisely to avoid the parliamentary phase of the procedures in Art. 344 CBRV, inasmuch as the National Assembly was controlled

by the opposition, who would surely have opposed this presidential ambition; a compelling reason to avoid, and attempt to completely functionally dismantle this legislative body by any means possible.

Surely, those reasons led President Maduro to convene a National Constituent Assembly so that the Venezuelan people, with their originating constituent power, could once again exercise this supreme foundational power to reshape the Bolivarian constitutional system that was, allegedly, undergoing a severe crisis, although the truth is that it was a systemic crisis (political, institutional, economic, and social) of the regime in power.

Thus, in accordance with the voting rules from Decree Nº 2,878, of the 23rd of May 2017, the NCA, once installed as an originating power, should set its own working regulations, "limited by the values and principles of our republican history, and by compliance with international treaties, agreements, and commitments validly entered into by the Republic, the progressive nature of citizens' fundamental rights, and democratic guarantees with the highest respect for the commitments made". Nonetheless, the preceding rules stated that, provisionally and until the NCA produced its own working rules, it would be governed by the rules of the 1999 NCA.

So the unequivocal political will of this body to declare supreme unlimited power was clear, an expression of the originating constituent power the Venezuelan people had entrusted it with. Hence in no case would it consider the CBRV a limit to its functioning. This desire for organic and institutional supremacy was confirmed by the constituent Decree on the 8th of August 2017, which provided the rules to ensure the full institutional functioning of the NCA in keeping with the constituted public powers. Its fifth and final rule provided that all public powers would be subordinate to the NCA, and in light of that, would be subject to comply with and ensure compliance with the laws produced by the constituent body. Consistent with that, the fourth rule stated that the 1999 Constitution and the rest of the legal system would remain in force as long as they

did not contradict the norms produced by the NCA, leaving no doubt as to the supremacy of the laws coming from it.

However, this desire for organic and institutional supremacy for the NCA was not limited to the above. It also extended to decisions about the composition and functioning of constituted bodies, according to what the constituent Decree from the 8th of August stated when examined in detail. In fact, its first rule laid down the objective of the directive as to regulate the exercise "of sovereign power" of the NCA to create laws in order to "ensure the harmonious, just, balanced functioning of all of the branches of public powers". This was realised in the third rule, which stated that, in order to ensure compliance with its objective, the NCA had the power to pass laws "about competencies, functioning, and organisation of the organs of public power" with immediate effect. In view of this normative power, the same rule three of the Decree similarly provided that the NCA could also "limit or decide to cease the activities of authorities making up the public power". To put it another way, the Decree in question was configured as supra-legal law of constituted powers, hierarchically above the then-current 1999 constitution, which would be a legal anomaly, wrecking the structural principles of the Venezuelan constitutional system it aimed to reshape, and a battering ram with which to beat the ungovernable, opposition-controlled Venezuelan parliament. Thus, it created a supreme, absolute body to strip the competencies from and completely annul the rebellious National Assembly.

The question of the legitimacy of convening the NCA was doubtless one of the most controversial of this whole process (Brewer Carías, 2017b; García Soto, 2017; Compains Silva, 2018; Brewer Carías and García Soto, 2017). In the explanatory text and Art. 1 of Decree Nº 2,830, President Maduro based his constitutional ability to convene the NCA on Arts. 348, 347, 70, and 236.1 CBRV. The 1999 text did constitutionalise a National Constituent Assembly as a procedure for creating a new constitution, in that in Art. 347 it recognises the Venezuelan people as the holders of originating constituent power, in exercise of which "could

convene a National Constituent Assembly with the aim of transforming the state, creating a new legal system, and writing a new constitution". In other words, it constitutionalises originating constituent power, leaving it in a latent form until the people want to exercise it. With this constitutional provision, originating constituent power stops being "pre-legal" according to the concepts –that we have seen– in the origins of this doctrine, and only maintains its originating and unlimited nature.

Art. 348 CBRV recognises the power of the following to raise a proposal to convene an NCA: the President of the Republic in the Council of Ministers; the National Assembly (if passed by a two-thirds or greater majority); the Municipal Councils, via a vote of two-thirds of them; and fifteen percent of the voters in the electoral roll. In fact, from a literal interpretation of both provisions it is evident to us that the 1999 constitutional text only recognises the president's power to propose convening the NCA, but in no case does it grant him power to convene it, as it ascribes that power exclusively to the Venezuelan people in exercise of the originating constituent power they hold ex Art. 347. If one accepts, as one must if being exact, that there is a distinction between the power to propose convening the NCA and the power to convene the NCA (exclusively ascribed to the Venezuelan people), this interpretation calls into question the constitutional authorisation for President Maduro to convene the NCA as based on Decree Nº 2,830, of the 1st of May 2017.

The Constitutional Chamber of the Supreme Court of Justice had a different interpretation. In their judgement Nº 378, on the 31st of May 2017, interpreting articles 347 and 348 CBRV, they stated that a consultative referendum prior to convening an NCA was not necessary, nor constitutionally mandated, as it is not expressly stated in any of the provisions of Chapter III of Title IX of the constitutional test, opening the way for convening the NCA in Decree Nº 2,830 laid down by President Maduro.

Thus, although the ruling also entered into questionable considerations of opportunity to enhance the Government's legitimacy in convening an NCA, in the matter that interests us it is useful to highlight their interpretation surrounding articles 347 and 348 CBRV:

> "Article 347, whose interpretation was requested, must be necessarily articulated with article 348, both constitutional texts. In effect, the Venezuelan people are the holders of originating constituent power and, in that condition, and as the holders of sovereignty, convening the National Constituent Assembly corresponds to them. However the proposal for convening it corresponds, by general rule, to the organs of public power (the President of the Republic in the Council of Ministers; the National Assembly by a two-thirds vote; and the Municipal Authorities, via a two-thirds vote) who indirectly, and via representation exercise popular sovereignty. The only exception of popular initiative for a convention is fifteen percent of voters on the electoral roll. In this manner, article 347 defines in whom originating constituent power resides: in the people as keepers of sovereignty. However, article 348 states that the initiative to exercise the constituent convention corresponds to, among others, the "President of the Republic in Council of Ministers", a body of executive power, which acts in exercise of popular sovereignty.
>
> In the terms previously expressed, the court considers that a consultative referendum prior to convening a National Constituent Assembly is not necessary nor constitutionally obligatory, because that is not expressly stated in any of the provisions of Chapter III of Title IX".

This judgement does not manage to distinguish the essential difference between the power to propose convening the NCA (ascribed by the CBRV to specific bodies, ex Art. 348) from the power to convene it (ascribed by the CBRV exclusively to the Venezuelan people, ex Art. 347, which can only be articulated following a special referendum on convening an NCA). If –as is done here– those powers are understood to be general powers of action granted by the constitution to specific subjects for specific ends (in the former case, to propose the convention, and in the latter to actually convene it), it is clear that they are configured as different levels of activity that the CBRV concerns itself with distinguishing, and

articulating in different provisions. An unequivocal intent that the ruling did not manage to understand, as it confused the two levels. If one accepts that, then it jumps out that President Maduro's constitutional authorisation to convene the NCA is questionable in the terms of its basis in Decree Nº 2,830, although the Constitutional Chamber of the Venezuelan Supreme Court had a different interpretation.

Clearly, the decision of the Constitutional Chamber of the Supreme Court was the cause of some bewilderment in the legal field. The then Attorney General of the Republic would formally request clarification of the controversial ruling Nº 378, of the 31st of May 2017, although the Constitutional Chamber declared the request inadmissible for lack of legitimacy, thus avoiding re-opening such a prickly question.

That being the case, despite Art. 347 CBRV consistently and logically providing that the activation of originating constituent power, and the subsequent convening of a National Constituent Assembly has the substantial objective of writing a new constitution, in the case before us this was not so. Two years after the formal installation of this constituent body –the 4th of August 2017– little is known of the process of creating a new constitutional text to replace the 1999 Bolivarian constitution, and all of the indications are that this is a body with the underhand desire to be permanent. Before celebrating its two-year anniversary, it had extended its activity as "plenipotentiary power of the nation" until at least the 31st of December 2020 (Constituent Decree of the 20th of May 2019). It is clear then, that its aims go beyond mere writing of a new constitutional text, to become an absolute counter-power to the legitimately constituted opposition-controlled National Assembly from which it is removing constitutional competences step by step. We are without a doubt, facing an indisputable practical example of the perversion and authoritarian interpretation of Sieyès' paradigm.

## 5. EPILOG: ARTICLE 347 OF THE 1999 BOLIVARIAN CONSTITUTION, OR THE LATENT TEMPTATION TO REINVENT THE CONSTITUTIONAL WHEEL

Twenty years after the promulgation of the Constitution of the Bolivarian Republic of Venezuela of 1999, and without losing sight of the grave political and institutional crisis that has paralysed the country, perhaps rather than noting some conclusions to close this study, it would be better to reflect briefly on where we might find the origin of these political-legal and institutional dysfunctions that the Venezuelan political and constitutional system is suffering from.

We have already seen that the 1999 constitutional text shapes the National Constituent Assembly as a procedure –to no small extent an extraordinary procedure– to make profound changes to the political system, reshaping the constitutional order and, obviously, creating a new constitution *ex novo*. This is possible having considered that Art. 347 recognises the Venezuelan people as the legitimate holders of originating constituent power who may, in exercise of this power, convene a National Constituent Assembly to carry out any of the aforementioned radical actions. Thus, the 1999 framers constitutionalised originating constituting power –which at that moment stopped being real, although conserved its unlimited nature– and left it in a latent state that the people could awaken it from whenever they felt it appropriate. In other words, exclusively conceiving the people as the legitimate subject to activate it when the time comes.

It is obvious that accepting the classical doctrine of constituent power in this way is not without its risks. It means a latent political temptation to reinvent the constitutional wheel as a radical solution in extreme crisis situations, such as the one in Venezuela currently, a temptation that is more abundant in authoritarian regimes such as in this case. On these foundations perhaps we might explain the authoritarian interpretation and perversion of the paradigm of constituent power examined in this study.

Given these considerations, perhaps it is not unreasonable to characterise the constitutional design of Art. 347 CBRV as a significant reason underlying the current political-institutional dysfunction afflicting Venezuela, obviously without that justifying the authoritarian outrages of the current Venezuelan regime, which when all is said and done, bears the true, ultimate responsibility for the country's socioeconomic and institutional decline.

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