JUDICIAL REVIEW IN VENEZUELA*

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INTRODUCTION

Judicial review of the constitutionality\(^1\) is the power assigned to the courts to decide upon the constitutionality of statutes and other governmental acts; therefore, it can only exist in legal systems in which there is a written and rigid Constitution, imposing limits to the State organs, and particularly to Parliament. That is why, judicial review of the constitutionality of State acts has been considered as the ultimate result of the consolidation of the rule of law, extensively developed in the Americas due to the democratization process.

In his welcoming letter to the Seminar on “Judicial Review in the Americas … and Beyond”, Professor Robert S. Baker referred to the fact that since the Supreme Court’s decision in *Marbury v. Madison* two hundred years ago, “judicial review of the constitutionality of statutes –he said- has been an integral part of the law and politics of the United States”; to which we must add that in a certain way, it has also being the situation in all Latin American countries, particularly after democ-

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racy has been reinforced in the political systems of our countries, –even with all its inconsistencies–.

We must not forget, when we talk about judicial review, that above all, it is an institutional tool which is essentially linked to democracy; democracy understood as a political system not just reduced to the fact of having elected governments, but where separation and control of power, and the respect and enforcement of human rights is possible, through an independent and autonomous Judiciary.

And precisely, it has been because this process of reinforcement of democracy in the Latin American countries, that judicial review of constitutionality of legislation and other governmental actions has become an important tool in order to guarantee the supremacy of the Constitution, the rule of law and the respect of human rights.

And it is in this sense that judicial review of the constitutionality of State acts has been considered as the ultimate result of the consolidation of the rule of law, when precisely in a democratic system, the courts can serve as the ultimate guarantor of the Constitution effectively controlling the exercise of power by the organs of the State2.

On the contrary, as happens in all authoritarian regimes even having elected governments, if such control is not possible, the same power vested for instance, upon a politically controlled Supreme Court or Constitutional Court, can constitute the most powerful and diabolic instrument for the consolidation of authoritarianism, the destruction of democracy and the violations of human rights3.

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Unfortunately this is what has been happening in my country, Venezuela, where after decades of democratic ruling through which we constructed one of the most formally complete system of judicial review in South America, that same system has been the instrument through which the politically controlled judiciary and particularly the subjected Constitutional Chamber of the Supreme Tribunal, have been consolidating the authoritarian regime we now have.

With this important warning, allow me then to try to explain you the general trends governing the very comprehensive judicial review system established in Venezuela, in many aspects since the 19th century, and to try to classify it within a constitutional comparative law framework.

II. A GENERAL OVERVIEW ON THE SYSTEMS OF JUDICIAL REVIEW AND THE VENEZUELAN SYSTEM

This guarantee can always be analyzed according to the criteria established a few decades ago by Mauro Cappelletti⁴ who, following the trends of the so called “North American” and “European” systems, distinguished between the “diffuse” (decentralized) and “concentrated” (centralized) methods of judicial review of constitutionality of legislation. The former exercised by all the courts of a given country, and the latter only assigned to a Supreme Court or to a Court specially created for that purpose as a Constitutional Court or Tribunal.

In the first case, all the courts are empowered to judge the constitutionality of statutes, as is the case in the United States of

America, where the “diffuse method”\(^5\) was born. That is why it is also referred as the "American model", initiated with *Marbury v. Madison* in 1803, latter followed in many countries with or without a common law tradition. It is called “diffuse” or decentralized, because judicial control belongs to all courts, from the lowest level up to the Supreme Court of the country. In Latin America, the only country that has kept the diffuse method of judicial review as the only judicial review method applied in the country, is Argentina. In the other Latin American countries where it has been adopted, it coexists in parallel with the concentrated method (Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru and Venezuela).

In contrast with the diffuse method of judicial review, in the “concentrated” or centralized method, only one single court is empowered to control, generally with annulatory powers, the constitutionality of legislation, whether the Supreme Court or a special Constitutional Court created for that particular purpose. In this latter case, the system is also called the “Austrian” or “European” model, because it was first established in Austria (1920), being latter developed in Germany, Italy, Spain, Portugal and France. The method has also been adopted in many Latin American countries, in some cases as the only one applied, as is the case of Costa Rica, El Salvador, Bolivia, Chile, Honduras, Panama, Paraguay and Uruguay. In other countries, as mentioned, it is applied conjunctly with the diffuse method (Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru and Venezuela).

It has been this mixture or parallel functioning of the diffuse and concentrated systems, which has given rise to what can be considered as the “Latin American” model of judicial review, that as

aforementioned, can be identify in Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Perú and Venezuela, where on the one hand, all courts are entitled to decide upon the constitutionality of legislation deciding autonomously upon their inapplicability in particular cases, with inter partes effects; and on the other hand, the Supreme Court or a Constitutional Court or Tribunal has been empowered to declare the nulity of statutes contrary to the Constitution⁶.

The Venezuelan judicial review system is precisely one of the latter, combining since the XIX century, the diffuse and the concentrated methods of judicial review⁷.

In effect, Article 7 of the 1999 Constitution⁸ declares expressis verbis that its text is “the supreme law” of the land and “the ground of the entire legal order”; assigning to all judges the duty “of guaranteeing the integrity of the Constitution” (Art. 334) with powers to decide not to apply a statute deem to be unconstitutional, when deciding a concrete case. Article 335 of the Constitution also assigns the Supreme Tribunal of Justice the duty of guaranteeing “the supremacy and effectiveness of the constitutional rules and principles”, as “the maximum

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and final interpreter of the Constitution”, with the duty to seek for “its uniform interpretation and application” (article 335).

Additionally, the Constitutional Chamber of the Supreme Tribunal of Justice (articles 266, par. 1º y 336), as “Constitutional Jurisdiction” is empowered in an exclusive way to declare the nullity of certain state acts on the grounds of its unconstitutionality, in particular, the statutes and other state acts issued in direct execution of the Constitution⁹; and also to judge the unconstitutionality of the omissions of the legislative organ (article 336).

Other state acts, such as the administrative acts and regulations, are also subjected to judicial review of constitutionality by the “Administrative Jurisdiction” courts attributed to particular courts for judicial review of administrative action, which are empowered to annul administrative acts because their illegality or un unconstitutionality (art. 259 C.).

Also, according to the Constitution (article 29), the courts have the duty to protect all persons in their constitutional rights and guaranties, when deciding the action for “amparo” (protection) that can be brought before them against any illegitimate harm or threat to such rights.

Based in all the aforementioned constitutional provisions, judicial review of constitutionality can be exercised in Venezuela¹⁰, not only through the two basic methods already mentioned, but in addition through other seven judicial means, as followed: 1) The diffuse method of judicial review of constitutionality of statutes and other

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normative acts by all courts; 2) The concentrated method of judicial review of the constitutionality of certain State acts, by the Constitutional Chamber of the Supreme Tribunal of Justice; 3) The protection of constitutional rights and guarantees through the actions for *amparo*; 4) The concentrated method of judicial review of Executive regulations and administrative actions by special courts controlling their unconstitutionality and illegality (*contencioso administrativo*); 5) The judicial review powers to control the constitutionality of legislative omissions. Finally; 6) The concentrated judicial review powers for the resolution of constitutional conflicts between the State organs; 7) The protection of the Constitution through the abstract recourse for interpretation of the Constitution; and 8) The Constitutional Chamber power to take away from ordinary courts the jurisdiction of particular cases.

In this sense and according to a Venezuelan long tradition that as mentioned can be traced back up to the XIX Century\(^\text{11}\), all the principles of the mixed or comprehensive system of judicial review had been gathered in the 1999 Constitution.

### III. THE DIFFUSE METHOD OF JUDICIAL REVIEW

Since 1897, the Venezuelan Civil Procedure Code has regulated the diffuse method of judicial review\(^\text{12}\); currently set forth in article 20 which prescribes:


\(^{\text{12}}\) It was expressly established in the Civil Procedure Code of 1897. See Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, cambridge 1989,
“Article 20: In the case in which a statute in force, whose application is requested, collides with any constitutional provision, judges shall apply the latter with preference.”

The principle of the diffuse method of judicial review also has been more recently set forth in article 19 of the Criminal Procedure Organic Code, as follows:

“Article 19: Control of the Constitutionality. The control of the supremacy of the Constitution corresponds to the judges. In case that a statute whose application is requested would collide with it, the courts shall abide to the constitutional provision.”

Based on this author proposal¹³, article 334 of the 1999 Constitution consolidated the diffuse method of judicial review of the constitutionality of legislation¹⁴, as follows:

“In case of incompatibility between this Constitution and a statute or other legal provision, the constitutional provisions shall be applied, corresponding to all courts in any case, even at their initiative, to adopt the pertinent decision.”

Through this article, the diffuse method of judicial review acquired constitutional rank in Venezuela, as a judicial power that can

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¹³ See the proponed draft for this article, in Allan R. Brewer-Carías, Debate Constituyente (Aportes a la Asamblea Nacional Constituyente), Vol. II, (9 September – 17 October 1999), Caracas 1999, pp. 24-34.

¹⁴ For instance, as it previously happened in other countries like Colombia, from 1910 (art. 4); Guatemala, in 1965 (art. 204); Bolivia, in 1994 (art. 228); Honduras, in 1982 (art. 315) and Peru, in 1993 (art. 138). See Allan R. Brewer-Carías, Debate Constituyente (Aportes a la Asamblea Nacional Constituyente), Vol.III (18 October-30 November 1999), Caracas 1999, pp. 94 to 105.
even be exercised *ex officio* by all courts\textsuperscript{15}, including, of course, the different Chambers of the Supreme Tribunal of Justice.\textsuperscript{16}

This constitutional provision follows the general trends shown in comparative law regarding the diffuse method: it is based on the principle of constitutional supremacy, according to which unconstitutional acts are void and hold no value. Therefore, every and all judges, when an specific case is brought before them, are entitled to decide upon the unconstitutionality of the statute they shall apply for the resolution of the case, as an incidental issue, and this power can be exercised even at their own initiative (*ex officio*). The decision of the judge holds only *inter partes* effects in the specific case and, therefore, just declarative effects.\textsuperscript{17}

The general judicial procedural system in Venezuela is governed by the by-instance principle, so that judicial decisions resolving cases on judicial review are subject to the ordinary appeal. Therefore, the cases could only reach the Cassation Chambers of the Supreme Tribunal through cassation recourses (art. 312 and ff. CCP). Because this situation could lead to possible dispersion of the judicial decision on constitutional matters, the 1999 Constitution set forth a corrective procedure by granting the Constitutional Chamber of the Supreme Tribunal of Justice, the power to:

“Review final judicial decision issued by the courts of the Republic on amparo suits and when deciding judicial review of statutes, in the terms established by the respective organic law.” (art. 336,10 C)

\textsuperscript{15} This has been a feature of the Venezuelan system. See Allan R. Brewer-Carías, *Instituciones Políticas y Constitucionales, Vol VI, La Justicia Constitucional,* op. cit., p. 101.

\textsuperscript{16} Case Carlos P. García P. vs. Cuerpo Técnico de la Policía Judicial.

Regarding this provision, it must be pointed out that it is neither an appeal nor a general second or third procedural instance. It is an exceptional faculty of the Constitutional Chamber to review, upon its judgment and discretion, through an extraordinary recourse (in similar sense as the *writ of certiorary*) exercised against *last instance* decisions in which constitutional issues are decided by means of judicial review or in *amparo* suits.

It is a reviewing non obligatory power that can be exercised in an optional way\(^{18}\), being the Constitutional Chamber empowered to choose the cases in which it considers convenient to decide because the constitutional importance of the matter; having also the power to give to its interpretation of the Constitution general binding effects, similar to the *stare decisis* (Article 335) effects.

Nonetheless, the Constitutional Chamber has distorted this review powers regarding judicial decisions, extending it far beyond the precise cases of judicial review and amparo established in the Constitution, exercising his review power regarding any other judicial decision issued in any matters when it considers it contrary to the Constitution, a power that the Chamber has considered to exercise without any Constitutional authorization, even *ex officio*; for instance, when considering that the judicial decision has been contrary to a Constitutional Chamber interpretation of the Constitution, of when considering that the decision is affected by a grotesque error regarding constitutional interpretation\(^{19}\).


\(^{19}\) See decision N° 93 of February 6, 2001 (Caso: *Olimpia Tours and Travel vs. Corporación de Turismo de Venezuela*), in *Revista de Derecho Público*, N° 85-88, Editorial Jurídica Venezolana, Caracas, 2001, pp. 414-415. See, Allan R. Brewer-Carías, “*Quis Custodiet ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpre-
IV. THE CONCENTRATED METHOD OF JUDICIAL REVIEW

The second traditional method of judicial review in Venezuela has been the judicial power to annul statutes and other State acts of similar rank, when considered unconstitutional, which since 1858 was granted only and exclusively to the Supreme Court of the country. Now, according to the 1999 Constitution, this power is attributed to one of the Chamber of the Supreme Tribunal of Justice, the Constitutional Chamber, as Constitutional Jurisdiction (articles 266,1; 334 and 336 of the Constitution).

This method of judicial review can be exercised in three ways: when the Chamber is requested to decide upon the unconstitutionality of statutes already in force, through a popular action or in some cases in an obligatory way; or when deciding on the matter in a preventive way before the publication of the challenged statute. In all these cases, the Constitutional Chamber has the power to annul the unconstitutional challenged statutes with erga omnes effects.

1. The concentrated method of judicial review through the popular action

The first of these mean for the Constitutional Chamber to exercise judicial review of legislation in a concentrated way is when deciding popular actions that can be filed before the Supreme Tribunal by anybody in order for it, to declare the unconstitutionality and to decide the nullity of national statutes and other acts of similar rank, including Executive decrees of such rank; of other State acts issued in direct and immediate execution of the Constitution; of States Constitutions and statutes; and of municipal ordinances.

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This method of judicial review is established in article 334 of the Constitution of 1999, following a tradition that began in 1858\textsuperscript{20}, when gives the Constitutional Chamber the power to:

“Declare the nullity of the statutes and other acts of the organs exercising public power issued in direct and immediate execution of the Constitution or being ranked equal to a law, [which] corresponds exclusively to the Constitutional Chamber of the Supreme Court of Justice.”

This judicial review power to annul State acts on the grounds of their unconstitutionality, refers to: 1. National laws (statutes) and other acts of rank equal to laws; 2. State Constitutions and statutes, municipal ordinances, and other acts of the legislative bodies of the States and the Municipalities issued in direct and immediate execution of the Constitution; 3) State acts with rank equal to statutes issued by the National Executive; 4) State acts issued in direct and immediate execution of the Constitution, by any other State organ exercising the Public Power.

Since the 1858 Constitution, the Constitutional Jurisdiction was assigned to the Supreme Court of Justice in Plenary Session\textsuperscript{21}; so one of the novelties of the 1999 Constitution was to assign it to just one of the Chambers of the Supreme Court of Justice, the Constitutional Chamber (arts. 262; 266,1), which as all the other Chambers, has the mission of:

“Guaranteeing the supremacy and effectiveness of the constitutional rules and principles: it shall be the last and maximum interpreter of the Constitution and guardian its standard interpretation and application.” (art. 335, first paragraph).


The specificity of the Constitutional Chamber in these cases, according to article 335 of the Constitution, is that:

“The interpretations made by the Constitutional Chamber on the content or the scope of the constitutional rules are biding to the other Chambers of the Supreme Court and other courts of the Republic.”

Now, regarding the concentrated method of judicial review of statutes and other State acts of the same rank or issued in direct execution of the Constitution, exercised by the Constitutional Chamber as Constitutional jurisdiction, the most important feature of the Venezuelan system to point out, is that the standing to raise the actions corresponds to any individual, being the action an actio popularis. Consequently, according to article 5 of the Organic Law of the Supreme Tribunal of Justice, any individual or corporation with legal capacity, are entitled to file the action of nullity against the abovementioned state acts, on the grounds of unconstitutionality.

Being the objective of the popular action, according to the doctrine of the Supreme Tribunal, the “objective defense of the Constitution’s majesty and supremacy”; anybody has the necessary standing to sue; as ruled by the Constitutional Chamber of the Supreme Tribunal, in decision N° 1077 dated August 22, 2001:

“any individual having capacity to sue has procedural and legal interest to raise [the popular action], without requiring a concrete

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24 According to this criterion, therefore, as the Supreme Court in Plenary Session has said, the popular action “may be exercised by any and all citizen with legal capacity.” Decision dated November 19, 1985, in Revista de Derecho Público, N° 25, Editorial Jurídica Venezolana, Caracas 1986, p.131.
historical fact that harm the plaintiff’s private legal sphere. The claimant is a guardian of the constitutionality and that guardianship entitles him to act, whether he suffered or not a harm coming from the unconstitutionality of a law. This kind of popular actions is exceptional.”

This concentrated method of judicial review has traditionally been used, in an extensive way, particularly by States and Municipalities against national statutes, and conversely, by the Federal government against States and Municipal legislation; and also, by individuals against national States and municipal statutes for the protection of individual rights.

2. The obligatory concentrated method of judicial review of the “state of exception” decrees

Regarding the concentrated method of judicial review of constitutionality, the second case for its exercise refers to the “state of exception” decrees that can be issued by the President of the Republic. Pursuant to article 339 of the Constitution, these Executive decrees declaring an “state of emergency” shall be submitted by the President of the Republic before the Constitutional Chamber of the Supreme Tribunal, in order for it to review its constitutionality. Additionally, article 336, set forth that the Constitutional Chamber is entitle to:

“Review, in any case, even ex officio, the constitutionality of decrees declaring states of exception issued by the President of the Republic.”

This judicial power of obligatory judicial review is also a novelty introduced by the 1999 Constitution, following the precedent of Colombia (art. 241,7), but with the addition of the possibility for the Constitutional Chamber to exercise it ex officio.

25 Case: Servio Tulio León Briceño.
By exercising this control, the Constitutional Chamber can decide not only on the constitutionality of the decrees declaring “states of exception”, but also on the constitutionality of its content, pursuant to the provisions of articles 337 and following of the Constitution, in particular, verifying the constitutional guaranties of rights that can be restricted and if the decree effectively contents, for example, the necessary regulation regarding “the exercise of the right whose guarantee is restricted.” (art. 339).

3. The preventive judicial review of the constitutionality of some state acts

But in addition to the actio popularis and these cases of obligatory review, the concentrated method of judicial review can also be exercised by the Constitutional Chamber of the Supreme Tribunal, in a preventive way regarding statutes that have been sanctioned but are not still published. This preventive control can occur in three cases established as an innovation in the 1999 Constitution, regarding international treaties and organic laws, and regarding non promulgated statutes, at the request of the President of the Republic.

In the traditional system of judicial review in Venezuela, the sole case that was considered as a mechanism of preventive concentrated method of judicial review of statutes, was the Supreme Tribunal of Justice power to decide the unconstitutionality of an already sanctioned statute but not yet promulgated, on the occasion of the presidential veto regarding statutes.26

Now, as mentioned, the Constitution of 1999 has introduced the figure of the preventive control of the constitutionality regarding international treaties, organic laws, and of non promulgated statutes when requested by the President of the Republic.

A. Preventive Judicial Review of International Treaties

In the first place, there is the preventive judicial review method, foreseeing in article 336,5 of the Constitution, regarding international treaties, when granting the Constitutional Chamber faculty to:

“Verify, at the President of the Republic’s or the National Assembly’s request, the conformity with the Constitution of the international treaties subscribed by the Republic, before their ratification.”

It is important to point out that this provision, originated in the European constitutional systems, like the French and Spanish ones, and also existing in Colombia, now incorporated in the Venezuelan system of judicial review, permits the preventive judicial review of constitutionality of international treaties subscribed by the Republic, avoiding the possibility of subsequent challenge of the statutes approving the treaty.

In this case, if the treaty turns out to be in no conformity with the Constitution, it cannot be ratified, and an initiative for constitutional reform to adapt the Constitution to the treaty, might result. On the other hand, if the Constitutional Chamber considers that the international treaty conforms to the Constitution, then, a popular action of unconstitutionality against the approved statute could not be raised subsequently.

B. The Preventive Judicial Review of the Organic Laws

The second mechanism of preventive judicial review method refers to Organic Laws in the sense that according to article 203 of the

\[\text{\footnotesize\textit{Implicaciones constitucionales de los procesos de integración regional, Editorial Jurídica Venezolana, Caracas 1998, pp. 75 ff.}}\]

\[\text{\footnotesize\textit{Implicaciones constitucionales de los procesos de integración regional, Editorial Jurídica Venezolana, Caracas 1998, p.590.}}\]
Constitution, the Constitutional Chamber must decide, before their promulgation, on the constitutionality of the “organic” character of the organic laws, when qualified in this way by the National Assembly.

Article 203 of the Constitution defines the Organic Laws in five senses: First, those the Constitution itself qualifies as such\(^{29}\); second, the organic laws issued in order to organize Public branches of government (Public Powers)\(^{30}\); third, those intended to “develop the constitutional rights”, which opens a wide range for that category, since it implies that all laws issued to develop the content of articles 19 to 129 shall be Organic Laws; fourth, those organic laws issued to “frame other laws”; for example, the Taxation Organic Code that shall frame all specific tax laws, or the Organic Law on the Financial Administration of the State that shall frame the annual or pluriannual budget

\(^{29}\) This happens in the following cases: Organic Law of Frontiers (art. 15), Organic Law of Territorial Division (art. 16), Organic Law of the National Armed Force (art. 41), Organic Law of the Social Security System (art. 86), Organic Law for the Land Planning (art. 128), Organic Law Establishing the Limits to Public Officer’s emoluments (art. 147), Organic Law of Municipal Regime (art. 169), Organic Law on the Metropolitan Districts (arts. 171 and 172), Organic Law ruling officers ineligibility (art. 189), Organic Law Concerning the Nationalization of Activities, Industries or Services (art. 302), Organic Law of the Nation Defense Council (art. 232), Organic Law Ruling the remedy of reviewing decisions adopted on actions of *amparo* and on diffuse judicial review (art. 336), Organic Law of State of Emergency (art. 338 and Third,2 Transitional clause), Organic Law on Refugees and Asylum (Fourth,2 Transitional clause), Organic Law on the Peoples Defendant (art. 5 Transitional clause), Organic Law on Education (Sixth Transitional clause), Organic Law on Indian Peoples (Seventh Transitional clause), Labor Organic Law (Fourth,3 Transitional clause), Labor Procedural Organic Law (Fourth,4 Transitional clause) and Tributary Organic Code (Fifth Transitional clause)

laws, or the specific laws referred to public credit operations; and fifth, those organic laws named that way, as organic, by the National Assembly, when its draft is admitted by the vote of 2/3 parties of the present members before initiating the discussion.

These latter case of laws qualified as such by the National Assembly, are those that shall be automatically sent, before their promulgation, to the Constitutional Chamber of the Supreme Tribunal of Justice, seeking a decision on the constitutionality of their organic assigned character.

C. Judicial Review of statutes sanctioned before their Promulgation

The third mechanism of preventive judicial review of constitutionality set forth in article 214 of the Constitution is established in cases when the President of the Republic raises the constitutional issue against sanctioned statutes, before their promulgation. Thus, a control of the constitutionality of sanctioned but not promulgated statutes is set forth in a different way to the so called “presidential veto” to statutes, also traditionally established in Venezuela (art. 214 of the Constitution), which always involves their devolution to the National Assembly.

V. JUDICIAL REVIEW THROUGH THE ACTION FOR AM-PARO OF CONSTITUTIONAL RIGHTS AND GUARANTEES

But beside the classical diffuse and concentrated methods of judicial review with the aforementioned variations, in Venezuela, as in all other Latin American countries, a third judicial review means can be distinguished within the specific action established in the Constitutions for protection of constitutional rights, which can also serve for control-

31 The Constitutional Chamber considered that it is an exclusive standing of the President of the Republic. See decision Nº 194 of 0February 15, 2001.
ling the constitutionality of statutes and other governmental actions applicable to the case.

The action or suit for protection (amparo) as an specific judicial means for the protection of all constitutional right and guarantees\textsuperscript{32} was constitutionalized in the Venezuelan 1961 Constitution, implying the obligation of all the courts to protect the persons in the exercise of their constitutional rights and guarantees. In the amparo suit decisions, judicial review of the constitutionality of legislation can also be exercise by the courts as part of their rulings.

Article 27 of the current Constitution of 1999 establishes:

“Every individual is entitled to be protected by the courts in the enjoyment and exercise of the rights, even those which deriving from the nature of a man that are not expressly set forth in this Constitution or in the international treaties on human rights.”

The amparo suit is governed by a procedure that shall be oral, public, brief, free of charge, and without any formality. The judge is entitled to immediately restore the affected legal situation or the situation more alike to that; and the court shall issue the decision with preference to all other matters. As per the Organic Law on Amparo of Constitutional Rights and Guarantees of 1988\textsuperscript{33}, in principle, all courts of first instance are the competent courts to decide the amparo suits.

The standing to file the action of amparo corresponds to every individual, whose constitutional rights and guarantees are affected,\textsuperscript{34}


\textsuperscript{34} Individual, political, social, cultural, educative, economic, Indian and environmental rights and their guarantees are listed in arts. 19 to 129 of the Constitution. In Venezuela, there exists no limitation established in other countries (e.g. Germany, and Spain,
even those inherent to the human being not listed in an express way in the Constitution or in the international treaties on human rights ratified by the Republic. In Venezuela, such treaties rank in the same level of the Constitution, and they even prevail in the internal order as long as they establish more favorable rules on the enjoyment and exercise of rights than those established in the Constitution and laws (art. 23 C).

In that sense, in Venezuela, the action of *amparo* is instituted against State organs, against corporations and even against individuals actions or omissions that may infringe or threat the constitutional rights and guarantees. In all cases of amparo proceedings, if the alleged violation of the constitutional right is referred to a statutory provision, in its decision the amparo judge can exercise the judicial review of the statute and decide upon its unconstitutionality, not applying the statute to the case.

Courts decisions have been constant in granting the action of *amparo* a personal character. Therefore, the standing corresponds firstly to “the individual directly affected by the infringement of the constitutional rights and guarantees.” But by virtue of the constitutional acknowledgement of the legal protection of diffuse or collective interests, the Constitutional Chamber of the Supreme Court has admitted the possibility of exercising the action of *amparo* to enforce collective and diffuse rights, for instance, as the ones referred to an acceptable quality of life (basic conditions of existence) and of the voters in their political rights, admitting precautionary measures with *erga omnes* effects.


35 See, for example, decision of the Constitutional Chamber dated March 15, 2000, Revista de Derecho Público, Nº 81, Editorial Jurídica Venezolana, Caracas 2000, pp. 322-323.

36 Decision of the Constitutional Chamber Nº 483 of May 29, 2000 (Case: “Queremos Elegir” y otros), Revista de Derecho Público, Nº 82, Editorial Jurídica Venezolana, Caracas 2000, pp
In such cases the Constitutional Chamber has admitted that “any individual with legal capacity to bring suit, who is going to impede a damage to the population or parts of it where he belongs to, is entitled to bring the [amparo] suit grounded in diffuse or collective interests...This interpretation, based on article 26, extends the standing to companies, corporations, foundations, chambers, unions and other collective entities, whose object be the defense of the society, as long as they act within the boundaries of their corporate object, aimed at protecting the interests of their members regarding their object”. 37

On the other hand, regarding the general defense and protection of diffuse and collective interests, the Constitutional Chamber has also admitted the standing of the Defender of the People38.

489-491. In the same sense, decision of the same Chamber N° 714 of July 13, 2000 (Case: APRUM).

37 See decision of the Constitutional Chamber N° 656 of 06-05-2001, Case: Defensor del Pueblo vs. Comisión Legislativa Nacional. In these cases, as stated by the Constitutional Chamber in a decision dated February 17, 2000 (N° 1.048, Case: William O. Ojeda O. vs. Consejo Nacional Electoral), in order to enforce diffuse or collective rights or interests, it is necessary that the following elements be combine: “1. That the plaintiff sues, based not only on his personal right or interest, but also on a common or collective right or interest. 2. That the reason of the claim filed on the action of amparo, be the general damage to the quality of life of all the inhabitants of the country or parts of it, since the legal situation of all the member of the society or its groups has been damaged when their common quality of life was unimproved. 3. That the damaged goods are not susceptible of exclusive appropriation by one subject (as the plaintiff). 4. That the claim concerns an indivisible right or interest that involves the entire population of the country or a group of it [and] that a necessity of satisfying social or collective interests exists, before the individual ones”. See Decision Nº 1.048 of the Constitutional Chamber dated 02-17-00, case: William Ojeda vs. Consejo Nacional Electoral.

38 The Chamber has admitted the Peoples’ Defendant standing “to act to protect those rights and interests , when they correspond in general to the consumers and users (6, article 281), or to protect the rights of Indian peoples (paragraph 8 of the same article), since the defense and protection of such categories is one of the faculties granted to said entity by article 281 of the Constitution in force. It is about a general protection and not a protection of individualities. Within this frame of action, and since the political rights are included in the human rights and guarantees of Title III of the Constitution in force, which have a general projection, among which the one set forth in arti-
Regarding this action for *amparo*, and in order to seek the uniformity of the application and interpretation of the Constitution, article 336 of the Constitution also grants the Constitutional Chamber of the Supreme Tribunal the power to review in a discretionary way all final decisions issued in *amparo* suits. These extraordinary remedy can be raised against judicial decisions applying the diffuse method of judicial review, characterized by the facultative, not obligatory character of the power of the Constitutional Chamber to exercise the review.

VI. THE JUDICIAL REVIEW OF THE CONSTITUTIONALITY EXECUTIVE REGULATIONS AND OTHER NORMATIVE ADMINISTRATIVE ACTS

The forth mean of judicial review of constitutionality is the concentrated method also established in the Constitution regarding Executive regulations and other normative administrative actions. For such purpose, Article 259 of the Constitution set forth the “Administrative Jurisdiction” (Judicial Review Courts of Administrative action) (*contencioso-administrativo*), in the following way:

“Article 259: The Administrative Jurisdiction corresponds to the Supreme Tribunal of Justice and to the other courts determined by law. The organs of the Administrative Jurisdiction have the power to annul general or individual administrative acts contrary to law, even because of deviation of power; condemn the payment of amounts of money and the compensation of damages caused in responsibility of the Administration, decide claims for the fulfill-

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Article 62 of the Constitution can be found, it must be concluded that the Defender of the People is entitled on behalf of the society, to bring to suit an action of *amparo* tending to control the Electoral branch of government, to the citizen’s benefit, in order to enforcing articles 62 and 70 of the Constitution, which were denounced to be breached by the National Legislative Assembly…” (right to citizen participation). See decision of the Constitutional Chamber N°656 of May 6, 2001, Case: *Defensor del Pueblo vs. Comisión Legislativa Nacional*
ment of public services and arrange what is necessary to restore the subjective legal situation damaged by the activity of the Administration.”

Therefore, pursuant to this constitutional article, judicial review also corresponds to the courts of the Administrative Jurisdiction, when exercising their faculty of annulment of administrative acts, including regulations contrary to the Constitution, to the statutes or to other sources of administrative law. In these cases, similar to judicial review of constitutionality, the decisions annulling administrative acts, both normative ones and of particular effects, have *erga omnes* effects.

The difference between the “Constitutional Jurisdiction” (*Jusdicción Constitucional*), attributed to the Constitutional Chamber of the Supreme Court of Justice, and the “Administrative Jurisdiction” (*Jurisdicción contencioso-administrativa*) attributed to the special courts for judicial review of administrative actions, resides in the State acts subjected to control: on the one hand, Constitutional Jurisdiction is in charge of deciding the nullity actions against unconstitutional statutes and other acts of similar rank or issued in direct and immediate execution of the Constitution; on the other hand, Administrative Jurisdiction is in charge, among others, of deciding nullity actions against unconstitutional or illegal administrative acts or regulations.

Therefore, as per article 266,5 of the Constitution, the Political-Administrative Chamber of the Supreme Court is entitled:

“To declare the total or partial nullity of bylaws (regulations) and

40 *idem*
other general or individual administrative acts of the National Ex-
cutive, when it proceeds.”

Regarding the standing to challenge administrative acts on the
grounds of unconstitutionality and illegality, when referred to norma-
tive administrative acts or regulations, anybody can bring the action
before the courts by means of the popular action of nullity. Conse-
quently, a simple interest in the legality or constitutionality is enough
for any citizen to be sufficiently entitled to raise the nullity action for
unconstitutionality or illegality against regulations and other norma-
tive administrative act.42 This simple interest has been defined by the
First Administrative Court, in a decision dated March 22, 2000, as “the
general right granted by law upon every citizen to access the compe-
tent courts to raise the nullity of an unconstitutional or illegal adminis-
trative general act”.43

However, as to the administrative acts of particular effects, the
standing to challenge them before the Administrative Jurisdiction
courts corresponds solely to those who have a personal, legitimate and
direct interest in the annulment of the act; that is to say, to those per-
sonally and directly damaged by the administrative act in their legiti-
mate rights and interests (art. 5, Law). This has been the general rule
on the matter even though some decisions have been issued by the

42 See Allan R. Brewer-Carías, , Instituciones Políticas y Constitucionales, Vol. VII, La Justicia
Contencioso-Administrativa, Caracas 1997, pp.74 ff. See, for example, decision of the Su-
preme Court of Justice in Political-Administrative Chamber, dated 11-24-99, case: Comité Interprofesional du vin de Champagne.

43 See decision of the First Administrative Court dated 03-22-00, case: Banco de Venezolano
de Crédito v. Superintendencia de Bancos, Revista de Derecho Público, Nº 81, Editorial Jurídica
Politico-Administrative Chamber of the Supreme Tribunal, giving standing to any person just with a general interest.  

Additionally, in this case of the Administrative Jurisdiction, even before the new Constitution became effective in 1999, the possibility of protecting collective interests was also opened, in particular against city-planning acts, the case being now widely accepted regarding collective or diffuse right.

Nonetheless, and even thought the very impressing advances regarding judicial review of administrative actions experienced in the past decades, due to the political control of the Judiciary developed during the past seven years, the role of the Administrative Jurisdiction in controlling Public Administration has dramatically diminished in Venezuela, affecting the rule of law.

VII. JUDICIAL REVIEW OF LEGISLATIVE OMISSIONS

The fifth judicial review mean was established in the 1999 Constitution is regarding legislative omissions, empowering the Constitutional Chamber to review the omissions of the legislative organ; which is another new institution in matters of judicial review estab-

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44 See decision of the Supreme Court of Justice in Political-Administrative Chamber of 04-13-00, case: Banco Fivenez vs. Junta de Emergencia Financiera, Revista de Derecho Público, N° 82, Editorial Jurídica Venezolana, Caracas, 2000, pp.582-583.


46 idem


48 This institution has its origins in the Portuguese system, see Allan R. Brewer-Carías, Judicial Review in Comparative Law, Cambridge University PPress, Cambridge 1989, p. 269.
lished by the 1999 Constitution. In its article 336, the Constitution grants the Constitutional Chamber faculty:

“To declare the unconstitutionality of the municipal, state or national legislative organ omissions, when they stopped from issuing the indispensable rules or measures to guarantee the enforcement of the Constitution, or when they issued them in an incomplete way; and to establish the term, and if necessary, the guidelines for their correction.”

This provision has given extended judicial power to the Constitutional Chamber, which surpasses the trends of the initial Portuguese antecedent on the matter, where the standing for requiring this decisions was only given to the President of the Republic, the Ombudsman or the Presidents to the Autonomous Regions\(^49\). On the contrary, the Venezuelan Constitution of 1999 does not establish any condition whatsoever for the standing, whereby regarding normative omissions\(^50\), the standing to raise has been considered as similar to the one applied to the *popular actions*.

In many cases the Chamber has been asked to decide regarding omissions of the National Assembly in sanctioning statutes, like the Organic Law on Municipalities which, according to the Transitory dispositions of the 1999 Constitution was due to be sanctioned within two years following its approval. Even though the Chamber issued two decisions in the case, the National Assembly only sanctioned the statute in 2005\(^51\). In these cases, fortunately, the Chamber has not legislate it-


\(^{50}\) It has been called by the Constitutional Chamber: “legislative silence and the legislative abnormal functioning”, decision N° 1819 of August 8, 2000 of the Political-Administrative Chamber, case: *Rene Molina vs. Comisión Legislativa Nacional*.

self in substitution of the Legislative body, as conversely it has done, violating the Constitution and abusing from its powers, regarding the election of the members of the Electoral branch of government, the National Electoral Council. In such case, due to the omission of the National Assembly in electing those members with the needed 2/3 majority vote, the Constitutional Chamber which has been completely controlled by the Executive, directly appointed them, substituting the Legislator will in violation of the Constitution, allowing through that decision the complete control of the Electoral body by the Executive52

VIII. JUDICIAL REVIEW OF THE CONSTITUTIONAL CONTROVERSIES BETWEEN THE STATE ORGANS

The sixth judicial review method refers to the power attributed to the Constitutional Chamber of the Supreme Tribunal of, to “Decide upon constitutional controversies aroused between any organ of the branches of government (public power)” (Article 336).

This judicial review power refers to controversies between any of the organs that the Constitution foresees whether in the horizontal or vertical distribution of the Public Power, and, in particular, “constitutional” controversies, that is, those whose decision depends on the exam, interpretation and application of the Constitution, such as those referring to the distribution of powers between the different State or-

gans, specially those distributing the power between the national, states and municipal levels.

The “administrative” controversies that can arouse between the Republic, the states, municipalities or other public entity, are to be decided by the Political-Administrative Chamber of the Supreme Tribunal (art. 266, paragraph 4°), as an Administrative Jurisdiction.

As the Supreme Court of Justice specified, in order to identify the constitutional controversy, it is required

“That the subjects parties of the controversy be those who have been expressly assigned faculties for that actions or provisions in the constitutional text itself, that is, the supreme state institutions, whose organic regulation is set forth in the constitutional text, different from others, whose concrete institutional frame is differed to the ordinary legislator;”

On the contrary, “we are not in presence of the constitutional controversy when the parties to same are not organs of the branches of government (Public Power), with attributions established in the constitutional text.”

In any case, the standing to raise a remedy in order to settle a constitutional controversy only corresponds to one of the branches of government (public power) organs party to the controversy.”

IX. RECOURSE FOR CONSTITUTIONAL INTERPRETATION

Regarding the powers of the Constitutional Chamber as Constitutional Jurisdiction, the seventh judicial review means refers to its power to decide abstract recourses of interpretation of the Constitu-

53 Decision of the Political-Administrative Chamber Nº1819 of August 8, 2000 of the Political-Administrative Chamber, case: Rene Molina vs. Comisión Legislativa Nacional

54 See dissenting vote of Justice Héctor Peña Torrelles, Case: José Amando Mejía y otros.
tion; a judicial means that the Constitutional Chamber has created itself from the interpretation of article 335 of the Constitution, which grants the Supreme Tribunal the character of “maximum and final interpreter of the Constitution.”

In effect, the 1999 Constitution, only grants the Supreme Tribunal of Justice, power to “decide the recourses for interpretation on the content and scope of the legal texts” (art. 266,6); faculty that is to be exercised “by the different Chambers [of the Tribunal] pursuant to the provisions of this Constitution and the law” (article 266,C). No reference is made in the Constitution to recourse for the interpretation of the Constitution itself.

Nonetheless, before the Supreme Tribunal of Justice Organic Law was sanctioned (2005), and without any constitutional or legal support, the Constitutional Chamber of the Supreme Tribunal created an autonomous “recourse for interpretation of the Constitution”55, funding its ruling on article 26 of the Constitution, which establishes the right to access to justice, from which it was deduced that although said action was not set forth in any statute, it was not forbidden either, therefore ruling that “citizens do not require statutes establishing the recourse for constitutional interpretation, in particular, to raise it.”56

In order to raise this recourse for constitutional interpretation, the Constitutional Chamber has nonetheless considered that a particular interest shall exist in the plaintiff, ruling that:

“as public or private person, shall have a current, legitimate legal interest, grounded in a concrete and specific legal situation in


56 This criterion was ratified later in decisions dated September 11, 2000 (N° 1347), November 21, 2000 (N° 1387), and April 5, 2001 (N° 457), among others.
which he is in, which necessarily requires the interpretation of constitutional rules applicable to the case, in order to cease the uncertainty impeding the development and effects of said legal situation.”

In decision N° 1077 dated August 22, 2001, the Constitutional Chamber ruled that:

“The purpose of such recourse for constitutional interpretation would be a declaration of certainty on the scope and content of a constitutional provision, and would form an aspect of citizen participation, which may be made as a step prior to the action of unconstitutionality, since the constitutional interpretation could clear doubts and ambiguities about the supposed collision. It is about a preventive guardianship [of the Constitution].”

The Chamber added that the petition for interpretation might be inadmissible, “if it does not specify which is the obscurity, ambiguity or contradiction between the provisions of the constitutional text, or in one of them in particular, or on the nature and scope of the applicable principles, or on the contradictory or ambiguous situations aroused between the Constitution and the rules of its transitory regime” 58. The interpretation of the Constitution made in these cases by the Constitutional Chamber has binding effects59.

This extraordinary interpretative mean, although theoretically an excellent judicial mean for the interpretation of the Constitution, unfortunately has been extensively used by the Constitutional Chamber but to distort important constitutional provisions or to interpret them in a way contrary to the Text or to justify constitutional solutions according

57 Idem
59 Decision N° 1347 of the Constitutional Chamber dated November 9, 2000.
to the will of the Executive. It was the case, for instance, of the various Constitutional Chamber decisions regarding the consultative and repeal referendums between 2002 and 2004, confiscating and distorting the peoples’ constitutional right to political participation\textsuperscript{60}.

\section*{X. THE CONSTITUTIONAL CHAMBER POWERS TO TAKE AWAY JURISDICTION FROM LOWER COURTS REGARDING PARTICULAR CASES}

Finally, mention must be made to the figure of the “avocamiento”, that is, the possibility for the Constitutional Chamber to take away cases from the jurisdiction of lower courts, at any stage of the procedure, in order to be decided by the Chamber.

This extraordinary judicial mean was initially established in the 1976 Organic Law of the Supreme Court of Justice, as a competence attributed to the Politico-Administrative Chamber of the Supreme Court, which the said Chamber used in a self-restricted way\textsuperscript{61}. That exclusivity regarding such competence was rejected by the Constitutional


\textsuperscript{61} See Roxana Orihuela, El avocamiento de la Corte Suprema de Justicia, Editorial Jurídica Venezolana, Caracas1998.
Chamber, assuming itself the *avocamiento* power in matters of amparo cases\textsuperscript{62}, and eventually annulling the Organic Law provision \textsuperscript{63}.

In 2004, the new Organic Law of the Supreme Tribunal, following such doctrine established by the same Tribunal, granted as a general competence to all the Chambers of the Tribunal, the power to take away cases from the jurisdiction of lower courts, ex officio or through a party petition, when considered convenient, and to decide them (Articles 5,1,48; and 18,11).

This power, which has been highly criticized because breaks the due process of law rights, and particularly, the right to be trial in a by-instance basis by the courts, has allowed the Constitutional Chamber to intervene in any kind of processes, including cases being trialed by the other Chambers of the Supreme Tribunal, with very negative effects\textsuperscript{64}. For instance, the Constitutional Chamber power was used in order to annul a decision issued by the Electoral Chamber of the Supreme Tribunal\textsuperscript{65} based in the protection of the citizens right to political participation, in which the latter suspended the effects of a decision of the National Electoral Council (Resolution N\textsuperscript{o} 040302-131 of March 2, 2004), objecting the presidential repeal referendum petition of 2004.

\begin{itemize}
\item \textsuperscript{62} See decisión No. 456 of March 15, 2002 (Case: Arelys J. Rodríguez vs. Registrador Subalterno de Registro Público, Municipio Pedro Zaraza, Estado Carabobo), in Revista de Derecho Público, N\textsuperscript{o} 89-92, Editorial Jurídica Venezolana, Caracas 2002.
\item \textsuperscript{63} See decisión N\textsuperscript{o} 806 of April 24, 2002 (Case: Sindicato Profesional de Trabajadores al Servicio de la Industria Cementera), in Revista de Derecho Público, N\textsuperscript{o} 89-92, Editorial Jurídica Venezolana, Caracas 2002, pp. 179 y ss.
\item \textsuperscript{64} See Allan R. Brewer-Carías, «*Quis Custodiet ipsos Custodes*: De la interpretación constitucional a la inconstitucionalidad de la interpretación», in VIII Congreso Nacional de derecho Constitucional, Perú, Fondo Editorial 2005, Colegio de Abogados de Arequipa, Arequipa, September 2005, pp. 463-489.
\item \textsuperscript{65} See Decisions N\textsuperscript{o} 24 of March 15, 2004 (Exp. AA70-E 2004-000021; Exp. x-04-00006); and N\textsuperscript{o} 27 of March 29, (Caso: Julio Borges, César Pérez Vivas, Henry Ramos Allup, Jorge Sucre Castillo, Ramón José Medina Y Gerardo Blyde vs. Consejo Nacional Electoral) (Exp. AA70-E-2004-000021- AA70-V-2004-000006
\end{itemize}
The Constitutional Chamber, in this way, by means of a decision No. 566 of April 12, 2004, interrupted the process which was normally developing before the Electoral Chamber of the Supreme Tribunal, took away the case from such Chamber, and annulling its decision, decided in contrary sense, according to what was the will of the Executive, restricting the peoples right to participate through petitioning referendums.66.

**CONCLUSION**

As abovementioned, judicial review can be considered as the ultimate result of the consolidation of the rule of law, having played a very important role in contemporary world, contributing to the consolidation of democracy, to ensure the control of the exercise of State powers and to guarantee the respect of human rights.

When exercise within those purposes, judicial review powers are the most important instruments for a Supreme Court or a Constitutional Tribunal to guarantee the supremacy of the Constitution.

But when used only with circumstantial political purposes against the democratic principles, in contrary sense, the judicial review powers attributed to a Supreme Court or to a Constitutional Tribunal can constitute the most powerful instrument for the consolidation of an authoritarian government.

Consequently, the only fact of the provision of various methods of judicial review and the corresponding actions and recourses estab-

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lished in a Constitution, is not a guarantee of constitutionalism and of the enjoyment of human rights, or of the possibility to control of State powers, particularly, of the division and separation of powers, which nowadays still remains as the most important principle of democracy.

The most elemental condition for this control, is always and inevitable, the existence of real independent and autonomous judiciary and in particular, of the adequate institutions for controlling the constitutionality of State acts (Constitutionals Court or Supreme Tribunals), capable of controlling the exercise of political power and of annulling unconstitutional State acts.

Unfortunately, and as I mentioned at the beginning, in Venezuela, notwithstanding the marvelous formal system of judicial review enshrined in the Constitution described, which I have intended to describe, combining all the imaginable instruments and methods for that purpose; due to the factual concentration of all State power in the National Assembly and in the Executive branch of government, and due to the very tight political control that is exercised upon the Supreme Tribunal of Justice, the rule of law has been progressively demolished, with the complicity of the Constitutional Chamber. Consequently, the authoritarian elements that were enshrined in the 1999 Constitution, have been progressively developed and consolidated, precisely through the decisions of the Constitutional Chamber, weakening the democratic principle.

Unfortunately, that is why in Venezuela the politically controlled Constitutional Chamber of the Supreme Tribunal of Justice, instead of being the guarantor of constitutionalism, of democracy and of the rule of law, has been the instrument used to cover with some sort of veil with “constitutional” or “legal” camouflage prints, the authoritarian regime we now have installed in the country.

Pittsburgh, November 2006