SOME PROBLEMS OF THE CENTRALIZED FEDERATION AND SUB NATIONAL CONSTITUTIONALISM IN VENEZUELA[▸]

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The Venezuelan Federation today, unfortunately and in spite of its long tradition, is not a good example of a real decentralized federal system of government, nor of Sub national effective policies developed by autonomous States within a sustantive Sub national Constitutions framework. The Federation, during the last Century, has been progressively centralized, weakening democracy itself and minimising the role of the States in developing public policies. This process of centralization has been completed with the 1999 Constitution.

But it has not always been likewise. During the nineteen century the country had a highly decentralized system of government, experiencing in its political evolution the pendulum movement forced by centripetal and centrifugal political forces which has consequently produced more decentralized more centralized governments.

I. Some aspects of the history and development of the Venezuelan Federation

The first of the Constitutions of an independent Latin American State was the *Federal Constitution for the States of Venezuela* sanctined by a General Congress on the 21th December, 1811; by which the country adopted a federal form of government following the influence of the US Constitution. Federation was the only constitutional instrument the framers of the new State had in order to put together the seven Colonial Provinces that formed the State, which had never been together in Colonial times. Thus, it can be said that Venezuela was the second country in constitutional history to adopt federalism, being an important aspect of Venezuelan constitutionalism.

[▸] Presented to the Conference on FEDERALISM AND SUB-NATIONAL CONSTITUTIONS, DESIGN AND REFORM, Center for State Constitutional Studies, Rutgers University-Camden, Rockefeller Foundation Study and Conference Center, Bellagio, Italy, March 23-26, 2004.

After endless civil conflict, which marked the history of the country during the nineteen century, due to the permanent struggles between the regional *Caudillos* and the weak central power that was been formed, by the end of the Century the federal form of government began to be limited. This was the consequence of the centralizing tendencies derived from the consolidation of the National State, reinforced, particularly during the first half of the twentieth century, by the autocratic regimes the country had, manifested in aspects such as military, administrative, tax and legislative organizations and activities. These centralizing tendencies almost provoked the disappearance of the territorial distribution of power and of the effective territorial autonomy of the 23 States and a Federal District, which conformed the federal organization of the State.

The democratization process of the country really began in the second half of twentieth century, particularly after the adoption of the 1961 Constitution, in which the Federal form of the State was kept, but with highly centralized national authorities.

Due precisely to the democratization process of the country and according to express constitutional provisions, a political decentralization process begun in 1989, with the transfer of powers and services from the national level of government to the States. Even a Minister for Decentralization was appointed in 1993-1994 as member of the Cabinet, to reenforce the decentralization process. Also in 1989, for the first time since the nineteen century, States Governors were elected by universal, direct and secret sufrage, and regional political life began to play an important role in the country.

A crisis in the party system gave rise to the 1999 Constitution making-process with a radical change in the political players nationwide, that originated the reversal of the decentralizing effort that were been made. This Constituent Assembly which was elected in 1999 became the main institutional tool the newly elected (1998) President, Hugo Chávez Frías – a former Lieutenant-Colonel who led an attempted coup d'état in 1992 – used to conduct the take-over of all the branches of government of the State and to reinforce the centralization of the Federation. The Assembly was elected in July 1999, made up of 131 members, 125 of whom were blind supporters of the President. Only four dissident voices were heard during the six months it functioned, indeed, a very precarious "opposition".

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Unfortunately, the 1999 constitution-making process was not conceived as an instrument of conciliation aimed at reconstructing the democratic system and assuring its effective governance. That would have required the political commitment of all the components of society and the participation of all sectors of society in the design of a

new functioning democracy, and this did not occur. The constitutional process of 1999, in fact, served, as mentioned, to facilitate the total takeover of the branches of State power by the new political group that crushed not only all the others, but also the autonomy of the States of the Federation. As a result, almost all of the opportunities for inclusion and public participation were squandered, and the constitution-making-process became an endless *coup d'état*, when the Constituent National Assembly elected in July of 1999, began violating the existing 1961 Constitution by assuming all branches of State, powers it lacked under that text, and intervening in the federated States. This was followed by the violation of the new 1999 Constitution after its approval by referendum, when the same Constituent Assembly enacted a "transitional constitutional regime" which was not submitted to nor approved by popular vote. That situation has continued, affecting the separations of powers, and has allowed the subsequent National Assembly to legislate outside the constitutional framework with the consent of the Constitutional Chamber of the Supreme Tribunal of Justice.

The new Constitution of 1999 had not the necessary provisions in order to undertake the democratic changes that were most needed, namely the effective political decentralization of the Federation and the reinforcement of States and municipal political powers. The Constitution of 1999 actually continued with the same centralizing foundation embodied in the previous Constitution and in some cases, centralizing even more certain aspects. If it is true that it defined the decentralization process as a "national policy devoted to strengthened democracy" (Article 158), in contrast, the public policy developed during the last four years can be characterized as a progressive centralization of government, without any real development of local government. Consequently, in Venezuela, federalism has been postponed and democracy has been weakened.

II. Constitutional provisions relating to federalism in the 1999 Constitution

A Federation, above all, is a form of State in which public power is territorially distributed among various levels of government with autonomous political institutions. That is why, in principle, federation and political decentralization are intimately related concepts, being decentralization the most effective instrument not only to guaranteeing civil and social rights, but to allowed effective participation of citizens in the political process. In this context, the relation between local government and the population is essential.

That is why it can be said that the strong centralizing tendencies in Venezuela in recent years are contrary to democratic governance and political participation.

According to Article 4 of the 1999 Constitution, the Republic of Venezuela is formally defined "as a decentralized Federal State under the terms set out in the Constitution" governed by the principles of territorial integrity, solidarity, concurrence and co-responsibility. Nonetheless, "the terms set out in the Constitution," are without a doubt centralizing, and Venezuela continued to be a "Centralized Federation," which is, without doubts, a contradiction.

Article 136 of the Constitution states that "public power is distributed among the municipal, state and national entities", establishing a Federation with three levels of political governments and autonomy: *a national power* exercised by the Republic (federal level); the States power, exercised by the 23 States and a Capital District; and the *municipal power,* exercised by the 338 existing Municipalities. On each of the three levels, the Constitution states that government must always be "democratic, participatory, elected, decentralized, alternative, responsible, plural and with revocable mandates" (Article 6). The Capital District substituted the former Federal District (established since 1863), with the elimination of all kind of federal intervention regarding the authorities of the Capital District.

The organization of the political institutions on each territorial level is guided by the principle of the organic separation of powers, but with different scope. On the *national level*, with a presidential system of government, the national public power is separated among the "Legislative, Executive, Judicial, Citizen and Electoral" branches of government (Article 136). The 1999 Constitution thus, surpasses the classic tripartite division of power by adding the Citizen Power (Public Prosecutor, General Comptrollership and the Rights Public Defender), as well as an Electoral Power (National Electoral Council). The Judicial and Electoral branches are reserved only to the national (federal) level of government.

It must be noted that the Constitution of 1999, regarding the legislative branch of government, established a one-chamber National Assembly, thus eliminating the country's traditional bicameralism and specifically, eliminating the Senate. Thus, Venezuela has become a rare federal state without a federal chamber or Senate in which the States through its representatives can be equal (equal vote). In the National Assembly, on the contrary, there are no representatives of the States, and its members are globally representatives of the citizens and of the States, not subject theoretically to mandates, nor instructions,

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but only to the "dictates of their conscience" (Article 201). This effectively eliminates all vestiges of territorial representation.

The national 1999 Constitution established that each State has a Governor who must be elected by universal, direct and secret vote (Article 160), and a State Legislative Council, which is comprised of representatives elected according to the principle of proportional representation (Article 162). It is the responsibility of the States Legislative Councils to enact the Constitution of each State in order "to organize its public powers" along the guidelines of the national Constitution, which guarantees the autonomy of the States (Article 159). That is to say, in principle, the Executive and Legislative branches of government of the States must be regulated in the States Constitutions, as well as the Comptrollership Office.

But in spite of the national Constitution provisions regarding the States Constitutions, in all of the States Constitutions (Sub national) additionaly to the organic part, a dogmatic part has been incorporated, regulating civil and human rights. All the Sub national Constitutions are reformed or amended by the States Legislative Councils by a majoritarian vote, different to the vote needed to reform ordinary legislation.

III. Limits to the contents of the Sub national Constitutions

As mentioned, in principle, each State has constitutional powers to enact their own Sub national Constitutions, in order to organize their public powers, that is to say, its executive and legislative powers, and additionally, its organ for audit control.

Regarding civil and human rights regulations, as mentioned, all States Constitutions have specific norms relating to them, but in general terms they repeat what is regulated in the national Constitution. The latter has an extensive enumeration of protected human rights (civil, political, social, educational, cultural, economic, environmental and indigenous peoples') also protecting non-enumerated rights inherent to human beans, leaving very small room for additional regulations or innovations by the State Constitutions. The national Constitution has also constitutionalized the rights enumerated in international treaties on human rights, whose norms not only have constitutional rank but supra constitutional rank in the sense that they prevail when establishing more favourable regulations.

Regarding the regulations on the organization and functioning of the States branches of government, the scope of States powers has also been seriously limited in the 1999 national Constitution, which

for the first time in federal history, refers to national legislation for the establishment of the general regulations on this matters.

First of all, it must be pointed out that in Venezuela, since 1945 the Judicial branch is reserved to the national level of government, basically due to the national character of all mayor legislation and Codes (Civil, Commercial, Criminal, Labour and Procedural Codes). Consequently, being all the Courts national (federal), there is no room for States Constitutions regulations on the matter.

Regarding judicial review, the Constitutional Chamber of the Supreme Tribunal of Justice, is the constitutional organ with power to review and annul with *erga omnes* effects (Art. 336) all laws (national, States and municipal) including States Constitutions, when contrary to the national Constitution. This concentrated method (European model) of judicial review is combined with the diffuse method (American model) of judicial review, which allows all courts to declare the unconstitutionality of laws (national, States and municipal) in particular cases and controversies, with *inter partes* effects. In this cases, thou, an extraordinary recourse for revision can be brought before the Constitutional Chamber witch can establish in the matter "imperative and obligatory interpretations" of the Constitution (*stare decisis* principle).

In relation to the States legislative branch of government, the 1999 national Constitution, for the first time in federal history, states that the organization and functioning of the States Legislative Councils must be regulated by a *national* law (Article 162); a manifestation of centralism heretofore unforeseen.

Accordingly, in 2001 the National Assembly sanctioned an *Organic Law for the States Legislative Councils* which established detailed regulations regarding not only the organization and functioning of the Councils (as the national Constitution allowed), but also regarding its members and their competencies and as well as the general rules for the exercise of their legislative functions (law enacting procedure). With this national regulation, the effective contents of the States Constitutions regarding their legislative branch have been voided being limited to repeat what is established in the said national organic law.

Additionally, the possibility of organizing the Executive branch of States' government has also being limited by the 1999 national Constitution, which has established all the basic rules concerning the Governors as head of the executive branch. The national Constitution additionally has extensively regulated the general rules referring to national, States and municipal Public Administration, public employees (civil service), administrative procedures and public

contracts. All this rules have been developed in the 2001 national *Organic Laws on Public Administration and on Civil Service*. Therefore, in this respect as well, the States Constitutions had also been voided of real content, their norms tending to repeat what is established in the national organic laws.

Finally, regarding other States organs, the National Assembly also sanctioned in 2001, a *Law on the appointment of the States' Controller*, thus limiting, in this case without constitutional authorization, the powers of the States Legislative Councils to regulate such matters. It must also been pointed out that the national intervention regarding States Constitutions regulations regarding their own States organs, has been completed by the Constitutional Chamber of the Supreme Tribunal of Justice which during the past years (2001-2002) has annulled norms of three States Constitutions which had created the Office of the Citizens Rights' Defendant on the grounds that it is a matter reserved to the national (federal) level of government.

As mentioned, the national Constitution establishes a three level of territorial autonomy (home rule) and distribution of State powers, directly regulating local (municipal) government in an extensive manner. In this matter, States Constitutions and legislations can only regulate municipal or local government accordingly to what is established not only in the national Constitution, but in the national *Law on Municipal Government,* which leaves very little room even for regulating the necessary particularities derived from the territory and economic and social development of the local entities.

Thus without any possibility for the States Legislatures to regulate anything related to civil, economic, social, cultural, environmental or political rights; and with the limited powers to regulate their own public branches of government (executive and legislative) as well as other States organs (General Comptroller and Citizens Defenders) branch) as mentioned, very little scope has been left for the contents of Sub national Constitutions, which in general terms, repeats what it is regulated in the national Constitution and in the above mentioned national Organic laws.

IV. The constitutional system of distribution of powers within the national, State and municipal levels of government

The national Constitution enumerates the competencies attributed in an exclusive way to the national (Article 156), States (Article 154) and municipal (Article 178) level of government. In this

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regulations, however, the exclusive matters are almost all reserved to the national level of government, and an important part are attributed to the Municipalities, but a very few are attributed to the States.

According to Article 156, the National Power has exclusive competencies, for example, in the following matters: international relations, security and defence, nationality and alien status, national police, economic regulations, mining and oil industries, national policies and regulations on education, health, the environment, land use, transportation, industrial and agricultural production, and post and telecommunications. The administration of justice, as mentioned, also falls within the exclusive jurisdiction of the national government (Article 156.31).

Regarding local governments, Article 178 assigned to the Municipalities competencies in, for example, urban land use, housing, urban roads and transport, advertising regulations, urban environment, urban utilities, electricity, water supply, garbage collection and disposal, basic health and education services, and municipal police. Some of the powers regarding these matters are of an exclusive nature but most of them are concurrent. As mentioned, the autonomy of Municipalities is set forth in the Constitution, but without any constitutional guarantees because it can be limited by national law (Article 168)

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But regarding States competencies, the national Constitution fails to enumerate substantive exclusive matters within their attributions and rather concentrates on formal and procedural ones. Furthermore, the competencies related to a limited number of matters are established in a concurrent way, for example, regarding municipal organization, non-metallic mineral exploitation, police, state roads, administration of national roads, and commercial airports and ports (Article 164). Nonetheless, as mentioned above, the possibility for the States legislatures to regulate its own local government is also very limited, being subjected to what is established in the national Organic Municipal Law.

States Legislative Councils can enact legislation on matters that are in the States' scope of powers (Article 162), but being concurrent matters, according to the national Constitution their exercise depend on previous national decisions and regulations, which means that the legislative powers of the States are very limited. In this respect, the 1999 Constitution did little to ease the centralizing tendencies in the country and, indeed, contributed to intensifying that centralization.

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As mentioned, the national Constitution has limited the possibility for the States to regulate concurrent matters, which traditionally have provided a broad field for possible action by States

bodies, by subjecting their exercise to what the National Assembly must previously establish by means of national "general laws". The States Legislative Councils can only developed those laws after their enactment (Article 165). In any case, this legislation referring to concurrent competencies must always adhere to the principles of interdependence, coordination, cooperation, co-responsibility and subsidiary, as expressly stated in the national Constitution (Article 165).

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On the other hand, regarding residual competencies favouring the States, the principle has been a constitutional tradition in Venezuela. In the 1999 Constitution, however, this residual powers of the States has also been limited by expressly attributing to the national level of government a parallel and prevalent residual taxation power in matters not expressly attributed to the States or municipalities (Article 156.12).

The 1999 Constitution, following the provisions of the 1961 Constitution, as above mentioned, establishes the possibility of decentralizing competencies by mean of its transfer from the national level to the States, process that was regulated in the 1989 *Law on Decentralization and Transfer of Competencies*. Even though important efforts for decentralization were made between 1990 and 1994 in order to revert the centralizing tendencies, unfortunately the process was later abandoned, and since 2003 the transfers of competencies that were made (health services, for instance) had begun to be reverted.

V. The financing rules of the Federation

Mention should be made to the constitutional rules regarding the financing of the federation. Virtually, in the 1999 Constitution, everything concerning the taxation system is more centralized than in the previous 1961 Constitution, and asmentioned, the powers of the States in tax matters has been basically eliminated.

Not only does the national Constitution listed the national government competencies with respect to basic taxes (income tax, inheritance and donation taxes, taxes on capital, production, value added, taxes on hydrocarbon resources and mines, taxes on the import and export of goods and services, and taxes on the consumption of liquor, alcohol, cigarettes and tobacco) (Article 156.12), and expressly attribute to the Municipalities taxation competencies with respect to local taxes (property and commercial and industrial activities taxes) (Article 179), but it also, as was earlier stated, gives the national government residual competencies in tax matters (Article 156.12). In

contrast, the national Constitution, does not grant the States competencies in matters of taxation, except with respect to official stationery and revenue stamps (Article 164.7). Thus, the States can only collect taxes when the National Assembly expressly transfers to them, by law, specific taxation powers (Article 167.5), which has not yet occurred.

Lacking therefore their own resources from taxation, States financing is accomplished basically by the transfer of national financial resources through three different channels. First, it is done by means of the so-called "Constitutional Contribution" by the national level of government," which is an annual amount established in the National Budget Law equivalent to a minimum of 15% and a maximum of 20% of total ordinary national income, estimated annually (Article 167.4), that must be distributen among the States, according to their population. Second, a national Law has established a system of special economic allotments for the benefit of those States in the territories of which mining and hydrocarbon projects are being developed; benefit that according to this Law have also been extended to include other States (Article 156.16). And third, financing for States and Municipalities comes from national funds, such as the *Intergovernmental Fund for Decentralization*, created in 1993 as a consequence of the national regulation of VAT, or the Interstate Compensation Fund, which is foreseen in the Constitution (Article 167.6).

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Following a long tradition, the States and Municipalities cannot borrow or have public debt; being required a special national law to approve State borrowing.

March, 2004.