October 6, 2017

Venezuela's National Constituent Assembly

Jose Luis Sardon
Good afternoon,

By letter of June 26, the Secretary General of the Organization of American States requested the Venice Commission to prepare an opinion on the legal issues raised by the President of Venezuela Nicolas Maduro’s calling elections for a Constituent Assembly.

Paloma Biglino, Veronika Bílková, Kaarlo Tuori, José Luis Vargas Valdez and myself acted as rapporteurs for this opinion. We were efficiently coordinated by the Secretariat of the Venice Commission, led by Simona Granata.

Between May and early June, President Maduro issued decrees calling such elections, fixing procedural rules for it, and exhorting the assembly to be elected to submit the draft of the new Constitution for approval in a referendum. They took place on 30 July.

In its decision 378/2017 of May 31, the Supreme Court of Venezuela ruled that “it is neither necessary nor constitutionally mandatory to call for a consultative referendum prior to calling for a National Constituent Assembly”.

However, according to Article 347 of the current Venezuelan Constitution, the original constituent power of the people of Venezuela may be exercised by calling a National Constituent Assembly.

Article 348 states that the initiative for such calling may emanate from the President of the Republic sitting with the Cabinet of Ministers; two thirds of the members of either the National Assembly or the municipal councils in open session; or, 15% of the voters.

So, the Supreme Court’s decision did not account for the wording of the constitutional provisions concerned: one establishes the power to initiate the procedure which can lead to such assembly; the other entrusts “the people” with the decision to convene it.

Certainly, when the current Venezuelan Constitution was drafted, both ex ante and ex post referendums were held. Even if repeating the same scenario was not a constitutional requirement, it would seem appropriate to do so.

Maduro’s decrees stress that the motivation behind the process is to give the people the possibility to express its view and to create a system that would overcome internal political tensions and would guarantee peace.

They justify the power of the President to establish the electoral rules with a circular argument: affirming that he is the authority which has called the Constituent Assembly. Additionally, they mention Article 236 of the Constitution.
However, this article does not give the President the authority to change the electoral system established by the law. Moreover, it obliges the President to comply with the law and the Constitution in force.

Decree 2878 established also that the 553 members of the Constituent Assembly were elected in three different ways: 364, by territory; 181, by sectors; and, 8, by the General Assemblies of Indigenous Peoples.

The Constitution of Venezuela does not include explicit provisions on the composition and election of a Constituent Assembly, but it requires that an equal weight is assigned to individual votes in all electoral processes.

In this light, we must comment the three main aspects of the rules used for this election.

First, almost two thirds of the members of the assembly were elected in districts that replicate the municipal division of Venezuela’s territory. In Venezuela, there are 335 municipalities, 23 of them are capitals of regions, and one is the national capital.

The decree apparently attempted to take into account the difference in population between these entities, but its effort was insufficient.

The municipalities were divided into three categories: Caracas elected seven members, the 23 regional capitals elected two members each, and the remaining 311 municipalities were single member electoral districts.

Because of this scheme, the political weight of each vote was very different depending on the place of the residence of the voters. The vote of a citizen in Maroa, for example, had, approximately, 136 times the political weight of one in Caracas.

Second, the remaining third of the assembly was elected through a corporatist system, which included representatives of seven sectors:

- Businessmen and businesswomen;
- Peasants, and fisherman and fisherwomen;
- People with disabilities;
- Students;
- Workers;
- Communes and Communal Councils; and,
- Pensioners;

These sectors reflect different criteria. Arguably, businessmen, workers, pensioners and students may be considered distinct categories, but people with disabilities, communes, communal councils, peasants and fishermen do not follow the same—or even an identifiable—logic. Therefore, the list appears arbitrary.
Furthermore, the decree assumes that Venezuela’s society is divided in occupational and interest groups whose members were registered before the State. This assumption required substantiation.

In 2012, the International Labour Organization said that, without taking into account the agricultural sector, 47.5% of the Venezuelan labour force works in the informal economy. Since in the last five years the economic crisis there has deepened, this number might currently be even higher.

This part of the Venezuelan labour force is not registered in any “official institutions, guilds, and legally recognized associations”. The same may be true for businessmen that operate in the informal sector.

This corporatist election excluded a significant proportion of Venezuelans. Additionally, citizens that do not belong to the sectors included voted only for the municipal representatives, whereas those who do belong to them voted for both the municipal and sectorial representatives.

Third, the constituent assembly is composed of a large number of members: 553. This contrasts with other recent constituent assemblies convened in Latin-America. In terms of size and population, the two most similar countries to Venezuela are Colombia and Peru.

Both of them rewrote their Constitutions in the 1990s, as Venezuela also did. However, the assemblies that carried out such task were composed of just seventy and eighty members, respectively.

Even in Venezuela, the 1999 Constituent Assembly was composed of just 131 members—a number quite similar to the 130 member assembly that approved Ecuador’s 2008 Constitution.

Conclusions

It appears that the power to decide on the convocation of a constituent assembly, upon the initiative of the President, belongs to the people of Venezuela, who should do so directly, through a referendum.

According to the Constitution of Venezuela, the power to determine the rules for the election of the Constituent Assembly only belongs to the National Assembly, and not to the President of Venezuela.

Moreover, the rules for the election of the Constituent Assembly departed from the democratic principle of equal voting power.
Rules based on sectorial representation also entailed a flagrant violation of the democratic principle of equal voting rights.

Finally, the number of members of the constituent assembly appears to be too large to hold meaningful debates.

All of this undermines the credibility of the constituent process.