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International Law and Structural Changes in Venezuela

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INTERNATIONAL LAW AND STRUCTURAL CHANGES IN VENEZUELA
BY JOSEPH DAVIDS

THE PROJECT TO AMEND THE CONSTITUTION OF 1999

In 2007 Venezuela’s President, Hugo Chavez, and the National Assembly, proposed a sweeping reform of that country’s constitutional order. The reforms included, among other things, the concentration of national authority in the Presidency, the removal of term limits on the Presidency, the creation and recognition of new forms of property and the creation of citizens’ councils. The package of amendments was put to a popular vote in a referendum held on December 2, 2007 and was voted down in a close vote of 51% against and 49% in favor. After the defeat President Chavez announced his continued support for the reforms and his intention to implement them through “a renewed offensive for the great constitutional reform”\(^1\). Mr. Chavez’s plans for reform have the potential to violate international human rights law. While these amendments might be a dead letter, the spirit of the reforms and the types of structural changes that they embody are still alive. Recently Mr. Chavez has taken actions to implement some of these reforms, or exercise power that these reforms would have vested in the Presidency, on other grounds.\(^2\)

RELEVANT INTERNATIONAL AGREEMENTS

Venezuela is a party to many major international human rights agreements; the ones most pertinent to our discussion are the following:

\(^1\) Chávez announces second offensive to reform the Constitution, El Universal, December 5, 2007

\(^2\) Simon Romero, Chávez Seizes Greater Economic Power, N.Y. Times, May 18, 2008,
Participation in Government

It is a fundamental human right to participate in government either directly or through elected representatives. This right is codified in both the American Covenant on Human Rights (the pact of San José) and the International Covenant on Civil and Political Rights (ICCPR). Both covenants clearly state that every citizen shall have the right to

“(a) take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.”

The Human Rights Committee (HRC) understands Art 25 of the ICCPR’s language about directly participating in the government to mean elections, holding elected office as well as participating in “popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community.” Where there are elected officials they must actually have the authority to implement their decisions and they must

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4 Human Rights Committee, CCPR/C/21/Rev.1/Add.7, General Comment No. 25. Para 6(b) “Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.”
be accountable for those decisions to the electorate. In the whole of the committee’s General Comment 25, explaining its understanding of Article 25, popular assemblies are only mentioned once, and all the other forms of direct participation in government are justified through language talking about elections and holding elected office. It appears that the use of popular assemblies as a mode of participation as envisioned by the HRC was limited.

The proposed amendments raise two concerns about the right of the people to participate in government. The first is the power to be vested in the President to create “federal districts” as well as “federal cities” with the further authority to administer these regions in the hands of the national government. The second is the creation of the “popular power” as a form of direct participation in the affairs of both local and national governance. The “popular power” is to be organized in, and expressed by, the “councils of popular power.” There will also be an “assembly of citizens” with binding authority over its territory. The highest political authority in the city will be the “assembly of citizens.”

**Federal Territories**

The constitutional reform would have granted the President, when sitting in the council of ministers, power to declare “communal cities”, federal districts, “functional districts” and several other types of federally administered territories. Under this article

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5 *id. para 7.*
6 Amendments to Articles [hereinafter Articles] 16, 151, and 236 refer to this power (the official copy of the proposed amendments used for this report was downloaded from http://www.asamblanacional.gov.ve).
7 Article 136
8 Article 70
9 Article 70, 184
10 Article 184
11 Article 16 para 5; to declare communal cities there must already be present in the area an organized community, the “comunas” and communal self-government as well as approval by the National Assembly.
it would be the President alone who had the power to chose and remove the authorities of these newly created administrative divisions.\textsuperscript{12}

The Functional Districts can be created out of one or more municipalities or parts of municipalities without prejudice to the states to which the municipalities are a part.\textsuperscript{13} This system seems to maintain a role for the local government at least in so far as the National government in implementing its development plan (ostensibly the reason for the creation of the functional district) must be in “permanent consultation” with the “inhabitants.”\textsuperscript{14} What it does not do is describe the relationship between the federally appointed “authorities” and the locally elected representatives and administration. The only guidance we are given is that “the political-territorial organization for the Republic will be governed by an organic law.”\textsuperscript{15} A reading of Article 156 paragraph 11, which would have given to the national government the competence to govern the functional districts, reinforces the impression that a minimal role is envisioned for the local representatives.\textsuperscript{16}

This kind of top down authority calls into question the extent to which the elected “representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power.”\textsuperscript{17} If the local representatives do not wield actual power the elections in which they are elected will not satisfy the right “to vote… at genuine periodic elections… guaranteeing the free

\begin{itemize}
\item[\textsuperscript{12}] Article 16 para 6
\item[\textsuperscript{13}] Article 16 para 9
\item[\textsuperscript{14}] Article 16 para 8
\item[\textsuperscript{15}] Article 16 para 13
\item[\textsuperscript{16}] Article 156 para 11; this is also true for the other types of federally created territorial entities listed in Article 16.
\item[\textsuperscript{17}] Human Rights Committee, CCPR/C/21/Rev.1/Add.7, General Comment No. 25. Para 7.
\end{itemize}
expression of the will of the electors.”18 To the extent that the federally appointed authorities would dominate the locally elected authorities there is a possible violation of the ICCPR and the Pact of San José.

**The Assembly of Citizens and the Popular Power**

One of the major themes of the constitutional reform was the restructuring of the political organization of the city (what the reform calls the basic level of organization of the state)19 by mandating the incorporation of the “councils of popular power”20 and the “assembly of citizens,” which will not only have binding authority on the territory under its control21 but will be the highest authority over the “political-territorial entities that make up the city.”22 The “assembly of citizens” will have the authority to grant and revoke the power of local authorities.23 The specific make up of the “assembly of citizens” is not governed by the constitution, but is to be regulated as soon as possible24 by law.25 What we do know is that the genesis of the “popular power” is not “born of suffrage or any kind of election, but is a condition of organized human groups as the base of the population.”26

The HRC recognizes that participation in the government may be through “popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community.”27 The sheer scope of the “assembly of citizens” calls in to question the ability of individual citizens to effectively participate in

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18 ICCPR Article 25(b); Pact of San José Article 23(b).
19 Article 16 para 3
20 Article 168 para 5
21 Article 70
22 Article 184 para 9
23 *id*.
24 Disposiciones Transitorias number 1 (part of the reform package)
25 Article 70 para 2
26 Article 136 para 2
government. In a city of several thousand inhabitants it is unlikely, if not impossible, for every voice to be heard. More concerning still is if this kind of authority is to be exercised at the national level. It is not likely that a “town hall” type of meeting would be possible at the national level, either because of transportation issues or simply the inability to manage a group that might number in thousands to resolve issues. More importantly, perhaps, is that the HRC’s comment seems to limit this kind of participation in government to the local level.28

Outside of the ability to participate because of logistical issues is the danger that the system might develop a top-down authority structure. It is the “assembly” that grants the authority to operate to the “councils of the popular power.”29 Even if every person could participate in a “council,” the “assembly” through its authority to grant and revoke the power of local authorities may effectively silence “councils” that are not “behaving.” This is a danger because the existence of the “councils” (and possible the elected municipal government) would be dependant on the will of the “assembly,” which “represents the political unity of the territory.”30 The reform of the constitution also does not envision a binding authority for the individual “citizen councils.”31 The constitutional reform does not deal with the membership of the “assemblies” and this is to be left to a national law.32 A system set up in this way would be prone to extreme forms of abuse, and the ability to create a system (with binding authority) based on patronage of those at

28 See footnote 4 supra
29 Article 184 para 9
30 id.
31 In Article 70 it is specifically said that the “assembly” will have binding authority before the individual “councils of popular power” are even mentioned as governmental entities.
32 Article 70 para 2
the top as the only means to gain membership at the bottom. This is in marked contrast to
the bottom up system envisioned in the ICCPR and the Pact of San José.

**Right to Property**

The Pact of San José explicitly protects the right to the enjoyment of personal
property, subject only to the limitation that such right may be subordinated in the
interests of society.\(^{33}\) This subordination is limited by a duty on the state depriving an
individual of his property to justly compensate that individual.\(^{34}\) The right is not triggered
by technical terms such as “expropriation” but uses the word “deprived.”

The proposed amendments raise several concerns when it comes to personal
property and the right to compensation set down in the Pact of San José. The first was
touched on above; the power of the national government to designate federal districts and
military zones over which it directly governs.\(^{35}\) Second is the creation of new forms of
“property” and the eventual transfer of different sectors of the national economy to the
possession of these new forms of property.\(^{36}\) The last concern that we will cover is the
ability of the national government to “reserve” to itself the exploitation of natural
resources that are considered strategic.\(^{37}\)

**Military Zones**

The proposed changes to Article 11 would have given the president the power to
declare “strategic regions of defense” (military zones) in order to guarantee “the
sovereignty, security and defense … of the Republic.”\(^{38}\) The proposed article gives no

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33 Pact of San José, Article 21(a)
34 Pact of San José, Article 21(b)
35 Article 11; Article 16
36 Article 115; Article 156 para 34
37 Article 113 para 2
38 Article 11 para 5
other check on the ability of the president to declare these “military zones.” The president seems to have a free hand; there is no requirement of approval by the national assembly, or even by and branch of the newly created “popular power.” The extent to which private property would be seized and used by the government is unclear, as is the procedure (if any) for removing an owner from the newly declared “military zone” or (the possible) restitution of the property after it is no longer needed for “strategic reasons of defense.” Even more uncertain is who would be governing the “military zone” as the proposed article only provides for the appointment of “special authorities” in special circumstances.  

Most importantly for our purposes, there is no provision requiring compensation for the deprivation of the ability to use property while it is in the ambit of the “military zone.” This is in contrast to other parts of the proposed amendments that include the duty to compensate.

_Social, Collective and Mixed Property_

The constitutional reform would also institute new forms of property that include, “public property” (that which belongs to entities of the State), social property (which comes in two forms, direct and indirect), “collective property” and mixed property. Private property is then restricted by a requirement that the property be “legitimately acquired,” a statement lacking in the Constitution of 1999. With the creation of these

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39 id.
40 Article 115 includes an expropriation clause, however, no mention is made in Article 11 to expropriation and no mention is made in Article 115 to Article 11. It is my position that legally these two provisions discuss different legal acts; the creation of “military zones” and “expropriation.”
41 Article 11
42 id.
43 Article 115 of the Constitution of 1999 (the current constitution) reads, “Se garantiza el derecho de propiedad. Toda persona tiene derecho al uso, goce, disfrute y disposición de sus bienes. La propiedad estará sometida a las contribuciones, restricciones y obligaciones que establezca la ley con fines de utilidad pública o de interés general. Sólo por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de
new forms of property the authority would be given to the national authorities to “administer and regulate the different aspects of the national economy, including the eventual transfer of these interests into social, collective and mixed types of property.”44

One of the concerns coming from this proposed reform is that the lines between the different types of property are very blurry. The proposed amendments establish “public property” or that which belongs to state entities. It also establishes “indirect social property” which is that property that is administered by the state “in the name of the people.”45 The practical distinction between these two types of property may well turn out to be a legal fiction. In both cases the property is in the possession of the State and being used by it for the benefit of the people. The difference is merely the legal title. This technicality may very well separate “expropriation” from “transfer.” If “personal property” is “expropriated” (or taken over by the government for “the public utility or social interest”) there is a right to “just indemnification” under the constitutional reform.46 In all the proposed amendments that deal with “indirect social property” there is no mention of compensation to be made to those from whom the property is “transferred.”47 It is possible that this may be used as a legal back door around the duty to compensate for “expropriation.”48

justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes.”

As becomes readily apparent there is no limit to the use of property but that which is legitimately within the interests of society, and if there is an interest in society for taking the property the owner must be “justly indemnified” for the loss. The passage of the Constitution of 1999 closely tracks the requirements of the Pact of San José in Article 21.

44 Article 156 para 34
45 Article 115
46 id.
47 see Articles 112 (government promotion of enterprises of social or mixed property), 113 (reserving of the right to exploit natural resources through enterprises of social or mixed property) and 115 (the creation of the different types of property.
48 It is my position that “transfers” and “expropriations” are functionally identical and should be treated the same way.
Then there is “direct social property” which is that under the control of local territorial authorities.49 This form of property looks to be a lot like “indirect social property” except that it works on a more local level. In any case it is the State that gives the property to the local authorities to administer. In this sense the property is referred to as “communal property” or “city property.”50 If there is any saving grace to this form of property it is that it is (likely) administered directly by local authorities.

The last new form of property that would have been created by the reform package is “collective property.” This kind of property is simply that which is owned collectively by social groups or groups of people together.51 Two things seem to separate this form of property from “direct social property” one is that there is no need for the “ownership” of the property to be in the hands of some kind of “official” group or authority. It is just that which is owned by a collection of individuals making up a social or other group. The second is the origin of this kind of property. Both “indirect social property” and “direct social property” are products of the transfer of some property either to the State to administer for the people or from the State to local authorities to administer for the people. “Collective property” originates (inexplicably) from social origins or private origins. However, if this kind of property did not exist before (and it did not) there is no way that it could just spring into being without depriving the “owner” of the property of some interest in the property (if not all) when it becomes “collective property” and is owned by a group.52 Unless the owner willingly gives up some of that interest to members of the group there has been a “taking,” and the owner should be

49 Article 115
50 id.
51 id.
52 Simply put, if I own something and that thing is within my sole control if I have to share that item with anyone else my property interest in the item has been diminished.
entitled to compensation. The constitutional reform would also create a “mixed” form of property, but the dangers of this kind of property are addressed by the preceding discussion, as “mixed” property is nothing more than a “mix” of the property rights discussed above.

Possibly the most disturbing change is the new limit put on “personal property.” As mentioned the right to personal property in the current Venezuelan constitution is limited only by the right of the State to expropriate property for the public good coupled with the right to compensation for that taking. The constitutional reform would weaken the right to “personal property” by setting as a condition of that property right that the property in question be “legitimately acquired.” While this kind of language may have a certain sense to it (who wants to protect a property interest in illegitimately acquired property) deprivation of property rights without compensation is illicit under the Pact of San José. The one expansion of note in “personal property” is that under the reform the protections of this type of property are explicitly extended to “juridical” persons, or corporations.

**Reservation of Exploitation of Natural Resources**

The power of the national government to “reserve” to itself the right to exploit natural resources that are considered “strategic” raises the same concern as the creation of new forms of property and the power to “transfer.” The difference between this threat to “property” rights and that posed by the creation of new types of property interests is primarily in what aspects of the economy and national life the provisions touch. The

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53 Pact of San José Article 54
54 Constitution of 1999, Article 115
55 Article 115
56 id.
57 Article 113 para 2
different forms of “property” outlined above may apply, so it would seem, to any property interest or right. In the case of the exploitation of natural resources we are focusing on specific areas of the national economy. The two most prevalently mentioned in the constitutional reform are petroleum and agriculture.  

**Petroleum**

When it comes to petroleum the reform outright “reserves” for reasons of “sovereignty” the exploitation of “hydrocarbons” and the processes employed in such activities. No further action is necessary on the part of the government. The authority is also given to the State to reserve other activities that are associated with “hydrocarbons.” The “National Executive” will carry out the reserved activities directly or through “enterprises belonging to the Executive or through mixed enterprises where the Executive has the majority of the interest and control.” Article 302 seems to set up an “expropriation” scheme without calling it such. More disturbing is the status of these new entities as property of the “National Executive.” Given all the new forms of property that would be created by the reform (State, direct social, indirect social, collective and mixed) the Article bypasses them all and creates a new type of property, that belonging not to the State, but property belonging only to the “National Executive.” This would appear to remove even the National Assembly from the decision making process, at least as regards the use of these new enterprises. The reform also leaves open the question of what happens when the “National Executive” takes control of the exploitation of “hydrocarbons.” Will those who are currently in the business of “exploiting

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58 Articles 156, 302 (petroleum), 305 (agriculture)  
59 Article 302 para 1  
60 Article 302 para 2  
61 Article 302 para 3
hydrocarbons” be compensated when they lose the right to do business? It is unclear, but it seems unlikely. As covered above, this is not “expropriation” but “reservation,” and therefore not covered by the “expropriation” clause of Article 115. There is also the chance that it will be argued that those who are currently in charge of the “exploitation of hydrocarbons” will be deemed not to be “legitimately” in possession, and therefore not even benefit from the limited protection of “private” property contained in the proposed reforms.62

Agriculture

The reform outlines a similar procedure for agriculture. The main difference is that unlike petroleum, agriculture is not automatically “reserved.” However, agriculture is considered “strategic to rural development.”63 By this declaration it might fall with in the power of the government to “reserve” to itself those parts of the economy considered “strategic by this constitution.”64 Even if this were not the case, the reform specifically declares that the government may “assume” different sectors of agriculture when “necessary” to protect the “security and sovereignty” of the national food supply.65 Several different ways of “assuming” the production of the food supply are given, but only one of them is “expropriation.”66 The other forms of “assuming” do not seem to carry with them the right to just compensation like expropriation.67

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62 Article 115 explicitly includes property owned by “juridical” individuals as “personal” property and so the expropriation guarantees also apply to property owned by corporations.
63 Article 305
64 Article 113
65 Article 305
66 Article 305 also provides for transfer, expropriation, “affectacion” and occupation as well as other methods that may be established by the “constitution or the law.”
67 Article 156 para 34
CONCLUSION

This constitutional reform while itself a dead letter may be a window into what is happening in Venezuela toady, and perhaps in the region generally.\textsuperscript{68} If nothing else the proposed amendments show how a popular democracy can willingly turn itself in to a closed system based on patronage. It is important to remember that while the reform package was defeated at the polls it was only narrowly defeated.\textsuperscript{69} The next time we may not be so lucky.

\textsuperscript{68} Nicaragua has instituted its own “council” system, while different, it is a similar idea; http://www.nytimes.com/2008/05/04/world/americas/04nicaragua.html?scp=1&sq=nicaragua%20councils &st=cse

\textsuperscript{69} see note 1 \textit{supra}. 

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