CONSTITUTIONAL JURISPRUDENCE
IN THE SUPREME COURT OF VENEZUELA

By

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ABSTRACT

The prime focus of this dissertation consists in exploring constitutional jurisprudence in the Supreme Court of Venezuela over the last five decades, making use of arguments drawn from Venezuelan history and the existing jurisprudential approaches to theories about the general character of law as integrated in numerous public law cases. This study offers a new approach, one that focuses on ensuring that fundamental constitutional principles are aligned with the concrete objectives (purposes) that the Constitution sets out to achieve. This account is developed through a theoretical framework comprising of: I. A historical overview from independence (1811) to democratization (1947 and beyond), emphasizing the fundamentals of the Constitutions of 1961 and 1999, to portray a vivid and accurate picture of the origins of Venezuela’s constitutional democracy; II. A survey, of constitutional cases that illustrates the evolution of the Venezuelan constitutional jurisprudence under the overt or subliminal use of certain default legal theories, namely, legal positivism in the era of the 1961 Constitution, legal realism and Ronald Dworkin’s adjudication theory in the era of the 1999 Constitution III. An insightful discussion of the main arguments of Ronald Dworkin’s principled theory and Justice Aharon Barak’s purposive theory, in an effort to build theoretical support, which links the various points of their respective theories in order to articulate one in the context of the Venezuelan jurisprudence; IV An original attempt to build a theoretical approach based on the Venezuelan constitutional system, history, culture, and identity to bring together the priorities of formalism, particularly the written principles of the Constitution and the priorities of functionalism and social welfare. This is to ensure that the Supreme Court decides accordingly with the constitutional principles as much as their underlying purposes to provide solutions to legal conundrums.
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# TABLE OF CONTENTS

*Abstract* ............................................................................................................................... ii  
*Acknowledgments* .................................................................................................................. iii  
*Table of Contents* .................................................................................................................... iv  

## INTRODUCTION .................................................................................................................. 1  
Objectives ................................................................................................................................. 2  
Rationale for the Research ........................................................................................................... 3  
The Need for the Study ............................................................................................................... 4  
Research Methodology ............................................................................................................... 5  
Summary ..................................................................................................................................... 11  

## PART I THE EVOLUTION OF THE CONSTITUTION OF VENEZUELA ......................... 12  
Chapter 1: THE CONSTITUTIONAL HERITAGE OF VENEZUELA: THE SEARCH FOR FREEDOM ..................................................................................................................... 14  
Emancipation: the Decline of Spanish Empire (Prior to 1810) .............................................. 15  
The Constitution of Independence (1811-1819 and *La Gran Colombia* (1821-1830)) .... 17  
The Constitution of the Autonomous Country (1830-1858) ................................................ 27  
The Federal Constitution and the Tendency to Deviate to Autocracy (1864-1881) .......... 32  
The Constitution of Centralization (1901-1935) ................................................................... 36  
The Constitution of Liberation (1936-1946) .......................................................................... 41  
The Constitution of Democratization: Constructing Institutions (1947-60) ......................... 43  
Constitutional Democracy (Constitutions of 1961 and 1999) ............................................... 50  
Summary ..................................................................................................................................... 70  

Chapter 2: CONSTITUTION OF 1961 OF VENEZUELA: THE FUNDAMENTALS OF AN EXCEPTIONAL CONSTITUTIONAL DEMOCRACY ................................................................. 53  
Priorities of the Democratic State: Strict Structure and Continuity over Time .................... 55  
Government Framework: Separation of Three Branches of Power ...................................... 57  
The Development of the Judicial Power: The Supreme Court of Justice ............................ 58  
The Protection of Individual, Social and Economic Rights .................................................... 60  
The Transition to a New Constitution ....................................................................................... 64  
Summary ..................................................................................................................................... 69  

Priorities of the Democratic Social State of Law and Justice ................................................ 72  
The Protection of Social Rights ................................................................................................. 75  
The Power of Judicial Review: the Constitutional Chamber ............................................... 77  
Government Framework: Separation of Five Branches of Power ....................................... 79  
Summary ..................................................................................................................................... 82
PART II  THE CONSTITUTIONAL JURISPRUDENCE DEVELOPED BY THE SUPREME COURT OVER THE LAST FIVE DECADES ...........................................................................................83

Chapter 4: CONSTITUTIONAL JURISPRUDENCE IN THE ERA OF THE 1961 CONSTITUTION ..........................................................................................................................85

The Early Stage of Venezuelan Jurisprudence .......................................................................87

The Supreme Court's Legal Formalism in Constitutional Jurisprudence ..............................90

Original Intent: the Sovereignty Commands .......................................................................92

Lola y Laura Gutiérrez v. Enriquecimiento sin Causa, 1962 ...................................................93

Nestor Moreno v. Municipalidad Distrito Federal, 1964 .........................................................95

Ley de Reforma Agraria, 1963 ...............................................................................................95

Francisco Wytack, 1971 ......................................................................................................99

Juan Jiménez, 1978 .............................................................................................................100

C.A Sindicato Jobalco v. Blanca Fuenmayor, 1969 .............................................................101

Alberto Solano, 1969 ........................................................................................................103

Consejo de guerra permanente de Caracas, 1979 ...............................................................104

Textual Meaning: Analysis of Words ....................................................................................106

CompuLab Services International C.A, 1976 .......................................................................107

I.C. Oropeza, 1987 .............................................................................................................108

V. Rios, 1989 ........................................................................................................................110

Albornoz v. Roppolo, 1991 ................................................................................................112

Monagas, 1993 ....................................................................................................................114

Emphasis on Formal Requirements, or Technical Elements ...............................................115

José M. Sánchez v. José Ferrera, 1967 ................................................................................116

Rafael Alfonzo, 1976 ...........................................................................................................117

B. Fajardo, 1980 ................................................................................................................118

L. Medrano v. Auto Sill, 1983 ............................................................................................119

Del Acqua C.A., 1984 .........................................................................................................120

R. Jiménez, 1988 ...............................................................................................................121


Municipio Sotillo, 1995 .......................................................................................................124

Venmar & Motiel C.A v. Concreta Martín, C.A., 1996 .........................................................125

Reliance on Precedent: the Binding Jurisprudence Approach .............................................126

M. Morales, 1990 ...............................................................................................................127


Fedecámaras v. Ley del Seguro Social, 1994 ....................................................................129

B. González, 1995 .............................................................................................................130

Banco del Orinoco, S.A., 1995 ..........................................................................................131

M. Pérez, 1996 ..................................................................................................................131

Emphasis on the Structure: Hierarchy of Norms & Logic System of Rules .......................132

Pinto Salinas v. Hipódromo, 1963 ......................................................................................132

J. Jiménez, 1968 ...............................................................................................................132

Consulta del Consejo de Guerra, 1979 ...............................................................................132

Constitucionalidad Ley Reforma Parcial Ley Orgánica Poder Judicial, 1969 .................134

Dr. Ferrer v. Zulia Bar Association, 1969 ........................................................................135

City Council District Plaza v. C.A. Electricidad de Caracas, 1970 .....................................136

Cervecería Modelo CA, 1979 ............................................................................................136

L. Terán, 1983 ....................................................................................................................137
Chapter 5: CONSTITUTIONAL JURISPRUDENCE IN THE ERA OF THE 1999 CONSTITUTION

The New Era of Venezuela’s Jurisprudence .................................................................................................................................................................................153
The Supreme Court’s Functionalist Style ...................................................................................................................................................................................157
Emphasis on the Contextual Facts and Policy: the Social State of Law and Justice ......................................................................................................161
Asodevipilara, 2002 .................................................................................................................................................................................................163
Re: Referéndum Consultivo, 2003 .................................................................................................................................................................................................164
Reelección Presidencial, 2006 .................................................................................................................................................................................................169
Emphasis on Practical Solutions: Filling the Gaps .........................................................................................................................................................171
Servio Tulio León Briceño, 2000 .........................................................................................................................................................................................161
Corpoturismo, 2001 ......................................................................................................................................................................................................174
INSACA v. Ministerio de Sanidad y Asistencia Social, 2001 .................................................................................................................................................176
Emphasis on the Interdisciplinary Matter ........................................................................................................................................................................177
Dilia Parra Guillén, 2000 .................................................................................................................................................................................................178
Baker Hughes, 2001 .......................................................................................................................................................................................................179
Asociación Civil de Comerciantes del Centro Comercial San Ignacio, 2002 ........................................................................................................180
Testigo de Jehová v. Clínicas Caracas, 2009 ........................................................................................................................................................................181
Emphasis on the Judge’s Social, Economic, Political and/or Personal Inclinations ................................................................................................182
Leopoldo López, 2011 ...................................................................................................................................................................................................183
Martín Javier Jiménez & Rafael Celestino Belisario, 2011 .............................................................................................................................................184
Summary .............................................................................................................................................................................................................................185

Chapter 6: CONSTITUTIONAL JURISPRUDENCE IN THE ERA OF 1999: JUDGES’ MORAL READING

Ronald Dworkin’s Theory in the Venezuelan Jurisprudence: the Moral Reading ........................................................................................................186
The Judges Own Views of Dworkin’s Adjudication Theory ........................................................................................................................................190
William Dávila Barrios et al., 2000 ..................................................................................................................................................................................190
Hermánn Escarrá, 2001 ................................................................................................................................................................................................195
Eduardo Lapi García y Biaggio Pilieri, 2008 ............................................................................................................................................................................200
Ricardo Fernández Barruecos, 2011 .............................................................................................................................................................................207
Juramentacion Presidencial, 2013 ................................................................................................................................................................................212
Presidente Encargado, 2013 .........................................................................................................................................................................................217
Summary .............................................................................................................................................................................................................................218
Chapter 7 FREEDOM OF EXPRESSION IN THE SUPREME COURT’S CONSTITUTIONAL JURISPRUDENCE: THE NEED FOR A NEW APPROACH.........................................................219

  J. Delgado v. Colegio Nacional de Periodistas, 1980 ........................................223
  R. Márquez, 1998 ..........................................................................................224
  Perfumería La Diadema Capital C.A., 1995 .....................................................225
  CAMRADIO, 1982..........................................................................................226
  I.C. Oropeza, 1987 ........................................................................................227
  María Eugenia Díaz v. Military Tribunal, 1981 ..............................................228
  J. Guzmán, 1990 ............................................................................................230
  Radio Caracas Televisión RCTV v. Min. of Communications, 1990 .............232

  Elías Santana, 2001 .......................................................................................234
  Radio Caracas Televisión, RCTV, 2007 ..........................................................238
  Comité de Oyentes Interactivos de la Radio (OIR), 2007 .........................241

Freedom of Expression, the Court’s Moral Reading ..............................................243
  Rafael Chavero Gazdík, 2001 ........................................................................245

Summary ..................................................................................................................249

PART III: A NEW PERSPECTIVE ON CONSTITUTIONAL INTERPRETATION:
PRINCIPLES AND PURPOSES -- TWO SIDES, ONE VIEW........................................250

Chapter 8: PRINCIPLES AND PURPOSES: DWORKIN’S DEFENCE OF PRINCIPLES AND
CHIEF JUSTICE AHARON BARAK’S PURPOSIVE THEORY: TWO SIDES, ONE VIEW .....251

  Ronald Dworkin’s Defense of Principles:............................................................252
    Law-as-Integrity: A rational and Cohesive System of Principles...................253
    Principles Refer to Individual Rights: One Right Decision...........................256
    Courts Have a Weak Discretion ....................................................................257
    Constitutional Interpretation Is a Construction Interpretation Process ..............260
  Chief Justice Aharon Barak’s Purposive Interpretation ......................................262
    Purposes of the Constitution ........................................................................263
    Constitutional Interpretation Is a Holistic Process .........................................266
    Judicial Discretion: the Court Must Adopt an Objective Attitude ....................268

  Reconciling Dworkin’s Principles and Barak’s Purposes:.................................271
    The Interplay between Principles and Purposes .............................................276
    The Role of Discretion in Constitutional Interpretation ..................................276

Summary ..................................................................................................................278
INTRODUCTION

This study explores five decades of constitutional jurisprudence in the Venezuelan Supreme Court of Justice. Structured in the form of ten chapters, it offers a historical overview of Venezuelan constitutionalism, through a survey of landmark cases that demonstrate the evolution of the Venezuelan constitutional jurisprudence. To that end, this study examined case by case, the overt or subliminal use of certain default legal theories by the Supreme Court of Venezuela to justify constitutional decisions.¹ In a chronological order, the study shows how the Court goes from a formal application of the law, under a perspective that resembles legal positivism during the era of the 1961 Constitution (1961-1998), to a more functional style that reflects arguments associated with the theory of legal realism during the era of the 1999 Constitution (1999-2013). In the last few years, the Court has justified its decisions using arguments similar to those of Ronald Dworkin’s adjudication theory. However, there are substantial disagreements regarding the interpretation of fundamental rights, such as freedom of expression. It is evident the need for a new approach for constitutional interpretation in Venezuela. This study offers an insightful discussion regarding principles and purposes based on the theories of Ronald Dworkin and Justice Aharon Barak. In a more thorough examination of Venezuela’s constitutional heritage and the existing jurisprudential approaches, this study outlines a new approach to constitutional interpretation. The proposed approach reconciles the priorities of formalism, especially the constitutional principles, and the significance of functionalism and social welfare, to accomplish the objectives (purposes) of the Constitution. A considerable amount of literature has been published on constitutional interpretation and legal theory in industrialized countries around the world. However, no substantial study of the constitutional jurisprudence of Venezuela’s Supreme Court has previously been done. This unique study makes accessible, for the first time, an analysis of Venezuela’s constitutional jurisprudence over the last five decades. The introduction has been arranged in the following sections: a) objectives of the study; b) rationale for the research; c) research methodology and structure of the study; and d) summary of the chapter.

¹ The reader should bear in mind that because there were no translations available for English-Speakers, the author took it upon himself to translate all the case law presented in this study.
**Objectives of this Study**

This study aims to achieve three main objectives:

The first objective is to outline the historical framework, that is, the evolution of Venezuelan constitutionalism from independence to the democratic era. It provides an overview of the context and significance of the Constitution and offers a complete background of the fundamentals and grand principles of the 1961 and 1999 Constitutions.

The second objective is to demonstrate the evolution of the Venezuelan constitutional jurisprudence. To accomplish this, the study will examine arguments from prominent decisions of the Venezuelan Supreme Court of Justice to map out the progression of its interpretative approach over five decades. This study elucidates the justifications given by the Supreme Court in landmark cases and indicates that even if judges are not aware of theoretical underpinnings they still use some default theoretical assumptions.

The third objective is to determine what judges should ultimately value when confronted with the interpretation of fundamental constitutional rights, such as freedom of expression. According to this approach, the major theories selected (Dworkin’s defence of principles for constitutional adjudication, and Justice Barak’s purposive constitutional interpretation) offer great insights that help bridge operational gaps. Based exclusively on Venezuelan constitutional heritage and jurisprudence, this study aims to deduce a theoretical approach, which faithfully interprets the Constitution, using the example of freedom of expression. The proposed approach attempts to reconcile the priorities of formalism, such as the dependency and consistency that written constitutional principles can provide, and the significance of functionalism with adaptable and flexible mechanisms to achieve the underlying ends of the Constitution. This dissertation offers an innovative approach that focuses on identifying the concrete purposes of constitutional principles in order to apply them in current difficult circumstances.
**Rationale for the Research:**

The role of the Constitution is to provide a structure for good governance and good quality of life. This foundational document features inherent values and aspirations; it is the product of the history, culture, and traditions of the country as part of the social contract. A constitution is not made to mean one thing at a particular time and another when the circumstances change. On the contrary, a set of inviolable principles are entrenched in this document to endure the test of time. Nonetheless, society is in constant development, and changing circumstances can alter the course of the nation. It is the function of this document to preserve the bedrock rules while maintaining faith in progress. This is not always crystal clear in a text with broad provisions, both bright and unclear, calling for interpretation. Judges have the ultimate responsibility to address what can be seem as the irreconcilable objectives of the Constitution, not only to preserve the rule of law but also to apply the Constitution in a context of real social change. Perhaps, most importantly, judges have the potential power of constitutional interpretation to provide stability in the democratic process without the need of modification to the original text.2 This generates immense confidence in the respect of the law and the institutions of the country. While the Constitution can be amended, reformed, or even rewritten, it requires a tremendous effort by citizens to do so. Instead, constitutional judging enforces the text under the contemporary context without distinctions between social, economic, cultural, civil, or political rights since each of them are part of the Constitution as a whole. Although judges can expand the coverage of existing norms, at the same time, they must fit with the institutional constraints to protect the integrity of the constitutional system. Venezuelan constitutionalism entrenched in the same document social and economic rights with individual rights given each of them the same value-based conception to celebrate that Venezuelans can enjoy equally the right to voice their opinions and receive education or material security like housing for example. The main problem is that the language of these constitutional rights is often open to multiple interpretations. Rights and freedoms set in the Constitution demand determination of appropriate understandings and meaning to achieve their mandate in society. This can only be achieved through a theory of interpretation.3 This study offers a solution for this issue.

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2 Zachary Elkins, Tom Ginsburg, and James Melton *The endurance of national constitutions* (New York: Cambridge University Press, 2009)
3 Katharine Young, *Constituting Economic and Social Rights* (New York: Oxford University Press, 2012) at 30
The Need for the Study

In general, there is vast literature regarding constitutional interpretation, especially in industrialized nations, in which constitutional issues are highly debated. However, the interpretive practices of Latin American Supreme Courts are not as well known. In any country where a written Constitution includes fundamental rights, judges face the problem of how best to achieve the judicial mandate of interpreting constitutional rights. In the case of Venezuela, the Supreme Court in the last fifty years has undergone a radical transformation. Certainly, judges have been assuming the role of the ultimate interpreters of rights and freedoms. Therefore, it is necessary to conduct original research in order to understand the evolution of the interpretation of the Constitution by the Venezuelan Supreme Court. Focused on the landmark constitutional cases, this study elucidates the underlying legal reasoning behind the most contested judgments.

The Supreme Court has been subjected to seemingly fatal criticisms. Most critics have adopted a pessimistic view by claiming that the Supreme Court is nothing more than a group of politicians in robes. The approach to interpret the Constitution used by the Court is a cover for political decision-making, by an undemocratic judiciary. Claims go even further by affirming that there is no judicial independence in Venezuela and that the Supreme Court depends on the Executive power’s will. A premise of this study is to advance a new approach that goes beyond the present understanding of the role of law in the process of change. The proposed approach tries to answer the problem associated with the interpretation of fundamental rights, for example freedom of expression. This study presents a new approach that is faithful to the Constitution, and to Venezuela’s history, culture, and identity.

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6 Raul Sánchez Urribarri, “Judges and their Loyalties: A Comparative Study Focused on the Venezuelan Supreme Court” Theses and Dissertations Paper 398 (Political Science, University of South Carolina, 2010).
Research Methodology

Legal scholars have struggled to provide a methodology that achieves consensus. In fact, according to British legal professor Paul Chynoweth “[legal research] can all too easily be dismissed as lacking a methodology as being based only on opinion, or even as being ‘not research’ by peers operating within a scientific, rather than a humanities paradigm.” With this in mind, it is important to adopt a methodology that is accepted in the legal community and provides the necessary tool to carry out the research. The best possible methodology for this study is qualitative research, which refers to a mode of inquiry that generates descriptions from social settings, analysing the context rather than applying numbers to derive meaning. This methodology provided the most suitable perspective to understand in depth the phenomena in question. Qualitative research provides a flexible strategy that captures the essence of how the decision-making process works. Particularly, how constitutional jurisprudence has evolved in Venezuela. This research methodology is not a unique approach; there are multiple variations of qualitative research, for example interpretative research, feminist qualitative research, grounded research, and naturalist research. Yet, the vast body of scholarship on this subject places more emphasis on the study of the phenomena in its natural context. Indeed, this methodology tries to answer particular research questions rather than hypothesis. Considering Canadian Law Professor Harry W. Arthurs’ proposed taxonomy of legal research, the study of constitutional jurisprudence fits the category of doctrinal research, in which the concern is with the normative character of the law to develop legal concepts with sufficient merit to get published. This dissertation on constitutional jurisprudence, based on a qualitative research methodology, elaborates systematically a clear plan in order to provide a solid argument.

10 David Silverman, eds., Qualitative Research (London: Sague, 2011)
11 Peter Cane and Herbert Kritzer, eds., The Oxford handbook of empirical legal research (New York: Oxford University Press, 2010) at 940
12 Stephen Lapan, MaryLynn T. Quartaroli, and Frances J. Riemer, eds., Qualitative Research: and Introduction To Methods and Designs (San Francisco: Jossey Bass, 2012)
15 Harry W. Arthurs, Law and learning: report to the social science and humanities research council of Canada by the consultative group on research and education in law (Ottawa: National Legal Aid Research, 1983)
The doctrinal analysis issued in this study of constitutional jurisprudence identifies the underlying theories from the evidence collected rather than imposing a prior category or idea. From an interrogative function and ability to articulate historical facts, this study reviews literature, case-law, law scholars’ contributions, and new ideas to construct a theoretical framework. The chapters of this study are organized in chronological order, analogous to a chain novel, where each subsequent chapter is presented in such a way that it represents an important aspect and continuation of Venezuelan constitutional jurisprudence.16 The study elaborates on clear sustainable arguments that are consistent with the proper historical context. This is drawn from the explanation of the documentary evidence, reflecting the complexity, detail, and context in which it is immersed. In order to explain in detail the different stages of Venezuelan constitutional jurisprudence, it is necessary to engage in a historical journey of the conceptualization of Venezuela’s constitutional framework. Historical moments presented in this study are well recognized as time-frames that portray a vivid and accurate picture of Venezuela’s constitutional heritage, in order to properly unveil the underling theories set in the jurisprudence. This study takes a case-law approach, which means a case-by-case study of constitutional decisions that made a lasting impression in Venezuela’s legal system.17 Case-study research is designed to focus on a specific situation. It has been commonly assumed that a research inquiry produces knowledge only on the particular cases studied and that any other general conclusions drawn from it are only propositions.18 Overall, this study compiles a vast list of constitutional jurisprudence to highlight the theories behind the decisions, including the origin and progression of the Venezuelan Constitution and jurisprudence. This unveils the need for a new approach that depicts the truthful history, culture, and identity of the country. Overall, the proposed approach might help to interpret constitutional rights that not only protect rights in Venezuela, such as freedom of the press and speech, but also let Venezuelans enjoy a modern democracy. This theoretical proposition might be ambitious and might fall short of

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16 From the pedagogical point of view, the chapters can function largely as self-standing pieces in their own right thus making it possible to consider assigning particular chapters of the study for courses focusing on discrete topics such as the historical evolution of the Venezuelan Constitution from independence in 1811 to democratization (1947 and beyond), the rise of jurisprudential theories in the Venezuela’s Supreme Court of Justice under the 1961 Constitution or under the most recent historical period of the 1999 Constitution, and/or what it means to live under a constitutional democracy in a Latin American historical context.

17 Roland Scholz and Olaf Tietje, *Embedded Case Study Methods: integrating quantitative and qualitative knowledge* (London: Sage, 2002)

its goal, but by providing a comprehensive inquiry of the jurisprudence and solid arguments based on particular theories, this study provides many useful insights and interesting questions that can help further research.

From the ability to articulate historical facts, and case-law appraisal, the study develops an innovative theoretical framework structured in the form of ten chapters or essays. These chapters are written drawing upon and referencing more detailed primary and secondary material where relevant. These chapters are grouped in three main parts:

Part I of the theoretical framework provides an overview of Venezuela’s history and how the Constitution has acquired significance throughout the Venezuelan historical context and constitutional evolution throughout the following stages: Independence (1811), Autonomy (1830-1863), Federation-Autocracy (1864-1901), Centralization-Liberation (1901-1935), and in the last stage and Democratization (1947 and beyond). In this last stage – Democratization), emphasis will be given on the last five decades, which includes the 1961 and 1999 Constitution.

Part II of the theoretical framework consists of an appreciation of how the Supreme Court has developed constitutional jurisprudence. The Supreme Court judges assume the role of ultimate interpreters of rights and freedoms. This study analyse s landmark decisions to demonstrate the evolution of Venezuela’s constitutional jurisprudence. It illustrates in different landmark cases how judges have turned their attention from formal application of the law to more flexible approaches in an effort to tackle the function of the law. Case by case, this study explores arguments and approaches that reflect some arguments similar to rewound legal theories. The Court’s jurisprudential theories have acquired significance over the years, with a particular interest on constitutional law issues. One example of this is Legal Formalism, influenced by the theory of legal positivism in the early stage of Venezuela’s jurisprudence, which serves to maintain the predictability of the legal system. Predominant formalistic approaches are analyzed in this study with their respective relevant case-law in chronological order: (a) Original Intent, (b) Textual Meaning: Analysis of Words, (c) Emphasis on Formal Requirements or Technical Elements, (d) Reliance on Precedent, the Binding Jurisprudence Approach, (e) Emphasis on the Structure – Hierarchy of Norms: Law as a Logic System of Rules and Legal Validity, and (f) The Transition to a more Flexible Approach
Legal Realism in the new era of Venezuela’s constitutional jurisprudence from 1999 to 2011 serves to enlighten a new style of constitutional interpretation. Predominant functionalist approaches are analyzed with their respective relevant case-law in chronological order: (a) Emphasis on Policy, (b) Emphasis on Practical Solutions, (c) Emphasis on the Interdisciplinary Matter, and (d) Emphasis on the political, economic, and psychological inclinations of the judges: the judges’ beliefs and experiences in selected cases.

Ronald Dworkin’s adjudication theory has been used in the constitutional jurisprudence of the Supreme Court of Venezuela in the early years of this last decade. The survey of landmark decisions demonstrates that judges have used some of Dwokin’s arguments to justify their decisions. In the last few years, the Court has received several criticisms for its decisions regarding freedom of expression. The analysis of landmark decisions demonstrates that many decisions have some affinity with arguments associated with predominant legal theories. For example: (a) Freedom of expression cases that resemble arguments of legal positivism, (b) Freedom of expression cases that reflect arguments of legal Realism, (c) The judges’ own understanding of Dworkin’s adjudication theory.

Finally, Part III of this study is a reflection of how judges should interpret constitutional principles by means of achieving their goals or purposes. A new approach is recommended, stemming from arguments associated with the defence of principles and purposes of the Venezuelan Constitution articulated with the Venezuelan history and culture to better understand constitutional rights. This part of the study is a constructive piece grounded in the historical and theoretical framework developed in the study. The purpose is to develop some insights into the dynamic decision making process in Venezuela. This study attempts to reconcile the priorities of formalism as well as the underlying principles of the Constitution, and the priorities of functionalism and social welfare, ensuring that judicial decisions are true to the concrete objectives (purposes) of the new Constitution. Building that bridge will be the focus of this last part of the dissertation. The Venezuelan Constitution lends itself to a constructive approach of judicial interpretation in which the judge should find the best conception of both principles and purposes that fits the broad story of the country’s historical record, culture and tradition.
Currently there is a need to improve Venezuelan constitutional jurisprudence, particularly in relation to the understanding of freedom of expression, which is essential for a democracy to thrive. Overall, this part of the study is an analysis of landmark cases that demonstrate the underpinning theoretical assumptions of Supreme Court judges, such as Legal Positivism, Legal Realism and Dworkin’s adjudication theory in the arguments upheld by the Supreme Court of Venezuela in constitutional decisions. Certainly, even when judges purport to be theoretical or anti-theoretical they are employing some type of default theoretical assumptions. The increasing importance of legal theory in constitutional interpretation has made an impact on Venezuela’s jurisprudence. One example of this is the Legal Formalism of the Supreme Court which holds similar arguments to those of certain authors of legal positivism. This serves to maintain the certainty and predictability of the legal system during the early stages of Venezuelan jurisprudence. Predominant formalistic approaches are analyzed in this study with their respective relevant case-law in the following order:


(e) Emphasis on the Structure – Hierarchy of Norms: Law as a Logic System of Rules and Legal Validity (J. Jiménez, 1968; Consulta del Consejo de Guerra, 1979; Pinto Salinas v. Hipódomo, 1963; Constitucionalidad Ley de Reforma Parcial Ley Orgánica

(f) The Transition to a more Flexible Approach (Enfermos de Sida v. Ministerio de la Defensa, 1998; Asamblea Nacional Constituyente, 1998)

Legal Realism in the new era of Venezuela’s Jurisprudence serves to highlight a new style of constitutional interpretation. Predominant functionalist approaches are analyzed with their respective relevant case-law in the following order:

(d) Emphasis on the Political, Economic, and Psychological Inclinations of the Judges (the judges’ beliefs and experiences in cases such as Leopoldo López, 2011; Martín Javier Jiménez & Rafael Celestino Belisario, 2011).

Ronald Dworkin’s Adjudication theory in the constitutional jurisprudence of the Supreme Court of Venezuela: the analysis of landmark decisions demonstrates that judges have used some of Dworkin’s arguments to justify their own “moral reading” approach of the so-called Democratic Social State of Law and Justice, for example in landmark constitutional decisions such as William Dávila Barrios et al., 2000; Hermán Escarrá, 2001; Eduardo Lapi García & Biagio Pilieri, 2008; Ricardo Fernández Barruecos, 2011; and Juramentación Presidencial 2013, and Presidente Encargado, 2013

Freedom of Expression adjudication in the Supreme Court’s Constitutional jurisprudence: the survey of landmark decisions demonstrates that judges have used different arguments taken from predominant legal theories to justify their decisions. For example:


**Summary:** This introductory chapter presents an overview of the research purpose and objectives of the study, as well as the research methodology, the rationale for the research and the need of the study. The overall structure of the study will take the form of ten chapters organized in three main parts, beginning with the historical background of Venezuelan constitutionalism. First part an overview of the historical development of the Constitution and its institutions. The second part will focus on the Supreme Court’s constitutional jurisprudence in the last five decades, using a survey of landmark constitutional cases, which reflect the underlying and different approaches or versions taken by the judges regarding Legal Positivism, Legal Realism and Professor Ronald Dworkin’s adjudication theory. Particular emphasis will be placed on freedom of expression adjudication over the last five decades to evidence the need for a new interpretative approach. Finally, the third part will present a new approach for constitutional adjudication based on new perspectives deduced from the analysis of Venezuelan history and its constitutional jurisprudence, along with the arguments of Ronald Dworkin’s principles and Chief Justice Aharon Barak’s purposive theory. This new approach will attempt to reconcile the formal respect for the rule of law with the functional application of the Constitution to promote a better society in Venezuela.
PART I

THE EVOLUTION OF THE CONSTITUTION OF VENEZUELA

Venezuela’s constitutionalism demonstrates the dynamic process of building a system, structure and organization that represent what is consider valuable for society. Jurisprudence is an integral part of this process that interconnects with a range of disciplines, such as history, sociology, political science, physiology, and even economics. In order to better understand the reasons behind the radical constitutional changes that occurred in the past decade, it is necessary to look at the constitutional framework with a historical perspective. This is particularly important because it reveals that Venezuelans have fought over centuries to install a sovereign state along with freedom entrenched in the constitutional norm. Evidently, the chronological examination of the transition from the absolutist regime to a civil society, including all the struggles in between, is what makes it possible to comprehend the shape that democratic institutions have taken in Venezuela. Jurisprudence, in other words, “should neither be understood nor taught as a purely abstract or philosophical subject. The most important historians have much to say about the pressing legal and political issues of their, and our own, time.”19 Indeed, there is a correlation between historical process and constitutional jurisprudence in Venezuela. After reviewing the historical context of Venezuelan constitutionalism, it is no surprise that one of the main goals of the Venezuelan people has been to establish a free society founded on the values of a law-based state. Although, there have been difficult episodes during this journey, there has been a consistent theme across this historical analysis and that is the quest for freedom. According to Historian Germán Carrera Damas, “the Venezuelan national project was the establishment of a sovereign liberal state.”20 Even during the worst moments, this fundamental right was always an essential part of the Constitution. This is evident when reviewing each of the twenty-six constitutions proclaimed during Venezuela’s history. Indeed, there has always been a section that guarantees this essential right, which demonstrates its importance for the Venezuelan people. Throughout the review of Venezuelan history it is possible to affirm that the identity of the country has been mostly strengthened at times when citizens’ freedom was threatened.

The aim of this part is to give the reader an exhaustive description of the constitutional development in Venezuela. It outlines the context and evolution of the legal framework, including a detailed review of the long-lasting Constitution of 1961 and the relatively recently promulgated Constitution of 1999. The compendium of Venezuelan historical writings is long and very general. Thousands of pages incorporate intricate facts impossible to summarize briefly. However, history serves as vital evidence in the understanding of the dramatic evolution of the Constitution. In order to comprehend the past, the present and the future of the jurisprudence regarding constitutional rights, it is necessary to comprehend the factors that cause such changes and the elements that persist despite these changes, which has become an evolving trend in Venezuela. The main stages of this evolution are analyzed in great detail to provide a clear historical assessment of the origin and progression of the Venezuelan constitution and its jurisprudence. From the independence in 1811 to the democratization in 1947, this study provides the context necessary to reveal the true identity of this nation and its institutions. Particular attention is paid to the 1961 Constitution, introducing the reader to the structure of this rigorous document that lasted over forty years. It includes the rationality behind its restricted nature and its fundamental role as a stable legal framework in place for over four decades. This contributes to explaining the reasoning behind the judges’ decisions during this exceptional democracy era. In fact, the 1961 Constitution counts for a great deal of the constitutional cases used in this study to understand the evolution of the interpretation of constitutional rights by the Venezuelan Supreme Court. The same can be said about the radical change brought by the 1999 Constitution. The abrupt breakout of a new extremely complex constitutional document requires a deeper understanding of its structure and organization. Particularly, new concepts such as the Democratic Social State of Law and Justice are an integral part of the constitutional text and have influenced the jurisprudence during this era. Part I of the study provides readers with an overview of the history of Venezuelan constitutionalism structured chronologically around eight landmark stages from independence in 1811 to democracy in 1947, making emphasis on the era of constitutional democracy (1961-1999). It has been organized in three chapters: Chapter 1 outlines the historical background of the Constitution from independence to democratization. Chapter 2 covers the fundamentals of the 1961 Constitution; and chapter 3 presents the innovations of the 1999 Constitution.
CHAPTER 1
THE CONSTITUTIONAL HERITAGE OF VENEZUELA:
THE SEARCH FOR FREEDOM

This chapter offers an overview of Venezuelan history identifying the foundation of the constitutional structure, and describing its evolving set of rules, principles, and practices relating to the governance of society. It provides the historical context necessary to evidence the culture, tradition and identity of this nation and its institutions; a clear historical assessment of the origin, the context and progression of the Venezuelan legal framework. Although there have been difficult episodes during this journey, the quest for freedom has been a consistent theme across the historical analysis of Venezuelan constitutionalism. This chapter has been chronologically organized in eight historical periods:


The Constitution has acquired progressively a greater significance during Venezuelan history. From the aspiration of independence in 1811 to the advances of liberation in 1936, and democratization in 1947, the Constitution reflects the fundamental values that brought Venezuela into being. It was only in 1961 that the Constitution ensured democracy as the system of government. Yet, pressures from the masses demanding further reform of the Constitution culminated in the entrenchment of numerous social, economic, and political rights, in the Constitution of 1999.
**Emancipation and the Decline of the Spanish Empire (Prior to 1810)**

Venezuela, one of the leading nations of Latin America, has more than five centuries of history and almost two centuries of republican life as a state independent from the Spaniards. According to historian Luís Mariñas Otero, Venezuela entered modern constitutionalism as the third state in the modern world to adopt such principles, which, in 1811, were considered products of the American (1776) and French (1789) Revolutions.

The Spanish Empire colonized and ruled Venezuela during the 16th, 17th, and 18th centuries and La Real Audiencia de Santo Domingo (The Royal Audience of Santo Domingo) maintained judicial oversight of the Spanish settlements in America, including Venezuela during the 16th century. La Recopilación de Leyes de los Reinos de Indias (Laws of the Indies) promulgated by the Spanish Crown in 1680 was the body of law that governed Venezuela during two centuries. In the late 17th century, Venezuela was mostly part of the Virreinato de la Nueva Granada (Viceroyalty of New Granada), the Spanish name given to the colonies that were part of its jurisdiction in South America.

It is not until the 18th century that Venezuela was recognized as an autonomous colony of Spain, becoming the Capitanía General de Venezuela (Captaincy General of Venezuela), administrated by a Governor General imposed by the Spanish Empire, who ruled by cédulas (decrees) that constituted the basic law of the land. The Captaincy General grew from a small town of 6,000 souls to a major commercial colony with great influence in Latin America.

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21 The Venezuelan aboriginal groups before the Spanish Conquistadores arrived in Venezuela were: Caribbean, located in almost all the coasts, Timoto-Cuicas in the Andes, the Wayuu, settled in part of the coast around Lake Maracaibo, and other families, such as the Guaijros, Warao, Guaiqueries, Pemones, Yanomami. These aboriginal communities were ruled by a chief that had autonomy and each group had their own rules and customs. There is no written constitution made by any aboriginal group. For more information, please see Miguel Acosta Saignes, *Estudios de Etnología Antigua de Venezuela* (Caracas: Universidad Central de Venezuela, Instituto de Antropología y Geografía, 1954).


26 José Ignacio Rubio Mane, *El Virreinato* (México: Universidad Autónoma de México, 2005)


The economic trade of slaves, cotton, cocoa, and tobacco rapidly attracted wealthy individuals, such as counts, marquises, and aristocrats who were highly educated, and very aware of the latest political developments. It was in this period of time, more precisely in 1787, that the United States of America, after gaining their independence from Britain, established their social and political organization by creating a constitution without precedent. A few years later in 1789, France proclaimed the Rights of Men and put into effect the Montesquieu doctrine of separation of powers, which influenced many parts of the world. 29

The Napoleonic invasion of Spain weakened the imperial control over the Spanish colonies. On April 19th, 1810, with the excuse of protecting and preserving the hegemony of the Spanish King over the Venezuelan territory, aristocrat and intellectual members of the Cabildo (city council) created La Suprema Junta Conservadora de Los Derechos de Fernando VII (Conservative Supreme Board on the Rights of the Spanish King Fernando VII). 30 Under the Laws of the Indies, the Cabildo did not recognize the French authority, Field Marshall Vicente Emparan, appointed by Joseph Bonaparte as the Governor General of Venezuela. 31 Consequently, the Supreme Board took control over the provinces of the Captaincy General of Venezuela. The Supreme Board directed all its efforts to form an independent state, expelling French and Spanish authorities from the newly independent territory, contrary to what the Spanish Empire to which they aspired. 32 The news propagated to other countries of the continent, raising the first set of principles that brought this nation into being.

Venezuela has placed herself in the number of free nations, and hastens to give advice to this event to her neighbours so that, if the aspirations of the new world are in accord with hers, they might give her help in the great and very difficult career she has undertaken. Virtue and moderation have been our motto; fraternity, union and generosity should be yours, so that these great principles combined may accomplish the great work of rising America to the political dignity, which so rightly belongs to her. 33

On June 11, 1810, the Supreme Board, in pursuit of popular legitimacy, conducted elections to form the first National Congress with 42 provincial representatives of the

29 Guillermo Morón, Historia de Venezuela (Caracas: Editores Italgráficas, 1971). [Hereinafter Morón, Historia de Venezuela]
31 Mario Briceno-Iragorry, Actas del Cabildo de Caracas (Caracas: Editorial Elite, 1943).
32 Perera, Historia Venezula, supra note 24
Captaincy General of Venezuela. The National Congress, acting on behalf of free men, abolished the slave trade and taxing of aboriginals, thereby gaining the trust of the general population. The political elite knew that in order to gain a truly independent state, they would have to manage their own justice system and so on August 14th, 1810, the National Congress created Venezuela’s first Supreme Court, called the High Court of Justice. The National Congress also appointed legislative committees to draft the first Civil Code, Criminal Code, laws of freedom of the press, and primarily the first Constitution.

The Constitutions of Independence (1811-1819) and La Gran Colombia (1821-1830)

Venezuela declared its independence on July 5, 1811. The 1811 Constitution was the first one in Latin America. It marked the beginning of judicial power and was the first to proclaim the independence of the Nation from the Spanish kingdom. Although the Constitution was a draft, lawyers Gabriel Ponte, Juan Germán Roscio, and Fernando Javier Ustáriz presented the first Constitution of a Latin American country to the first Venezuelan Congress on September 3, 1811. Following difficult discussions on the rights and freedoms that the nascent Republic should preserve and the system of government that should exist, Venezuela adopted, for the first time, a written Constitution on December 21, 1811, including a federal system of government, a bill of rights, and the Supreme Court of Justice. The Venezuelan Congress, with representatives of the Provincias Unidas de la Confederación Americana de Venezuela en el Continente Meridional (United Provinces of the American Confederation of Venezuela in the Southern Hemisphere), first adopted the name of the newly independent territory and settled to define the organizational framework of the nascent Republic, including the respect of a certain set of fundamental rights and freedoms. The deputies of these provinces, namely, Caracas, Cumaná, Barinas, Margarita, Mérida, Barcelona, and Trujillo, unanimously rejected French interference in Venezuela’s

34 Mariñas-Otero, Constituciones de Venezuela, supra note 23
36 Gil-Fortoul, Historia Constitucional Venezuela, supra note 25.
37 Mariñas-Otero, Constituciones de Venezuela, supra note 23.
38 David Bushnell, Simón Bolívar Liberation, and Disappointment (New York: Pearson Longman, 2004) at 31.[Hereinafter Bushnell, Bolivar Liberation and Disappointment]
39 Pablo Ruggeri Parra, La Supremacía de la Constitución y su Defensa (Caracas: Corte Federal y de Casación, 1941)
40 Pedro Grases y Horacio Jorge Becco, Pensamiento Político de la Emancipación Venezolana (Caracas: Biblioteca Ayacucho, 1988) at 134.
These provinces are, to this day, immortalized in the seven stars of the Venezuelan flag. The first framework of power of Venezuela was characterized by a triad assuming the role of the executive power, a bicameral congress, with a house of commons and a senate, and a high federal court, as the final instance of appeal. The 1811 Constitution, unanimously adopted by the Venezuelan Congress, established explicitly constitutional supremacy as a fundamental principle of the emerging Republic:

The present Constitution, including treaties or laws enacted to develop the present Constitution, is the supreme law of the state. The authorities of the republic must follow and observe it religiously without excuse. Laws that were enacted against the Constitution, have no value. 41

Venezuelans received the new Constitution with great joy. Following the examples of the United States and France, the Venezuelan Congress entrenched the rights of freedom, security, property, and equality before the law. According to historian José Guillermo Andueza, “the principle of constitutional supremacy was recognized to protect the sovereign constituent power in the Constitution.” 42 The founding fathers conferred the highest authority in a legal system, guaranteed in the Constitution. This ensured that the rights and freedoms entrenched in this document were protected against the arbitrary actions that conflicted with the main rules, practice and principles of the Constitution. According to historian Orlando Tovar Tamayo, “the Constitution was a system of political control of the provincial laws and a preventive mechanism to make magistrates comply with the law.” 43 The principle of the supremacy of the Constitution also concerned the government system. The State, divided into a Legislative, Executive, and Judicial system, sought to create checks and balances to prevent tyranny or absolutism. However, the distribution of power was unclear and undefined, which kept Venezuela’s independence vulnerable. Thus, during the discussion in Congress regarding the distribution of power in the federal government, the deputy of Barcelona, Francisco de Miranda dissented on certain aspects of the 1811 Constitution. 44 Miranda, one of the leading figures in initiating the quest for independence in South America recognized by historians as the Précurseur des

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42 José Guillermo Andueza, La Jurisdicción Constitucional en el Derecho Venezolano (Barquisimeto: Instituto Jurídico del Estado Lara, 1955) at 51.
43 Orlando Tovar Tamayo, La Jurisdicción Constitucional. (Caracas: Academia de Ciencias Políticas y Sociales, 1983) at 85. [Hereinafter Tovar Tamayo, Jurisdicción Constitucional]
Indépendances de L’Amérique Latine, including Venezuelan independence, considered that the newborn Republic had an ambivalent separation of powers doctrine. Power, he said, “is not in the right balance, or the structure or organizations are not generally sufficiently simple and clear, so that it can be permanent. [...]” Miranda, with vast international experience, raised his voice in the first Venezuelan Congress and criticized the ambivalent separation of powers doctrine. However, his argument in favour of a clear and defined distribution of power between the different branches of the federal government did not persuade the founding fathers. In addition, the War of Independence had just begun, which was an obstacle to the successful and complete function of the Constitution.

Miranda, educated in the finest schools of Europe, played an important role in great political movements of his time, such as the struggle of independence in the United States, the French Revolution, and the emancipation of South America. Miranda’s prestige as a military leader came during the French Revolution, where he earned the rank of field marshal of France and a place in the Arc de Triomphe. After being part of the important political movements of his time, Miranda envisioned an independent South America, united in one great confederation. With the help of Great Britain, Miranda was the first leading Venezuelan military leader to try to invade the Captaincy General of Venezuela in 1806. Despite his unsuccessful attempt, Miranda kept pursuing the independence of Venezuela. Miranda went to Washington to meet privately with President Thomas Jefferson and his Secretary of State James Madison, to discuss possible help from the United States to achieve the independence of Venezuela. During his visit, he gained volunteers to join his quest. Miranda brought the first Venezuelan flag when his expedition landed in the province of Coro, but his army was not strong enough to take control of the entire country. This led him to return to Britain. In London, Miranda had meetings with important officials of the Crown which granted him a large military force to attack the Spanish forces in Venezuela, under the command of field Marshal Arthur Wellesley, 1st Duke of Wellington. However, Napoleón’s

46 Núñez, Acta del 19 de Abril 1810, supra note 41 at 41
48 Bohórquez-Morán, Francisco de Miranda, supra note 45.
invasion allied Spain with the British Empire, aborting Miranda’s effort for the Venezuelan Independence.50

Venezuela, seemingly close to consolidating independence, plunged into economic chaos. High inflation and low production of main products caused a social crisis.51 The Spanish Empire, anxious to recover its colonies, took advantage of the economic catastrophe and governmental weakness. Indigenous people, slaves, and a large force of disaffected people, furious with their plight, helped the frigate captain of the Spanish Armada, Domingo de Monteverde overthrow the Venezuelan young republic civilian president, Cristóbal Mendoza.52 The hopeless situation made Miranda sign an armistice with Monteverde, with the purpose of allowing the escape of revolutionary officers. However, some of them, including a young military leader, named Simón Bolívar, did not agree with the armistice. Just before boarding a ship to Britain, Bolivar and his soldiers arrested Miranda under charges of treason, handing him to the Spaniards.53 Miranda would never regain his freedom. Now Governor, Domingo de Monteverde unleashed a campaign of persecution and terror against the revolutionary patriots, in defiance of the armistice agreement. The Spanish army, hunted Bolivar and his men until Francisco Iturbe, a distinguished aristocrat and Bolivar’s friend, offered Monteverde his properties in Puerto Cabello in exchange for Bolivar’s departure to Europe, and reminded him that it was Bolivar who had arrested Francisco de Miranda. Monteverde granted Bolivar a Spanish passport that allowed him to travel Europe untouched. However, Bolivar with a defiant boast said, “I arrested Miranda to punish a traitor, not to serve the king.”54 On July 25, 1812, Venezuela came once again under Spanish rule.55

In exile, in Europe, Simón Bolívar vowed to liberate Venezuela from the Spanish rule. This prominent military and political leader came from a wealthy family of Spaniards born in Venezuela, educated by prominent tutors, Andrés Bello and Simón Rodríguez. He learned the military arts in the finest school of Europe, and became a revolutionary ambassador for

51 Morón, *Historia de Venezuela*, supra note 29
53 Sherwell, *Bolivar: The Liberator*, supra note 33
55 Ibid.
the independence of Venezuela. Seeking to coordinate military actions to liberate Venezuela, Bolívar took refuge in Cartagena de Indias (now Colombia), where he wrote the *Manifiesto de Cartagena* (1812), a letter sent to the Cartagena Congress explaining the main reasons behind Venezuela’s failure to maintain independence. The historical document is early evidence of Bolívar’s political ideals, “Do not be deaf to the pleas of our bothers, rush forth to avenge death, to give life to the dying, succor to the oppressed and freedom to all.” The government in Cartagena supported his quest for independence with five hundred men at his command to begin what Bolívar called *La Campaña Admirable* (The Admirable Campaign). August 6th, 1813 marked the victorious entrance of Bolívar into Caracas, after defeating Monteverde’s troops on the western part of Venezuela. The Governor of Caracas granted Bolívar the title of *The Liberator* as the highest possible honour. The newly independent Venezuela began the process of re-establishing the rules enacted in 1811, including the Constitution. However, many of the representatives of the people in an assembly in Caracas argued the need for strong leadership, pointing at Bolívar to be the governor general of Venezuela. To this proposal, Bolívar responded:

> I have not come to oppress you with my victorious arms. I have come to bring you the empire of law. I have come with the purpose of preserving your sacred rights […] A successful soldier does not acquire any right to command his country. He is not the arbiter of laws and government; he is the defender of freedom […] elect your representatives, magistrates, a just government and be sure that the armies which have saved the republic will always protect the freedom and the national glory of Venezuela.

Venezuela’s independence did not last long. José Tomás Boves, Spanish military general, acting by himself and armed with a powerful troop of soldiers, declared war against the Venezuelan patriots. In command of equestrians of *Los Llanos*, Boves’ crusade against the Venezuelan patriots gained public support from those unfortunates who saw an opportunity in his army. This cruel and bloody war crushed any application of the 1811 Constitution. On July 16, 1814, Boves entered Caracas destroying everything in his path, which triggered the emigration of thousands of people from the capital of Venezuela. Fortunately, Bolívar and other patriots were able to escape Boves’ terrifying campaign.

56 Bushnell, *Bolívar: Liberation and Disappointment*, supra note 38
On September 7, 1814, after the falling of the Second Republic of Venezuela, Bolívar wrote *El Manifiesto de Carúpano* (The Carúpano Manifesto). This document expressed the frustration and mistakes that Bolívar thought were the causes behind the inevitable fail of the Second Republic of Venezuela.

It is impossible for ordinary men to appreciate the high value of the realm of freedom or to choose it over blind ambition and vile greed. In this crucial matter, our fate depended on the choice of our compatriots, who in their corrupted condition chose against us; the rest was a consequence of a decision that was more dishonourable than fatal and more to be lamented for its essence than for its result.61

In 1815, once Napoleón was defeated and the Spanish kingdom restored, the Spanish King was determined to recover his colonies. He appointed Field-Marshall Pablo Morillo as the General Captain and Commander of Spain’s most powerful, numerous and well-equipped army to pacify the revolts in American colonies. Morillo landed on the Island of Margarita, ending Boves’ rule over Venezuela.62 On September 6, 1815, when the hope for freedom in Venezuela was almost lost, Bolívar wrote one of his greatest documents, *La Carta de Jamaica* (Kingston Letter). By means of his formidable pen, Bolívar tried to counteract the Spanish propaganda against those who proclaimed the freedom of America. Bolívar reached out to the English-speaking world, especially Britain, to gain sympathy for the independence of Latin America. In this important historical document, *The Liberator* expressed his political and constitutional ideals for the unification of South America:

> The Judicial Power that I propose enjoys absolute independence: nowhere else does it enjoy as much. The people present the candidates, and the legislature chooses the individuals who will make up the courts. If the judicial power does not come into being in this manner, it cannot possibly maintain its integrity, which is the safeguard of individual rights. These rights, Legislator, constitute the freedom, equality, and security that are guaranteed in the social contract. The judicial power controls the measure of good or evil, in the lives of citizens, and if there is freedom, if there is justice in the republic, they are dispensed by this power. The political organization is of little importance as long as the civil organization is perfect, that is, as long as the laws are rigorously applied and thought to be as inexorable as fate.63

On January 1, 1817, Bolívar returned to Venezuela determined to liberate not only his homeland, but also all of South America. The quest was extremely difficult, because his army did not have combat experience to battle against the most powerful army in the continent. Yet, Bolívar was able to gain the support of the equestrians of *Los Llanos*, now

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61 Writings of Simón Bolívar, supra note 57 at 128.
62 Langley, Bolívar: Venezuelan Rebel, American Revolutionary, supra note 54 at 51.
63 Writings of Simón Bolívar, supra note 57 at 60.
commanded by José Antonio Páez, *The Lion of Apure*, thereby coordinating efforts to defeat the Spanish Kingdom.  

In 1818, during the war of independence, Bolívar requested that constitutional principles entrenched in the 1811 Constitution be translated and published in different languages to promote Freedom, Property and Happiness as the most fundamental values of Venezuela’s constitutionalism abroad. Following the success of Nueva Granada (Colombia), Quito (Ecuador) and the weakness of the Spanish troops in Venezuela, Bolívar took the opportunity to install a National Constituent Assembly, called Congreso de Angostura with representatives from the three territories with the purpose of proclaiming the Ley Fundamental (Constitution). Venezuelans would wait eight years, in the middle of an atrocious war and arbitrary governments, to proclaim their own constitutional text.

On February 15, 1819, sessions of the National Constituent Assembly (Congreso de Angostura) began with twenty-six representatives of the provinces that conformed Venezuela and other newly liberated territories. *The Liberator* delivered the most important speech of his political career, *El Discurso de Angostura* (The Angostura Address), expressing his ideals of constitutionalism. Bolívar, regarding the constitutional project, expressed the necessity of fundamental rights for everyone by an independent Court. 

> Let the legislative power relinquish the attributes belonging to the executive, but let it acquire, nevertheless, new influence in the true balance of authority. Let the courts be strengthened by the stability and independence of the judges, the establishment of juries, and of civil and criminal codes, not prescribed by old times, nor by conquering kings, but by the voice of nature, by the clamour of justice and by the genius of wisdom.

For a significant part of his speech, Bolívar argued in favour of democracy, which in his view was the perfect system of government to bring more happiness, social safety, and political stability. “Only Democracy, in my opinion, is susceptible of absolute freedom.” Indeed, *The Liberator* was convinced that the fundamental principles in the Constitution depended exclusively on the establishment and practice of a democratic system. “By establishing a democratic republic, Venezuela has declared for the rights of man and freedom of action, thought, speech, and the press. These eminently liberal acts were possible

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64 Sherwell, *Bolívar: The Liberator*, supra note 33
because only in democracy can absolute liberty be assured […]” 68 He favoured a democratic system, yet with a centralized government and hereditary senate.

Bolívar’s appreciation for liberty as the cornerstone of Venezuela’s society was his most beloved dream. The Liberator insisted in his speech to the Congress of Angostura that the Constitution must give expression of society’s history, culture, and identity. “Laws must represent the physicality of the country, the climate, soil quality, its location, its extension, the way people live, their religion, their custom, their wealth, their commerce, their manners […]. This is the code we must consult, not the one written by Washington […]” 69 This is one of the most significant differences between the 1811 Constitution and the 1819 Constitution. The first one was the expression of the major influence of the United States’ Constitution and the French Revolution. The founding fathers’ intentions in the 1811 Constitution was to entrench the most advanced constitutional principles in order to accomplish an ideal democratic society that sadly was inconceivable in the Venezuela at the time. Instead of reflecting abstract philosophical aspiration, the 1819 Constitution gave expression to the main Venezuelan context in the middle of an independence war.

It is in this respect that Bolivar, inspired by the British parliamentary system, proposed two main ideas: a hereditary Senate, based on the ideal of the Roman Senate or the House of Lords, and a strong centralized executive government. Bolivar’s hereditary Senate was entitled to mediate constitutional controversies and exert the natural power of a Court of Justice.70 Although the Congress of Angostura refused Bolivar’s idea of an hereditary Senate, the delegates of this Congress kept the idea to have an elected Senate, no hereditary, in the Republic, with the responsibility to “interpret all provisions that represent doubts,” relegating the Supreme Court to have almost no authority.71 Bolivar argued, “nothing is as dangerous with respect to the people as weakness in the executive power.”72 Precisely to avoid past errors, the Congress structured a more solid and stable centralist government.

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68 John Lynch, Simón Bolívar: A Life (New Haven, CT: Yale University Press, 2007) at 120. [Hereinafter Lynch, Simón Bolívar: A Life]
69 Bolivar, Congress of Angostura, supra note 66.
70 Tovar Tamayo, La Jurisdicción Constitucional, supra note 43.
72 Writings of Simón Bolívar, supra note 57at 45.
On August 15, 1819, the Third Republic of Venezuela sealed its independence from Spanish rule by enacting a constitutional document that concretely established a strong executive branch, a bicameral parliament, a high court of justice, and a set of fundamental rights and duties. The quest for independence spread over South America. Bolívar, now the main military leader of Latin America, contributed decisively to the independence of present-day Bolivia, Colombia, Ecuador, Panamá, Perú, and Venezuela. The Liberator’s ideals had a great influence through Venezuelan and Latin American constitutional history.

On June 24, 1821, Bolívar and his patriots defeated the Spanish Army in the Battle of Carabobo, which finally consolidated Venezuela’s independence from Spanish rule.

It was The Liberator’s most beloved idea to see Latin America united. Just after defeating the Spanish army in Venezuela, Bolívar travelled to Cúcuta, Colombia, to attend the General Congress of Colombia. On July 12, 1821 the Congress adopted the Fundamental Law of the Union, following Bolívar’s ideal of a united South America, New Granada and the Captaincy General of Venezuela united, giving birth to La Gran Colombia (the Greater Colombia), a federation covering much of Colombia, Panamá, Ecuador, Venezuela, as well as small parts of Costa Rica, Perú, Brazil, and Guyana. On October 6, 1821, the Congress of Cúcuta (Colombia) sanctioned a new Constitution that consolidated these newly independent states into a confederation. Although the Cúcuta Congress did not follow Bolivarian ideas of a perpetual presidency or a hereditary Senate, the Congress retained the power to interpret the Constitution. This new Republic had Bolívar as president and Francisco de Paula Santander, the Colombian hero of independence, as vice-president.

Initially, La Gran Colombia was structured in three departments with capitals in the cities of Bogotá (Department of Cundinamarca, Colombia), Caracas (Department of Venezuela), and Quito (Department of Quito, Ecuador). After Perú and Bolivia joined the confederation, Bolívar attempted to implement his “Bolivian Constitution,” previously drafted for Bolivia, as the name suggests, in which provision 144 stated, “Civil liberty, individual security, property, and equality before the law is guaranteed to the citizens by the

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73 Ibid at 15.
75 José Félix Díaz Bermúdez, Bolívar y el Derecho (Caracas: Universidad Central de Venezuela, 1980).
76 Ruggeri-Parra, Historia Política y Constitucional de Venezuela, supra note 58.
77 Joaquín Tamayo, Nuestro Siglo XIX. La Gran Colombia (Bogotá: Editorial Cromos, 1941).
78 Ibid
79 Ruggeri-Parra, Historia, Política y Constitucional, supra note 58.
Constitution."

Other provisions called for a perpetual presidency, “giving the power to the president to select a direct successor.” Vice President Santander, who believed in the sanctity of constitutional government and the rule of law, opposed Bolívar’s intentions, arguing that the 1821 Constitution explicitly prohibited any reform before 1831, 10 years after the establishment of the Constitution. The relationship between Santander and Bolívar began to sour, to the point where Santander said, “I have not fought fourteen years against Fernando VII to take now a king named Simon I.”

Meanwhile, the relations between departments and the centralist government started to deteriorate. José Antonio Páez as governor general of Venezuela embarked on a political movement named La Cosiata to oppose Bolívar’s dictatorship intentions. With growing internal conflicts and his constitutional reform blocked, Bolívar declared himself The Liberator President, establishing a dictatorial regime to keep La Gran Colombia united.

In the last period of his life, Jeremy Bentham, who personally sent Bolívar copies of his work, including the Constitutional Code, inspired Bolívar’s philosophy. “I have paid my tribute of enthusiasm to Mr Bentham and I hope Mr Bentham will adopt me as one of his disciples, as, in consequence of being initiated in his doctrines, I have defended liberty, till it has been made the sovereign rule of Colombia […].” This philosophy earned him enemies in influential spheres, such as the Church and the Congress, which ultimately accused Bolivar of personal ambitions. On April 27, 1830 after losing popularity, Bolívar resigned from the presidency and returned to Venezuela with the intention of embarking to England, yet his health and enemies did not allow it. His last days were uncomfortable and restless. Broke and in exile, Bolívar went to Santa Marta, Colombia where he died at the age of 47. In his last words he declared, “my last wishes are for the happiness of our native land. If my death will help to end factions to consolidate the Union, I shall go to my grave in peace.”

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80 Writings of Simón Bolívar, supra note 57 at 84.
81 Ibid, at 158.
82 Abelardo Forero Benavides, Francisco de Paula Santander: El Hombre de las Leyes (Madrid: Editorial Anaya, 1988) at 98.
83 Mariano Picón-Salas, De la Conquista a la Independencia (México: Fondo de Cultura Económica, 1969)
84 Lynch, Simón Bolívar: A Life, supra note 68.
85 Ibid, at 245.
86 Ibid, at 278.
The Constitution of the Autonomous Country (1830-1858)

On May 6, 1830, José Antonio Páez, Governor General of Venezuela declared Venezuela's autonomy from La Gran Columbia. Later, on September 22, 1830, just after Venezuela’s secession from the Great Colombia, the Constituent Assembly of Valencia, with the assistance of twenty-three delegates of the provinces that composed the country, enacted a new Constitution. The 1830 Constitution declared Venezuela as an independent, free, and prosperous nation. This constitutional text followed the centralist orientation that previous constitutions had established. However, it established for the first time in Venezuelan constitutional history the power of judicial review of legislation and other public acts to the Supreme Court of Justice. Nevertheless, provision 224 of this Constitution established that the Legislative Power of the Congress could interpret or explain any doubt about the “intelligence of any provision of the Constitution.” The Supreme Court of Justice, according to provision 147, was to resolve cases of jurisdiction between Tribunals, as well as to address constitutional matters with the Executive power. The Constitution set the coordination and dialogue between the Court and the Senate to judge the President and/or the Vice-President or any other public employee. Citizens were free to claim any right or complain for any damage suffered to their dignity or property. The Supreme Court was composed of five members: a President, three members, and a prosecutor. For the selection of the Court members, the President of the Republic proposed to the House of Representatives nine candidates for three positions. The House would reduce the number of candidates by half and submit it to the Senate to appoint three new members of the Supreme Court. On May 18, 1836, the first laws of the judicial power and the code of judicial procedure began the organization and administration of justice in Venezuela. José Antonio Páez, a military and political leader, was the first President of the Republic of Venezuela that respected the rule of law. According to historian José Gil-Fortoul, “Páez’s influence contributed to re-establish and ensure the constitutional orders.” The rule of law became the cornerstone of Venezuela’s constitutional system. Although the Congress remained the

87 Venezuela, Congreso Constituyente, Actas del Congreso Constituyente de 1830 (Caracas: Ediciones del Congreso de la República 1982).
88 Tovar Tamayo, Juridicción Constitucional, supra note 43 at 87.
89 Ibid at 86.
90 Venezuela, Actas del Congreso de Angostura: Febrero 15, 1819 a Julio 31, 1821, supra note 71.
91 Brewer-Carías, Historia Constitucional de Venezuela, supra note 22
92 José Gil-Fortoul, Historia Constitucional de Venezuela, supra note 25 at 468
constitutional mediator, the Supreme Court of Justice was the Republic’s ultimate appellate body. The Senate shared with the Supreme Court a responsibility to protect the Constitutionality against the President or Vice President’s misconduct. The consistent application of the law was one of the main contributions of Páez’s government. The economy grew and the wealth and increasing exports contributed to the stabilization of this young country.

Bolivar’s words at the Angostura Congress would have an impact for years to come. Generals and military heroes from the independence war held the economic power. The military invasion of public matters ended with former military commanders as representatives of the people in the Congress. The newly appointed legislators began the distribution of aristocratic property. According to historian Laureano Vallenilla Lanz, “Páez, Monagas, and others, who had entered war without any type of property, recently after Venezuela gained its independence, became the wealthiest owners of Venezuela.” The wealthiest political-military became the Caudillos, (Political-military leaders) with regional and national power.

After Páez’s presidency, Venezuelan intellectuals, aware of the caudillos’ increasing power, had the National Congress elect José María Vargas, a university professor and rector of the Universidad Central de Venezuela, as the first civilian President of the Republic of Venezuela. The intellectuals and aristocrats wanted to recuperate their land and other possessions confiscated by the military during the independence war. However, the generals of the independence war considered those properties as payment for their services to the country. The military revolted against the civilian President and Congress, forcing Dr. Vargas to leave the government, despite his aspiration to stay longer as President, which, in turn, destroyed any possibility for a civilian government. Former President Páez, despite his military background, rejected the insurrection, and fought his old comrades to return the

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93 Monsalve-Casado, La Corte Suprema supra note 35
95 Germán Carrera Damas, Aspectos Socioeconómicos de la Guerra de Independencia (Caracas: Universidad Central de Venezuela Ediciones, 1972).
96 Ibid, at 105.
97 Vallenilla Lanz, Laureano, Cesarismo Democrático y otros Textos (Caracas: Editorial Monte Ávila, 2004) at 4. [Hereinafter Vallenilla Lanz, Cesarismo Democrático]
98 Napoleón Franceschi González, Caudillos y Caudillismo en la Historia de Venezuela: 1830-1930. (Caracas: Editorial Eximeo, 1979), at 29. [Hereinafter Franceschi, Caudillismo en Venezuela]
constitutionality to the country. The defeat of the rebellion was a significant triumph for the civilian government and the newly born constitutionalism. Yet, Dr Vargas, having returned to the Presidency, did not last long. After his resignation, Vice-President General Carlos Sublette assumed the Presidency of Venezuela, finishing his term. Congress then elected as President one of the most important Caudillos of this time, General José Tadeo Monagas. With the Congress on his side, General Monagas passed a law to reform the Constitution, in order to grant him greater power. This new legislation against the constitutional order, transformed an elected president into a flourishing dictatorial government. Yet, his authority did not last long for General Julian Castro, governor of Carabobo overthrew the national government.

On July 5, 1858, the new government announced a national convention with the name of Constituent Assembly of Valencia, in order to rebuild the country and promulgate a new constitution. “The great national convention acclaimed by the people to rebuild the republic on the basis of the broadest freedom and to recuperate the sacred principles of morality and justice that unfortunately had been violated.” This national convention abolished economic restrictions on voting, giving Venezuelans the opportunity to vote directly and freely for their own representatives to Congress.

After years of conflicts, on December 24, 1858 the newly elected representatives of the people from the provinces that conformed Venezuela at the time discussed a new constitutional regime. The political debate that followed led to the birth of a new Constitution that provided broad individual rights to the people. Within this modern Constitution, entrenched rights, such as freedom of expression, equality before the law, habeas corpus, freedom of association, all without disavowal of any other individual rights, were explicitly established. After a number of political issues still affecting the newly independent country, Venezuelans had learned that those in power must be accountable to the people. The 1858 Constitution established a federalist system, providing more autonomy to the provinces of Venezuela. In addition, it regulated the presidential period, establishing a

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99 Allan Brewer Carías, Las Constituciones de Venezuela (Caracas: Academia de Ciencias Políticas y Sociales, ACIEMPOL, 2008) at 44. (Hereinafter Brewer-Carías, Las Constituciones de Venezuela]
101 Mariñas-Otero, Constituciones de Venezuela, supra note 23 at 40
102 Ibid at 41.
103 Ibid at 42.
four-year period for the president in function. Moreover, it instituted the Supreme Court of Justice as the absolute arbiter of the Constitution. Explicitly, the civil legislators granted the Supreme Court of Justice the power to review legislation, by request of any citizen, for its adherence to the Constitution. The 1858 Constitution finally gave the true meaning of the principle of constitutional supremacy. It awarded the Court with the jurisdiction to invalidate legislation contrary to fundamental constitutional principles. Thus, “the Supreme Court of Justice can declare the nullity of legislative acts sanctioned by the provincial legislatures, at the request of any citizen, if it was contrary to the Constitution.” In this regard, Historian Pablo Ruggeri affirms that, “this provision inspired Supreme Courts in America to obtain their power to override unconstitutional laws or acts.” The war of independence, La Gran Colombia, and the experience with the Caudillos inspired the founding fathers to determine that the best way to protect Venezuela’s aspirations of justice and dignity and make the Supreme Court the ultimate guardian of the Constitution. According to Former Supreme Court Justice Humberto la Roche, “this Constitution [1858] considered that the Supreme Court must be empowered to protect the Constitution from any unconstitutional legislation or illegal acts performed by the public authorities.” Moreover, citizens had the right to appeal to the Supreme Court against misleadings by the legislative branch. The Constitution of 1858 not only established the Court’s power to review the exercise of lawmaking power by legislative bodies, but also the constitutional remedy to access the judicial system for protection of constitutional rights, which historically evolved into the Sistema de Amparo (constitutional injunctions). This particular ‘protection’ or recurso de amparo of individual rights had already been incorporated into the Mexican national Constitution in 1837, when de Tocqueville’s Democracy in America became of great interest in Mexico. Its description of the practice of judicial review in the United States appealed to many Mexican jurists. Although the founding fathers of the Venezuelan

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104 Ulises Picón Rivas, Indice Constitucional de Venezuela (Caracas, Editorial Élite, 1944) at 475.
105 Mariñas-Otero, Constituciones de Venezuela, supra note 23 at 43.
106 Ibid at 250.
108 Humberto La Roche, El Control Jurisdiccional de la Constitucionalidad en Venezuela y los Estados Unidos (Maracaibo, Universidad del Zulia, 1972) at 27.
Constitution had the best intentions to build a constitutional system to protect the rights and freedoms of everyone, the military Generals did not agree. War was just about to start.

In 1859, The Great War of the Caudillos began. Venezuela experienced the horrors of civil war and the subsequent jockeying for power among strong military leaders. This conflict became the central event in the lives of Venezuelans who experienced the tumultuous upheaval that shook the Republic between 1859 and 1863. Disagreement between the conservative and the liberal parties ended in an atrocious war. Social deterioration grew more serious than ever before. Doomed to poverty, Venezuelans blamed the wealthy military for robbing them and joined forces with populist leaders who promised equal distribution of land. Among them was Ezequiel Zamora, a poor merchant who became a military leader driven by hatred of the wealthiest class. Zamora built his own insurgent guerrilla army to fight for the equalization of social classes, redistribution of land, abolition of taxes, and the removal of the oligarchy.

The Federal war changed the history of Venezuela. Ezequiel Zamora, one of the most powerful Caudillos of his time, used his hatred of the wealthy class, manipulating the most unfortunate to join the war in his quest to destroy everything that resembled wealthy social upper class. “Let’s go to Caracas to kill all of the whites, all of the rich and all who are literate!” Known for their charismatic personalities, Caudillos were military men who played with the emotions of the masses for their own selfish interests. On January 10, 1860 a bullet during the battle of San Carlos ended the life of this influential character. The legacy of Ezequiel Zamora’s ideals was “a far-reaching land reform for the benefit of the masses, a project for combining soldiers and civilians in his struggles and the

111 Franceschi, *Caudillismo en Venezuela, supra* note 98 at 29.
114 Elizabeth Gackstetter Nichols and Kimberly J. Morse, *Venezuela* (Santa Bárbara C.A: Greenwood/ABC-Clio, 2010) at 44. [Hereinafter Nichols & Morse, *Venezuela*]
protection of the labouring classes, which resembled the constitutional and political platforms in Venezuela’s later days.”

After Zamora’s death, Generals Juan Crisóstomo Falcón and Antonio Guzmán Blanco took control of the liberal party and supported the insurgency. However, their ideals were not as radical as Zamora’s. Rather, the new leaders of the liberal movement believed in the political, social and economic transformation of Venezuela. Their goal was to encourage foreign investment, while their main objective was to adopt the constitutional principle of federalism in the constitutional system. On April 23, 1863, negotiations began to end this civil war, which ended with the signature of El Tratado de Coche (Treaty of Coche). On May 22nd, 1863, following the treaty, José Antonio Páez stepped down from the presidency of Venezuela giving it to his successor General Juan Crisóstomo Falcón.

The Federal Constitution and the Tendency to Deviate to Autocracy (1864-1881)

The bloody civil war of Venezuela, called by many historians the Federal War, ended the life of 60,000 to 100,000 Venezuelans. The triumph of Juan Crisóstomo Falcón redefined the nation. Although Venezuela was in the middle of a turbulent period, with Caudillos disputing the control of the provinces, as well as a terrible economic crisis, the President of the Republic called again for the National Constituent Assembly to promulgate a new constitutional text. On June 17, 1863, the councils of each State sent their representatives to Caracas to join the Assembly, embracing the postulates of the liberal movement. These deputies designed a new federal state with the division of government along territorial lines, including an extensive and absolute bill of rights in the 1864 Constitution. This Constitution, on one hand established the organizational framework of general rules for government, and on the other, consolidated the power of regional Caudillos that finally ended the revolt against the constitutional system. The Union, integrated by twenty states and one district capital, formed the “The United States of

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121 Ibid
Venezuela, the new denomination of the Venezuelan territory." 123 Following federalism as a constitutional principle, the founding fathers of the 1864 Constitution decentralized the court system, to include a Federal High Court as the ultimate appellant jurisdiction over all the state courts that were part of the Union. Provision 92 of the 1864 Constitution, granted the new Federal High Court the power to nullify any act that contravened the States’ autonomy. “Any act by the Legislative or the Executive powers that violates states’ rights or attack their independence should be considered null by the High Federal Court under the request of the legislatures’ majority.”124 The main responsibility of this court was to maintain clear the jurisdiction of each State or municipal court in order to keep the unity of the federation. The Federal High Court had five members elected by the Congress and proposed by the state legislatures. To select these members, each State’s legislature presented to the Congress a list equal to the number of places to be provided, and the Congress elected those who collected more votes at the submission of candidacy. 125

The 1864 Constitution embraced federalism as a constitutional principle. According to historian Edgar Estévez González, “on March 28, 1864 the seventh constitution passed by the name of Federal Constitution, one of the best in the country's political evolution and the greatest influence of nineteenth-century Venezuela.”126 After the 1811 Constitution, this was the second constitutional text that entrenched the principle of federalism. It also established the presidential term to only last four years without re-election. More importantly, it established fundamental rights such as property rights, privacy, and freedom of expression,.127 However, according to Venezuelan constitutional lawyer and Professor Allan Brewer-Carias, “the federation, formally established, caused the country's political disintegration, developing regional caudillos, which soon entered into rivalry.”128 Violence simmered the country through the middle of the 19th century. A new Caudillo, General Antonio Guzmán Blanco, named Vice-President of Venezuela by General Falcón, emerged. El Illustre Americano (the Illustrious American) as he proclaimed himself, was the head of

124 Ibid at 89.
126 Edgar Estéves González, La Guerra de los Caudillos (Caracas: Editorial CEC El Nacional, 2006) at 84.
127 Gil-Fortoul, Historia Constitucional Venezuela, supra note 25.
128 Brewer-Carías, Las Constituciones de Venezuela, supra note 99 at 67.
the liberal party and fought for the federal ideals. Yet he confessed the following: “I don’t know where they got the idea that the people of Venezuela are in love with the federation, when they don’t even know what that word means.” The Venezuelan liberalism was a masquerade for the nefarious action of the *Caudillos* who wanted to become supreme leaders with authoritarian power.

On May 27, 1874, the Congress, under the influence of General Guzmán Blanco’s government, reformed the 1864 Constitution to ensure his government a long tenure of power. The 1874 constitutional reform brought restrictions to the right of property, establishing the expropriation mechanism. Yet, inspired by Auguste Comte’s ideals that religion could become an application of science, he advocated for a separation of the Government and the Catholic Church; this theory influenced the creation of a secular government in Venezuela. This reform entrenched freedom of religion or affiliation, and one of the most important rights, free and universal education for everyone.

Venezuela started a complete transformation. Guzmán Blanco’s government brought economic prosperity to Venezuela. The *Ilustre Americano* implemented important political, social, and economic policies, such as the establishment of the Bolívar as the official Venezuelan currency, the obligatory education of citizens, and the reconciliation of the Venezuelan people. Strongly influenced by his days in Europe and the United States, Guzmán Blanco promoted the liberal arts to make Caracas resemble modern cities like Paris or New York. “Caracas thus became a kind of miniature Paris.” This influence was not only architectural, but also philosophical. During his eighteen years in power, Guzmán Blanco embraced Auguste Comte’s positivist ideas with open arms. Science, reason, and logic prevailed over myths and other unscientific ideas. Guzmán Blanco’s actions opened a new era. Doctor Rafael Villavicencio, also following Comte’s positivism during his tenure at the Ministry of Public Instruction, promoted scientific knowledge. Adolf Ernest, a professor at the Universidad Central de Venezuela, was the pioneer that

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130 Brewer-Carías, *Las Constituciones de Venezuela, supra* note 99
brought to Venezuela the positivist theory in his lectures on natural history, starting as far back as 1874.134

The positivist doctrine also influenced the Venezuelan legal system, education, and structure. On April 27, 1881, the Congress of Venezuela promulgated a new Constitution influenced by scientific ideas and inspired by the French legal system. 135 The 1881 Constitution’s innovation was the introduction of la Corte de Casación (Court of Cassation).136 This court shared its function with the High Federal Court, whose jurisdiction was to resolve civil controversies, and hold accountable the government. La Corte de Casación (La Cour de Cassation in French) which originated in revolutionary France, is the appellant body used to nullify the judgment of lower courts, including the State or Municipal courts. Yet it cannot substitute the judgment of the lower court. Instead, it sends the case to the court of appeals for a decision on the case merits.137 This French institution, La Corte de Casación was devoted to unifying the case-law in Venezuela. The most important responsibility of this Court was the uniformity of legal interpretation in the entire country. Citizens had the right to challenge decisions of lower courts in front of La Corte de Casación on the merit of misinterpretation of the law. The influence of the French legal system and the scientific approach that legal positivism brought to the 1881 Constitution may have contributed to making judges of the Federal highest Court and La Corte de Casación strictly literalists and textualists. The courts’ role was relegated to only deciding whether the application of the law was correct based on the careful reading of the written text. The scientific analysis of facts rather than subjectivity proposed by the legal positivism had a great influence on judges of La Corte de Casación mandating its jurisdiction to control the lower court’s correct application of the written text of the law.138 This Civil law institution was the first attempt in Venezuela to establish a jurisdictional body that reviewed the correct interpretation of the law. The technical analysis of the law expressed in the

136 Monsalve-Casado, La Corte Suprema de Justicia, supra note 35
138 Ramón Escobar León, Estudios sobre Casación Civil (Caracas: Publicaciones del Tribunal Supremo de Justicia, 2000). [ Escobar León, Estudios sobre Casación Civil]
jurisprudence of La Corte de Casación may have also limited the interpretation of the constitution for years to come.

**The Constitution of Centralization (1901-1935)**

The era of the Caudillos was not over yet. During the last decade of the 19th century, regional Cadillos wanted to conquer Caracas, as the center point of power in Venezuela. On May 24, 1899, General Cipriano Castro launched his Revolución Liberal Restauradora (Liberal Restorative Revolution) using the liberal party platform and the ideal of a true federalism, and invaded Caracas with his own private army. During this revolutionary turbulence, General Cipriano Castro took control of the government and called for the appointment of a national constituent assembly to enact yet another new Constitution. The members of this assembly were not elected; instead, the electoral bodies of the municipal councils of each state, controlled by Castro, appointed them. With his Revolución Liberal Restauradora (Liberal Restorative Revolution), Castro had the intention to stay in power as long as possible. Hence, on April 13 1901, the National Constituent Assembly sent to the General Castro, for his approval, a new Constitution that served his interests, including the exclusion of the right to vote freely for a president.

General Castro’s Revolución Liberal Restauradora (Liberal Restorative Revolution) was destined to change the course of Venezuelan history. The autocratic revolution led by Castro finally ended decades of civil war, crushed regional and national Caudillos, and implanted a strong centralist government. This constitutional text maintained both Courts: the Federal High Court and La Corte de Casación. However, only the Federal High Court had the jurisdiction to review the constitutionality of national legislation or any other act of the government from the federal political institutions. According to constitutionalist Jesús María Casal, “the Constitution of 1901 established an original mechanism, in which lower courts by their own discretion could request the Federal Court to determine the constitutionality of a legal statute that collides with the Constitution.” It was the responsibility of the Federal High Court to determine the constitutionality of laws.

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140 Mariñas-Otero, *Constituciones de Venezuela*, supra note 23.
141 Ibid.
142 Jesús María Casal, *Constitución y Justicia Constitucional* (Caracas: Universidad Católica Andrés Bello, 2006) at 156. [Casal, *Constitución y Justicia Constitucional*]
In addition, the 1901 Constitution empowered the president completely, establishing an appointed system for his election, consolidating Castro’s dictatorial regime. However, long economic mismanagement under former president Guzmán Blanco’s leadership and Castro’s extravagant spending of the national treasury buried the country in considerable foreign debt. Great Britain, Germany and Italy demanded immediately the settlement of their claims at the very moment of the assumption of Castro to government. Venezuela’s serious deficit problems prompted foreign creditors to influence their governments to enforce their claims. Nevertheless, Castro refused to honour Venezuela’s foreign debt, which triggered Great Britain, Germany, and Italy to blockade Venezuelan ports. Holland, Belgium, Spain, and México joined the European claims. Castro, unable to meet European demands, infuriated the Europeans, who did not hesitate to open fire. Puerto Cabello endured the gunshots of Germany’s warships, which destroyed Venezuelan coastal cities. In addition, the Dutch navy destroyed a part of Venezuela’s navy. The European action enabled General Castro to manipulate the uneducated mob using sentimental patriotism, declaring himself El Defensor de la Soberanía Nacional (Defender of the National Sovereignty) in order to stay in power. The European aggression alarmed the United States’ government. A worried President Theodore Roosevelt sent letters to the GermánEmpire warning that he “would act against any German effort to acquire new overseas colonies.”

European hostilities ended and shifted to the field of international diplomacy. On February 13, 1903, thanks to the United States’ intervention, Castro signed Washington’s Protocols by which Venezuela promised to gradually fulfill its financial commitment. The United States’ government, stunned by the European’s ventures in Latin America, extended the Monroe Doctrine, asserting the right of the United States to intervene in stabilizing the

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143 Constitución de los Estados Unidos de Venezuela [13/4/1901], provisions 73, 82, 79, and 89.
144 Langue, Histoire du Venezuela, supra note 100 at 229.
146 Ibid.
147 Ibid at 22
economic affairs of small nations in the Caribbean and Central America, if they were unable to pay their international debt.\(^{151}\) The United States’ involvement in Latin American affairs triggered reactions around the continent, especially in Argentina, where Luis María Draco, the Argentinean minister of foreign affairs, defied the American interventionist policy. As professor of international law Horacio Grigera said, “the Argentinean diplomat and jurist Luis María Draco was chiefly concerned with banning the use of force to compel the payment of foreign public debt.”\(^{152}\) The well-known Draco Doctrine explains, “among the fundamental principles of public international law that humankind has enshrined, the most precious one is that all States, regardless of the strength at their disposal, are equal entities of law, and therefore, deserve the same considerations and respect.”\(^{153}\) Therefore, “public debt cannot lead to armed intervention, no less to the occupation of [South] American soil by a European power.”\(^{154}\) These historical episodes influenced the entrenchment of constitutional provisions defending the national sovereignty of most Latin American nations. Defined by international disputes, Venezuelans suffered the economic consequences of trade blockages and low coffee prices. Cipriano Castro’s greatest accomplishment was to survive the catastrophic economic, social, and international tumults. Extremely sick, Castro sought medical attention abroad, appointing Juan Vicente Gómez as Acting President while he attempted to recover his health. Gómez took the opportunity to appoint loyal important cabinet ministers, taking control over the government. When Castro attempted to return, the government no longer recognized him as the President of Venezuela.

On December 19, 1908, while Castro was in Europe seeking medical attention, Juan Vicente Gómez declared himself president of Venezuela, instituting one of the longest dictatorships in Latin American, described by historian Edwin Lieuwen as, “probably the worst of Venezuela’s many dictators.”\(^{155}\) Once again, the newly proclaimed dictator decided

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\(^{151}\) US: Theodore Roosevelt’s Annual Message to Congress for 1904; Records of the U.S. House of Representatives; House Records HR 58A-K2; Record Group 233 (Center for Legislative Archives; National Archives).


\(^{153}\) Luis Draco, La República Argentina y el Caso de Venezuela (Caracas: Oficina Central de Información, 1976) at 17.

\(^{154}\) Ibid, at 19.

\(^{155}\) Edwin Lieuwen, Venezuela (London: Oxford University Press, 1961) at 43. [Hereinafter Lieuwen, Venezuela]
to rewrite the constitutional text. Following the procedure established in the 1901 Constitution and with Congress on his side, on August 5, 1909, Gómez made sure the constitutional reform amplified presidential powers, restricted property rights, freedom of expression, and economic freedoms to consolidate his dictatorship.\footnote{Mariñas-Otero, Constituciones de Venezuela, supra note 23.} His repressive regime established Venezuela’s secret service agency, endowed with sophisticated resources to eliminate any opposition insurgency. “Brutal tortures, persecution, and death were Gómez’s signature over decades of tyrannical rule.”\footnote{Ibid at 49.} Gómez was a brutal dictator who confiscated most of his opponents’ properties, accumulating a vast fortune from coffee plantations, cattle, industrial plants, and real estate.

Although the Federal High Court and \textit{La Corte de Casación} remained the same, the rule of law was a remnant of the past. Under the 1901 Constitution, reformed in 1909, the National Congress named the President of the Republic, and the advisory Council of Government, this one similar to the French Constitutional Council, yet it was more to convey the illusion of shared power.\footnote{Ibid.} Gómez reformed the Constitution on several occasions in order to keep ruling the country at his will. According to historian Judith Ewell, “Gómez proved to have quite an affection for constitutions and had new ones written in 1914, 1922, 1925, 1928, 1929 and 1931.”\footnote{Ewell, Venezuela a Century of Change, supra note 137 at 48.} However, these constitutions restricted democratic rights, such as freedom of expression, free press, freedom of information, and the right to vote. There was no safe place to discuss national matters; criticism faced arbitrary arrest and torture.\footnote{Ibid.} Gómez founded the Venezuelan army academy, providing the military with social and legal privileges.

On April 15, 1914, Venezuela’s history changed forever when the government discovered oil. Petroleum became the first industry in the country, putting aside coffee, cacao, and other agricultural products.\footnote{Mariñas-Otero, Constituciones de Venezuela, supra note 23} Substantial investments in the nascent industry brought new infrastructure, roads, ports, and railways to change Venezuela from a poor rural land to a major industrialized nation. Accordingly, “we can talk about the ‘Gómez era’ as a period in which Venezuela changed from an agricultural society into a growing urban
More oil discoveries encouraged Venezuelan exports, foreign trade, and direct investments from top international oil industries. By the beginning of World War I, the country was proudly the world’s second largest oil producer and exporter. However, Gómez, poorly educated, did not visualize the importance of oil, allowing the international oil industry to draft the first Venezuelan petroleum legislation. Although the “black gold” brought great benefits, the tyrannical government was the one that benefited the most. The petroleum “prosperity” did not elevate Venezuelans’ standard of living. Deals with oil concessions opened a new chapter in governmental corruption. Gómez’s regime preferred to acquire the most sophisticated military equipment, rather than to improve the health and education of his people.

University students from the Universidad Central de Venezuela (Central University of Venezuela) in Caracas, inspired by the Mexican Revolution of 1910 and the Russian Revolution of 1917, revolted against Gómez’s dictatorship. On October 29, 1928, hundreds of students marched against Gómez’s absolute rule, demanding social justice, democracy, and better public services. Yet “the iron-fisted boss put down every attempt at revolution more ruthlessly than Germany’s famed blood purge of 1934.” Students from the Universidad Central de Venezuela suffered the consequences of rebelling against a tyrant. Torture, murder, imprisonment, and hard labour were the punishments for their disobedience. For several years, the government closed the Universidad Central de Venezuela. However, the students’ ideas of social justice brought a new perspective to the country. La Generación del 28 (Generation of 1928) as students called their movement, escaped into exile, including Rómulo Betancourt and Raúl Leoni, leaders of the revolt and future presidents.

162 Fernando J. Devoto & Torcuato S. Di Tella, eds., Political Culture, Social Movement and Democratic Transitions in South America in the XXth Century (Milano: Fondazione Giangiacomo Feltrinelli, 1997) at 246.
163 Brian McBeth, Juan Vicente Gómez and the Oil Companies in Venezuela, 1908-1936 (New York: Cambridge University Press, 2002). [Hereinafter McBeth, Juan Vicente Gómez]
165 McBeth, Juan Vicente Gómez, supra note 163 at 33.
166 Manuel Caballero, Gómez el Tirano Liberal (Caracas: Alfadil Ediciones, 2003).
Juan Vicente Gómez’s dictatorship paid Venezuela’s international debts and consolidated itself as one of the most important oil producers on a global scale, while Caracas, Valencia, and Maracaibo became cosmopolitan cities. On December 17, 1935, Gómez died, ending 27 years of cruel dictatorship. Gómez’s absolute tyranny marked a painful transition from decades of warfare and rural Caudillos to a modern democratic welfare state.

*The Constitution of Liberation (1936-1946)*

A period of transition took place after the death of Juan Vicente Gómez. General Eleazar López-Contreras, Minister of defence under Gómez’s regime, immediately succeeded the dictator to finish his remaining term. On April 26, 1936, a newly elected National Congress decided to appoint General Contreras to serve as president until 1941. According to historian Judith Ewell, “López Contreras demonstrated that he would tolerate no disorder, but also that he preferred to exercise moderation in the use of force.” On July 20, 1936, a new constitutional reform took place in Venezuela beginning the transition to a democratic system. Although tyranny was far from over, the reconstruction began with the progressive restoration of civil liberties. One of the first acts that demonstrated this transition was when Congress, by reforming the Constitution, partially re-established the Supreme Court’s power to nullify the acts of the government. The innovation of the 1936 constitutional reform was the recognition of social rights for the first time in Venezuelan history. The 1928 student movement had a great impact on the constitutional reform that entrenched labour rights, such as the right to receive vacation, training and weekly rest on Sundays, the workers’ right to unify, and to have decent work conditions. The oil industry in Venezuela was an overwhelming phenomenon that encouraged the emigration of skilled workers that populated the urban cities. In addition, this constitutional reform, for the first time included provisions in favour of foreign emigration. Although social rights were the

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172 Ewell, *Venezuela a Century of Change, supranote* 133 at 74.
175 *Constitución de los Estados Unidos de Venezuela [16/07/1936]* Provision 123.
most innovated incorporation of the 1936 constitutional reform, the limitation to property rights and freedom of expression, as well as the prohibition of any group that supports communism or anarchism continued as heritage of Gómez’s dictatorship. University students, largely inspired by Marxist theories, became more involved in national issues, founding the first political parties, yet López-Contreras’s government did not tolerate any possible communist uprising.176

Eleazar López-Contreras’ government was a transitory stage between the dictatorships and a democratic, elected government. The economic wealth of the oil industry opened the possibilities to embrace ambitions social reforms. On February 21, 1936, *El Programa de Febrero* (February plan) of López-Contreras’ administration delivered the principled guide of action to develop public policy in priority areas, such as law, education, foreign trade, and emigration.177 On March 7, 1938, the *Plan Trienal* (Triennial plan) established the first budget and specific infrastructure developments for the country.178 A young intellectual, Arturo Uslar Pietri, urged López-Contreras to *Sembrar el Petróleo* (Sow the Oil). This became the first oil legislation that established a comprehensive legal framework to safeguard Venezuela’s interest from the exploitation of this natural resource. Uslar Pietri’s project was “to use the massive revenues from the oil industry to fund social welfare programs, such as health care and public national school systems.”179 However, López-Contreras’ government was unable to fulfill the expectations of the people. An outburst of protests for better social services and employment caused López-Contreras to impose censorship and repression.180 Iron-fist ruling remained relatively constant through the tumultuous transition towards Democracy.

176 Nichols & Morse, *Venezuela*, supra note 114 at 54.
Constitution of Democratization (1941-1960)

Venezuela’s democratic system took a long time to build. On April 1941, the National Congress, in a much-contested election, appointed the next President: Minister of Defence and dear friend of López-Contreras, Isaías Medina Angarita.\(^{181}\) The new president implemented an ambitious national development plan to structure Venezuelan democracy. Medina Angarita’s administration re-established the guarantee of fundamental human rights, independence of the media, civil liberties, and the rule of law. The president, for the first time in forty years, decided to wear civilian suits rather than military uniforms.

Once again, in Venezuela’s constitutional history, a National Congress reformed the Constitution by Presidential request. The 1945 Constitutional reform brought more than just new constitutional rights. Mario Briceño Iragorri, Manuel Egaña, and Luis Loreto, founding fathers of the Constitutional reform of 1945, drafted the first legislation to remedy the infringement of rights and freedoms, as set out in provision 32, section 17, of the reformed 1945 Constitution.\(^{182}\) Democracy in Venezuela was now materializing. Discussion, organization, and activities of political parties occurred freely and openly. Acción Democratica or AD (Social democrats) became the most popular and principal opposition party. On April 23, 1945, after intense debates in the National Congress, the political enthusiasm of the new political actors pushed for new laws. The most important laws allowed women to participate in politics, giving them the right to vote and stand for election. These laws also established a centralized judicial system, where the High Federal Court held jurisdiction over the organization and distribution of courts in the country and was responsible for judicial appointment in lower courts.\(^{183}\) Laws set out the right to organize in a political party, allowing Venezuelans to elect deputies and senators to the Bicameral National Congress, who in turn appointed the President of the Republic.\(^{184}\) The National Congress continued to enact legislations that deepened the constitutional reform begun in 1945, for example health care law, which provided a public insurance system for every citizen of Venezuela. In addition, Congress enacted a comprehensive labour law that...

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\(^{182}\) Constitución de los Estados Unidos de Venezuela (reforma) [23/04/1945].

\(^{183}\) Freddy Domínguez & Napoleón Franceschi, Historia de Venezuela (Caracas: Ediciones Cobo, 1989).

guaranteed oil industry workers minimum wages, and Venezuela’s first federal tax legislation that structured the collection of taxes to fund social services in the country.\textsuperscript{185} Congress also included the reform of the oil legislation with the intention of establishing “the principles of equity and justice that must regulate our oil industry to make them reality for all Venezuelans.”\textsuperscript{186} The collection of taxes and revenues from the oil industry was overwhelming, and with these monies, Venezuela was able to overcome extreme poverty, providing better social services, health programs, and schools across the nation.

The Second World War affected Venezuela’s financial resources. Nazi submarines made it impossible to move the Venezuelan oil, and the production dropped significantly.\textsuperscript{187} The ongoing depression in the oil industry made it impossible to satisfy the widespread popular demands for better social services, enabling political parties to pressure for deeper democratic reforms, such as the right to elect directly the president of Venezuela by free universal vote. Although Medina Angarita’s government gradually returned to Venezuela the right to elect members of the National Congress, the presidency remained elected by Congress.

Consequently, on October 18, 1945, \textit{La Revolucion de Octubre} (the October revolution) started.\textsuperscript{188} \textit{Acción Democratica or AD} (Social democrats), the most popular political party with some military commanders, started a revolution against Medina’s government in 1945. Advocating imminent democratic change, \textit{Acción Democratica or AD} (Social democrats) overthrew Medina Angarita. On March 15, 1946, \textit{La Junta Revolucionaria de Gobierno de los Estados Unidos de Venezuela}, (The Revolutionary Government Junta of the United States of Venezuela), led by Rómulo Betancourt, took power, calling for a National Constituent Assembly and general elections to promulgate a new Constitution.\textsuperscript{189}

On July 5, 1947, the new Constitution entrenched a democratic social welfare state with freedom, dignity, and social justice as principles. The 1947 Constitution guaranteed

\begin{footnotes}
\item[185] Ramírez, Isaias Medina Angarita, supra note 181.
\item[186] Congreso de Venezuela, Pensamiento Político Venezolano, Siglo XX, Gobierno y Epoca del Presidente Isaias Medina Angarita (Caracas: Publicaciones del Congreso de la República, 1987) at 25.
\item[188] Corina Yoris, 18 de Octubre de 1945: Legitimidad y Ruptura del Hilo Constitucional (Caracas: Universidad Católica Andrés Bello, 2004).
\item[189] Asdrúbal Baptista, Venezuela Siglo XX: Visiones y Testimonios (Caracas: Fundación Polar, 2000).
\end{footnotes}
political freedom, labour and civil rights, and committed the government to undertaking measures to promote economic development and social welfare. The 1947 Constitution expanded a wider range of social rights, including education, social security, labour, and health care as fundamental parts of the constitutional text. However, the most important innovation of the 1947 Constitution was the restoration of the universal right to vote in free elections for any public office. As a result, the National Constituent Assembly convoked the first free, universal presidential election in Venezuela of the twenty-century. On December 14, 1947, Rómulo Gallegos, prominent novelist, was elected as Venezuela’s first democratic president. His administration began a fundamental restructuring of the machinery of government, establishing democratic structures and institutions at every level of society. Gallegos’ administration established a series of basic reforms, including drastic changes within the management of the petroleum industry. In addition, Gallegos’ enacted the “50-50” decree, which ensured the government would receive 50% percent of the annual profit made by foreign companies that exploited the country’s oil reserves. This administration also planned to create a national company that would exploit national oil reserves.

One of the most important democratic institutions built during this administration was the Supreme Court of Justice. Gallegos’ government presented a proposal to the National Constituent Assembly to unite the High Federal Court and La Corte de Casación (Cassation Court) to create the Venezuela’s Supreme Court of Justice. The founding fathers of the 1947 Constitution wanted to bring a new political order by building the necessary democratic institution in Venezuela. As researcher Luis Ricardo Dávila explains, “the Revolutionary Government junta sought to achieve this task by at least three mechanisms: the constitution of popular democratic identities, the institution of an ‘effective democracy’ and the defence of economic nationalism.” The protection of the democratic identities entrenched in the Constitution was a necessary step to accomplish this ‘effective democracy.’ The 1947 Constitution granted the Supreme Court of Justice the power to

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190 Bethell, The Cambridge History of Latin America, supra note 187.
review the constitutionality of laws. Ten members, called Supreme Court Justices, were responsible for the effective application of the Constitution. Citizens could summit to the Supreme Court their claims regarding violations of the Constitution at the conclusion of a successful appeal before the High Court of Appeal of their jurisdiction.

However, the populist discourse brought greater expectations than what could be fulfilled. Gallegos’ administration took control over the entire national economy, under the constitutional provision, which expressly permitted the Executive to dictate economic measures concerning the planning, circulation, and consumption of wealth, in order to achieve the development of the country. Drastic reforms increased labour costs, creating antagonism towards Gallegos’ government from Venezuelan merchants, manufacturers, and foreign oil companies. The agrarian reform law provoked nearly all landholders into vehement opposition, refusing any greater restrictions on their individual rights. On the promise of wealth redistribution, Gallegos’s populist government took a radical turn and young military commanders knew their time was coming. As a result, the new civilian government crumbled towards a totalitarian regime.

The legacy from decades of dictatorial rule was difficult to put aside. On November 24, 1948, Colonel Marcos Pérez-Jiménez was welcomed into the exclusive circle of Latin America’s authoritarian rulers. After overthrowing Gallegos’ government, La Junta Militar de Gobierno (The Military Government Junta) temporarily re-enacted the 1936 Constitution. The military regime decimated the labour, student, and peasant movements, and suppressed all political parties, cancelling elections, while those who tried to oppose the will of the military government were sent to labour camps, jailed, exiled, or killed. The Supreme Court of Justice was dismantled to bring back the High Federal Court and La Corte de Casación (The Cassation Court). At this point, Venezuela's last
dictatorship overshadowed every democratic development accomplished with the 1947 Constitution.

Contrary to other Venezuelan dictators, Marcos Pérez Jiménez developed major public work projects and spectacular constructions, such as the Puerto Cabello’s petrochemical industrial complex. The landmark hotel Humboldt on top of Avila Mountain, connected to the city of Caracas by a funicular railway was also built during the same period. Oil exploration, infrastructure development, and concession to foreign companies necessitated the emigration of thousands of European skilled workers, who under La Política de Puertas Abiertas, the Open Doors Policy made Venezuela their new home. Pérez Jiménez’s dictatorship modernized La Universidad Central de Venezuela (the Central University of Venezuela), which became a landmark for the country. In addition, during his dictatorship, the government constructed ambitious freeways, such as Caracas-La Guaira and Caracas-Valencia, which connected the capital city with the major cities of the country.

However, infrastructure development came at a high cost. As stated by Elizabeth Gackstetter, “the stability and prosperity on the surface masked political oppression, corruption, and growing social inequality.” The military government decided to cover its dictatorship by calling for the general election of a National Constituent Assembly; yet the plebiscite demonstrated the people’s rejection of the government. Knowing that the results were against them, the military government fixed the results to enact a new Constitution and to declare General Marcos Pérez-Jiménez president. On April 15, 1953, the National Constituent Assembly, composed of Pérez-Jiménez’s supporters, enacted the 1953 Constitution. This new constitutional text consolidated Pérez-Jiménez’s dictatorship, re-establishing the High Federal Court, La Corte de Casación and two high appellant courts packed with Perez Jimenez loyalist. The National Constituent Assembly changed the name of the “United States of Venezuela” for the “Republic of Venezuela” in recognition of the effective demise of the federal government. The 1953 Constitution brought back the censorship days, while freedom remained in the dead letters of the new constitutional text.

203 Ewell, Venezuela a Century of Change, supra note 133.
205 Nichols & Morse, Venezuela, supra note 114 at 57.
206 Mariñas-Otero, Constituciones de Venezuela, supra note 23.
207 Ibid.
Venezuela’s social tolerance of military habits over a century of old traditions was not something that civil society could easily erase. Torture and murder abounded. Pérez-Jiménez’ secret service used violence to intimidate his opponents.208 Although they had been frightened by years of oppression, university students once again led the democratic process. Even though Pérez-Jiménez called for an election to extend his dictatorship for another five-year term, Venezuelan university students clamoured in the streets for democracy, clashing with the armed forces.209 On January 21, 1958, a general strike erupted in Caracas and claims for freedom intensified to such a scale that three days later, Pérez-Jiménez resigned; this marked the end of dictatorship.210

From this point onward, Venezuelan democracy began to flourish. On January 23, 1958, after a civil/military revolt that ended with Pérez-Jiménez leaving the country, La Junta Patriótica Gobierno (Patriot Government Junta), presided by Wolfang Larrazábal and integrated by military commanders and civilians representing each political party, took provisional control of the government, promising general elections at the end of that year. La Junta Patriótica Gobierno (Patriot Government Junta) kept the 1953 Constitution in force as a temporary measure.211

On October 31, 1958, the most representative political parties of the country, including AD (Social Democrats), COPEI (Social Christian Party), and URD (Democratic Republican Union) signed a formal agreement called the Pacto de Punto Fijo (Pact of Punto Fijo) to respect the result of the presidential elections and the supremacy of the Constitution, to maintain the stability of the democratic governance in Venezuela.212 “The purposes established in this document are to consolidate the national coexistence and permit the development of constitutional principles, such as political openness, stable democratic governance, honesty in the public administration and the respect for the rule of law, which are the essence of the patriotic will of the Venezuelan people.”213 The Pacto de Punto Fijo

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209 Ibid.
210 Ibid.
211 Germán Carrera Damas, *Fundamentos Históricos de la Sociedad Democrática Venezolana* (Caracas: Universidad Central de Venezuela, 2002) at 58. [Hereinafter Carrera-Damas, *Fundamentos Históricos*]
aimed to ensure the transition from authoritarian rule to democracy and civil government in order to give a high tone to the electoral debate, to share a basic program of government, and to respect and enforce the outcome of the elections. This formal agreement between the three most important political parties, signed by the three presidential hopefuls was an important document that “reaffirmed the unitary climate which was prevailed in Venezuela, since the civic-military effort of January 23rd, 1958.” In other words, this Pact was a mechanism for protecting democracy.

Under this Pact, on December 7, 1958, Venezuelans elected Rómulo Betancourt as the president of the Republic of Venezuela. Venezuelans also elected deputies, and senators to form a Bicameral National Congress in popular, free, and direct elections. The transformation from a dictatorship government to a democratic system became the objective of the Congress. The promulgation of a new constitutional text that embraced the democratic values was the most important objective of the newly elected Congress. A bicameral commission, integrated with the most prominent deputies, senators, and lawyers of the country, began the construction of a new constitution based on the reform of the 1947 Constitution. This bicameral commission took two years, in consultation with the National Congress and Provincial legislatures, to present a final draft.

Naturally, the new democratically-elected government suffered opposition from extremist and rebellious military units that did not agree with a civilian democratic government. El Porteñazo and Carupanazo were military insurrections that tried unsuccessfully to overthrow Betancourt’s democratic government. Those unsuccessful military attempts led elements of the Armed forces to join the national liberation guerrilla (FALN), equipped and armed by Fidel Castro’s regime to begin a guerrilla war against the newly constituted government. This extreme-left guerrilla group bombed the United States’ Embassy in Caracas and other United States’ interests, which led to a cooperation

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216 Ibid, at 385.

217 Ibid.


between Venezuela and the North American government to train military and police personnel. According to political scientist Steve Ellner, “Acción Democrática’s standard-bearer, Rómulo Betancourt, played a leading role in the hemispheric offensive against Cuba’s Fidel Castro in the 1960s.” 220 Finally, after being defeated by Venezuela’s national army, this guerrilla movement joined the communist political party to participate in civil democratic elections.

**Constitutional Democracy (Constitutions of 1961 and 1999)**

On January 23, 1961, after intensive debates, Congress enacted a new Constitution of the Republic of Venezuela. 221 This new constitutional document entrenched democratic values, social justice, and the respect for the rule of law. The 1961 Constitution was carefully conceived, setting a clear separation of power between the legislative, the executive, and the judiciary in order to provide a stable, democratic, and representative welfare state for Venezuela. After the historical heritage of unsuccessful attempts to establish federalism in Venezuela, the drafters of the 1961 Constitution firmly opposed the idea of a decentralized federation. Instead, the national government was given the sole power to make decisions and enforce them.

The 1961 Constitution, inspired by the 1947 Constitution, expanded social, political, and economic rights. According to history and constitutional law professor Alfredo Arismendi, “the economic section of the 1961 Constitution demonstrates the importance of social justice, when it asserts that the economic legal framework of the Republic must be based on the principle of social justice to ensure that everyone live with dignity to benefit the collective.” 222 Certainly, the 1961 Constitution safeguarded democratic values shared by the Venezuelan people, such as the democratic alternative by popular elections, the responsible governance, and the representation of minority groups. 223 The most fundamental purpose behind the 1961 Constitution was to guard freedom, as it has been historically the highest aspiration of the Venezuelan society. This aspiration was translated in the constitutional text by once again granting to the Supreme Court of Justice the power of judicial review, in order

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221 Carrera Damas, *Fundamentos Históricos*, supra note 211 at 58.
to make accountable those who exercised public powers in the name of the population. The 1961 Constitution was premised on the idea that respect for the rule of law, democracy, and ultimately liberty could be accomplished with fair and timely administration of justice. These rules, including the procedures to amend or reform the Constitution, provided a framework that balanced the need for stability and flexibility in the constitutional text.

After more than forty years of stable democracy, Venezuela became an *exceptional democracy*. Certainly, if the norm in the region was political instability, *Venezuela was a rock.* 224 Venezuela was in fact an example for Latin America, with regular elections, respect for civil rights, and government accountability. 225 In addition, Venezuela’s economy was blessed with an oil industry that made this country the world’s leading exporter during the eighties. 226 The oil revenues were capable of maintaining steady improvement in social benefits for the entire nation, which built an exceptionally large middle class. 227 *El Pacto de Punto Fijo* provided the principles to institutionalize two political parties, AD and COPEI, who had minimum ideological differences. This made consensus and stability possible in the country. 228

However, Venezuela’s *exceptional democracy* progressively began to deteriorate. After decades of elected civilian rule, military coups interrupted Venezuela’s democratic development. According to historian Mark Ungar, “despite the oil wealth and political stability, the state’s effectiveness in Venezuela had been trampled by the executive power, party control, and bureaucracy.” 229 After forty years of elected civilian rule, military coups interrupted Venezuela’s democratic development. During his second presidential term, at the beginning of the 1990s, Carlos Andrés Pérez tried to implement economic measures to deregulate the banking system, lift prices control, open the oil industry to private capital, and privatize communication, air transportation, electric industry and many other strategic

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226 Richard Crooker, *Venezuela* (New York: Infobase, 2006) at 71
227 Ibid.
sectors in order to bring foreign capital to the country. However, diverse political groups, including his own political party, AD, strongly disagreed with the *Paquete Económico* (economic package) that Pérez’s administration was trying to implement. On February 27, 1989, the first street disturbance began, which led to two military coups.

On February 4, 1992, Lt. Colonel Hugo Chávez Frias commanded a military insurrection against the democratically elected government. This episode in Venezuela’s history once again changed the country markedly. It was not until the 1990s that Venezuela saw unprecedented street riots, repeated military coup attempts, and the impeachment and jailing of an elected president. The political instability took Venezuelans by surprise. A furious electorate, nostalgic for a more prosperous past, elected Rafael Caldera for the presidency for the period of 1994 to 1999, during which Venezuela suffered one of the worst financial crises in its history. The confidence in democratic institutions and the political parties crumbled to the point where, during Caldera’s presidency, Venezuela had to accept the help of the International Monetary Fund. Caldera’s government granted amnesty to those who attempted to go against the Constitution and the democratic institution in 1992. This allowed Hugo Chávez-Frias to regroup his military commanders to launch a new political party to run for the presidency. On December 3rd 1998, Venezuelan’s disheartened with unfilled promises and constantly deteriorating social conditions, desperate for change, gave the most comprehensive defeat to AD and COPEI, which had alternated government for more than thirty five years.

On February 2, 1999, a new democratically elected government was put in place. Chávez-Frias promised in his presidential campaign to call a National Constituent Assembly to draft and enact a new constitution. However, this idea had many detractors, according to constitutionalist Brewer-Carias, “the dismantling of democracy began in 1999 with the

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232 Ibid
convening of the Constituent Assembly not authorized in the 1961 Constitution.” 237 After months of controversial debates, the National Constituent Assembly enacted the 1999 Constitution, which obtained its legitimacy with a national referendum to approve this new constitution. On December 15, 1999, Venezuelans welcomed one of the world’s longest, most comprehensive and complex constitutions. The 1999 Constitution of the Bolivarian Republic of Venezuela advocates a Democratic Social State of Law and Justice. This Constitution has been the supreme law during these last Fourteen years in Venezuela.

In conclusion, this chapter has provided a short review of the journey from 1810 to 1999, describing some of the main features of the Venezuelan constitutional Heritage. The constant and progressive transformation of the Venezuelan Constitution was not linear. There were difficult political periods along the way. Certainly, Venezuela, a comparatively young country with a long history of written constitutions, is a nation that has struggled over the centuries to establish liberty, equality, and justice as principles that define the identity of this country. Traditionally, a particular feature of Venezuelan constitutional history was the concept of a written constitution: a document that outlines the organization, functions, and powers of the government as well as the fundamental principles, such as freedom, rule of law and democratic values. The evolution of the Venezuelan constitution shows a nation struggling for liberty, respect of human rights, and the rule of law.

**Summary:** This chapter highlighted the Venezuelan constitutionalism, as it acquired significance in over two hundred years of history, evolving into 26 Constitution since Venezuela became independent in 1811. The focus was on the struggle of the Venezuelan people to obtain freedom, rule of law and democracy. This constitutional evolution was explained throughout universal accepted historical time frames, which includes a brief introduction to the 1961 Constitution that lasted over almost four decades, and the 1999 Constitution that introduced the Democratic Social State of Law and Justice. A more detailed analysis of these last constitutions follows.

CHAPTER 2
THE 1961 CONSTITUTION OF VENEZUELA: THE FUNDAMENTALS OF AN EXCEPTIONAL CONSTITUTIONAL DEMOCRACY

This chapter focuses on the detailed explanation of the 1961 Constitution of Venezuela in an attempt to elucidate the influence of this strict, coherent and logical legal framework, which is reflected in the evolution of the interpretative approach of the Supreme Court. It is essential to comprehend the main features of this constitutional text in order to better understand the particular justifications offered by the judges to resolve constitutional cases. The 1961 Constitution primarily provided a set of rules, fundamental principles and governmental institutions all codified in a written document. This included a rigid separation of government branches, a coherent set of norms understandable from within, and the protection of social, political, and economic rights. It laid down the scope and limitations surrounding the exercise of the authority elected democratically by the citizens. This period of time was referred to as “an exceptional democracy”.²³⁸ The evolution of the constitutional jurisprudence in the Supreme Court of Justice begins with this constitutional text, which is remembered in Venezuela as being the Constitution that remained in effect the longest for a total of four decades. Indeed, jurisprudence is not developed as an isolated process; on the contrary, it is a product of history, context and theories that influence the reasoning of judges when faced with the most difficult and contested cases. It is therefore important to comprehend the context and legal framework surrounding one of the most stable periods of Venezuelan history. The objectivity and predictability of the Constitution derived not only from the education of the judges but also from the structure of the constitutional text itself. Consider in particular the formal criteria and technicalities written in the text as pre-existing concepts that judges had to value. This chapter is organized into the following six areas: a) Priorities of the Democratic State: Strict Structure of the Constitution of 1961, b) Government Framework: Separation of Three Branches of Power, c) The Development of the Judicial Power: the Supreme Court of Justice, d) The Protection of Individual, Social and Economic Rights, e) The Transition to the 1999 Constitution. The features behind the enforcement of the 1961 Constitution during four decades will be explained in detail.

²³⁸ Goodman, Lessons of the Venezuelan Experience, supra note 224

In 1959, after a long period of tumultuous episodes, including long civil wars, the jockeying of Caudillos into power, military dictatorships, and civil revolts, the citizens of Venezuela freely elected their representatives and senators to draft a new written document that would embrace the values and aspirations of the entire society as the highest law of the land. In 1961, the bicameral elected congress wrote a new constitution, entrenching and consolidating democracy, freedom and the rule of law in Venezuela. On January 23, 1961, the twenty-fifth constitution of Venezuela was promulgated. It contained twelve titles, two hundred and fifty provisions, and twenty-three transitory dispositions. The 1961 Constitution entrenched social, political, and economic rights, expanded the notion of separation of powers, and structured Venezuela’s welfare state. 239 Former President of the Supreme Court of Venezuela, Ezequiel Monsalve Casado, highlighted the importance of the Constitution of 1961, which guided “the rescuing of the rule of law, democracy and liberty in Venezuela.”240 The preamble of the 1961 Constitution set a variety of goals and purposes of the constitutional text, including the protection of human dignity, the promotion of general welfare, social security, and the achievement of equal participation of all Venezuelan citizens in the enjoyment of wealth, according to the principles of social justice, to promote economic development. It also declared that on behalf of the Venezuelan people, invoking the protection of the Almighty God, the promulgation of the Constitution in 1961 guaranteed the democratic order, as the unique and indispensable means to ensure the respect for citizen’s rights and dignity. In addition, the preamble of the 1961 Constitution included the goal of cooperation with other nations, especially with Latin American countries, based on the mutual respect of their respective sovereignty, the self-determination of each country, and the universal guarantee of individual and social human rights. Finally, the preamble of the 1961 Constitution rejected war, conquest, and economic domination as instruments of international policy, and honoured the historical heritage of the nation, forged by the people in their struggles for Freedom and Justice, as exemplified by Simón Bolívar, the Liberator.


The 1961 Constitution marked a peaceful transition from an authoritarian regime to a democracy and civil governance.\(^{241}\) This written text established the scope and the limitations of the government’s authority. It set a strict separation of powers, establishing three main branches of power: the national executive, with the President as the head of the State; the bicameral legislative branch, with elected senates and deputies; and finally the Supreme Court of Justice, with nine justices representing the judicial power. Leaving behind years of repressive dictatorial regimes, these branches of government interacted with each other in complex ways to embody the legitimate authority of the country. During this era there was the belief that the Constitution properly had every possible answer to the problems confronted in law. The 1961 Constitution became the supreme law of the country and provided consistent and rationalized solutions to political, social and economic issues. It was conceived as part of the Punto Fijo Pact (\textit{Pacto de Punto Fijo})\(^{242}\) to provide the framework for a respectful debate in the public arena, share a basic program of government, and respect the constitutional norm, including the outcome of an election.\(^{243}\) As is pointed out in the case of \textit{Guillén v. Mene Grande Oil}, the Constitution was conceived as “being precise, transparent, and reliable.”\(^{244}\) Certainly, the founding fathers of the 1961 Constitution, aware of Venezuela’s constitutional history, established a framework with very rigid procedures for amending or reforming the Constitution. In the belief that these would secure the rule of law, strict norms regarding the limitation on the exercise of authority were in place to hold officials accountable for their actions. According to Canadian legal and political commentator Gregory Tardi “the rule of law is animated by the fundamental principle that no one, whatever his or her function in society and no matter how high his or her status in the organization of the State, is above the law because of public administration policy or political justification.”\(^{245}\) Indeed, the Constitution represents the rules, principles and institutions that support the legal stability of the nation. Yet, it also needs to allow change to adapt to new social developments.

\(^{242}\) The Pact of Punto Fijo was a formal agreement signed by representatives of Venezuela's main political parties to ensure respect for the result of the 1958 presidential elections, to guarantee the supremacy of the Constitution and the preservation of the rising democratic regime.
\(^{243}\) Germán Carrera Damas, \textit{Una Nación llamada Venezuela} (Caracas, Monte Avila, 1983).


**Government Framework: Separation of Three Branches of Power**

The doctrine of separation of powers became an important feature of the 1961 Constitution. The structure and responsibilities of the public branches of the government were extensively codified in detail, with a strict division between branches and their functions. For example, the Executive Branch represented by the President and the cabinet was the legitimate authority responsible for the social, political and economic development of the country. The government’s bureaucracy grew stronger over the years, which translated into the involvement of the government in almost every aspect of Venezuelan life, making decisions that would affect the entire nation. To avoid placing too much power in one individual or group, Congress, as the Legislative Branch, had the ability to closely control government actions. As constitutional law professor, Carlos Ayala Corao explained at the time, “the attenuated Presidential system has established controls of parliamentary nature. These controls, although they have not modified the essence of the presidential regime to become a parliamentarian system, have established important changes in the original model of the pure presidential regime.”

The bicameral legislative branch had the responsibility to formally pass, amend, and repeal legislation. This included legislations to expand on the protection of constitutional rights called *Leyes Orgánicas* (organic laws). In addition, the house of deputies and the Senate exercised parliamentary accountability over the executive government by discussing and passing the national budget, and rejecting or approving the cabinet appointments. The Senate also had the responsibility to review and approve the signing of international treaties. More importantly, the Senate was the institution had the responsibility of exercising accountability over the Supreme Court. The Senators appointed the Supreme Court judges based on the criteria established in the Constitution. In addition, they had the ability to pass a motion of censorship against the Supreme Court judges who had lost the confidence of the Senate.

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246 *Constitución de Venezuela, 1961, supra* note 239. Provisions 181 to 199 of the 1961 Constitution contained the presidential responsibilities, including maintaining public order, conducting military operations as commander-in-chief, directing foreign policy as the nation’s chief diplomat, managing the national treasury as the head of the bureaucracy, appointing State governors and Municipal authorities as the head of the government, and managing the oil industry and state property.


249 *Constitución de Venezuela, 1961 supra* note 239
The Development of the Judicial Power: the Supreme Court of Justice

The Supreme Court of Justice had the final jurisdiction over legislation, administrative acts, and over any legal matter in the Republic. According to provision 46 of the 1961 Constitution, any governmental action inconsistent with the Constitution which impaired the rights and freedoms of the people, had no force or effect.250 The most important innovation in terms of the judiciary in the 1961 Constitution was to organize the Supreme Court in different specialized chambers or courts: Sala Plena (Plenary Chamber), Corte Criminal (Criminal Court, specialized in the specific area of criminal defence law), Corte de Casación (Court of Cassation), and Sala Político-Administrativa (the Political-Administrative Chamber). Under provision 215 of the 1961 Constitution, the Supreme Court had the constitutional jurisdiction to review and annul any legislation or government acts infringing upon constitutional liberties.251 Venezuela’s constitutional system progressively became more complex. Influenced by the French legal institutions and Venezuela’s constitutional history, the 1961 Constitution maintained the tradition of having a supervisory jurisdiction. The Corte de Casación (Court of Cassation), part of the legal system since the 1881 Constitution, had the responsibility to ensure the correct interpretation of the law. This Court had the power to overturn judicial decisions from lower and superior Courts. Individuals could seek to challenge the interpretation of law in civil, business, and labour issues made by lower or superior courts before the Corte de Casación, as an essential part of the Supreme Court of Justice.252 These challenges concerned specifically the interpretation of the law, rather than facts or any other concerns related to the case.253 This Court was an integral part of the Supreme Court of Justice, devoted, as the top of the hierarchy of the judicial system, to maintain the unification of the criteria used to interpret the legal system. Its mandate was to ensure that lower and superior courts achieved uniformity in their interpretation of the law.254

250 Constitución de Venezuela 1961, supra note 239, provision 46.
251 Ibid provision 215.
252 Emilio Mendoza, La Teoría de la Interpretación de los Contratos y la Jurisprudencia Venezolana (Caracas: Academia de Ciencias Políticas y Sociales, 2010).
254 Humberto Enrique Tercero, La Casación y su Evolución Histórica en Venezuela: Debate entre el Argumento Federalista y Unitario ó Centralista (Caracas: Ediciones Paredes, 2010).
This civil law institution was concerned with the coherent, logical and consistent interpretation of the law. Many cases brought to this Court dealt with constitutional rights, yet judges held that rigid rules set in the Constitution confined their discretion to enhance the stability and predictability of their decisions. Certainly, the 1961 Constitution was characterized by the formal procedures to follow in order to articulate a solution in social, political and economic issues. This is reflected in the Corte de Casación’s formal application of the written text of the Constitution. It limited the role of the judges so that they simply had to affirm whether the Constitution was been applied correctly or incorrectly. Judges allowed claims to be decided at this jurisdiction only based on arguments regarding misinterpretation of the written text in lower or superior courts. In many cases this Court refused to acknowledge the interpretation of constitutional rights because there were not enough procedures to do so. The interpretation of the Constitution was only a fair reading of the ‘black letter of the law’, giving no chance for constitutional innovation. Due to the Venezuelan industrialization, the branches of government had undergone a significant transformation. The emergence of a complex federal administrative structure reshaped the relationship between government and individuals. This phenomenon increased constitutional litigation and brought more social issues before the Court. The founding fathers of the 1961 Constitution incorporated the Political-Administrative Chamber into the Supreme Court of Justice to hold accountable those in power. This was an important innovation of the 1961 Constitution, because this Chamber was concerned with protecting or limiting, the rights and freedoms of the Venezuelan citizens. Inspired by the French legal system, the Venezuelan judicial system began to exercise judicial control over a wide area of administrative activity. The Political-Administrative Chamber was responsible for guaranteeing that government officials acted according to the Constitution. Judicial control of administrative action tried to subordinated government to the law of the land, while administrative institutions had to follow the fundamental constitutional principle of rule of law. The Court’s objective was to preserve consistency in the constitutional system. It

255 Escobar León, Estudios sobre Casación Civil, supra note 138.
256 Abreu-Burelli, La Casación Civil, supra note 202.
presupposed the veritable hierarchy of the Constitution, which rejected the acts that were not consistent with it.

**The Protection of Individual, Social and Economic Rights**

According to provision 46 of the 1961 Constitution, any governmental action inconsistent with the Constitution that would impair rights and freedoms had no force or effect. This provision refers to the doctrine of constitutional supremacy.\(^\text{259}\) It has been part of Venezuela’s constitutional heritage to recognize judicial review as an important responsibility of the Supreme Court. Provision 49 of the 1961 Constitution authorized the judicial power to protect the enjoyment and exercise of citizens’ rights and freedoms, while provision 50 recognized that although rights might lack specific legislation, the provision did not impair their exercise.\(^\text{260}\) In this regard, constitutional law professor Orlando Tovar Tamayo indicates, “the Supreme Court’s jurisprudence consistently has been deaf to these constitutional precepts [provisions 49 and 50]. Despite the written text of the Constitution, the Court held that, in the absence of a clear statutory authority it had no jurisdiction.”\(^\text{261}\) The jurisprudence enacted by the Court has held that *habeas corpus* is the only constitution remedy available to protect personal freedoms. Even though the constitutional text was clear about the protection of rights and freedoms, judges avoided providing a broader answer about this issue, limiting themselves to the determination of the constitutionality of norms. In the 1962 case of *Lola y Laura Gutiérrez v. Enriquecimiento sin Causa*, the Court dismissed the entrenched constitutional protection of provision 49, sustaining that there was no statutory authority that allowed the Court to grant such protection.\(^\text{262}\) In other words, the Supreme Court’s decisions disregarded constitutional protection, because citizens could only challenge the constitutional validity of a statute or other legal rule, even though the Constitution of 1961 had entrenched constitutional remedies to invalidate any act against rights and freedoms.\(^\text{263}\) The Court hesitated to provide proper protection, as established in the constitutional text, basing their arguments on the strict separation of powers and the proper

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\(^{259}\) *Constitución de Venezuela 1961*, supra note 239, provision 46.

\(^{260}\) *Ibid* provisions 49 and 50.

\(^{261}\) Tovar Tamayo, *Juridicción Constitucional*, supra note 43at 100.


role of legislation. Indeed, the judges were sceptical of judicial innovation regarding the protection of constitutional rights.

The Supreme Court’s jurisprudence repeatedly maintained the need for legislation to protect fundamental rights. For many years, the Court only allowed the protection of rights that related to habeas corpus, which was a legal proceeding for the individuals to seek relief from their unlawful detention. 264 In fact, it was understood that criminal courts had the jurisdiction to concede constitutional remedies. The Political Administrative Chamber tackled this issue, defining which court could hear challenges in favour of constitutional rights and freedoms established in the 1961 Constitution. “The jurisdiction of ordinary as well as superior criminal court, as it referrers the fifth transitional provision of the Constitution, is limited to knowledge habeas corpus cases. Any decision that is beyond this specific jurisdiction is overreach, invasive and usurps the Constitution.” 265 Most constitutional challenges did not go through the narrow scope that judges of the Supreme Court established. Many constitutional controversies did not get proper responses from the judicial branch. As Venezuelan constitutional scholar Rafael Chavero affirms, “this decision was interpreted by judges as well as the vast majority of trial lawyers as the denial of the right of constitutional protection entrenched in provision 49 of the Constitution.” 266

Constitutional supremacy presupposed a vibrant role for the Supreme Court to rule not only on the limits of power but also on issues of public interest affecting the rights set out in the Constitution. Venezuelans’ claims for constitutional justice began to get louder. With greater frequency, citizens started to challenge the lower court’s decisions. For example, in the 1981 case of Rondalera, a group of citizens challenged the decision of the governor of the District Capital to shut down an educational institution. The civil court favoured constitutional remedies, establishing that provision 49 of the 1961 Constitution not only referred to habeas corpus, but also showed the need for constitutional instruments to adjudicate constitutional rights and freedoms. 267 Although this decision was overthrown later by the superior court, it influenced the entire country. During the 1980s, the Court overruled

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266 Rafael Chavero, Amparo Constitucional en Venezuela (Caracas: Editorial Sherwood, 2000) at 23.
its own precedents to hear constitutional challenges based on Provision 49 and not on any other specific legislation.

The Supreme Court, in the landmark case of Andrés Velásquez (1983) enabled constitutional litigation for the protection of rights and freedoms without the limitation of any other legislation but the Constitution.

By accepting the current practice of constitutional remedies, the Court cannot help noticing that ordinary and superior courts should make a prudent and rational use of the rule contained in provision 49 of the Constitution. It is the judges’ task to compensate by an analogy and other tools of interpretation provided by the Venezuelan legal system, in cases where there is no law regulating the matter.

The innovation and novelty of constitutional judging was hidden largely by the use of a highly formalistic approach to adjudication. As Humberto La Roche, former judge of the Supreme Court of Venezuela, said, “the judge must always be convinced that he is in each case, the society’s expression of his time.” The Constitution is not an obstacle to arbitrary power it is the true foundation of freedom. Justice René Plaz Bruzual, judge of the Supreme Court of Justice during the 1961 Constitution, adds, “without a doubt, the necessity of constitutional injunction to protect and defend rights and freedoms is unquestionable. However, when a balance is made of the jurisprudence dictated by the Supreme Court, it is possible to see that the majority of constitutional challenges were denied, because of formal criteria such as admissibility procedures or jurisdiction.” It was after decades of decisions which denied protection of constitutional rights that on January 22, 1988, Congress enacted the Ley Orgánica de Amparo y Garantías Constitucionales (The Law on Constitutional Injunction of Rights and Guarantees). This constitutional remedy was already used in Mexico back in 1837, but it was only in the late 80’s that it opened the doors to a new era of constitutional litigation. Constitutional injunction (called in Venezuela “Amparo”) gained a tremendous popularity for the protection of constitutional rights and freedoms. As stated by John Rawls, “in a constitutional regime with judicial review, public reason is the reason of its supreme court.” Rapidly, constitutional litigation began to occupy lawyers, judges, and citizens in general. Individual, social, political, and economic rights established as part of the

270 René Plaz Bruzual, El Recurso de Amparo en la Legislación Venezolana (Caracas: Biblioteca de la Academia de Ciencias Políticas y Sociales, 1989) at 28.
core of civil rights enabled individuals to challenge the constitutionality of wrongful acts that threatened or harmed the exercise of citizens’ rights.

Since the enactment of the constitutional injunction legislation, Venezuela’s constitutional litigation opened a new chapter. As Orlando Tovar Tamayo indicates, “it is noticeable that [Venezuela’s constitutional system] evolved from the criterion of political control, distinctive of continental Europe, to the criterion of judicial review, feature of the United States.”

Indeed, in the era of the 1961 Constitution, constitutional jurisprudence began an evolution that resembled the common law in Canada or the United States more than the French legal system that had influenced the founding fathers. The Supreme Court faced various challenges while developing constitutional remedies and protections for rights and freedoms. For example, in the 1986 case of *Gladys Rachadel*, the court held that provision 49 was intended to protect the constitutional rights listed in Title III of the 1961 Constitution. However, the Court denied such requested protection because the petitioner had to follow a specific procedure before exercising her right of defence at the administrative jurisdiction. The 1986 Case of *Héctor Valverde Aristimuño* reaffirmed the decision made in the 1983 case of *Andrés Velásquez* and established that a citizen’s right to appeal obligated the courts to provide an opportune answer to the case. In addition, the Court, in the 1986 case of *José Luis Caraballo*, held that constitutional injunctions could be used to challenge lower courts decisions that breached constitutional rights. In the 1986 case of *Augusto Olivo Gómez*, the Court held that because the petitioner did not follow a claim under the administrative jurisdiction, there was tacit consent with the content of the administrative act; thus constitutional injunction could not be applied. Moreover, in the 1986 case of *Registro Autónomo Permanente*, the Court established a set of thirteen characteristics that successful constitutional injunctions had to follow. The constitution timidly started the complex journey of defining the nature of constitutional meaning.

Another important legislation was the *Ley Orgánica de la Corte Suprema de Justicia (Supreme Court of Justice Act)*. Section 24 of the provision 42 provided the ability to request

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272 Tovar Tamayo, *Juridicción Constitucional*, supra note 43 at 94.
the Supreme Court’s interpretation of legal texts.278 This strengthened the power of judicial review of the Supreme Court.

The Act was of major constitutional significance because it gave to ordinary people the ability to request petitions for constitutional interpretation. In this regard, Venezuelan law scholar Antonio Silva Aranguren explains,

[The request for interpretation] cannot be exercised in respect of any legislation; there must be a specific legal rule that allows it. The new Law of the Supreme Court of Justice Act advocated for the better constitutional protection of constitutional rights, the Supreme Court accepted the premise that rights and freedoms are desirable, refusing to apply legislative or executive acts that contravene the rights of citizens. Indeed, ordinary people had the ability to challenge the actions of the various institutions of government to safeguard most constitutional rights. Constitutional supremacy was broadly understood as the ultimate law of the nation that must be protected and any act contrary to its principles should be declared unlawful or out of the legal sphere.279

According to this piece of legislation, judges were better equipped to provide meaning of constitutionally entrenched rights. At the promulgation date of the above-mentioned legislation, only three laws consented to permit judges to interpret the law: the Civil Service Act, the Judicial Power Act, and the Electoral Act. The matters for which the Court could interpret the legislation from direct requests of citizens were restricted to these pieces of legislations. The legislative branch was cautioned to let the Court interpret the law. Although judges established the constitutionality norms, their application and performance were limited because judges were not used to interpreting or adjudicating constitutional rights.

The Transition to the 1999 Constitution

For many authors, during the 1961 Constitutional era Venezuela was able to consolidate a healthy democratic system.280 Indeed, as Political Scientist Peter Merkl wrote “it appears that the only trail to a democratic future for developing societies may be the one followed by Venezuela […] Venezuela is a textbook case of step-by-step progress.”281 For many, the Venezuelan society was the model of a pluralistic democratic society. Yet there

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278 Ley Organica de La Corte Suprema supra note 256 provision 42.
was increasingly a popular disillusionment with the Supreme Court, which did not offer proper protection of the people’s rights. Discontented with the corruption and mismanagement of the national treasury by the national government, the Venezuelan people started civil and military revolts.

The most crucial presidential elections in Venezuela’s democracy marked the path for the enactment of a new Constitution. 282 The leader of a failed attempt to violently overthrow the constitutional government, Hugo Chavez ran for the presidency under the platform that he would improve the living standards of the popular classes and that the only possible way to do so was by changing the 1961 Constitution. A majority of Venezuelans casted their votes in favour of this option hoping that the new president would solve the growing social inequality. The President claimed that he could call a national referendum asking the people if they approved a change of the Constitution, based on the principle of the people’s sovereignty. However, the 1961 Constitution established a strict procedure for its reform or amendment and did not recognize any other option, including the one proposed by the President. This proved to be a challenge for Chavez.

The Supreme Court had to hear arguments against the possible call for a national referendum to change the entire Constitution by the newly elected President of the Republic, and so the situation became more complexe. The President rose to power with the slogan that he would immediately sign a decree calling for a national referendum, letting the people decide whether or not to hold a general election for a new Constitution. 283 A group of citizens appealed to the Supreme Court requesting the interpretation of the Electoral Act. They argued to the Supreme Court that the Political Administrative Chamber had the responsibility to provide a specific answer to citizens’ concerns with the new President’s announcement. In this regard, constitutional law professor Tulio Alvarez affirms, “the problem is quite serious, on one hand the majority that supports the idea of a Constitutional Assembly has not defined the rules and institutions intended to alter the constitutional text. On the other side, those who do not welcome any need change.” 284 The Supreme Court was

282 Ellner & Salas, Chávez and the Decline of Democracy, supra note 235.  
284 Tulio Alberto Alvarez, La Constituyente: Todo lo que Usted Necesita Saber (Caracas: El Nacional, 1998), at 24 [Hereinafter Alvarez, La Constituyente]
set on deciding the future of the democratic system in Venezuela. Built rigidly, the 1961 Constitution did not allow for any other mechanism to amend or reform its content.

Explicitly articulated, the inviolability provision prohibited and condemned any attempt to violate the constitutional supremacy. The Court explained the balance between the people’s sovereignty and the constitutional supremacy, and it argued that the Constituent Power, as the people’s sovereignty, is what made the Constitution supreme:

This petition presented a double issue: If the Constitution, as the supreme norm can organize its own transformation process, the democratic principle would be just rhetorical. However, the Court must decide between the procedures highlighted in the constitutional text and the popular will of the people as the Constituent Power to carry out any alteration in the Constitution, which could affect the idea of constitutional supremacy. Originally, it was understood that the Constituent Power was a community political power to organize, regulate and restrict the actions of the public power. The idea of the people as a constituent power, as the active creators of the constitutional order, is inherent to its nature of sovereign power, unlimited and largely original, not governed by the legal rules that may have been derived from the established powers. Provision 4 of the Constitution of the Republic of Venezuela, devoted exclusively to the principle of popular representation, cannot be directly exercised. The only way is to deposit the vote. Yet the people’s sovereign power can be self-exercised. Undoubtedly, the person who has the power to delegate it, can also exercise it. This does not exhaust its powers, especially when it comes to the point where the Constitution itself recognizes this. Therefore, the possibility of delegating sovereignty by voting for the people’s choice did not impede the exercising of the people’s sovereignty on matters for which the Constitution has no explicit provisions. This leads to one conclusion: popular sovereignty becomes the supremacy of the Constitution when the constituent power wants to exercises its power.

Venezuela’s Supreme Court had to choose between enforcing the written norms explicit in the Constitution and assuming an active role relating to the social facts that went beyond the legal text. The Supreme Court had to decide whether to follow the majority’s desire for change, or to honour its oath to guarantee the constitutional supremacy. Although the main challenge of the Court was the possibility that a national referendum could undertake the drafting of a new Constitution, the Court tackled the balance between the people’s sovereignty and the constitutional supremacy. The Court had to respond to an advisory opinion request in December 1998, asking to ascertain whether the newly elected president could hold a referendum to convocate a constitutional assembly and allow the rewriting of the Constitution. The 1961 Constitution did not provide any such mechanism.

Some had argued it necessary to reform the 1961 Constitution to include such a provision. Instead, on December 16th, 1998, a human rights organization, the “Fundahumanos,” filed a case under the Venezuelan Supreme Court asking it to issue a constitutional interpretation concerning the constitutionality of holding a referendum for the approval of a constitutional assembly.

This organization, which included law scholars, argued that the 1961 Constitution could only be amended using the procedures explained in provisions 245 and 246. More specifically, provision 250 clearly stated the following:

This Constitution shall not lose its effect if it ceases to be observed due to acts of force or be repealed by any other means other than the ones it provides. In such eventuality, every citizen invested with authority or not shall have the duty to assist in the restoration of its actual effect. They will be judged according to that same Constitution and the laws issued in accordance with it, which appear responsible for the facts mentioned in the first part of the previous paragraph and leads government officials to be organized subsequently, if not helped to restore this Constitution. The Congress may approve by an absolute majority of its members the seizure of all or part of the assets of these same people and those who were illicitly enriched under the usurpation, to compensate for the damage caused to the Republic.288

In December 1998, the recently elected government, claiming to represent the will of the people, called for a Constituent Assembly to rewrite the Constitution. In addition, a group of citizens appealed to the Supreme Court requesting the interpretation of the Electoral Act. They argued to the Supreme Court that the Political Administrative Chamber had the responsibility to provide a specific answer to the citizens’ concerns regarding the new President’s announcement. Venezuela found itself in a situation where massive constitutional reform was an issue that needed to be resolved.

On January 19, 1999, the Supreme Court, under the Presidency of Judge Cecilia Sosa, ruled in favour of the referendum to call for a National Constituent Assembly to “transform the state and create a new legal system authorizing the President to select the procedures to elect the members of the Constituent Assembly.”289 The Court argued that the “Constituent Power,” as the people’s sovereignty, is what made the Constitution supreme. Under provision 181 of the Electoral Act, and based on the provision 4 of the 1961 Constitution, the Supreme Court agreed to hold a national referendum to begin the processes of drafting the new Constitution. 290

288 Constitución de Venezuela 1961, supra note 239, provision 250.
290 Constitución de Venezuela 1961, supra note 239, provision 4.
The decision in favour of the referendum remained controversial among law scholars. This new ruling justified the majority rule to impose a new Constitution, ending the validity of the 1961 Constitution. It became one of the most striking moments in Venezuelan constitutional history. In a unanimous decision, five justices of the Political-Administrative Chamber of the Supreme Court of Justice opened the floodgates for the unprecedented national referendum that ultimately led to the Constitutional Assembly’s drafting of a new constitution: the 1999 Constitution. Under the premise that sovereignty unquestionably originated from the popular will, as it was established under provision 4 of the 1961 Constitution, which recognized that citizens through universal and free elections exercised popular sovereignty, the Court argued in favour of the constituent power of the people. The Court understood “the people” as the sole creators of their own constitutional order, capable of organizing their own hierarchy of power and proper constitutional norms. The constituent power of the people was the true foundation of democracy. Therefore, it could not be constrained by the existent norms of the legal system. Such transcendental power went beyond the written text of the 1961 Constitution because it was for the people to decide what was best for their society. The Court considered the constituent power of the people as immanent to the already erected constitutional system that could perform profound changes to its own system. This did not contravene with the supremacy of the Constitution. The Court argued that, on the contrary, it was truly democratic to allow the constituent power to move constitutional changes forward as a genuine means toward the people’s will, ultimately making the Constitution supreme. Venezuela’s new constitutional system was underway. The national referendum had two questions: the first was whether to convocate the Constituent National Assembly and the second was whether voters accepted the procedures set forth by the president. Ninety-two percent of those voting said “yes” in response to the question about convoking a constitutional assembly, while eighty-six percent approved the

292 Brewer-Carias, Historia Constitucional de Venezuela, supra note 22.
winner-takes-all approach of the President (with an abstention rate of sixty three percent), which secured him one hundred and twenty-five members of the one hundred and thirty-one seats available in this new institution.

The President’s supporters dominated the creation of the National Constituent Assembly. These results could be interpreted one of two ways. On the one hand, Richard Gott states, “if Venezuelans had ever felt deprived of democratic practice; they were now in receipt of it in abundance.” While on the other hand, Brewer-Carías argues that “the Constitutional Assembly not regulated in the Constitution introduced major constitutional reforms, reinforcing the concentration of state power. This process in Venezuela was considered *a coup d’état*, giving rise to an authoritarian government that in recent years has destroyed the democratic system.” This Constituent Assembly, assuming the constituent power, dismantled Congress and intervened in the judiciary. As Tulio Alvarez indicates, “the problem was not its democratic convocation, but its uncontrolled power, product of the Supreme Court’s poor interpretation and resignation of exercised judicial review under the 1961 Constitution.” The Constituent Assembly, expecting to draft and adopt a new permanent constitution, took a prominent role in introducing major reforms to transform the State and create a new legal system. Because of the vast power given to the National Constitutional Assembly, Venezuelans witnessed the resignation of the Chief Justice of the Supreme Court of Venezuela, Cecilia Sosa, who had served on the Court since 1989. Chief Justice Sosa resigned from office because she felt that the new constituent assembly which was “created to write a new constitution for the country, was threatening the independence of both the legislative and judicial branches of the government.” Her fears came true when,

\[\text{CNE, Elecciones 99, supra note 289.}\]


\[\text{Gott, Chávez and the Bolivarian Revolution, supra note 283 at 144.}\]


\[\text{Jennifer McCoy & David J. Myers, eds., The Unraveling of Representative Democracy in Venezuela (Baltimore: Johns Hopkins University Press, 2006) at 279.}\]

\[\text{Alvarez, Constituyente, Reforma y Autoritarism del Siglo XXI, supra note 212 at 170.}\]

\[\text{Vicki Jackson & Mark Tushnet, Defining the Field of Comparative Constitutional Law (Westport: Praeger Publishers, 2002) at 10 [Hereinafter Jackson & Tushnet, Defining the Field of Comparative Constitutional Law].}\]
in December 1999, in a national referendum, Venezuelans voted in favour of a new constitution with the hope of a better future.

**Summary:** This chapter outlined the key characteristics and fundamentals of the 1961 Constitution focusing on its structure (250 provisions), its purposes and grand principles, the separation of three branches of power (executive, legislative and judicial), the Supreme Court of Justice and the birth of the judicial review to protect rights and freedoms, the grand principles of the nascent constitutional democracy, the birth of the federal state, and constitutional remedies (specifically, the Law on Constitutional Injunction on Rights and Guarantees, called “Amparo”). The respect that this Constitution acquired made possible the enforcement of its text for four decades, the longest stable period in Venezuela’s history (which was called “exceptional democracy”). This chapter also briefly discussed the transition towards the 1999 Constitution. A more detailed analysis of this last Constitution is in the next chapter.
CHAPTER 3


The twenty first century brought fundamental change in Venezuela’s constitutional system. After vigorously heated debates around the draft of constitutional changes, the National Constituent Assembly, surrounded with controversy, accomplished its main goal of writing a new Constitution. 303 Venezuelans with faith in a better future voted on a national referendum to approve the Constitution drafted by the Constituent Assembly. 304 On December 1999, Venezuela welcomed one of the world’s longest, comprehensive, and complex constitutions ever made. 305 To respond to the enormous social needs, the writers of the new Constitution embraced a more inclusive and understanding relation within and between the State and its people. This is blueprinted in the Constitution as the Democratic Social State of Law and Justice, which is not only concerned with the narrow focus of the individual rights alone, but also with what could be fair and just for the social whole. The 1999 Constitution declared a long and robust list of social rights, which entitle citizens to goods and services. This brought a new dynamic in terms of constitutional adjudication, resulting in a greater role for the Supreme Court. The judges got actively involved with their decisions on the ground of distributive justice. Indeed, the new Constitution amplified the power of judicial review, including a new Constitutional Chamber inside of the Supreme Court to deal with the proper interpretation of the Constitution. This chapter focuses on the new role and power of the Supreme Court to better comprehend the evolution of constitutional jurisprudence in Venezuela. It also provides a clear description of the constitutional system and the birth of new dynamic branches within the government. This chapter is organized in the following areas: a) the Democratic Social State of Law and Justice; b) the Protection of social rights; c) the Power of Judicial Review: The Constitutional Chamber; d) Government Framework: Separation of Five Branches of Power.

303 Alvarez, Constituyente, Reforma y Autoritarism del Siglo XXI, supra note 212.
304 CNE, Elecciones 99, supra note 289.
305 Carrillo Artiles, Tendencias Actuales Derecho Constitucional, supra note 291.
Priorities of the Democratic Social State of Law and Justice

The second provision of the 1999 Constitution states, “the Bolivarian Republic of Venezuela constitutes a Democratic Social State of Law and Justice that defends the superior values of life, freedom, justice, equality, solidarity, democracy, social responsibility and, in general, human rights, ethics and political pluralism.” The Constitution embeds a set of written principles that are the product of Venezuela’s long constitutional history. They represent the true identity, history, and culture of the Venezuelan society. The 1999 Constitution enumerates a vast set of social rights, giving constitutional protection to those desirable goals of social justice. The distributive justice, as an integral part of the welfare state described in the new constitutional system, allows citizens to challenge legislation or government acts that obstruct the State’s distribution of resources. For example, provision 75 of the 1999 Constitution states “family as a natural association in society, and as the fundamental space for the overall development of individuals.” This represents a ‘superior value’ that is inherent to the Venezuelan society, and receives constitutional protection on the grounds that it is an important standard for the community. This also includes marriage, defined in the Constitution as a stable union between a man and a woman. The Constitution also protects motherhood, and fatherhood to guarantee assistance and protection to mothers and fathers that take care of their children, from the moment of conception, throughout the pregnancy, all the way to childbirth. It also includes the obligation of a father and a mother to raise, educate, and care for their children, along with the obligation to pay alimony in the case of divorced parents. Indeed, the 1999 Constitution provides a regulatory framework to guarantee that people meet their needs, in order to live a decent life. In fact, the 1999 Constitution guarantees that every person has the right to adequate, safe and comfortable housing, with appropriate essential basic services, making the government responsible for providing social policies that help those in need to construct or purchase houses. Certainly, social rights entrenched in this constitutional text require a

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306 Constitución de la República Bolivariana de Venezuela, [30/12/1999] Gaceta Oficial No 36.860, provision 2. (Hereinafter Constitución de la República Bolivariana de Venezuela, 1999)
308 Constitución de la República Bolivariana de Venezuela, note 306, provision 75.
309 Ibid, provision 76.
strong sense of responsibility and a new interpretative approach from the Court towards those in need.\textsuperscript{310}

The constitutional protection of social rights in the new Venezuelan constitution goes beyond traditional rights. It includes the right to a public health system as part of the right to life, giving the State the responsibility to develop policies that will improve the quality of life, welfare, and access to public services that protect the health of the Venezuelan society.\textsuperscript{311} In addition, the 1999 Constitution specifically establishes the public character of the health system. Moreover, the new constitutional text entitles citizens to obtain productive work that enables them to a dignified and decorous living.\textsuperscript{312} In fact, it guarantees the equality between man and woman in their economic activity, also requesting from the State the improvement of working conditions. It incorporates broad protections for workers, recognizes the role of trade unions, protects the rights to strike and association, and provides a detailed regulation concerning labour benefits, such as vacations, pensions, and minimum wage. Also, in Venezuela, cultural and educational rights are accessible to everyone for free, from kindergarten to university.\textsuperscript{313} The Constitution enshrines the pre-eminence of human rights and states that their defence and development is one of the essential objectives of the country.\textsuperscript{314} The protection of aboriginal and environmental rights is another important innovation. It is the recognition of Venezuelan aboriginal community’s political, economic, and cultural, customs, practice, language, and ownership rights.\textsuperscript{315} The Constitution guarantees ethnical, cultural and spiritual existence of diverse aboriginal communities in Venezuela, including protecting their own self-government, education system, language, tradition, and values.\textsuperscript{316} Moreover, the Constitution entrenches the duty of ‘each generation’ to protect and maintain the environment for the benefit of society as a whole.\textsuperscript{317}

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\textsuperscript{311} Constitución de la República Bolivariana de Venezuela 1999, supra note 306, provision 83.
\textsuperscript{312} Antonio Ramírez, “La Seguridad Social en la Constitución de la República Bolivariana de Venezuela” in Libro Homenaje a Fernando Parra Aranguren (Caracas: Tribunal Supremo de Justicia, 2001).
\textsuperscript{313} Constitución de la República Bolivariana de Venezuela, supra note 306, provisions 98 to 111.
\textsuperscript{314} Allan Brewer-Carías, Principios Fundamentales del Derecho Público (Caracas: Editorial Jurídica Venezolana, 2005).
\textsuperscript{316} Constitución de la República Bolivariana de Venezuela 1999, supra note 306, provision 199.
\textsuperscript{317} Ibid, provision 127.
\end{flushright}
individuals in the Venezuelan territory. Most countries in the region followed similar steps to guarantee social rights to bridge the gap of inequality.

The Constitution obtained its legitimacy through a historic national referendum. It was the first approved by popular referendum in Venezuelan history. Replacing the long-standing 1961 Constitution, the 1999 Constitution became the current and twenty-sixth Constitution of Venezuela. From the 250 provisions contained in the past 1961 Constitution, the structure of the 1999 Constitution was enlarged to 350 provisions. It has more than 36,000 words devoted to the political organization of the country as well as a long and robust list of rights to stay current with social changes. For example, a more comprehensive set of women’s rights are included, following the international treaties created with respect to this subject. In addition, the 1999 Constitution gives importance to the environment, guaranteeing protection against toxic and hazardous waste from entering the country, as well as avoiding the manufacture and use of nuclear, chemical, and biological weapons. Another example under provision 128 of the 1999 Constitution guarantees the preservation of national parks, ecological processes, and natural monuments, following the premises of sustainable development, including public consultation and information campaigns. Venezuelans have the opportunity to force public officials and private organizations to preserve the ecological balance, making the constitutional jurisdiction active in terms of environmental accountability. In addition, the new Constitution enhanced educational, cultural, and economic rights already found in the 1961 Constitution. These constitutional provisions provide broad and extensive rights for all citizens to reflect and reinforce their social needs. The impact of social constitutionalism is that it reshapes the accepted tradition of centralized authority and presidential powers, because it is, in the end, up to the jurisprudence of the Supreme Court to provide concrete definitions, limitations, and extension of these constitutional rights. Yet, the 1999 Constitution also empowers the President to dictate public policy that impact people’s everyday life. It is the role of the Supreme Court to ensure that these rights remain real rather than empty promises.

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318 Ibid, provisions 71 to 74.
321 Constitución de la República Bolivariana de Venezuela, supra note 306, provision 128.
The Protection of Social Rights

The strictly rigid constitutionalism is now part of Venezuela’s history. The 1999 Constitution restructures the constitutional system to welcome a more flexible and adaptable Constitution. The Supreme Court is crucially important because it is the institution responsible for providing concrete meaning to a vast range of rights, including individual, political, and economic rights to aboriginal groups, women, and society as a whole. Constitutional judging takes a more important role, giving the judiciary an overwhelming responsibility to decide the sense, scope, and priority of such desirable goals entrenched in the constitutional text. Although, judges should not get involved in making policy decisions, their interpretation of the rights and freedoms can define or enrich these goals or even obscure them. Since the enactment of the 1999 Constitution, the relationship between the public officials and the citizens has become increasingly complex. Indeed, there is a growing number of conflicts and intense disagreements erupting between the two. The population, more aware of its rights and duties, is calling for greater efficiency from those who represent them within the government, claiming the enforcement and enjoyment of the written social rights, as it is promised in the Constitution. The direct effect is that Courts, specifically the Supreme Court, are now the major protagonists of the most discussed issues in the country. The Court has the authority to guarantee the rule of law as a barrier to the exercise of arbitrary power, but this authority also extends to helping attain certain social goals by implementing the robust list of rights entrenched in the Constitution. Individual, social, political, economic, indigenous and environmental rights not only serve to restrain unlawful exercise of power and authority but also advance the well-being of the community. The 1999 Constitution goes as far as saying that everyone has the right to enjoy and exercise their rights, including those not expressively mentioned in the Constitution.322 The Venezuelan constitutional entrenchment of fundamental rights does not end with those written in its text. Indeed, according to provision 27 of the 1999 Constitution, the inherent rights of individuals not expressly mentioned in the Constitution are also an integral part of the constitutional rights of the Venezuelan citizens. In other words, the Constitution offers a certain flexibility and adaptability to new social circumstances by giving the opportunity for judges to introduce ‘inherent rights’ that have not been written in the Constitution. From this point of

322 Constitución de la República Bolivariana de Venezuela 1999, supra note 306, provision 27
view, the rigorous respect of the constitutional text is a thing of the past, giving a new role to judges.

Part of the new role of the Supreme Court of Justice urged the judges to provide substantive content to the robust list of rights when dealing with social issues. The Court has jurisdiction over all range of issues, including federal, regional, and municipal matters. It is organized into diverse chambers – the Constitutional Chamber, the Political and Administrative Chamber, the Labour Court, the Cassation Court, the Electoral Court, the Criminal Court – and it has thirty-two judges. In order to be eligible for appointment at the Supreme Court, individuals must have the Venezuelan nationality, a minimum of fifteen years of law practice or a post-graduate degree law or have been a senior member of the faculty of law for a minimum of fifteen years, or the judge of a superior court with at least fifteen years of experience. They must also possess a recognized sense of integrity and have a good reputation. The Venezuelan judicial system can be described as a complex pyramid, following district and municipal courts, as well as trial and appeal courts that deal with civil and criminal matters. There are courts with special jurisdiction in the following areas: business, labour, taxes, administrative, juvenile, military, and agriculture. Judgments from the superior courts may be appealed at the next level of the hierarchical order. Superior courts hear appeals of the lower courts, while their decisions can be challenged at the highest jurisdiction of all, the Supreme Tribunal of Justice. In terms of constitutional rights, citizens have the opportunity to challenge any act or decision directly to the Supreme Court, specifically to the Constitutional Chamber. In fact, this gives citizen the opportunity to disguise as legal issues the most difficult social concerns and present them to the Constitutional Chamber for a decision. The social precepts in favour of the disadvantaged promote the debate of social question at the Supreme Court level rather than at the National Assembly or any other branch of government. This is also encouraged by the fact that the 1999 Constitution guarantees the “free access to justice, available, impartial, transparent, autonomous, independent, responsible, fair, and expeditious, without improper delays,

323 Ley Orgánica del Tribunal Supremo de Justicia, Gaceta Oficial, N° 37.942 [20/5/2004]
324 Constitución de la República Bolivariana de Venezuela 1999, supra note 306, provision 263.
325 Rubén Laguna Navas, La Sala Constitucional del Tribunal Supremo de Justicia: su Rol como Máxima y Última Intérprete de la Constitución (Caracas: Universidad Central de Venezuela, 2005). [Laguna-Navas, Sala Constitucional: Máxima Última Intérprete de la Constitución]
formalisms, or useless relocations”. 326 This provides citizens access to the highest constitutional jurisdiction to request the guarantee of their social rights above formal criteria that could be considered a barrier to accomplish the social goal of the constitutional text.

The Power of Judicial Review: The Constitutional Chamber

Perhaps the most important innovation of the new constitution is the creation of the Constitutional Chamber, as the Court with the responsibility to provide clear meaning to the Constitution. Although each court has the duty to protect the constitutional rights, not every court or tribunal has jurisdiction to elucidate constitutional challenges. This new Constitutional Chamber inside of the Supreme Court of Justice exercises the constitutional jurisdiction. It is responsible for the centralized method of constitutional judicial reviews. 327 The 1999 Constitution significantly increased the role of the judges to hold legally binding decisions in order to guarantee the supremacy and effectiveness of the constitutional text. This has given the judges the power to decide what is right and just in society. The judges of the Constitutional Chamber empowered with a wide scope to declare the invalidity of inconsistent government acts or to review laws for constitutionality, became the living guardians of the Constitution. The emphasis of the 1999 Constitution was to place the Constitutional Chamber at centre-stage of the most dramatic debates of our times. Framers, inspired by the French and German Constitutional Courts, 328 centralized the judicial review in the hands of specialized constitutional judges inside of the Supreme Court to protect the integrity of constitutional supremacy. According to Venezuelan constitutional law professor Jesus María Casal, “in Venezuela, we aim to make one institution responsible for the constitutional jurisdiction, without being a constitutional court, as in European countries, where the court is above any jurisdiction.” 329 Indeed, the rise in social demands resulted in the introduction of a specialized chamber inside of the Supreme Court for the adjudication of social rights. The mandate of the Supreme Court is to advance the cause of justice in hearing legal questions of fundamental importance and to defend the rule of law. However, the responsibility of the Constitutional Chamber to provide substantive content concerning vast social rights turned the judges’ attention towards social issues. The Constitutional Chamber

327 Brewer-Carias, Constitución 1999, supra note 319.
329 Casal, Constitución y Justicia Constitucional, supra note 142 at 85.
thereby became not only the ultimate interpreter of the Constitution, but also the one responsible for the enforceability of social goals entrenched in the constitutional text. In doing so, the judges took center stage to become the guarantors of social values and interest.

For many years, judicial review has been recognized as one of the main functions of the Supreme Court. Traditionally, in Venezuela, a civil law country where laws are written, codified, and accessible to all citizens, the responsibility of judges was to make decisions in terms of the written text rather than an interpretation of the Constitution. However, the evolution of Venezuela’s constitutional jurisprudence demonstrates that judges have been taking a different discourse to claim a more flexible and adaptable approach to deal with constitutional issues. Cases such as those of Corpoturismo, Tulio Briceño, Emery Mata Millán, and Bingo La Trinidad, are great examples of the transformation of the Supreme Court. To simply be concerned with determining the constitutionality of norms is no longer constitutional judging. It has become the opportunity to ventilate social concerns and solve them in legal terms. In fact, judges are called upon to answer questions about housing, health care, education, food and social security, which have repercussions across the entire country. In the face of this novelty, the interpretative approach of the Supreme Court has radically changed to try to address the social demands. The role of the Supreme Court is no longer understood as essentially technical and predictable. The Court has now set aside the formal view of being more concerned with the procedures to follow to institutionalize a more dynamic role for the judges. The 1999 Constitution makes a distinction between law and social justice in its preamble. It affirms that social justice refers to the share and equal distribution of goods with the majority of society. This has been considered by judges as an explicit invitation to participate actively in a wide array of social issues. Certainly, the amplification of social rights in the 1999 Constitution, along with the written constitutional responsibility of the Supreme Court to ensure them, has impacted the already shifting interpretative approach of the judges. Constitutionally granted, judges have enough discretion when it comes to deciding constitutional issues. Although they must follow the Constitution to provide forthright answers on important issues, judges enjoy a wide margin of appreciation and personal judgment to adjust the interpretation of the constitutional text. This raises the question of whether or not the judges are indeed applying the law objectively, and if so, to what degree. It could be argued that to decide social constitutional issues judges
need room for appreciation and flexibility.\textsuperscript{330} However, the reasoning behind landmark cases opens the debate regarding the role of the judges regarding the application of so often vague and overlapping rights.

\textit{Government Framework: Separation of Five Branches of Power}

The 1999 Constitution brought radical change in the Venezuelan legal system; from renaming the country, redesigning the flag and shield of arms, increasing the number of branches of power, and giving a new role to the Supreme Court, to placing an overwhelmingly important amount of power in the hands of the President. One concept that changed the dynamic of the country is the Participatory Democracy. In this regard, Roberto Gargarella says, “defenders of participatory democracy proposed the establishment of a variety of institutional mechanisms, capable of ensuring a much stricter connection between the representative and the people.”\textsuperscript{331} This particular model engenders an active civil society involved in every aspect of the social, political, and economic life. Indeed, social issues can only reach the judges’ bench only if an active citizen requests their rights and freedoms. Yet, public policy, in most cases, is still made by those elected officials representing the people. Participatory democracy attempts to empower the people to deploy deliberation and active participation in the environmental, economic, social, and political decisions that have national transcendence. Section 71 of the 1999 Constitution entrenched the popular referendum mechanism that can be triggered at the initiative of the president, the national assembly, or at least ten percent (10\%) of the registered voters to consult the population on national matters. Although the Supreme Court of Justice has a highlighted role in Venezuela’s society, any democratic system needs a proper balance. In this regard, professor Brewer-Carías writes, “the essence of the principle of separation of powers in the Constitution is that every branch of public power has its own functions. These are carrying with autonomy and independence in a system of checks and balances, in which any organ of public power is subject to another, except concerning the mechanisms of judicial review, tax control or the protection of human rights”.\textsuperscript{332} One of the most significant innovations of the 1999 Constitution is the separation of powers in five branches, with the hope that this would

\textsuperscript{330} Jeff King, \textit{Judging Social Rights} (New York: Cambridge University Press, 2012) at 97
\textsuperscript{331} Roberto Gargarella, Pilar Domingo & Theunis Roux, \textit{Courts and Social Transformation in New Democracies: an Institutional Voice for the Poor?} (Aldershot: Ashgate, 2006) at 23
\textsuperscript{332} Brewer-Carías, \textit{Historia Constitucional, supra} note 22 at 184.
provide democratic accountability to the system. In the words of our Liberator, Simón Bolívar, “it is harder to maintain the equilibrium of freedom than to endure the weights of tyranny.”333 In an endeavour to maintain equilibrium between the branches of government, the Constitution structured the state power around five branches of government.

The drafters of the 1999 Constitution envisioned a system where the executive, legislative and judiciary branches where accountable to the people by el Poder Ciudadano (the Citizen Power) and el Poder Electoral (the Electoral Power). However, the written text gave a preponderant role to the Executive Power. In fact, under the 1999 Constitution the President has, more than ever, a vast set of responsibilities.334 This is problematic for the stability and real social change. The excessive power concentrated in the hands of the President has thwarted the popular empowerment promised by the 1999 Constitution. Although the 1999 Constitution provides a clear and strict separation of power between five branches, the four other branches of the government have been overpowered by the executive one. In addition, the Constitution diminishes the importance of the other branches for holding those in power accountable. For example, the Legislative Power became an elected unicameral congress, named the National Assembly, and responsible for the initiation, elaboration, discussion, and enactment of national legislation. However it is no longer the place to discuss important national issues. Instead, the Supreme Court of Justice in practice is dealing with more national issues than never before. Moreover, El Poder Ciudadano (the Citizen Power) is composed of el Defensor del Pueblo (the Defender of the People), el Procurador General (the General Prosecutor Office or General Attorney Office) and el Auditor General (the General Auditor Office). They are responsible for the ‘public ethics’. For example, the Citizen Power is responsible for preventing, investigating, and punishing any public action that undermines the public ethics.335 The decisions of this branch are binding to any public institution, including the executive, the legislative and the judiciary. The 1999 Constitution has established a particular procedure that permits the Citizen Power to remove judges from the Supreme Court if they undermine the public ethics.

333 Writings of Simón Bolívar, supra note 57 at 35.
334 The 1999 Constitution provides an exhaustive enumeration of the President of the Republic twenty-four, (24) specific responsibilities including: enforcing the Constitution and the law, maintaining public order, directing foreign policy, conducting military operation as Commander in Chief, declaring the state of emergency, restricting constitutional rights, dissolving the National Assembly, calling referendums, approving laws been drafted by the National Assembly, and managing state property.
335 Ley Orgánica del Poder Ciudadano, Gaceta Oficial, Nº 37.310 [25/10/2001].
with the goal of establishing certain judicial accountability. This is problematic for the independence of the judiciary and a threat to the stability of judges’ tenure. Yet, the Defender of the People, the Auditor General, and the General Prosecutor Office are subject to removal by a ruling of the Supreme Court, a way of balancing their powers.

*El Defensor del Pueblo* (the Defender of the People) is responsible for representing the interest of the citizens in order to protect their rights and freedoms established under the Constitution and international treaties on human rights. However in the last decade there has been an unprecedented disregard for basic human rights, which has ended in several cases with the intervention of the Inter-American Court of human rights.\(^{336}\) Moreover, *El Procurador General* (the Office of Public Prosecutor) is responsible for guaranting that the criminal justice system maintains a balance between the public order and the preservation of the rights and freedoms. In addition, the prosecutor’s office is in charge of every criminal investigation, including filing the appropriate legal actions to hold liable public officials for civil, labour, criminal, administrative, military, or disciplinary offences.\(^{337}\)

*El Auditor General* (the General Auditor Office) is responsible for holding accountable elected officials regarding the stewardship of revenues, expenses, and public property. This branch does more than just audit government departments and agencies, it also controls the public debt, conducts investigations against any public official, and applies the respective sanctions to those public officials that did not conform to their functions. In addition, it reviews the results of public policies and decisions made by public-sector agencies, and finally files legal actions against those public officials that mismanage public finances.

*El Poder Electoral* (the Electoral Power) is in charge of holding municipal, regional or national elections. It also regulates the political party fundings, in order to ensure the integrity and transparency of the election campaigns. This branch is responsible for counting, certifying and announcing the results of municipal, regional, and national elections. Based on the concept of participatory democracy, provision 70 of the 1999 Constitution the participation and involvement of people in public affairs is the direct application of the principle of sovereignty. In addition, it enumerates the ways by which citizens can make their voices heard during important decisions; for example: voting to fill public offices,

\(^{336}\) Laurence Burgorgue Larsen & Amaya Ubeda de Torres, *The Inter-American Court of Human Rights, Case Law and Commentary* (New York: Oxford University Press, 2011) at 189

\(^{337}\) *Ley Orgánica del Ministerio Público*, Gaceta Oficial, Nº 38.8647 [19/03/2007].
referendum, consultation of public opinion, mandate revocation, legislative, constitutional and constituent initiative, and open forums.

The Constitution structures interdependent branches of government that would assist each other to enhance the public confidence, yet the overwhelming responsibilities granted to the President and his cabinet made citizens see the Supreme Court as the only guarantor. Paradoxically, the various branches that were created to separate the powers within the government, in the end, remain all accountable to the the Supreme Court.

**Summary:** This chapter provided an overview of the 1999 Constitution, the longest and most compressive Constitution in Venezuela’s history. This chapter focused on the following aspects: the key characteristics and innovations of the Constitution, the government framework, the protection of rights and freedoms with an emphasis on social rights of the Democratic Social State of Law and Justice, the new Supreme Tribunal of Justice (TSJ), and the power of judicial review. The 1999 Constitution marked the history of Venezuela by introducing different changes, from the name of the country (the new Bolivarian Republic of Venezuela) to an increased number of branches of power, as well as the birth of the Constitutional Chamber, strengthening the power of judicial review. The structure of this Constitution was enlarged to contain 350 provisions devoted to the political organization of the country as well as the formal acknowledgment of rights and freedoms. In addition to the executive, legislative, and judicial power, this new Constitution added the Citizen Power and the Electoral Power, with specific responsibilities established in the constitutional text. The supremacy of the 1999 Constitution has been recognized by the jurisprudence of the Supreme Court in cases such as those of Corpoturismo, Tulio Briceño, Emery Mata Millán, Bingo La Trinidad, and Baker Hughes S.R.L. The next part of this study will focus on the analysis of the Supreme Court’s constitutional jurisprudence over the last five decades.
PART II

THE CONSTITUTIONAL JURISPRUDENCE DEVELOPED BY THE SUPREME COURT OVER THE LAST FIVE DECADES

This part of the study focuses on the second section of the theoretical framework; referring to the evolution of the Supreme Court’s constitutional jurisprudence over the last five decades in Venezuela. As it was stated in Part I of this work, in Venezuela judges hold the power of judicial review to strike down legislative and government acts, thereby protecting constitutional rights. Constitutional judges are the final arbiters in hearing and deciding legal questions of fundamental relevance in Venezuela. Judicial review is expressly provided to judges by the Venezuelan Constitution and by judicial mandate. Although the Venezuelan legal system is civil law, the interpretative approach to deal with constitutional cases has evolved over time. As comparative law scholars have also argued, “the world’s systems of constitutional review are in many respects converging: similarities in theory and in practice, procedures, and jurisprudential issues occur in recent decades.”

Hogg and Bushell argue that, “judicial review is legitimate in a democratic society because of its commitment to the rule of law. Judicial review, they say, is a doctrine fundamental to the constitutional democracy.” According to Venezuelan constitutional law scholar Maria Luisa Tosta, arguments of legal theories have been found in outstanding publications in Venezuela, which have left a tradition in law schools around the country. In the view of Ronald Dworkin, the most influential legal philosopher of our time, constitutional interpretation reflects an underlying theory about the general character of law. Certainly, judges develop jurisprudence under the overt or subliminal use of leading legal theories.

This part of the study attempts to demonstrate the progression of Venezuelan constitutional jurisprudence over more than five decades, in which judges have developed their own style using certain approaches to constitutional interpretation.

338 Jackson & Tushnet, Defining The Field of Comparative Constitutional Law, supra note 302 at 459.
Based on the assumption that there is a connection between prominent legal theories and constitutional jurisprudence, a centerpiece of this study consists of a analysis of constitutional decisions of the Supreme Court to appreciate the approaches to constitutional interpretation developed over half of a century. This analysis is primarily occupied with exploring the arguments used to justify constitutional decisions. Specifically, this work provides an overview of the Supreme Court reasoning that approximate with main legal theories. This is referred to the arguments offered by judges that are comparable with theories such as Legal Positivism in the era of the 1961 Constitution, Legal Realism and Dworkin’s adjudication theory in era of the 1999 Constitution. As it will be seen in the next chapters, the last fifty years of constitutional jurisprudence in Venezuela, the interpretative approach of the Court have evolved from a strict application of the ‘black-letter-words’ that can be seen as a formalist conception in 1961 to a more flexible, adaptable and even outside the law functionalist conception that began with the new promulgated Constitution of 1999. However, the Court’s interpretative approach in the last few years has upholds particular limits on freedom of expression that are threats to the enjoyment of this right.

The chapters are the following: Chapter 4 The theory of Legal Positivism in the constitutional jurisprudence developed by Supreme Court in the Era of the 1961 Constitution. Chapter 5 The Theory of Legal Realism in the constitutional jurisprudence developed by Supreme Court in the Era of the 1999 Constitution. Chapter 6 The Ronald Dworkin’s Theory of Adjudication in the constitutional jurisprudence developed by Venezuelan Supreme Court. Chapter 7 Freedom of Expression adjudication in the constitutional jurisprudence developed by Venezuelan Supreme Court over the last five decades. Chapter 8 will discuss author Ronald Dworkin’s defence of principles, closely related to Chief Justice Aharon Barak’s purposive theory of constitutional interpretation theory; each one bringing its own unique insights to the field of constitutional interpretation.
CHAPTER 4
CONSTITUTIONAL JURISPRUDENCE IN THE ERA OF THE 1961 CONSTITUTION

As a practical presentation of the evolution of Venezuela’s constitutional jurisprudence, this chapter aims to introduce the analysis of the most relevant constitutional decisions made during the forty years of enforcement of the 1961 Constitution. As seen in previous chapters, the application of black-letter law has predominated in the rationale behind constitutional decisions since La Alta Corte Federal and La Corte de Casación. Indeed, judges have been treating the Constitution as a system of rules, applying them logically, regardless of moral or policy implications. Although legal positivism was not discussed by name, the constitutional jurisprudence of the Supreme Court during the enforcement of the 1961 Constitution reflects arguments drawn from this school of thought. Many of the decisions regarding the constitution only considered the validity of the source of the law regardless of its merits as seen in moral or policy terms. As the positivist legal philosopher Joseph Raz explains, “law has a source if its content and existence can be determined without using moral arguments. The sources of a law are those facts by virtue of which it is valid and which identify its content.” 343 The early years of the new constitutional framework established after a dictatorship required judges to arrive at solutions deducting them from recognized rules and well-established facts. Venezuela is a civil law country where, generally speaking, the legal validity of a rule or decision depends on the fact that comes from an authority that enjoys the respect of society. Historically judges have been ruling in formal terms, by resorting to legal rules that followed the prescribed procedural forms. Indeed, during the 1961 Constitution most of the constitutional cases heard by the Supreme Court ended with restricted decisions to declare the constitutionality of laws, without entering into debates about other factors that could affect the outcome of the decision. This essentially formalistic view of constitutional interpretation maintained its evolution, as the Court engaged in more difficult cases.

Concepts of formalism, textualism, and positivism are used interchangeably in this study by the very fact that during four decades of jurisprudence, judges rationalized their decisions a fixed, coherent, gapless, autonomous, and comprehensive character of the law.

Of course, there are differences between each of these concepts, and not everyone will agree
with a particular definition; yet in order to explain the complexity of the judges’ own
approaches to constitutional jurisprudence during that time, it is helpful to use a particular
label. At the beginning of the 1960’s, the Court argued that the text itself presented in its
original language offered the most convenient way to solve the controversy. This is a
definition of textualism. As the Venezuelan constitutional system progressed, the Court had
to deal with more complex issues, yet it will be shown in this chapter that the judges upheld
in their decisions adherence to the strict formal procedures produced by the lawmakers,
disregarding social interest or public policy, to ascertain the blueprint of the Constitution.
This is a clear description of legal formalism, explaining the process with which the judges
reached their decisions. Formalism also constitutes one of the aspects of legal positivism,
and the conception of law that the judges assumed and translated in their decisions provides
an insight to the debate about this legal theory in Venezuela’s constitutional scholarship.
According to British legal scholar John Gardner, “legal positivism is normatively inert. It
only tells us that, insofar as judges should apply legal norms when they decide cases, the
norms they should apply are source-based norms.” In fact, as it is explored during this
entire chapter, the Supreme Court of Venezuela during the enforcement of the
1961 Constitution reduced constitutional interpretation to a formal ascertainment mechanism
of the norm. In other words, judges detached themselves from the context and concentrated
solely on the written rules of the Constitution. Therefore, their intent was to determine the
pedigree of a rule based on the authority of the Constitution. This sources thesis reduced the
role of the Court to that of an observer which steers clear of intricate discussions of morality
or politics in constitutional issues. Certainly, the decision-making style regarding
constitutional cases reflected this conception of the law in their jurisprudence. Since legal
positivism explains the general character of law, while legal formalism describes how judges
decide cases, and legal textualism demonstrates how to apply the law, it is safe to say that all
these concepts share a similar conception of the law.

The faith that Venezuelan citizens had placed in the judicial system was one of the
most defining characteristics of its democratic consolidation. In Venezuela, after a long
period of instability and dictatorship, citizens demanded an independent judiciary that could

Positivism]
guarantee impartiality and objectivity in its decisions. The judges of the Supreme Court took seriously the importance of consistency and predictability in their decisions to maintain stability and the rule of law. The idea of a higher law strong enough to rule over political, social, and economic issues flourished with the democratic system. More than ever, the Supreme Court of Justice was responsible for safeguarding the constitutional structures necessary to build a free society. The 1961 Constitution adopted a strict separation of powers that envisioned the judges as distancing themselves from dealing with social, political, and economic facts. Congress, on the other hand, was the only authority that had this responsibility. In practice, the arguments drawn to provide meaning to the constitutional text resulted in the application of rules that determined the constitutionality of norms.

**The Early Stage of Venezuela’s Jurisprudence**

Studies regarding constitutional theory in Venezuela began at the end of the 19th and at the beginning of the 20th century. Venezuelan scholars aimed primarily at categorizing and defining distinct schools of thought. Even if the judges did not mention in their judgements a particular legal theory, their decisions were the products of a process of legal education, which necessarily did so. The formalist view of legal positivism and ius-naturalism has been an important subject in the curriculum of Law Faculties in Venezuela.\(^\text{345}\) Traditionally, most judges and law scholars were graduates from Central University of Venezuela (UCV), founded in 1721, specifically from the Faculty of Juridical and Political Sciences, which was opened in 1827. Since the development of faculties of law across the country, the monopoly of the education of lawyers and judges is no longer at UCV. Prestigious Universities opened their door to new students of law, including the University of Zulia (LUZ), the Andrés Bello Catholic University (UCAB), the University of the Andes (ULA), the University of Carabobo. Particular attention has been drawn to the significance of the *Law Theory and Philosophy of Law* as a subject matter, at least in the last century.\(^\text{346}\) Indeed, the curriculum of these legal schools included diverse subjects related to the study of jurisprudence.

In 1975, Professor of Law María Luisa Tosta, from the Central University of Venezuela, surveyed twenty-two renowned Venezuelan Law scholars from different

\(^{346}\) Ibid at 27.
Venezuelan universities during the last century. She organized her research in two main periods: the classic period before 1960 and the contemporary period between 1960 and 1970. Her findings demonstrate that the surveyed law professors of prestigious school of laws used diverse secondary materials, denominated in classical law books. These books and materials embodied in their content a series of statements, arguments, and methodologies ascribed to each of the major schools of legal theory. The law professors of these surveyed law schools progressively increased their awareness of legal theories throughout the years of academic teaching and in their scholarly writings. Professor Tosta found that the prominent legal theories taught in Venezuela’s law schools were Natural Law, Legal Positivism, and Legal Formalism. She explained that the classic era was “the birth of the Venezuelan positivist doctrine, even though most authors were unaware of it at the time.” Moreover, she determined that although in the analysis of the content of the main books used by law professors and their students there were ius-naturalist statements and arguments, the general scheme of positivism was widely developed by law books and law professors. Certainly, natural law advocates such as John Finnis see the usefulness of legal positivism, in that the rule of law requires clearly identifiable law. It is important to observe that both positivism and natural law are generally formalist in approach. Specific arguments of the above mentioned legal theories were found embedded in the main publications used as primary books for training new lawyers and judges. Professor Tosta explained in her research the influence of these publications in law schools around the nation. Indeed, law professors during the 1961 Constitution used diverse books regarding the general theories of law, philosophy of law and other materials to study jurisprudence. Then, it is possible to affirm that law students that later on became lawyers and eventually judges of the Supreme Court trained with the central theme of formalist views of law, particularly legal theories such legal positivism and natural law, which influenced their perspective of Law in Venezuela. This is particularly important to understand holistically the evolution of Venezuelan constitutional jurisprudence.

347 Ibid.
348 Ibid, at 55.
349 Ibid, at 56.
The influence of legal theories in the jurisprudence of the Supreme Court during the 1961 Constitution is evident. For instance, the judges were trained in the most prestigious universities of the country under the insight of the main legal books and texts of that time. The book *Introduction to Law* by Rafael Pizani, published in 1956, widely used by law professors in their classroom, is “a clear and coherent description of the formalism thesis, which also shows a comprehensive knowledge of Kelsen’s thought.” Another example can be found in the doctoral dissertation of Rogelio Pérez Perdomo published by the Central University of Venezuela in 1974 under the title, *El Formalismo Jurídico y sus Funciones Económico-Sociales*. In his findings, Doctor Perdomo demonstrates that formalism was the prevailing jurisprudential doctrine of the time. Prior to the 1960s, Doctor Perdomo explains, judges were mostly ‘formalist and rule-oriented.’ Indeed, as it has been seen in previous chapters, the history of Venezuelan constitutionalism demonstrates that judges when dealing with constitutional controversies resolved to a strict adherence to the formal procedures and rules set in a recognized legal text. Moreover, Venezuelan constitutional law professor Allan Brewer-Carías, in his book entitled *Constitutional History of Venezuela*, explains that traditionally, the resolution of controversies was discoverable and deducible from a given body of legal written rules. In fact, *La Alta Corte Federal* was one of the first highest courts to deal with constitutional issues, in which its decisions resembled the arguments of classic legal positivism. The adherence to a gapless system of written legal rules to solve most of the cases was determinant in adjudication. Moreover, *La Corte de Casación* maintained the tradition by only considering the constitutionality of norms under the premises of the Constitution. Nonetheless, the legal reasoning of the judges of the Venezuelan Supreme Court during the 1961 Constitution maintained in part this tradition. In order to comprehend the evolution of Venezuela’s constitutional jurisprudence, it is necessary to examine not only its historical context, but also the legal education of lawyers in Venezuela. In fact, the literature on Venezuela’s legal education illustrates the influences

352 Rafael Pizani, *Introducción al Derecho* (Caracas, Librería Pensamiento Vivo, 1956) at 41.
of legal theories. The arguments used by the Court to deal with controversial cases reflect concepts of these mentioned theories.

**The Supreme Court's Legal Formalism in Constitutional Jurisprudence**

In Venezuela, as in any other country where there is a written constitution that includes a bill of rights and freedoms, interpretation remains an important part of the legal process. Surely, Venezuelan judges have developed constitutional jurisprudence under the manifest or unconscious use of legal theories. As said before the Supreme Court, when it had to deal with constitutional issues, concentrated its efforts on getting the facts and applying the law. According to Australian public law professor Suri Ratnapala, “legal formalism treats law as a closed and gapless system of rules that can be applied logically, without the need to take into account any policy or moral considerations.” Indeed, the solutions to controversial issues under the premises of legal formalism take a similar logical process to that of deducting the answer from the known rules, norms and set facts. The Jurisprudence of the Supreme Court during the 1961 Constitution in many aspects refers, without mention by name, to arguments offered in theories related to legal positivism. As Venezuelan law professor, José Melián Vega asserts, “under these premises it is possible to affirm that our national legal system was born under the influence of legal positivism.” This legal theory comprehends a vast literature and not everyone agrees on a particular definition for this large movement in jurisprudence. In trying to provide a definition it is possible to say that it “holds that the truth of legal propositions consists of the facts about rules that have been adopted by specific social institutions and in nothing else.” However, in the analysis of the evolution of Venezuela’s constitutional jurisprudence it is possible to distinguish arguments of different highly regarded legal theorists within the context of the already mentioned theory. This incorporates the English legal positivism, which includes theorists such as Thomas Hobbes, John Bentham, John Austin and H.L.A Hart, this, without mentioning the legal positivism, represented by Hans Kelsen. Books, manuals and other academic materials widely used in Venezuelan universities provided concise and comprehensive coverage of

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these already mentioned theorists, which have been translated in many languages, including Spanish.

The Supreme Court’s legal reasoning incorporates arguments from these theorists as they arrived in Venezuela’s scholarship. In fact, continental legal positivism, particularly Hans Kelsen’s *pure theory of law* was widely acclaimed in Venezuela before H.L.A Hart’s *Concept of Law*. The arguments of this jurisprudential movement happened to be helpful for the judges of the Supreme Court, helping them provide a more theoretical justification to their own approaches used to render decisions during the era of the 1961 Constitution.

Venezuelan Constitutional history demonstrates that when the Court had to deal with difficult constitutional controversies, the judges provided arguments extracted predominately from a particular legal theory. In the 1961 constitutional era, the Court’s rulings regarding the interpretation of constitutional rights and freedoms employed arguments predominantly from authors who can be placed within the context of the theory of positivism. In many constitutional decisions, the Venezuelan Supreme Court determined the meaning of the 1961 Constitution by arguing that the constitutional text was a gapless system of constitutional rules, which could not allow any other considerations outside of what was written in the Constitution. In other words, the judges justified their constitutional decisions by establishing the proper rule applicable to particular facts. The legal formalism in the Venezuelan jurisprudence during that time demonstrates that the judges gave preference to the written rules, procedures and other formal criteria to avoid policy considerations. Even when they had to fill in open-ended legal concepts, the judges did not express their subjective preferences. The role of the Supreme Court was then to deduce solutions to legal controversies solely according to the written legal text. The Venezuelan justices of the Supreme Court commonly claimed that even if their decisions could be considered controversial, their interpretation of the text remained objective and faithful to the Constitution itself.\(^{359}\) The jurisprudence of the 1961 Constitution used predominately the judges’ version of legal formalism, which understood the character of the law as those authors that are considered part of the legal positivism.

Original Intent: the Sovereignty Commands

The interpretation of the 1961 Constitution was substantially characterized by the acknowledgement of the intent of the framers of the Constitution. Indeed, one of the main arguments used by the Supreme Court was that a fair reading of the Constitution depends on the discovery or construction of the original intention of the people who wrote the text. At the early stage of constitutional jurisprudence, during the 1961 Constitution, the judges invoked in several decisions the so called Intencion del Legislador (the intention of the legislator) which can also be understood as the intention of the founding fathers of the 1961 Constitution. In many cases the Court claimed that in order to remain faithful to the Constitution the best possible practice was to unveil the intentions of the legislator behind the written norms. Similarly, in the American context, legal scholar Keith Whittington explains, “the rule of law in fact requires the deliberate fidelity of those who apply the law as well as to those who make it, or at least in terms of the law created by legislators. Originalism is the interpretative method associated with such fidelity to the law of the Constitution.”

This sort of Venezuelan originalism found some theoretical similarities with John Austin’s theory. The work of John Austin approaches law as an object of scientific study dominated neither by political theories nor by moral evaluation. Moreover, in terms of adjudication, according to law professor William Morison, Austin gave preference to the intention of the legislator, “the literal meaning of a statute ought to be given effect by the courts in Austin’s view because the words were weighed, and Austin assumes virtually by definition that the intended meaning of the legislator is what must be law.” The Supreme Court of Venezuela provided very similar arguments while dealing with the adjudication of constitutional rights at this stage of the Venezuelan jurisprudence. Although Austin’s legal positivism promoted the scientific understanding of legal rules, delimiting law from religion, morality, politics, and customs, it was open to exercise the ‘construction’ process in regard to legal interpretation. In a similar fashion, the judges of the Supreme Court viewed the adjudication of constitutional rights as the discovery of the

360 Keith Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (Lawrence: University Press of Kansas, 1999) at 217. [Hereinafter Whittington, Constitutional Interpretation]
361 John Austin, Lectures on Jurisprudence (New York: Henry Holt, 1875) at 150. [Hereinafter Austin, Lectures on Jurisprudence]
general intentions of those who wrote the Constitution. *El Legislador* was the main character that the Supreme Court judges began to analyse in order to uncover his intentions regarding constitutional rights. This particular approach had certain differences in comparison with those from other countries, and must be properly understood in the context of Venezuelan constitutionalism.

To illustrate the arguments of the Supreme Court of Venezuela, the 1962 case of *Lola y Laura Gutiérrez v. Enriquecimiento sin Causa* is a great example. This dispute between two ladies, regarding the profit gained by one of them without being the true owner of the subject, ended with an injunction claiming the need for a clear understanding of the right to due process. The Venezuelan Court asserted that the genuine interpretation of the law must give effect to the intention of the legislator who originally drafted the Constitutional text. This is one of the first cases to deal with Constitutional provisions, in which the Court took on the difficult task of assessing the meaning given to the words of the Constitution.

From the appellant’s arguments, this Court, based on the spirit and purpose of the founding fathers of the Constitution, ascertained that the alleged provision 49 of the Constitution intends to summarize the outlining of legal procedures, and leave other specific provisions under a subsequent law, especially those which could be heard on appealed. Indeed, the founding fathers were careful to regulate the defence of personal freedom, called *habeas corpus*, omitting other Constitutional rights and freedoms that could be protected by Constitutional remedies, such as *Amparo*. It is clear that this omission was deliberate and intentional, leaving the protection of Constitutional rights in suspense until the promulgation of the legislation. It reveals the clear intention of the founding fathers, which was to regulate the right of *habeas corpus*, deferring the effective implementation of Constitutional rights to the proper legislation.364

In the above extract of the judgement of the Supreme Court, it is possible to distinguish that the arguments used by the Court resemble those of John Austin’s thesis about the science of interpretation. Indeed, John Austin argued that, “the discovery of the law which the lawgiver intended to establish, is the object of genuine interpretation: or, (changing the phrase,) its object is the discovery of the intention with which he constructed the statute, or of the sense which he attached to the words wherein the statute is expressed.”365 The judges, in the case mentioned, literally analyzed the words of the Constitution in order to eventually lead to a legislator’s intent, illustrating in their opinion the true meaning of the norm. The Court tried to give meaning to provision 49 of the

364 *Lola y Laura Gutiérrez v. Enriquecimiento sin Causa* 1962, *supra* note 262
365 John Austin, *The Province of Jurisprudence Determined* (1832), (New York: Cambridge University Press, 1995) at 231
1961 Constitution using an approach based on the spirit and purpose of the founding fathers of the Constitution. The judges explained the meaning of the right to due process supported under the premise of what can only be called the original intention of the founding fathers.

In the case mentioned above, the Court examined the constitutional text to establish the meaning of the right of due process producing a decision that called for legislation from Congress. The Court held that it was not responsible for regulating or providing any other legal remedy until valid legislation was in place. In the end, this formalistic view of constitutional adjudication, in the examined case for example, does not give a proper solution in a concrete matter. Indeed, it only establishes that there is the need for a legislation to solve the case. Yet, in the meantime, there is no concrete answer to the claim.

Having said that, the judges of the Supreme Court firmly believed in the separation of power, and they had some sort of dialogue between the Courts and the Legislator, particularly when it came to requesting from the legislative branch the necessary rules and procedures to interpret the law. Under the premises of the intention of the legislator, the Court arrived at the conclusion that “this omission was deliberate and intentional by the founding father,” asserting that the true intention of the legislator, when Constitutional drafting, was to protect personal freedom through habeas corpus in criminal proceedings and no other right or freedom. This demonstrates that during the early stages of Venezuelan constitutional jurisprudence, the judges had a strict formalist view of the adjudication of rights, avoiding any extra legal considerations. The Venezuelan Supreme Court judges developed their own understanding of constitutional interpretation using arguments drawn from the main theorists of legal positivism and applied it to constitutional cases. In this particular case, the judges used their own particular understanding of originalism.

Constitutional scholar Dennis Goldford asserts in the American context, “originalism holds that the ‘original understanding’ of the Constitution is privileged: the original understanding of the Constitutional text in the writing-and-ratifying generation always trumps any different

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366 Constitución de la República Bolivariana de Venezuela 1999, supra note 306, provision 49:
“The courts protect every citizen of the Republic to enjoy and exercise the rights established and guaranteed by the Constitution. The procedure is brief and summary, and the competent judge shall have power to immediately restore the legal situation.”
understanding of what text in succeeding generations.” 367 During the early stage of Venezuela’s judicial review, the judges claimed that in Constitutional adjudication it was necessary to discover the framers’ intention, since, according to the Court’s rationale, the Constitution, as a broad document, was sometimes vague and not self-enforcing, and so it needed a judge’s exegesis to reveal the true intention of those who enacted Venezuela’s Magna Carta.

The Court emphasised in diverse cases that the concrete meaning of the Constitution was possible by revealing the true intention of those who wrote the document. This was necessary, according to them, to ensure that erroneous interpretations of the law did not contaminate the harmony of the entire legal system. The Venezuelan originalism was rigorous in scrutinizing the text of the Constitution, trying to identify the valid precept applicable to the case. In fact, Venezuelan law scholar María Luisa Tosta says, “the role of the interpreter and applicator of the law is limited to determining the applicable legal text and its meaning and interpretation of the intent of the legislative branch.” 368 Another example to illustrate this particular approach used by judges to adjudicated constitutional rights is the 1964 case of Néstor Moreno v. Municipalidad Distrito Federal, where the City Hall of Caracas expropriated the property of a citizen who, after a long litigation process, was able to bring his case to the Supreme Court requesting the protection to his constitutional entrenched right of property.

This Court asks the question: what will be the purpose of the legislation established in provision 47 of the Constitution where by any circumstances Venezuelans or foreign citizens could request any compensation when expropriations or damages were caused by non-legitimate public servants under the exercise of public functions? Indeed, the wisdom of the founding fathers here is clear; by establishing the personal responsibility of public servants, the legislator avoids compromising the Nation, Provinces, or Municipalities when officials exercise power by force or other forms. As it is established in provision 4 of the expropriation statute, citizens have rights that guarantee the use and enjoyment of their property as well as all legal remedies to request compensation when public officials act illegally. Therefore, this Court, by analyzing the Constitution and federal legislation and by discovering the legislator’s intent, precedes the current claim.369

In this particular jurisprudence, the judges based their rationale on the intention of the drafters found on the written text of the Constitution. The Court has repeatedly stated that the true interpretation of the Constitution must follow the intention of the founding fathers

368 Tosta, Ius Naturalism, Positivismo y Formalismo, supra note 340at 24.
finding them built in the constitutional text. This shows some similarities with the arguments of John Austin’s theory, “if the legislative purpose is ever defeated by judicial interpretation, it is not because of any legislative ambition on the part of judges, but because the legislative purpose was been ill-expressed.”\textsuperscript{370} The Court’s methodology to solve the case was to merely uncover from the text the legislative intention in the specific constitutional precept, following its particular originalist approach.

In the case of \textit{Néstor Moreno v. Municipalidad Distrito Federal}, the Venezuelan Supreme Court justified, under the premises of what can be called Venezuela’s originalism, that City Hall was not responsible for damages for wrong doing in the expropriation of Mr. Néstor Moreno’s property. In fact, the argument given by the Court concentrated exclusively on arguing that the intention of the drafters of the Constitution was to establish the personal responsibility of particular public servants, and not the institution as a whole, on wrong doing in their job to avoid compromising the entire government institution. However, judges avoided the main issue of Mr Moreno’s claim that was obtaining compensation for the illegal act against his property. Instead, the Court dismissed the case under the premises of some sort of originalism that from the written text unveil the intention of those who wrote it. This originalism, which the Venezuelan Court regarded as the main argument to justify their decisions was, as in other latitudes explained as “the theory that in Constitutional adjudication judges should be guided by the intent of the Framers.”\textsuperscript{371} However, in the two cases already mentioned, the Court justified the dismissing of the parties who urgently requested the protection of their fundamental constitutional rights, only based on the argument that it was the will of those who drafted the Constitution. In the American context, according to law professor Steve Calabresi, “the case for originalism starts from legal positivism, with the idea that only enacted law is the law of the land. When there is an ambiguity in the law, we have to seek out what the meaning of the lawgiver was. And so, naturally that leads to looking at originalism as the source for interpreting the law.”\textsuperscript{372} Indeed, in this early stage of Venezuela’s constitutional jurisprudence, the Supreme Court identified and explained the law according to a set of rules found in a written

\textsuperscript{370} John Austin, \textit{The Austinian Theory of Law} (London: John Murray, 1906) at 298. [Hereinafter Austin, \textit{The Austinian Theory of Law}]  
document that held solutions to each legal problem. Moreover, the character of the law that judges followed during this era at least in the arguments used to address constitutional dilemmas showed some affinity with legal philosopher John Austin’s positivism. Austin argues that those exercising ‘sovereignty’ enact commands that become laws because they are followed by the threat of sanction. In terms of interpretation of the law, he favours the discovery of those intentions behind the enacted legislation:

Here is the interesting and crucial test of the question how the law springs into existence. That the judges cannot make the law is accepted from the start. That there is already a rule by which the case must be determined is not doubted. Unquestionably, the functions of making and declaring the law are here brought into close proximity, but, nevertheless, the distinction is not for a moment lost sight of.373

Then, in the context of Venezuela’s constitutional jurisprudence, when the judges faced difficult cases they went to look at the original intention of the drafters of the Constitution. Yet they did not explain that the words of the Constitutions should be interpreted as they were conceived at the time, but rather that the original intent of the founding fathers is embedded in the written text, which is an approach, unique to the Venezuelan Court. However, so far, as the constitutional decisions above mentioned explain, the Court dismissed claims for the protection of constitutional right using this approach. In fact, the judges resolved many cases by arguing that they looked at the text and found the intentions of the founding fathers of the Constitution, without fully protecting fundamental rights explicitly expressed it in the text. This also reflects the way lawyers, judges, and law professors during the 1961 Constitution identified with some particular understanding of legal positivism. Although in modern days it is difficult to find a legal positivist that considers legal formalism in that extreme, in Venezuela during this era the tradition was to instruct students to search only the law in statute books, or judges to justify their decisions with the rules found in the Constitution.

After analyzing landmark cases in the Venezuelan jurisprudence, it was evident that there was an inherent connection between the legal theories assumed by judges and their particular understanding of the written law. The interpretation of the law, as any other legal activity, follows the paradigms of the leading legal theory of the Court. The trending theme during the early stage of constitutional decisions was that the threat of sanction was what ensured respect for the judgments. Under the paradigms of legal positivism, and since La

373 Austin, The Austinian Theory of Law, supra note 370 at 28.
Corte de Casación, the Venezuelan judges backed up their constitutional reviews over lower courts with the threat of sanction to those who did not follow the Court’s doctrine. Indeed, Venezuelan legislation provided jurisdiction to the Supreme Court over constitutional matters and the judges of federal and provincial jurisdictions usually obeyed its decisions. A great example to illustrate this aspect of Venezuelan jurisprudence is the 1963 case of Ley de Reforma Agraria. In this particular case a group of citizens requested the Supreme Court the nullity of a superior court judgment, based on their claim that the decision was an errant interpretation of the Constitution violating their property rights. The Court held that based on the “true meaning of the founding fathers” every decision made by the Court would become res judicata, meaning that there would be no appealing process, since it produced erga omnes effects. This meant that every superior or lower court of the entire country had to follow the Court’s doctrine. In addition, lower or superior courts that dared to refuse the Court’s decision would be punished with the revocation of their duties. In fact, the Venezuelan Civil Code, Civil Procedures and the Supreme Court Act established the responsibilities of the court and the other members of the judicial system in this regard.

This Court establishes with this judgment the following: The decisions made by the Court of Cassation when citizens requested the nullity of a legislation, which contravenes the National Constitution would acquire the formality of res judicata, producing erga omnes effects for every court of the Republic. Judgements made by the Cassation Court feature obligatory and definite status not subject to an appeal. Therefore, no judge can refuse to apply this Court judgment, which is the true meaning of the founding fathers’ will established in the Constitution and the federal legislation.374

As stated in the case above, the arguments given by the Court put an emphasis on the authority to hold decisions that must be obeyed by other courts. Under the premises of the respect of the will of the founding fathers, the Court established the constitutionality of the lower court’s judgments. Judges of the lower and superior courts usually obeyed the Supreme Court because they avoided sanctions. This is analogous with Austin theory, which explains, “the sovereign was identifiable by two characteristics: habitual obedience from the bulk of the population, and habitual non compliance with the commands of any other human superior.” 375 Certainly, under these premises, the sovereign command and threat of sanctions, which Austin’ legal positivism argues, were closely related to the understanding

of the law explained by the Venezuelan Supreme Court in its jurisprudence. In this regard, Venezuelan public law professor Eloy Lares Martínez explains the following:

The Venezuelan legal system confers to the Cassation Court one of the most important pedagogical mission: to transmit to legal subjects, as a way of disciplining judges of superior courts, the true meaning of national statutes and laws. Establishing the obligation of judges at superior or lower courts to follow the Cassation doctrine and creating legal resources to revoke and punish those judges that defy the Cassation judgement.

In terms of Constitutional interpretation, the Supreme Court, as seen in the cases above, followed a legal formalism that in some cases dismissed the claims for the protection of fundamental constitutional rights based on a Venezuelan originalist approach. The disregard of external considerations that could be considered biased or ideological from the Court while deciding constitutional cases had a great impact on the stability and predictability of legal decisions. However, it also affected the possibility to provide a concrete protection for certain constitutional rights. Many of the arguments of the Supreme Court while dealing with constitutional issues demonstrate some similarities to lessons learned from John Austin’s theory.

The 1971 case of Francisco Wytack illustrates well the formalistic approach to constitutional interpretation often used by the Supreme Court during the 1961 Constitution. In this case, a Belgium priest who arrived to help Caracas and preach the Catholic doctrine the city, particularly in the poorest neighbourhoods, was found by the authorities working closely with insurgents that wanted to overthrow the elected government. He was captured and sent to a criminal court, which allowed the authorities to deporte him to his homeland. The priest appealed to the Supreme Court requesting the protection of his Constitutional rights to due process and defense.

Following the decision of December 14th, 1970, this Administrative Chamber held that the jurisdiction to hear cases concerning the deprivation of liberty or violation of Constitutional guaranteed rights is the responsibility of the lower criminal court in which the claimed violation happens or where the victim is located and proceedings are conducted under the guidelines stated by the Constitution. Nonetheless, it was the intention of the founding fathers that the field of protection of Constitutional rights established or not in the Constitution be excluded from the application of the habeas corpus. Therefore, this procedural remedy should not be applied when citizens challenge the validity of acts alleged to violate individual rights, it can only serve to obtain a judicial determination of the legality of an individual’s custody in the criminal law context. The founding fathers regulated only one of the Constitutional guaranteed rights and reserves to Congress the power to regulate the rest, which does not mean that judges no longer

376 Lares-Martínez, Significado del Recurso de Casación, supra note 253 at 191.
According to the Court in this decision, the constitutional protection of due process and defense were written in such a high level of generality that the judges had to evoke the founding fathers’ intentions to determine the meaning of the text. However, the Court again refused to provide protection to constitutional rights, such as due process, because in their judgment the will of the founding fathers was to only protect one particular right and no other. This Venezuelan originalism, arguing that the intention of the drafters of the Constitution right was inbuilt in the constitutional text, justified dismissing the protection of some constitutional rights, such as due process. In many cases, the protection of fundamental rights had to be postponed, as asserted by the Court’s doctrine, because in the judges’ view the lack of legislation in this matter can allow the Court to support the claim of those who requested their constitutional rights. Certainly, the Court’s doctrinal analysis exposed in the jurisprudence reflected a legal formalism that in some degree is difficult to find. In fact, the formalist view that the Court presented in this particular case demonstrated a closed and calculated treatment of the constitutional text, with no consideration for the outcomes of this decision.

The Court’s conception of formality in its decision-making process can be exemplified with the 1978 case of Juan Jiménez. In this particular case, the City Council of Cedeño enacted a legislation regulating the earning of horseshoes, including a new tax that affected the people living in the prairies of Venezuela. Mr. Jimenez claimed that the legislation in question imposed new taxes which violated the Constitution, because agriculture matters and new taxes were exclusively the responsibility of the federal government. The Court had to determine the constitutionality of this municipality act that imposed taxes on the hooves of cattle.

Juan Jimenez has recourse to demand the unconstitutionality of provisions 2 and 3 of the municipal district council of Cedeño’s act, which regulates earned horseshoes. This act provided a mechanism for the revision and control of cattle irons. In deciding this case, the Court notes that provision 136 of the Constitution confers to the national government “the preservation and promotion of agricultural production, livestock, fisheries, and forestry.” One legal means or instrument created by the State for the promotion and defence of the national production, whatever it may be (in this case livestock) is its tax policy. This explains the special treatment that the founding fathers have given the issue, intending “tax immunity” for the benefit of the traffic in livestock production as an incentive and encouragement for the promotion of it. On the

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other hand, the founding fathers established in section 4 of the provision 18 of the Constitution the prohibition on States “to create taxes on live cattle or their product or by-products.” Also it was extended to the municipalities, which “may not tax the products of agriculture, fishery and breeding of food animals other than the ordinary tax on business trade.” The implementation of the tax policy, as it was the clear intention of the founding fathers, should be exercised exclusively by the National government and not by states or municipalities.378

Once again this case demonstrates a trend across the early constitutional jurisprudence from the Supreme Court which is to use the originalist approach to interpret constitutional rights. The arguments offered in this Supreme Court’s judgements demonstrated the worry of the judges to uphold in their decision fidelity to the Constitution. The Court noted in the case above that the discovery of the founding fathers’ intentions led to a clear solution, according to which only the federal government has the monopoly on tax recollection. Although this decision did not fully debate the possible remedies to infringements of fundamental rights, the Court limited to set the constitutionality of the norm. Certainly, as seen in the cases above-mentioned, these arguments reflect some of John Austin arguments, such as, “in extreme cases, recourse might be had to analogical extensions of the text based on what the legislator might be presumed to have willed had his intentions been directed to the particular situation calling for judicial regulation.”379 Venezuelan judges argued in many cases that an objective analysis of the law was to respect the intention of the writers of the Constitution. In other words, the Venezuelan judges at this stage of constitutional jurisprudence could agree with the American approach of originalism, that is “the intention of the framers should control interpretation, because it is only by examining their ‘original intent’ that the interpreter can discover the normative meaning of the Constitution.”380 Certainly, in a different context and a different constitutional system, both share the idea that the interpretation of the Constitution is a matter of finding arguments that best justify the decisions while still remaining faithful to the its written words.

The 1969 case of C.A. Sindicato Jobalco v. Blanca Fuenmayor also serves to illustrate the approach used by the judges to decide constitutional cases. In this particular case, the union of workers claimed that their boss, Miss Fuenmayor, had violated certain labour rights. However, the labour trial did not favour their claim and they decided to appeal to the

379 Austin, The Austinian Theory of Law, supra note 370 at 292.
Supreme Court arguing that proper notification to appear on trial was not followed by the Court, which represented a fundamental violation to their constitutional right of due process.

The Supreme Court reaffirms its doctrine that among the essential formalities of the notification, regulated in provision 137 of the Code of Civil Procedure, is the appointment of the defendant. Judges must comply with the formal rules of procedure. The publication of the appointment of the defendant is essential to the validity of the notification. Legislation made judges responsible for the adequate stability on trial and for correcting faults that could taint the cases. Therefore, as it was the intention of the legislator [founding fathers] to preserve due process of law, this Court concluded that the superior court of appeal did violate provision 229 of the Code of Civil Procedure.381

In this case of dispute between a labour union and their boss, the judges of the Supreme Court took a different understanding of the founding fathers’ intentions. Instead of following the recent jurisprudence that established that it was not the intention of the founding fathers of the Constitution to provide remedies to the infringement of certain constitutional rights, including due process, the Court decided the opposite. This time, the Supreme Court explicitly held that the will of the legislator was to preserve the constitutional right of due process. In this case, the Court essentially changed its perspective on the intention of the founding fathers to overthrow the decision of a superior court and grant the right of due process. This demonstrates that the Venezuelan originalism was not necessarily strict enough to maintain the same constant formalist perspective. On the contrary, in this decision, the Court showed that there must be an evolution in the decision-making process to address the concrete dilemmas. However, this decision also showed that Venezuelan originalism could provide arguments for judges to justify their own particular understanding of the constitutional text. Nevertheless, this landmark case changed the constant dynamic behind the argument that the founding fathers’ intentions was not to provide remedies to the infringement of constitutional rights, but only to apply the procedure of *Habeas Corpus* in criminal matters. In fact, the 1961 Constitution, as seen in chapters before, granted to every citizen the enjoyment of a vast set of Constitutional rights. Indeed, it was the will of the founding fathers of this Constitution to no only grand these rights but also safeguard them from infringements. It is important to notice that the Supreme Court during this early stage of its jurisprudence sustained that law was exclusively the legislation enacted by the sovereign legislator. Indeed, the conception of the law was dominated by the change in behaviour linked to treat of sanction, which, in their view, made

people respect and follow the law. In fact, the judges avoided any issue that could be considered political or associated with moral predictions. This case above illustrates a disagreement concerning the Court’s role to protect constitutional rights. Yet, it followed the tradition of Venezuela’s originalism that unveils the intentions of the founding father of the 1961 Constitution based on its own text, under the premise of the judges’ views regarding legal positivism.

The majority of the cases analysed so far reveal that the Supreme Court of Justice relied on the arguments of the discovery of the intention of the founding father to dismiss the claim of the appellant. Another example of this approach in practice is the 1969 case of Alberto Solano. In this case, the presidential candidate Mr, Solano appealed to the Supreme Court arguing that his constitutional right to information was infringed by the National Electoral Board when he, as presidential hopeful, was not properly notified of the time to postulate for the Presidential race.

The appellant manifested in his statement that he, as a presidential hopeful, is entitled to obtain updated information concerning when the electoral body is registering candidates for the next elections. This Court, after analysing the evidence provided, held that among the political rights guaranteed by the Constitution is that of being able to run for public office. Nevertheless, provision 112 of the Constitution establishes that this right does not pertain to every citizen, only to those who meet the requirements of aptitudes that are specifically required in the aforementioned Constitutional precept. In the case of presidential office, in addition to meeting the conditions required by the Constitution, the person desiring to be elected has to be chosen through a process of universal and direct vote as it is indicated in the provision 183 of the 1961 Constitution. It was the intention of the founding fathers to provide a set of requirements in order to get the most capable man or woman elected for this important office. This Court found that there was no status of presidential hopeful and that therefore, the appellant was not entitled to any right arising from this condition. Venezuelan electoral law provides discretional power to the supreme electoral body to determine when it is more appropriate to open the electoral process of registering candidates for the next elections. It is an appreciation that only the supreme electoral body can do. The legislative intention [founding father’s intention] was to provide the electoral body with the exclusive discretionarily to determine when the information would be available. However, it is limited when the decision does affect the equal conditions for all participants in the process, as it was the true intention of those who drafted this piece of legislation.382

In this landmark case, the Supreme Court argued that to decide faithfully and accordingly with the Constitution it was necessary for the judges to interpret the constitutional document based only on its original meaning, as the drafters intended when they wrote the constitutional provision in question. Indeed, the Court elaborated the arguments around the fact that the intentions of the founding fathers who wrote the constitutional text were to find the best possible candidate for the highest position in the

country. However, this did not give any right to those who aspire to be president to obtain privileged information that should be accessible to everyone. The Court based on this originalist approach, avoided discussing the consequences of the decision in the political arena, which gave discretion to the electoral national board to decide the calendar for presidential elections and the notification for the public to register to run for office. Moreover, the decision dismissed the claim of right to information based on the fact that those who drafted the Constitution said nothing regarding the practical application of this constitutional right. Once again, the Court justified once again the decision on the rules found in the written Constitution without considering other factors or even the applicability of constitutional rights.

In the era of the 1961 Constitution, the judges of the Supreme Court addressed the most controversial questions by applying the rules set out in the text, in which law was conceived by the legal community as the rules endorsed via the threat of sanction imposed from a higher authority. The judges self-restrained to avoid external considerations that could jeopardize predictability of legal decisions and the stability of the newly established legal system. In this regard, legal scholar Tom Campbell asserts:

> In crude early positivism terms, legislative intent as contextual plain meaning can make sense of the idea of law as the command of the sovereign. In a way which gives us a basis for understanding why we might wish to have a sovereign: namely, to achieve the decisive ordering of social relationships for the improvement of the lives of all subjects.383

As aforementioned, the jurisprudence of the Supreme Court validated early positivism which understands law as the command of the sovereign and its interpretation as the intention of the legislator from the plain meaning of the text. Most of the cases analysed so far claimed that originalism was the method most accurate to determine the true meaning of the Constitutional precepts. The 1979 case of *Consejo de guerra permanente de Caracas*, is another example. In this case, a military officer brought to the Supreme Court a constitutional challenge to the decision of the Court Martial who he claimed violated his constitutional right of due process.

> This court’s fundamental mission is to review the governmental actions that conflict with the Constitution. In addition, this court hears challenges concerning lower and superior court’s decisions that might be contrary to the provisions entrenched in the Constitutional text. In other

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words, the founding fathers intended to establish two types of judicial review, which are exercised by two specialized Courts inside of the Supreme Court. This enables the Court to exercise control over the Constitutionality and legality of any governmental action enacted by public officials, no matter if the challenged action is legislative, administrative, or even judicial in nature.384

The Supreme Court settled to determine its jurisdiction to exercise judicial review based on the founding fathers’ intentions. In this decision, the judges argued that they have jurisdiction to hear appeals from each of the courts of the Venezuelan judicial system, including the military jurisdiction. The judges argued that the will of the legislator was to establish a Supreme Court that protects the rule of law in the country. In the case above, the Court argued that it was responsible for reviewing any act of government that could conflict with the Constitution. In their opinion, decisions of the Martial Court could be subject to a judicial review by the Supreme Court as it was the intention of the founding fathers of the Constitution to settle any controversy that could arise between civilians or military personnel related to constitutional rights.

After examining these landmark constitutional cases, it is clear that the Supreme Court is using a particular approach to justify its decisions. The manifest intent of the framers was the argument mostly used by the Supreme Court during the beginning of Venezuela’s jurisprudence to provide what they considered a value-free methodology to solve most controversial issues. In a different context legal scholar John McGinnis argues, “judicial review requires originalism because the original meaning of the Constitution is the crucial factor in obtaining the consensus that makes Constitutional provisions desirable.”385 Certainly, the original meaning that the Court tried to unveil from the constitutional text was the best possible approach to obtain consensus in the Supreme Court to settle constitutional dispute. In general, it is possible to conclude that at the beginning of Venezuela’s jurisprudence, the Supreme Court of Justice justified its decisions according to its own understanding of the original intent, which characterized law with the early conception of legal positivism: the sovereignty command.

**Textual Meaning: Analysis of Words**

One of the defining features of Constitutional jurisprudence in Venezuela in the era of the 1961 Constitution was the often-invoked plain meaning of terms and phrases to interpret the Constitution. Textualism is the unquestioned claim that the interpretation of the Constitution must begin with the reading of the written text.386 Often, the Court argued that the true meaning of the Constitution was given solely by the verbatim application of the words of its written norms. The fair reading of the constitutional text operated as a straightforward approach, in the judge’s view, which remained faithful to the Constitution. As proven before with the Venezuelan originalism, the Court relied on the written text to find its meaning. The main difference with the other approach was that the judges did not need to invoke the intention of the legislator to justify their decision, instead the argument was that the plain meaning of the words expressly written in the Constitution was enough to find solutions to many constitutional cases. So far in the case analysis, the Supreme Court linked the facts of the case to a specific clause set in the written text. In fact, the judges argued that it was sufficient to read, as a normal Spanish speaker, the text to justify a decision. There is some evidence that the Supreme Court at the early stage used its own take on originalism and also textualism to justify constitutional decisions. According to this method for constitutional interpretation, the judges should read the words of the Constitution to find its ordinary meaning and apply them avoiding any social or moral aims. It is possible to affirm that this approach in essence is part of legal formalism, according to which the law is composed of gapless and closed rules. In a way, the motivation behind the textual application of the constitutional norms was to constraint the judges to pursue foreign concept not regulated in the Constitution. In fact, the judges of the Supreme Court might agree with John Austin’s legal positivism because both defend the thesis that jurisprudence only cares for the written law. The judges did not dispute the validity of the law or attempt to alter the words of the Constitution. As American law professor Craig Ducat affirms “rules can only be valid or invalid, consistent or inconsistent with higher legal norms not good or bad.”387 Indeed, the textualism used by the Supreme Court to decide cases demonstrates the legal

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formalism that was used during the early stages of the constitutional jurisprudence in Venezuela.

Another example to illustrate textualism in Venezuela is the 1976 case of *CompuLab Services International C.A.*, in which the appellant contested before the Supreme Court the constitutionality of the decision made by the Ministry of Health and Welfare. The Court had to decide which institution had the jurisdiction to hear a claim in matters related to the practice of medicine.

The issue to resolve in this case is whether the appeal referred to in provision 32 of the Law Practice of Medicine must be heard by the Ministry of Health and Welfare, as contended by the appellants or presented directly to the Supreme Court, in accordance with the opinion expressed by the official in the paragraph quoted above. This question is motivated by the frequent use of expressions ‘before’ ‘to before’ and ‘for before’ in the rules that govern any action against judicial and administrative decisions. Strictly grammatical interpretation is usually given to such expressions, considering that some differences must exist between them if the legislature uses one instead of the other. In this connection, it is estimated that the terms ‘before’ and ‘to before’ refer to the organ by which the action is brought, while the expression ‘for before’ refers to the organ which must adjudicate and decide the case. According to these criteria, those who wish to appeal a decision of the Ministry of Health, based on the section under consideration, must present their challenge within ten days before the Supreme Court of Justice at the Political Administrative Chamber. To strengthen this statement, this Court, grammatically analyzing the words in controversy, argues that ‘before’ acts as the preposition ‘in the presence of’, according to the Dictionary of the Spanish Royal Academy. Therefore the appeal should not approach the ministry before the court.388

It can be ascertained that during the era of the 1961 Constitution, judges were essentially formalistic in their perspective of constitutional adjudication. This made the judges believe that it was irrelevant to consider any other aspect to interpret the Constitution. Indeed, the judges argued that by simply reading the text of the constitutional precepts, it was possible to find a solution.”389 It seems reasonable that if the Court argued in favour of the textual meaning to settle disputes, they would use dictionaries that are authoritative sources to provide meaning to specific words in the give context. However, the textualism of the Court relied on dictionaries that originated mostly from Spain, which did not necessarily provide the understanding that any Venezuelan would gather from reading the Constitution. In the example, the Court concentrated on a particular written word and used the dictionary to find its meaning. The argument to settle the case was to define the word ‘before’ using a Spanish dictionary to provide a clear understanding of the Constitution. The Court concluded saying that after grammatically analyzing the word ‘before’, it was able

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to settle the jurisdictional issue. The Venezuelan judges mounted a strong defense of textualism in its purest form, the plain meaning of words, or dictionary definitions, as a basis for the neutrality and rationality of judicial decision-making. The understanding of the law by the Supreme Court judges during this stage of Venezuelan jurisprudence brings to mind the arguments given by the authors that support legal positivism. In a different context, but similar to the Venezuelan case, American constitutional writer Sanford Levinson describes how “legal positivism justifiably emphasizes the origins of law in social facts; the ordinary language of all developed legal systems includes constant recourse to texts that authorize specific conduct.” 390 Indeed, judges of the Supreme Court argued that the solutions of different controversies relied solely on the text, avoiding any external consideration. Indeed, one of the major themes in legal positivism is the separation between law and morality. 391 The Supreme Court seems to coincide with this argument when its decisions gave preponderant weight to the approach which remained trustful and faithful to the text.

The application of constitutional rules seems to be linked to the Court’s own textualist approach. Another interesting case to help illustrate this trend is that of I.C. Oropeza, in 1987, where Mr. Oropeza claimed that he was arbitrarily detained by a group of people working for a security company. He requested a constitutional injunction arguing the protection of his constitutional right to personal liberty.

The protection described under Provision 49 of the National Constitution refers to the personal liberty of citizens. In principle, only public officials can deprive them of such a Constitutional guarantee. Nevertheless, in this case, the core of this controversy is the term “arbitrary” and whether or not public officials have monopolized arbitrariness. In this regard, this court noted that the expression is not referring exclusively to an individual, as it is evidenced by the definitions listed below. The Spanish language dictionary defines the term as “the act or conduct contrary to justice, reason, or law, dictated only by his or their will.” While the Usual law dictionary conceptualized the expression as the “act, conduct, proceed contrary to the fair, reasonable, or legal, inspired only by the will, caprice, or evil purpose”. The concepts outlined do not show any difference between private or public acts in terms of arbitrariness. Then, there is no doubt in saying that in Venezuela the protection of provision 49 allows citizens to request Constitutional injunction against private actions that might undermine Constitutional rights and freedoms. 392

The case above is great example of the the use of dictionaries by judges to elucidate the ordinary meaning of words. Here again, the Supreme Court of Justice relied on Textualism to render a decision. The judges justified the adjudication of a constitutional right by

391 Scott, Jurisprudence supra note 19 at 25
analysing the exact word that was in the center of the controversy. This decision demonstrates that judges interpreted the Constitution based on the bare words of the text to ascertain the express meaning of the constitutional precepts.

The semantic meaning that governed adjudication in Venezuela demonstrates the affinity of the arguments held by the Court to early arguments taken from the legal positivist theory. This was in part because the judges of the Supreme Court maintained the argument that by focusing on the text, the judges could not inject their own moral or political views. In this particular case, the Court was asked to provide a meaning to the constitutional right of personal liberty. The rationale expressed by the Supreme Court judges in this decision was that the word ‘arbitrary’ was a key component to solving the controversy. Although it has often been said that constitutional rights represent an open text which needs to be interpreted, in this case the Court invoked the definition of the word ‘arbitrary.’ For the Court, it was appealing to use dictionaries to give a clear meaning to the written words because of the emphasis placed on the gapless rules of the Constitution. In fact, as the case demonstrates, the Court used two main dictionaries, one from Spain and the other from Venezuela to elucidate the meaning of the word “arbitrary.” In the Court’s conclusion to determine if the constitutional norm only applied to governmental institutions or also to private citizens or companies, it held that the definition of the word did not show any difference between the two and therefore was applicable to both. The understanding of the ordinary meanings of the word used in the constitutional text and the definitions found were the main arguments invoked by the Court to adjudicate this individual right. The practice of textualism in constitutional adjudication in Venezuela rejected any external source, yet allowed the use of dictionaries to pinpoint exact parameters to find the meaning of the word. However, the Court did not explain the fact that the dictionaries were different and in many cases, that the same word had a different meaning from one dictionary to the other. Indeed, the words in the Spanish dictionary might have a different connotation depending on the context in which the word is used. In each country and even in some cases in each region, language can evolve differently and words can have a meaning in one region or country that is not observed in any other region or country. Because of the linguistic aspect of the approach used to interpret the Constitution, the judges tended to focus specifically on a particular word in one particular dictionary. However, they did not justify the use of
dictionaries, even those that were not related to law and those who had been edited in Spain, therefore came from a foreign source, to the strict application of the norms.

The Supreme Court of Venezuela looking for a reasonable and credible attempt to accomplish predictability and determinacy of constitutional decisions, focused principally on the provision directly applicable to the facts of the case. The textualist approach used by the Court to resolve several constitutional dilemmas seems characterized by an aversion to reach for resources beyond those explicitly written on the document. Similarly, one of the main arguments of legal positivism is the separation thesis. According to H.L.A Hart the concept of this major jurisprudential theory can be restricted to what he calls the *Thesis of Separation*. Both the interpretation method and the legal theory underpinning in the judges’ arguments demonstrate the concern to maintain a separation from external concepts. Even when constitutional cases dealt with political, economic, and social issues, the Supreme Court during the enforcement of the 1961 Constitution avoided getting into the debate and strictly followed the constitutional text. A good example of this can be seen in the 1989 case of *V. Ríos*. Miss Ríos challenged the decision of the lower court. In her opinion, it diminished her constitutional right to defend on trial. She claimed that the judges of the lower court acted outside their jurisdiction, allowing evidence without cross examination, which rendered her defenceless.

This Constitutional legislation has been careful when it comes to remedies and injunctions referring to legal decisions. It does not open, just by principle, unrestricted protection against erroneous judicial decisions, which are normally part of control mechanisms through the exercise of hierarchical and specific legal resources. This explains why provision 4 of the Constitutional Injunction and Remedies Act requested other requirements to challenge the judicial decisions. This Court, interpreting the phrase ‘acting outside its jurisdiction’ believes that the use of the word ‘jurisdiction’ is not entirely clear and correct. It is necessary to look at the ordinary language to enlighten the Court.

In this particular case, the Court not only analysed the facts but also the legislation as a whole. As explained in other cases, the Court demanded from Congress a piece of legislation to organize the procedures for citizens to request constitutional remedies. The *Constitutional injunctions and Remedies Act* gave a written procedure to request the protection for constitutional rights. More notable, the Supreme Court judges in this case carefully interpret the new act and the Constitution to set a clear path when dealing with the constitutionality of

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decisions made in other courts. In this case, the judges argued that the ordinary meaning of the word “jurisdiction” was the solution to the controversy.

The Court’s rationale was that the formal application of the text was the method adopted to interpret the constitutional text and legislation. The textualist approach practiced by the Court during decades ensured fidelity to the law in order to accomplish justice. In the words of American legal scholar Caleb Nelson, “textualists suggest that interpretation should focus upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean.” That is to say that some of the arguments of legal positivism and of the Supreme Court’s interpretation of the Constitution were similar when it came to their take on the character of the law and justice. In fact, the formal procedures applied consistently to the circumstances, especially using the ordinary meaning of the words to find solutions, elucidated a particular focus that judges of the Supreme Court and the arguments linked to legal positivism could have in common. In a different context, American constitutional law professor John Manning affirms, “the most basic interpretive premise of textualism does not contradict, and in fact fits tightly with, core positivist assumptions about interpretation.”

Certainly, after the examination of the above Venezuelan jurisprudence it is possible to say that the textualism used by the Court and the arguments expressed to justify these decisions have similar points with assumptions from legal formalism. The complete determinacy of the law was supported in the judges’ arguments as seen through the examination of their decisions. The Supreme Court had maintained that the faithful reading of the constitutional text respected the consensus accomplished by the promulgation of the 1961 Constitution. The textualism and originalism served to distinct the Court from the political, social, and economic dynamics. Rules must be satisfactorily understandable to the population and the application of these rules must be clearly explained by the Court to resolve the consequent controversies. To earn the trust of the citizens, the Supreme Court needs to be perceived as a reliable institution to solve controversies without the influence of political, moral or powerful figures. The predictability and determinacy of judicial decisions is fundamental to the judiciary in order to maintain its authority. However, when constitutional decisions seem to bare more in mind the formalities and procedures than the

395 Caleb Nelson What is Textualism (2005) 91 VA. L. Rev. 347 at 354
concrete claims themselves, the real function of the constitutional text might be diminished and its purpose limited.

At the beginning of Venezuela’s constitutional jurisprudence, judges based their decisions on the assumption that the written words of the Constitution were sufficient authoritative sources to provide answers to controversies. This reflected the judges’ persistent classical version of the determinacy of the legal rules. So far, the Court in its judgements maintained the criteria that the textualist approach helps the judges to strictly focus on the ordinary meaning of the Constitution, rejecting any other possibility to discuss issues that were interconnected and needed answers. In this chronological examination of examples of decisions in which the Court interpreted the Constitution in accordance with the plain meaning of its words, there is the case of *Albornoz v. Roppolo*. The controversy between two businessmen was related to the fact that each of them claimed to control the entire business. The decision of a lower court was challenged before the Supreme Court because Mr. Roppolo claimed that his constitutional right to own a business was in danger.

The core meaning of words, used in rules, changes and acquires different meanings from those intended for it. In any language, interpreters confront problems with the use of terms or expressions often used differently according to the time and who is using them. From a legal point of view, there are words that lack a legal definition, as is the case of ‘company.’ The conception of the word ‘company’ would be more likely attached to the economic context. The economic development requires to reformulate differently many definitions, especially in mixed economies like Venezuela, where the administration is involved in many economic aspects. Based on the arguments explained before, and within the Venezuelan legal system, this Court, using the text itself, understood accordingly that the ordinary usage of the word ‘company’ has two conditions: an organized activity for the manufacture of a specific product or a person acting as an ‘entrepreneur’ who organizes, at his/her own risk, the company.397

The judges, in the case of *Albornoz v. Roppolo*, acknowledged the issue that the words of the written Constitution could acquire a different understanding over time. However, the Supreme Court decided to use the plain definition of the word, “company”, which, in their opinion, was at the core of the controversy. The Court, once again, rejected the idea of evaluating the context of the case, choosing instead to formulate a definition of the word in question. In this case the economic context was particularly important, yet the Court strictly focused on the ordinary meaning of the constitutional text to solve the controversy. The arguments shown in this decision demonstrated once again the use of the textualist approach.

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In fact, the Court affirmed in its decision that it found two conditions for the definition of the word ‘company’ and that based on these criteria, it could solve the controversy in question.

The textualism illustrated by the Supreme Court in the cases above-mentioned exhibits the strict application of the written words of the Constitution as objective criteria for decision-making. Similarly, in the American context, Supreme Court Justice Antonin Scalia asserts, “the text is the law, and it is the text that must be observed.”

In fact, as the case above reveals, the approach used by the Venezuelan Supreme Court is similar to arguments used by judges of the United States of America, such as Judge Scalia’s originalist approach. Both could agree that the textual method of constitutional interpretation is faithful to the mandate of the people and it provides predictability to the Court’s decisions. According to law professor Robert Bennett in the context of the United State constitutional law, “Justice Scalia has suggested that originalism would be stronger if the focus were on the original public meaning of the constitutional text and not to the original intention of the framers.”

As in the cases that have been used to exemplify these approaches, it seems that the judges indentified themselves at the beginning with the idea of finding the intention of the founding fathers and progressively began to find this intention in the text itself, to the point where they decided many cases simply by relying on the plain meaning of the words. All this can be explained with the main legal theory built in the arguments used by the judges at this stage of Venezuela’s jurisprudence. That resembles arguments of an early stage of legal positivism, particularly the separation of law from morality and the determinacy of the law, as a gapless set of rules. Of course judges at this stage of the evolution of constitutional jurisprudence in Venezuela faced the difficult cases that involved political, economic, and social issues, which changed the dynamic of constitutional litigation in Venezuela. The Supreme Court of Venezuela was able to solve constitutional controversies using their own take on originalism and textualism. These two particular approaches in the decision-making process demonstrated that the interpretation of the Constitution in Venezuela evolves, even the judges’s own interpretative approaches were not used the same way over the years.


The Venezuelan Supreme Court restrained itself from interpreting the Constitution under the premise of the originalist approach, which evolved over time. Although one of the main features of Venezuela’s Constitutional jurisprudence during the 1961 era was its predictability and stability, the interpretation method to deal with constitutional issues changed over the years. The judges referred to the intention of the founding fathers, but began, years later to solve constitutional cases by referring exclusively to the text. This is exemplified in the 1993 case of *Monagas*. In this case, a foreign worker on a temporary visa came to work for Venezuela’s national oil industry, yet was dismissed from his position without previous notification. On trial, the decision stands that there was no wrong doing for the company to fire him from his job, yet he challenged this decision, arguing that he did not have the right to exercise the constitutional right of defense.

In this specific controversy, the question to ask is whether a temporary resident can exercise the right of defence established in provision 49 of the 1961 Constitution. This Court deems necessary to interpret the mentioned provision according to the textual meaning of the phrase: “any natural person resident of the Republic.” This Court considers that Constitutional injunction has broadened the protection of inalienable Constitutional guaranteed rights and freedoms. It covers acts and omissions that might be subject to challenges from individuals and entities against whom it can be exercised, as it has been repeatedly held by our jurisprudence. This Court considers that the intention of the founding fathers was that the Court interpret the phrase “any natural person resident of the Republic” using just the plain meaning of the words. This allows any individual, without distinguishing social condition or legal status, to challenge any act or omission that might threaten or injure his or her Constitutional rights produced in the limits of the Republic.400

The Supreme Court in this particular landmark decision admitted that the intention of the authors was equivalent to the plain words of the text. In this case, the Venezuelan originalism focused directly on the words, grammar and syntax of provision 49 of the 1961 Constitution to find a solution. Although the Court acknowledged the founding fathers’ intentions in the text, it held that the plain language was the solution to the Constitutional controversy. In the American context, constitutional law Professor Keith Whittington explains, “to search for intent is not an attempt to avoid language in search of something hidden by it. Rather, meaning or intention is embedded in the language itself, it is realized with the utterance.”401 The evolution of the textualism and originalism the in Venezuelan jurisprudence can be seen in the case of *Monagas*, and so, it is possible to conclude that the intention of those who drafted the Constitution was represented in the plain meaning of its words.

Emphasis on Formal Requirements or Technical Elements

Formalism, often associated with legal positivism, tends to restrict the judges when they interpret the Constitution to solely consider a coherent and consistent body of law. Legal formalism could be argued as a logical, self-constrained, rational, gapless and deductive application of a core system of rules and norms. “Legal formalism is the theory that tracks the implications of form through the doctrines, institutions, and conceptual structure of a sophisticated legal system.”\footnote{Ibid, at 113} Certainly, the decision-making process of the Supreme Court bears a resemblance to legal formalism. That is, in the formalist conception, constitutional adjudication is the adherence to the prescription of the legal norm to deduce the right answer in constitutional controversies. In a different context but insightful for this research, legal scholar Ernest Weinrib argues, “the function of law for the formalist is to express this immanent rationality in the doctrines, institutions, and decisions of the positive law.”\footnote{Ernest Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 Yale L.J. 957, at 957 [Hereinafter Weinrib, Legal Formalism].} Moreover, rule-based adjudication primarily relies on the fidelity of legal rules to generate correct answers from the result of the applicable norm. According to constitutional law scholar Frederick Schauer, “such a system would bring the advantages of predictability, stability, and constraint of decision makers commonly associated with decision according to rule.”\footnote{Frederick Schauer, “Formalism” (1988) 97 Yale L. J. 509 at 547.} The Supreme Court judges reached their judgments, self-restraining their discretion to, according to them, remain faithful to the Constitution. It was of vital importance for the Venezuelan judges of the Supreme Court to preserve stability and predictably in constitutional decisions. Their view of law reflected in their opinions and the jurisprudence exhibited a particular view similar to arguments taken from legal positivism. Indeed, the judges seemed to embrace a formalist perspective adhering to the prescription of the constitutional norms as a set of rules that provided straight answers to every controversy. As Schauer explains, “at the heart of the word ‘formalism’ in many of its numerous uses lays the concept of decision making according to rule.”\footnote{Ibid} Venezuela’s Supreme Court emphatically refused to pursue policy goals or evaluate the context of the norms. As seen in the cases above regarding originalism and textualism, the focus was instead on ensuring the fidelity of the prescribed forms when interpreting the constitutional text.
The loyalty that the judges of the Supreme Court demonstrated following the prescribed form of the constitutional norm indicates the perspective regarding their understanding of the law. The 1967 case of José M. Sánchez v. José Ferrera is another example to illustrate the formalist preferences of the judges in the interpretation of the Constitution. In this case, the decision of the lower court was challenged because there was no sufficient reasoning behind the decision, which according to the challengers, went against their right to a fair trial.

It is the duty of this Court to stress the need for reasoning in lower and superior judgments. One of the most important obligations of the judges is to express the reasons that made them take a decision. From the analysis of the facts, the judges have the responsibility to determine the rules applicable in the controversy. Legal analysis at these levels is constrained by the study of those rules, created by the legislature to preserve the parties involved from arbitrary judicial decisions. The rationality of legal analysis proves its legality by appreciating the facts and evidence brought before the Court, deducing which rule is relevant to solve the dispute.\footnote{José María Sánchez v. José Ferrera [04/7/1967] C.S.J., Sala de Casación, Exp. N° 281-67.} The Court argued that the reasoning behind constitutional decisions was firmly connected with the adherence to the prescribed form of the constitutional norm. In this case, the Court argued that it was important for decisions of lower or superior courts to express the reasons behind their decisions to follow the formal procedures of legality. Brazilian legal scholar, Roberto Unger, in describing the value of formalism to those who do not share his critical perspective, explains, “the security of rights, so important to the ideal of legality, would fall hostage to context-specific calculation of effect.”\footnote{Robert Unger, “The Critical Legal Studies Movement” (1983) 96 Harv. L. Rev. 561 at 566.} The judges, in this landmark decision, rejected the arbitrary judicial decisions that did not follow the technical evaluation of procedures and formal criteria under the constitutional text. The judges must appreciate the fact and the rules to deduce the answer and maintain the rule of law. In order to develop a strong judicial system that genuinely earns the trust of the public, the judges during the era of the 1961 Constitution avoided considering the context or policy goals of constitutional norms in their interpretation. They strictly followed the formal standards of written norms that fulfilled the requirements in a specific case. In the case above-mentioned, the Supreme Court established the doctrine that decisions must had reasonable justification from the appreciation of the facts to deduce the solution of the controversy from the constitutional text. The arguments of the Court demonstrate once again that during this period of time, the law was seen as a gapless system of rules that could be applied logically to every case.
Venezuela’s Supreme Court described legal norms as coherent and gapless, providing solutions to every case falling within its scope. Another example to illustrate the Supreme Court’s arguments is the 1976 case of Rafael Alfonzo. This case involved a challenge of the constitutional validity of tax regulations relating to selling corn starch.

In consequence, this Court holds that all acts of the public administration should follow the rules or norms established by the competent authority, whether this authority is outside the administration or constitutes norms or rules it has developed. These pre-established rules determine the boundaries of administrative or fiscal activity. They ascertain the functions and powers of the authorities and the procedures under which the administration must develop its activity. The Court considers that it is necessary to analyze the procedure followed by the administration to determine whether or not the principle of legality established in the Constitution was violated, and, finally, in the assumption that there has been such a violation by the administration, this will cause the invalidation of the challenged administrative act by the taxpayer. After confronting the rules transcribed in this judgment, this Court finds that the procedure followed by the administration has no legal hold, since the unlawful administrative act did not come from a valid source or the procedure already established by the recognized authority in tax purposes. 408

The Court in this particular case favoured the claim of the company striking down the government act that imposed a new tax on corn starch. The argument given by the judges was that the Constitution presents a clear set of procedures to establish taxes and the government did not follow them, therefore there was no valid justification for the imposition of such a tax, which violated the constitutional text. In an effort to maintain the principle of legality, the Supreme Court assumed a formalistic conception of the judicial process. The Court’s decision was based solely on the procedures and formal criteria pre-established in the Constitution. The Court held that the authorization for the administration to impose any duties on citizens had to be clearly stated in written laws as part of the rule of law. Legal philosopher Joseph Raz explains in a different context that can be applied in this particular case, “the legal validity of a regulation is impugned on the ground that the body that enacted it had no legal power to do so. The charge cannot be repulsed by a claim, however justified, that the rule the regulation embodies is nevertheless legally binding because it is a good rule, one that it would be sensible to follow.”409 An act of the government, according to the Court, can only be valid and binding when it followed the criteria properly determined under the Constitution.

409 Joseph Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries (New York: Oxford University Press, 2009) at 330. [Hereinafter Raz, On the Authority and Interpretation of Constitutions]
The Supreme Court of Venezuela in many constitutional cases held that the application of the constitutional text led to the determination of the results. The judges maintained their view that following the procedures established in the Constitution was enough to provide a solution to each dilemma presented to the Court. Another example of the Supreme Court’s rationale behind its decision-making process is the 1980 case of B. Fajardo. This case involved a challenge to the constitutional validity of a superior court decision, which, according to Miss Fajardo, violated her right to a fair trial.

This Court, leaving aside the inconsistency and lack of precision in the reasoning of this disposition, argues in favour of clear linkages between the claimed violated Constitutional provisions and the arguments that support it. Courts must establish if the norm applicable should be deduced from the facts of the case. There is no questioning the sovereignty enjoyed by judges in assessing the evidence and facts, yet, the judges’ appreciation of these facts does not free them from following the legal rules established as formal requirements, which must be observed during the decision-making process.410

The Supreme Court reversed the decision of the superior court based on a formal view of the law. Indeed, the Court argued that the judges are free to appreciate the facts and evidence but are constrained to follow the legal procedures and rules for the decision-making process. The reasoning behind this decision was a product of the prevalence of a particular understanding of the law. The judges deduced the answer of constitutional controversies by enforcing the constitutional written rules. In a similar context, constitutional scholar Michael Robertson explains, “the correct legal result would then be reached by a process of logical deduction.”411 The Venezuelan Supreme Court’s conception of legality resembles the legal formalism’s perspective according to which the norms are gapless, meaning that the judges were required to apply them logically when faced with controversies. In the case mentioned above, the Court established the doctrine that the judges were constrained by the legal norms during their decision-making process, which demonstrates that constitutional jurisprudence during the 1961 Constitution era was based on legal formalism in Venezuela. As seen before in other cases, the Court advocated for a formal interpretation of the Constitution, faithful to its procedures and norms, respecting the will of those who wrote it. This could be done, according to the judges, by following the logical order of a gapless set of constitutional rules and norms.

The Supreme Court reinforced the paradigm that valid Constitutional judgments were the result of a strict application of the procedures established in the Constitution. It is possible to illustrate this paradigm with the 1983 case of L. Medrano v. Auto Sill, where the appellant claimed before the Supreme Court that his right to defend on trial was violated because during the trial the representative of the company Auto Sill did not permit the cross-examination evidence that could support Mr. Medrano’s claim.

In this case, this Court deems relevant to assert that provision 68 of the Constitution is a rule of general nature. This Court considers that from the textual analysis of the Constitutional precept, “defence is an inviolable right at all stages and levels of the legal process” this provision contains a general and abstract formulation of the right of defence. Citizens can defend their rights and interests in the terms and conditions established by law at the organs of the administration of justice. Given such a general and abstract formulation of the provision 68, it is hard for this Court to conclude that its application can be direct and isolated from the specific, particular, and concrete system of rules. The only legitimate source of guidance is the enacted legislation, which established the regular procedures to follow in these cases.412

The Supreme Court relied on the textual analysis to provide a concrete answer. It is particularly interesting in this case that the Court acknowledged the difficulty behind the direct application of the words with just the plain reading. Yet, the judges argued that because of the abstract formulation of the constitutional provision, they had to conclude that legislation was needed to provide procedures for the Court to follow. In this case, the judges denied the protection of a fundamental constitutional right based on a formalist approach. This resembles the arguments given by the Supreme Court during the 60s and 70s, requesting written legislation in order to protect constitutional rights. The case of L. Medrano v. Auto Sill demonstrates that the Court had a formalistic view of the interpretation of constitutional interpretation and could not protect rights without pre-established procedures. The arguments seen in the rationale of this case were also used in other cases before, yet all of them represented a particular view of law that resembled legal formalism. The arguments that the judges used to justify their decisions tended to be an evolving process. The Court looked to supply a persuasive and comprehensive justification for the adjudication of abstract Constitutional rights. The deductive logic and precise application of rules and norms set in the constitutional law was the methodology used by judges to decide constitutional issues during the 1961 Constitutistional period. This formalistic appreciation of the Constitution is reflected in the case above when the Court denied the protection of a constitutional right because of the lack of formal procedures to follow.

The many cases already commented on have a common denominator. Indeed, the Supreme Court of Justice maintained a formalistic perspective on constitutional interpretation. Another example of this perspective in practice is the 1984 case of Del Acqua C.A. In this case, the appellant declared disobedience to newly promulgated legislation arguing that the norms and rules established in this document were against his constitutional rights.

This theory of decay or disobedience of the law in our administrative/judicial system so far has not been accepted. It is not viable for being in contradiction with the Constitutional principle that asserts that laws can be repealed only by other laws. This principle is developed also in our Civil Code, which states that no law can be repealed, unless it is by another law. Certainly, this Constitutional principle states that legal norms, in the most general sense, are only valid if they followed the formal criteria established by the national legislative branch. In addition, legal norms are valid when the empowered authority enacts them, for instance, by administrative acts, or by municipal acts. Yet this act must remain consistently with other valid norms within the legal system.\textsuperscript{413}

The validity of the legal system depends exclusively on its sources. This is the main argument that the Supreme Court in this particular case used to dismiss the claim that there was disobedience of the law. This seems to coincide with the sources thesis of legal positivism. Theorist of this major jurisprudential movement can agree that the authority of the law comes from its source. Legal theorist Joseph Raz affirms “the law presents itself as a body of authoritative standards and requires all those whom they apply to acknowledge their authority.”\textsuperscript{414} Certainly, the Supreme Court in the case above affirms that the law is valid when an empowered authority enacts it. In other words, the validity of the law comes from the recognition of its authority as law. This argument is similar to the source thesis, as part of the legal positivism theory. In fact, the Court made it clear, as it shows in the case above, that legal norms are valid only if they followed the requirements set in the Constitution. This is similar to Hans Kelsen’s argument that “the reason for the validity of a norm can only be the validity of another norm.”\textsuperscript{415} Certainly, the Venezuelan Supreme Court judges had a particular view of law and projected it on their interpretation of the Constitution. The arguments that the judges used to justify their decisions, as seen in the cases above mentioned, maintained over decades of jurisprudence arguments that are similar to the ones that major theorist of legal positivism have explained.

\textsuperscript{413} Del Acqua C.A.[17/05/1984] C.S.J., Sala Político Administrativo, Exp. Nº 425-84.
\textsuperscript{414} Raz, The Authority of Law supra note 343 at 33
The judgments analyzed in this section demonstrate that the Supreme Court in this period emphasized on the formal procedures and the requirements established in the Constitution in order to provide solutions to constitutional dilemmas. For example, in the 1988 case of *R. Jiménez*, the appellant challenged the constitutionality of the decision of a lower court based on the newly promulgated *Constitutional injunctions and remedies act*.

This case deals with the possibility of challenging, through Constitutional injunction, superior or lower court decisions. Procedural legislation has created a set of mechanisms and legal resources to restore Constitutional guarantees. This court asserts that it is necessary for citizens to exhaust every legal procedure available for their protection of Constitutional rights, before exercising the Constitutional injunction before this Court. If the Supreme Court allows this behaviour, the use of Constitutional injunctions would be abused, and probably displace well-established procedural ways in our system of positive law to guarantee Constitutional rights. It is the responsibility of this Court to decide cases based on the system of rules and procedures established by the legislator. Therefore, it is only through pre-established procedures of the positive law that the plaintiff should obtain the restoration of the legal situation presumably infringed.\(^{416}\)

The Court in this case once again relied on the argument that the legal procedures previously established by the legislation, the *Constitutional injunctions and remedies act*, must be completed by the appellant before referring the case to the Supreme Court. The judges emphasized on the formal procedures to be followed for citizens to request the protection of constitutional rights. It is evident that in this case, the judges formulated their arguments with a formalistic perspective. The legal formalism that the judges seemed to use in their arguments, understood the written law as being objective, gapless, and above political or moral bias. According to legal scholar Brian Tamanaha “the label legal formalism is regularly applied to the characterization of the common law as comprehensive, gapless, conceptually consistent and logically ordered and autonomous as developed by judges through the application of reason”.\(^{417}\) The arguments given by the judges in the *R. Jimenez* case, can reflected legal formalism in Venezuela. Legal procedures and the formal criteria established to access the jurisdiction of the Supreme Court were necessary to guarantee the integrity of the constitutional system. The Court emphasized once again that the application of the rules and norms, following the procedures and formal criteria could provide a solution to each constitutional issue that arised. The decisions presented so far all demonstrate that they favour the formal criteria over discretion.


Another example of the Supreme Court of Venezuela’s approach to the adjudication of constitutional rights can be seen in the 1990 case of *D. Roa v. Seguros la Seguridad C.A.* In this case, Mr. Roa claimed that the *Seguros la Seguridad* insurance company failed to pay his personal injury protection, which he argued, based on the jurisprudence of the court, could be interpreted as a violation to his constitutional rights.

This Court advises the appellant that in our legal system the traditional sources of law are the valid promulgated legislation and custom. Decisions made by this court respectfully and peacefully followed the procedural relationship of case-by-case solutions to solve similar problems in particular cases; case-law is not a source of law in Venezuela. This Court, following strictly the separation of powers, has a specific role to play that cannot be confused with the role of the legislative branch. One creates the law and the other is only responsible for applying it.\(^{418}\)

In this case the Court argued that the validity of the Venezuelan legal system rests on valid sources. It seems that in all the cases analysed so far there is a recurrent tendency from the Supreme Court to provide arguments that in many aspects are similar to those of Legal positivism. In this case the Court reinforced the idea of a strict separation of powers as set in the constitutional text. The Supreme Court held that the role of the judges is to follow carefully the procedures on a case-by-case basis to solve their dilemmas. Venezuela’s legal thinking over decades, as demonstrated in the case above, maintained the position that law was a gapless and coherent set of rules and norms valid because of their source. In this case, the Court argued that the separation of power set in the Constitution specifically provided Congress with the authority to enact legislation, the executive branch with the authority to follow it and the Supreme Court with the authority to apply it. The Court’s understanding of the Constitution reflected in the judges’ decisions revealed a particular inbuilt legal positivism. Indeed, judges in Venezuela at the beginning of the newly proclaimed 1961 Constitution considered the rule of law as the application of positive and logically demonstrable rules. In a different context, yet very insightful, legal philosopher Neil MacCormick affirms, “a system of positive law, especially the law of a modern state, comprises an attempt to concretize broad principles of conduct in the form of relatively stable, clear, detailed, and objectively comprehensible rules.”\(^{419}\) It was ideal for the Venezuelan Supreme Court to determine the legal outcome of a constitutional controversy based on the facts and fixed rules applicable to a specific case. Therefore, the adjudication of constitutional rights was justified under the premises of legal formalism.


The decisions of the Supreme Court held that the well-established procedures and formal criteria were essential to maintain legal certainty. Another case that demonstrates is that of *P. Araguaney v. Pierre Roelens Construcción Naval, C.A.*, in 1991. In this particular case the appellant argued the violation of his constitutional right to defense himself on trial because of a mismanagement of the judge of the lower court during trial.

This Court has stressed that in cases of violations of the right of defence a good technique to deduce the proper applicable rule necessarily involves: a) determining the formality or procedure that the lower court or the Court of appeals presumably omitted or violated; b) applying the premises of the right of defence to the facts of the case brought to the Court, following the formalities and procedures presumably omitted by the lower court or the Court of appeals; c) resolving, if such omission or violation of the formality or procedure could harm or undermine the right of defence of one of the parties involves. 420

This decision is particularly interesting because the Supreme Court established a test for the analysis of cases regarding the constitutional right of defense. Indeed, the judges went on to explain with details the different steps necessary to deal with this type of case. The Court emphasized once again on the determined, gapless and logically applied formal criteria and procedures needed to solve cases related to this constitutional right. Yet, it is the first time so far in the analysis of constitutional jurisprudence during the 1961 Constitution that a decision explains with detail the procedures to be followed by other courts to deduce logically the best possible answer for cases related to the constitutional right of defense on trial. The arguments used in this case resembled the postulates of legal formalism. The Court placed an emphasis on forms and procedures to deduce the proper constitutional precept applicable. In a different context, but very insightful, legal theorist Dennis Michael Patterson explains, “legal formalism postulates that the law’s content can be understood in and through itself by reference to the mode of thinking that shape it from inside.”421 There is no room to doubt that the judicial decision-making process of the 1961 era justified the enforcement of Constitutional written norms by a strict adherence to the formal criteria and procedures established by the law. The judges held in their decisions that the application of the formal procedures served the stability, consistency, security, and certainty of the application of the law, as guidelines for constitutional adjudication. The judges assumed that the law was sufficient in itself to solve any controversy.

The practice of deciding constitutional cases during the 1961 era demonstrates that the judges avoided what could be called some romanticism or moralizing myths. The Court recognized that by following procedures as established in the valid and authoritative constitutional system, decisions can be faithful to the Constitution. In the words of Emílios Christodoulidis, “formalism is a realization of the rule of law ideal.” The decisions examined kept avoiding dealing with other issues, and only concentrating on the valid norms, following them almost verbatim. In fact, at the beginning of the jurisprudence of the Venezuelan Court, that was usually the method applicable to constitutional interpretation; a demonstration of the formalistic perspective of the judges. Another example of this practice is the 1995 case of Municipio Sotillo, where the appellant challenged the constitutionality of the municipal act that closed a community center.

The constitutionality invoked in this case made references to the concept of judicial review. This Court, in fact, established that the purpose of defending the Constitution does not only lie, solely, on positive aspects of Constitutional law, but also on the primary norms that set the standards necessary for its proper function and validity. In addition to the secondary rules that form the core of the Constitution, in terms of our own Latin public law, the purpose of defending the Constitution could depend on what is essential to protect in this regime of norms. Not only the positive rules that give concrete form to a given objective, but also the objective itself, such as democracy, freedom, equality, etc. Since the legal order is established by a set of positive rules, the most effective defence of the Constitution is to ban certain changes of positive law that could affect those previously stated as being objective. Indeed, this court has sustained extensively that the violation of the Constitution must be flagrant and direct in order to declare specific unconstitutional governmental actions.

In this case, the Court exhibits affinities to arguments taken from legal formalism. The concept of law that the Court demonstrated was analysed as a closed, consistent, and complete system of general and abstract norms. It is almost undeniable that the judges, in a tremendous effort to maintain certainty and stability in the judicial process, deduced solutions almost as a mathematical axiom. The Court’s deductive approach emphasized on the predictability and stability of the written norms, as the best possible method to determine the violation of the constitutional text. The judges defended the validity of the constitutional norms as a set of standards that can be properly applied to solve cases. They argued that rules have objectives, like democracy and freedom, and that it is up to the Court to ban acts that contravene those objectives.

422 Veitch, Christodoulidis & Farmer, Jurisprudence, supra note 19 at 96.
The consistent jurisprudence of the Supreme Court of Justice during the 1961 era evidence the emphasis made by the judges on formal criteria and procedures while dealing with constitutional cases. Another example of this formalistic view of constitutional interpretation is the 1996 case of *Venmar & Motiel C.A v. Concreta Martín, C.A.* In this case, the debate over the ownership of property ended up before the Supreme Court to determine the correct enforcement of constitutional property right.

The Supreme Court has adopted a judicial diagnostic of the legal situation to determine if the facts of this case fall within the hypothesized criteria of the legal norm. The first involves an outline of the *questio facti* of the specific controversy. The second step is to establish the proper connection between the factual circumstances surrounding the case and the concrete and abstract norm. The correct interpretation of the law can be determined by subsuming the particular facts of the dispute on the hypothesized standard of the norm.424

Here, the Court argued that in order to decide constitutional cases, the judges must limit them to subsuming the facts in the prescribed constitutional norm. This formal account of the judicial role acknowledged once again that the adjudication process in Venezuela during this part of the twentieth century was deliberately formalistic. Similarly, in the American context, legal scholar Richard Posner affirms, “if the positive economic theory of the common law is right, the common law is a logical system, and deductive-logic-formal reasoning can be used (by the judge) to reach demonstrably correct results in particular cases.”425 This logical method uses deductive reasoning, in a literal sense, to reach a correct answer in Constitutional cases. During this period, the Venezuelan jurisprudence used consistently arguments linked to the early stages of legal positivism, emphasizing particularly on the formalistic perspective regarding the interpretation of constitutional rights. The judges avoided, such as in the case above, external factors to determine the facts and the norms that should be applied in the case. It seemed that the interpretation of the Constitution was a mechanical procedure in which the judge got the facts and determined if they fit or not in the hypothesized standard of the norm. American legal author Ernest Weinrib explains, “the function of form is to draw out the law’s immanent intelligibility by making salient the nature of unity and coherence both within and among legal relationships.”426 Indeed, the Court had made it clear that there was no need for value judgement when constitutional issues were brought to the highest court of the land.

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426 Weinrib, *Legal Formalism*, supra note 403 at 963.
Reliance on Precedent: the Binding Jurisprudence Approach

In Venezuela, since the Supreme Court began to elucidate constitutional issues, case-law became part of the constitutional life of the country. The Venezuelan judges during the era of the 1961 Constitution devoted considerable attention to elaborate doctrines with their decisions, while following previously rendered ones, as it was appropriate for the judicial function to recognize the lessons learned in previous constitutional judgments. Although Venezuela’s legal system followed the Civil law model, when certain set of facts where decided on previous cases, the judges of the Supreme Court tended to continue the case-law. The doctrine elaborated for constitutional decisions progressively began to become part of the judicial decision-making process at the Supreme Court. In the words of American constitutional law professor Craig Ducat, “the more a Constitutional system matures, the more its lawyers and judges look at its Constitutional provisions not directly but through layers of interpretation in previous cases.”427 Regarding this, the ratio decidendi of previous cases made way for abundante cautela428 not to disturb settled matters in Constitutional decisions. Indeed, for the Court of Cassation as part of the Supreme Court of Justice, following the historical tradition determined miscarriages of legal interpretation in lower or superior court, based solely on the verbatim law. Although cases involving claims against government actions would generally fall within the jurisdiction of the Political Administrative Chamber, the Court of Cassation also adjudicated constitutional issues regarding this specific matter. Once a constitutional resolution was accomplished the point made by the Supreme Court would stand in the jurisprudential doctrine of all courts of the system. Indeed, the Supreme Court of Justice ensured the unity of interpretation and application of the law by the lower and superior courts of the system. An analysis of the case-law during the 1961 Constitution demonstrates the frequency of precedent-based argumentation by the judges, which shaped the Constitutional adjudication process and the evolution of the legal rule system. The Supreme Court began to follow its own jurisprudence. The Court, honouring previous judgements, followed the criteria established by prior judges. It was fundamental for the Court to rely on the binding jurisprudence doctrine on the assumption that certainty, predictability, and stability in Constitutional adjudication were fundamental objectives of the legal system.

427 Ducat, Modes of Constitutional Interpretation, supra note 387 at 45.
428 Brewer-Carías, Constitución 1999, supra note 319.
The Constitutional doctrine, elaborated during the years of the 1961 Constitution, demonstrates the adherence to precedents in the Venezuelan legal system. Bound by the Supreme Court doctrine, the judges of superior or lower courts followed it strictly, to set stable requirements for future generations. The doctrine of the Court rendered constitutional judgments under the premises of prior Authoritative decisions. It provided guidance to considerably cloudy Constitutional precepts. A good example is the 1990 case of *M. Morales*, where Miss Morales claimed her constitutional right to motherhood.

To decide this case, this Court has to analyze the allegation of violation of provision 74 of the national Constitution, which protects motherhood, regardless of the marital status of the mother. It dictates the necessary measures to ensure every child, without any discrimination, comprehensive protection from conception to its full development, to grow in favourable moral and material conditions. In addition, this Court has to analyze the allegation of violation of provision 93 of the Constitution that states that women and younger workers will be subject to special protection. Therefore, to decide on this case, the Court strengthens his argument based on a previously established ruling, dated January 24, 1985, which expressed the following “the Constitutional provisions mentioned before do not refer then to valid law, so its application is strictly necessary. Thus, the right to security of tenure at work of pregnant women and the right to enjoy the pre and post-natal rest are rights inherent to the human person.” This Court, following provision 50 of our national Constitution, which establishes that the enumeration of the rights and freedoms contained in this Constitution should not be understood as the exclusion of others, decides that the lack of regulatory legislation does not impair the exercise of Constitutional rights.429

Here, the Court relied on a prior judgment to set the standard to decide future Constitutional controversies. Although it is almost impossible for cases to have exactly the same facts as another previous one, in the case above, the Court considered and answered the controversy in the same way they did for a previous case, in which the same question had arisen. The judges’ reasoning concentrated on the similarities of the facts rather than the differences, in order to apply the doctrine previously built by the Court. In this regard, legal scholar John Salmond asserts, “only through this rule can that consistency of judicial decision be obtained, which is essential to the proper administration of justice.”430 For decades, the Supreme Court maintained the conception that the mature development of the rule of law as the underpinning of the Venezuelan public law system meant that the judges decided cases through the logical, stable, and consistent application of the law, especially with precedent decisions, in order to make this institution reliable. This doctrine was considered authoritative and persuasive, as presumption of the right answer for the specific cases.

430 John Salmond, *Jurisprudence* (London: Stevens and Haynes, 1907) at 39
The judges, in several cases, decided constitutional disputes based on what in similar situations the Court had settled for in the past. One of these cases is that of *H. Izquierdo v. Kernite Venezuela, S.A.*, in 1994. In this case, the dispute was regarding the constitutional right to defend on trial. Mr. Izquierdo alleged the obstruction, by the company where he worked, of his right to counter the allegations presented against him.

To decide, the Court notes that the appellant comes to this highest Court, formalizing the request to apply the correct interpretation of a rule of Constitutional character. This Court has established, on previous occasions that this rule proclaims the caseload of the defendant to identify in the affidavit which facts to deny or reject. As it was already decided in the decision dated April 12th, 1989, an abstract of that decision asserts, “the legislature just wanted to attribute the effect of the ‘fictitious confession’ when the alleged facts are not clearly determined in the affidavit. It also denies and rejects those that have not made the required determination of the elements of the process.” Therefore, applying the doctrine and reasoning described above, this Court declares the ticket alleged and so decided.431

In this regard, the adjudication of constitutional rights under the basis of precedent decisions was recognized by the Court as an important step to remain faithful to the Constitutional text. In this case, the court followed the decision made on April 1989 and even quoted a part of it to provide arguments that could guide in the solution. Precedent, according to legal scholar Frederick Schauer, “involves the special responsibility accompanying the power to commit to the future before we get there.”432 Certainly, the judges of the Supreme Court followed precedent decisions because they believed that those judgments provided reasons to support an understanding of the Constitution. Adherence to precedent limits and shapes the approach of the Court to decide in present controversies. The case before explained demonstrates that the Court did not leave room for creativity or personal views. Instead, it ensured the continuity of authoritative decisions previously enacted by the Supreme Court. Insightful in this subject, professor of Jurisprudence Neil Duxbury stressed, “for the classical legal positivism however, the idea that precedents bind future decision makers is intelligible only if there is a stipulated doctrine or sanction which will be *prima facie* applicable to those decision makers when they ignore precedents.”433 Indeed, as it has been pointed out before with great detail in the section concerning Venezuela originalism, the Supreme Court had approached the interpretation of the Constitution with arguments similar to classical legal positivism.

The precedent emanated from the Supreme Court, during the 1961 Constitution era, supported the idea of a gapless system of rules. Certainly, the arguments used by the Court were likely associated with a classical view of legal positivism. This can be exemplified in the 1994 case of Fedecámaras v. Ley Seguro Social, where the Venezuelan Chamber of Commerce that associates all businesses in the country requested a repeal to the Supreme Court, because they considered it was unconstitutional the Social Insurance Act.

According to provision 3 of the Constitutional Injunction and Remedies Act, every citizen has the right to challenge the Constitutionality of laws, and request the immediate suspension of its application. From the analysis of the fact of this case, it is possible to make a connection with previous decisions made by this Court, such as the cases of Public vallas (April 24th, 1990), and Venevision (May 5th, 1993). Therefore, this Court affirming its own jurisprudential approach, settled to assert that the suspension of the effectiveness of a specific legislation, could not, as the plaintiff claims, extend the Constitutional protection to all citizens collectively, because it would be in contradiction with the particularity of the active procedure for defence. Therefore, it is conclusive for the Court that this request is not applicable.434

The Venezuelan judges, in this historical era, believed that in the process of deciding constitutional controversies, precedents had maintained the logically established written rules previously enacted by the recognized authority. In this case, the Court, instead of getting into the debate about the implication of its decision on society, reaffirmed its own jurisprudence to settle the case. In a formalistic view of the interpretation of the Constitution, the Court decided to deny the claim based on the fact that the striking down of the legislation could be requested in the name of citizens collectively. The application of constitutional precepts under the premises of legal formalism made it difficult for the Supreme Court to find more concrete solutions to difficult cases. The Supreme Court relied on previous judgments to settle constitutional controversy in many difficult decisions. According to legal scholar Neil MacCormick, “so far as legal systems include rules that it is mandatory to apply in every case to which they clearly refer, observance of the requirements of deductive logic is a necessary element in legal justification.”435 Indeed, the Supreme Court maintained that the Constitution was sufficiently clear and capable of verbatim application of factual circumstances, entirely separate from making law or policy. This is best exemplified in the case above, in which the Supreme Court avoided the debate regarding the social issues of repealing the Social Insurance Act, locating instead the formality missing and following the previous judgements in this regard to dismiss the claim.

435 Neil MacCormick as quoted in Veitch, Christodoulidis & Farmer, Jurisprudence, supra note 19 at 98.
After decades of constitutional decisions, the Court in cases where facts were similar to previously decided constitutional cases followed their established legal doctrine. The Court began to follow its own jurisprudence. The judges argued that to reach appropriately a decision, precedents served to reconstruct the normative and factual premises set out previously by other judges in the adjudication of constitutional rights. To illustrate this point, legal scholar Neil Duxbury adds, “when we make a decision on the basis of experience, we are valuing experience for what it teaches us.” An appropriate example to the precedent-based adjudication is the case of *B. González*, in 1995, in which Mr. González claimed the violation of his constitutional right of equality and non discrimination.

In many decisions, this highest Court has established and delineated the essence of the right contained in provision 61 of the Constitution. While this provision refers explicitly to the prohibition of discrimination based on race, sex, creed and social condition, this Court asserts that discrimination, when similar or analogous situations are decided without justification, is treated differently. Now, in this specific case, this Court, following the jurisprudence of the Political Administrative Chamber for the case of *San Juan Antonio Rodriguez*, the case of *Francisco Visconty* and the case of *Carmelo Vera Agustín Díaz*, stresses that if there has been no evidence brought that aimed at testing the alleged discrimination, this Court cannot conclude in favour of the plaintiff.

The Supreme Court based its reasoning in this case regarding the right of equality on prior landmark decisions with a similar situation. In fact, the Court relied on different administrative cases, which it believed gave arguments in favour of the fact that without evidence that can prove the alleged discrimination, the Court could not favour the plaintiff. As the case above demonstrates, the Court had specific techniques of judicial exegesis or reasoning to read precedents that were adequate to the specific case. Despite that fact, Venezuela’s legal system was inspired under the premises of Roman law, where the code of law determines the outcome of legal controversies. In several cases during the period of the 1961 Constitution, the judges referred to previous decisions to determine the result of present cases. As explained by Venezuelan law professor Rogelio Pérez Perdomo, “to the civil law fundamentalist, authoritative interpretation by the lawmaker was the only permissible kind of interpretation.” However, the several judgments analysed so far demonstrates that the judges relied on their own doctrine set in previous cases.

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436 Duxbury, *Precedent supra* note 433 at 16
The development of the Venezuelan constitutional jurisprudence elaborated chronologically a set of reasons given in support of specific outcomes on diverse types of cases. This provided to the subsequent Court plenty of normative material to draw upon while deciding new controversies. Another example of the use of precedents is that of the 1995 case of Banco del Orinoco S.A., where the legal department of the Orinoco Bank challenged the constitutionality of one of the acts made by the trial court.

This Court has noted that it is extremely dangerous for the legal security agreement to allow Constitutional injunctions for protection against legal acts in formation. It would constitute an unacceptable interference in the Court’s affairs, undermining the autonomy and independence of judges. In this regards, this Court of Cassation, in the ruling dated March 12th, 1992, explains: “the Constitutional judge's intervention in the course of a trial, would lead to a serious disturbance of its development and would tend to subvert the process.” Therefore, this court, respecting its own doctrine, has to dismiss this case.439

Solutions awarded in previous Constitutional controversies served as guidelines for the judges to accomplish the adjudication process. According to law scholars James Fleming and Sotirios Barber, “the more a Constitutional system matures, the more its lawyers and judges look at its Constitutional provisions not directly but through layers of interpretation in previous cases.”440 In fact, the case above demonstrates the adherence of Venezuela’s Supreme Court to precedents, which reveals the maturity of the constitutional system. The last example to illustrate the direct application of previous cases is the 1996 case of M. Pérez, in which the plaintiff claimed the violation of the right to due process.

The peaceful and constant jurisprudence emanating from the Supreme Court has established the condition of immediate and direct violation of the Constitution to grant Constitutional protection to those who requested it. It is necessary for the verification of the violation, to determine who is responsible for this offense against the highest law in the land. Additionally, the Court of Cassation has established that it is necessary to exhaust the ordinary and extraordinary subsequent procedures before attempting Constitutional injunction. By not using the normal procedural means, this Court concludes that it is inadmissible to the Constitutional injunction and so it dismisses this case.441

The Supreme Court, as in several cases, granted continuing validity to a set of rules previously laid down in a decision. In fact, the Court once again argued in favour of previous cases, giving reasons that had already been given in other cases to settle the dispute. The judges searched previously settled cases that related to a specific controversy, extending its solution to present cases.

440 James Fleming & Sotirios Barber, Constitutional Interpretation: the Basic Questions (New York: Oxford University Press, 2007) at 135. [Hereinafter Fleming & Barber, Constitutional Interpretation]
Emphasis on the Structure: Hierarchy of Norms & Logic System of Rules

Jurisprudence, at this point, turns into a more complex issue. In Venezuela, as the country grew and developed, the federal government broadened its scope and magnitude in all kinds of new duties. The control of governmental acts and the adequate action of public officials became a necessity. To prevent public officials from running amok, the 1961 Constitution established the power of the court to declare the constitutionality of legislation and governmental action, as well as to maintain the correct interpretation of the law in the entire country. The legal control, as the responsibility of the Supreme Court, prevents any arbitrary action from governmental officials. As seen in the jurisprudence studied, for example, the 1963 case of *Pinto Salinas v. Hipódromo*, the judges advocated for the supremacy of the Constitution. They argued that everyone is subject to the Constitution. “The Constitution is the fundamental law of the republic, and any extra limitation violates the principle of legality.”

Similarly, in the 1978, case of *J. Jiménez*, the Court held that “the Constitution is a supreme norm and everyone must respect the supremacy of constitutional rules,” while in the case of *Consulta del Consejo de Guerra*, in 1979, the Court stated that the “supremacy of the Constitution means respecting the constitutional rules and principles.” Certainly, everyone must adhere to the Constitution. Indeed, the role of the Supreme Court was to apply correctly the logical rules of the legal system to solve specific cases. And so the judges excluded unexpressed values or personal views when dealing with constitutional issues. Constitutional adjudication, therefore, was to deduce the right answers in cases by adherence to the prescription of the norm. At the enactment of the *Supreme Court Act*, in 1976, the Administrative Chamber gained wide jurisdictions to deal with Constitutional controversies related to governmental actions. Although some of the decisions held by this Court found in the original meaning a value-free methodology to provide a concrete meaning to the Constitution, most jurisprudence of the Administrative Chamber followed the analysis of the hierarchy of norms to interpret the law as an objective and scientific fact. The development of jurisprudence in Venezuela made objectivity an important criterion for constitutional adjudication. And so, Venezuelan jurisprudence began its transformation.

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444 *Consejo de guerra permanente de Caracas*, supra note 384.
The Supreme Court rhetoric used to justify its constitutional decisions demonstrates similarities with arguments of Kelsen’s theory. The jurisprudence of the Supreme Court of Venezuela suggested that judges do not have discretion to decide accordingly with reason.\textsuperscript{445} The case of \textit{Pinto Salinas v. Hipódromo} is a good example of the Court relying on hierarchy of norms than than the merits of the case. Mr. Salinas challenged the decision of the national government regarding the house track because in his opinion the government abused its power, violating the Constitution.

This Court will now determine the sources of government power based on a hierarchical chain of validity. The Constitution and laws define the powers of the government, and every public official is subject to its obedience, as stated in the provision 117 of the Basic Law of the Republic. Therefore, the activity of the State and all the people within the same exercise of public functions should ensure that their powers strictly follow the expressly indicated limits. Any overreaching in the exercise of these powers vitiates the act of illegality in question and should be declared invalid if so requested. This is the principle of legality, which must rest on the rule of law.\textsuperscript{446}

The Court justified the constitutional meaning of governmental powers, relying on the chain of validity. In this case, the judges argued that everyone, the State or citizens, is subject to the law, and that any act that contravenes the constitutional system must be declare invalid. Judicial review obtained its validation upon the premises that any act that contravened the higher written text of this basic norm had to be discarded to preserve the integrity of the Constitutional system. Interpretation by the \textit{science of law} is purely a “cognitive ascertainment of the meaning of legal norms,”\textsuperscript{447} which suggests that the judges simply apply the possible meaning of a legal norm, where politics and ideology offer no guidance. The presupposed validity of the basic norm built a ‘pyramidal structure’ where the Constitution, traced back to the first one ever enacted, was on top, and other statutes or laws, judicial decisions or acts of government were lower in the hierarchy. The development of jurisprudence in Venezuela made it clear that the role of the Court was to interpret faithfully and trustfully the constitutional text.

\textsuperscript{446} \textit{Pinto Salinas v. Hipódromo}, supra note 442.
\textsuperscript{447} \textit{Ibid}, at 355
The Supreme Court endeavoured to achieve a measure of objectivity required to preserve the system of norms. Early stages of constitutional interpretation demonstrate that judges of the Supreme Court accentuated on the hierarchy of norms. In fact, to illustrate the arguments of the Supreme Court, the best example is the 1969 case of *Constitucionalidad de la Ley de Reforma Parcial de la Ley Orgánica del Poder Judicial*. In this case, the President of the Republic challenged the constitutionality of the partial reform of the *Judicial Power Act* enacted by Congress affirming that it violated the separation of powers.

This Court ratifies the jurisprudence established by the former Supreme Court on February 2nd, 1943, in which the Court set that it is irrelevant to analyze the usefulness of law in order to establish its Constitutionality. Indeed, there is no point for this Court to debate the advantages or disadvantages of a specific legislation. Therefore, it is irrelevant if legislators include one or more rules in a particular law to achieve the purposes specified in the Constitution. Those are matters beyond the Court's jurisdictional control over legislative acts, unless they violate a specific provision of the Constitution. Dissenting opinion: This Political Administrative Chamber exercises the Constitutional jurisdiction, as provision 215 of the Constitution establishes it. Since the Constitution does not distinguish or limit the powers of the Court in this matter, the Political Administrative Chamber is not only able to examine the written law, but also the legislative formalities, which the statutes must accomplish. The Constitutionality of laws can only be measured under the hierarchy of norms. Laws can be unconstitutional when the Court establishes the logical contradictions between lower laws and the fundamental basic rule of the State.448

In this particular landmark case, the judges, for the first time, were split between those who supported the Constitutionality of the Act and those who did not. One side of the courtroom argued that it was not the judge’s responsibility to determine if the formal criteria chosen by the legislators defeated the purposes of this challenged legislation. Judicial review only operates when legislators expressly violated the Constitution. On the other hand, the dissenting judges believed firmly that this challenged Act was unconstitutional because it was contrary to the presupposed validity of the hierarchy of norms established by the Constitution. The judges of the Supreme Court of Justice in their dissenting opinion insisted that the legal system was bedrock of a scientifically deducible system of rules that comprise solutions for legal issues. This case demonstrates the early tensions between the different approaches to interpret the Constitution. For one side, it was possible to elucidate arguments similar to legal formalism. The Supreme Court avoided, in those cases where the law remained silent, to resort to moral, political or sociological conclusions that could render their judgment bias. Other judges also resorted to arguments similar to the contiential positivism of Hans Kelsen.

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The 1969 case of *Dr. Ferrer v. Zulia Bar Association* is another example of the adjudication of constitutional rights based on the hierarchy of norms. In this case, lawyer Ferrer challenged the new rules of the Zulia Bar Association’s membership. In his opinion the new rules differentiated between lawyers from national universities and other lawyers.

The Court examining the jurisdiction for this case established that the power to annul acts of the administration is expressly conferred in the Constitution, under provision 215, establishing the power of the court to declare invalid acts of the administration. The State recognizes this Court as a body that exercises power to ensure the maintenance of the hierarchy of the legal system. Because the State intervenes in the creation of professional associations, it is clear that this organization must comply with the State legal system. To conclude, when legislation or any other act collides with the higher norm, the Constitution, it generates the nullity of the lower norm so as to preserve the validity of the hierarchy of norms.449

In a logical syllogism, the Court argued that legislation and other acts that jeopardize the constitutional system must be declared null to protect the highest norm. In the case above, the new regulations were against the highest norm, and so the Court found them null because in its opinion they threatened the entire legal system. In fact, this case demonstrates how the Court’s arguments rested in a legal-logical sense of the Constitution as a basic norm that supports the validity and legitimacy of the entire legal system. The Supreme Court during the early stage of jurisprudence resorted not only to arguments derived from originalism, textualism, formalism, but also the hierarchy of the norms. As the case above demonstrates, the Supreme Court decided in conformity with the legal order in its hierarchical structure instead of relying on the merits or facts of the case.

The Constitution, as the ultimate rule of the hierarchy of the legal system, settled its application under the written rules, objectively applied by the judges. The condition for any legal norm to be binding was that the hierarchy of the norms had to be validated by the Constitution and behind it the “basic norm.” Indeed, in Venezuela’s legal system, every public authority was compelled to act within the powers granted by legislation, in accordance with the Constitution, as seen in the 1970 case of *City Council District Plaza v. C.A. Electricidad de Caracas*.

This court observed that, in accordance with provision 7 of the Code of Civil Procedures and case-law in Venezuela, the control of the Constitutional legitimacy of law under Venezuela’s positive legislation is the responsibility of both the Supreme Court and trial courts. Indeed, no matter the category or hierarchy, judges are responsible for the correct application of the fundamental law of the land, the Constitution. Establishing the jurisdiction of the Court, it is then

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able to hear this particular case. After analyzing the alleged collision between the content of provision 45 of the Municipal Code of Laws and provision 136 of the national Constitution, this Court found that in this case there is not such a collision between the regional legislation and the national Constitution. Instead, the municipal legislation is perfectly compatible and respectful of the hierarchical structure enacted by the Constitution.\(^{450}\)

According to this case, once lawmakers produce rules, the judges apply them to the facts of a case regardless of the social interests and public policy. The Court relied on the hierarchical structure of the Venezuelan legal system to render its decision. “Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system.”\(^{451}\) The Constitution, as the ultimate positive law, imposed constraints on the judges’ decision-making process to set the meaning of legal norms in conformity with the legal order of its hierarchical structure. “Purely political value judgement is falsely presented as scientific truth.”\(^{452}\) Kelsen recognized that the legal system must have a normative base, which does not need to rest on moral prescriptions or political ideologies. “Because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law.”\(^{453}\) Kelsen notes the importance of keeping its theory ‘pure’ to separate from any political, social, moral biases. In fact, the judges during the early stage of jurisprudence, either by originalism, textualism or formalism, tried to maintain a separation between the Constitution and other external factors to be considered while interpreting the constitutional text.

The Constitution was understood by the judges of the Supreme Court as the norm that represented the validity of all norms belonging to the legal order. Another example of the arguments of the Court in practice is the 1979 case of *Cervecería Modelo C.A.* In this particular case, the Cervecería Modelo C.A claimed the violation of the Constitutional principle of defence, suing for the annulment of the resolution issued by the National Institute of Educational Cooperation (INCE), which did not justify the specific sanction applied.

This Political-Administrative Chamber, reiterating its jurisprudence, establishes that provision 181 does, in fact, provide jurisdiction for this court to deal with an action on Constitutional grounds, making other courts decline their jurisdiction in favour of this high court. This way, the Supreme Court is able to ensure the unity and uniformity of Constitutional jurisprudence. Along this view, this Court, recognizing the complexity of interrelating norms,
establishes that the collision of norms or rules that infringed the fundamental norm is the best way to determine the unconstitutionality of norms.454

The Court justified the decision to hear the case and provide meaning to the right of defence based on the structure of the legal system, specifically dismissing the claim based on the facts that it contravened the Constitution as the fundamental norm. The judges emphatically presupposed that the Constitution, justified by the basic norm, was logically above the other norms of the legal system. The logically-established source of legislation presupposed its validation from the fact that its authority was recognized and followed as the top of the structure. Indeed, Hans Kelsen argues, “The basic norm supplies only the reason for the validity, the content of the norms constituting the system. Their content can only be determined by the acts by which the authority authorized by the basic norm, and the authorities in turn authorized by this authority, create the positive norms of this system.”455 On this point, judges in Venezuela set the standards to recognize the constitutionality of the norms when performing a judicial review of the legislation or acts of the government, under the premises of determining the hierarchy of the norm in question and its adherence to the Constitution. For legal scholar Owen Fiss in the American context, “judges may not project their preferences or their views of what is right or wrong, or adopt those of the parties, or of the body politic, but rather must say what the Constitution requires.”456 The quest for objectivity was fundamentally important for the Court in constitutional adjudication.

The premises of the structure of the legal system made the Supreme Court settle for nullifying any act or legislation that could collide with the highest norm that is the Constitution. For instance, in the 1983 case of L. Terán, the Court settled the constitutional challenge brought by Mr. Teran arguing that his right to defense had been violated.

The purpose of the legal actions heard before the Supreme Court is to ensure the unity and uniformity of the Constitutional jurisprudence. However, this case has to be understood in strict sense, on facts that demonstrate the unconstitutionality of the challenged legislation or act. In consequence, this Court has concluded that to decide appeals, it must be based on Constitutional grounds. This will be determined under the hierarchy of a valid legal system. When the contested act is confronted with the Constitution, it evidently results in the collision between both parties and, in the end the lower act is dismissed.457

455 Kelsen, Pure Theory of Law, supra note 415at 197.
In the analysis of the constitutional right of defence, the judges of the Supreme Court argued that the validity of rules in the legal system could only be determined by the higher norm the Constitution. The Court solved the case by carefully reviewing the facts and the challenged act and logically rejected those acts or legislations that collided with the ultimate rules of the land. This formal view of Constitutional interpretation, where judges must technically observe the challenged act to verify its adherence to the Constitutional precepts, was free from empirical mixtures that misguide the understanding of the law. Certainly, as law professor Marco Haase explains “the nullity of the act does not depend upon the volition of the actor but upon the objective meaning.”\textsuperscript{458} In fact, according to Kelsen, a legal observer attempts to determine the ‘objective’ and not the subjective meaning of an act. Indeed, Kelsen’s ‘pure scientific law’ rejects any external account on the conception of what law really is. The hierarchical model of law transmits a normative force based on the validity and authorization along with the highest norm. Similarly, but in a different context, philosopher Frederick Hayek argues that “a government in all its actions is bound by rules fixed and announced beforehand, rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of that knowledge.”\textsuperscript{459} The Court was emphatic on the relevant facts, as established by rules of evidence, and then subsumed these facts under the written constitutional precept applicable to the controversial case.

There is a difference between the early positivist assumptions that describe the law as the threat of sanction by a sovereign entity and other positivist theories. Kelsen’s positivism explains that the nature of the basic norm is the proposition that we ought to comply with it because we accepted it and therefore laws and the Constitution are valid. The judges at the Supreme Court argued that the constitutionality of laws can only be measured under the hierarchy of norms. In fact, the example of the 1990 case of \textit{J. Moreno}, demonstrates that the Court began to justify decisions under premises similar to those explained by Kelsen. In this particular case, Mr. Moreno requested the protection of his constitutional right of due process.


\textsuperscript{459} Frederick Hayek, \textit{The Road to Serfdom} (London: Routledge & Kegan Paul, 1944) at 54.
The court noted that after having issued the Constitutional injunction and remedied act, it began to recognize the special character, which the protection of rights and freedoms has. This Constitutional action, established in the national legislation, is extraordinary. It makes possible the restoration of Constitutional rights to prevent violations or transgressions against fundamental rights recognized by Venezuela’s society. Constitutional injunctions protect not only citizens per se, but also the Constitutional system as a whole. When there is a direct and immediate violation of the height Constitutional text, it defends and protects the integrity of the system. In sum, the Constitutional injunction is justified to the extent in which rights and freedoms are threatened or injured.460

The Court holds that at the top of the hierarchy of norms, the Constitution was the highest norm. The judges argued that constitutional actions looked forward to defend and protect the integrity of the constitutional system. This argument regarding the system of laws and the hierarchy of the Constitution are closely related to Hans Kelsen’s positivist theory. Although the justification of many constitutional cases during the 1961 Constitution relied on the written text, formal criteria, and original intentions, also as seen in this case, they found support in the hierarchy of the constitutional system. According to Kelsen, to avoid the erosion of legality, acts inconsistent with the hierarchic structure of norms must be reviewed and declared by judges against the Constitution, consequently depriving them of legal effectiveness.461 In the case above, the judges acknowledged the importance of protecting rights and freedoms recognized by the Constitution. The integrity of the constitutional system prevails, recognized by the Court to prevent transgressions against constitutional rights. Thus, it has been demonstrated so far, with the cases above, that the judges answered constitutional issues using their own formalist style of constitutional interpretation under the influence of the theory of legal positivism.

461 Kelsen, Pure Theory of Law, supra note 415.
The Transition to a New Style of Constitutional Interpretation: Strong Discretion

The Venezuelan Supreme Court, as any other court, had to deal with cases in which written rules were vague or uncertain. In fact, many cases brought to the Court embedded real social, political and economic problems that could not find other venues to be resolved. Yet, at the early stage of jurisprudence in Venezuela, the Supreme Court deduced the answer for constitutional dilemmas from the general abstract rules set in the Constitution. The Court decided to avoid any external aspects, treating the consequences of its decisions as irrelevant or foreign to the decision-making process. The judges relied on their own originalism, looking exclusively for the intention of the founding fathers of the Constitution, while, in other cases, they used the text itself, just giving a fair reading to answer the controversies. In other cases, such as the one above, the Court held that to preserve the hierarchy of the legal system, the protection of the Constitution as the height norm in the system was the priority. In addition, the Supreme Court decided constitutional cases by following either the precedents or the procedures or formal criteria set in the constitutional text. However, many constitutional cases were dismissed based on technicalities or rejected on the basis of particular formalities related to the Supreme Court’s jurisdiction. The Court held that there was no written rule that expanded on the application of the Constitution. Yet, constitutional cases became more difficult, and contested, where the written text was not sufficiently clear to provide a concrete answer to the controversy. According to legal theorist H.L.A Hart, “all rules have a penumbra of uncertainty where the judge must choose between alternatives.” In his view, judges need to exercise their discretionary powers when dealing with hard cases for which no previous legislation or case law has determined the specific outcome. “There will be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable, […] but there will also be cases where it is not clear whether they apply or not.” In these cases, it is not possible to know with certainty how to apply the words of the legal text, as the language itself is indeterminate. This “penumbra” occurs because of the indeterminacy of the application of rules. For those hard cases in which facts cannot squarely fall within the core meaning of the textual words, the judges may actually create a new law.

463 Ibid, at 126.
Words compose legal rules, yet they have imprecise meanings. The uncertainty of
the constitutional text regarding broad rights and freedoms made the interpretation of the
Constitution a difficult task. H.L.A Hart states that “there is a limit, inherent in the nature of
language, to the guidance which general language can provide.”\(^{464}\) Indeed, constitutional
precepts often present a variety of rights and freedoms with inexact terms that lead to
misconceptions. This ‘penumbra’ makes it difficult to subsume fact-situations under the
categories established in the system of rules. It opens the doors for the judges to use their
views in the adjudication process. The existence of uncertainty regarding constitutional
rights provides the possibility for cases of social, political, and economic nature to get
through the judicial system for the constitutional debate. H.L.A Hart holds that in these
controversial cases there is no “uniquely correct answer.”\(^{465}\) It is possible to conjecture that
Hart might reject the determinant application of rules in cases where the rules cannot be
applied deductively, giving room to “judicial virtue” to create a new law. The judges of the
Supreme Court became more aware of the difficulties that brought the uncertainty of the
words in the constitutional text while dealing with new controversies that related to diverse
social problems. The Court received cases that could not find a unique answer, instead many
situations required different approaches to provide the best solution. The issue of discretion
began to arise in the debates between judges of the Supreme Court. This can be
demonstrated in the arguments given by the judges while interpreting the constitutional text,
which often ended in dissenting opinions, particularly with new difficult cases. In fact, the
judges began to argue that the rules themselves did not always provide the best solution,
particularly in those difficult situations. According to legal scholar Brian Bix, “Hart argued
that judicial lawmaking at the margins was a good thing, giving need flexibility to the
application of legal rules.”\(^{466}\) The freedom in interpreting the constitutional text was almost
inexistent during the early stage of jurisprudence in Venezuela. As discussed in the cases
above, Supreme Court judges held that the objectivity of their decisions relied on the
truthful and faithful application of the constitutional text. Each of the approach used during
this period, which resembled early arguments of legal positivist, maintained the idea that the

\(^{464}\) *Ibid*, at 12.

\(^{465}\) *Ibid*.

judges should avoid getting into other aspects rather than following strictly the blue prints of the Constitution.

The precedent can set the standards for several constitutional rights. Indeed, Hart argued favourably for the use of precedent decisions, as guidance for those blurred rules surrounded by the vagueness of its text. The precedent built over several years in Venezuela advocated for the stick application of the gapless and logical set of rules. Something similar to what legal scholar Mathew Kramer said about interpretation of the law is “to stick to what we can observe and measure.” The main feature of constitutional interpretation during the early stages of Venezuelan jurisprudence was the concern for the objectivity and predictability of decisions. However, in several instances, jurisprudence is difficult to apply in a particular case, since every case displays unique facts and specificities. This invites the judges to use their discretionary powers in order to set a core of meaning of constitutional rights not previously settled. For example, regarding constitutional adjudication, when it comes to what H.L.A Hart called the “irreducibly open-textured” issues, judges need to make “a fresh choice between open alternatives.” Legal scholar David Lyons explains “in order to decide penumbral cases, Hart says, courts musts, and do, further develop the rules [...]. Courts thus act as surrogate legislatures, filling gaps by amending the law.” Indeed, H.L.A Hart adds that, “the open texture of law leaves a vast field for a creative activity which some call legislative.” Of course, the Court’s authority to exercise discretion on blurry cases relies on the existence of secondary rules conferring its legitimacy. The problem with the application of rules comes largely from the fact that they are not precise enough to provide always-adequate grounds for adjudication. The open text, as explained by H.L.A Hart is more likely to occur in different occasions because “facts-situations, continually thrown up by nature or human invention, which posses only some of the features of the plain cases but others lack” Especially when the Constitution declares a

470 Hart, The Concept of Law, supra note 462 at 125.
472 Hart, The Concept of Law, supra note 462 at 200.
473 Ibid, at 133.
474 Ibid, at 123
long list of rights strongly committed to social rights, including housing, food, education and others, which entitle citizens to basic good and services. This might raise questions not anticipated by the Constitution.

H.L.A Hart’s positivism advocates for the separation of law from morality, in his Postscript to The Concept of Law, the author recognizes that “the rule of recognition may incorporate criteria of legal validity conformity with moral principles or substantive values.”\footnote{Ibid, at 250.} For this positivist account on jurisprudence, the use of discretion to answer the most complex questions is seen as desirable. The indeterminacy made Hart argue avidly in favour of “judicial virtue,” which gives judges the opportunity to exercise their creativeness to solve constitutional controversies, without it meaning that the judges enjoy absolute freedom in deciding the outcome of a case. It is possible to affirm that H.L.A Hart did not consent to an absolute freedom on the discretionary powers of judges, especially when he indicates that “very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles.”\footnote{Ibid, at 200.} On this perspective, when judges cannot find applicable legal rules, they can rely on a “reasonable purpose of rules” that makes them provide clear reasons for the adjudication on matters of high Constitutional importance. Certainly, the judges should interpret the law, based on the secondary rules, in accordance with the social facts recognized by higher officials as standards of conduct. However, when indeterminacy surrounds norms and rules, the judicial discretion complements the system of rules. The judges adapt the purpose of a pre-existing system of rules to provide reasonable justifications for the adjudication of new cases brought to the Court. “No matter how the judge reaches their decision as a matter of thinking the problem through, they must publicly give reasons for their decision in the form of arguments about justice, social policy, morality, or others and show how these arguments are best weighed up in justifying the decision which they give.”\footnote{Veitch, Christodoulidis & Farmer, Jurisprudence, supra note 19at 106.} It is no doubt necessary for a legal system to have the judges provide, during the adjudication process, reasons to justify their decisions, taking in consideration that there is not one correct answer for every case. According to H.L.A Hart’s view, when the gapless legal system exhibits blurred rules, it might need the judges’ judicial virtue to

\footnote{\textit{Ibid}, at 250.}\footnote{\textit{Ibid}, at 200.}\footnote{Veitch, Christodoulidis & Farmer, \textit{Jurisprudence}, supra note 19at 106.}
adapt the purpose of the rules in order to answer new legal dilemmas. Yet this discretionary power does not give the judges the absolute freedom to impose their moral views. Indeed, they still have to interpret the text accordingly with the Constitution.

During the 1961 Constitutional era, jurisprudence in Venezuela established standards in order to control and limit governmental acts. It defended a normative reasoning towards the Constitutional adjudication of rights, which made the judiciary branch seem predictable and stable. However, there were cases in which the Supreme Court had to exercise strong discretionary powers to elucidate Constitutional rights. This issue is illustrated namely in the 1998 case of *Enfermos de Sida v. Ministerio de la Defensa*, where the Court had to deal with one of the most controversial issues brought to its jurisdiction at the time. The Ministry of Defence, after conducting a routinely medical investigation at one of its military bases, found out that in one military unit several of its personnel had acquired AIDS. Taking this military matter as top secret, it conducted more medical examinations, determining that this lethal disease was spreading fast among the military personal of the base. To treat this pandemic, the Ministry of Defence decided to consider this problem as a national security issue. In order to remedy the situation, the employees suffering from this disease were sent to their respective homes. However, those employees argued that they were subject to humiliation and mistreatment from the Ministry of Defence. They did not receive their salaries and were arbitrarily separated from family, friends, and coworkers, making their lives miserable. Following a Constitutional injunction to the Supreme Court, the personnel suffering from the disease argued that the Ministry of Defence denied their Constitutional rights of health, work, and life. The legal team of the Ministry of Defence explained to the Court that they took all the necessary measures to preserve the life of military and civil personnel who laboured at the infected base. The isolation and evacuation were part of the regular procedures established for this type of emergency. The quarantined zone prevented the spread of this pandemic to the near town, which according to the Ministry of Defence, saved the lives of thousands of people living in the surrounding areas. In the case of *Enfermos de Sida v. Ministerio de la Defensa*, the Political Administrative Chamber at the Supreme Court addressed *Prima facie* two sets of rights: individual rights and collective rights. The Court recognized that although individual rights must be protected, it couldn’t bypass the fact that human beings are social creatures living in a society. An intrinsic part of
being human is establishing rules of coexistence to protect the community as a whole. This case is a great example of H.L.A Hart’s theory regarding his concept of the “penumbra of uncertainty.” Because the Supreme Court had to make a decision where there was no solution expressly written.

In the terms of H.L.A Hart, the above case Enfermos de Sida v. Ministerio de la Defensa was a hard case. The judges of the Supreme Court faced the difficulty of providing a concrete answer for which there was no specific solution in the constitutional text. In H.L.A Hart’s theory of the judicial virtue, the judges elucidated the solution making a fresh choice between the alternatives provided.

There is no doubt that the right of others, civil society or the State, merits a legitimate recognition, respect and protection from this disease (AIDS). It is the ultimate right of survival, to preserve the health, life and prevent the spread of this disease in the community. Even from an economic perspective, it is important to maintain the healthy life of future generations for the general welfare and democratic development of our country. The Court, however, in deciding this case, does not oppose individual rights with collective rights. Instead, it seeks their symbiosis, their conciliation in the context of justice, which is essential under our Constitutional law. In terms of the right to health: the appellants alleged that the Ministry of Defence injured their right to health because they did not receive proper treatment. For this Court, the right to health (physically and mentally) means that the State has the duty to protect public health, especially in taking measures to prevent the spread of epidemics or environmental pollution with adverse health effects. It is undeniable that this essential human right empowers rights-holders to claim the enjoyment of the highest standard healthcare. In the context of this lethal disease, AIDS, this Court, in support of those vulnerable to infection and those already infected, holds that the plaintiffs and others in similar situations are entitled to receive the proper medical attention. From the cross examination, this Court found responsible the Ministry of Defence for the damages to the right of health of the plaintiffs. However, in terms of the right to work, after examining the evidence and the arguments of both parties in conflict, this Court dismisses the alleged claim because due to the extreme danger of this disease, which made reasonable the isolation of the infected personal to prevent further spread. Nevertheless, following the ruling of October 30th, 1997, this Court agrees that “human dignity is inalienable and intangible; it is a spiritual and moral value inherent to the human condition in all dimensions, religious, ethical and social”. The human being, as is understood in Kantian term homo noumenon is a moral subject entitled to absolute dignity and it must be treated with respect. 478

This unprecedented case made the judges trusts their own knowledge of the disease to design and implement a solution that could deliver benefits to both parties in this controversy. It is particularly interesting that the Court quoted previous decisions to provide a concept of dignity. “The Court agrees that ‘human dignity is inalienable and intangible; it is a spiritual and moral value inherent to the human condition in all dimensions, religious, ethical and social’.”479 Nonetheless, the Supreme Court considered many factors, including

479 Ibid.
the economic perspective of the issue, the impact for the community and the democratic development of the country. The Court held that the Ministry of Defence deprived those suffering from AIDS of their human dignity when it published their names at the base.

Judicial virtue must be exercised under the parameters of the Constitution. Although, H.L.A. Hart seems to concede that the judges will inevitably have discretion in difficult cases, the role of the Court must be to rule properly and consistently with the constitutional framework. In this particular case, the Court considered the fact that the Ministry of Defence made public the names of the employees suffering from AIDS, exposing them to discriminatory treatments. In the opinion of the Court, the people who carry this terrible disease and those who do not should not be treated differently. The Supreme Court held that "equal treatment must always be observed, idem ratio, idem ius." The Court concluded that,

The Ministry of Defence, working to the best of its ability under the social security benefits, must guarantee the immediate health treatment to the plaintiffs. In addition, the Ministry of Defence must ensure their salary, in order for them to achieve a dignified and decent living. By virtue of the obligation of the Defence Minister, he must request Congress to allocate a special budget to implement preventing measure against AIDS. This should included awareness, research, and treatment of this terrible disease.

The Court, as noted in this case, took into consideration previous judgments, enacted legislation, and constitutional precepts as a whole to accommodate a contemporary issue under the written text of the 1961 Constitution. The judges of the Supreme Court instead of just reading the text, the will of the legislator, the precedent or the formal criteria or even the hierarchy of norms, decided the case by considering more than just the norms. Because there are cases in which the law could not have anticipated a controversial issue, judges get a vote of confidence to exercise their wisdom or statecraft. Reflecting on H.L.A Hart’s theory, MacCormick explains that, “the theory holds that although judges are indeed duty-bond to apply the relevant legal rules in every case in which they are clearly applicable, they necessarily have a wider discretion what do to in the situation for which the rules are not clear.” According to Hart’s theory, the proper attitude of judicial virtue, then, should be ruling under an acceptable and reasonable product of impartial choice. Although legal

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480 Ibid.
481 Ibid.
483 Ibid, 200.
rules do not always exhaustively have a unique answer for every legal problem, judges are bound by the rule of law to accommodate new facts to pre-established precepts and jurisprudence. It has already been said that in relatively vague rules, judges exercise strong discretion to adapt them to the contemporary controversy issue.

The lines separating underlying legal theories in constitutional jurisprudence often become blurry. There is a fine line between judicial virtue and judicial activism. The “open texture” of law, indeed, leaves a vast room for discretion. The apparently “unlimited” discretion that the judges might exercise to settle in controversial facts exists only under the Constitutional framework. “In all cases, judicial discretion exists only within the framework of some predetermined standards. Where these standards are legal rules, the discretion extends only within rather a restricted field, though rarely eliminated completed.” 484 However, discretion can turn into reshaping the law. In this regard, Hans Kelsen argues that “the Court is authorized by the legal order to decide the case at its own discretion, to condemn or to acquit the accused, to find for or against the plaintiff […] that means that the Court is authorized to create for the concrete case the norm of substantive law it considers satisfactory, just, or equitable. The Court then functions as a legislator.” 485 Venezuela’s Supreme Court was not immune to this phenomenon. When the question of having a referendum on a new Constitution came to the Supreme Court, it unravelled the complexities of Constitutional interpretation. During the presidential election of 1998, a former army paratrooper Hugo Chavez, who had previously tried to overturn by military force the National Government, ran for the presidency. His platform was to bring the Revolution and focus on “the need to dissolve and replace the existing National Congress and the need to elect a Constitutional Assembly to draft a new Constitution.” 486 The term Revolution, as Kelsen explains, occurs when the effectiveness of the basic norm ceases because of the eruption of a new legal order. “The change of the basic norm follows the change of the facts that are interpreted as creating and applying valid legal norms.” 487 Indeed, the new elected President’s announcement, calling for a national referendum to let the people decide whether to hold a general election for a Constitutional Assembly that would draft a new Constitution

484 Ibid, at 130.
486 Gott, Chávez and the Bolivarian Revolution, supra note 283 at 134
487 Kelsen, Pure Theory of Law, supra note 415 at 210
raised questions among a group of citizens who requested the intervention of the Supreme Court. 488

In the 1998 case of Asamblea Nacional Constituyente, the citizens inquired to the Supreme Court of Justice if it was possible to convocate a referendum to transform the Constitution under the pre-established rules of the Electoral Act. 489 Venezuela’s Supreme Court had to choose between two alternatives: following “a radical transformation of the Constitutional system or keep the strict application of the Constitutional text.” 490 According to constitutional law professor Tulio Alvarez, “the problem is quite serious, on the one hand the majority that supports the idea of a Constitutional Assembly has not defined the rules and institutions intended to alter the Constitutional text. On the other hand, those who do not welcome any changes needed.” 491 The stability and predictability of the 1961 Constitutional system was about to take a dramatic turn. Hans Kelsen explains, change occurs when the effectiveness of the basic norm ceases because of the eruption of a new legal order: “the change of the basic norm follows the change of the facts that are interpreted as creating and applying valid legal norms.” 492 In this case, the Supreme Court had to make a reasonable choice, to go beyond the written rules. The future of the Venezuelan democratic system was in the hands of a group of judges at the Supreme Court. Certainly, the 1961 Constitution did not contain a specific provision as to the procedures for electing a national constituent assembly to reshape the Constitutional framework. However, the proponents argued that the Constitution provided the right for the people to exercise their power directly, as well as through the bodies of the State power. This case challenged the Court to settle the future of the nation.

This petition presents a double issue: on the one hand, if the Constitution, as the supreme norm, can organize its own transformation process, the democratic principle can, then, just be rhetorical. On the other hand, to preserve the popular sovereignty, it must correspond to the people, as the Constituent Power, to carry out any alteration to the Constitution, affecting the idea of Constitutional supremacy. Originally, the Constituent Power was understood as a community political power to organize, regulate, and restrict the actions of the public power. The idea of the people as constituent power or as the active creators of the Constitutional order is inherent to its nature of sovereign power, unlimited and largely original, not governed by the legal rules that may have been derived from the established powers. Provision 4 of the institution of the Republic of Venezuela, devoted exclusively to the principle of popular representation,

488 Carrillo-Artiles, Tendencias Actuales Derecho Constitucional, supra note 291
489 Asamblea Nacional Constituyente, supra note 286.
490 Ibid.
491 Alvarez, La Constituyente, supra note 284 at 106.
492 Kelsen, Pure Theory of Law, supra note 415 at 210.
cannot be directly exercised, as the only method is to deposit the vote. Yet the people’s sovereign power can be self-exercised, undoubtedly the ones who have the power to delegate it can also exercise it, do not exhaust its powers, especially when it comes to the point where the Constitution itself recognizes this power. Therefore, the possibility of delegating sovereignty by voting for the people’s choice did not impede on the exercise of popular sovereignty on matters for which the Constitution has no explicit provisions. This leads to one conclusion: popular sovereignty becomes the supremacy of the Constitution when the constituent power wants to exercises its power.493

The Court held that the ‘Constituent Power of the People’ was what made the Constitution supreme, as a justification for the majority rule to impose a new Constitution. In conjunction with provision 4 of the 1961 Constitution, which established “sovereignty resides in the people,” the Court recognized that the transcendental power of the people went beyond the written text of the 1961 Constitution. It was up to the people to decide what was best for the society that they were living in. Then, the constituent power of the people, founded on the popular sovereignty, allowed ‘the people’ to create their own Constitutional order.494 Sometimes as this case demonstrates, the judges would appreciate the context and ultimately the impact of their decision in society. Asamblea Nacional Constituyente was an unprecedented decision that ended more than forty years of Constitutional stability and predictability in legal decisions. It became one of the most striking moments in Venezuelan Constitutional history,495 and demonstrated the shift from an strict formal application of the constitutional text to a more flexible approach that considered other external aspects of the law including the judges’ own views in the decision-making process. Legal theorist Neil MacCormick, referring to H.L.A Hart’s theory, explains that, “the judge must go beyond the law and (without sacrifice of impartiality) consult his own sense of moral and political rightness or equity and of social expediency to come to what seems the best decision on the problem in hand.”496 A considerable scope for judicial discretion, under the fuzzy edges of Constitutional rules, can be quickly turned into judicial policy-making. The Court may be forced to accommodate political hostile views to its rulings, bringing valuable and distinctive perspective to the public issue; however, it could be tempted to go farther, compromising its objectivity. In the case of Asamblea Nacional Constituyente, which was decided unanimously, the drafting of the 1999 Constitution was in fact permitted.

493 Ibid
494 Asamblea Nacional Constituyente, supra note 286.
495 Brewer-Carias, Historia Constitucional, supra note 22.
496 MacCormick, H.L.A Hart, supra note 482, at 126.
The Supreme Court had to deal with blurry Constitutional precepts, such as the definition of the people’s sovereignty. For these penumbral areas, where the laws seemed to have run out or they simply had gaps to be fulfill, the judges exercised discretion to provide a particular answer. These cases are extremely complex, and difficult to maintain consistent with complete determinacy with the law. There is always the danger that the exercise of discretionary power could follow in an arbitrary ruling. Although constitutional adjudication should be consistent with clear procedures to guarantee that every decision is made by written rules and not in response to any external pressure, the narrowest approach that the Supreme Court had in place to adjudicate rights and freedoms was subject of many criticism. Justice René Plaz Bruzual, judge of the Supreme Court of Justice during the 1961 Constitution, argued the following:

The conception of legal positivism should not be applied to deal with Constitutional rights and freedoms, but should rather be supported and justified as a meta-legal sense based on the civilized conscience of what is just and equitable. Consequently, I do not consider that the protection of Constitutional rights must be integrated in an automatic Kelsen’s system, in a rigid and absolute legal formalism.497

It is evident that the Court had to reshape its approach to deal with increasingly Constitutional challenges in response to modern legal and political events. It was time to tackle the core of the case, considering the consequences of the solutions. Justice Bruzual adds, “without a doubt, the necessity of Constitutional injunction to protect and defend rights and freedoms is unquestionable. However when a balance is made with the jurisprudence dictated by the Supreme Court, it is possible to see that the majority of Constitutional challenges were denied, because of formal criteria such as admissibility procedures or jurisdiction”498 The rise of civil awareness, demanding protection for Constitutional rights, served as an indispensable force to generate change in Venezuela’s adjudication of rights. In 1999, a “new social contract” transformed Venezuela from a system of what some authors considered an exceptional Democracy to what the constitutional drafters called the Democratic Social State of Law and Justice of the new Bolivarian Republic of Venezuela. Not only was the name of the country changed, but the Supreme Court of Venezuela also changed its way of understanding law. With the adoption of the 1999 Constitution,

497 Plaz-Bruzual, El Recurso de Amparo en la Legislación Venezolana, (Caracas: Academica de Ciencias Políticas y Sociales, 1989) at 13 [Hereinafter Plaz-Bruzual, El Recurso de Amparo ]

498 Ibid, at 28.
constitutional interpretation became somewhat more flexible and more oriented towards economic, social, political, cultural, and political aims.

The social constitutionalism strongly emphasized in the 1999 Constitution entrenched a robust list of social rights, yet maintained the centuries-old tradition considering the protection of individual rights. The meaning of social rights, such as food, education, motherhood, among many others, has not been completely clear in the description of these rights. The Supreme Court has gained strong discretion to interpret these rights because in many cases they were inconsistent or vague. Indeed, in order to accomplish certain social policies, the judges needed to provide clear standards in their interpretation of the constitutional text. In fact, under the 1961 Constitution, all public power, including legislative power, was bounded by a set of rules stated in two hundred and fifty provisions that were intrinsic to the constitutional order. Under the 1999 Constitution, the idea was that the Constitution should not only entitle citizens to basic good and services. It should also define the organization of government in order to provide concrete answers to social issues. The result was an expansion of the five branches of government and commitment for social justice in three hundred and fifty provisions. Both the 1961 Constitution and the 1999 Constitution did not only consider the organization and limitation of powers but also the creation of social clauses in favour of the vulnerable members of society. In the case of *Asamblea Nacional Constituyente*, the Court had to face a difficult choice that ended with the promulgation of a complete new constitutional system. This case revealed the struggles at the Supreme Court for an approach that could find concrete solutions considering the reality of living in Venezuela at that time. The above cases, *Enfermos de Sida v. Ministerio de la Defensa*, and *Asamblea Nacional Constituyente* demonstrate a breaking point in the evolution of the constitutional jurisprudence in Venezuela. The interpretation of the Constitution began with a more strict application of the written text to evolve in a more flexible approach that reflected the personal characteristic of those making the decision. This new approach in the 1999 Constitution was elaborated and developed further. As H.L.A Hart states, “no doubt the contention that a legal system must treat all human beings within its scope as entitled to certain basic protections and freedoms is now generally accepted as a statement of an ideal of obvious relevance in the criticism of law.” 499 Venezuela’s

499 Hart, *The Concept of Law*, supra note 462 at 201
jurisprudence began a transformation or a transition from the era of the 1961 Constitution to the current period. Yet, this brought on a new set of challenges, where the judges began to see themselves as having a licence to overhaul the law and shape it into what they considered the changing realities of Venezuelan society.

**Summary:** Based on the review of the literature and case-law analysis, this chapter provides evidence of the formalistic style of the Venezuelan Supreme Court in the era of the 1961 Constitution. The analysis of constitutional jurisprudence over four decades confirms that judges justified their decisions using arguments drawn from the theory of legal positivism. This chapter examined relevant constitutional cases from 1961 to 1998 demonstrating the prominent formalist approaches used by the Supreme Court, exemplified by different arguments that justified constitutional decisions. The judges reached their conclusions based on the language of the law, the hierarchical system of rules and the legislative intentions. Nonetheless, the formalistic style of the Court similar to the theory of legal positivism prompted detractors to claim that there was a need for new approaches in the Venezuelan jurisprudence. The chapter concludes with a discussion regarding the transition from the primarily application of ‘black-letter’ law in the era of the 1961 Constitution to a more contextual or functional interpretation of constitutional rights in the era of the 1999 Constitution. The next chapter will focus on the analysis of constitutional jurisprudence developed by the Supreme Court in the era of the 1999 Constitution.
CHAPTER 5
CONSTITUTIONAL JURISPRUDENCE IN THE ERA OF THE 1999
CONSTITUTION

The strictly rigid constitutionalism of Venezuela is now in the past. During the 1961 Constitution, judges were more concerned with strictly following formal criteria, procedures and logically deduced answers from the written law. Constitutional judging was a matter of quoting the provision of the Constitution contrasting it with available facts to make a decision. The promulgation in a national referendum of the 1999 Constitution brought an immediate transformation of Venezuela’s constitutional jurisprudence. As indicated in chapter 3 of this study, the 1999 Constitution embraced a more inclusive and understanding relation within and between the State and its people. It was strongly committed to broader social aspirations, including rights to housing, health care, education, culture, minimum income, women, aboriginals, and the environment, as desirable goals of the Democratic Social State of Law and Justice. These social rights entrenched in the 1999 Constitution brought a new dynamic in terms of constitutional judging. The view of logically deduced solutions made from the application of the written constitutional text had undeniably started to lose its appeal at the highest constitutional jurisdiction. The Supreme Court of Justice nowadays, empowered to strike down national, regional, and municipal legislation, government acts, or any public power decision, including international treaties and international courts’ decisions as the ultimate interpreter of social, educational, cultural, political, and economic rights, began to approach constitutional adjudication more actively as a way of accomplishing social justice.500 Over the last fourteen years, the Supreme Court’s jurisprudence demonstrated that the judges have approached the interpretation of the 1999 Constitution using their own particular views, which resemble the theory of legal realism. Through a series of discussions, this chapter is organized in two sections (a) Legal Realism: in the New Era of Venezuela’s Jurisprudence and (b) the Venezuelan judges’ approaches similar to the legal realism theory, used, in this last decade, in selected landmark judicial decisions about constitutional rights.

500 Laguna-Navas, Sala Constitucional: Máxima Última Intérprete de la Constitución supra note 325
The New Era of Venezuela’s Jurisprudence

Since the enactment of the 1999 Constitution, judges have gradually abandoned the formalist view used for almost four decades in Venezuelan jurisprudence. The Supreme Court reacted against its own mechanical application of constitutional norms to favour discovering the role of the Constitution in society. Contemporary changes have become a great influence in constitutional decisions. Any transformation of that scope and magnitude was not the derivative of a single cause but rather a confluence of institutional, economic, societal, and political factors that made the Supreme Court take this revolutionary turn.

The development of the new insight about constitutional interpretation demonstrates an evolution in Venezuela’s constitutional jurisprudence. At an early stage, the judges strictly applied verbatim the rules of the Constitution, while in the later part of the twentieth century, they began to question the formal criteria of the law as straightjackets to accomplish the goals of the Constitution. Instead, the judges argued that the careful considerations of extralegal aspects to solve the disputes brought before them could really bring a fair decision. The Court acknowledged openly economic, political and social factors in their decisions. This involved the blending of legal, policy, ideology, and personal convictions concerning the issues that needed practical solutions. The implication of this model of constitutional judging is the flexibility with which the judges can engage in changing social issues. Martin Loughlin, talking about the functionalist approach, explains, “functionalist style is more concerned with what law is than with what law does.”

Functionalism, as a basic structure for public law, is concerned with facilitating the government’s action to address the most needed issues. Canadian constitutional scholar, Peter Oliver asserts, “because functionalists are concerned with reality rather than abstractions, they are attuned to the real challenge for public law.” In the case of the Venezuelan Supreme Court, practical solutions began to be more important than enforcing logically deduced rules.

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501 Martin Loughlin, Public Law and Political Theory (New York, Oxford University Press, 2003), at 135
[Hereinafter Loughlin, Public Law and Political Theory]

The Court has been constantly arguing that impersonal and unrealistic perspectives that separate the true role of the judges and the Constitution in society cannot answer the complexity surrounding contemporary issues. The opinions subscribed to by the judges in their decisions reflected their particular view regarding solving social problems. In this new era of constitutional interpretation, the judges could no longer hide behind formal criteria or technicalities to deal with the meaning of broad social rights. As a result, the judges ended up favouring an approach that openly acknowledged political, economic and social considerations, which, in fact, become social policies enacted from the bench. Certainly, arguments used by the Supreme Court demonstrate similarities with those of the American legal realism. As American scholar William Fisher explains, “the heart of the movement of legal realism was an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence.”503 The constitutional judging of the Venezuelan Supreme Court considers the social context and observes what is best for society as a whole, using their discretion systematically to develop the law. In the words of former United States Justice Oliver Wendell Holmes, “the life of the law has not been logic, it has been experience.”504 In the case of Venezuela, the Court has been trying to advance their take on the Democratic Social State of Law and Justice. This is a concept written in the 1999 Constitution, which has been repeatedly used by the Supreme Court to reflect their idea of a progressive social change, based on their experience and understanding of the public interest. According to legal realism, as legal scholar Karl Llewellyn’s persuasive arguments explain, “the particular facts of a case […] sometimes have a more significant effect on the outcome than does the applicable law.”505 From this perspective, the Venezuelan Supreme Court has taken the path of rejecting the straightjacket of formalities and rules to give judges a more active role in constitutional issues. In fact, the most controversial cases tended to be decided using non-legal considerations in a practical matter. However, this brings into question the legitimacy of the Supreme Court’s policymaking dimension. For some, it is a threat to the stability and confidence of the Venezuelan

503 William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed eds., American Legal Realism (Oxford: Oxford University Press, 1993) at xiv. [Hereinafter Fisher, Horwitz, and Reed, American Legal Realism]
There are concerns regarding the democratic deficit associated with a more policy-oriented jurisprudence. Society evolves faster than the Constitution. From the realist perspective, this compels judges to set aside abstract considerations to decide the most controversial questions in accordance with the public interest. In the case of Venezuela, the promotion of a Democratic Social State of Law and Justice holds certain values expressly written in the 1999 Constitution as superior, such as life, liberty, equality, democracy, the pre-eminence of human rights, ethics, social responsibly and pluralism. As a result, the Supreme Court holds that under the 1999 Constitution of Venezuela the judges are more concerned with accomplishing social justice in order to give, according to them, real solutions to the people. The ultimate guardians of rights and freedoms in Venezuela are the Supreme Court judges with the power to strike down all types of legislation or act of the federal, provincial, or municipal government, including international treaties, or constitutional (organic) laws made by the National Assembly. In the last fourteen years, the Supreme Court has been involved in nearly every aspect of modern life. The Court has been making decisions regarding diverse issues that relate to broader social issues.. The Constitutional Chamber of the Supreme Court, in its attempt to accomplish social justice, has been recognizing the importance of the social context and the outcome of its decisions into the real world. In fact, the adjudication of constitutional rights in Venezuela has become a very important mechanism for society to solve the most difficult issues. Increasingly, constitutional litigation has become more popular, bringing more inbuilt political, social and economic issues to the Court to facilitate the judiciary’s active intervention in society’s most controversial issues. As a result, the judges always find possibilities to exercise their discretion and their include their own distinctive views in matters of national concern. However, constitutional restraints to the exercise of power have been simply irrelevant for constitutional judges. The danger of heading towards the possibility of the imposition of an autocracy sounded alarm bells globally. In deciding constitutional issues, Venezuelan judges are divorcing from the legal rules to reach their decisions and basing them instead on the facts, context and their own preferences. They have been more inclined to engage in

507 Constitución de la República Bolivariana de Venezuela 1999, supra note 306 provision 2
508 Brewer-Carías, Dismantling Democracy: the Chávez Authoritarian Experiment, supra note 7
policy making disguised as a move to reflect the social aspiration of the Constitution. The justifications of their decisions are closely related to arguments offered by the American jurisprudential theory of legal realism.

**The Supreme Court's Functionalist style**

Venezuela’s constitutional jurisprudence during this last decade faced crucial legal challenges regarding political, social, and economic issues. The judges began to see themselves as the ‘lawmakers’ to promote their personal ideals of what they conceived as the Democratic Social State of Law and Justice. In this regard, Venezuelan constitutional law professor Margarita Escudero León asserts, “constitutional interpretation has been used by Supreme Court judges to make new law.” Indeed, the ambiguity of the language used in the 1999 Constitution, insufficiently explicit to apply straightforwardly, opens the possibilities for judges to justify the adoption of extralegal views to determine the legal outcome. The focus of Venezuela’s constitutional decision-making process is on the judges’ own construction of the best outcome as an attempt to solve the most crucial constitutional issues in coherence with the political, social, and economic reality of the country. An example is the landmark case of *Mata Millán*. In this case Mr. Mata Millán was elected governor of Delta Amacuro State, yet the national authorities did not recognize him as the new governor and instead proclaimed his adversary using military force. The situation was very tense because Mr. Millán had a decision from a provincial court that re-established him in the governor’s office; however the National government, ignoring this decision, gave the equalization payments to his adversary. It was up to the Supreme Court to decide.

Judges enjoy plenty of autonomy and independence in their decision making process, although their decision must conform to the Constitution and statutes. Judges have available a wide margin of appreciation for the applicable law in the case, so they can interpret and adjust the law to their understanding, as it is the judges’ responsibility to decide cases. While it is true that the Constitution requires the enactment of legislation, emanating from the National Assembly, to regulate the exercise of power granted to this Court in paragraph 10 of Section 336 of the Constitution, this Court has accepted the doctrine that constitutional provisions are applied immediately. Whether or not they are rules, it is the responsibility of this Court to accomplish the real meaning of the Constitution.

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The question was whether a newly elected governor could request a constitutional injunction directly to the Supreme Court. In fact, the legislation made it difficult for citizens to request protection directly from the Court because of a lack of formal procedure. In this case, the Court went beyond the text to address the main issue by rejecting the need for legislation and establishing a new procedure that at the end became a new law.

The Venezuelan Supreme Court in the particular case of Mata Millán brought the lawmaker function to the judiciary. The Constitutional Chamber in an unprecedented decision described with particular detail its own jurisdiction, establishing the particular procedures to be followed in order to bring cases to the Court. The judges considered sociological, political, and contextual facts to justify their decisions. The case of Mata Millán became the constitutional model to follow in order to file cases in the court room. Instead of a literal application of the constitutional text, the judges of the Supreme Court in this decision considered that the constitutional jurisdiction of this Court needed development. In the American context, American legal scholar Jerome Frank affirms, “the law, therefore, consists of decisions, not of rules. If so, then whenever a judge decides a case he is making law.” 511 Similarly, the Supreme Court favours a notion in which the judges adjust their decisions to what they consider right. In fact, there has been an increase of cases coming to the Supreme Court requesting it to take on a more active role to solve society’s contemporary issues. This style of judging is not unique to the Venezuelan Court, as the American jurisprudential scholar Karl Llewellyn asserts, “the idiosyncrasies of the particular case and its possible emotional deflections are set for judgement against a broader picture which gives a fair chance that accidental sympathy is not mistaken for a long-range justice for all.” 512 After examining the case of Mata Millán it is possible to suggest that the judges began to use their own personal views using arguments similar to legal realism in their decision-making process. Legal scholar Karl Bodenheimer indicates that “law appears to the realists as a body of facts rather than a system of rules, a growing institution, rather than a set of norms.” 513 As seen in the case above, the Court suggested that judges can go beyond the written text of the Constitution or legislation, taking into account their own experience and

analysis of the law. The context of the case was problematic because of the tension between the provincial and the national government. Yet the Supreme Court decided to dismiss the claim of the newly elected governor with unconventional arguments that demonstrate a shift of the Court from the verbatim application of the written text to a more adaptive interpretation of the Constitution.

Since the 1999 Constitution, the Court’s adjudication of rights and freedoms has a more subjective and flexible perspective than the previous methodology for constitutional interpretation. Judges in the context of Venezuela have been claiming to be more aware of the persistent social problems. The rhetoric on case of Mata Millán resembled arguments of legal realism. As legal scholar Richard Posner points out regarding legal realism, “judges do not ignore legal doctrine, but they are not straitjacketed by it.” The social forces surrounding the issues in which judges have to make a decision motivate them to reflect their understanding of the law. No matter how precise or uncertain the formal legal rules may be, the Supreme Court judges held that new social issues unpredictable by the constitutional drafters enabled them to make law and formulate policy in accordance with the changing social conditions. The Court keeps rejecting the straitjacket approach that makes it impossible for them to tackle social concerns more directly than the straightforward application of the written text. Legal scholar Frederick Schauer adds, “nowadays it would be hard to find very dissenters from the view that when judges change the law, they base their decisions on a mix of policy and principle that can hardly be thought of as a deductive or logical exercise.” The fact that the Court holds, in Mata Millán, that the constitutional text was uncertain and therefore allowed for lawmaking, facilitates subjectivity in constitutional rulings. The interpretation of fundamental rights in Venezuela can be controversial. The result has been that the judges are favouring a particular political and moral view that is not necessarily consistent with the constitutional text and tradition. In this case, the Court took this opportunity for judicial lawmaking, yet denied the respect of the democratic will of the voters in this province.

516 Frederick Schauer, Thinking Like a Lawyer: a New Introduction to Legal Reasoning (New York: Harvard University Press, 2010) at 125.
The Venezuelan Court, making an effort to connect with the real issues, rejects the *straightjacket* of rules, yet it struggles to adapt constitutional interpretation to accomplish social justice. Most of the cases that come before the judges are related to social and economical policies, which bring the opportunity for judicial law and policy making. The judges proceeded to demolish the formalistic view stressing that they are working towards tackling the exact political or economical “stimulus” that shifts the case one way or another.517 The prominent commitment for social justice in the 1999 Constitution underlined the assumption of a new role for the Supreme Court. A more active, involved and practical Court emerged with the new Constitution. The judges’ own functional style tries to understand the Constitution in terms of the social concerns that need real solutions. In fact, the constitutional jurisdiction has become a more popular venue to discuss the most important national issues. More complexes and challenging issues are brought to the Supreme Court daily, making judges advocate for reforming and in some cases making law to suit these changing conditions in their decision-making process. The grandfather of legal realism, Oliver Holmes laid the foundation of a healthy and constructive scepticism of law, which expressed succinctly the legal realists’ concern that courts did not operate in a neutral impartial way. Holmes’s legal philosophy affirms that “the law is an evolutionary process. It reflects society’s adaptation to changing world. Courts play a vital role in the evolution of the law by actively reforming the law to suit changing conditions.”518 Similarly, in the case of *Mata Millán*, the Court argued that to provide a clear meaning to the constitutional text judges must focus primarily on matching the achieving the real meaning of the Constitution. “Whether or not they are rules, it is the responsibility of this Court to accomplish the real meaning of the Constitution.”519 The arguments in *Mata Millán* recognizes that the indeterminacy of constitutional norms, the new issues unpredicted by the constitutional drafters and the non legal considerations interrelated with the case are important factors in constitutional judging. Even with a sympathetic understanding of the Supreme Court’s decision-making process, it is necessary to fully acknowledge that these decisions are transforming the role of the Court into a morer political one.

519 Emery Mata Millán [20/01/2000] T.S.J., Sala Constitucional, Exp. No 00-002
Emphasis on Contextual Facts and Policy: the Social State of Law and Justice

The Supreme Court of Justice began to consider the outcome of its decisions, rising sympathy for public policy. The judges argued against the possibility of applying in a neutral or objective manner the literal meaning of the constitutional text. In other words, the textual meaning of the Constitution, as the judges of the Supreme Court held, could not provide clear guidelines for unprecedented cases. In the American context, legal scholar Michael Steven Green affirms “the inability of the linguistic meanings within the law to tell judges what to do in future cases.” 520 In fact, the Supreme Court since the promulgation of the 1999 Constitution started to reject the exaggerated pretensions of legalism that marked constitutional jurisprudence in the early stages. The Court willingly considers social context and opened the possibly to justify its decisions based on the needs of society. The determination of the Court to accomplish social justice has changed the constitutional adjudication process in Venezuela. In fact, the decisions of the Supreme Court regarding constitutional issues prove a certain scepticism concerning the separation of power theory and appreciation for the context like never before. 521 For instance, in the 2002 case of Asodeviprilara, a non profit organization that represented loan borrowers, the plaintiff requested the protection of their constitutional right of housing, claiming that the ‘credito indexados’ or variable-rate loans offered by financial institutions adjusted the house price annually based on the inflation rate. This automatically increased the borrower’s monthly payment, which generated interest over interest. The plaintiff argued that this usury made it impossible for them to pay their original debt. These kinds of loans generally offered to those who want to buy a house do not offer the borrowers one steady interest rate over the life of the loan, but rather a variable one, increasing with the inflation rate set by the Venezuelan Central Bank. In this particular class action thousands of citizens were at risk of foreclosure and losing their home. The National Bank Association representing the financial sector defended the variable-rate loans arguing that in an inflationary economy with the volatility of interest rates, characterized by low income levels for most of the population, the ability to purchase homes applying the traditional credit system was restricted to a very low percentage of the population that had the sufficient resources to make a monthly payment.

The financial institution, in the opinion of the National Bank Association, was offering a solution with the variable rates loans because the payment was made according to the borrower’s income, never exceeding thirty percent of the household income. The National Bank Association stated that the rate volatility did not affect the borrower’s ability to pay, because even if rates rose excessively, the borrower continued to pay the same monthly amount. The Constitutional Chamber of the Supreme Court was facing a very unique case that involved the entire financial system, along with the home of thousands of families on the line. The Court assumed the case as an opportunity for the judges to bring their own perspective on what they considered was a route to social progress.

The Democratic Social State of Law and Justice promotes the harmony between the social classes, preventing the dominant class, through the economic, political, or cultural power, from abusing and suppressing the other classes or social groups, thereby hindering the nation’s development. The Constitutional Chamber must defend the people or groups who in relation to others are legally less fortunate, in contrary to the Capitalist Rule of Law.522

In this judgement, the Court relying on political, social, and economic factors argued that the definition of the concept of Democratic Social State of Law and Justice was the ultimate purpose of the 1999 Constitution and that it provided a clear solution. Although Provision 2 of the Constitution, in which this concept is blueprinted constains nothing about social classes, the Court brings in this concept to discuss the difference between unprivileged citizens and those who are more prosperous. This in order to justify that the loans were violating the constitutional rights set in provisions 114 and 115 that entrenched the fundamental right of housing. Moreover, the Court went further in this decision to establish a complete different system for the mortgage owners to honour their debt towards their financial institutions. Not only did the Court declare unconstitutional flexible loans based on the argument that they were unfair and unjust to the borrowers, but it also went so far as to re-organize a new set of procedures to request a loan and repay it. The Supreme Court judges are conscious of the social, economic, or political implications that underlie the facts behind complex issues, which in their view, pre-established rules cannot regulate.523 The arguments offered by the Court were openly setting policy and new laws.

The Court promoted the theory of social justice to justify the consideration of external factors in constitutional judging. The deeper understanding of judicial discerning advocates for the judges to play a more active role, using law as a tool to promote the common good. The case of \textit{Asodeviprilara} is an example of the Supreme Court considering the indeterminacy of the written text and non-rules factors in constitutional judging. The judges wrote their decision in the language of judicial innovation to discuss social policy.

The formalist rule of law, considered as a technical instrument to regulate human relationships without any reference to ‘real’ content, as is well known in Venezuela, has prevented the State to become the engine of social transformation. It is important, as much as possible, to understand the law as an achievement of common good, and not as a normative that applies equally to mixed realities.\footnote{Ibid.}

The ultimate ground for the judges’ constitutional interpretation includes what is required in a good society. In this decision, the Court saw itself as an ‘engine of social transformation’ where rules cannot be blinded to the social, political, and economic concerns of the people. In fact, the Court held that the formalist view of the Constitution prevents the Court from becoming an ‘engine of social transformation.’ The interpretation of the Constitution is not as simple and straightforward in difficult cases. The Court argued that the law must achieve common good. The Constitution is not just a written document. Especially in a country like Venezuela where the Constitution has entrenched a vast set of economic, social and political rights to provide the Venezuelan people with a legal framework that aims to protect the most vulnerable. Indeed, American law professor Herman Belz explains, “the Constitution must be treated primarily as a contemporary governmental institution rather than just as a code of law.”\footnote{Herman Belz, “The Realist Critique of Constitutionalism in the Era of Reform,” (1971) 15 Am. J. Leg. Hist. at 292.} The judges explicitly used extra-legal considerations to decide constitutional issues in accord with the tenets of society’s changing needs. The content of constitutional precepts does not deny the fact that in this contemporary era, the Supreme Court judges have openly detached themselves from the formalist style of constitutional judging to devise what they consider concrete and practical solutions. The case of \textit{Asodeviprilara} demonstrates once again that constitutional judging is undetermined, opposing legal certainty because the process is impregnated with policy considerations and new regulations based on the judge’s view of what is the right policy.
The Supreme Court of Justice has been actively involved in the most important issues of Venezuelan society in the last fourteen years. In fact, judges have been arguing that social perspective is important to elucidate the best possible interpretation of the Constitution. As seen in the above-mentioned case, the Court is not afraid to embraces politics as a way to ensure that public policies solve critical issues in society. Instead of assuming constitutional interpretation as following logical and pre-established rules, the Court attempted to generate solutions to improve the social welfare. Public law scholar Martin Loughlin explains, “functionalism therefore presented itself as a modernizing movement, originating in an attempt to bring legal thought into closer alignment with the prevailing ideology.” The functionalist style exercised by the Court tried to engage the judges directly in the heart of the issue, taking into account the political and economic implications of the decision. The judges, to a certain extent, tried to support social change in the interest of society as a whole. However, it is difficult to disengage from the concerns regarding the possible conflicting views and the democratic process, when the Supreme Court judges are actively advocating for their own views regarding constitutional matters. A good example is the 2003 case of Referéndum Consultivo. During this period of time, Venezuela was in a very critical situation. After rioters took the streets and requested the resignation of the President of the Republic, the solution to the crisis was to proceed with the mechanism established for it in the Constitution. In August of 2003 over more than three million people signed a petition requesting the National Electoral Council (CNE) to recall a referendum regarding the stay in office of the President of the Republic. However, the National Electoral Council rejected the signatures based on particular technicalities. Once again, determined to succeed in their request, three million six hundred thousand people signed the petition. There were heated debates regarding the possibility to ask the question regarding the stay in office of the President in a referendum. Yet, it remained the Supreme Court’s responsibility to provide a clear meaning to Provision 71 regarding the recall of referendums. Once again, the Supreme Court of Justice had the opportunity to resolve this political and social crisis.

528 Brewer Carías, Dimantling Democracy supra note 7 at 113
529 Ibid.
Venezuelan Supreme Court rhetoric on knowing the real function of the law dismissed applying literally the abstract words of the Constitution. In a different context, legal scholar Martin Loughlin affirms, “social process could come only through the extension of the capacity of government both to identify the needs of society’s constituent parts and to devise solutions to social problems.”530 The judges have been adopting the perspective that the Constitution is an instrument to accomplish social aspirations, yet using their own appreciation to find what they consider is right.

The admissibility or not to the request of constitutional interpretation is closely related to the function that the Constitution plays in the political activities of the Venezuelan State. In fact, the Constitution has three basic roles: to integrate all aspects of the law including political, economic, cultural, and other elements that influences the political debate and form a political unity. The Constitution is the convergent point of diverse opinions, coming from political parties, associations, unions, or groups, even if they are antagonistic, enabling the implementation of institutional mechanisms essential to making possible governability and pluralism in the exercise of power. The second role is to establish the necessary norms to regulate society in order to accomplish peace, even though the Constitution emerged as a political agreement. However, this normative role must contribute to the achievement of the objectives that legitimate the political agreement and encourage people to follow the rules. The third role is to organize the functions between the political institutions of the State. This includes the principles of separation of powers, the principles of legality and competence of public institutions in order to avoid arbitrary governmental actions and at the same time accomplish the objective of the political unity and peaceful living. This Court has repeated insistently that in constitutional interpretation the political theory established in the Constitution cannot be ignored. The interpretation of the Constitution must be consistent with the political theory that supports its legitimacy. In this democratic social state of law and justice, the purpose of the referendum is not a mechanism of decision-making by the voters on matters of national importance, instead it is the participation of the voters to express their opinion and influence those who will decide what do to in this subject matter.531

The landmark decision above demonstrates that the judges adopted a policy-oriented understanding of the constitutional text to answer the issue in question. The Court’s argument was based on the issue that this difficult case, in which the future of the democratic system was at stake, required the comprehension of different interconnected variables. Certainly, the Supreme Court rejecting the formal application of the law, assumed what the judges consider the political theory behind the Constitution. The judges hold that they are oriented towards the solution of society’s most crucial issues. Yet, judges are explicitly infusing their decisions with their own political views. At the end, the Supreme Court held that the Provision 71 of the Constitution regarding consultative referendum is not legally binding.

530 Loughlin, The Functionalist Style in Public Law, supra note 526 at 387.
The Court has understood its role as instrument of political and social change. It is clear that this is the case in the abovementioned matter, in which the decision was directly influenced by the judges’ own ideological ideals that they considered would advance social progress. In controversial cases, judges openly stated that they are looking at the function of the Constitution, which is no other than facilitating the State action for the progress of the nation. This thesis seems to coincide with the legal realist movement. As Willian Popkin affirms “the central message of Legal Realism was to call attention to the discretionary political element in judging.” In the context of Venezuela, after analyzing the case of Referéndum Consultivo, it is possible to deduce that the discretionary political element in constitutional judging is given the opportunity for judges to appear weighing the value of competing public interests, while in the end they decide based on their own private judgement. The functionalist style of adjudication maintains that the judges must choose the best possible outcome of the legal decision to accomplish a specific societal goal. However, the criticism to this approach has been that law is viewed as what the judge’s understand it is. In the case above, the judges were assuming a law-creation attitude that resulted in decisions that were not necessarily following the Constitution. Of course, when it comes to constitutional cases with competing values, it is difficult to find a clear solution. According to legal theorist Karl Llewellyn, the principle of legal realism is “conception of law in flux, of moving law, and of judicial creation of law.” For this jurisprudential movement it is inevitable that judges using their discretion to create laws, when they have to deal with an ever changing society. In the case of Referéndum Consultivo, the Venezuelan Supreme Court recognized the aspects surrounding their judgments, weighing carefully the implication that this specific decision would have on the political, economic, and social life, in order to accomplish what they considered was the Democratic Social State of Law and Justice. Likely, as legal realist theorist Jerome Frank explains, “courts must essentially deliver their judgment on matters of social and economic policy.” Indeed, the Supreme Court as well as authors of Legal realism, call for a frank acknowledgment of non-legal factors and uncertainty of the law that govern the judicial decision making process.

533 Karl Llewellyn, “Some Realism about Realism, responding to Dean Pound” (1931) 44 Harvard Law Review 1237
534 Frank, Are Judges Humans? supra note 511 at 42.
The dynamics of economic, political and social changes in Venezuela resulted in the active role of Supreme Court judges in constitutional issues. The Court is using the Constitution as a broad concept that essentially allows judges’ to make lawmakers policy choices in order to tackle the most urgent problems of society. In the words of legal realist Roscoe Pound, “constitutional law theory and its doctrine should keep up with the development of social, economic, and philosophical thinking.” The Supreme Court, in the case of Referendum Consultivo, intersected politics, law and the judges’ own views to interpret the requested provision. Certainly, the Constitution is an evolving document that requires the judges’ best interpretation to objectively establish guidelines in cases in which the text is vague or imprecise. In this regard, Pound affirms, “law must be brought up to date and, specially, must come to recognize that justice entails not merely fair play between individuals, but fair play between social classes.” In the case of the Supreme Court of Venezuela, judges are doing more that considering the social aspirations and adapting the constitutional text to address them. In fact, as seen in this case, the judges are reaching their conclusions by merely rationalizing their own desired results.

The constitutional interpretation should be done according to the tradition and cultural analysis of the historic values of the Venezuelan people, instead of according to a supposed universal system of absolute principles, which cannot be placed above the political theory of the Constitution itself.

The Court essentially argued that the interpretation of the Constitution cannot be done without considering the underlying political theory embedded in its text to accommodate the decision according to social interests. The judges must consider the living culture, tradition, history, and values shared by the Venezuelan people while interpreting the Constitution. The social interest demonstrated by the Constitutional Chamber of the Supreme Court has been taking a turn into an unveiling of the policy making dimension of judges. The problem resides in the fact that the reasoning that the Court has given to deal with controversial cases is setting aside the stability and predicatability of the rule of law. By blending personal views, social context, and political ideals into constitutional judging, the decisions of the Supreme Court put in question the legitimacy of its authority.

536 Roscoe Pound, as quoted in Fisher, Horwitz, and Reed, American Legal Realism, supra note 501 at 7.
537 Re: Referendum Consultivo, supra note 531
The Constitution evolves and progresses with society to match the understandings of matters depending on the history, culture and tradition of the nation. Yet, it is difficult to apply an old precedent when dealing with current social issues. This is the argument that the Supreme Court has been giving to allow judges to consider what is right as a valid interpretation of the Constitution. The judges are going far beyond rules and reason to satisfy their personal agendas. Indeed, the political, social, and economic factors are a crucial part of the judges’ decision making process to satisfy the need of society.

A system of principles, assumed to be absolute and supra historical, cannot be placed above the Constitution, nor can its interpretation contradict the political theory that supports it. From this perspective, any theory that proposes absolute rights or goals must be rejected and, even though intra-constitutional antinomies between norms and between these and the legal principles (unconstitutional constitutional norms) are not excluded, the interpretation or integration must be done according to the living culture and tradition whose sense and scope depend on the concrete and historical analysis of the values shared by the Venezuelan people. Part of the protection and guarantee of the Constitution of the Bolivarian Republic of Venezuela is established then, in an in fieri politic perspective, reluctant to the ideological connection with theories that can limit, under the pretext of universal validities, the supremacy and the national self-determination, as demanded in Provision 1º eiusdem.538

There is always room for the rules written in the Constitution. The judges are not, in many cases, simply forgetting the written text, however, they are less inclined to use the straightjacket approach, and more willing to consider adapting and defining the law, especially with hard cases facing crucial policy questions that need a comprehensive solution.539 This conception of the Constitution leaves to the discretion of the judges the consideration of external aspects outside the constitutional text to interpret fundamental rights and freedoms. In the Court’s perspective, judges, acknowledging the social factors of their jurisprudence, might be able to infuse real vindication on those less fortunate. However, the outcome of these decisions demonstrates something different. It has been hurting the authority of the Supreme Court because the population is considering them fully politically engaged in the debates, which raises questions about their objectivity and impartiality. The judges, as it has been said before, have been facing difficult choices and in good faith, they have tried to consider engaging in a practical and functional decision-making process. Yet, so far, this approach has resulted in the judges’ expressing their own particular views in their judgements, while still not being able to satisfy the necessity for guidance in dealing with broad social rights.

538 Re: Referendum Consultivo, supra note 531
539 Leiter, American Legal Realism, supra note 517 at 19.
In general, the Supreme Court holds that its decisions are result-oriented shaping the constitutional text to enhance the welfare of society. The focus is on the consequences of the decisions, instead of on the abstract consideration and analysis of the text. Justice Oliver Holmes adds that it is better to “decide cases first, and determine the principle afterwards.”\textsuperscript{540} The Constitution should not be an obstacle to social change. It is the argument that judges keep repeating in their decisions to justify their own personal views in their judgements. The idea that Supreme Court judges must interpret the Constitution to advance the welfare of society resembles the arguments of the supporters of legal realism. “A truly realistic theory of judicial decision,” says legal theorist Felix Cohén “must conceive every decision as something more than an expression of individual personality, as even more importantly a product of social determinants.”\textsuperscript{541} In fact the Supreme Court holds that the evaluation of the political, social, and economic factors interrelated with constitutional cases is necessary to provide a more concrete solution than just following the text. This opens the debate on the legitimacy and authority of the Supreme Court to overstep the Constitution. For example, in the 2006 case of \textit{Reelección Presidencial}, the Supreme Court was asked if any constitutional amendment to Provision 230 of the Constitution to establish the possibility of continuous re-election of the President of the Republic is contrary to the fundamental democratic principle embedded in Provision 6, according to which the government will always allow the alternative appointment of new elected Presidents.

Citizens are the only ones able to change the Constitution. In fact, they have the last word to set the limit to those that represent them. Constitutional interpretation cannot be isolated or disconnected from society. The re-election as established in our constitutional system does not suppose a change in our democratic system. On the contrary, it re-affirms and reinforces the mechanism for participation set in a \textit{Social State of Law and Justice} as blueprinted in the 1999 Constitution. Moreover, when in our society, needs are so enormous that constitutional changes become necessary to improve the conditions of citizens in lower socioeconomic status, constitutional provisions should only be at their service.\textsuperscript{542}

The Supreme Court calls for a frank acknowledgment of the social, political, and economic factors to go as far as to adjudicate disputes using the judges’ own conceptions of what is required by Venezuelan society. However, their decisions are conflicting with the true nature of the constitutional text, which questions their legitimacy.

\textsuperscript{540} Oliver Wendell Holmes, \textit{The Common Law} (Boston: Little, Brown, 1881). [Hereinafter Holmes, \textit{The Common Law}]

\textsuperscript{541} Cohén, \textit{Transcendental Nonsense & Functional Approach}, supra note 514 at 843

\textsuperscript{542} \textit{Reelección Presidencial} [28/07/2006] T.S.J., Sala Constitucional Exp. Nº 06-0737
The satisfaction of the current political ideology of the Supreme Court demonstrates how choices among competing public values affect the end of the constitutional text. According to Venezuelan constitutional scholar Ruben Laguna Navas, “nowadays, the traditional thinking that the judicial function is just simply implementing the abstract rules to individual cases submitted to the Courts has been overcome. It is possible to affirm that jurisprudence brings up to date those abstract sets of rules, which imply an unquestionable enrichment of law.”

This kind of constitutional interpretation has been structured by the Supreme Court with emphasis on policy-making, including the judges’ own perspective on pursuing the Democratic Social State of Law and Justice to realize Venezuela’s social goals. The judges have been arguing that they are looking for the real function of the constitutional text in society. The argument that judges are humans and as part of the society their ideals play a role in their decisions is similar to the arguments of the authors that support the legal realism movement. Undoubtedly, judges cannot avoid acknowledging social factors when they are adjudicating social rights. In fact they can infuse real vindication for those less fortunate to ascertain and enforce the social function of law. In the case above, the Supreme Court held that constitutional provisions were “social needs” to be accomplished by the constitutional adjudication of welfare claims. Empirical consideration of contemporary social peculiarities has been the theme of the adjudication of constitutional rights. The judges hold that they cannot simply apply mechanical rules, which leave behind an indispensable function of law in today’s society. This has been considered by the Supreme Court judges as the opportunity for them to bring their experiences and ideals into their decisions. Supreme Court judges not only adjudicate constitutional rights, but also decide what is right and what is wrong for the entire Venezuelan society. In the American context, American legal scholar Brian Tamanaha argues, “[with] the emergence of legal realism, judges were brought down to an equal partnership with legislators or worse, to become servants of the legislative will.”

However, the infusion of the judges’ own preferences does not necessarily coincide with the Venezuelan Constitution. The Court moves from the legitimate concern for a more functional and real approach to the interpretation of constitutional rights by relying on the judges’ own beliefs.

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543 Laguna Navas, Sala Constitucional, Máxima Ultima Intérprete de la Constitución, supra note 325.
Emphasis on Practical Solutions: Filling the Gaps

Supreme Court Judges as human beings part of society and acknowledge the context surrounding them to provide real solutions with their decisions. Regarding this point, though in a different jurisdiction, American legal scholar Richard Posner adds that, “law really would be a method of social engineering, and its structures designs would be susceptible of objective evaluation, much like the projects of civil engineers. This would be a triumph of pragmatism.”545 However, the Supreme Court of Justice in difficult cases trusts more the judges’ own perception of society’s beliefs and preferences. It seems inevitable that when judges are faced with controversies whose competing values affect the entire country, they can exercise discretion to find justice and equity. In fact, the tendency from the jurisprudence of the Supreme Court is to go beyond rules and logic. That is to say, the Supreme Court in the name of advancing the development of the Constitution has resolved to defining policies to fill the gaps and find practical solutions, without any formalities or procedures. Decision-making process in the Supreme Court of Venezuela is subject to broad and general influences from the context and extra legal considerations of the judges to reach an understandable solution. The sceptical attitude towards rules, embraced by the Constitutional Chamber of the Supreme Court emphasised the assumption that rapid social change needed real solutions from the highest bench. This perspective is also shared by the legal realism that, according to legal scholar Keith Bybee explains, “legal realism exposed the role played by politics in judicial decision-making and, in doing so, called into question conventional efforts to anchor judicial power on a fixed, impartial foundation.”546 The judges have been justifying their decisions based on what the outcome ought to be, including their own fusion of personal preferences to the adjudication of rights. The Court’s imperative responsibility to fill the gaps and to bring practical solution in difficult constitutional cases has become a priority. Even with the perception of a decline in its authority and legitimacy because of controversial decisions, as seen above, the Supreme Court has maintained that the increasingly social issues need solutions.

Venezuela’s constitutional jurisdiction has embraced a more ‘solving-problem’ practical approach to deal with prominent public issues. This shift from fixed-rule deductions to emphasize the actual effects of constitutional jurisprudence became essential for the judicial recognition of society’s immediate problems. For the functionalist perspective it is an expression of the progressive evolution of constitutional jurisprudence in Venezuela. For more than forty years in Venezuela, as seen in the previous chapters, citizens struggled to obtain concrete and practical solutions to their constitutional controversies. In several occasions their claims got dismissed by the Supreme Court under the premises of formal criterias or technicalities. In a radical turn, the Supreme Court, in the last fourteen years has concentrated on enacting social policies from the bench, and understanding the law as an instrument for progressive change. However, the imperative responsibility of the judges to do justice in a society eager to obtain real solutions to their critical problems has been reduced to giving judges considerable lawmaking discretion. Extra-legal considerations are now more important to solve concrete social issues than the certainty of rules and procedures. This is illustrated in the 2000 case of Servio Tulio León Briceño. In this case Mr León Briceño requested the Constitutional Chamber of the Supreme Court to clarify who can bring a collective claim to the Court, what is the procedure to be followed in those cases and if in those cases the decision can be applied immediately.

To defend the Constitution in a State whose values are social responsibility (Article 2 of the current Constitution), the access to the constitutional jurisdiction to interpret the content and scope of constitutional rules and principles cannot be subject to the limitation of the law. To achieve a participatory democracy, the Supreme Court must be receptive to questions regarding the interpretation of rules and principles. This Constitutional Chamber, responsible exclusively for the highest and final interpretation of the Constitution must fully assume the responsibility of ensuring the uniform interpretation and application of the Constitution. Therefore, citizens do not require formal procedures set in the law to request the interpretation of the Constitution; instead they can follow the legally binding decisions of this Court.547

The class action lawsuit regarding constitutional rights was established by the Supreme Court in this unprecedented landmark case that filled the gap between the written text and the practical solution needed in Venezuela. The functional style of adjudication exercised by the Court allowed citizens the opportunity to request directly, without delays or long processes in lower and superior courts, to address the Supreme Court, specifically the Constitutional Chamber, regarding class actions.

The judges of the Supreme Court, as it has been seen in different cases before, are no longer accepting to apply pre-existent norms to deal with new social issues. The interpretation of the Constitution to favour the advances of the *Social State of Law Justice* is now the priority of the Court. According to legal theorist Martin Loughlin, “law, the realist argued, was not a matter of abstract logic but a practical exercise in social engineering.”

Even though it is legitimate for judges to be concerned with giving tangible solutions with their decisions, this argument disguises the judges’ own particular preferences in constitutional cases. The judicial decision-making process has become an open field for “result-oriented” decisions. For example in the case *Servio Tulio León Briceño*, the Supreme Court resolved a long waiting situation that the legislator should have done a long time ago; it established a practical procedure to file class action constitutional law-suits. Although this was an opportunity for bringing real access to this jurisdiction to the people, it demonstrates that the judges could make decisions that do not necessarily follow the Constitution. It opens the debate regarding the Supreme Court’s role in a democratic system. Basically, in the Court’s opinion, constitutional interpretation is an instrument for judges to make important social progress. As legal realist theorist Félix Cohén explains “judges must see law as a functional tool to accomplish social objectives”. However, in a democratic country, the role of the Supreme Court is to protect and preserve the Constitution. This landmark decision erased the lines that divided the logical deduction of rules and the law-making role of the judges. Since the Court has taken this approach to adjudicate constitutional rights, it is extremely difficult to predict the decisions of the Supreme Court. The Court takes the risk that the interpretation of the Constitution is perceived as the infusion of personal convictions of the judges. Therefore, the authority and legitimacy of the decisions of the Supreme Court of Justice are compromised. Citizens no longer have confidence in the objective and impartial judgement of a Court that openly expresses its opinions. The decision above instituted a concrete and precise procedure that was needed to access the constitutional jurisdiction, yet the exercising of a legislative role remains the responsibility of the National Legislature.

The 1999 Constitution explicitly requires that judges at the constitutional jurisdiction interpret rights and freedoms in the most favourable way to guarantee the citizens’ enjoyment of fundamental rights. The judges have interpreted this as their possibility to consider more practical solutions out of the restrictions established in the written text. Adjudication, as argued by those who are critical of the legal realism movement, is an inherently subjective system dominated by the pervasive political, social, and economic predilection of judges. However, legal realism understands the law as the potential instrument to accomplish the most important goals of society. “In particular, by emphasising the indeterminacy of law and legal reasoning, and the importance of nonlegal considerations in judicial decisions, the realists cleared the way for judges and lawyers to talk openly about political and economic considerations that in fact affect many decisions.” Certainly, the arguments that the Supreme Court of Venezuela has been displaying in many constitutional decisions demonstrate an affinity with the theory of legal realism. At the core of legal realism, American theorist Brian Leiter explains, “judges’ adjudication process responds to stimulus and facts, rather than rules and reasons.” In Venezuela, the stimulus corresponds, as the Court has been demonstrating in many constitutional cases, with the social, political, economic context in which the decision is made. For example, in the 2001 case of Corpoturismo, there was a dispute over debt repayment between the Tourism Corporation of Venezuela and Olympia Tours and Travels. The decision of the Administrative Chamber of the Supreme Court regarding this issue was constitutionally challenged before the Constitutional Chamber of the Supreme Court. The question was to know if a decision already made by a Chamber of the Supreme Court could be challenged at the constitutional jurisdiction.

This Constitutional Chamber assuming its role of being the guardian and protector of rights has the constitutional obligation to observe any fact, act, or omission that, in turn, might flow in an unanswerable violation of the Constitution and the legal order. Therefore, it possesses the maximum authority to interpret the Constitution. Its decisions are binding for all the courts of the republic including the other Chambers of the Supreme Court. In this regard, the Constitution, in Section 335, granted the concentrated method of judicial review to this Chamber, in order to unify the judicial opinion of all courts and protect the constitutional principles.

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551 Constitución de la República Bolivariana de Venezuela 1999, supra note 306.
552 Chistopher Roederer & Darrel Moellendorf, Jurisprudence (South Africa: Kluwer, 2007) At 180
This landmark decision reaffirmed the Constitutional Chamber of the Supreme Court of Venezuela’s responsibility as the ultimate interpreter of the Constitution. This controversial case questions the jurisdiction within the Chambers of the Supreme Court. Evidently, it was taking as an opportunity for the judges of the Constitutional Chamber to assert that the constitutional jurisdiction is the last resort to hear appeals in cases in which there is presumption of constitutional violations. Although judges could consider statutes, precedents, or even customs, there is no doubt that in this case the Constitutional Chamber assumed to ‘construct’ its jurisdiction, establishing that it is the last resort in all matters which constitutionally come before it. The judges, particularly those in the Constitutional Chamber, are highly autonomous when it comes to deciding constitutional issues in a more practical matter. As it was famously stated by Chief Justice Charles Evans Hughes, “we are under a Constitution, but the Constitution is what the judges say it is.”555 In this particular case, the Constitutional Chamber essentially went further to say that the other branches of the Supreme Court are subject to its jurisdiction and doctrine. The judges showed with their decision that they are the ultimate interpreters of constitutional rights, even above the other branches of the Supreme Court. This is likely associated with the legal realist theory, as legal scholar Michael Green explains “the realists, recognizing that judges have no legal obligation to decide a particular way even when the law is determinate, concluded that a judge always has discretion and that every decision is a lawmaking act.”556 In fact, in the case of Corpoturismo it is possible to elucidate that the judges, using their discretion, went further to expand the jurisdiction of their Chamber. It is possible to affirm that other branches of the Supreme Court could no longer be considered as last resort courts, because if there was a constitutional argument to be made, it was possible to appeal the decision to the Constitutional Chamber of the Supreme Court. Once again, as seen along this chapter in difficult cases judges assumed that the indeterminacy of the law, the nonlegal considerations and the infusion of the judges’ own particular views on the matter provided the justification necessary to resolve the dispute on the basis of lawmaking or policymaking. The Supreme Court is responsible for enforcing Venezuela’s Constitution, but it does not mean they can infuse the personal preferences of the judges when rendering a decision.

It has been demonstrated along this chapter that the approach to adjudicate rights has been under the influence of the judges’ own considerations, which resembles the arguments of legal realism. There are many authors who sympathize with the judges’ discretion to provide a better understanding of the law.\(^{557}\) However, notable examples exposed in this chapter demonstrate that this discretion could result in the judges resolving disputes using their moral or political views, which ignores the main purpose of the judiciary that is to be an objective and impartial venue to sort difficult controversies. The strong discretion of the judges to fill the gaps of the constitutional text is illustrated in the 2001 case of *INSACA v. Ministerio de Sanidad y Asistencia Social*. In this particular case, the lawyers of the INSACA pharmaceutical company requested a *Habeas Data* to the Constitutional Chamber of the Supreme Court of Venezuela to correct the misguiding information given by the Minister of Health regarding one of their products.

The provisions of the Constitution have a complete force and direct application, and when the statutes have not been developed it is required to resort to the courts of justice. Due to the direct application of the norms, it is the constitutional jurisdiction, represented by this Constitutional Chamber, which will resolve the controversies that might arise as a result of the legislatively undeveloped constitutional provisions, until the laws that regulate the constitutional jurisdiction decide otherwise.\(^{558}\)

The Court in deciding this particular case took into account the lack of legislation in this matter, and so the judges went further to elucidate a new procedure to deal with this kind of issue. Once again, the Supreme Court exercising discretion in an unprecedented case resolved with a decision that filled the gap of the text with a practical solution. However, judges cannot decide what is good or not for society by infusing their own personal views in the controversy. There are also cases where the jurisprudence of the Supreme Court elaborates a particular test that provides guidelines to access its jurisdiction. This solution is viewed as judicial lawmaking and has become, in Venezuela, a landmark case that has been used to file constitutional challenges to the Court. The judges have been assuming a perspective that challenges the presumption that the constitutional text provides them unfailing guidance, yet it is their unique responsibility to justify their decision under the written law, while still adapting to the social issues that always evolve.

\(^{557}\) Escudero León, *El Control Judicial de Constitucionalidad*, *supra* note 509.

**Emphasis on the Interdisciplinary Matter**

Under the traditional conception of the rule of law, judges always find in written rules the single clearest answer to the question before them. However, law is a giant complex web that integrates different views within a society. Law’s interdisciplinary connections with contemporary issues in political, economic, and social theories push judges to choose between different answers, each of which maybe argued to be the correct one. A judge’s responsibility is to find the ‘correct answer’ in cases implicating moral, political, and social concerns, which touch an entire nation. The interdisciplinary approach has been used to designate the judges’ various versions of law, based on different disciplines, including psychology, sociology, and economics. A good example is the case of *Dalia Parra Guillén*, in 2000. In this particular case the Defender of the People challenged the decision of the National Assembly that appointed new members for the Electoral National Council without following the proper procedures. In the opinion of the Defender of the People, the new appointments violated the Constitution that permits civil society, universities and NGOs to postulate and evaluate the candidates for the Electoral National Council’s office.

Provision 2 of the Constitution of the Bolivarian Republic of Venezuela expresses that Venezuela is a *Social State of Law and Justice*. This society is open to new developments that influence the current positive law and futures laws. This means that law must be adapted to new realities. This Court takes into account these influences that shape society, law and justice to ensure a comprehensive quality of live with dignity for every citizen of this country. A provision of this nature pursues a social balance to allow the development of a good quality of living. In order to achieve its purpose, the law must be interpreted against anything that disrupts its goal, including avoiding any disturbances that can come from any aspect, whether it is economic, cultural, or political. Civil rights are entrenched to protect the quality of living of the community. Individual subjective rights that seek personal satisfaction as their reason for existence are about profiting from others, and if the civil rights’s aim is to get quality of living, therefore, the Court must dismiss any act that threatens this aim.559

The Constitution is not fact-specific, but rather an open text, that contains general and sometimes vague rules. The judges of the Supreme Court have been taking this opportunity to discuss in their decisions different topics intersecting with the constitutional dilemma. In the case above, for example, the Court considered the interdisciplinary matters that require the interpretation of the constitutional text. The discussion regarding the welfare of society is a subject that implied a departure from the strict and determined rules to focus on the outcome of a constitutional case.

As mentioned before, the judges are dealing with difficult interdisciplinary cases. In many constitutional controversies, the judges exercise their discretion to solve the dispute by articulating their views regarding a social approach of the Constitution. As legal author George Christie affirms “discretion relates to how people interact with each other in a political context.”560 The Venezuelan Supreme Court has been arguing the impossibility of interpreting the constitutional text without exercising a strong discretion that can take into consideration the social, political, economic issues. In fact, in the case above, the Supreme Court held that new realities must be adapted for the best quality of living of the citizens in Venezuela. The legal reasoning of the Court demonstrates a flexible attitude towards interpreting the abstract constitutional precepts. This approach is inherently subjective, and is dominated by the pervasive political, social, and economic predilections of judges.561 To this, Cohén adds, “judges must conceive every decision as something more than an expression of individual personality […] as even more importantly […] a product of social determinants.”562 In the case of Delia Parra Guillen, the Court expressively affirmed that it was taking non legal factors into consideration to decide the case. In fact, the Court went as far as to engage in a discussion regarding the quality of life. In particular, the judges argued that their task was to construct an efficient society to ensure the social balance for the satisfaction of the community. Therefore, the judges were more concerned with what the outcome should be, a process that may well be non-syllogistic, involving hunches, personal views, or possible extra-legal considerations, including views about policy.563 In other words, for the Supreme Court of Justice to interpret the Constitution, it is necessary to think with a more flexible, and intuitive understanding of the social context. The aim was to present constitutional interpretation as a more innovative process that could deal with social, economic, moral, and political issues. Similar to the arguments of legal realism, the judges of the Supreme Court in Venezuela disputed that the written norms can clearly and consistency provide unique solutions. Instead, constitutional judging is more personal because it involves the judges’ preferences in the interpretation of constitutional rights.

561 Fisher, Horwitz & Reed, American Legal Realism, supra note 501
562 Cohén, Transcendental Nonsense & Functional Approach, supra note 514 at 843.
563 Veitch, Christodoulidis & Farmer, Jurisprudence, supra note 19 at 102.
The arguments of the Venezuelan Supreme Court are to recognize intentionally the indeterminacy of the written text, in many cases, as well as non-legal-factors in order to influence the outcome of constitutional issues. Of course, these arguments are not exclusive to the Venezuelan judges; in fact they are part of a complex theoretical analysis that emerged from the legal realist’s perspective. American justice Benjamin Cardozo, perhaps the premier realist judge, made the following statement: “here is the text to be unfolded. All that is to come will be development and commentary.”

Legal decisions often depend on the judges’ understanding of the need of society to best interpret the law in accordance with practical solution for challenging issues. The 2001 case of Baker Hughes S.R.L is another example that demonstrates the continuity of the Supreme Court’s arguments, which, in difficult cases, resemble those of the American legal realism. In this case, the lawyers of the company Baker Hughes S.R.L appealed the decision of the Labour Chamber of the Supreme Court because it violated the right to defend the company.

The Constitutional Chamber, through its decisions based on arguments and reasoning, given as an expression of the will of the Constitution, seeks to specify, on the one hand, the ethical and political objectives of the constitutional norms with the criteria of opportunity or usefulness in tune with the reality and new situations. On the other hand, it clarifies, through the abstract interpretation of the Constitution, the complex questions that arise.

In the above landmark decision, the Constitutional Chamber held that judges are empowered with a wide scope to review laws and even judgments of other courts, including those made by other branches of the Supreme Court. In its arguments the Court affirms that it is necessary to consider the ethical and political objectives rooted in the constitutional text to render the best solution for the controversy. It can be recognized from the above case that the Supreme Court understands the importance of flexibility and the interconnection of multiple factors in the process of constitutional adjudication. As Legal scholar Felix Cohén explains:

Judicial decision is a social event. Like the enactment of a federal statute, or the equipping of police cars with radios, a judicial decision is an intersection of social forces: behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is viewed simply at the moment in which it is rendered.

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564 Fisher, Horwitz, and Reed, American Legal Realism, supra note 501 at 3.
565 Baker Hughes [25/01/2001] T.S.J Sala Constitucional Exp. No 00-1712
566 Cohén, Transcendental Nonsense & Functional Approach, supra note 514 at 34.
The Court made it clear that it was the responsibility of the judges to find those political and ethical goals embedded in the Constitution in order to accomplish what they consider to be social justice. Indeed, the constitutional jurisprudence of the Supreme Court evolved in this period of the 1999 Constitution. The Court began with a more practical view of the decision making process to move forward in favour of judicial law-making. The claim of uncertainty of the constitutional precepts allowed the judges to consider the process of constitutional adjudication ultimately as judicial consideration for public policy. In the development of Venezuelan constitutional jurisprudence there has been a prominent rise of the judges’ persuasive ability. The interpretation of constitutional precepts is focusing more into accomplishing what the judges perceive is required in Venezuelan society and law. Under the premises of a subjective judicial decision-making process, the judges are able to advocate for the use of jurisprudence as a tool to achieve the development of the constitutional system and its social goals. Yet, the judges have openly been favouring the political and general context in their decision making process. For example, in the 2002 case of the Asociación Civil de Comerciantes Centro Comercial San Ignacio, Miss Segunda Anaya filled a constitutional challenge to the Supreme Court arguing that civil association of the Mall San Ignacio was violating her right to freedom of association.

In this case, this court has to consider the legal nature of the right of association, taking into account its public or social significance. Today it is well accepted that society is moving collectively, influenced by external considerations. In this regards, associations are a form of collective gatherings all working towards specific objectives. Within this context of social justice, the Court, being an essential part of our society, needs a large degree of freedom to develop creative solutions to complex questions. Thus, taking into account Hobbes, Savigny, Rousseau, Welker and Gisker, it is possible for this Court to affirm that the members of this society have the right to establish corporations or associations independently from the State, aimed at achieving a more just society.567

The above decision demonstrates how the Court considers the context and other external legal factors to interpret the right of association. Indeed, the judges’ views of a particular social and economic issue seem reflected in their judgements, particularly in this case, where they used certain arguments of legal philosophers to justify their decision. The judges invoked the context and other external factors with the idea of achieving a just society.

567 Asociacion Civil de Comerciantes Centro Comercial San Ignacio  [20/11/2002] T.S.J., Sala Constitucional, Exp. 01-1402
The Constitution is a fundamental part of politics. Its text deals with a complex set of values, such as economic, social, moral, anthropological, and political ones that tend to evolve with society. The Supreme Court of Venezuela has exhaustively, as seen in several cases analyzed above, held that the social welfare criterion is to be pursued through the law, which constitutes the cornerstone for social justice. The development of a complex legal system instantly increases the need for judges to engage in an active role. Certainly, the Court has adjusted its decisions to respond to the facts that dominate political forces embedded in the Venezuelan Constitution. In Roscoe Pound’s words, “reason is an illusion. Experience is not the unfolding of an idea. No “pure fact of law” is to be found in rules since the existence of rules of law, as anything outside of the books, is an illusion.”

For the most part, law is uncertain. This limits its ability to predict the outcomes of legal cases based on the rules of law. Instead, law is radically uncertain as to the judges’ work towards an outcome that seems appropriate for a specific case. A good example of this is the 2009 case of Testigo de Jehovah v. Clínicas Caracas, in which a patient disputed his right to refuse medical treatment because of his religious beliefs.

The law exists to protect the people. In the cases where the freedom of religion collides with the right to life, it is necessary to weigh these constitutional values, taking into account values and cultural patterns of our society that are enshrined in our constitutional system. Above all, Law exists for the benefit of the people. This Court decided to favour the right to life, as the most important right in our society.

The Venezuelan Supreme Court has been demonstrating, as in the case above shows, that constitutional judging requires more than a simple application of the rules. Judging is a complex issue. As legal scholar Richard Posner explains, “judges must make value judgments based on feeling or intuition, but they also recognized that the disciplined judge uses such hunches as a last resort.” In the case above, judges infused their own experience to support their claim that the right to life was above the individual right of religion. They disregarded his religious beliefs, and so the plaintiff’s request to deny medical treatment for himself was eclipsed by the right to life. There is no doubt that the Court has been dealing with the most difficult questions that society could ever come up with. The Court insisted on having a practical approach to deal with these constitutional dilemmas and at the end, the Court once again let the judges’ own personal views decide the constitutional issue.

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568 Pound, Law in Books and Law in Action, supra note 53 at 61.
Emphasis on the Judge’s Political, Economic, and/or Personal Inclinations

For the last fourteen years, the Supreme Court of Venezuela has been dealing with the most controversial social, economic, moral, and political issues of our time. This, especially since Venezuelan constitutional jurisdiction allows citizens to bring claims directly, without a previous judgement or any other formality, to the Constitutional Chamber when constitutional rights and freedoms are in danger.571 For the most controversial issues, in which the constitutional text is uncertain, the judges have been justifying their decisions based on extra legal considerations, including their own perceptions on the matter to provide more concrete solutions. The role of the judge in filling the gaps between the written text and the social challenges (lacunae), which in the opinion of the Supreme Court in many decisions analyzed in this Chapter, requires a flexible approach where the judges have a more important role to play. According to this view, the judges need to use their decision to adapt standards needed to solve constitutional dilemmas. The indeterminacy of the constitutional text in some cases has been the argument to allow judges to use historical, political, economic, social, and even psychological arguments to support their judgements. At times, when the constitutional text seems vague and contradictory, the need for concrete solutions in Venezuela persuades the Court to assume a more active role in society. From the study of constitutional jurisprudence since the enactment of the 1999 Constitution, it is possible to conclude that the attempt to draw a distinction between law and politics is far behind. Instead, the judges have been arguing that it is essential for the Democratic Social State of Law and Justice that the Supreme Court, particularly the Constitutional Chamber, assumed openly the active role of a Court resolved to provide the solutions to the necessities of the population.572 Indeed, the judges of the Supreme Court have gone beyond the written constitutional text in many constitutional decisions regarding social rights. Objectivity and impartiality in these difficult cases, the opinion of the Court seems to be unattainable. The emphasis on social, contextual, historical, economic, and political forces has blended policy and law making into constitutional judging. The Court is not afraid to recognize the importance of the judges’ political, economic, and/or social preferences.

571 Laguna Navas, Sala Constitucional, Máxima Ultima Intérprete de la Constitución, supra note 325.
572 Carrillo-Artiles, Tendencias Actuales Derecho Constitucional, supra note 291.
The intense political, social, and economic debate in Venezuela has influenced the Court’s judgements. One of the most recent cases is that of Leopoldo López in 2011. On September 1st, 2011, the Inter-American Court of Human Rights held that the Republic of Venezuela was internationally responsible for the infringement of the political right of Leopoldo López Mendoza. The Constitutional Chamber of the Supreme Court of Venezuela rejected the decision that granted the appellant protection for his right to run for public office, arguing that it contravened with the political project of the Venezuela Constitution.

Law is a normative theory that serves the political project of the Constitution. Its interpretation must commit, if the goal is to maintain the supremacy of the Carta Magna, to the political theory that best represents it. In this regard, the standards used to solve conflicts between rules and principles must be compatible with the political project of the Constitution, the Democratic Social State of Law and Justice. This means that constitutional interpretation should not affect the validity of the political project of the Constitution with ideological interpretations that privilege individual rights at all cost. This also includes those who give preference to the international legal order over our own domestic law at the expense of our State Sovereignty. It is unacceptable that under the universal validity of principles, the ideological interpretation tries to undermine our national sovereignty. In the case of a challenge between an international decision and the Constitution, the constitutional norms that favour the public interest must prevail. No Court or Jurisdiction is above the Venezuelan Constitution. The Constitutional Chamber is the only institution, which can determine what human rights treaties, pacts, agreements, and decisions might be part of the Venezuelan constitutional system. If an international institution or court accepts to protect an individual over the violation of the collective, the said decision must be rejected, even though it comes from an International Court that supposedly protects human rights. In Venezuela, the State privileges society as a whole disregarding the individual and resulting in a Democratic Social State of Law and Justice. Therefore, the interpretation of the Constitution is ideological and in the name of the general interest, the security of the people and society as a whole, this Court declares inapplicable the decision of the Inter-American Court of Human Rights.573

Increasingly, the Court has been involved in the political process, which goes beyond the law, to the point of declining the thesis of the protection of individual interest to give priority to collective and social concerns.574 As this case demonstrates, from a formalist perspective, the judges are letting political considerations get in the way of constitutional judging in order to give priority to what they see as politically preordained rights. In different cases already mentioned, the judges have been putting aside the constitutional text, instead exercising a more flexible understanding of the Constitution, allowing other factors to determine the decision. Nowadays it is difficult to predict the outcome of constitutional decisions, because the Court could take a narrow or generous conception of the constitutional text depending exclusively on external factors rather than the written text.

574 Casal, Constitución y Justicia Constitucional , supra note 142.
Another example of this phenomenon within the Supreme Court can be seen in the 2011 case of *Martín Javier Jiménez & Rafael Celestino Belisario*. In this particular case, the provincial criminal court convicted Jiménez and Belisario for the serious offenses of land invasion, trespassing private property and occupying illegally farmland and opted for a sentence of ten years in prison. However, the defence challenged the decision to the Constitutional Chamber arguing that the prosecutor’s office violated their constitutional right of due process. In a landmark decision, the Constitutional Chamber struck down provisions 471 and 472 of the Venezuelan Criminal Code, which are part of the chapter regarding offences against individual rights, specifically the offence of trespassing private property.

Since the Court noted in this case the possible violation of the Constitutional order, it is the function as the judiciary to protect the fundamental principles of due process and proper implementation of laws. Within the context of harmonious and sustainable development of social justice, particularly in the farmland, this Court observed substantial differences between the objectives pursued by the norms of private ownership and land possession. In this situation the social development takes pre-eminence over the particular one. That is to say, in the context of farmland, above the individual right of property overlaps the right that emerges from the use of the property for the food production and useful items for human consumptions that meet the needs of the farmer, his family and the collective. The proper role of the judiciary is to protect those who daily work hard the land that gives us food, in order to improve their quality of life and the entire population. After examining the agriculture law, the food security is a priority for the Venezuelan state, as well as the due process and the principle of legality entrenched in the Constitution. This Court, giving the need of legal certainty in the interpretation of the law and exercising the power of judicial review established in section 334 of the Constitution, that the provisions 471 and 472 of the Criminal Code were inapplicable for being secondary to the political project of the Constitution.575

The above case constitutes the consolidation of the judicial policy-making power in Venezuela. In this particular decision it is possible to determine the Court’s policy initiative regarding agriculture. Yet, in doing so, they jeopardize the individual right of property. The imposition of the Court’s policies in many cases, as seen before, tends to undermine individual rights. As this case demonstrates, the Court has been increasingly relying on the judges’ own personal beliefs and political opinions or political, social, and moral predilections. Unfortunately, the Court is taking the opportunity of interpreting general and abstract constitutional precepts to ignore its mandate to fairly adjudicate constitutional rights. This results in having value of the constitutional rules, norms, and principles diminished, which has greatly affected the authority of the Supreme Court. Indeed, since the Court has lately separated itself from what many see as the fair interpretation of the Constitution, citizens have been trying to obtain justice in international courts.

The Inter-American Court has been emanating decisions that condemn the Venezuelan Supreme Court for the infringement of Inter-American human right treaties and other international conventions. In general, the above-mentioned approaches reflect the judges’ own functionalist style underlying the Venezuelan constitutional jurisprudence. It is possible to mention a few of their characteristics, such as rule scepticism, flexibility, and the adaptability of the jurisprudence to current social changes. Also included in those characteristics is the strong discretion of the Court accommodating the interpretation of the law in order to benefit the outcomes, which enhance, in their criteria, the welfare of society. In addition, the judges’ own values, experience, non-legal facts, and external considerations serve the purpose of elucidating the true meaning of the Constitution. Even though the Court has not explicitly mentioned it, the characteristics mentioned above demonstrate that in the last fourteen years, constitutional jurisprudence in Venezuela has closely been related to the legal realism movement.

**Summary:** After examining the Venezuelan constitutional jurisprudence and reviewing prominent scholars, it was possible to determine the decision-making model used by the Venezuelan constitutional judges in the era of the 1999 Constitution. This chapter has surveyed a vast number of landmark constitutional decisions that provided useful insight to determine the reasoning behind the adjudication of constitutional rights in Venezuela in the last fourteen years. The content and structure of this chapter reflects in several ways the Court’s own approaches to interpret the Constitution, which are closely related to the theory of Legal Realism. These approaches are: (a) **emphasis on policy: the Democratic Social State of Law and Justice**, (b) **emphasis on practical solutions**, (c) **emphasis on the interdisciplinary matter**, and (d) **emphasis on the political, economic, and/or psychological inclinations of the judges**. These approaches show the judges’ functionalist style associated with the theory of legal realism in the judicial decisions of the Supreme Court of Venezuela. The next chapter will show that alongside the functionalist turn, Ronald Dworkin’s theory of adjudication has also served to justify the interpretations of the Constitution in different controversial cases.
CHAPTER 6
CONSTITUTIONAL JURISPRUDENCE IN THE ERA OF THE 1999 CONSTITUTION: JUDGES’ MORAL READING

It is not a simple enterprise to grasp the particular conception of the constitutional judging of Venezuela’s Supreme Court. Since the enactment of the 1999 Constitution, the Court has progressively undertaken the role of redefining political, social and economic matters in Venezuela. Judges often have a great deal of discretion when they interpret open-ended constitutional rights. In fact, the Supreme Court in many cases has announced new constitutional rules that cannot be found in the Constitution, engaging in an active judicial law and policy making. The justification of this new role of the Supreme Court has been that constitutional judging is more than just a simple reading of the Constitution. Instead, judicial decisions must look for guidance beyond the canonical constitutional materials. Although it is possible to recognize the affinity of this argument with the legal realism movement, perhaps one of the most interesting findings in the evolution of constitutional jurisprudence in Venezuela is that judges of the Supreme Court have invoked Ronald Dworkin’s theory of adjudication to justify their decisions. The Supreme Court recognized the importance of Dworkin’s theory to the adjudication of constitutional rights, appealing to the political morality that is at the heart of the Constitution. Ronald Dworkin has argued that there is a particular way of enforcing a constitution, in which judges must invoke moral principles about political decency and justice to provide the right answer concerning difficult controversies.576 However, in his view, these moral principles must fit the broad history of America.577 In the words of Ronald Dworkin “the moral reading therefore brings political morality into the heart of constitutional law.”578 The moral reading proposed by Dworkin affirms that judges should invoke tangible moral principles, inherent to the political structure, to better interpret the constitutional abstract text.579 Since the enactment of the 1999 Constitution a robust and long list of rights have been entrenched with the commitment for social change.

577 Ibid
579 Dworkin, Freedom’s law, supra note 576
The Supreme Court has taken the role of the institution called to bring social justice in Venezuela. Judges have suggested the need for an account of constitutional interpretation profoundly conscious of social problems and the need of real solutions to reflect the progressive changes of the 1999 Constitution. The deliberately open-ended constitutional text has serves as an opportunity for the judges to infuse their own normative beliefs about what the Constitution ought to say. In several important constitutional cases, judges used arguments available to justify the outcome they desired. Their decisions are giving more importance to their own personal convictions disguised as a genuine interpretation of the Constitution. Moral reasoning, while subject to legitimate criticism, is, in the view of the Supreme Court judges, the most practical way to read the Constitution, as is reflected in their decisions. The judges have assumed the construction or creation of new constitutional rules to bridge the operational gaps when the text bears a number of potential valid interpretations. Certainly, the Court has taking some arguments of Ronald Dworkin’s theory to argue in favour of a need for “a fusion of constitutional law and moral theory.”\textsuperscript{580} The Supreme Court judges in the name of the moral reading of constitutional rights used their discretion to consider other areas outside of law. This account raises the question of the legitimacy of the Supreme Court’s decisions regarding the most fundamental constitutional rights. The Venezuelan Supreme Court using the argument that its decisions fit with the ideal of a Social State of Law and Justice are infringing individual rights. In fact, this is contradictory to the moral reading proposed by Ronald Dworkin. The moral reading of Dworkin is rooted in American constitutional life for the defence of liberal judicial convictions on individual rights against the State. Yet in the case of Venezuela, the Supreme Court arguing that it is adapting Dworkin’s theory, has been emphatic in several cases to favour the fusion of politics and constitutional adjudication. This is one possible explanation as to why the judges have been considering political ideals in their different judgements regarding the interpretation of the constitutional text. This chapter discusses Dworkin’s theory in the Venezuelan constitutional jurisprudence in the following two sections: (a) Dworkin’s moral reading in the Venezuelan constitutional jurisprudence, and (b) a survey of a number of landmark constitutional decisions that provide an overview of the judges’ own view of Dworkin’s adjudication theory.

\textsuperscript{580} Dworkin, Taking Rights Seriously, supra note 358at 149.
Dworkin’s Theory in the Venezuelan Jurisprudence: the Moral Reading

The 1999 Constitution recognizes a vast series of political, economic, social, cultural, aboriginal and environmental rights designed to protect citizens and groups against the government or particular acts that contravene their fundamental rights. This Constitution declares individual and collective rights against the government in very broad and abstract language. For instance provision 27 states: “everyone has the right to be protected by the courts in the enjoyment and exercise of constitutional rights and guarantees, including even those inherent individual rights not expressly mentioned in this Constitution or in international instruments concerning human rights.”\footnote{Constitución de la República Bolivariana de Venezuela 1999, supra note 306, provision 27.} This provision, in the light of Dworkin’s moral reading, proclaims that individual rights are not just those entrenched in the Constitution, but also the individual rights that must be recognized because they represent justice and political decency inherent to the morality of the country. When the Court has to render decisions concerning difficult cases, the moral principle that is involved in the controversy can be applied bringing political morality into the constitutional jurisprudence. The moral principle that was not written in the Constitution gets recognition by the Court’s jurisprudence. It is true that in the last fourteen years the Court has been more active in the political, social and economic context. The judges of the Supreme Court have ruled more statutes or government orders unconstitutional than in the previous forty years of formalism. Interestingly enough, judges have been trying to convince the public that the political morality embedded in the Constitution favours the collective over the individual to solve the discrepancy between social classes, when in fact, Venezuela’s history is rich in examples of the struggles that the people of this country have had to face in order to accomplish the entrenchment of fundamental rights and freedoms for the enjoyment of the entire population. The truth is that the Court emphatically rejects the philosophy of liberalism that, in Dworkin’s view, is the political morality that judges ultimately must rely on to protect the rights of individuals. Instead, the judges of the Supreme Court have been putting emphasis on their own convictions of social justice. Yet, it is not about setting differences between collective or individual rights, the role of the Court is to protect constitutional rights as a whole. The Court argued that it is taking the Constitution as an instrument to correct the injustice suffered by the most vulnerable, when in fact it is leaving people without voice.
The Court has been interpreting the *Democratic Social State of Law and Justice* as the goal or objective that the entire State must set out to achieve, meaning that decisions of the Supreme Court must facilitate its accomplishment. The Court’s own understating of political morality has given judges the opportunity to impose their own conceptions of what is good or wrong in society. Similarly, as legal author Richard Vernon explains, “Dworkin claims that thanks to the involvement of constitutional rights, there was wider debate, deeper disclosure of the complex issues involved and a greater sense of the difference between matters of right and wrong and matters of state jurisdiction.”\(^{582}\) In the view of the Supreme Court judges, there are at the forefront of defending social rights. Yet as seen in many cases, the illegitimate preferences of judges continue to undercut popular empowerment, especially their individual rights. The Supreme Court holds that their interpretation facilitates the State’s goal of establishing a *Democratic Social State of Law and Justice*. Naturally, this is paradoxical because the Court holds that it is moving forward with its interpretation of the Constitution to accomplish a *Social State*. Yet by dismissing the protection of fundamental individual rights such as freedom of expression, it is weakening the chance for citizens to raise their concerns regarding social issues. To think that a group of judges of the Supreme Court can really comprehend the social drama that Venezuelans live daily without letting them express their opinions and concerns freely is delusional. Although the enthusiasm for finding more practical and functional interpretation of the abstract constitutional precepts is illustrative of an evolution of the Supreme Court, setting aside the law to impose its own views and political considerations is not the answer. Dealing with the most crucial constitutional issues should not give the judges the opportunity to impose their views and ideologies on the rest of the population. It seems to grotesquely restrict the fundamental rights of citizens, when a professional group of elites decide cases based on their own personal opinions. This is exactly one of the characteristics that is emphatically rejected by the moral reading of the Constitution as it was conceived by Ronald Dworkin. The respect for constitutional rights, either social or individual, must be paramount of the Supreme Court judges, guardians of the Constitution. The Court’s concept of political morality does not necessarily reflect Dworkin’s theory of adjudication, nor the spirit of the Venezuelan constitutionalism.

The Judges’ Own Views of Dworkin’s Adjudication Theory

The reason that constitutional interpretation is more than just a fair reading of the text is because determining the precise meaning of abstract constitutional provisions is complex. It is particularly difficult to set the right meaning to guarantees such as the protection of the environment, as well as access to health care, education, food, housing, work, and clothing. In addition, the 1999 Constitution includes guarantees of gender equality and mechanisms, beyond voting, for participatory democracy, which invite to competing interpretations that might all be valid. The Constitution created institutions of referendum and popular consultation and introduced the right to recall the President, Governors and Majors. Yet, the most difficult questions are brought to the Court. Moreover, Venezuela is constantly evolving, people change their views of what is morally right or wrong more often than not and judges are not immune to this situation. The Supreme Court judges in Venezuela have openly recognized that to deal with this robust list of rights, Dworkin’s theory permitted them to provide a reasonable answer. A great example is the 2000 case of William Dávila Barrios et al, where a group of elected Governors on behalf of civil society decided to file a class action against the Minister of Finances before the Supreme Court arguing that the equalization payments had not been done according to the Constitution. More specifically, they argued that each province must receive fifty percent (50%) of the revenue generated from the export of oil, but instead the Federal Government is transferring that revenue to the investment fund for macroeconomic stabilization. They claimed the prompt transfer of the oil revenue to the State Governments, and blamed the Federal government for the fiscal imbalance. The Venezuelan legislation is silent regarding the possibility for public elected officials to bring cases to the Supreme Court on behalf of the citizens that they represent. The Constitution may have clearly written norms but there are cases in which the judges’ face conflicting issues that the drafters could not have anticipated and they must honour with their interpretation the entire governing document. The Venezuelan Supreme Court has maintained during the era of the 1999 Constitution that it is unrealistic to see the Constitution as a simple black-and-white set of rules that have all the answers for every case. In fact, judges have been making arguments that are centered on the understanding of the interconnection between the written text of the Constitution and their free appreciation to justify practical decisions.
The Supreme Court, in *William Dávila Barrios et.al*, addressed important concepts such as civil society, moral rights, collective rights, and unwritten rights.

The 1999 Constitution has the mandate to ensure the participation of civil society, yet nothing is said about their collective rights as an entity. Although the Constitution expressly recognizes collective entities, such as civil society, we can argue that their rights are moral rights. This has special meaning in the case of Venezuela, where the *Democratic Social State of Law and Justice* is rooted in the preamble and provision 2 of the Constitution. We could say that the constitutional obligations of the State could generate so-called “moral rights” such as what Ronald Dworkin explains in his book *Taking Rights Seriously*. Such rights are somehow recognized in the current Constitution, in precept 22, to protect the rights inherent to the person as well as legal rights not enumerated or written in the constitutional text. Even if rights are not explicitly written, it does not mean they cannot be protected. The Venezuelan society recognizes them as fair and just within our cultural tradition founded in the Universal Declaration of Human Rights. In harmony with that insight, this Court recognizes unwritten rights in the Constitution that are inherent to the person.583

The Court protects these so-called moral rights, not written in the Constitution, which in the above case are considered ethical standards, values, or principles of special importance for all members of this society. The judges exercising their own moral reading of the Constitution argued that Venezuelans are entitled to unwritten rights that possess a moral justification as they are inherent to the person. In this case, the Court seems to recognize that universal rights, entrenched for example in international instruments, such as those written in the Universal Declaration of Human Rights, are an integral part of Venezuela’s constitutional tradition, or in Dworkin’s words, our political morality. The Court’s constitutional rulings play an important role in defining concepts such as the promotion of general welfare, the security of liberty, and the protection of the community and property from violence, as part of the social contract that is protected by the Constitution. The role that the judiciary ought to play is to facilitate the functioning of the constitutional system to reflect the interests permeated within society. In Dworkin’s view, these rulings have to be done by judges who value integrity as virtue to remain faithful to the Constitution.584 If judges do not have integrity regarding the Constitution and respect for the law, the legitimacy of their decisions is compromised. The challenge in constitutional judging is the complexity of the diverse social, political and economic issues that need clear answers based on an abstract constitutional text and for which no solution already exists. The need to find the best possible answer to the controversy remains a judge’s ultimate quest.

584 Dworkin, *Freedom’s Law,* supra note 576.
The case of William Dávila Barrios et al is demonstrating a contradiction in the arguments of the Supreme Court. In fact, judges disguised their arguments with Dworkin’s theory in order to impose their view of society. Judges held that it is important to protect ‘the unwritten right inherent to the person’ and the so-called ‘moral rights’, yet, at the end, the judges dismissed the claim to enforce the Constitution and transfer the oil revenues to the provinces, arguing instead that there was a lack of legislation in this matter.

The recognition of unwritten rights brings a question. Do unwritten rights, in the name of justice and fairness, deserve the protection of the Court, even though they are not positively enumerated in the Constitution? According to the political morality of the State, and the need of justice, citizens collectively can exercise moral rights. Moral rights are ethical requirements, goods, values, reasons and principles of particular importance enjoyed by all human beings, for the mere fact that they are human beings. They can be demanded or claimed against the rest of society and have to be incorporated into the law as written legal rights, if not already. The legitimating of collective entities to exercise these moral rights must come from the representativeness of society, community, groups and others, rather than from the State governors, mayors or other public officials. The collective entities, such as civil society, have certain characteristics that gives them power to exercise their moral rights. First, the Venezuelan people exercise those rights. This means that they manage, finance, and organize the collective entity without foreign organizations that are just in for their own political or economic benefits. Allowing foreign aid or international groups in representation of the Venezuelan society could bring violent groups that can jeopardize our security and the harmony in our nation. Second, their members are not part of the government, nationally, regional or locally, which means that they are completely independent of the State, financially and in terms of management.585

The indeterminacy of the constitutional precepts made the judges disagree with reason about the scope and limitation of rights and freedoms. The democratic legitimacy of the jurisprudence coming from the Court relates closely to the role of the judges in hard cases, properly setting aside external factors that can compromise the authority of the institution. The Supreme Court has relied on Dworkin’s theory to persuade the public that they are taking rights seriously, yet their decisions are slowly but continuously limiting the exercise of individual rights. In this case, judges argued that because there was no clear procedure in the constitutional text to deal with a case of this magnitude, the Court needed to provide a solution using ‘real life’ as guidance to craft a new constitutional procedure to bring constitutional issues in the name of a large group of people. Yet it denied the governors access to the constitutional jurisdiction rejecting the possibility for then to obtain the equalization payments from the Federal government. Judges are not just harming individual rights of elected officials to resort to the Court when there are discrepancies within the Federal government, but also the public that cannot receive benefits from the oil revenues.

The Supreme Court rejected the claim using Dworkin’s theory in the case of William Dávila Barrios et al. This claim was crucial for regional and local government to obtain their constitutionally granted incomes from the Federal government. Instead, the Court recognized a set of unwritten rights permitting constitutional challenges from civil society, without allowing them to be represented by elected public officials. It also established a test to claim the representation of civil society in a class action, which allowed, in the Court’s opinion, the exercise of moral rights. The problem is that the Court’s decision also restrains non-governmental organizations from seeking any kind of revenue from foreign countries or other sources of financing and jeopardizes a vast group of human rights organizations that depend on foreign aid, as well as multilateral and international organizations that have representatives in the country to advocate for human rights. Moreover, the concept of civil society given by the Court is only restricted to groups or organizations that participate in the Venezuelan government, rejecting the possibility of non-governmental organizations to represent the interest of civil society in international forums.

To recognize the collective rights of foreign groups or entities or of those that are influenced by them, and to allow them to act in the name of the national civil society is to permit ethnic and foreign minorities to intervene in the life of the State in defence of their own interests and not those of the security of the nation. Minorities that may create movements that could be harmful for the country. They can even be aggressive and conflictive and founded on separatist movements.586

The judges’ discretion can be set to accomplish justice and fairness. According to American legal scholar Todd Pettys, “the judges’ ability to make discretionary judgements when adjudicating constitutional disputes is central to the mechanics of democratic constitutionalism.”587 It is true that judges need freedom to read broadly and progressively the Constitution to advance its social, political, and economic agenda, but the constitutional decisions of the Supreme Court proves that judges can use the moral reading of the Constitution to disguise their own personal preferences, which puts in question the legitimacy and authority of the Court. The Court must provide with its jurisprudence the conditions to freely and respectfully permit citizens to enjoy their fundamental right to life in a democratic society. Although the Supreme Court has been considering Dworkin’s theory with the belief that it justifies nearly any result, it also invites judges to present their differences with this perspective.

586 Ibid.
William Dávila Barrios et al had two dissenting opinions. First, one argued that the Supreme Court, specifically the Constitutional Chamber could not close the door on the protection of the fundamental issue in question based on formal criteria or moral rights, instead there are fundamental principles in jeopardy such as the respect for equality before the law.

The opinion of this dissenting judge is that the 1999 Constitution rejects the formalities that do not allow judges to provide clear and precise solutions to defend constitutional principles like equality and the right to defence. In fact, after other similar decisions rendered by this Court in which all judges agreed on the amplitude of the guarantee of access to the constitutional jurisdiction, denying now this claim because there is no specific law seems contradictory. For this reason, this dissenting judge respectfully dissents from the rest of the Chamber because of the incompatibility of this decision with the national and international understanding of fundamental rights.588

The decisions of the Supreme Court must defend the Constitution. Even if it means going against what the majority considers just or fair, to stand-up for the fundamental individual rights for equal respect of everyone. The adjudication of rights and freedoms cannot depend on the community’s understanding of fairness and justice, or on the judges’ own personal preferences. Social life is constantly reinventing itself, the structure, rules and values that a society agrees on tend to change over time. Yet this does not mean that fundamental principles set in the Constitution, and which represent the identity, culture and tradition of the country, can be dismissed or forgotten by the judges while interpreting constitutional rights in challenging issues. The second dissenting opinion of this case held that based on cases such as Mata Millán, this issue should not even be discussed in this Chamber. Yet this dissenting judges argued that the Court should not close the opportunity to bring this case again, but rather allow citizens to represent themselves when they present the issue.

The opinion of this dissenting judge is that the Court has been clear that constitutional injunction against high public officials cannot be filled to this jurisdiction because it is not against the person itself, but rather against an act or legislation that could jeopardize the Constitution in which this Court has jurisdiction to act. The intention of the founding fathers and the jurisprudence of this Court coincide with the fact that this Constitutional Chamber is an institution that protects and preserves the Constitution. Moreover, regarding the presumption that the Minister of Finances omitted the equalization of payments, this dissenting judge does not agree that this omission is against the Constitution, by rather, perhaps, against the law. Therefore, this case should not be discussed in this jurisdiction and this Court should orient citizens to bring this controversy in front of the appropriate court.589

589 Ibid
Nothing is more dangerous than judges infusing their own preferences in decisions. Instead of following the Constitution, they tried to give effect to obscure ‘intentions’ incompatible with the constitutional structure resulting in unfair decisions. The Court’s decisions must guarantee everyone equal justice and fairness as stated in the blueprint of the Constitution.

The open-ended language in which the 1999 Constitution was drafted and the always-evolving context of Venezuelan society make the task of constitutional judging difficult. The Supreme Court judges in Venezuela have openly recognized the moral grounds of constitutional interpretation, referring to arguments regarding Dworkin’s theory of the moral reading of the Constitution. A good example is the landmark 2001 case of Hermán Escarrá. In this case, a former drafter of the 1999 Constitution, Hermán Escarrá requested the interpretation of provisions 57 and 58 of the Constitution, regarding the right of freedom of expression. In this decision, the judges set aside assumptions that to interpret the Constitution they need to consult the intentions of the founding fathers of the Constitution, or that a fair reading of the constitutional text was enough to justify the decision. Instead, the Court constructed and justified its decision using arguments from Dworkin’s theory.

Recently, Dworkin has argued that law is not the result of logical deductions, but an interpretative practice that ‘constructs’ institutions. Constitutional decisions require the fulfillment of two main aspects, first the internal consistency with the written norms of the legal system and second the external or political theory that underlies the institutional morality of the legal system. In order to fill gaps, the interpretation of the law focuses on an ideological political theory that helps justify decisions.590

The Constitutional Chamber had the opportunity to provide Venezuelans with a favourable theory of freedom of expression. However, the judges decided to dismiss the petition. Instead, the concept of political morality of Dworkin’s theory was interpreted to inevitably let personal convictions set the criteria for protecting rights, especially freedom of expression, one of the cornerstones of a democratic system. The Court argued that the political project of the 1999 Constitution is to accomplish the Democratic Social State of Law and Justice, and though this might be valid, against all evidence they claimed, without reason, that protecting fundamental individual rights is obsolete.

The standards for resolving the conflict between principles and rules must be compatible with the political project of the Constitution (Democratic Social State of Law and Justice). Ideological

interpretations that privilege individual rights or international legal standards cannot affect national law in detriment of the national sovereignty.\textsuperscript{591}

They argued that individual rights should not be a priority for the \textit{Social State of Law and Justice}, because the most vulnerable and unfortunate people need prompt solutions.

Social rights are rooted in Venezuela since the beginning of 1940’s, yet individual rights have been entrenched in Venezuela since the first Constitution. This mismatch between the protection of collective rights and individual rights is unsatisfactory and obscure. Instead, the Supreme Court is dismissing centuries of Venezuelan constitutionalism, in which Venezuela began its quest for independence to eventually become a nation based on fighting for freedom. It is essential for the Supreme Court that the interpretation of constitutional clauses matches the social needs to receive practical solutions. It is the perception of the judges that to accomplish Social State of Law and Justice they need to advance the social policies that are in the interest of the State rather than individual rights. However, a fair and just society needs to guarantee citizens their right to express freely. Although freedom might have certain restraints in particular situations, the Supreme Court must respect the proper limits of its authority and provide meaning to this constitutional right in these modern times. There is no doubt, after a fair reading of Venezuela’s history that living in a society where everyone enjoys freedom of expression without fear is rooted in the Venezuelan culture, history, and identity. The Guardians of the Constitution must act against any practice that offends the constitutional and democratic system, which includes those that undermine not only social rights but also the protection of individual rights, such as right of assembly, religion, freedom of expression, and many others entrenched in the 1999 Constitution and Venezuela’s constitutionalism. The judges of the Supreme Court in Venezuela interpreted Dworkin’s moral reading of the Constitution arguing that “to find the best conception of constitutional moral principles it is necessary to elucidate the morality of the Constitution, in their best light”\textsuperscript{592}. For the judges, the ‘best light’ becomes their own interpretation of the \textit{Democratic Social State of Law and Justice}, without considering the rest of the provision, which affirms that the protection of freedom and respect for the dignity of the individual are essential. Even if Dworkin affirms, “the moral reading encourages lawyers and judges to read an abstract constitution in the light of what they take to be

\textsuperscript{591} Ibid.
\textsuperscript{592} Ibid, at 11
justice,“593 it does not mean that judges are free to impose their personal convictions while adjudicating fundamental freedoms.

Dworkin encourages judges to discover the law rather than create it, and in those hard cases, they should value the use of the latent principles and values as criterion for the resolution of social conflicts.594 Judges, in Dworkin’s view, interpret those abstract constitutional precepts trying to identify the moral principles that best justify the just and fair adjudication of rights and freedoms. A hard case occurs, in Dworkin’s perspective, “when a particular law-suit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, ‘discretion’ to decide the case either way.”595 Dworkin’s adjudication theory ultimately rests upon the ideal that people are equal as human beings and their rights must be taken seriously. The interpretation given by the Court of this theory came from the judges’ own views of the Venezuelan society, defining the political morality of the legal system as irremediably ideological and putting emphasis on the achievement of their version of a Democratic Social State of Law and Justice. Indeed, the Court has rejected the liberal perspective that Dworkin promotes in his theory, making normative judgments regarding constitutional controversies under the discourse of safeguarding the interest of the community.

No functional conception of political morality can determine an objective answer to constitutional controversies. Either a liberal or a socialist conception of the embedded philosophy under the constitutional system can provide judges with the justification to give the proper meaning to the written text. Political rhetorics coming from the highest Court of the land often imply a dichotomy between the proper role of the judges and the interpretation of the law. When rulings are publically seen as personal preferences or part of an ideological agenda, the Court suffers an erosion of legitimacy. The Court, as Dworkin explains, should play a crucial role to protect minorities and political dissidents from the majority rule.596 This is not the monopoly of the liberal theory. It is clear that ‘respect’ is fundamental to life in a well-established democracy: it is the responsibility of the judicial system to ensure that

593 Dworkin, Freedom’s Law, supra note 576.
594 Dworkin, Taking Rights Seriously, supra note 358 at 36.
595 Ibid, at 81
596 Ibid.
citizens, including government officials, respect the rules and principles entrenched in the Constitution.

The evolution of the Venezuelan constitutional jurisprudence has demonstrated that excessive formalities and procedures become obstacles to justice. Yet, even if the judges’ personal convictions might represent legitimate concerns regarding social issues, they are not suitable for the interpretation of constitutional rights. The Court had the opportunity in *Hermán Escarrá*, to invoke, for decency with the public, the principle of freedom to explain and justify the text and its application.

A system of principles, supposedly absolute and universal, cannot be above the Venezuelan Constitution. Neither can the interpretation of its text misguide the political theory that serves as its legitimacy. Then, it is necessary to reject any theory that pretends to impose rights as universal and absolute, which in our tradition or history is not shared by the Venezuelan people. Part of the responsibility of the Court is to protect not only the Constitution but also the political morality that legitimates our legal system, sovereignty and self-determination. 597

The flexibly and practical arguments to justify the adjudication of rights in order to achieve justice are understandable. However, judges must be extremely careful when explaining their motivations, disguising them as a genuine interpretation of the Constitution, as it has worked against the protection of individual rights so far in Venezuela. In fact, freedom of expression has been suffering restraints and setbacks. It seems that for the Supreme Court judges this right was never entrenched in the Constitution. The goal of solving the most crucial issues of those more vulnerable is admirable and shared by millions of people. Yet, it does not justify the limitation of every citizen’s right to express freely their ideas, opinions or thoughts. Also, an arbitrary interpretation of the political morality of the country does not justify the rejection of universal rights, internationally recognized as laws and standards for the respect and protection of basic human rights, including the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and many other international instruments that have been subscribed by Venezuela. More than ever citizens of the world have their basic rights protected by international treaties and covenants enforceable at international courts and commissions, which has become an important step to universally guarantee that everyone enjoys living in a fair and just world. 598

598 It is recognized that regional human rights instruments address the issue of freedom of expression, including The European Convention, implemented by the European Court of Human Rights; the American Convention,
This includes the opportunity to hold opinions without the interference of State officials, allowing citizens to share and engage freely in a dialogue with others. The 1999 Constitution granted judges of the Supreme Court, especially those in the Constitutional Chamber, the power to review any act that contravenes with the Constitution as well as to be the ultimate interpreter of the Constitution. Judges cannot disguise their decisions with the language of the ‘moral reading’ of Dworkin to dismiss long-standing constitutional rights. The constructivist approach that Dworkin defends attempts to guide judges in reaching decisions in difficult cases. Dworkin argues that in every constitutional issue there is a right answer to solve the problem, and because it is morally the right solution, then judges need to read morally the Constitution to consider the true essence of the law and justify constitutional decisions. Although it is the responsibility of the legislator to provide society with the best economic, political, and social legislation that engages with contemporary issues, the Supreme Court must guide citizens with a precise interpretation of the Constitution, which bridges the gap between the written text and the current issues in society. In Dworkin’s perspective, “the best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.”

It can be justified that the political morality of Dworkin’s theory is different in every jurisdiction, and argued that the values and principles of the Venezuelan constitutionalism might differ from the North American ones, but Venezuela’s constitutional history has taught us that freedom, property, and equality have been rooted in its constitutional tradition for centuries. The 1999 Constitution is a product of that historical evolution, including in its text several precepts that represent the Venezuelan identity. The values and principles that truly demonstrate the main political culture, history and morality of the Venezuelan people do not resemble the unsatisfactory arguments presented by the Court in Herman Escarra. The courts are expected to provide a clear meaning of abstract precepts in the Constitution, not to create others.

implemented by the Inter-American Court of Human Rights and the Inter-American Commission; and the Organization of African Unity, implemented by the African Commission on Human and People’s Rights.

The notion of constitutional interpretation as a construction interpretation process will be further discussed in chapter seven (8) of this study on Dworkin & Barak.

Dworkin, Freedom’s Law, supra note 576 at 34.

Brewer-Carías, Historia Constitucional, supra note 22.
The role of Supreme Court judges is to protect equally, with respect, fairness and justice, rights and freedoms, collectively and individually from the abuse of those who hold power. Ronald Dworkin’s theory of adjudication has become a powerful tool for judges in Venezuela to add their own perspective, blending them in their decisions. Another example is the 2008 case of Eduardo Lapi García y Biaggio Pilieri, in which the national electoral body prohibited Mr. Lapi Garcia to run as candidate for State governor because there was a criminal procedure against him. His political party represented by Mr. Pilieri challenged the decision requesting a constitutional injunction to the Supreme Court.

The though task of judging has enormous challenges and difficulties. To come through these difficulties, the judge must have a diverse set of technical skills, abilities and knowledge and certain personal qualities, and the courage and character needed not to be persuaded by reasons unrelated with the nature of the issue. Judges must be willing to make decisions according to reason and conscience to ensure the core of fundamental rights. At the same time, they must be sensitive to the requirements of justice. In the light of this matter, judges can examine the fundamental intrinsic values that are in dispute to provide the best possible answer.602

The Court engages with a manner in which judges seek to blend their personal qualities, technical abilities with their freedom of appreciation according to their conscience and reason. This dimension sets aside the constraints imposed by the constitutional text. Arguing that judging is extremely difficult, the Court tries to justify the moral reading of the Constitution. Certainly, this argument has some affinity with Dworkin’s theory of the adjudication. In Dworkin’s perspective, judges should weigh the importance of moral principles in order to maintain a political, social and economic stability, treating everyone equally. According to Dworkin, “fidelity to a moral constitution does not entail that judges should be the final arbiters of what that constitution requires in concrete controversies.”603

Certainly, judges that assume a moral perspective in the adjudication of rights and freedoms without detaching themselves from the controversy, run into the problem of faithfulness to the Constitution. In a democratic system, everyone should respect equally the law. This has more significance for the Supreme Court, which must represent the institution in our political system to guarantee everyone, including them, equality in the eyes of the law.

The Court must protect its reputation as an impartial and objective institution. It is indispensable for the judges of the Supreme Court to assume this responsibility putting aside their emotions and personal views to focus on the controversial case. The legitimacy of their decisions depends on good arguments, which guarantee that everyone is treated with the same respect. In a democratic system, it is necessary for people to trust their public institutions. If the public loses confidence in their Supreme Court, the authority and legitimacy of this institution is questioned. Even in those new cases where a clear answer is difficult to find simply with the constitutional text, the responsibility of the Court is to find the best possible solution that will remain a good decision in the years to come. The Supreme Court evoking, arguments taken from Dworkin’s adjudication theory in *Eduardo Lapi García y Biaggio Pilieri* embraced the judges own will for criteria of judgment.

The judge must know the “law” in its broadest sense to interpret the constitutional text in the light of its context. Some authors claim that the judges’ role ends with the mere application of the law. This is not entirely true since judges are responsible for the interpretation of the legal rule according to its text and context. Judges are not androids, or simple machines that produce decisions; the judicial activity is more than just applying the text. There is a distinction between the “application” of the law and the “solution” to controversies. According to Lohn Fuller, “Statutory interpretation is not a simple translation of the formal elements that the legislature uses but ‘rather’ a process that seeks to adjust the law to the needs and values implicit in society.” In harmony with this insight, when there is a gap in the law, judges assume the development or creation of a new law. To do this, judges must act in accordance with principles and rules, but at the same time be open to consider the context, by seeking justice, social peace and healthy living.604

The Court argued that legislating from the bench is necessary when there is no clear answer from the law, because judges are not “androids” that mechanically apply the law. Encouraged to interpret the constitutional text in a broader manner, the Court argued that it is necessary to include context and morality while dealing with complex constitutional issues. The Court goes further to affirm that the necessity for practical solutions to unanticipated issues must be in harmony with principles, such as justice, social peace and healthy living. Unfortunately, there seems to be a dichotomy in the Supreme Court’s argument, because in order to provide practical ground to these principles, judges resolve to infuse personal preferences to make a decision. The Supreme Court openly endorsed the moral reading of the Constitution to find justification to their own characterization of it, which allows for the personal views of the judges to dictate the result of constitutional issues.

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Judges of the Supreme Court are not in position to reduce the interpretation of the Constitution to a matter of which external considerations or moral grounds appeal to their preferences. The 1999 Constitution set a strict separation of powers, between the legislative, executive and judiciary, giving the Supreme Court the responsibility of interpreting and reviewing any act that compromises the integrity of the Constitution. The legislature is the institution of the democratically elected members that represent the people to discuss and enact legislation and debate social concerns. Social, political and moral policies are not the responsibility of a certain group of judges when they are interpreting the Constitution. As Canadian constitutional law theorist, Wilfrid Waluchow affirms in a similar context, “if we can not trust our judges to act with integrity in honouring their constitutional duties, including the ever-present good-faith requirement, in the face of such pressures, then what hope is there for constitutional democracy?”

Constitutional judging does not grant judges absolute power to rewrite the Constitution according to their own ideological views when there are gaps between the text and the question at hand. Judges must respect the will of the people entrenched in this fundamental document that codifies rights, which characterize those long periods of brutal wars for independence, restructuring and consolidation of the democratic system to obtain respect in the name of dignity and liberty. These rights are the core values that historically, culturally and traditionally represent the identity of Venezuela as a nation. No one is above the law, including the judges of the Supreme Court. According to Venezuelan constitutional law scholar Brewer-Carias while referring to the Supreme Court, “it would be inconceivable that a Constitutional Court can violate the Constitution it is called on to apply and interpret.”

Although constitutional jurisprudence has evolved from a strict formalist perspective that became a straightjacket for judges to provide concrete solutions to social issues, the moral reading of the Constitution cannot be the opportunity for judges to dismiss core values of the Venezuelan constitutionalism. Judges of the Supreme Court could argue that they are adapting the moral reading of Dworkin into the Venezuelan constitutional system, yet the exacerbate equalitarianism reflected in their judgements are incompatible with Ronald Dworkin’s defence of liberty and equality.

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606 Brewer-Carias, *Dismantling Democracy: the Chávez Authoritarian Experiment*, supra note 7 at 241
The implications of the interpretation given by the Supreme Court to Dworkin’s theory made constitutional judging depend on the personal political convictions of the judges. Although Ronald Dworkin argued that constitutional decisions should be grounded in principles, he was emphatic in making it clear that judges must avoid policy consideration. The Court has not hesitated to openly recognize that in difficult cases, in which the plain text does not provide a solution, they are shaping the constitutional clauses to their personal preferences.

In the absence of clear norms to solve the issue, the Court must appeal to another normative system outside the law, like the moral one. However, to adequately solve the issue it is necessary to evaluate the goals, aims and purposes assigned to the norms that have been entrenched in the Constitution with a vision for social progress. At the same time, these goals, aims and purposes are invoking a moral assessment from the Court, which is influenced by the moral conscience of society. As Ronald Dworkin explains there are abstract clauses of the Constitution that invoke moral principles; and the Courts must decide according to what they consider better and more just from a moral point of view. In light of these insights, this Court interprets constitutional norms based on a social morality.

The ‘moral reading’ has been problematic in Venezuela. The judges political convictions are not relevant to the interpretation of constitutional provisions. The social progress that judges envision in their judgement considers an equalitarian society that undermines individual rights and does not have grounds under the Venezuelan history. In fact, as seen in Chapter 1, Venezuela’s development towards democracy was difficult. Yet, citizens were determined to succeed in their objective of becoming a free and equal nation. This is fundamentally different from the particular view of the judges exposed in these decisions, which contravene with the fundamental right of the individuals. Particularly, the political morality of Dworkin’s theory as adapted by the judges of the Supreme Court argued that their interpretation is influenced by “the moral conscience of society.” The Court failed to give concrete arguments as to what constituted this moral conscience. New social rules are being created between members of society each and every day, even new ways of communication and interaction between members of society have changed in recent years. New technologies give the opportunity to interact with people from different cultures, traditions, religions and many more, which make them hold diverse opinions because of their unique and personal views. This means that society in general might have contradictory views on what represents justice and fairness in a specific situation. It is difficult for judges to establish the current understanding of society regarding what is just and fair.

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For example, there is still a lot of controversy around the world with issues such as the legalization of drugs, abortion, gay marriage and many other topics society as a whole still needs to consider, especially when it is evolving almost daily, bringing new ideas and perceptions of what is right or wrong. This increases the difficulty for judges, who are not sociologists and psychologists, to determine the communities’ understanding of justice and fairness. In this case the Court struggled to faithfully fill the gap between the text and the concrete issue. Instead the Court argued that the free appreciation of the Constitution lets the judges decide according to ‘what they consider better and more just from a moral point of view.’ Yet, one could argue that the judges of the Supreme Court of Venezuela go as far as imposing their own personal moral point of view on the rest of society. Dworkin’s theory of adjudication envisions judges deciding cases following the principles of fairness and justice. According to Dworkin, law-as-integrity “does not aim to recapture […] the ideals or practical purposes of the politicians who first created it, but rather aim to justify what they did in an overall story worth telling now.” The judges’ personal views are irrelevant in Dworkin’s theory. In fact, Dworkin argues that judges do not exercise discretion, because there is always a right answer, one answer to most constitutional problems. However, in Venezuela, judges of the Supreme Court have a different take on Dworkin’s theory. They looked at Dworkin’s theory of the moral reading of the Constitution to provide a constructive approach for the interpretation of the constitutional text in those difficult cases that divided the nation. Yet, the Court has been disguising their own personal preference in their adjudication of rights and freedoms. It seems that moral considerations in constitutional adjudication are subject to confusion and allow judges to go beyond the law to impose their own view of political morality. According to legal scholar Alexander Latham, “the content of the law cannot depend on controversial questions of morality, or for that matter, of economics, sociology or quantum physics.” Even if judges have the freedom to appreciate the law, they must respect what the Constitution represents.

608 Dworkin, Law’s Empire, supra note 341 at 227.
609 Ronald Dwokin, Justice in Robes supra note 609
It is essential in constitutional judging that the precepts of the Constitution maintain their authority. The authority of the judges and therefore the constitutional precepts, remains in jeopardy when their judgments are not different from those of a politician or a moralist. Of course, the abstract language of the constitutional text requires that judges assume their role of interpreters with integrity to honour the legal tradition, culture and values of the constitutional system. Complexity is a critical part of constitutional judging these days. The Venezuelan Court is aware of these difficulties, turning to a broader view of the reading of the Constitution. However, Dworkin’s moral reading of the Constitution served the purpose of the judges of the Supreme Court to disguise their preferences as in the case of Eduardo Lapi García y Biaggio Pilieri.

This case has opened the possibility for voters, who will participate in the electoral process, to elect a citizen, Eduardo Lapi. If he wins, he will benefit from the legal procedures established in the criminal law that decay any order of deprivation of freedom. This situation combines well opposite conducts, on one side a legal duty (evading the law) and on the other, a constitutional right (to run for public office). However, if the result of the election consolidates a breach of the criminal law, it is a violation of the principles of justice and social peace that hold the morality of society since ancient times. The moral values embedded in the Constitution protect the right conduct, not the wrong one, as Eduardo Lapi running for governor would be. He is looking to break the criminal law by getting elected, which is morally wrong and this Court will not let it happen.611

The above-mentioned demonstrates that the Court is not qualified to predict the future of a political election and then discourage one particular candidate based on moral grounds, because there are no constitutional rules that support the Court’s arguments. Instead, the Court should ensure that the political process is equally open to everyone. Constitutional judging can provide guidelines to the democratic process guaranteeing the democratic rights to everyone in equal terms. The individual right to run for office or any other official position is essential for a democratic process to flourish. As Dworkin affirms, “we accept that constitutional interpretation aims at making best sense of the Constitution’s words as provision for just government.”612 This is contrary to this decision, in which the judges obscure the constitutional provisions and step in the democratic process of electing the best candidate and permitting those who want to run for office in democratic free elections.

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The Constitution entrenched a vast group of rights and freedoms that morally represent good. For example, freedom of expression is a right that gives citizens the opportunity to vocalize their ideas, thoughts and opinions, without fear of retribution. This is morally good for individuals and for society because creativity and innovation can flourish. The same is possible to affirm with the right to participate in the political arena, like running for public office. It is morally good for everyone to have the opportunity to participate politically in a society because the best candidate can win and represent hope for a better future. Morally these are good things for society and individuals, yet they depend on personal views.

Constitutional interpretation is different from moral judgments. Moral judgments that judges can have regarding constitutional rights and freedoms depend closely on their particular views of what are the concepts of right or wrong. Although Supreme Court judges are wise citizens appointed through strict criteria, they are not the ones to dictate what is morally right or wrong in society. From the Court’s point of view, judges are following Dworkin’s theory when he affirms “thoughtful judges must then decide on their own which conception does most credit to the nation.” 613 This could be understood as giving excessive primacy to the judge’s political views. “The requirement of integrity obliges the judge to develop a scheme of rights that interprets the text in the best possible light.” 614 Contrary to what Dworkin’s theory of the moral reading stands for, the Supreme Court has justified its decisions against individual rights, like in the case of Eduardo Lapi García y Biaggio Pilieri, where Court denied Mr. Lapi Garcia the possibility of running for governor, allowing the National government to persecute him in a criminal court. The discovery of moral values in the Constitution has become a perfect disguise to let the judges’ most personal views influence society, politics, morality and many others subjects. The influences of the judges’ own views are misleading the interpretation of constitutional rights.

613 Ibid, at 11.
614 François Du Bois, edit The Practice of Integrity: Reflections on Ronald Dworkin and South African Law (2012) at 97
Another example of the Court using moral arguments in constitutional interpretation is the 2011 case of Ricardo Fernández Barruecos. In this landmark case, the prosecutor’s office requested to the Constitutional Chamber of the Supreme Court clarification regarding the constitutional regulations of the financial system. The prosecutor argued that the newly promulgated Financial Institutions Act, in its section regarding financial crimes, seemed to decriminalize embezzlement. Not only could this new legislation affect their case against Mr. Fernández Barruecos, setting him free, but it could also endanger the financial system and the constitutional norms that regulate this sector of the economy.

In order to achieve the Democratic Social State of Law and Justice each of the institutions part of the public law must defend the moral values enshrined in the Constitution. But for this to become a reality, it is necessary for the Supreme Court to effectively deal with conflicting interests occurring in our society. There are antagonist interests in society where the law is silent or uncertain when it comes to regulating these issues. The more economically powerful established a hegemonic rule over the less fortunate. In such cases, the Court must intervene to determine the best possible solution.615

From this extract of the decision of the Court it is possible to find some affinities with the theory of the moral reading of the Constitution, where the judges openly recognize that there are moral values embedded in the core of constitutional rights. In this case, the judges of the Supreme Court tried to bring political morality into the heart of constitutional judging. Certainly, the Court holds that some conflicting moral values could rise from reading the Constitution. The best justification used to bring practicality in their judgments is to clarify that their decisions are towards accomplishing the Democratic Social State of Law and Justice. This strategy for constitutional interpretation to adapt Dworkin’s theory in Venezuela is controversial, because judges prefer to exercise their discretion to discuss moral issues or political preferences, instead of finding the right meaning of the constitutional norms to protect individual and collective rights equally, with respect and fairness. Their role as judges of the Supreme Court is precisely established in the Constitution in order to provide a clear meaning for the entrenched fundamental rights with constant respect and equality to everyone. Considering the case mentioned above, in which the Court heard a constitutional challenge regarding a financial criminal legislation, the judges gave arguments connecting with their particular vision of the political morality of the Constitution, which, in their view, is to privilege the less fortunate over the wealthy. Once

again, the Supreme Court tends to ignore that according to the Constitution, everyone is equal before the law, and so there should be no distinction between social classes.

Constitutional challenges are uncovering the most difficult issues of society, looking for a straight answer from the Supreme Court. Although judges need freedom to research, argue and understand properly constitutional disputes, this does not mean that they cannot be modest and acknowledge that there are not oracles that can provide all the right answers. The judges’ moral convictions bear no role in constitutional judging. It is a constitutional tradition that the legislative branch, which represents democratically the people, enacts the legislation of the country and citizens recognize them as law. Although in the case of Ricardo Fernández Barruecos, the Court found that the legislation in question was indeed contrary to the Constitution, declaring its unconstitutionality, the judges went further to discuss their own concept of moral values, and delineated the new legislation based on their own view of society, which gave pre-eminence to the state control over the economy.

The Concept of the Democratic Social State of Law is not limited to social rights already mentioned in the Constitution, but also includes the economic, cultural and environmental rights. These rights are entrenched to give balance to social classes; which is achieved through a major distribution of the wealth, greater access to cultural activities and logical management of natural resources. Therefore, the public sector may intervene in the economy to regulate it and only allow individuals to act under its authorization, and the State should retain a wide discretion in monitoring and inspecting the economy. In light of this, the judges must provide support to the function of the State by interpreting the Constitution constructively to give meaning to the moral values reflected in the text that are in accordance with the State’s project.616

The Court has in their perspective adapted Dworkin’s moral reading to the reality of constitutional judging in Venezuela. For judges of the Supreme Court finding the best conception of constitutional moral principles is an occasion for their moral and political sensitivities to play a role in the interpretation of constitutional rights. Certainly, in the cases in which the Court has used arguments of Dworkin’s theory, including this above-mentioned case, the judges have affirmed that their conception of an equalitarian Venezuelan society in which the collective is above the individual ‘fits’ the broad understanding of the Social State of Law and Justice to produce ‘the best answer’. As in this case, the Court explains that it has a law-making role because of its responsibility to find the best answer to the case in question, which does not necessarily represent the written text of the Constitution. The judges did not consider the history, culture or even identity of the country, but rather based their decision on their own reflections.

The Supreme Court has become a new forum where citizens can bring social injustices to be exposed and ratified. The judges have to deal with an exceptional number of controversial issues that set apart society. Each of these problems involves a complex web of moral and political concerns. The judges are claiming the need to elucidate on moral grounds the true meaning of abstract constitutional provisions. Indeed, they have been giving arguments that resemble Dworkin’s theory of the moral reading of the Constitution to justify their decisions. The ideological preferences of the judges have infused the interpretation of the Constitution. This phenomenon is not the monopoly of the Venezuelan judiciary according to American legal scholar Edward Wilfrid Thomas who claims, “once the judiciary trespasses into ‘political territory’, it is claimed, it loses its legitimacy.”  

Constitutional judging deals with moral, political, social and even economic issues regarding constitutional provisions, it does not mean that judges are going to justify their decisions based on their own personal views, the Constitution deserves respect. Even in the American context there are critics to the moral reading. As American legal scholar affirms “any reading is a ‘moral reading’ so long as it is based on the judge’s own moral and emotional reaction to the problem rather than on the nation’s historical understanding of constitutional principle.” The true meaning of abstract constitutional provisions does not depend on the political or moral views of those who are responsible for giving just and fair decisions. Constitutional rights are entrenched in the enjoyment of the population without relying on temporary trends either moral or political in nature, linked to a specific time and place. Time can change but fundamental rights and freedoms will prevail. It is essential in a democratic state that citizens trust the judicial system, specially the Supreme Court, to work in virtue of guaranteeing everyone their entrenched constitutional rights and freedoms. The judges’ decisions regarding the Constitution should stand the test of time so that when citizens return twenty or more years behind they can still think it was the right decision.

The Supreme Court of Venezuela did not hesitate to appeal to morality in order to find enough justification for declaring unconstitutional a specific financial criminal legislation. In the case of Ricardo Fernández Barruecos, the judges of the Supreme Court, using the arguments of Ronald Dworkin’s moral reading of the Constitution, saw themselves as lawmakers involving personal preferences in their constitutional judgments. Although, one could argue that this might be a misinterpretation of Ronald Dworkin’s theory, especially when it tends to praise judges to the point where they become the only ones with the best answer to constitutional issues. Dworkin has stated that “judicial decisions are political decisions, at least in the broad sense that attracts the doctrine of political responsibility”619. In the case of Venezuela, judges are considering themselves not only as the guardians of the Constitution but also the constitutional oracles whose views guide the entire society. As American legal scholar Ara Lovitt affirms, “in fact, Dworkin concedes that today it would be ‘suicidal’ for a Supreme Court nominee to show any endorsement of the moral reading”620. In Ricardo Fernández Barruecos, the Court anticipated critics and addressed them by arguing that the formalistic approach of the old positivist understanding of the Constitution leads to mechanical decisions, and the function of the Court is to make fresh moral judgments that adapt to social needs even if they have to exercise a lawmaking role.

In confusing situations, judges cannot always rely on analogies or positivist/textual considerations but must turn to society’s needs. When judges have argued against the fulfillment of this function, they would come from the old positivist, but in any case, this style of judging is a mistaken formalistic approach, a mechanical and unintelligent way of dealing with constitutional rights. Decisions have to adapt to social needs, even if they have to create a new right. Assuming a different interpretation could go against the principles embodied in the Constitution. Just considering the possibility that bankers entrusted with the money of workers, mothers, and students who worked hard to deposit it in the bank, could appropriate it could not only hurt the trust of the financial system but also the hard working people. Although there is the right to economic freedom for the benefit of the individual, this Court must guarantee that its interpretation is conform to the consolidation of a Social State of Law and Justice. Therefore this Court must declare the unconstitutionality of the provision 213 of the Financial Institutions Act.

The incorporation of political morality in constitutional judging in Venezuela has served as ‘justification’ to give the judges the absolute freedom to ‘adapt social needs’ that hold their own convictions, while dismissing individual rights.

619 Dworkin, Taking Rights Seriously, supra note 358 at 88.
The Supreme Court has tried to find the best possible solutions to highly controversial constitutional disputes. The judges have been taking a primary role in the adjudication of rights claiming that such perspective is for “the advance of social policies that will secure prosperity for all.” 622 It is possible to say that some of the arguments used by the Supreme Court resemble Dworkin’s theory. Dworkin states, “rights may vary in strength and character from case to case, and from point to point in history.” 623 Yet, his theory affirms that judges are not ‘law makers.’ “They are not, nor should they be, deputy legislators.” 624 His doctrine of responsibility demands, “articulates consistency.” 625 In fact, Ronald Dworkin affirms that “law is effectively integrated with morality: lawyers and judges are working political philosophers of a democratic state.” 626 In Venezuela, judges have interpreted this as working towards their view of a Social State of Law and Justice which is against Dworkin’s rights thesis. In other words, the Venezuelan judges’ own conceptions are incompatible with Dworkin’s defence of individual rights. Yet, this does not mean that one should try to justify their interpretation of the moral reading. It is difficult to rationally agree when the result of these decisions undermine the freedom of millions of people because of the political views of the judges. The Court’s take on collective rights cannot justify dismissing individuals’ rights. Indeed, Dworkin explains, “a right to do something even when a democratic majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.” 627 Certainly, there is a contrast between Dworkin’s theory of adjudication and the Venezuelan judges’ underlying understanding of the law. The role of the Supreme Court is to protect the principles that make the Constitution supreme. The Court should weigh the importance of constitutional principles in order to maintain the political, social, and economic stability by treating people equally. According to Dworkin’s theory, policies are related to the promotion of a social goal and principles are connected to the promotion of justice and fairness. Principles provide guidelines for judges in those difficult cases when rules do not offer a clear solution. Instead, the Court has been giving room to the judges’ own perspectives on policy rather than justice and fairness.

623 Dworkin, Taking Rights Seriously, supra note 358 at 139.
624 Ibid, at 31-45, 81-90 and 123-126.
625 Ibid.
626 Dworkin, Justice for Hedgehogs, supra note 612 at 414.
627 Ibid, at 194
There is much to admire in the theory of adjudication of Professor Dworkin. The theory of adjudication of Dworkin envisions judges deciding consistently cases following the principles of fairness and justice rather than capriciousness. "The Judge has a constitutional role requiring that he not be swayed by populism. Judges are not elected precisely for this reason."628 This statement is truly applicable in the case of Venezuela, even though there is a robust list of social rights. The judges are going to engage in some sort of populism, by any means, to win the sympathy of society, instead of truly protecting constitutional rights for everyone in Venezuela without any distinction, as is according to our Constitution.

One of the most controversial cases of the last fourteen years of the 1999 Constitution is the 2013 case of Juramentación Presidencial. In this controversial case, lawyer Marelys D’Arpino requested to the Supreme Court the interpretation of the constitutional precept 231 regarding the oath required by the Constitution before the President began a new term in office. The 1999 Constitution mandates that the elected President must take an oath at the National Assembly on January 10 of the first year of the constitutional term. However, in the case of an exceptional circumstance that prevents the elected President from swearing at the National Assembly, the Constitution establishes the Supreme Court of Justice as the next legal place for the President to take oath. The debate started because the re-elected President was taking health treatments outside the country and there were no news about whether or not he would be able to return on time for the inauguration of a new term as re-elected President. Once again, it was up to the Supreme Court of Justice to interpret the Constitution and provide a clear and concrete answer to this debate.

The request for the interpretation of provision 231 of the Constitution can be narrowed to declare if the formality of the oath established by the Constitution for January 10/2013 means a formality sine qua non for a re-elected President to continue exercising his responsibilities. In addition, the other question this Court must answer concerns the possibility of postponing this formality for another time. First, for this Court holds that the oath of office of the President of Venezuela is not just an old formality without any significance. This oath is an important solemnity that holds an historical tradition for the Venezuelan republic, because it seeks the ratification of the President in front of the public, his commitment to ensure the faithful application of the law and the fulfillment of his duties. This must be done in accordance with the Constitution, January 10, on the first year of his term at the National Assembly, because this is the political institution where different social forces represent the people. However, if for any reason the President cannot swear at the National Assembly he can do it at the Supreme Court without the Constitution establishing a specific date. That is, in such an event, the act of taking the oath must still be done; yet due to the circumstances, the place and time can change. The separation of the sentence by a semicolon underpins the interpretation given to the constitutional text. Moreover, the request also implies that the Court should elucidate if the re-elected President has to take an

628 Stephen Guest, Ronald Dworkin (California, Standford University Press, 2013) at 47
oath this January 10 of 2013 at the National Assembly or not. To provide a solution of this issue, the interpretation must be done accordingly with the principles of the Venezuelan Constitution, as it has been explained in the case of Herman Escarrá in 2001. In order to fill gaps, the interpretation of the law focuses on an ideological political theory that helps justify decisions. In this regard, it is important to consider the principles of justice and popular sovereignty, which are represented by the last electoral process that re-elected the President. Any attempt to null an election or dismiss an elected public official by any other institution that is not the popular vote would be considered against the free expression of the popular will. The absence of the President to take oath on January 10 2013 does not extinguish or null his new term in office. At this point, it is important not to exhaust the constitutional rules and consider the principle of continuity. Under this principle, it is possible to avoid the paralysis of the government and maintain the function of the system until there is a corresponding successor. Based on this principle it is unacceptable that there is a time lag between the start of the constitutional term January 10 2013 and the oath of a re-elected president. It is unthinkable that because the “oath” of the President is not done on the proper time to the National Assembly the Executive power ceases, even when the Constitution itself admits that such an oath can be deferred to this Supreme Court, at a later date. In this regard, it is clear that the presidential term starts January 10 of 2013, yet the fact that President cannot take oath on that date does not suppose that his status as President or re-elected President is lost. In accordance with the principle of continuity of public administration and the preservation of the popular will, the government cannot cease to exist due to a gap between the beginning of a constitutional term (January 10) and the oath that has to be taken. In conclusion, The President has been absent from the national territory for health reasons with the authorization of the National Assembly, in accordance with Article 235 of the Constitution. The National Assembly has ratified this authorization in full effect on January 8, 2013 until the President’s health improves. The President’s Health treatments outside the country should not automatically entail a temporary absence as defined in Article 234 of the Constitution, unless it is explicitly stipulated by the Head of State through a decree written specifically to that effect. An inauguration is not required for President Chávez to begin his term, an inaugural ceremony need not be held for a re-elected president for his term of office to start. Despite the fact that a new constitutional period begins on January 10, it is not necessary that there be a new inauguration for President Hugo Rafael Chávez given his condition of being a re-elected President with no interruption in his term of office. The President can take oath at the Supreme Court on a date later. 629

As in many cases analyzed along this chapter, judges have justified their decisions with a particular interpretation of Ronald Dworkin’s moral reading of the Constitution. Like Dworkin, the Court aims to convince the public that in difficult cases judges make fresh judgments based on their conception of the political morality embedded in the Constitution. In this particular case, the Court referred to the case of Hermán Escarrá, in which the judges rejected the formalistic interpretative approach that ruled over four decades admitting gaps in the constitutional text and arguing that in order to fill in those gaps, the judges would have to focus on the political theory that underlies the institutional morality of the constitutional system. With this constructive approach, the Court considered something like Dworkin’s principles, to play a prominent part in its justification for the interpretation of the Constitution. In fact, the Court affirms that gaps in the constitutional text need to be filled by

considering principles such as justice and popular sovereignty. On this point, the Court invoked the so-called ‘principle of continuity.’ This unwritten principle operated as the standard to follow to maintain the re-elected president in charge of the government. The Court held that the stability of the national government under the ruling of the re-elected President was more important than the formalities established in the Constitution, such as the date and place for the President to take oath of office. The judges resorted in an unprecedented fashion to a foreign concept not written in the Venezuela constitutional system to weight it over the explicit procedures blueprinted in the Constitution. The Court once again took arguments from Dworkin’s theory and re-interpreted them to infuse their own preferences to the case.

The first difficulty created by the Supreme Court with this so-called ‘principle of continuity’ is that it clouded the country with uncertainty by permitting the President to maintain a grip over the government while taking health treatments abroad without knowing clearly when his new term in office would start. The Constitution explicitly stipulates particular scenarios to deal with a situation where the President would not able to exercise his mandate; the absolute absence of the President due to his death, resignation, removal from office by a decision of the Supreme Court, to being mentally or physically disabled, which would be certified by a medical board and approved by the National Assembly, or to the abandon of the office declared by the National Assembly and revoked by popular vote.630 Moreover, if any of those scenarios occurred before the President swears an oath of office, the Constitution hands the government to the next highest public official elected, which is the President of the National Assembly, who has the responsibility to call for national election in the immediate thirty days. The constitutional text also anticipated a situation where the President had already taken the oath and if any of these scenarios occurred during the first four years of his term, the Vice-president would then be in charge of running the executive branch.631 However, the Court dismissed the predictability and determinacy of the written constitutional text to recognize what they referred to as an unwritten ‘principle’ in the Constitution, which does not qualify as such. This is problematic because the judges are considering broad, unspecific, and unclear standards to impose a particular government to the population. There are formalities, such as the oath of the President at the beginning of a

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630 Constitución de la República Bolivariana de Venezuela 1999 supra note 306
631 Ibid
new term in office, that must be taken for the sake of the democratic system. The judges cannot continue deciding cases in a way inconsistent with the Constitution solely under the grounds of their judicial preferences. The central idea of the Constitution is to provide a set of governing rules for the organization of power. It is the spirit of the Constitution to achieve stability yet not at the expense of democracy. The judges, by disrupting the institutional logic of the Constitution, are revealing their true intentions disguised as constitutional judging. It seems as though the judges are heavily in favour of those in power rather than the community, who they claim to defend with their idea of a *Social State of Law and Justice*. In this case, the Court, by trying to reduce the constitutional law to a distorted political view, fails to provide convincing arguments that subtend their conclusion. Similar to the criticism the Critical Legal Studies makes about American Jurisprudence, in this contested case the judges masked their power assertions with legality.

The second difficulty with the reasoning of the Supreme Court references to what extension ‘continuity’ qualifies as principle enforceable under the Constitution. Upon closer examination, the nature of this standard is unclear and obscure. Particularly there is almost no argument to support the claim that this unwritten standard is considered a part of the Venezuelan constitutional principles. In fact, the 1999 Constitution established an exhaustive set of principles such as liberty, justice, equality, solidarity, and social responsibility as superior values of the *Social State of Law and Justice* that should serve to assist the interpretation of the constitutional text and delineate the scope of rights and freedoms. These principles have a deep attachment rooted in the history, tradition, and culture of this country. It is impossible to consider ‘continuity’ as a principle under the constitutional text in terms explained by the Court because it is going against an important aspect of the democratic system; the President has a fixed term of office and by virtue, this provides a fair degree of certainty and stability. It also provides a sense of security that elected representatives can only exercise their mandate for a certain period, giving the possibility for other people to replace them by votes at a fixed time. It seems that the Court considered the executive branch to be the President. The replacement of a person from office does not represent the paralysis of the government. In fact, Venezuela, for almost half a century, had presidential elections without any inconvenience. The Supreme Court’s dispense of the written text of the Constitution is a threat for the continuity of the democratic system. A particular date,
January 10 has been set in the Constitution for the President to take an oath that represents the end of a term in office and the start of a new one. This is not just a formality; on the contrary, it is a requirement of the Constitution in order to recognize officially a person elected as President of Venezuela. Even in those cases of re-elected Presidents, the Constitution does not make any difference. Not only has the event a fixed date, but it also has a fixed place. The even takes place at the National Assembly, as the institution that represents best the different views and opinions from the Venezuelan people. There have been moments in which conflicts made it impossible to access the national congress. The episode in 1848 called the Attack on Congress, *Ataque al Congreso* where the political fight between Jose Tadeo Monagas and Jose Antonio Paez ended in the murder of several congressional representatives, is one of the reasons for a second specific place for the President to take the oath of office.  

The written Constitution must be taken seriously and its interpretation must provide compelling reasons that represent the history, culture and the identity of Venezuela as a nation. The Court’s interpretative approach to deal with this case is less transparent and invokes an unwritten standard that in the context of this decision has no normative force under the constitutional order. Continuity as a principle does not have constitutional validity since it is not enforceable in terms of the democratic system established in the Constitution. Constitutional principles are a valid set of standards that promote certainty, predictability, and stability since they have stood the test of time as paramount pillars on which the system stands on. In fact, they are blueprints within the text, in order to invite the Court to turn to them for aid in the filling of gaps in difficult constitutional controversies. These principles have a normative force to impose obligations *erga omnes* since they represent the true nature of the Constitution. Most importantly, they constrain the judges when making decisions in the absence of a clear rule. In the case of the ‘continuity’ as explained by the Supreme Court, it does not pass the test to be considered as an unwritten principle. Constitutional Principles must be seen as a product of the constitutional heritage that Venezuela struggled to achieve. With some affinity, there is an excellent doctrinal analysis developed in the Canadian constitutional law, denominating unwritten principles of the Constitution.  

In the words of Chief Justice McClachlin

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632 Brewer-Carías, *Historia Constitucional*, supra note 22
unwritten principles are fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts

First, unwritten constitutional principles refer to unwritten norms that are essential to a nation’s history, identity, values and legal system. Second, constitutions are best understood as providing the normative framework for governance. Seen in this functional sense, there is thus no reason to believe that they cannot embrace both written and unwritten norms. Third - and this is important because of the tone that this debate often exhibits - the idea of unwritten constitutional principles is not new and should not be seen as a rejection of the constitutional heritage our two countries share.634

If it was the intention of the Supreme Court of Venezuela with this decision to introduce unwritten principles in the Venezuelan constitutional law, then it is necessary to elucidate them based on certain criteria. The judges cannot look beyond the law and apply extralegal standards without any grounds under the constitutional system, especially when these standards go against the core of the democratic system.

The controversial case of *Juramentación Presidencial* provided arguments for the Supreme Court to decide another contested issue. Since the President passed away due to his health problems, the country began to wonder who might be the person to assume the vacancy. The Constitution was clear in this regard, setting for the President of the National Assembly to assume power and call for a national election in the next thirty days. However, the Vice-president after announcing the death of the President of the Republic immediately assumed control of the Executive branch. This led lawyer Otoniel Pautt Andrade to file for the interpretation of provision 233 of the Constitution regarding the absolute absence of the President. The Supreme Court once again had to decide a crucial matter for the Venezuelan democratic system. In the 2013 case of *Presidente Encargado*, the Court holds that:

It is the responsibility of this Court to determine the proper meaning of the Constitution. The moment the death of our beloved President Hugo Chávez Frías was announced, Venezuela had a President re-elected and acting as such leading the executive government. Explained in a previous decision, the re-elected President started his new term on January 10, 2013 based on the principle of continuity his government continues functioning despite the fact that he did not swear on that specific day. This means that a new constitutional term in office has already started therefore the Vice-president is the person to be in charge of the government and must take oath as President at the National Assembly. Moreover, the Court considers it important to discuss provision 229, which establishes that no one can be elected President while assuming the responsibilities of Vice-presidency, Cabinet member, State Governor, or City Major on the date that elections are called. For this Court, the Vice-president, at the moment when he assumed the Presidency, was no longer Vice-president and therefore could present his candidacy for President

of the Republic. The now acting President does not need to separate from office to run for office since he is following the principle of continuity.  

The proper role of the Supreme Court under the Venezuelan Constitution in this case is to proceed accordingly with the mechanism established in these circumstances. In this case, the re-elected President passed away before his inauguration, this means that the President of the National Assembly should have been the one to take the Presidency as the constitutional text mandates. Instead, the Supreme Court adhered to the unwritten and uncertain ‘principle of continuity’ to change the Constitution once again to name the Vice-President as Acting President. In other words, the Supreme Court was not only able to re-write the constitutional text but also elect who would run the destiny of the country. This decision represents another level of entrenched power to enforce the perquisites of those powerful government officials instead of protecting the sovereignty of the popular will. When Ronald Dworkin was arguing that principles play a role in hard cases, he did not envision that judges could innovate at pleasure. After all, the Supreme Court holds judicial supremacy to protect the public from arbitrariness.

Summary: This chapter focuses on Ronald Dworkin’s theory in the constitutional jurisprudence as developed by the Venezuelan Supreme Court in the era of the 1999 Constitution. The work aimed at analyzing specific landmark cases, such as those of Hermán Escarrá in 2001, William Dávila Barrios et al., in 2000, Eduardo Lapi García & Biagio Pilieri in 2008, and Ricardo Fernández Barruecos, et al., in 2011. and Juramentación Presidencial in 2013 and Presidente Encargado in 2013. The analysis of such cases revealed Venezuelan judges turned to Dworkin’s arguments regarding the “moral reading of the Constitution to infuse their own views on the Democratic Social State of Law and Justice. In their task, however, judges have, for the most part, ended in defending their own personal political preferences rather than guaranteeing constitutional rights, which goes against Dworkin’s individual rights thesis. Certainly, this chapter demonstrates that there is a contrast between Dworkin’s theory of adjudication and the Venezuelan judges’ underlying understanding of the law. The next chapter will show different legal theories used in freedom of expression adjudication over the last five decades. Freedom of speech has been the most controversial case in the Supreme Court’s constitutional jurisprudence over the last few year

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635 Presidente Encargado [08/03/2013] T.S.J Sala Constitucional, Exp. 13-0196
636 Allan Hutchison The Rule of Law: ideal or ideology (Toronto: Carswell, 1987)
CHAPTER 7
FREEDOM OF EXPRESSION ADJUDICATION IN THE SUPREME COURT’S CONSTITUTIONAL JURISPRUDENCE: THE NEED FOR A NEW APPROACH

As noted in previous chapters, the jurisprudence of the Supreme Court of Venezuela regarding constitutional issues has shifted from the strict application of the verbatim words, the founding fathers’ intentions, formal criteria and hierarchies to a more flexible and adaptable interpretation of the Constitution, finding similarities with the arguments taken from legal realism and Dworkin’s adjudication approach. However, it seems that judges are taking the opportunity to freely infuse their own views on the Constitution. This chapter shows how that phenomenon played out in particular with freedom of expression. The cornerstone of a democratic society is the protection of freedom. It is crucial for a legitimate free and independent society to guarantee the enjoyment of fundamental rights. Freedom of expression does not only represent the individual liberty to communicate with others, but is also the ultimate test for a democratic system to accomplish economic, social, political, and educational development. The entrenched rights to communicate, inform, and express freely are fundamental for a well-functioning democratic system. Essentially, citizens can freely voice their opinions, communicate their thoughts, assess the views of others, and debate their own ideas. It also exposes those who abuse their powers and aids in the search for truth. Through the exercise of this entrenched constitutional right, civil society has strengthened as the fundamental counterweight to facilitate public participation in the democratic system. It ensured the necessary meanings for any member of society to participate actively in social, political, economic decision-making process. This chapter will analyze the Supreme Court’s record in dealing with freedom of expression, particularly the arguments used by judges to justify their decisions regarding this fundamental right. It will demonstrate the role that jurisprudential theories play on the interpretation of fundamental rights. This chapter has been arranged in the following four sections: (a) freedom of expression and legal positivism in the era of the 1961 Constitution, (b) freedom of expression and legal realism in the era of the 1999 Constitution, (c) freedom of expression and Ronald Dworkin’s adjudication theory in the early years of this last decade, and (d) a discussion on the paradox of freedom of expression in Venezuela: the need for a new approach to guarantee freedom of expression.
Freedom of Expression in the Era of the 1961 Constitution: Legal Positivism

Across Venezuelan history, liberty has been paramount. As it was discussed in chapter one of this study, freedom has acquired significance throughout the Venezuelan historical and constitutional evolution. Since the declaration of independence in 1811, liberty has been a key component of Venezuela’s constitutional system. In the struggle to build an independent and just society, freedom gained the strongest possible constitutional protection.

To write about freedom of expression in Venezuela is to write about its constitutional protection. During the twentieth century, the conception of freedom of thought and speech changed as the adjudication process evolved in Venezuela. The earliest jurisprudence related to this fundamental right was strictly text-based. Although the cases often did not make it to the Supreme Court because decisions were made in lower courts, the related controversies regarding freedom of expression came from the fact that the government, on many occasions, tried to interfere with the right to inform of newspapers and other members of the media.637 However, the Constitutional adjudication of freedom of expression does not escape controversy. The 1961 Constitution entrenched the right to express thoughts orally or in writing, without any prior censorship, yet, those same thoughts could be subject to penalties if any statement, such as a hate speech, constituted a crime in accordance with the criminal law. According to Venezuelan scholar Mercedes Pulido Briceño, “[freedom of expression] gave room to questioning and complaints. It is that freedom of expression, often uncomfortable and sometimes subjective, requires every day reflection. Although many complaints remain unpunished, there is no ignorance of those facts.”638 The Supreme Court, during the 1961 Constitution, had to deal with adequately balancing government actions that might obstruct individuals’ freedom to express views or hearing and assessing the views of others. Scholar Vincenzo Zeno-Zencovich explains, “the functioning of a modern society is based largely on an abundance of information.”639 This constitutional right is always developing and overcoming existing limitations. Freedom is an evolving phenomenon that needs to expand with the State’s interference reduced to a minimum.

Freedom of expression, according to the 1961 Constitution, does not simply protect individual liberty from State interference, but rather the individual’s freedom to communicate with others. Freedom of expression is necessary for obtaining truthful and impartial information. According to American legal scholar Larry Alexander, “freedom of expression thus promotes the search for some truths and impedes the search for others; and in the former cases the truths at issue still sometimes be worth the costs of the expression and sometimes not.”\(^\text{640}\) Indeed, freedom of expression is an instrument to help discover the truth. In all levels of the educational system, journalism, and even in areas of scientific inquiry, it is fundamental to enjoy freely the right to express thoughts and opinions for the enrichment of discussions and development of new ideas. Canadian legal scholar Richard Moon adds, “freedom of expression, like other constitutional rights and freedoms, is seen as an important part of the individual’s personal sphere that should be protected from external interference, particularly state interference.”\(^\text{641}\) In the era of the 1961 Constitution, the Supreme Court of Justice restricted the meaning and scope of rights and freedoms, along with establishing limitations. Influenced by their own perception of the jurisprudential theory of legal positivism, judges applied a narrow approach to the interpretation of the right to freedom of expression. After long years of dictatorship, distinguished by weak institutions that failed to provide effective accountability for those in power, independent and free media were encouraged for a more robust civil society. In 1961, the Constitution extended the protection of the entrenched rights of the free press beyond the circulation of ideas and opinions. The right to express freely was guaranteed against indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information. The Constitution expressly established the subsequent imposition of responsibility to protect the rights or reputation of others, or the protection of national security, public order, or public health or morals.\(^\text{642}\) It also included restrictions to propaganda in favour of war and any advocacy of racial or religious hatred that constitute incitements to lawless violence. The Venezuelan


\(^{642}\) *Constitución de Venezuela 1961*, supra note 239, provision 66.
judiciary during that period, had to deal with tensions between the general faith in individual freedom and the recognition that there are ‘expressions’ subject to penalty.

Freedom of expression was not an absolute right in Venezuela. Indeed, it was necessary to establish a set of boundaries that protect citizens against serious prejudices and misconceptions, which are so substantively evil that they stir people to anger. Although free speech invites disputes, it is the Court’s responsibility to promote diversity and peaceful exchange of ideas. It is one of the main distinctions between democratic systems and totalitarian regimes. Freedom of expression is an invaluable asset to a genuine constitutional democracy. As British constitutional law professor T.R.S. Allan explains, “freedom serves the end of justice by denying government the ability to stifle moral and political discussion, especially where it concerns the merits of the current conduct of government or the legitimacy of the prevailing distribution of power.” The protection of freedom must, without a doubt, be fundamental for the enjoyment of a democratic society. Judicial review appears as an institutional instrument that prevents the government or private enterprise from suppressing society’s fundamental rights. The constitutional right of free expression is a guarantee intended to protect citizens from governmental policies that hold back the interchange of ideas, thoughts, and opinions. According to French constitutional scholar Michel Verpeaux, “freedom of expression can be regarded as the mother freedom, the one brought into play by that faculty of articulating an idea which is man’s primary function.”

The guarantee of freedom of speech holds an absolute privilege. Without it, citizens would not be able to communicate their opinion and ultimately challenge those policies that concern public affairs. Only by the exercise of freedom of expression can citizens voice their grievances and obtain redress, which is indispensable for the political foundation of a democratic society. Indeed, constitutional restrictions that ensure protection against abuse of powers of the elected government require that citizens state publicly their concern. Free exchange of ideas, uninhibited publications, and the free flow of information empower citizenry to choose better those who would govern them. The public’s central role in a

645 Michel Verpeaux, Freedom of Expression: in Constitutional and Case law (Strasbourg: Council of Europe 2010) at 12
democratic system is not only to vote for the best candidate that represents their interest, but also to raise their concerns, get informed, and express themselves freely for the sake of a better society.

During the 1961 Constitutional system, the Venezuelan government maintained a cordial relationship with the private media. In this regard, Cuban-American professor Jorge García asserted in 1989, “there is complete freedom of expression in Venezuela; there is no political repression and the government keeps itself away from academic matters. This benign political atmosphere has helped the free exchange of ideas and criticism, which in turn has opened the doors to the free and frank discussion of views that in other countries are considered taboo.” 646 Certainly, since the concept first appeared in the Venezuelan 1811 Constitution, respect and defence of this fundamental right have been a primary concern, as it was intended by the founding fathers of this nascent country. According to American scholar Elizabeth Fox, in reference to the early years of the democratic system of Venezuela in 1961, “press freedom and freedom of expression, especially from government censorship and repression, had been important demands in their struggle against the authoritarian regimes, and they were loath to increase state ownership of the media.” 647 Certainly there have been episodes where citizens requested protection of this fundamental right from the Supreme Court. in those cases, the Court did no hesitate to apply literally the constitutional precept regarding freedom of expression. Judges made a significant effort to follow strictly the written constitutional rules to protect individual liberty from state interference. The priority for the Supreme Court was to ensure legal certainty in the adjudication of rights. On this last point, it is noteworthy to illustrate this with the 1980 case of J. Delgado v. Colegio Nacional de Periodistas, where the Venezuelan Association of Journalist appealed the decision of the Superior Court that allowed Mr. Delgado admission to the Association.

This Court, based on provision 136 of the Supreme Court Act suspended the decision of the superior court, avoiding possible irreparable damages that might interfere with individual’s freedoms. The requirements for a university degree and a membership in a professional association do not deny the human right of freedom of expression. On should not confuse the right to communicate information by any means with the capability and professional preparation needed to ensure proper disclosure of news or other information. Citizens have a right to be

647 Elizabeth Fox, Latin American Broadcasting: from Tango to Telenovela (Bedfordshire: University of Luton Press, 1997) at 69.
informed by professional journalists. The exercise of the journalist profession must be in concordance with the law to avoid irreparable damage to other members of society.\textsuperscript{648}

The Supreme Court struck down the decision of the Superior Court that permitted the admission of Mr. Delgado as a member of the Venezuelan Association of Journalist.\textsuperscript{649}

The Supreme Court of Justice based its decision on the textual words of the Constitution, its judges explaining that the professions for which a university degree and a membership in a professional association are required to practice did not constitute a violation of the right to express freely. According to Argentinean scholar Damian Loreti, “everyone can exercise the right of freedom expression, yet it can not be equivalent to those professional journalists who specialize in this field.”\textsuperscript{649} The adjudication of freedom of expression from the Supreme Court during the 1961 Constitution era was dominated by the view of law as a coherent, logical, and comprehensive system of rules. The judge’s responsibility was reduced to deduce from the constitutional rules the proper response to any controversy referring to the enjoyment of free speech. Indeed, the Supreme Court judges restrained themselves to provide a narrow meaning to this fundamental right. In its rulings, the Court only referred strictly to the breach made by any particular law or government act that might compromise this constitutional guarantee. Another example is the 1998 case of \textit{R. Márquez}. In this case, Mr. Márquez, an artist whose television show got cancelled because of very low rating, argued before the Supreme Court that the TV station violated his right to freedom of expression. The issue in this case was twofold: on the one hand, the artist argued for the protection of freedom of expression, which in his view was the right to develop his artistic personality and for the audience to watch a TV show that promotes national folklore. On the other hand, the governmental TV station argued that the schedule and low rating of this TV show did not let others participate, and the administration was taking the necessary measure to ensure a valuable programming.

This Court reviewed the allegation of the complainant who pointed out that the cancelation of the TV show in question was aimed at the preservation of the cultural identity of the country, and the protection and promotion of artistic values of Venezuela. However, it is necessary to understand that the fundamental rights of work, expression, religion and association, among others are subject to restrictions established by law. This Court has been emphatic that those rights written in the Constitutional text or in other legislation of the Republic are not absolute. In this particular case, it must be clear that the work relation between an artist, producer, or any other employee of

\textsuperscript{649} Damián Loreti, \textit{America Latina y la Libertad de Expresión} (Bogotá: Grupo Editorial Norma, 2005) at 102.
a TV station do no compromise the right of free expression to which everyone is entitled according to the Constitutional mandate.\textsuperscript{650}

The Supreme Court based its decision on the premise of a strict application of the written text. In this decision the judges made it clear that individual rights are not absolute and are subject to restrictions by the Supreme Court in particular cases.

The adjudication of this constitutional guarantee relied on the formalism of the Supreme Court. Judges only focused on determining the disagreements between the constitutional text and the act in question. As Former Supreme Court judge of Venezuela Humberto La Roche asserts, “the unconstitutionality is realized when there are inconsistent and irreconcilable provisions of legislation or government actions with the Constitution. The problem of unconstitutionality is the contradiction between rules and not a crisis of legitimacy.”\textsuperscript{651} Indeed, legal positivism arguments are present in this decision of freedom of expression, just as in many decisions rendered by the Supreme Court during the 1961 Constitution era. The source thesis, according to which the Court based its decision only on the text as the recognized valid legal source, privileged the strict formal constitutional-ascertaining blueprint. Particularly, the Court reduced its scope of decision asserting when legal acts threaded to undermine this individual guarantee. Another example, is the 1995 case of Perfumería La Diadema Capital C.A, in which the representatives of this company challenged the decision of the Minister of Health to prohibit the sale of prescription drugs in stores without medical prescriptions or without the name of the pharmacy on the said prescription.

Only law can curtail the right to freedom of expression. In this regard, this Court wishes to remind that an individual’s freedom can only be limited by the legal order established by the Constitution. The appropriate body, in this case, the Congress of the Republic, can regulate this fundamental freedom. However, it is written in the constitutional text that “persons” can only exercise this right; therefore companies, enterprises, governmental agencies and non-governmental organization, just to name a few, do not enjoy this constitutional guarantee \textit{per se.} Only members of the organization can express their opinion or thoughts in any related issue.\textsuperscript{652}

The Court referred to the written words of the constitutional text to provide a narrow meaning of the word \textit{persona}. In other words, judges held that only citizens are entitled to this individual right, excluding companies or other organizations. This narrow meaning of

\textsuperscript{651} Humberto La Roche, La Constitucion de 1961 y la Custodia de la Integridad de la Constitución de Venezuela (Maracaibo: Universidad del Zulia, 1976) at 236.
freedom of expression limited the commercial expression of companies to name their business in order to attract costumers, even if they do not exclusively sale the product they are advertising. The Court in this decision set aside commercial speech based on a textualist approach to constitutional interpretation. This mechanical decision-making based on the strict application of the written constitutional text narrowed the scope of this right.

The Supreme Court of Venezuela in the case of *Perfumería La Diadema Capital C.A.*, approached the interpretation of freedom of expression with textualism, while allowing other branches of government to make the law. The Court rejected the lawmaking role of judges and specifically limited the scope of its interpretation to the written text. In fact, judges in this case affirmed that the branch of the government was responsible for making any limitation to the right of freedom of expression under the law, rather than the executive branch, which accentuated on the separation of power doctrine established in the 1961 Constitution. Moreover, the Court turned to the conveyed meaning of the word ‘person’ as anyone would do to provide a clear meaning to the text. Indeed the Court limited the ability of the judges to substitute the constitutional text with their own policy preference, yet narrowing the scope of fundamental rights. Regarding the textualist approach, constitutional scholar Adrian Vermeule explains, “textualism focuses principally or solely on the statutory or constitutional provision directly applicable in the case at hand.” As the case demonstrates, the Court’s decision regarding freedom of expression relied on the literal words of the Constitution. This can also be seen in the 1982 case of CAMRADIO (the National Radio Association of Venezuela). In this case, the National Radio Association challenged before the Supreme Court, the Minister of Communication’s decree prohibiting the advertisement of alcoholic beverages. The Ministry prohibited any type of promotion, publicity or advertisement of alcoholic drinks in any radio station of the country.

The National Executive Power is in charge of guaranteeing the well being of people by protecting them from receiving messages and publicity that might distort or impact the value of health. It is also in charge of the defence and supreme vigilance of the general interests of the Republic, the preservation of public peace and the correct application of the law throughout the country. According to this account, this Court based on the constitutional rules, reaffirms the responsibility of the National Executive to protect citizens from any distort or disvalue.

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The Supreme Court held that it was the responsibility of the Executive branch to guarantee the well being of the population. In fact, the Court goes further to affirm that the government is in charge of the ‘supreme vigilance of the general interest of the Republic.’ This includes restrictions on publicities that might distort the value of health.

The passive view of constitutional judging approached freedom of expression based on the textual meaning. “Textualism asserts that syntax and semantics are all that is need inside the formalist circle. If one understands the grammar of the language in which the text is written and the conventionally accepted meanings of the words making up the text, that is all that is needed in order to understand the meaning of the text itself.”655 Indeed, judges at the Supreme Court assumed their role of applying the Constitution as textually as possible. Under this adjudicative model, judges avoided any external consideration that might encourage mistaken assumptions of the law. Another example of the formalist arguments used by the Court to approach freedom of expression during the 1961 Constitution era is the 1987 case of I.C. Oropeza. The radio station director suspended the producer of the “Piaroa” aboriginal radio show because his remarks did not represent the radio station’s views.

According to this Court, it seems necessary to bear in mind the importance of protecting the individual’s personal sphere from interference by the State. This criterion refers to the personal freedom that citizens enjoy by entrenchment of their constitutional rights. As it can be read in provision 66 of the 1961 Constitution, the State has the responsibility to ensure that everyone has the right to express his or her opinion or thoughts by any means possible using any type of media without previous censorship. However, this Court deems important to define what the word “arbitrary” means. The dictionary of the Spanish language defines this term as “the act or procedure contrary to justice, reason, or law, only dictated by the caprice of someone”. Also this Court reviewed the law dictionary of G. Cabanellas who defines arbitrary as the “act, conduct, procedure contrary to what is just, reasonable or legal, inspired only by will or purpose to do harm.” Thus, this Court finds arbitrary the act of the radio station’s director to take out of the air a show because he did not agree with the views expressed on it. Indeed, this Court finds that action arbitrary and that it violates not only the right of the producer, host, and the guest on the show, but fundamentally hurts mostly the listeners of this radio station.656

The Supreme Court in this case relied on dictionaries to find the correct meaning of the constitutional text. Although, judges affirmed that they avoided any external consideration and rationally applying the textual words of the Constitution, dictionaries were a basic part of the decision. The choices among meaning provided by dictionaries gave the judges a particular perspective that did not necessarily represent the Constitution. For American legal scholar John Ferejohn, “legal norms cannot be reduced to systems of punishment but must

655 Robertson, Impossibility of Textualism & Pervasiveness of Rewriting Law, supra note 411 at 382.
be understood to guide action in other ways.” 657 In this case, the concern regarding censorship made judges attempt to find a definition for the word ‘arbitrary’. Yet to do so, they relied on a dictionary instead of the constitutional text itself. It is also important to note that the dictionaries used in this decision did not come from Venezuela, which could have altered the meaning further.

Freedom of expression concerns an unlimited variety of subjects, from controversial ideas, opinions, thoughts, to highly controversial news, heated debates, and notorious publicity, among many others. It is crucially important for a democratic society to respect the diversity of views that people have about different subjects. Indeed, people willing to understand the views of others and respect their opinions are better informed. In the words of former US Supreme Court Justice Oliver Wendell Holmes, “the ultimate good desired is better reached by free trade in that the best test of truth is the power of the thought to get itself accepted in the competition of the market place.” 658 The effort to protect this fundamental right resides in the inspiration of discovering truth or knowledge. In the landmark case of 1981 María Eugenia Díaz v. Corte Marcial, Mrs. Diaz, a Venezuelan journalist, was held in custody, prosecuted and sentenced to prison for revealing top national security secrets in a newspaper. The Martial Court found Mrs. Diaz guilty of violating provision fifty (50) of the Código Penal Militar (Military Code) because she published an article in the newspaper El Diario de Caracas, entitled, “Guayana: Juego Estratégico Venezolano” (Guyana-Venezuelan Strategic Game) that compromised the national security of the country.

In this case, the plaintiff challenges the decision of the Martial Court that found a journalist guilty for revealing military secrets that might compromise the national security of the country. Although this Court is respectful of the military jurisdiction, it is necessary to reaffirm that in our hierarchical legal system, the Constitution is the supreme valid norm. The validity of norms, rules, and acts depend on the conformity with the Constitution. According to our Constitution, every citizen is entitled to due process, entrenched in Article 49, which is also called ius de non evocando, meaning that no one can be denied the natural court to which he or she is entitled to. Consequently, special tribunals cannot be set up to judge a special subject; neither can civil nor military tribunals judge anyone without jurisdiction specifically prescribed by law. No one can deny a citizen his or her absolute right to be heard by the proper or natural judge as the law provides it. Our security needs cannot alone justify the suppression of free speech. Therefore, this Court finds unconstitutional the Military Tribunal’s decision, because the only Court competent to deal with this matter is the Civil Criminal Court. 659

The 1961 Constitution established as a fundamental freedom that, every person can express opinions, thoughts, and ideas, without the intervention of the State or previous censorship from any governmental agency, which includes the Military. In this case the situation was very delicate because it involved top secret military information regarding Venezuela’s possible military strategies against Guyana. The Court had to balance the right to express freely with the national security of the country.

The constitutional system of 1961 limited and restrained the State power to prevent any abusive action against the right to freedom of expression. As explains American constitutional scholar Edwin Baker regarding freedom of expression, “constitutional provisions, especially those providing for individual rights, limit majoritarian, presumably welfare-advancing or collective self-definitional, decision making.”660 However, in the case above, freedom of speech and the possibility of warfare with another country both held in the balance, which made the case challenging for the judges. To make a decision in this situation, the Supreme Court emphasized on the chain of validity of the constitutional system. The Court argued that the presupposed validity of the basic norm built a ‘pyramidal structure’ in which the Constitution is at the top and other norms and judicial decisions are on the lower end. The judges declared invalid the decision of the Martial Court because any act that contravenes the higher written text must be declared unconstitutional, as was the case with this decision from the military court. In regards with the above landmark decision, Venezuelan scholar Rafael Naranjo explains, “this decision strengthens the principle of freedom of expression in a democratic society, the right of journalists to free access to the source and the right that society has to be informed timely and truthfully.”661 Freedom of press, freedom of speech and freedom of expression are all equally essential parts of human liberty. According to Scottish-Australian legal scholar Tom Campbell, “fundamental rights are capable of being viewed as positive right in the sense of correlating with the duty of the government to take positive steps to further communication.”662 In the case above, the Court considered essential for a democratic society the right to receive information even when in some cases it is considered by governmental official too sensitive to be published. Moreover, the Court recognized the right of journalists to publish publicly the research done to make a

661 Rafael Naranjo Osty, En Defensa de la Libertad de Expresión (Caracas: Edit Cejota 1982) at 32.
662 Campbell, Prescriptive Legal Positivism, supra note 492 at 184.
story, even if their sources are referring to delicate information. National security and freedom of expression are equally important. The respect for the right to express freely is fundamental for a healthy democratic system, yet the security of the entire population is fundamental for its survival. Yet, in this case, the Court chose to give greater importance to liberty over security.

During the 1961 constitutional era, the Supreme Court constrained itself to justify decisions related to freedom of expression based on the hierarchical structure of the Constitutional system. Its decisions attempted to guarantee the right of freedom of expression, without increasingly expanding its scope of protection. Another example of the Supreme Court moving from textual analysis to the source thesis in cases related with freedom of expression is the 1990 case of J. Guzmán. In this case, the director of a national newspaper challenged the governmental act that revoked all newspaper advertising as retaliation for the publication of a series of articles on government corruption.

The plaintiff alleges violation or threatened violation of his Constitutional rights or guarantees regarding freedom of expression and freedom of information, as they are entrenched in the provision 66 of our National Constitution. The reason for these allegations is that the Minister of State, the President of the Venezuelan Corporation of Guayana and the Chairman of the Central Office for Information in Venezuela decided not to continue publishing in such newspaper all their advertising guidelines. This Court, after analyzing the facts and evidence, reaffirm that free speech in our contemporary society deserves a high level of constitutional protection. However, that does not imply that citizens can abuse the scope of protection of this fundamental guarantee. The presumable violation of freedom of expression and free development of the person was not even well indicated in the factum of the case. Therefore, this Court considers that the plaintiff consents and agrees that who ever advertises in this newspaper can decide whether to continue doing so or not. Thus, this Court dismisses the cases under the premises described below.663

In this controversial case, the Supreme Court decided to dismiss the claim because it did not find enough evidence in the factum to support the claim. Moreover, the Court reaffirmed that in the hierarchical system of norms, the right to freedom of expression is in the top level of the hierarchy. However, in this case judges argued that there is an implicit agreement in the allegation to support that the government has the freedom to decide if it continues publishing in the newspaper. Judges held that the formal criteria of the constitutional system constraint them to go further with the discussion of the right of freedom of expression. The reductive appreciation of freedom of expression brought dissenting opinions from judges that point out the need for a more generous definition of freedom of expression.

Dissenting Opinion, Justice Ramon Duque Corridor: it is my duty to dissent from my fellow colleagues in this decision, because freedom of expression, freedom of personal development entrenched in Provisions 66 and 43 of our Constitution represent limits to the government’s disruption of the individual sphere that this Court out to protect.

This dissenting judge argued that the role of the Supreme Court is clearly set on limiting the government’s disturbance of individual rights, particularly freedom of expression.

The other dissenting judge argued the Supreme Court shall provide a more generous definition of freedom of expression, because the economic siege imposed by the government against the newspaper is enough evidence to consider that it is compromising the constitutional right to free press and information.

Dissenting Opinion, Justice Cecilia Sosa Gómez, my judgment of this case makes me disagree with the rest of my colleagues because the act of withdrawing advertising from the newspaper, which was referred by the plaintiff as “Economic siege imposed by the CVG,” was not reviewed enough. This Supreme Court should not evade the responsibility to decide based on the examination of every piece of evidence or fact that might compromise constitutional rights. Instead of just dismissing the case, more analysis, and reasoning should have guided the decision.664

The written text of the 1961 Constitution entrenched that any human being has the fundamental right to express himself or herself freely and without fear of retaliation. In this case it is possible to illustrate the struggles that judges had to face come up with the best possible answer to this open-ended constitutional right. The majority of the Supreme Court justified the restriction of this constitutional guarantee under the strict application of the written text, avoiding the contextual grounds. However, in the opinion of the dissenting judges it is possible to affirm that they were trying to discover new horizons in constitutional judging. Or as Japanese constitutional scholar Kenji Yoshino explains while describing judicial dissents, “the dissenter’s greatest permission is to imagine a better world, to be prophet of eternities.”665 Certainly, these dissenting opinions demonstrate the forces inside the Supreme Court that rejected the formalism and began to move towards a more flexible approach. In fact this decision, in the 90s, illustrates the first signs of the shift of the judicial philosophy of legal positivism, in which judges followed the source thesis and avoided any contextual analysis to open the doors for the discovery and flexibility in constitutional judging. Certainly, as seen throughout this study, and more specifically in chapters five and

664 Ibid
six, judges decided to rebel against the inflexibility of formalist reasoning behind controversial constitutional cases. As seen reflected in their jurisprudence, the judges believed it was an obstacle to the social advancement of the Constitution and its use as a tool for social reforms. However, the preference of judges in constitutional judging would eventually lead to undesirable results.

In the late 20th century, the reasoning behind the judgements that defined freedom of expression under the 1961 Constitution progressively began to change. For decades, Constitutional judging had been dominated by a particular formalistic analysis, but judges decided to shift towards a more flexible approach in constitutional interpretation. A good example of this stage of constitutional jurisprudence is the 1990 case of Radio Caracas Televisión, RCTV v. Ministerio de Comunicaciones, where the Ministry of Communications ordered the rescheduling of the broadcasting of the film “The Predator” in order to prevent children from being exposed to inappropriate violence on TV. The Ministry argued that RCTV station was failing its broadcasters’ responsibilities by advertising and broadcasting a violent film during a timeslot which was inappropriate for children. However, RCTV challenged this decision at the Supreme Court, arguing that its right to freedom of expression had been impoverished.

To decide, this Court observes that the plaintiff factum argues that the impediment to broadcast commercial ads promoting an adult film and the actual broadcasting of an adult film entitled The Predator infringes its commercial activity and its right to express freely. However, the Ministry of Communications argues that this enunciated film promotes violence and language not appropriate for a young audience, requesting to the TV station the rescheduling of this film. Although this Court understands that a broadcasting network is a profitable business, it remains in the competence of the National Executive Government, as the telecommunication act established, to suspend the broadcasting of any communication that perturbs the values of the Venezuelan society. There are diverse classes of speech that might need regulations, prevention and even punishment, which have not raised any constitutional issue. In this case, the Ministry of Communication only requested the rescheduling of the film to comply with the policies that limit and control any depiction of violence during young audience hours. A time rescheduling did not prevent the TV station from broadcasting the enunciated film. In light of the above, the Court dismisses the RCTV constitutional injunction and supports the Ministry of Communication’s decision.666

The Supreme Court of Justice explored more than just the constitutional text or the respect for the hierarchical constitutional system in this case. Instead judges privileged the interpretation of freedom of expression in the light of a broad social policy. The Court held that in order to protect children against offensive violence, it was necessary to adopt

limitations to the freedom of expression of the TV station. In fact, judges left behind the straightjacket of formal criteria to explore the policy implication of the interpretation of the Constitution. The restriction was imposed on the TV station because it could compromise the Venezuelan society’s values. This demonstrates the evolution of the constitutional jurisprudence of the Supreme Court. The shift in the reasoning of the Court is also evident with the enactment of the 1999 Constitution.

**Freedom of Expression in the Era of the 1999 Constitution: Legal Realism**

The right of citizens to express publicly their thoughts, ideas, and opinions is also entrenched in the 1999 Constitution. Freedom of expression is an essential liberty as set in the Constitution, Indeed, provision 57 of the 1999 Constitution established that every citizen in Venezuela has the right to express his or her thoughts, ideas, or opinions freely, while being also responsible for lewd, obscene, profane speech that incites to war, propaganda, discriminatory messages and promotes religious intolerance. In addition, the constitutional text recognized the right of citizens to receive impartial, truthful, and opportune information, yet without any clear indication of its scope. This individual freedom is essential for a democracy to thrive. However, in the last fourteen years, there have been governmental threats to impose serious restrictions to free speech, which could jeopardize the goal of a free and democratic society. For some authors, such as Canadian legal scholar Richard Moon, “recognition of the social character of freedom of expression is critical to understanding both the value and potential harm of expression and to addressing questions about the freedom’s scope and limits.” The entrenchment of this right reflects the social demand for pluralism of the media, which is fundamental for the marketplace of ideas. In the words of Oliver Wendell Holmes, “the best test of truth is the power of the thought to be accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” Constitutional judging in the case of freedom of expression is always controversial; yet, the decisions enacted from the Supreme Court in the last decade have been subject of much criticism. For the critics some decisions have privileged the will of the executive branch, which have influenced the freedom of the press and freedom of

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667 *Constitución de la República Bolivariana de Venezuela 1999, supra note 306*, provision 57.
speech in Venezuela. The evolution of the constitutional jurisprudence, particularly in cases related with freedom of expression demonstrates that judges have been shifting from a formal appreciation of the constitutional text to a more flexible analysis of the context, and policy and even, in some cases, lawmaking.

The 1999 Constitution not only entrenched the right of freedom of expression, press, and information, but also limited those who threaten or attempt to interfere with this individual sphere. No one can be arbitrarily limited or impeded others for expressing their own thoughts, ideas, or opinions publicly. Moreover, the 1999 Constitution embraces the concept of truthful and impartial information. As Moon says, “freedom of expression is valuable because it advances the goal of truth. Members of the community are more likely to recognize what is true and what is false, at least over the long run, if freedom of expression is protected.”

Indeed, from judging diverse opinions and competing views, citizens can discover truth and knowledge. According to Venezuelan law professor Asdrúbal Aguiar, “the textual separation that was introduced by the founding fathers of the 1999 Constitution between freedom of expression and the right of truthful information establish an individual and exclusive character to freedom of expression and a collective nature to the right of truthful information.” The Constitutional Chamber of the Supreme Court as the ultimate interpreter of the Constitution had to provide meaning to this important freedom.

The 2001 case of Elías Santana refers to a newspaper columnist who published diverse articles calling for civil disobedience against the national government, which drew the attention of the President of the Republic, addressing this issue in his own TV show. However, the columnist sought to exercise his right of reply to the public criticism made by the President about his proposal in the President’s own TV show. Mr Santana argued that it was a fair opportunity for him to respond to the allegations of the President in front of his audience. This controversial case brought forward the debate regarding the scope of freedom of expression. It became a national topic and everyone in the country had an opinion regarding this issue. The Supreme Court had the difficult task to resolve the dilemma regarding the difference between the right to express freely and the right that the media has to inform the population accurately, opportunely, and truthfully. The conception

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671 Moon, Constitucional Protection of Freedom of Expression, supra note 641 at 10.
672 Asdrúbal Aguiar, La Libertad de Expresión (Caracas: Universidad Católica Andrés Bello, 2002) at 123.
673 Casal, Constitución y Justicia Constitucional, supra note 142 at 270.
of the individual as being free and rational also implies responsibly for the content of the expressed thoughts. In addition, the significance of the information provided by the media must respect the audience by emitting truthful news. The struggles of the Court to find the best possible solution are illustrated in the following judgement:

The current Constitution separates the right to free expression from the right to receive impartial, uncensored, truthful, and opportune information, which involves the right to reply for those who are affected by inaccurate or offensive opinions or news. These are two different constitutional rights, one aimed at ensuring the expression of ideas or opinions, and the other at the benefit of citizens, consisting of the right to be informed impartially and truthfully by the media, without censorship. Freedom of expression allows everyone to express freely their thoughts, ideas or opinions, but the possibility of going to the media to express themselves is not the unrestricted right of every citizen, as each medium has limitations of time and space. Hence, the constitutional provision cannot be interpreted literally. Although the media cannot block anyone to express his or her opinion, it is possible that because of time, space, and other factors, not everyone would have the same opportunities to access a newspaper column, or a TV show.

This landmark decision demonstrates that the Supreme Court interpreted the constitutional right of freedom of expression in the light of a broad social policy. This is coherent with the evolution of the constitutional jurisprudence in Venezuela. The decisions made in the late 90s began that transformation and with a new Constitution, the Supreme Court started to elucidate cases with a more flexible and adaptable approach. In this case the Court explored the policy implication of its interpretation regarding the scope of freedom of expression. In fact, the Court argued that the journalist who is a well-know columnist in several newspapers can publish a reply to the President’s allegations in his own column, which does not constitute a restriction of his freedom, but is rather based on practicality.

However, once and idea, opinion, or any other way of communication is expressed, the issuer assumes full civil, criminal and disciplinary responsibility for everything expressed. The media allows people to build their own opinion, satisfying their right to be informed in an impartial, opportune and truthful way, avoiding the dissemination of false, manipulated and half-truths. This right is a collective right that allows a better quality of life for all of us in this country. It is an abuse of the media to have a majority of columnists following one single ideological trend. This prevents citizens from having impartial information, while preventing them from gathering wrong or malicious information. That is what the ruling of the Supreme Court of the United States, in the case New York v. Sullivan set to the actual malice standard to be met. In the opinion of this Court, in the case of the columnist, who is working in several national publications of the country, it is possible for him not only to reply through his own column, but also exchange opinions and information without having to access any other communication media. Because of his status as a journalist, it allows for national projection, which other individuals are not entitled to. It is therefore clear to the Court that the plaintiff intended to have a public discussion with the President and not the exercise of his right of reply, which he can exercise through his own column or any other means of communication.674

In cases such as this one, a simple reading of the text does not connect with reality. The judges elucidate cases related to freedom of expression while being less concerned with formal criteria and sources and more with the outcome of their decisions. The Court is now considering political, economic and social factors in its judgments.

Since the adoption of the new Constitution, the adjudication of freedom of expression has become one of the most debated issues in Venezuela. The government in different occasions during the last fourteen years has seriously treated this essential right. It is raising intolerance of critical expression generating an atmosphere of intimidation in which the right of freedom of expression is seriously limited. The issue is controversial and the problems arising around it are increasingly complex. The Supreme Court has been in the eye of the storm, trying to define the bounds of this constitutional right. Despite the number of decisions and the greater volume of comments, judges have failed to protect one of the most fundamental freedoms. An example of this is the 2006 case, Radio Caracas Televisión, RCTV v. Artículo 192 Ley Organica de las Telecomunicaciones. In this particular case, the TV station RCTV challenged the constitutionality of the new Telecommunication Act that forced TV stations across the country to suspend their programming to broadcast live the President’s speeches without receiving compensation from the National government.

The plaintiff argues that since the promulgation of the telecommunications act, the President of the Republic and his cabinet have abused the TV stations addressing the nation for more than seven hundred hours, interrupting their original programming without any kind of compensation for it. The plaintiff argues that the Executive branch is violating its freedom of expression, though and speech, as well as its freedom of economics. The Supreme Court has held in other decisions that freedom of expression and thoughts are not absolute. This right to freedom of expression is part of a broad social aspect, which admits no gap between the individual and his position on the social conglomerate. Judicial review is a tool to determine the compatibility of the legal rules with the content of the Constitution, which requires judges aware of the social, economic, and political framework for its development. In this case, the national government has an obligation to keep the population informed regarding its activities for the sake of social progress, and this might restricts broadcasters, programs and activities, for the sake of a more important social responsibility.

Freedom of Expression is an activity central to the accountability of those who hold elected governmental seats. According to American scholar Kent Greenawalt, “a government deciding what historical, political, and moral ideas to suppress is bound to be affected by

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aims other than the disinterested pursuit of truth.” It is considered one of the foundations of the democratic system, because the respect of the individual self-realization is inherent in the efforts to create space for a wider range of views for citizens to think, discuss, and challenge government abuses. Indeed, it is one of the most precious rights that citizens can enjoy in public life. It is essential for intellectual autonomy, innovation and creativity.

The cornerstone of a healthy and vibrant democratic society is the pluralism, tolerance and development of the universal right to voice one’s opinion. The above decision was an endorsement of the limitation of freedom of expression. In this case, the President based on the new telecommunication act had the power to force TV stations to broadcast his speeches live interrupting their programming. The Court held that it is the social responsibility of the TV broadcaster to inform the population, which means that their right to express freely is limited, giving favouritism to the will of the Executive Power. The arguments that helped justify this decision for the Supreme Court are similar to those of American Realism. The Court affirmed that judges need to be aware of the social, political and economic environment in which they are making decision, especially in cases like freedom of expression. This demonstrates the evolution of the constitutional jurisprudence in Venezuela, when judges made conscious efforts to reach decisions, which advanced, in their view, public policy. In this case for instance, the Court restricted the freedom of expression of TV stations to advance the policy of prompt government information. However, the efforts of the judges of the Supreme Court to disfavour the written constitutional principle of liberty could not be dismissed by the advance of a particular policy. According to Venezuelan scholar Brewer-Carías, “freedom of expression is in danger of extinction in Venezuela.” The Supreme Court with this ruling draws a definition of expression that restricts the enjoyment of this right. Yet the judges did not provide a particular test for this restriction, only held that elected officials, particularly the President, can restrict citizens from fully enjoying this right when they have to fulfill their responsibility of informing the population of governmental activities. Although freedom of expression is not an absolute right, as established in the 1999 Constitution, it does not seem to justify the social

responsibility of TV stations to broadcast live, without any compensation, the President’s Speeches, a stopping stopping every other programming in order to do so. People have the right to be protected against the abuse of power, especially when it infringes fundamental rights. Although there might be restrictions to rights and freedoms, there must be a clear justification behind them. This decision demonstrates that judges disguise the indeterminacy of the constitutional text to gradually constrain and limit the enjoyment of this constitutional guarantee in Venezuela.

Freedom of expression has been a part of Venezuelan constitutionalism since the beginning of the Republic. This fundamental right deserves particular protection to encourage tolerance, diversity and innovation. The multifaceted freedom of expression represents a challenge for the Supreme Court to remain faithful to the constitutional text, while still adapting to modern times in which technology is having a greater impact on the way we all communicate. The role of the Court under the words of 1999 Constitution is to review those acts or legislations that might seem to harm or threat the full enjoyment of this fundamental constitutional right. In the evolution of constitutional jurisprudence it is possible to appreciate specially with the adjudication of freedom of expression that judges openly detached themselves from the straightjacket of formal criteria to address the issue with a policy orientation. For example in the landmark 2007 case of Radio Caracas Televisión, RCTV, the judges of the Supreme Court took a more flexible approach to deal with the issue of freedom of expression. In this case, Radio Caracas Televisión (RCTV), “a channel which was founded in 1953, is one of Venezuela’s oldest private broadcasters and the most watched television station in the country.” The Executive branch accused this TV station of not being truthful when it was delivering news and it was frequently targeted because of its critical editorial line. The TV station allegedly violated the Telecommunications Act because it refused to broadcast one of the President’s speeches live. In Venezuela, the right to broadcast TV, Radio or Internet is regulated, and supervised by the Venezuela Telecommunications Commission (CONATEL). This public authority administrates the permission, extension, frequencies, and coverage of broadcasting concessions for private stations. This government agency is part of the Executive branch and the President of the Republic said that, “Radio Caracas Televisión (RCTV) station became a

679 Christopher Coyne, Media, Development, and Institutional Change (Massachusetts, Edward Elgard Publishing, Inc. 2009) at 48.
threat to the country so I decided not to renew the licence because it's my responsibility."\[^{680}\]

Thereby, the President himself instructed the Telecommunication Commission to cease the TV station’s broadcasting licence and operations.

In a long awaited decision, the Supreme Court unanimously decided that the refusal by the government to renew the licence of RCTV to broadcast did not restrict its right to freedom of expression.

Freedom to express without previous censorship ideas, opinion, and thoughts empowers the people, as long as they do not incur exceptional circumstances that the Constitution itself sets to limit. In this way, this right is not absolute as its development is limited by the respect of certain values and constitutional principles. In addition to this, although the Constitutional provision 57 recognizes the individual’s right to freedom of expression, this fundamental guarantee incorporates a social aspect, as individuals are part of a community that encourages the exchange of ideas and admits no gap between the individual and its position in the social conglomerate. The Constitutional Chamber in the case of RCTV v. Provision 192 Telecommunications Act, Exp.No1381 dated July 11, 2006, indicated that individual rights require a social and economic framework for their development. The media networks, public and private, shall contribute to civil education. The State guarantees public radio, television services, library and computer networks, which permit universal access to information. Moreover, paragraph 28 of provision 156 of the Constitution of the Bolivarian Republic of Venezuela established as the National Public Power, is responsible for the telecommunications system, including the administration of radio spectrum. Similarly, in the case of the exploitation of natural resources owned by the state, the National Public Power grants concessions under the criteria authorized by the law. In line with the above-mentioned, the radio spectrum is a public good and its use and exploitation must be made with the respective concession, in accordance with the law. In the case of the plaintiff, RCTV can only broadcast under the legal title derived from the concession approved by the National Public Power. However, the National Public Power decided not to renew its concession. Moreover, RCTV, like any other TV network, has the freedom to continue exercising its right of freedom of expression in many other forms, for example it can move to the subscription television services. It is clear that other TV broadcasters can provide to the Venezuelan population news, entertainment, information, and opinions, sufficient arguments that under the context of the Social justice, obligates this Court to dismiss the alleged violations.\[^{681}\]

The Constitutional Chamber said that individual rights are part of a social, political and economic framework which judges are also a part of. The Court held that freedom of expression has a social aspect, as individuals are part of the community in which they are exchanging ideas. The Court goes further to affirm that TV networks have a social responsibility, which is not only to educate the public, give them access to the media or promote balance programming, but also to permit the government to inform the nation of the latest developments for their benefits. This primarily means that the Court reaffirmed its previous decision regarding the limitation on this freedom and once again supported the


National Executive’s interests. With this decision, the Court not only denied the entire TV network, with hundreds of employees, the right to work and freely express opinions, but also cast doubts on its independence. Free speech suffered an unprecedented restriction when the Supreme Court permitted the shutting down of Venezuela’s oldest television station.

Freedom of expression, one of civilization’s most fundamental values, is seriously in jeopardy. This landmark decision did not help the process of political radicalization of the Venezuelan society. By shutting down an entire TV network the Court was closing the door to the exchange of ideas and opinions which is essential in a democratic society. In certain circumstances it might be understandable to impose restrictions on fundamental rights, when they are in favour of maintaining pluralism, tolerance and diversity for the development of freedom of expression. However, in the case of RCTV, the judges moved from favouring their own personal preferences to promote a doctrine in which ideology played an important role in the adjudication of constitutional rights. Brewer-Carias explains, “Radio Caracas Televisión, RCTV’s case undoubtedly shows the serious breakdown of the rule of law in Venezuela, as well as the unfortunate loss of the fundamental role of the judiciary as a guarantor of it.” It is safe to affirm that in this particular case the Court attempted to blend ideology and legality, which led to the questioning of the independence of the Supreme Court. Although the 1999 Constitution has been the product of a radical break in legality, freedom of expression remains entrenched in its text as a core element of the fundamental freedoms that Venezuela must enjoy. In fact, for an economy to thrive innovation and creativity are necessary to open new markets. To promote social integration and cooperation it is essential for people to voice their opinion. For a democratic society citizens must be informed and express their views to elect the best possible people that could represent their true interests. One could argue that socio-economic rights and individual rights are not separate entities, on the contrary, they complete each other in order to create a balanced society. The Constitution clearly enshrines the guaranteed social, economic and political rights as well as freedoms of individuals as part of a democratic state ruled by the law and not by personal

preferences of those who hold power. These rights are fundamentally contributing to the
development and fulfilment of not only individuals, but also society as a whole.

In Venezuela, the debate of ideas, opinions, or thoughts that challenge the power of
the Executive Branch can carry consequences. The constitutional justification of cases
regarding freedom of expression demonstrates an evolution in constitutional judging. This
can also be seen in one of the most controversial landmark decisions made in Venezuela,
the 2007 case of Comité de usuarios oyentes interactivos de la Radio (OIR). In this
particular case, a civil organization filed a constitutional class action challenging the
decision of the President to shut down RCTV arguing that it violated their right to freedom
of expression and information.

The State guarantees the provision of universal service of telecommunication to every citizen in
the country. The universal telecommunication service is defined as a set of services that
broadcasters are obligated by law to provide with minimum standards regarding quality and
affordability for all citizens in this country. This service is intended to satisfy the national
integration, maximizing access to information, educational and health development, and reducing
inequalities in access to telecommunications services. Thus, it is the responsibility of the State to
guarantee that the universal service of telecommunication, for example the TV broadcasting, get
to every citizen with quality and decency. Even though the Court recognizes that every citizen
has the right to access and enjoy the universal service of telecommunication, specifically TV
broadcasting, as it is entrenched in provisions 108 and 117 of the Constitution, because a TV
station is going out of air due to the revocation of concession by the National Government, it
does not mean that their right has been denied. Moreover, this Court considers that it is in the
public’s interest to have a free and enjoyable TV station, such as the Venezuelan Social
Television (TEVES). However, because it does not count with the infrastructure necessary for
national broadcasting, this would affect the citizens using this public service. It is in the Court’s
moral duty to take all necessary measures for the attainment of social prosperity. Therefore, the
Court must favour the general interest instead of individuals’ interests by temporarily granting
the use of the television broadcasting equipment, such as microwave, teleports, transmitters,
television auxiliary, towers, antennas, transmission booths, perimeter fence and electrical
connection property of RCTV, to ensure that the new TV station, TEVES provides quality and
decent services. 683

The Court held the general interest is more important than the interest of one individual
to guarantee the universal service of telecommunication. In other words, judges are giving
preference to the collective rather than the individual. However, it seems contradictory
because it is not one individual that has been restricted to express freely, thousands of
workers, technicians, journalist, among others collectively are been denied their right to
express their opinions. If it is considered that freedom of expression is fundamental for a
democratic society, then this right must be exercised by more than one person to effectively

Nº 07-0731
allow the necessary exchange of ideas with respect and tolerance. It is essential for society, as a collective entity, to permit critical voices that contribute to enrich the debate, which is essential in helping citizens to make their own opinion on any given matter.

The Supreme Court’s adjudicating role in Venezuela has taken a particular turn. Judges went further to argue that they have the moral duty to take all possible measures for the achievement of social prosperity. The evolution in constitutional jurisprudence is evident in this case where judges suggest a more ideological and less analytical approach, even vindictive at times towards those who request protection of their right of freedom of expression. The justification of the Court to support not only the shutting down of RCTV but also taking its equipment and giving it to the new governmental TV station without any compensation, explicitly demonstrates that judges in this case disguised behind a mask of legality its dangerous ideological interpretation. Social and economic prosperity cannot excuse the suppression of fundamental rights by the judges. Prosperity is a broad concept that requires essentially for people to be able to voice their ideas on how to best fulfill their purpose in society. It seems difficult to think that a group of judges sitting on a bench can elucidate prosperity by denying the views of others because they consider them a minority. In fact, freedom of expression is necessary for society to exchange opinions and thoughts even if sometimes they might be considered critical to those in power. It is possible to measure prosperity when a society demonstrates that it is tolerant and respectful of others. Innovative ideas and critical thinking foster progress for better and more prosperous future. An era where there is the possibility that suppression of ideas and opinions by the government would turn to censorship and possibly fear means that the Court did not take all possible measures to become a light of tolerance and understanding. Although opposing ideas can help to overturn a government, democracy means that everyone has the opportunity to vote for the best candidate, and for the public to make their mind it is necessary to hear critics of the government in place. One could argue that the government of Venezuela is trying to control every aspect of the printed and broadcasted media, which could eventually end in the total censorship of free speech. The Constitutional Chamber of the Supreme Court had the opportunity to justify a decision that favoured the right to

freedom of expression. The Supreme Court’s arguments must be grounded on the Constitution because it really represents the community as a whole and not only just a few. Instead the arguments of the Supreme Court to justify this decision show little distinction between politics and law. This could eventually represent a next chapter in the evolution of Venezuela’s constitutional jurisprudence.

**Freedom of Expression, the Court’s Moral Reading**

The opportunity for people to express what they think represents a self fulfilment experience and sharing it with others helps the truth flourish. There is a social character of this fundamental right that needs to be protected for the sake of the community. Tolerance and understanding of others, including their ideas and opinions, permits the wellbeing of society and better governance. Ronald Dworkin suggested that the justification for protecting this important freedom can be deconstructed in two broad categories: one instrumental and the other constitutive. “instrumentally, that is, not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us”\(^\text{685}\) and the other “that freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and constitutive feature of a just political society that government treat all its adult members as responsible moral agents.”\(^\text{686}\) Based on these categories it is possible to argue that freedom of expression is crucial to the development of a responsible society, where citizens participate actively with opinions and ideas, in an environment of tolerance without the risk of being punished. Certainly, for the improvement of social living, the unrestrained sharing of opinions and ideas helps citizens to make the best of them, not only because they can fulfill their personal expectations but also improve the welfare of others with innovation and creativity. For example, in this new era of technology and social networks, the opportunities to share ideas and opinions with the entire world are endless. This has maximized the opportunities for people to achieve or realize their thoughts, ideas and opinions, helping society progress further, faster. It has united or at least brought closer individuals all over the world, which suggests that freedom of expression enshrines integration and equality. Certainly the social media has demonstrated that citizens are able to participate equally in the discussion of topics that concern society as a whole, not only to permit better decisions when it comes to

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\(^{685}\) Dworkin Freedoms’ Law *supra* note 576 at 199

\(^{686}\) *Ibid* at 200
democratic elections but also to move forward topics that needed to be discussed for a long time. In a free society where compassion and acceptance are part of the exchange of ideas and opinions, citizens are inevitably empowered equally to participate in the debate to accomplish the best for society.

The ideal of a *Social State of Law and Justice* that the Supreme Court rhetorically affirms is moving forward with its constitutional interpretation that seems to charge that freedom of expression conflicts with the more urgent value of social equality. As it can be seen in the case of RCTV, the Court argued that it was the responsibility of judges to restrict the individual right of this TV station for a more important interest, which is the society as a whole. In fact, judges even argued that it was their moral duty to take all measures possible to accomplish, in the interest of the community, social progress to the detriment of this important individual right. For instance, in the 2001 case of *Rafael Chavero Gazdik*, the Supreme Court restricted freedom of expression, permitting censorship, in the interest of the *Social State*. In this case attorney Chavero Gazdik representing himself requested to declare unconstitutional several provisions (from 148 to 226) promulgated in the recent reform of the Venezuelan Criminal Code. He argued that the reform criminalized any act against the majesty of the Presidency and other high rank public officials with up to thirty months in prison, which in his view threatened the right of freedom of expression and the market of political ideas, a principle set in provision 2 of the 1999 Constitution.

Freedom of expression is the right of every person to freely express their thoughts, ideas or opinions orally, in writing or by any other form of expression, and make use of any means of communication or dissemination for it (Article 57 of the Constitution). This right includes freedom to seek, receive and spread information and ideas of all kinds, so closely linked to freedom of speech is freedom of information enshrined in Article 58 of the Constitution. This is not an absolute right, since according to the norm those who exercise this freedom are fully responsible for what they say. The only exception is the constitutional immunity that members of parliament have to exercise their freedom without any responsibility. Provision 57 of the Constitution is clear when prohibiting anonymity, war propaganda (nationally or internationally) discriminatory messages that target people because of race, sex, economic class or beliefs and acts that promote religious intolerance. The Inter American Convention of Human Rights, provision 13 section 2 established a certain criteria to restrict the right to express freely, and the first one is when it affects the reputation of others, national security, public order, the health of others, morality, or has to do with war propaganda, and hate against the nation and racial slurs or religion intolerance. Then, the countries that signed this treaty can legislate in this matter. In fact, after careful reading of the provision regarding offenses of defamation and slander against people, it does not contravene with the Constitution. Because both the Human Rights Treaty and the Constitution of Venezuela protect the reputation of others. Having this in mind, high elected public officials deserve respect as human beings. It is a moral duty to protect the integrity of the privacy, reputation and honour of those in power to avoid affecting the public’s morality. Moreover, these provisions in the criminal code have double function, one to protect the human
being behind the job and the dignity of the office to avoid the weaken of the State and public morality.\textsuperscript{687}

According to the Venezuelan Constitution, citizens can enjoy freedom of expression but they must respect the rights of others. The Supreme Court’s judicial decision-making process evolved to give judges a more flexible approach that goes beyond the words of the Constitution. In some cases, as seen in the chapter before, the Supreme Court has considered a particular take on the ‘moral reading’ of Ronald Dworkin. In the cases of freedom of expression, the Court took the political morality, as judges viewed, into the heart of the debate regarding the limits on this fundamental right, particularly to fit with the judges’ understanding of the constitutional provision 2 of \textit{the Social State of Law and Justice}, that favours the social character of law. Something has been clear from the evolution of Venezuela’s jurisprudence, and that is that judging cannot be a mechanical or robotic, and cannot fail to account for the context in which is involved. However, that does not mean that judges are permitted to impose their own views on the rest of the population. This was the case in \textit{Rafael Chavero Gazdik}, when the Court was asked to consider the constitutionality of norms that no only prohibit any expression against the high public officials but also convict those who dare to mock or insult the President and other members of the political branches by sending them to prison. The Court began to justify its decisions explaining that freedom of expression is not absolute and everyone that exercises this right is responsible for what it says. Then, judges compare the provision of the Constitution regarding freedom of expression and the American Convention on Human Rights, finding that both present restrictions to the right to this freedom. Constitutional judging is no longer strictly assuming the text of the Constitution, but also the international treaties adopted by the State. Moreover, the Court with a particular understanding of the moral reading held that it is the moral duty of the judges to protect the integrity of the privacy, reputation and honour of those in power to avoid affecting the public morality. The Court argued that the provisions in the Criminal Code which restrain freedom of expression are not only protecting the person behind the work but also the institution that they represent and failing to do so is a treat to the public morality and the State. Certainly, the Court seems to vest itself the authority to elucidate on moral grounds the conception of liberty and honour. The judges openly turned

this case into a moral debate, especially when they argued that the public morality of the
country was in jeopardy. They argued that their moral duty was to protect public authorities
from critical voices that could jeopardize their stay in power.

The Supreme Court with this decision upholds censorship of those who dare to
criticize the high public officials. The Court endorsed the restriction of freedom of
expression because in their view certain statements could threaten the real functions of
public institutions. In this case, judges assumed that they are protecting the public morality
by restricting the public from voicing their opinions against those who are representing them.
It is difficult to support in a democratic society a decision that prevents citizens from
expressing their opinions about the people whose decisions impact their lives. Because
everyone is equal in front of the law, no matter how powerful or important someone is, no
one is entitled to immunity from criticism. Forbidding citizens to express their views, even
when those views ridicule the powerful, is not only against the democratic living but also the
equality of people. Freedom of expression is not only an individual right that collides with
social rights, on the contrary, the social right of equality means that neither can thrive
without the other. It seems contradictory that the Supreme Court which has been assuming a
posture that defends the Social State of Law and Justice in different decisions clearly upheld
that an elected elite remains unaccountable and immune from critical opinions, when no one
should be treated different because of sex, race, religion, income or in this case election to
public office. Although, one could be sympathetic with restrictions to individual freedoms
for the good of society, it is hard to assume that censorship could represent something ‘good’
for the community. Everyone is entitled to an opinion because the equal protection of the
laws genuinely advances a good community goal that is living in a tolerant and
understanding society. Opinions regarding public elected officials are important even those
who could be seen as critical because they are indeed necessary for well informed citizens to
make their mind when electing public officials in a democratic society. The Supreme
Court’s constitutional interpretation in cases regarding freedom of expression has
demonstrated that its decisions could be viewed as an impediment to liberty, equality and
democracy.688

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upholds-prior-censorship-and-insult-laws>
One of the most important decisions regarding freedom of expression in Venezuela openly recognized the moral grounds of this right. The 2001 case of Hermán Escarrá, presented arguments similar to those of the moral reading of Ronald Dworkin. As seen in previous chapters the Supreme Court was asked in this case to provide meaning to provisions 57 and 58 of the Constitution, regarding the rights to free expression and information, and the right of reply. The judges grounded the decision in term of morality, stating that they considered themselves responsible for the political morality of the country. Once again, the Court demonstrated that its decisions are not the result of simple logical deduction but an interpretive practice that creates or builds new concepts.

The effort that this Court has to make to accurately recognize and identify the rules required to make this decision must comply with a double justification. First, consistency with the legal system, and second, to fit with the political theory behind the system, underlying an institutional and axiological morality. The external justification allows the distinguishing of the principles from the rules. It is clear that freedom of expression is a right that not only belongs to each individual, such as the journalists or reporters that are covering the news, but also a collective right. Everyone has the right to receive any information and access to the thoughts expressed by others. The two elements of the right to freedom of expression must be guaranteed simultaneously one cannot legitimately rely on the right of a society to be honestly informed.689

The Supreme Court held in this case that because their conception of the Social State of law and justice fit with the political morality of the country, the judges could limit the individual right to freedom of expression based on their particular conception of what is right or wrong. As Jerome Frank says, “where rules of law are impossible or inexpedient, the will of the judge is free from the constraint of acknowledge rules of action or principles of decision.”690 However, the judges’ own respective conceptions of good or evil tend to prioritize some views over others, claiming to do so for the good of the community, which goes against the respect for equality. The right to freedom of expression as entrenched in the 1999 Constitution has a social character not only permitting individuals to express their needs, and concerns, but also letting them be critical of those elected officials who are not implementing policies that benefit them. Sir William Blackstone indicated long ago “the liberty of the press is indeed essential to the nature of a free state.”691 Freedom enables everyone to better judge what is best for them. Restrictions and censorship obscures equal opportunities to share ideas, opinions and thoughts about what surrounds us.

Historically Venezuela has maintained the entrenchment of freedom of expression across its constitutionalism. Provisions 57 and 58 of the 1999 Constitution are the product of a historical struggle that took the lives of millions to safeguard as fundamentally important the guarantee that anyone can freely express their ideas and opinions. In the end, as social creatures, everyone needs to interact with others to develop and feel a sense of belonging and purpose in life. In this sense, Moon says, “as more and more of our discussion of freedom of expression is framed as constitutional argument, it may become natural to think of the freedom as an individual right against state interference.”

Certainly, freedom of expression is important for democracy not only because it enables citizens to exchange ideas, get new information and create their own opinions, but also because it holds accountable the people who are in power, leaving them open to criticism for the progress of society. Democracies, well-established or emerging, depend on the consent of an informed citizenry, and the news media are a primary source of the information people need in order to govern themselves. Alexis de Tocqueville noted almost 200 years ago, “you can not have real newspapers without democracy, and you can not have democracy without newspapers”. Since then, that simple statement has proven to be true in most nations all over the world. A free press is one of the foundations of a democratic society. Freedom of expression has often been called the oxygen of democracy, because the latter cannot survive without the former. Certainly, the cornerstone of a democratic society is the protection of freedom. According to Walter Lippmann, a twentieth-century American columnist, “a free press is not a privilege, but an organic necessity in a great society”. Indeed, as a society grows increasingly more complex, people rely to a greater extent on newspapers, radio, and television to keep abreast of world news, opinion, and political ideas. One sign of the importance of a free press is that when antidemocratic forces take over a country, their first act is often to muzzle the press. The journalists in a free society have kept democracies viable by giving a voice to the voiceless, ensuring that a ruling majority cannot trample the rights of a minority. The primary role of journalism in a free society has remained the same for generations: to keep people informed. Still there are questions about whether freedom of expression truly falls

Moon, Constitucional Protection of Freedom of Expression, supra note 641 at 219.

within the ambit of freedom of speech, which is typically regarded as a civil liberty, or a matter of freedom from government action. There are different approaches concerning this issue. Is it an absolute right or are there restrictions when it comes to hate speech, pornography and insults? Freedom is crucially for the development of a human being and a nation. Because it helps citizens discover the truth, an aspect of personhood. The same occurs with a community as whole. In addition, citizens can enjoy autonomy in making their own decisions and take responsibility of their act without government tutelage. With a rough outline of the uniqueness of the constitutional interpretation of freedom of expression in Venezuela, it is possible to formulate now the main questions to refocus on the current jurisprudence’s perspective in the next chapter: how can we best achieve the constitutional and judicial mandate of interpreting the Constitution? How can we best interpret the right to freedom of expression in Venezuela? The next chapters will discuss new perspectives on constitutional interpretation, focusing on constitutional principles and purposes, different from arguments associated with prevailing theories in Venezuelan jurisprudence.

**Summary:** Venezuela’s constitutional system has been committed to protecting citizens from the coercive legal censorship that suppressed opposing viewpoints. In this chapter, case analysis show that different freedom of expression cases from the era of the 1961 Constitution until the last few years in the era of the 1999 Constitution display diverse approaches associated with legal theories, positivism, legal realism, and Dworkin’s moral reading. Landmark cases show the controversy between the Venezuelan judicial style and the protection that the Constitution offers to this important right of freedom of expression in a democratic society. This chapter examines the evolution of Venezuelan constitutional jurisprudence to demonstrate the progression in the adjudication approach described in the abovementioned chapters. In the midst of the controversy, perhaps the central issue for Venezuela’s society is to find the right solution for the adjudication of freedom of expression. That is, how should judges go about interpreting the Constitution?
PART III
NEW PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION:
PRINCIPLES AND PURPOSES: TWO SIDES, ONE VIEW

The Supreme Court of Justice resorts to arguments that resemble legal theories, such as legal positivism, legal realism and Dworkin’s adjudication approach, as noted in previous chapters, to support its constitutional jurisprudence. However, the protection of fundamental rights, particularly freedom of expression, has taken a step back deteriorating Venezuela’s democracy. Neither the simplistic view that judges must follow verbatim formal criteria, sources or hierarchies to interpret the Constitution, nor the judges’ free-reigned imposition of ideological views on the Constitution have coherently guaranteed the constitutional rights, particularly freedom of expression in Venezuela. This Part III of the study will attempt to discuss how judges should go about their interpretation of the Constitution in light of the new perspectives deduced from this study. It is organized in three chapters:

Chapter 8 will discuss authors Ronald Dworkin’s and Aharon Barak’s constitutional interpretation theories, each one bringing their own unique influential insights to the field of constitutional interpretation. Both interpretive theories provide distinctive insights for the adjudication of constitutional rights. Particularly, the discussion about principles is a central point in Ronald Dworkin’s theory, as well as Aharon Barak’s perspective on the role and function of the purpose in constitutional interpretation. In fact, Dworkin was cited in many constitutional decisions in Venezuela, while judges argued in favour of a more practical role and function of the constitutional text, similar to Barak’s points. There is a new perspective that underlies their theories, which provides an active role for the judge in a democratic society, all in order to bring about the rule of law underlying the Constitution.

Chapter 9 will attempt to build an alternative approach, different from arguments associated with the prevailing approach used in constitutional judging in Venezuela. This approach reconciles the priorities of formalism and the priorities of functionalism to bridge operational gaps between legal theory and legal practice. This approach is put in practice in present situations, such as in the case of freedom of expression in Venezuela.

Chapter 10 will sketch a review of the study, conclusions, summary, implications, and recommendations for future studies.
CHAPTER 8
RONALD DWORKIN’S DEFENCE OF PRINCIPLES AND CHIEF JUSTICE AHARON BARAK’S PURPOSIVE THEORY: TWO SIDES, ONE VIEW

The evolution of the Venezuelan constitutional jurisprudence evidence that the Supreme Court is still searching for a better approach to interpret the Constitution. Indeed, judges still turn to different arguments to justify their decisions. One of the authors cited by the Court has been Ronald Dworkin, one of the most influential legal philosophers of our time. Although, the Supreme Court reinterpreted his moral reading of the Constitution, Dworkin’s strong emphasis on principles rather than policy is still very present.694 Principles provide reasons to decide controversies on the grounds of justice and fairness, equality and due process as set in the Constitution. This is particularly important for the construction of an alternative approach that would address the concerns of the Supreme Court, while still faithfully interpreting the Constitution. One of the main concerns so far exposed by the evolution of the constitutional jurisprudence has been to find the proper role and function of the Constitution to render concrete solutions.

Another author whose work has influenced the Supreme Court’s decision-making process is Chief Justice Aharon Barak, who remains one of the greatest judges of our time. He is, according to former Judge of the Canadian Supreme Court of Justice Claire L’Heureux-Dubé, “a role model for judges everywhere; he is the ultimate judge: competence, integrity, exceptional talent, and most of all courage.” 695 Aharon Barak’s Purposive interpretation theory outlines a unique role for the Constitution, which shapes the function of the law in society.696

The following chapter is divided in three areas: (a) Dworkin’s defence of legal principles: an overview of Dworkin’s adjudication theory focusing on principles in constitutional interpretation, (b) a sketch of Chief Justice Aharon Barak’s purposive theory of constitutional interpretation, (c) a comparative outline of both authors’ theories, which provides some insights for a new approach to constitutional interpretation.

Dworkin’s Defence of Legal Principles:

The hotly debated questions brought to the Supreme Court are intrinsically related with political, social and economic aspects. Venezuela, with a Constitution that has a robust list of social, economical, political, individual, environmental and aboriginal rights permits the submission of questions that require more than a fair reading of the constitutional text. In this context, the Supreme Court judges have been trying to decide cases on practical and functional grounds. Yet, until now, this has meant the infusion of the judges’ own personal views in constitutional issues. It has already been demonstrated in the evolution of the Venezuelan constitutional jurisprudence that judges should not enforce a certain political position because it undermines individual rights. In a more traditional conception of the rule of law, this means that the written rules explicitly set out in the Constitution are to be followed by everyone equally, including the Supreme Court judges. Yet Dworkin affirms that there is a right conception entrenched in the Constitution, which identifies the citizens’ moral rights and duties with respect to each other, and it can be enforced by the Court upon the citizens’ demand. 697 He emphatically stresses the role of principles as standards that judges find in the Constitution. “I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness.” 698 Individual rights as well as collective rights in the Venezuela constitutional system require more than a mechanical application of rules, instead principles, such as justice, fairness and due process as described by Dworkin should hold the most importance in the judges’ decision-making process. “Principles play an essential part in arguments supporting judgments about particular legal rights and obligations.” 699 As American law professor Robert Churchill explains, “even in hard cases, where a lawsuit cannot be brought under a clear rule of law laid down in advance by some institution, it remains the judge’s duty to discover what the rights of the contesting parties are.” 700 The Court always has to provide the right answer by searching through the legal principles that compose the moral fabric of society to solve difficult controversies.

697 Ronald Dworkin, A Matter of Principles supra note 694 at 12
698 Dworkin, Taking Rights Seriously, supra note 358 at 22.
699 Ibid, at 28.
Law-as-Integrity: a Rational and Cohesive System of Principles

Law, in Dworkin's view, is the result of the interpretive process of a cohesive system of principles that judges must apply to produce a right answer. Integrity is at the heart of his theory of interpretation, which is the recognition of the community’s understanding of principles. Law-as-integrity assumes that judges identify the community’s conception of principles, and apply them as consistent standards, “treating everyone equally when difficult cases arise before the Court.” Integrity, then, demands that judges look at morality and interpret the Constitution to access its moral authority. In Dworkin view, principles form the core of the political system and provide the major unifying force behind legislatures and courts, as well as among the various legislators and judges. They provide stability and guidelines for judges as they interpret the law. In this context, “integrity requires judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles.” Even if Dworkin is referring to the North American context, it is important to highlight that a set of coherent principles, such as justice, fairness, and procedural due process can provide the best constructive interpretation of the community’s legal practice, regardless of the country. Integrity, in Dworkin’s theory can be explained vertically. A judge who claims a particular right of liberty as fundamental must show that this claim is consistent with the majority of its precedents, and the main structures of constitutional arrangement. Also, integrity holds horizontally that a judge who adopts a principle must give full weight to that principle in other cases he decides or endorses. This adjudicative theory propounded by Dworkin introduces a moral constraint on the practical reliability of decisions. The proper method of judicial decision-making, then, is to extract a coherent set of well-justified moral principles from precedents, and apply them to cases. However, judges can abuse their powers, in fact, as seen in previous cases, such as those of Herman Escarra, Rafael Chavero Gazdik and RCTV where the judges pretended to observe the constitutional text and the important restraint of integrity while really ignoring it.

701 Dworkin, Law’s Empire, supra note 341 at 164-165.
702 Ibid, at 87-88.
704 Ibid, at 225.
705 Dworkin, Freedom’s Law, supra note 576
Integrity has two important aspects, one political that requires those creating the law to keep it coherent in principle, while the second is adjudicative and requires that those applying the law make decisions coherent with the past. In this regard, Joseph Raz argues that integrity is a matter of achieving the greatest possible “fit” with past legal records. In contrast to Dworkin, legal scholar John Hart Ely argues that integrity is neither law nor an adjudicative quality. As jurisprudence scholar Neil Duxbury explains, “it is a political quality which constitutional adjudication serves, or ought to serve, to promote. Conceived thus, integrity is no longer something which judicial activism undermines. Indeed judicial activism may epitomize integrity.” Ely insists that courts should demonstrate integrity in constitutional adjudication by striking down statutes that may obstruct political change, and by facilitating the representation of minority interests. Judicial review, in Ely’s view, is an integral feature of “an open and effective democratic process.” In engaging such review, the role of the courts is not to enforce particular political values, but to guarantee the integrity of that process. That is, it is for the courts, guided by the “general contours of the constitution.” However, Duxbury criticizes Ely’s theory because it cannot explain how the institution of judicial review may keep the integrity of the process and resist value-preferences. According to him, “the job of the court is to identify and protect the ‘objective’ political morality, which is a narrow conception of the democratic process.” Yet, he wisely points out the dubious status of objectivity and, by implication, the centrality of interpreting values. Judges must aim for integrity in their decisions, to strive for a fresh judgement without personal bias, personal interests, or interests of groups to which they may belong. However, Dworkin’s adjudicative theory then supposes that judges make fresh judgments of political morality. In Venezuela, this led to personal views playing a major role in constitutional judging. Interpretive equilibrium between the legal structure as a whole and the general principles is Dworkin’s perspective to justifying that structure.

710 Ibid, at 101.
711 Duxbury, Patterns of American Jurisprudence, supra note 708 at 293.
The unique demand that integrity makes upon both individuals and courts is that they recognize that what they have done in the past affects what they ought to do now.\textsuperscript{712} Certainly, Venezuela has come along way to accomplish a constitutional system that not only offers a robust list of social rights, but also entrenches individual constitutional rights. In a difficult social context in which the Court has been seen as the ultimate place to find concrete and real answers too many social issues, judges must stand to the promise of becoming the guardians of the Constitution. As Duxbury says, “believing in the rule of law requires elevating the ideal of integrity, and therefore the constitutional principles whose benefit it extends to all citizens.”\textsuperscript{713} Certainly, in difficult times, judges must take a stand in favour of the principles entrenched in the Constitution, which treats everyone as equals, protecting the minorities and giving the most vulnerable a voice to express their opinions and views for a better society. Dworkin’s argument, as described in Raymond Wacks’ *Understanding Jurisprudence*, considers a society embracing integrity as a political virtue mainly in support of the “moral authority to assume and deploy a monopoly of coercive force.”\textsuperscript{714} The ideal of Law-as-integrity requires judges to reason deductively in favour of the legitimacy of the moral constitutional principles. Certainly, Dworkin understands that rights as set in the constitutional text represent moral values which society embraces and understands their importance such that it should entrench them in the constitutional text. One could argue that because of Venezuela’s unique challenging context and because restrictions on individual rights are applied in favour of social rights, judges need to consider other aspects in their decisions. In this regard, Scott Hershovitz says, “integrity is a value that is realized by patterns of behaviour across time. Therefore, judges shall interpret the law in a principled way; promoting justice and fairness by coherently give meaning to the community’s conception of the underlying principles that justify the law”.\textsuperscript{715} Yet, even if that’s the case in Venezuela, judges should always understand that individual and social rights deserve the same respect. Justice and fairness are principles in the constitutional system, which require judges to see law as integrity in order to stand up to challenging times.

\textsuperscript{713} Ibid, at 13.
\textsuperscript{715} Ibid, at 273.
Principles Refer to Individual Rights: One Right Decision

The Constitution is a rational and cohesive system of principles that judges must apply with integrity to produce the right answer. The judges’ responsibility regarding adjudicating rights, according to Dworkin, is to understand that principles are propositions that describe rights in the lawsuits presented before judges. “The two different forms of justification, arguments of principles, and arguments of policy are blended together in constitutional judging.” 716 In fact, it is seems that according to the Venezuelan constitutional jurisprudence, judges decide difficult cases on the grounds of personal views, political ideologies and moral grounds blended together in constitutional adjudication. However, when the decisions restricted constitutional individual rights without a reasonable justification that is in accordance with respect for others, it presents a serious problem. Yet, still the Supreme Court cited Dworkin’s theory because it seems that judges realize the importance of principles in constitutional judging. Dworkin distinguishes the role of the courts and the legislature: courts apply rules when they clearly fall under the system of rules, while the legislature applies political decision-making. There are cases when courts find that other standards can provide better answers to controversies, and these are cases of principles. There is only one possible way that courts can decide a difficult case in which social rights and individual rights are in conflict that is, through reading the constitutional precepts coherently, according to principles such as equality, fairness, and justice. To Canadian legal scholar Richard Nordahl, the heart of Dworkin’s interpretive theory is the equality principle, because each principle can be understood as the equal respect for others. Judges cannot violate the principle according to which they must treat everyone as equal in status and with equal concern. 717 Nordahl explains, “in accordance to this principle (so Dworkin reasons) each is free to seek out, and to live, the life that is best for him or her (provided others neither are harmed).” 718 Presupposing freedom of choice, there has to be special protection for fundamental freedoms such as freedom of expression and freedom of personal, social,

717 Dworkin, Freedom’s Law, supra note 576 at 10.
and intimate association. Consequently, the government cannot distribute “goods or opportunities unequally on the ground that some citizens are entitled to more because they are more worthy of more concern.” A public institution must honour the principle of neutral policy. In this context, it is the duty of the Supreme Court to provide decisions based on the equal care for citizens, without elucidating a particular political ideology that undermines the opportunities for citizens to thrive and progress. “Those who work harder might end up with a higher than average standard of living.” By equalizing the starting point for everyone, the policy of equality of resources protects the principle of individual liberty and the integrity of the public sphere by reducing the chances of economic corruption. With this conception of individual rights and freedoms, “citizens do not themselves collectively enact legislation or resolve disputes concerning rights. That is the role for the authoritative decision-makers, democratically elected officials in the case of policies, and judges in the case of rights.” Therefore, legislature and judges should try to keep the law as coherent in principle as possible. As Dale Smith explains, “Dworkin claims that legal decision-making should be a matter of principle, not of political accommodation. In other words, legal decisions must be defensible by reference to a coherent set of principles.” Judges are then free to make rational decisions that lead to the best possible answer without usurping the place of a democratic legislator.

Courts Have Weak Discretion

Dworkin has observed that there is always a right answer to each constitutional issue. However, according to John Gardner, the judge has some discretion to decide the case either way. Dworkin distinguishes between two types of discretion. Strong discretion is the kind of discretion a decision-maker has when there are simply no standards set by an authority. While weak discretion occurs when the standards that an official must apply cannot be

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720 Dworkin, Taking Rights Seriously, supra note 358 at 31.
722 Nordahl, The Place of Community in Dworkin’s Jurisprudence, supra note 718 at 267.
723 Dworkin, What is Equality? Supra note 719
724 Nordahl, The Place of Community in Dworkin’s Jurisprudence, supra note 718 at 268.
726 Gardner, Legal Positivism, supra note 344.
applied mechanically but demand the use of judgment. This must be guided only by the mandate to choose the most reasonable alternative.\textsuperscript{727}

In Dworkin’s view, judges logically have weak discretion whenever principles are involved. On the matter of rights, judges are the appropriate authoritative decision-makers because there is no place for bargains and trade-offs. What is the role of a judge? As stated above, Dworkin sees that judges are best qualified for decision-making in matters of rights to a greater degree than ordinary good citizens and legislators. Judges hold the intellectual discipline and scope of knowledge to sidestep prejudice in favour of the consistently appropriate principles of justice and fairness. Dworkin explains that judicial decision-making is a part of the interpretive activity concerning rights bound by the principles, policies, values, and goals in the Constitution. Nevertheless, one could argue that Venezuela has a slightly more challenging context than the American one, where Dworkin is basing his theory. Yet the argument remains that it seems difficult for judges to elucidate the will of society or even the morality of the Constitution by staying behind the closed doors of the Supreme Court reviewing some facts presented by the plaintiff alongside the written text of the Constitution. In fact, the cases in Venezuela have offered a particular understanding of what could happen if judges are left with the responsibility of determining what is the will of society. Dworkin asserts that the principled model is the best possible model for a “morally pluralistic society.”\textsuperscript{728} Conversely, these decisions are valuable only if they represent the best interpretations of justice, fairness, and procedural due process. In deciding hard cases, for example, judges often invoke moral principles that Dworkin believes do not derive their legal authority from the social criteria of legality, contained in a rule of recognition. “If we treat principles as law we must reject the positivists’ first tenet, that the law of a community is distinguished from other social standards by some test in the form of a master rule.”\textsuperscript{729}

That is, Dworkin rejects the positivist conceptions of law prevalent even among legal realists and positivists that rights are premised upon a comprehensive set of moral precepts that make individual rights comprehensible. Even it is possible to be sympathetic towards the moral aspect of rights, they represent something even greater, which has stood the test of time.

\textsuperscript{727} Dworkin, \textit{Law’s Empire}, supra note 341 at 39.
\textsuperscript{728} Ibid at 213-214.
\textsuperscript{729} Dworkin, \textit{Taking Rights Seriously}, supra note 358 at 40.
The legal authority of a binding principle derives from its contribution to the best moral justification of a society’s legal practices considered in their entities. Hence, a legal principle contributes to such a justification if, and only if, it satisfies two conditions: the principle coheres with existing legal materials and the principle is the most morally attractive standard. Decisions based on constitutional principles disregard questions about promoting the general welfare of a community, instead targeting the question of what are the rights of the people under the Constitution. By using the arguments of principles, constitutional judging secures that rights and freedoms are guaranteed as it is said on the constitutional text. Even without overt constitutional support a person still has the right to be treated with the same respect and concern as anyone else.\footnote{Duxbury, \textit{Patterns of American Jurisprudence}, supra note 708 at 296.} H. L. A. Hart claims that in hard cases judges do exercise discretion.\footnote{H.L.A Hart, \textit{The Concept of Law}, supra note 462 at 5-11.} When a case cannot be decided by the strict application of the written rule, discretion prevails so that the case decision in the particular case results in a fresh piece of legislation.\footnote{Dworkin, \textit{Freedom’s Law}, supra note 576 at 31.} However, Dworkin does not accept strong judicial discretion nor does he support the idea of discretion as “absolute power of judges to impose their own convictions on the public.”\footnote{\textit{Ibid} at 8.} Given that assumption, judges may not read their own convictions into the Constitution, and they must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms explicitly designated in the document, such as the freedom of speech. Indeed, it is possible to agree with Dworkin that judicial discretion is constraint by principles, yet not based on morality, but rather on constitutional principles that stand the test of time and represent the history, culture and the identity of the country. Judges are not responsible for setting the goals that society wants to achieve. Because creating and actualizing social goals is the responsibility of the legislator, who not only represents the majority of the people who elected them, but is also directed precisely by arguments regarding policy. The legislators are the one responsible for discussing, defining, and debating the goals that society as a whole wants to pursue, because they represents the venue to discuss these matters, rather than an elite of few judges. This point of view assumes the rights of the citizens based on principles that are already are set in the Constitution, even before the decision is made.
Constitutional Interpretation is a Construction Interpretation Process

In hard cases, tradition and policies are among those criteria used by the judiciary. However, the legitimacy of constitutional decisions rests on the principles that the community as an entity agree on and which are enforced equally for everyone. This jurisprudence is basically a theory of adjudication because both concern one and the same issue – namely, imposing the best available interpretation on a given practice. Judges need to take the community and the morals into consideration, as Dworkin affirms, “by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.” However, in the case of Venezuela, judges can use this as an opportunity to provide their own particular views regarding political ideologies. As pointed out by John Bell, Dworkin characterizes policy as the category of “non-ethical standards.” This “de-moralization” of the idea of policy based on non-ethical standards refers to issues designated by the political field. They are set out in order to justify a decision by showing that it fulfills certain goals of a political, economic, or social nature. These goals, for example, can be for greater health or a better environment. Dworkin defines the policy of a law as among its ultimate goals. Yet, the judges, as said before, are not necessarily best suited to consider policies in certain circumstances, since they tend to restrict other important rights. However, Dworkin contends that the judges’ personal political or moral views do not shape constitutional precepts; it is the community as an entity that recognizes those rights and freedoms as valuable and giving meaning to the Constitution. However, under the premises of Dworkin’s theory, “the judge is prohibited from shaping the abstract moral Provisions which make up the Bill of Rights to accord with her personal political philosophy.” Instead, judges are obligated to develop the best constructive interpretation of a community’s legal practice.

Dworkin’s validity of legal norms depends more on their merits or content, than on their sources or form. Then, the Constitution is a document with particular principle

735 Dworkin, Taking Rights Seriously, supra note 358at 90.
737 François Du Bois, ed The Practice of Integrity: Reflections on Ronald Dworkin and South African Law (Cape Town: Juta & Co Ltd., 2008) at 97[Hereinafter: Du Bouis, The practice of Integrity]
aspirations: “the correct view, I believe, is that judges do and should rest their judgements on controversial cases on arguments of political principle, but not in arguments of political policy.”\textsuperscript{738} According to legal scholar Andrei Marmor, “it clarifies how it is that all forms of interpretation are radically valued independently or, in other words, how it is that evaluative judgments profoundly determine our interpretations.”\textsuperscript{739} These principles are those embedded in a constitution as law and are products of deliberate social and political decision. For example, Venezuelans elected a National Assembly that collected the community’s values and principles to build the fundamental law of the land, which ended with the enactment in 1999 of a new Constitution. However, the Supreme Court in difficult constitutional cases has been deciding inevitably according to political or ethical terms. This action seems to misunderstand the role of judges when interpreting the Constitution. The Court is relying on moral and political arguments to interpret the meaning for those provisions in question, in order to fit with the community’s values. Yet this has been permitting judges to impose their own views on the rest of society regarding the \textit{Social State of Law and Justice}. Although, in Dworkin’s jurisprudence, the distinction between laws and morals is no longer relevant, this does not allow judges to freely impose their personal ideologies while adjudicating constitutional rights. Instead, the best available interpretation of a given practice concerns the justification of beliefs that are extracted from the law rather than from the judges’ personal views. Dworkin emphasizes on the importance of principles, not only in the legal sphere but also in everyday life. “A principle of self respect, each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity.”\textsuperscript{740} Definitely, the role of principles is to guide people in identifying what really matters to succeed in life.

\textsuperscript{738} Dworkin, \textit{A Matter of Principles}, supra note 694 at 11.
\textsuperscript{739} Andrei Marmor, \textit{Interpretation and Legal Theory}, supra note 734 at 39.
\textsuperscript{740} Dworkin, \textit{Justice for Hedgehogs}, supra note 612 at 203.
Justice Barak’s Purposive Interpretation

Justice Barak claims that the Constitution should be interpreted in accordance with its purpose. Judges, in his view, depart from the literal meaning to construct a normative concept of the purpose of the Constitution. This purpose contains both a subjective purpose, regarding the intention of the founding fathers of the constitutional text, and an objective purpose that understands the role and function of the Constitution. Judges must study the provision in question to determine its role and function at the time of its creation, as well as the time of its interpretation. “The judge formulates the purpose based on information about the intention of the text’s author (subjective purpose) and the ‘intention’ of the legal system (objective purpose).”741 Then, judges find the ultimate purpose when both types of purposes point towards the same goal. Certainly, the reason behind the words used by the author of the constitutional precept is an important factor for the interpretation of the Constitution, but as Justice Barak’s points out, it is not the only one. Particularly, it is important to see these authors’ intentions in relation to the understanding of the community’s beliefs over the years and a reflection of society’s history and tradition.742 One could argue that the Supreme Court in different constitutional cases when it is trying to elucidate the meaning of the Social State of Law and Justice was indeed attempting to reflect the understanding of the community’s beliefs. Yet, judges have the responsibility to make difficult decisions even if that means going against of the majority’s perception of right or wrong because they are the faithful guardians of the long-standing principles of the Constitution. This relationship provides judges with a more precise and clearer meaning of principles, according to American law professor Thomas Balmer, “the center piece of Barak’s purposive interpretation is the interplay between what he calls ‘subjective’ purpose and ‘objective’ purpose to arrive at the ‘ultimate’ purpose of a legal text.”743 Judges have the discretion to give expression to goals, values, and aspirations of the Constitution. The purpose is not found or discovered, but rather constructed by the interpreter.

742 Ibid, at 391.
743 Thomas A. Balmer, “What’s a Judge to Do?” (2006) 18 Yale J.L. & Human 141 at 142. [Hereinafter Balmer, What’s a Judge to Do?]
Purposes of the Constitution:

The goal of constitutional interpretation is to achieve the objective purpose of the textual norms of the Constitution. According to Justice Barak, “the objective purpose constitutes the values, goals, interests, policies, aims, and function that the text should actualize in a democracy.” The purpose is deduced from a series of factors, such as the language of the text, its history, and the culture, each of them involved in the legal system. The text itself – and not the interpreter – supplies the normative construction for gathering the objective goals that the text sets out to achieve. The purpose is what animates the text and it is what the interpreter attempts to specify. In fact, the literal meaning of the text is not sufficient to provide a right answer to a range of meanings that an open text can provide. It is possible that diverse meanings of a text can mislead the interpreter. However, judges, according to the purposive interpretation, are capable of understanding the language of a text to gather enough information about its subjective purpose, the intention of the author, in order to elucidate the objective purpose, the goals that it sets out to achieve. The founding fathers’ intentions are not enough to provide a clear answer to difficult cases. Instead, the text has objective purposes that are deeply and basically understood by society. “They consist of the values and policies that establish the identity of the community.” The objective purpose is the result of a long development process that has historically determined society’s aspirations. The basic aspiration of the people must have been in accordance with the intention of the authors representing the people that wrote the constitutional text. The objective purpose of the Constitution is subject to change over time. In Justice Barak’s perspective, the Constitution is a living document, following the metaphor that the Constitution is a living tree. It is therefore natural that the objective purpose of the Constitution reflects the contemporary values and conception of society. Justice Barak adds, “the judge tries to find out which purpose would most rationally achieve the social project that the text established.” Essentially, judges instead of being trapped in abstract analysis, in Justice Barak’s view, they must remain flexible to take into account the needs for the concrete realization of the constitutional text.

744 Ibid at 90.
746 Barak, Proportionality Constitutional Rights supra note 696
747 Barak, Purposive Interpretation, supra note 741 at 150.
In order to determine the objective purpose of the Constitution, judges must first consider the explicit and implicit language of the constitutional text. According to Justice Barak, “judges determine objective purpose by reference to the basic values and principles in existence at the time of interpretation.” That is, the Court reading the Constitution must identify in its text the values, principles and policies that reflect society’s changes. Purposive interpretation considers the most fundamental values of society, reflecting long-standing views rather than its current, transient fads. The interpretation of the Constitution must be dynamic, not frozen in time, giving the objective purpose meaning in contemporary society, in order to accomplish the needs of a modern democracy. Justice Barak adds, “any perspective on the judicial role is a function of place and time. It is influenced by its environment. It is relative and incomplete. It changes periodically.” Indeed, he acknowledges the use of external sources to determine the objective purpose, ensuring harmony with the Constitution as a whole, interpreting each precept as an integral part of the others. The Court, in Justice Barak’s perspective, must see the Constitution as a unity in order to determine its objective purpose in society. This understanding of the Constitution as a unity includes reviewing its historical background, the social needs that motivated the authors to write it, the jurisprudence, and the fundamental values of the entire constitutional system.

Judges construct the objective purpose recognizing the importance of the historical context that serves as background for the constitutional norm, providing insights regarding the intention of the authors and the system itself. The needs that society wants to achieve and that motivated the authors to write the text also provide great help for judges to formulate the objective purpose. This, along with the case-law that other judges have been producing over years concerning similar cases, which offer a great chain of rational consideration to the objective purpose. However, one of the most important aspects to consider when judges are constructing the objective purpose of the Constitution, in Justice Barak’s view, are the fundamental values. “Fundamental values serve as the general objective purpose of every text, not because they express the intention of its author, but rather because the text operates

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748 Ibid at 156.
749 Barak, Proportionality: Constitutional Rights, supra note 696 at 64.
751 Barak, Purposive Interpretation, supra note 741 at 162.
within a system from which it draws life and on which it relies for enforcement. In the light of this insight, the Court must refer to these fundamental values in order to construct the objective purpose of the Constitution, which, in accordance with the subjective purpose and the authors’ intention, provides the best answer to constitutional interpretation. It is the judge’s responsibility to recognize them, as they are part of the Constitution itself.

Basic values embedded in the text, as Justice Barak explains, are product of interpretation. These basic values and principles, which make the Constitution supreme, are justice, equality, freedom of speech, assembly, religion, and dignity. Of course this list is not exhaustive, it just represents a set of core values that the Court as protector of the democratic and harmonious living in society, must provide with clear meaning. In this regard, Justice Barak is emphatic to state that “judicial rulings should reflect not judges’ own values but rather those they believe are warranted by the nature of their legal system and the ethos that characterizes it.” Although Justice Barak agrees with the judges’ strong discretion to consider policy and principles, he clearly states that they cannot impose their own ideas on society. Judicial discretion must be exercised with objectivity and responsibility, crystallizing the social consensus on the basic values that represent the identity, culture, and history of the nation. These basic values are essential to determine the objective purpose of the Constitution, because they can grow and evolve yet they stand the test of time. Furthermore, this set of basic principles is common to democratic countries. A unique part of a constitutional democracy, where citizens have the opportunity to express themselves freely, meet with different people, follow their own religion and have a judicial system that solves issues with equality and justice. In other words, they live in a society that respects the rule of law. Therefore, the Court must seek to achieve the objective purpose of the Constitution that is just, fair and efficient. In Justice Barak’s perspective, “purposive interpretation distinguishes among different type of texts and determines the relative weight assigned to presumptions of subjective and objective purpose for each of these different types.” In the case of the Constitution, Justice Barak expresses that its interpretation is subject to formulating the subjective purpose, which includes principles, values and goals that the founding fathers sought to achieve.

752 Ibid, at 164.
753 Ibid, at 165.
754 Ibid, at 183.
Constitutional Interpretation is a Holistic Process

The interpretation of the Constitution requires the analysis in depth of the system as a whole to determine the main purpose of each of its components. It is necessary that the Court understands the influence of the past, the present needs of society and the goals that the text is set out to accomplish for the future. Indeed, judges in determining the Constitution’s purpose through interpretation are considering the past, present and future of the document as a holistic enterprise. This is particularly true when the Constitution is difficult to change or amend, but the public needs a clear answer for modern social issues that even the brightest founding fathers could not have anticipated.

In fact, Justice Barak explains, “only thus is it possible to balance among the past, present and future, can the constitution provide answer to modern needs.” Judges must take into account that the values and principles, as objective purposes are in close relation with the intention of the founding fathers, as subjective purpose. In other words, they are seeking synthesis and harmony between past intentions, present principles and future goals. The development of the constitutional text is the responsibility of judges. They must understand the text in a way, which respects the historical efforts of the authors as well as the goals, the principles, and the values to achieve. The Court must resolve constitutional conflicts, honouring the intention of the founding fathers in harmony with achieving the expectation of modern society. “the judiciary plays a central role in every democratic structure […] the judge must preserve democracy and defend the constitution. Democracy cannot exist unless we fight for it.” Indeed, it is the ultimate goal of the Court to protect democracy as the unique system in which citizens can enjoy freedom. In an effort to provide certainty and coherence at a time when society changes its views on contemporary issues, judges must give meaning to the words of the Constitution in close relationship with the goals, principles, and values that stand the test of time. “That purpose contains both the subjective purpose, regarding the intentions of the creators of the constitutional text, and the objective purpose, as to the understanding of the text based on its role and function.” In Justice Barak’s view, only the integration of the subjective and the objective purpose brings a holistic interpretation of the Constitution.

755 Barak, The Judge in a Democracy, supra note 750 at 130.
756 Barak, Purposive Interpretation, supra note 741 at 236.
757 Barak, Proportionality: Constitutional Rights, supra note 696 at 46.
The legitimacy of constitutional jurisprudence ascribed to the accuracy with which judges interpret the written words of the fundamental law. Indeed, the public expects judges to assume an objective analysis of the cases in order to decide disputes according to the Constitution. Certainly, judges in a democratic society shall go beyond mechanical deductions of the applicable legislation to accomplish the ultimate purpose of the Constitution in legal disputes. Many constitutional challenges attempt to dress up political problems as legal issues reaching for the wisdom of judges to obtain a concrete answer. As Justice Barak says, “my approach is that the role of a court in a democracy is not restricted to adjudicating disputes in which parties claim that their personal rights have been violated. I believe that my role as a judge is to bridge the gap between law and society and to protect democracy.”

Indeed, the goal of constitutional interpretation, aside from providing a concrete meaning to the text, is to advance the principles and practices of democracy. Although the choice to assess the best possible policy for the country is an exclusive responsibility of the legislature or the President, the Court contributes by upholding those policies grounded and weighing them according to fundamental values and human rights. Furthermore, the Court is responsible for holistically reading the constitutional text to preserve the clarity of the law, the institutional capacity to solve divisive issues, and political prudence in a well-functioning democracy. The holistic process of interpretation is validating the theory of purposive interpretation in constitutional law. Justice Barak concentrates on a variety of considerations related to constitutional disputes, demonstrating that the purposive interpretation theory provides judges with a tool to engage holistically the legal system. Justice Barak adds that “constitutional purposive interpretation, with its holistic approach, takes into account both subjective and objective purposes when approaching the constitutional text.”

In doing so, the synthesis between the subjective purpose (intentions of the authors) and the objective (the goals that the Constitution is set to achieve) reconciles with the idea that judges can be social engineers, but must follow the rule of law in a democratic society. Then it is possible to affirm that purposive interpretation is only appropriate for democratic regimes and judges shall set aside their own political interests to apply the rule of law as a minimum requirement.

758 Barak, The Judge in a Democracy, supra note 750 at 193.
759 Barak, Proportionality: Constitutional Rights, supra note 696 at 48.
Judicial Discretion: The Court Must Adopt an Objective Attitude

The role of the Judiciary is to follow both the historical foundations as well as the innovative concepts embedded in the Constitution in order to provide meaning to fundamental rights and freedoms. The rise of judicial intervention in society’s contemporary issues has opened debates about the legitimacy of judicial discretion. The open text of the Constitution requires an interpreter to concentrate fully on bridging the gap between each word written in it and the commitment to accomplish the goals, principles, and values as the objective purpose intended by framers of the Constitution. To accomplish this responsibility, Justice Barak explains that the Court exercises discretion, weighing and balancing conflicting values that guide members of a community.760 Indeed, he adds “judicial discretion is the power of the judge to choose among several interpretative alternatives, each of which is lawful.”761 Opportunities to exercise discretion reside in hard cases, which suppose that the verbatim application of the law is disputable. “A judge must sometimes exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.”762 While judges must remain professional, reading the Constitution fairly, they fulfill their duty extending beyond the law to secure democracy in shifting societal conditions. According to American constitutional law professor Alan Tart, “society’s sense of justice cannot readily be reduced to precise legal standards.”763 Although the legislature has established rules and norms to define or indicate societal standards, it is incumbent on judges to exercise their discretionary powers in the name of justice and fairness on a case-by-case basis. “Every text requires interpretation,”764 so there is no meaning without interpretation. Although most texts do have plain meanings and perhaps allow for only one correct reading, these texts still require an initial conscious (or unconscious) interpretation to determine whether they are plain texts.765 Constitutional controversies are contested and controversial. However, Supreme Court judges have the ultimate responsibility of being guarantors of the democratic process in society.

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760 Aharon Barak, as quoted in Kent Greenawalt, Legal Interpretation: Perspectives from Other Disciplines and Private Texts (New York: Oxford University, 2010) at 335.
761 Barak, Hermeneutics and Constitutional Interpretation, supra note 745 at 771.
762 Barak, The Judge in a Democracy, supra note 750 at 146.
764 Barak, Purposive Interpretation, supra note 741 at 12.
765 Ibid at 14.
Complex social issues require judges to comprehend adjudication as not only determining the applicable rule or norm in a specific case, but also promoting and protecting the democratic process. In this regard, American constitutional scholar Craig Ducat adds, “to adequately justify the power of constitutional review, appointed, life-tenured judges must be shown to possess a unique quality – one so paramount that it transcends the importance of democratic accountability.” Indeed, judges have to demonstrate with their decision that personal values, political agendas or moral prescription are set aside to let the Constitution achieve its purpose. According to Justice Barak, their interpretation of constitutional rights must deduce the purpose to “reflect the full scope of the ideals that a particular right is seeking to achieve.” Indeed, he justifies judicial discretion by explaining that interpretation is not about determining the true meaning of a text because this ambition is extremely difficult. Instead, he argues that judges should search for the proper meaning of the text, knowing that the process is both discretionary and bounded for to judges. Such discretion is fundamental for the interpretative process to determine both the objective and substantive purposes. Judicial discretion is, in effect, the power “to decide which particular meaning, from amongst several legal meanings, is to be chosen, and to decide on the appropriate balance between the various competing considerations.” The constitutional text, like any other legal document, may have several meanings exposed through interpretation alone, it is the judge’s choice to advance the purpose of the norm embodied in a text. Justice Barak indicates that interpretation requires strong judicial discretion to deduce and reach the proper balance to apply coherently this theory of interpretation: “A system of interpretation reflects the reciprocal relationship between judiciary-legislature-executive and the will of the individual within that system.” The interpretation of the Constitution is a serious enterprise, in which judges must resolve ambiguities rather than exposing personal ideas or moral prescription. The normative nature of legal decision-making situates the parameters of this most interesting and comprehensive theory of legal interpretation.

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767 Barak, Proportionality: Constitutional Rights, supra note 696 at 71.
768 Ibid. at 9.
770 Ibid at 31.
The adjudication of constitutional rights is subject to a set of rules and principles. However, when the complexity of a case makes it impossible to rely solely on the written rules, judges exercise their discretion on the matter. This happens because legal texts have multiple purposes that often exist at different levels of abstraction. Justice Barak validates the ability of wisely employed discretion because “wisdom is a component of discretion in interpretation; I think judges should use their wisdom to find justice.” Using purposive interpretation, “an interpreter must make every effort to resolve contradictions among the different purposes [taking] all the purposes into account and [trying] to synthesize them.” Discretion becomes consequential when judges have to balance the subjective and objective purposes of the law; wisdom comes into play when they are looking for the best and most reasonable solution in difficult issues. Then, an interpreter of the law must weigh the objective and subjective purposes of the law to provide a reasonable result. Certainly, judges, as human beings, consider life experiences, reason, and emotions. Yet, they have a dual limitation to their own discretion: the inevitable use of the legal text, and their own wisdom logically and reasonably forcing them to realize the implications of their decisions. Although procedures and limits exist for judges to exercise discretion, Justice Barak is very forthright in defending judicial discretion: “[Judges] exercise choice, but they remain within the confines of a society, a legal system, and a judicial tradition.” He insists that a judge, while interpreting, must adopt an objective attitude to the purpose of the law and the individual legal text. However, there are “situations in which the interpreter of a legal text encounters a number of potential purposes.” In those situations, judges need discretion to narrow down possible results and respond accordingly to the text. “Judges never have absolute freedom of choice. The scope of their freedom varies from issue to issue, but it is always bounded.” Although Justice Barak favours judicial discretion to choose the relevant normative construction from the point of view of its purpose, judges are constrained to determine the purpose of the law through the semantic meaning of the text.

771 Barak, Purposive Interpretation, supra note 741 at 213.
772 Ibid, at 117.
773 Ibid, at 212.
774 Ibid, at 207-208.
775 Stanley Fish, “Intention is All There Is: a Critical Analysis of Aharon Barak’s Purposive Interpretation in Law” (2008) 29 Cardozo L. Rev. 1109. [Hereinafter Fish, A Critical Analysis of Barak’s Purposive Interpretation]
Reconciling Dworkin’s Principles & Barak’s Purposes

Both interpretive theories are unique, and both have been the subjects of criticisms. However, in spite of those criticisms, these scholars often appear to claim that they provide better accounts for constitutional rights interpretation. To differentiate what is common from what is unique is a daunting task. Rather, each conception of constitutional interpretation has its own viewpoint. It is important to consider both scholars’ justifications and recommendations for proper scopes and limits before expressing the argument about what would be a better perspective for Venezuela and the reasons for such a perspective. Below are the two key differences in viewpoints:

The Interplay between Principles and Purposes

Dworkin argues in favour of the constructive interpretation, which assumes law as integrity and aims at the principles of justice, fairness, and due process. According to Dworkin, judges must determine the best possible answer by assuming that the Constitution is structured by rules that are applied verbatim and principles that have their own importance and must be balanced to enforce them equally for everyone. In Justice Barak’s view, it is unjustifiable to privilege one set of principles over all the democratic values embedded in the Constitution. Indeed, Justice Barak affirms, “no one magic word like integrity (according to Dworkin) or efficiency (according to scholars of law and economics) or justice can capture law as social phenomenon.”776 In fact, the Constitution embeds fundamental values that represent the history, culture, and identity of a nation. Fairness, justice, and equality, are all-important rights, which judges must guarantee in their decisions. Justice Barak argues that the relationship between subjective and objective purposes provides judges with a clear meaning of society’s fundamental democratic values. Justice Barak and Dworkin agree that the Constitution holds the most important principles that a society recognizes as fundamentals. Yet they disagree on the judge’s exercise of discretion and the totality of principles that are rooted in the constitutional text. In Dworkin’s perspective, integrity means that the law must provide one clear answer, providing the same treatment for everyone equally.777 In order to do so, judges engage in a constructive interpretation that understands the importance of the principles of justice, fairness, and due process, which justify the Court’s adjudication of rights and freedoms.

776 Barak, Purposive Interpretation, supra note 741 at 296.
777 Dworkin, Laws Empire, supra note 341
In the case of Justice Barak’s purposive theory, constitutional interpretation favours the objective purpose, goals, values, aims, policies, and the function of the text to realize the author’s intentions in a democratic society. “It reflects the purpose that the norm is supposed to achieve within the bounds of a given democracy, at a given time.” The purpose provides meaning to the norm without setting aside the founding father’s intentions, which are the subjective purpose of the norm. “Purposive interpretation treats the fundamental values of the system as a purpose that coexists with, and sometimes supplants, subjective purpose.” Indeed, in Justice Barak’s purposive interpretation, the objective purpose, which includes the values, goals, and aims of the constitutional norm, is given ultimately more importance when it differs from the subjective purpose, which is the abstract intent of the legislator. Dworkin, on the other hand, insists that “the Constitution means what the framers intended to say.” Furthermore, law as integrity relies on the historical understanding of the intentions fixed in the constitutional document. Judges, in Dworkin’s view, must take into account the political and legal practices of the past, including the founding fathers’ intentions, aiming to identify the set of principles that best explain the justification for all the decisions in the name of the community. Judges should identify rights assuming that an author – the community as an entity – expresses consistency and coherence in creating them. Moreover, Dworkin affirms that “the Constitution must be interpreted as an expression of the best coherent vision of justice that can plausibly be attributed to the contemporary community.” In Justice Barak’s perspective, the Constitution shapes the character of society, its aspirations, reflecting events of the past, and sets the structure of the present, and the aspiration of the future. The purposive interpretation takes into account the founders’ intentions, the text as a whole, the history of the Constitution and the democratic values and principles of the system. “The purposive interpreter aspires to synthesis and coordination between the various pieces of information, resolving any lack of coordination between the different levels of abstraction of subjective purpose by choosing the level of abstraction that accords with objective

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778 Barak, Purposive Interpretation, supra note 741 at 377.
779 Ibid, at 297.
782 Dworkin, Law’s Empire, supra note 341 at 380.
The Interplay between Principles and Purposes

Justice Barak recognizes the importance of the legislative branch creating legal norms in their functional sense, just as Dworkin does. The role of the Court in interpreting them in accordance with the objective and subjective purposes is to find the ultimate functional role of the constitutional text. Because judges are not subject to popular vote their decisions do not have to implement a political view, or even be popular to be right. “In interpreting a piece of legislation, judges should realize neither their own intentions nor those of their political backers.”783 In this regard, Dworkin explains that constitutional interpretation is a matter of principles, not policies.785 The focus is on protecting constitutional rights, giving more importance to principles rather than rules and constructing the best possible justifications for the meaning of the law. Both scholars agree that constitutional interpretation is a matter of finding the best possible answer to determine the meaning of the norm. The purpose, according to Justice Barak, rests on the “values, goals, interests, policies, and aims that the text is designed to actualize. It is the function that the text is designed to fulfill.”786 Dworkin’s moral considerations in legal decision-making relates with Justice Barak’s views on adjudication. The role of the judges is to protect democracy and human rights, aside from implementing policies, which is the central function of the executive or legislative branch. The fundamental values embedded in the norms provide a guide for the judges to determine the right meaning of constitutional precepts. These values are not related to the personal or political perspectives of the judges; on the contrary, democracy and human rights reflect the identity of the nation. Furthermore, both authors pleaded that the constitutional authority of the Court depends on the preservation of the democratic system. “A judge who sees it as part of his role to protect the constitution and the democracy will deliberate in a manner differently from a judge who distances himself from such considerations.”787 Justice Barak emphasizes the role of the court as protector and preserver

783 Barak, Purposive Interpretation, supra note 741 at 385.
784 Ibid, at 238.
785 Dworkin, A Matter of Principles, supra note 951
786 Barak, Purposive Interpretation, supra note 741 at 89.
787 Barak, The Judge in a Democracy, supra note 750 at 120.
of democratic institutions, just as Dworkin’s theory is fundamentally intended for democratic countries. This is a valuable insight because judges, especially in Venezuela should serve to protect and preserve the democratic institutions. The character of society comes from its values and principles rooted in fundamental law, and it depends on the will that justifies and reflects the democratic system. The judges’ interpretation of values such as dignity and liberty must guarantee social and political rights within a community, such as freedom of expression, due process, and equality under the law.

The public’s confidence in the role of the Supreme Court is vital for the democratic system. In this regard, the writers of the Constitution established the strict separation of power as a fundamental principle of Venezuelan democracy. The realization of the judges’ own personal interest in the result of constitutional controversies not only undermines the confidence of the population in their judicial system, but also permits authoritarian ruling that threatens the democratic system. Policy decisions are the responsibility of those the population elected to provide the best possible solutions to society’s modern issues. Justice Barak and Dworkin insist that judges are not legislators, making it clear that the Court must defend the rights of individuals against the government, even when a democratic majority could think that it is not the right decision. The constructive process that Justice Barak and Dworkin agree on bridges the gap between the written words of the Constitution and contemporary problems. It assumes a deep understanding of the constitutional foundations, reading the Constitution as a whole, in harmony with previous precedents and the founding father’s intentions. Nevertheless, Justice Barak affirms that “the purposive interpretation does not give the abstract intent of the text’s author such a central role.” 788 The subjective purpose, a principal component of the purposive interpretation, acknowledges the intention of the founding fathers. “The relevant intent is aimed at the creator’s concept of the general and abstract purpose of the legal norm that was created.” 789

However, instead of keeping the dead hand of the past in the reading of the Constitution, the judges are looking forward to developing and improving the adjudication process. In fact, Dworkin goes even further by affirming that in those difficult cases, where there exists an internal conflict between principles, judges resort to deciding according to the political

788 Barak, Purposive Interpretation, supra note 741 at 297.
morality of the constitutional text. 790 In Justice Barak’s perspective, “purposive interpretation, like Dworkin’s system, adopts a moral-political approach.” 791 Although the understanding of fundamental values in Justice Barak’s perspective differs from Dworkin’s view, both reflect on the Constitution’s democratic character of a liberal society, as the entrenchment of society’s ultimate aspirations, such as fairness, justice, and equality. The confidence that the public has in the Court as a guardian of the most valuable principles, including the democratic process, restrains judges from imposing on the population their personal takes on public policy.

In general, the purposive theory has provided insights to demonstrate that the Constitution is not just the written words in a document. Beneath the text lie the principles, goals, and values representing the aspiration of the nation. The role of judges is to assemble the subjective purpose, which includes the founding fathers intentions, and the objective purpose that includes the fundamental values, without setting aside the case-law and constitutional history in order to provide a clear answer in constitutional controversies. Justice Barak emphasizes that, “purposive interpretation does not ignore subjective purpose in constitutional interpretation, but it does not give it a prominent role.” 792 Instead, the relationship between the subjective and objective purpose remains a living process in which judge’s exercise their discretion to give expression to the constitutional text. Justice Barak acknowledges the socio-historical context in which decisions are made, considering the underlying basic fundamental values that represent the perspective of the collective, protecting the individuals as well as society’s goals and objectives. However, in the case of Venezuela, it is important for judges to distance themselves from their own personal preferences and the imposition of political views to ensure the equal protection of everyone. Justice Barak says that the interpretation of the Constitution must adopt a broad and generous perspective that achieves its purpose in harmony with the founding fathers intentions. 793 Nevertheless, the Venezuelan Constitution is a broad document interrelated with the social, economical and political issues of this nation, concentrated on the written text of more than three hundred provisions. A broad view on its interpretation might generate

790 Dworkin, Freedom's Law, supra note 576.
791 Barak, Purposive Interpretation, supra note 741 at 298.
792 Ibid, at 389.
793 Ibid, at 392.
an opportunity for judges to exercise discretion to impose their personal views. Judicial restrain is necessary based on constitutional principles to provide clear and legitimate answers to the most controversial constitutional cases. In the Venezuelan context, the subjective purpose of Justice Barak’s purposive interpretation represents a dilemma for the interpretation of the constitutional text, because of the difficulties of implementing the intentions of those who wrote the document, as they are still alive and in different fields of the political spectrum. It is difficult for judges to determine clearly the main intentions of those who participated in the elaboration of the constitutional text. Although those intentions are important, in the Venezuelan context, they are not crucial for judges to decide constitutional issues.

The role of Discretion in Constitutional Interpretation

The inexactness of the constitutional text makes judges exercise a degree of discretion in the adjudication of rights. Appropriately, discretion is only possible in cases where a gap exists between the written text and the facts. “Judicial discretion exists because there are legal problems that do not have a single solution.” In this respect, Justice Barak states that any interpretative approach must rely on discretion to some degree. Purposive interpretation simply acknowledges that fact openly. Judges cannot have absolute freedom to present their own views as the law. In fact, it is completely unfair for judges to impose their values or personal ideas without appreciating the fundamental principles of the Constitution. “Although the judge is sometimes accorded judicial discretion by the system, this discretion is bounded by a limited set of values, traditions, history, and text that are unique to the system in which he operates.” Nonetheless, Dworkin does not recognize the existence of judicial discretion, rejecting the concept of “strong” judicial discretion because of ambiguous and vague language in the constitutional text. Instead, Dworkin says that the interpretation of the law must accord with legal principles. As polish jurisprudence professor Aleksander Peczenik explains, “[Dworkin] recognises the vagueness of the legal language, yet insists that a perfect judge, bound by the enacted law, can interpret it in the light of the legal

794 Barak, Purposive Interpretation, supra note 741 at 208.
795 Ibid, at 207.
796 Barak, Proportionality: Constitutional Rights, supra note 696 at 64.
principles together with his moral judgement, and thus find the one right answer to all legal questions.  

However, Justice Barak disagrees with Dworkin’s view that there is no need for judicial discretion because is possible to determine a single legal solution for any case. Justice Barak affirms that “reasonableness does not provide a single, legal solution to every case. Law is not mathematics. It is a normative framework.” Overall, the framework of a legal system is what determines the boundaries of judicial discretion. Justice Barak insists that “this discretion does not include the judge’s personal beliefs which are not shared by society at large.” In this regard, Dworkin agrees with Justice Barak. Judges should interpret society’s values and not impose their personal ideals on society. The adjudication of constitutional rights, in the purposive perspective of Justice Barak, is legitimate when judges decide according to both the subjective purpose, as is the intention of the framers, and the objective purpose of the legal text, in other words, the goals, values, and principles embedded in the Constitution to address the more concrete needs of modern democracy. There is still a substantial difference between Justice Barak’s and Dworkin’s theories. Barak’s purposive approach is looking to establish a specific function to the constitutional text by recognizing the importance of the objective purpose. In Justice Barak words “only in that way can the constitution fulfill its most crucial social functions, the direction of human behaviour across generations of social change and the provision of legal solutions to modern, evolving needs.” Justice Barak, in a more functionalist perspective, believes that the Constitution plays a specific role in shaping society’s hopes for a better future. “The constitutional provision was not legislated in a constitutional vacuum and does not develop in a constitutional incubator. Rather, it is a part of life.” Yet, in a more formalist perspective, Dwokin’s theory of adjudication maintains that solutions for constitutional issues can be best explained by an abstract analysis of a cohesive system of principles that judges apply to give the ‘right answer.’ Regardless of these differences, however, there is something both can agree on: the role of the Supreme Court judges is to ensure that their decision respects equally all parties involved. Judges must always set aside personal,

799 Barak, The Judge in a Democracy, supra note 750 at 265.
800 Ibid, at 59.
political, or moral prescriptions that could jeopardize the authority of the Court while deciding difficult constitutional issues. This is crucial for the legitimacy of the constitutional adjudication.

**Summary:** This chapter was an original attempt at building a principled-and-purposive approach, different from arguments associated with the prevailing legal positivism, legal realism theories, and Ronald Dworkin’s moral reading in Venezuelan jurisprudence. The first section of this chapter was primarily dedicated to discuss the value of principles in Dworkin’s theory. The second section focused on the significance of the purposes in Chief Justice Aharon Barak’s Purposive interpretation theory, which outlines the process of determining the semantic meaning of a legal text based on the following set of normative insights: (a) a constitution must accomplish its purposes, (b) purposes of the Constitution: the priorities of functionalism and social welfare, (c) constitutional interpretation is a holistic process, (d) judicial discretion: courts have discretion but must adopt an objective attitude. While recognizing the importance of Dworkin’s defence of principles, this chapter identifies its commonality as well as its difference with the purposive theory of Justice Barak and concludes that it is possible to reconcile both theories. In the reconciliation of both theories emerges a new approach in which both principles and purposes play an important role for the adjudication of constitutional rights. Preserving the rule of law and recognition of an individual’s liberty constitutes an important component in their understanding of constitutional interpretation.
CHAPTER 9
THE PURPOSES OF CONSTITUTIONAL PRINCIPLES IN THE CONTEXT
OF THE VENEZUELAN CONSTITUTIONAL SYSTEM

The future of the Venezuelan Supreme Court hangs in the balance like it has never before. Since the adjudication of fundamental rights has fallen short of guaranteeing fundamental rights, it is necessary to restore the authority and legitimacy of the Court in a way that respects the idea of a society ruled by law. In an effort to provide a solution to this issue, this chapter proposes a bold new way of interpreting the Constitution. The following pages will focus on a general approach used to faithfully interpret the Venezuelan Constitution. The chapter will attempt to reconcile the priorities of formalism, specifically the fundamental principles of the Constitution with the priorities of functionalism and social welfare, for instance the accomplishment of the objectives (purposes) the Constitution sets out to achieve. Certainly, the general and deliberately open-ended constitutional phrases, like equality and freedom, call for a more studied judgment. This is more challenging in a country like Venezuela, where in 1999 one of the most comprehensive constitutional documents in the world was established.802 Indeed, in this Latin American country, judges have to deal with a constitutional text that has more than three hundred and fifty provisions, entrenching a robust long list of rights embodying the aspiration to social justice and human dignity.803 The Venezuelan Supreme Court struggles to determine the practical meaning of the fundamental rights and freedoms. Even to this day, there is substantial disagreement as to how the Court should interpret the Constitution. The reality is that no matter which country they are from, Supreme Court judges have to answer the most complicated questions. When the Court has to deal with controversial cases that divide the nation judges have no other choice but to engage in a philosophical examination in order to justify their decisions. In these difficult cases, there is little room for mechanical deduction when constitutional issues refer to what H.L.A Hart calls the “penumbra of uncertainty.”804 This refers to cases where the written words of the Constitution cannot be applied straightforwardly.

803 Constitución de la República Bolivariana de Venezuela 1999, supra note 306.
804 Hart, The Concept of Law, supra note 462 at 134.
Principles are considered primarily standards that passed the test of time. Even in a society like Venezuela that is constantly changing there is a long standing set of constitutional principles that represents the culture, history and identity of the Venezuelan constitutionalism. They are inherent in the very nature of the Constitution to primarily maintain the normative order. Constitutional judging requires an elaborate understanding of the written words of the Constitution to truly comprehend the complexity of its interpretation. A simple reading of the text in recent challenging cases that the founding father could not have anticipated must still have a tenuous connection with the needs, desires, interest and aspirations of modern society. Difficult cases deserve a comprehensive analysis that engages in delivering substantive justice. Yet, this must be done according to clear standards that not only are recognized as such, but also guarantee the respect for everyone. Judges have the difficult task of ensuring a society that is ruled by law. The population expects from their judiciary the full protection of their entrenched civil rights in the most fair and respectful treatment possible. Again, it is worth repeating that judges have the obligation to set aside their personal ideological preference when putting their expertise to practice. In fact, as the Venezuelan cases have demonstrated, when judges infuse their personal preference in constitutional judging, arbitrariness threatens the authority and legitimacy of the Court. Judges have the responsibility to respect the certain degree of stability, security and confidence provided by the Constitution. This guarantees that everyone is treated equally. This document ensures that no one has absolute and unconditional authority over others to impose despotic and arbitrary rules. It provides arguments to entrench a set of principles against any questionable future change. Even though society evolves, there are certain cornerstones that are part of the constitutional heritage of a country. Such arguments are part of the Constitution to remind those in power that clear and stable standards must be followed to ensure the respect of everyone. Judges of the Supreme Court are expected to follow standards, in order to provide the best possible answer in contested issues. The principles entrenched in the constitutional text can guide the judges and help them to faithfully interpret the written words. These set of constitutional principles are not merely formalistic representations, they embody consistency and determinacy, which are necessary to maintain the legitimacy and authority of the Supreme Court when dealing with challenging and unpredictable cases.
The Venezuelan Constitutional Principles

The open texture of the Constitution provides an opportunity for judges to play a more important role when rules cannot offer specific solutions to controversial cases. In those difficult cases, principles that make the Constitution a fundamental law are crucial to finding solutions. According to Dworkin, there are other types of authoritative norms than just rules: “principles, policies and other sorts of standards, most often I shall use the term ‘principle’ generically to refer to the whole set of these standards other than rules.”

These standards are normative ideas that can guide judges to give meaning to the general text of the Constitution, when an unprecedented situation comes before the Court and the system of rules cannot produce a definite answer. Constitutional principles are the governing standards that aim at guiding judges in their interpretation of the blue prints of the Constitution. In Venezuela, provision 2 of the 1999 Constitution clearly states a set of principles. Freedom, justice, equality, solidarity, democracy, and social responsibility are standards that reflect the history, culture and can articulate the identity of this nation.

Over the centuries of difficult episodes in Venezuela, these principles have been constantly embedded in the constitutional system and are now explicitly written as a fundamental part of the constitutional text. The central component of principles is that they are appreciated by the population as pillars that can defend it against arbitrariness, not only because everyone recognizes their importance, but also because they serve as cornerstones for society to thrive. Judicial authority is legitimate when decisions are taken according to these principles. Even with the progressive transformation of society, this set of constitutional principles is an intrinsic of the constitutional heritage of Venezuela. Certain parts of the various constitutions written over the years have truly promoted the interest of the people. Principles are not a formalistic conception that does not permit the evolutionary nature of the Constitution. On the contrary, they represent a framework that embeds an ideal society. This requires that judges faithfully interpret them to maintain stability and respect of the body of rules. Fidelity to the Constitution really means passion for the project that embodies these principles.

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805 Dworkin, Taking Rights Seriously, supra note 358at 22.
806 Constitución de la República Bolivariana de Venezuela 1999, supra note 306 provision 2
The principles underlying the Constitution are different from those political or moral ones. Moral principles are determined by personal choices, which are an inherent feature of personal beliefs. Individuals tend to trust their own subjective rationality when deciding how to behave in society. Their character is shaped by external factors such as family, community, or education, adopting maxims that their rationality recognizes as good. Rational human beings are able to make decisions following an internal code of conduct, yet they are born free from their own personal beliefs. Bernard Gert adds, “rational persons not only personally desire to avoid the evils caused by violations of these [moral] rules but also desire everyone for whom they are concerned to avoid these evils.”807 However, individuals cannot trust their own capacities to achieve rational decisions, because their subjective analysis could stand on false premises, preventing them from goodness. Each individual assumes differently the principles that guide their behaviour depending essentially on the benefits provided. A decision made on these grounds does not always lead to the most fair or just conclusion. Adopting a moral approach to make a decision frequently refers to the result of a personal journey that holds an argument exclusively based on certain beliefs. This demonstrates the difficulty of justifying moral decisions, because they might not be part of the consensus of the community.808 Political principles consider social issues or economic factors that influence individuals to embrace the premises of a particular ideology. They are concerned with the general welfare, either by letting the State control the distribution of wealth or by defending individual liberty against the State. There are inevitable tendencies to consider, but only one particular doctrine to render valuable judgments.809 Everyone is free to think or act in accordance with their own political or moral views, the role of law is to ensure that everybody can enjoy it responsibly with the same opportunities according to a consensus body of rules and principles.

The Constitution embodies a set of coherent and consistent principles that are the product of the constitutional heritage. Constitutional principles go beyond the reach of temporary changes in popular perception or the whims of those who hold power. They represent the untouchable pillars of the rule of law. In years to come they will continue to be present in Venezuela’s constitutionalism. Indeed, the force of these principles ensures that the decisions made on these grounds by the Court are representing the true values of Venezuelan society. The interpretation of a constitution does not entitle judges to impose their personal values on the rest of the population.\textsuperscript{810} It is not about their personal views, political ideologies, or moral prescriptions. Indeed, this approach delegitimizes the Court’s authority, making the public lose faith in the fairness of the judgments. Constitutional interpretation transcends these positions to preserve the principles of justice. The role of the judges is to make a decision regarding new and challenging cases, contrasting the facts with the principles involved. Judges are to avoid personal political/moral predilections to ensure the accomplishment of the constitutional goal embodied in the principles set in the written Constitution. It is obvious that judges are free to search for the authentic meaning of the constitutional text. Yet, naturally, when controversies cannot be settled by the strict application of the words in the text, they must honour the constitutional principles that legitimize the legal system. In this regard, UK legal scholar Neil MacCormick affirms, “principles are to be understood as expressing values which are held to be significant in and for the legal system.”\textsuperscript{811} Constitutional principles are justified on the grounds that they represent what is meaningful for a nation, regardless of individual moral or political beliefs. Constitutional judging must be consistent and coherent. The stability and credibility of the constitutional text depend on the faithful application of its written norms. Deciding cases on the grounds of principles provide judges with consistency and coherence, giving them the opportunity to justify their decisions with arguments that represent the true nature of the norms. One of the priorities of formalism is certainty in the adjudication of rights that provide stability in the legal system. Even though it is necessary to fully accomplish the role and function of the Constitution, this must be done according to standards that categorically guarantee decisions on the grounds of the law, to avoid disbelief and arbitrariness.

\textsuperscript{811} MacCormick, \textit{H.L.A Hart, supra} note 482 at 118.
The Constitution, as part of the apparatus of the government, aims to accomplish the progress and evolution of society. According to American Constitutional scholar Robert Churchill, “Constitutional rights are definite and decisive in a way in which moral principles (with their dimension of ‘weight’) are not.” 812 Freedom, justice, equality, solidarity, democracy, and social responsibility are the most elevated values of the country entrenched in the Constitution to ensure that moral prescriptions, majority rule, and political ideologies do not blind those who represent the will of the people. The Supreme Court of Justice is the institution that ensures the proper role and function of these principles within the constitutional text. Judges are ultimately responsible for bringing them to a more concrete level when they need to decide on controversial cases. In this regard, Archibald Cox explains, “a public that believes judges follow their own personal credos will lose confidence in the judiciary.” 813 Certainly, when the highest court of the land tends to favour political, moral, and economic agendas, it threatens its own independence. It is essential to have clear principles that guide judges in their decisions. American law professor Andrew Coan adds, “the existence of a written constitutional text, whose plausible range of interpretations is limited at any given time and changes only gradually, helps ensure the baseline of legal stability necessary to make common law innovation attractive.” 814 Indeed, constitutional principles offer the necessary degree of certainty and stability to promote the interests of citizens as they are recognized by the Venezuelan community. It is impossible to deny that Venezuelans share various political and moral views. However, the model of the government embodied in the constitutional text has been approved by popular consent with a national referendum, which enacted the Constitution. The guardians of the Constitution must therefore, in interpreting its text, bear in mind that these principles provide judges with the proper self-restraint to address the new social, political and economical challenges without setting aside the Constitution itself. Judges shall always justify their decisions relying on rational and acceptable standards inherent to the Constitution.

812 Churchill, Dworkin’s Theory of Constitutional Law, supra note 961 at 66.
813 Archibald Cox, “Judge Learned Hand and the Interpretation of Statutes” (1947) 60 Harv. L.Rev. 370 at 393.
Constitutional judging has the potential to advance democracy. Although democracy is commonly understood as citizens exercising their right to express their opinions through universal suffrage, it is not limited to casting votes to elect representatives. The basic principle according to which individuals and groups have the right to express different and unpopular views without prior restraint or punishment is a necessary element of any democratic society. From time to time, individuals and groups take centre stage to draw attention to their cause and influence the public opinion. Certainly, controversial topics bring heated debates that tend to divide unevenly an entire society. However, the exchange of ideas in the public forum without the risk of punishment or segregation is essential to a democracy. Freedom, as a constitutional principle written in the Venezuelan constitution, is a product of the long history of tireless efforts to make it a guaranteed right within the nation. The Court, able to review impediments or threats to this freedom, must facilitate and not obscure the vibrant role and function of this dynamic right. Although judges are human, and they have their own personal prejudices and views, they are the active guarantors of a set of touchstone rights and freedoms written in the Constitution. Constitutional judging serves to forward the exercise of democratic rights in society, not only by determining the degree of constitutional constraints but also by aiming to ensure that the State achieves the main mandate of improving the public well-being without excessive interference. There is no need for judges to let external factors get in the way of actively validating the constitutional principles that are the product of the history, culture, and identity of a nation such as Venezuela. As Justice Barak says, “constitutional interpretation is a process in which every generation expresses its fundamental views, as they are formulated against the backdrop of its past.” In this view, the Supreme Court, when dealing with controversies that are a great challenge to resolve according to the written text of the Constitution, shall ensure that its constitutional judgments give expression to the goals and aspirations entrenched in the constitutional principles. This is made possible by establishing the relationship of the constitutional principles and the purposes that underlie them. The proper way to reconcile the certainty of principles with their function in modern society is to interpret them in accordance with their purposes.

815 Barak, Purposive Interpretation, supra note 741 at 389.
The Purposes of the Constitution

The Constitution has a good share of specific rules, which judges should read fairly, and objectively in order to apply them straightforwardly. However, when the Court has to deal with rights and freedoms, its decisions tend to raise heated debates in the social, political, and economic spectrum. In such cases, judges have exhausted the fair reading of the text and must go beyond it in order to provide a clear answer to difficult controversies. Yet, the Court must remain authoritative for the sake of the democratic system and respect for the rule of law. Judges shall adopt an objective attitude, putting aside moral, political, or other external factors that might influence their judgment. In such cases, constitutional principles represent standards that embody a set of purposes to consider when dealing with challenging situations. The purposes are the aspirations to social justice in an evolving context. The role of judges is to weigh the needs of society in accordance with the role and function that the Constitution has to play. According to Justice Barak, “these objective purposes are the ones that the legal community wants to achieve with its norms, and they represent the deep and basic understanding of the legal community.”

These purposes are capable of growth and development over time to meet new social, political and economic challenges that were unimagined by the drafters of the Constitution. They represent concrete goals and aspirations that the Venezuelan legal system is set to achieve. Certainly, constitutional rights are frequently articulated as principles, such as freedom of expression. Yet the document is silent regarding its purpose in society. Then judges as guardians of the Constitution have the difficult task of reconciling the formal criteria that provide the certainty and determinacy of the decision in order to achieve their desired ends. This fundamental right represents the constitutional principle of freedom explicitly written in the Constitution. But also, this principle embodies a particular purpose, which is as simple as the hope of the Venezuelan society for a democratic, truthful, and respectful society. Purposes reflect national ideals that are intrinsic of the constitutional heritage, the culture and the

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816 Barak, Hermeneutics and Constitutional Interpretation, supra note 745 at 770.
817 The 1999 Constitution (Constitución de la República Bolivariana de Venezuela 1999, supra note 306) provision 3 states, “The essential purposes of the State are the protection and development of the individual and respect for the dignity of the individual, the democratic exercise of the will of the people, the building of a just and peace-loving society, the furtherance of the prosperity and welfare of the people and the guaranteeing of the Fulfillment of the principles, rights and duties established in this Constitution.”
identity of the country. Constitutional judging shall aspire to achieve concretely the desirable goals behind the principles.

Constitutional judging has to connect with reality. Judges can no longer accept mechanical application of constitutional norms, nor the use of personal, political, or moral opinions. The principles entrenched in the Constitution are a clear and consistent set of standards that provide the limits of the interpretative process. The practical purposes give the judges enough room to elucidate the function that these principles must play on concrete grounds to address the social change. Judges should not forget that their role is to make consistent decisions that facilitate the goals and aspirations set in the Constitution. From the review of Venezuela’s constitutional jurisprudence, it is possible to distinguish a need for bridging the gap between law and society, particularly, when cases brought to the Supreme Court unveil political, social, and economic issues, as they are not discussed at the proper level, which is the legislative branch. The Supreme Court must have clear and consistent standards that can link the formal written words of the Constitution to the modern social challenges. Judge must then examine the goals to be achieved with the constitutional principles, as clear and consistent standards to connect with the collective aspirations. For example, in the cases of freedom of expression, which have been controversial, instead of relying exclusively on the judge’s personal views or the restricted words of the text, the Court could give the proper role to this constitutional right, that is no other than the concrete aspirations of Venezuelans to live in a free, democratic, and truthful society. This right has been entrenched in the Venezuelan Constitution since 1811, when the country proclaimed its independence.818 Freedom was accomplished after a long and difficult struggle that ended with a high cost for Venezuela. The founding fathers in the first Venezuelan Constitution decided to guarantee everyone the opportunity to freely communicate ideas, thoughts, and opinions without previous censorship to honour this principle. Then, in order to reconcile this with the consciously evolving society, the judges shall eloquently determine the purpose of this principle and compare it with the concrete issue in order to find a practical solution.. This proposal to address the challenges constitutional judges must face would also bridge the gap between the formal written words of the Constitution and today’s social needs.

818 Brewer-Carías, Historia Constitucional, supra note 22
Venezuela’s constitutional jurisprudence demonstrates that determinacy and flexibility are important aspects of judging. Decisions regarding rights and freedoms must be done according to the Constitution, without ignoring the social issues that need to be solved. Particularly, judges should reconcile the formal criteria of the written law to ensure stability and credibility in their decisions. They should also address the practical role of the Constitution, specifically its real function in society. Constitutional rights can not be simple abstractions that become empty when it comes to challenging reality. In this context, the recognition of the concrete purpose does not mean the creation of a new law or legal duties. The basis for the interpretation of constitutional rights is the principles that provide a coherent and articulate framework and the reconciliation of the capability to achieve concrete aspirations and goals. This creates a strong link with the social needs of today’s society. It is true that often conflicting issues regarding politics, social and economic factors are combined in an unprecedented style. Judges in a humble and generous understanding of the constitutional text ought to concentrate on identifying the particular standards and the goal to be accomplished as an expression of the changing needs of society. The social, political and economic features of the Venezuelan society are always present in the decision-making process. It makes it difficult for judges not to detach themselves from the current social atmosphere. Yet, the relationship between the certainty of the principles and the goals and aspirations of the purposes, along with the objective of finding more a practical meaning to constitutional rights when dealing with high debated cases provide a workable approach for the interpretation of the Venezuelan Constitution. The Venezuelan Constitution has written rules that define the authoritative institutions, their powers, and limits, including the procedures to change them, such as the amendments or reforms to the constitutional norms. It also has a set of distinctive principles that embody fundamental objectives, ideals, and aspirations of the Venezuelan society as a whole. The recognition of rights and freedoms in the words of the Constitution summarizes the struggles that this society has experienced over the years when agreeing on particular rights, either social, economic or political in nature. In the case of authoritative principles they are the product of the constitutional heritage. Judges need to deeper to analyse the role of the constitutional system and find the proper meaning to the rights and freedoms in their particular context. This decision must correspond with the history, culture, and traditions of this nation.
The Purpose of the Venezuelan Constitutional Principles

The Constitution lasts throughout time only when the Supreme Court copes with contemporary social transformations, while still remaining faithful to its words. The purposes embodied in the principles represent the goals, aspirations, and objectives that the spirit of the Constitution aims to accomplish for the sake of a socially responsible, just, and democratic nation. The current need in Venezuela is to determine how constitutional rights ought to be adjudicated. It is not the personal views, moral ideals and political agendas, but rather the constructive role of the judges that must help them find a balance between the two extremes of the Venezuelan constitutional jurisprudence. Between these methodological extremes lies a new approach that incorporates principles and purposes category definition. By articulating the constitutional principles, judges are looking for transparency and stability. By reconciling them with the social welfare and evolution of society’s issues, the purposes bring the necessary flexibility for the judges to find an answer under the framework of the Constitution. Both principles and purposes can be harmoniously integrated in a way that constitutional interpretation can work towards a solution to the issues. Liberty, justice, equality, solidarity, are not just words written in a forgotten document. On the contrary, the Constitution is a vibrant document that requires judges to embrace its mandate for a dignified life for society as a whole. The fact that the 1999 Constitution compels the Supreme Court to guard and protect the constitutional rights of Venezuelan citizens obliges judges to take seriously their fundamental responsibilities as final arbiters of what is just and fair. It is evident that the Court has demonstrated concerns and a conscientious effort to provide solutions to contemporary social issues. Obviously, judges need to engage actively in the protection of fundamental rights and freedoms. However, the search for the modern meaning of the constitutional text cannot contradict the pillar principles of the Constitution. The Court inevitably needs to preserve its authority as an institution to solve controversial issues. Judges must justify their decisions according to clear, consistent, and recognized standards. The Constitution should be interpreted in light of the purposes behind its principles in order to provide real answers. Judges remain faithful to the Constitution, this requires them to reconcile the ends of well-establish principles with their purposes to elaborate concrete solutions to the most important social concerns, as they are covered in the open-text of the Constitution.
The Supreme Court’s jurisprudential theory advocates for an active role for judges. Yet their decisions have been restraining basic rights and freedoms against Venezuela’s long tradition of democratic values. Recently, the Court has adopted an approach that had a negative impact on its legitimacy and authority. It is a valid argument that law can be used as a broad concept to solve the most urgent societal problems. Yet, this must be done without contradicting one of the most important functions of the Constitution, which is the protection of individuals from the abuse of power. The absence of judicial protection for essential individual liberties enunciates the breakdown of the democratic system. Certainly, liberal, conservative, socialist nor capitalist ideological views fairly represent the written text of the Venezuelan Constitution. To ensure that judges do not merely express personal preferences, their decisions must establish the objectives, goals, and aspirations of the constitutional principles that truly represent the identity of the country. This offers a dual objective; first, constitutional principles are a self-restraining mechanism for judges to decide only according to these standards, and second, the purposes ensure that judges meet the concrete concerns of contemporary society. As American legal scholar Richard Posner says, “judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines.”819 They are first and foremost humans that are concerned with their surroundings and the place they call home. Venezuela’s constitutional history demonstrates that over the past centuries certain principles have remained in each of the Venezuelan constitutions, one of them being freedom. For generations to come, this set of principles will remain as part of Venezuela’s constitutionalism, but their purposes hold flexible mechanisms for future development. It is up to the Supreme Court to apply them in the right circumstances replacing their personal views. Articulating principles and purposes together is like taking the two sides of one view. The precise standards of the Constitution provide stability and also the flexibility needed to make decisions that can hold the test of time. Judges must be able to adapt to new times, new problems, and new circumstances. The purpose behind the constitutional principles can provide the necessary adaptability to find more practical solutions, under the framework of the constitutional text. A harmonious interpretation of the purpose behind the principles can establish a relationship between the two, opening the door to evolution under the grounds of certainty to respect the history, culture and identity of this country.

The Purpose of the Principle of Freedom of Expression in Venezuela

The Court is responsible for providing meaning to a robust list of social rights that allows the people to request solutions for immediate issues. There is not need to favour the majority’s rule when one of the main functions of the Constitution is to treat everyone equally and with respect. Social rights are not at odds with individual liberties. On the contrary, it is possible to guarantee the protection of individuals along with their social welfare. They are not in contradiction, but rather complements one another. There is therefore no need to balance rights in favour of equality over individual freedoms to resolve the conflict in question. Just take the example of freedom of expression, the opportunity to voice criticism, opinions and thoughts gives the population an excellent tool to request greater governmental services and programs for the benefit of everyone. In addition, a well inform society can make better decisions, electing the proper and better prepared individuals to run the country. Moreover, when everyone has an opportunity to express their opinion regarding the policies or laws enacted by governmental institutions, they ensure the legitimacy of the decision, because it was adopted through a democratic process. Otherwise, the decision is not representative of the people’s opinions and could permit arbitrariness. It is in the advantage of the collective, in order to accomplish true equality, that everyone, from the common citizens to high public officials, gets the same opportunity to express ideas, opinions and thoughts. With the innovation of technology, the argument that only wealthy citizens have the monopoly over newspapers, television and radio is no longer valid. Nowadays, anyone can access social media and successfully spread a message that will be read by thousands, or upload a video that will be viewed by millions, not only in Venezuela, but all over the world. This means that this right permits people to express ideas, opinions, and thoughts, without distinction of social status, economic background, race, sex or political views. Indeed, freedom of expression enables the accomplishment of equality for the sake of a better society. It is really difficult to picture a society that preaches social equality where only a few can express their opinions, while others are restrained from doing so. In fact, the robust list of social economic rights entrenched in the Constitution is the product of intense debates, strong opinions and well though ideals. Otherwise, the drafters could never have had the chance to contemplate the arguments presented to entrench these rights in the first place.
The advancement of social justice must be done in accordance with the Constitution. In fact, a great way to reduce inequality is to guarantee everyone the right to express their opinions regarding their situation. The Court has an important role in restraining government policies that limit the opportunity for citizens to share ideas, opinions, and thoughts. This is not only done to maintain the democratic legitimacy of the government but also to ensure equality within the country, along with the advancement of social welfare. The Supreme Court, when it adjudicates cases of freedom of expression, must understand that the welfare of the country does not depend on particular social policies, but rather the guarantee that citizens can criticize them to obtain better ones, which are more in touch with reality. This idea does not mean that judges are going to engage in a technical analysis of the constitutional language. Instead, it is possible to elucidate the adjudication of this constitutional right by referring to the principles behind the Constitution. As said before, the Venezuelan Constitution has an explicitly written set of principles that guide the constitutional development of the country. One of them is freedom, which has been ramified to particular rights, such as freedom of expression, freedom of religion, freedom of association, in order to give this principle a more practical application. This principle has a role to play when it comes to the interpretation of the rights ramified from it. The constitutional principle of freedom embeds a dynamic and flexible purpose to achieve in society. For example, in the case of freedom of expression it is as simple as attaining a truthful, respectful, and democratic society. After reviewing the facts and evidence of a particular case, the Court can recognize the purpose behind the principle with a respect for different points of view to preserve the democratic system, and accomplish a truthful society. The role of the judges is to foster individual autonomy while encouraging the respect of others. The objective behind this principle is also to hold accountable individuals, groups, or entities that threaten others with their speech. In fact, the provision regarding freedom of expression in the Venezuelan Constitution establishes specific circumstances which permits some limitations on this fundamental right. War propaganda, hateful messages, and religious intolerance are the written restrictions to this right. Yet when cases are difficult, these restrictions should compel, with the purpose behind this right, a respectful, truthful and democratic society. Because there are clear concepts that give judges a workable and objective framework.
Judges, concerned with the impact of their ruling must recognize the concrete purpose embedded in the principle involved in the controversy. As American constitutional law scholar Herbert Wechsler says, “liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, it is not the inevitable by-product of technological expansion. It is achieved only by a rule of law.”\(^{820}\) Only through the exact interpretation of this fundamental right can citizens enjoy living in a respectful, democratic and truthful society. It is possible to reaffirm this when the restrictions written in provision 58 of the Constitution request limitations to hateful messages. It demonstrates that Venezuelans demand to live in a society where freedom of expression is exercised with respect to other people’s opinions and views. It is not an absolute right as it has been entrenched in the written text of the Venezuelan Constitution. Therefore, the justification to restrict someone’s right to express freely cannot be influenced by the judges’ own personal views or political ideologies because it can jeopardize the legitimacy of the judgment. As Canadian constitutional scholar Robert Martin explains, “in a constitutional democracy, unelected, unaccountable judges should not do certain things. Included amongst these would be setting the social agenda, amending the constitution, and publicly attacking democracy and democratic institution.”\(^{821}\) Another important aspect of the right to freedom of expression is that it guarantees and limits governmental action as fundamental for living in a democratic society. Despite the changes in mass media, it is essential for the Supreme Court to guarantee the foundations of a democratic system: freedom of expression. The respect of individual self-realization is inherent to the creation of a wider range of views that enable citizens to think, discuss, and challenge government actions. The best approach for the Court to regain its authority and provide concrete solutions is to reconcile the formal and well-established constitutional principles and the functionalist aspect of their purposes. In the case of freedom of expression, first, the Court must set aside their personal views in the adjudication of this fundamental right and then focus on recognizing the constitutional principle of liberty, grounded in the basic concept of freedom of expression. This requires an understanding of


the principle’s purpose, which is the aspiration for a truthful, democratic, and respectful society.

The Supreme Court is responsible for recognizing the role of the purposes underlying constitutional principles. Judges must address the changing needs and social concerns by grasping the workable purposes behind the principles of the Constitution. Jurisprudence regarding cases such as freedom of expression must be consistent with Venezuela’s history, culture, and identity. The specific solutions that are derived from the unveiling objective or purposes apply directly to concrete cases. The so called Social State of Law and Justice cannot exist if essential rights like freedom of expression are not properly guaranteed for everyone. The principle of freedom is inherent to the dignity owed to all human beings. Equality and respect for others is a deep-rooted commitment in Venezuelan constitutionalism. The judges have the duty to ascertain the best answer based on the objectives of freedom of expression, such as the accomplishment of a truthful, respectful, and democratic society. This provides reconciliation between the formal appreciation of the rule of law and the functionality and role of the constitutional text within society. Indeed, judges can follow an objective test to determine the principle involved in the difficult case and the underlying purpose adaptable to the needs. The personal preferences of judges for a particular public policy can undermine constitutional guarantees. Instead, the purpose of constitutional principles remains on the grounds of the constitutional text, yet provide the necessary flexibility to ascertain a direct answer to social needs. Decisions made under this approach are more likely to pass the test of time, just as a free democratic society has more opportunities to ensure the happiness and success of its people than those ruled by a tyrannical regime. By defining clearly the purposes of the constitutional right of freedom of expression, judges cannot change them and subjectively replace the constitutional mandate. The judges can face challenges by recognizing the constitutional principle associated with a controversy, and unveiling the main goal that it has to achieve within society. This approach is more sensitive to the reality of the dilemma posed by the particular facts of a case and is more conducive to finding a fair and just compromise between competing formalist and functionalist values.

Freedom of expression is a fundamental right to express thoughts, opinions, or ideas in a public forum without the fear of government invasion. It is not only an individual right, but
also affects the community as a whole, and has been entrenched in most democratic societies around the globe. As Dworkin says, “free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his conviction about what those laws and policies should be.” The value of liberty clearly supports a higher aspiration, concerning the proper conditions for citizens to interact with each other and with those who hold powerful positions. The principles that a constitution guards as fundamental provide a concrete set of standards that manifest a conception of the best possible society. The Democratic Social State of Law and Justice cannot exist without the exchange of ideas, opinions, and thoughts. Freedom of expression is crucial for a well-functioning democracy, allowing participation of every sector of society concerned with the issue of the community to take part in the debates. The right to speak freely empowers citizens to share their critical ideas and arguments about social, political, and economic issues that concern them as individuals as well as their community. Nowadays, globalization and technology have extended the scope of freedom of expression to relate to almost every human activity or experience. According to French constitutional law scholar Michel Verpeaux, “freedom of expression occupies an essential place in the system of fundamental rights; it expresses the identity and intellectual autonomy of individuals and governs their relationships with other individuals and society.” Taking into consideration the fact that this fundamental right is in constant evolution and expansion, its interpretation cannot be static. It is right to assume that the goal behind this fundamental norm is to accomplish a democratic, respectful and truthful society. There is no doubt that when citizens enjoy a greater degree of freedom, those who exercise power are more accountable for their actions.

The fundamental principle of freedom is in jeopardy when there is an increase in supporters of totalitarian ideologies, ultimately leading to a government which imposes their

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822 Constitución de la República Bolivariana de Venezuela, 1999 supra note 306, provision 57 states, “Everyone has the right to express freely his or her thoughts, ideas or opinions orally, in writing or by any other form of expression, and to use for such purpose any means of communication and diffusion, and no censorship shall be established.” Provision 58 says, “Communications are free and plural, and involve the duties and responsibilities indicated by law. Everyone has the right to timely, truthful and impartial information, without censorship, in accordance with the principles of this Constitution.”

823 Nigel Warburton, Free Speech (New York: Oxford University Press, 2009) at 4

unique view rather than taking the opinions and thoughts of the population into consideration. A functional account for the protection of freedom of expression certainly explains the value that this fundamental right has in society. It means that those regulations or restrictions imposed on this constitutional value must always be justifiable under the premise of a democratic society. This does not mean that everyone needs to agree. Indeed, there is room for disagreement and debate, under the framework of respect. Judges finding the purposes of freedom of expression can provide meaning to the fundamental principle of liberty, avoiding irresolvable and destructive conflicts. As Canadian constitutional scholar Richard Moon explains, “The adoption of a democratic form of government carries with it an obligation to protect freedom of expression. The exercise of self-government requires the free and open flow of ideas and information concerning public issues.”

A democratic, respectful and truthful society gives citizens the right to express their opinions, ideas, or views without fear of retaliation or censorship. The purpose underlying the constitutional principle provides concrete solutions to the challenging modern issues. In discovering the purpose of the constitutional principle, judges can achieve justice, fairness, and integrity. Such conceptions of constitutional interpretation help judges give a practical and dynamic expression to the entrenched rights and freedoms. The judicial branch has to remain the authority which guarantees diverse viewpoints to secure the free participation of citizens in expressing their opinions, thoughts, and ideas in a respectful environment. “The basic principle that individuals and groups have the ability to express different and unpopular views without prior restraint or punishment is a necessary element of any democratic society.”

It is difficult for any society to achieve equality, justice, and fairness without freedom. A judge must not only give weight to those constitutional precepts that offer expression to the will of the people’s sovereignty – which, in a democratic society, is ruled by law – but also understand their function in responding to new circumstances. However, it is not by balancing fundamental values that judges are going to accomplish the aspirations of the constitutional system. It is necessary for judges, as the guardians of a Constitution, to interpret its precepts with the clear intention of finding the goal that is behind the fundamental norm.

The Proposed Principled-purposive Approach in Practice: The Case of Freedom of Expression

The Supreme Court of Venezuela has articulated a decision that denied a TV broadcaster the right to express freely, favouring the national executive’s decision to shut it down. This is the 2007 case of Radio Caracas Televisión (RCTV), where, under the arguments that it was responsible for favouring the general interest, the Court restricted the broadcaster’s individual right. Any difficult case, for example the case of RCTV, where freedom of expression is in question, the best possible approach to deal with it in the Venezuelan context is by using the purpose behind the principle approach. According to this view, the Constitution should be interpreted in accordance with the principle involved in the controversy and its underlying purpose or objective that is in accordance with the history, culture, and identity of the Venezuelan constitutional system. In the case of RCTV, if it had been interpreted in a manner consistent with the approach proposed, the results would be different. After an assessment of the case, it is possible to elucidate that the principle involved in this controversy is that of freedom, one that Venezuelans have fought over for centuries to finally see it entrenched in the Constitution. More precisely, this case refers to the right of freedom of expression. The 1999 Constitution is the product of centuries of evolution. It is possible to elucidate from the constitutional heritage that there are written constitutional principles, which, over the centuries, characterized Venezuela’s constitutional arrangements. The cornerstones of this nation are explicitly written in the 1999 Constitution. Provision two of our Constitution enunciates them, as liberty, equality, solidarity, social responsibility. These principles provide the Constitution with the vital legitimacy to sustain its text. Equality as one of the principles written in the Constitution established that no one is above the law. Those who are the representative of the people should especially give the example and adhere to conduct themselves as it is stated in the Constitution. Even if the President of the Republic, as the head of state and the representative of the people who elected him, has a certain high status in society, it does not mean he or she is above the Constitution. Everyone has the right to express thoughts, opinions and even criticism freely. Yet, this right is not absolute and limitations are explicitly establishing in situations like war propaganda, hateful messages and intolerance against religious belief.
The right of freedom of expression under the 1999 Constitution is subject to a particular restriction in very specific circumstances. It is important to understand that in the case of RCTV, these explicit restrictions do not apply to the facts and evidence provided. Moreover, it is possible to elucidate from the language of the constitutional text that this norm has a purpose to achieve in Venezuelan society. From the particular internal architecture of this norm written in the Constitution this purpose must be composed by the achievement of a respectful, truthful and democratic society. They are all linked to each other to firmly infuse the principle involved in a more dynamic nature. In this particular case, components of the purpose of this right underlined are reflected in the constitutional text and not in a particular ideology or personal preference. In fact, the provision restricts hatred, propaganda, and intolerance. Another component of the purpose of this fundamental right is the opportunity for the exchange of different opinions, ideas and thoughts. And last but not least, it is possible to consider the society as being democratic, when everyone can write, speak, broadcast and disseminate a message without any interference by the governmental authorities. These components of the main purpose of the right to freedom of expression provide the compelling reasons used to answer the RCTV case. Indeed, RCTV, one of the oldest TV stations in the country, was shutdown by the President allegedly because it had become a treat to the government. The President announced on national television that he had to shut down this TV station because it was contrary to the interest of the country. Yet, when it comes to respecting the differences in opinion and views, in, including those that might be considered against the government, this TV station should have the right to broadcast its views, just like another person or group who agrees or disagrees with the government, including the government’s own TV station. Everyone has the right to choose what they want to watch, and it is not up to the State to decide which channel they should turn to. Freedom of expression and the social welfare are not at odds. On the contrary, freedom of expression has a particular role to play in giving everyone the right to speak without any distinction. This includes the opportunity to choose which channel they prefer to watch, which newspaper they prefer to read, or which radio they want to listen to. It is necessary for the faithful interpretation of the right to freedom of expression that there is respect for different ideas, opinions, and thoughts, even if those are critical of the government in place. Other wise, it would be very difficult for members of society to
decipher the truth behind all the arguments they are being exposed to. It is crucial for the Court to permit the flow of different opinions and criticism to give everyone, individually or collectively, the opportunity to make their own opinion about different subjects. In this particular case, if there are different comments, opinions, and criticisms disseminated by the various TV station, it should ultimately be up to the population to have a frank and truthful discussion and weigh the evidence that has been presented to determine the veracity of the allegations. In fact, if the messages emanated from RCTV were dangerous to the population, then an open discussion between respectful citizens would have surely been enough to determine the veracity of the arguments presented. This component of truth as part of the purpose of this right provides a clear argument against the closure of a TV station, which dismissed thousands of workers and put at risk the stability of the country. Indeed, it is in fact necessary to take different points of views in consideration, even those who are catalogued by some as being dangerous, to find the truth behind an issue or question. This corresponds to the purpose of this right, which is the accomplishment of a truthful society. Yet, it is not possible to have a real discussion if there is no guarantee that everyone can express their views, opinions and ideas without the threat of being punished. The interpretation of the constitutional text must be done to protect the constitutional rights that are entrenched in order to achieve particular goals or objectives in society. This is particularly important in this case, because freedom of expression has been part of Venezuela’s constitutionalism since the Venezuelans decided to become a free country. First entrenched in the Constitution of 1811, freedom of expression has constantly been an integral part of the Venezuelan subsequent constitutional texts.827 Even with the robust list of social economic rights, the 1999 Constitution also blue printed this right as a representative of the undisputed principles that are part of the constitutional text. In this context, the last but not least component of the purpose is to achieve a democratic society where people can voice their opinion to ensure that elected officials are held accountable for their actions.

It is the duty of the Court to ensure that the pluralism of ideas, opinions and views is permitted, without the threat of sanction. This goes for the case of RCTV, whose views had been considered dangerous by some, since everyone should have the right to express themselves freely, especially as democracy is a fundamental value in Venezuela.

827 Mariñas-Otero, Constituciones de Venezuela, supra note 23.
In conclusion, as seen in this Chapter, The Supreme Court is responsible for drawing the proper meaning from the constitutional text in order to resolve the most difficult social, political, and economic public controversies. In the form of lawsuits, citizens look more and more to the Court to resolve incredibly difficult questions that can no longer be answered by a simple reading of the text and the facts of the cases. These cases warrant the good judgment of judges, who must go beyond the written words of the text to offer the best solution. This compels judges to have a deeper philosophical understanding of the highest law of the land and an understanding of the facts in practice, where the objective purposes are to be achieved. In such cases, judges should integrate the priorities of formal constitutional principles with the function underlying their concrete purposes to provide the best possible solutions to complex problems. This implies that judges remain faithful to the Constitution while they are actively seeking to uncover the concrete purposes that these principles are set to achieve in Venezuelan society. In order to regain legitimacy and authority, the Supreme Court must account for the existence of these constitutional principles, and accept the inherent purposes underlying them in an effort to apply them to modern circumstances.

Improving the theory and practice of constitutional interpretation in Venezuela and protecting the purpose of freedom of expression means to reconcile a fundamental constitutional principle with the aspiration of a democratic, respectful, and truthful society. In this regard, the Honourable Charles Gonthier’s wisdom about the Canadian legal system comes to mind, “the purpose of the Court is not to substitute its value judgments for those of the democratically elected legislatures, but rather to interpret the values and principles already present in our constitutional documents. The role of the Court is not to make laws defining values, but to identify the limits laid down by the Constitution which governments must respect both in their legislation and in their actions.” Faith in democracy is one thing, faith in the wisdom of judges at the adjudication of fundamental rights is quite another.

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828 Nelson R. Dordelly-Rosales, “The Importance of Principles in Constitutional Interpretation: the Case of Freedom of Expression in Venezuela” in Michel Morin et al. Responsibility, Fraternity and Sustainability in Law. In Memory of the Honourable Justice Charles Docherty Gonthier (Markham, ON: Lexis Nexis, 2012) It was also a presentation in the Conference Responsibility, Fraternity and Sustainability in Law organized by the McGill Faculty of Law, in collaboration with the Canadian Institute for the Administration of Justice, the Centre for International Sustainable Development Law and the Faculty of Law of the University of Montreal, May 20-21, 2012.

Summary: Chapter 9 discussed what judges should ultimately value in adjudicating constitutional rights, especially in regards to freedom of expression in Venezuela. This chapter recognizes that there are connections among principles, purposes, and constitutional adjudication, and it offers an innovative approach that focuses on identifying the concrete purpose of constitutional principles in order to apply them in current circumstances. This differs from the subjective argument displayed in current public law cases and recognizing the supreme goal of the Constitution, with its purposive and principled dimensions, this perspective has several influences. The purpose of constitutional principles approach has been deduced from the analysis of the Venezuelan Constitution and jurisprudence, and the exchange between Dworkin’s and Barak’s interpretive theories. Although this approach is different, it has some similarities with the theories of Dworkin and Barak. Particularly, the relevance of the purposes and the principles, the rule of law, and the individual’s liberty are seen to constitute key components in constitutional interpretation. Purposes and principles can make independent and objective contributions towards mitigating the rights controversy. This study contributes specifically and concretely to recognizing the importance of the purposes of principles available in the Venezuelan Constitution. This approach of constitutional interpretation can appeal to judges who want to consider the social, economic and political effects of their decisions without relaxation or rejection of the fidelity of law. The idea is that it is possible to realize the significant potential of a coherent and undisputable set of constitutional principles by uncovering their purposes, which evolve, change, and adapt over time to new circumstances. The spirit of the Constitution is inherent in the aspirations of its principles.
CHAPTER 10

GENERAL SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

This final chapter summarizes the major findings resulting from the study of the Supreme Court of Venezuela’s constitutional jurisprudence. From an historical point of view of Venezuela’s constitutionalism to the most controversial constitutional decisions of the last Fourteen years, this study paints a picture, of the development of constitutional jurisprudence in Venezuela within the context of legal theory. Attention has carefully been drawn to high profile cases regarding rights and freedoms in order to witness the Supreme Court’s move into what can unfortunately be viewed as a danger zone. This perspective has acted as a spur for the development of a new theoretical approach for the adjudication of individual rights. In fact, no substantial study of the constitutional interpretation has previously been done in Venezuela. This study of over five decades of Venezuelan constitutional jurisprudence brings forth arguments drawn from particular approaches used by the judges to determine the general character of law. These arguments are the struggle between two grand visions dominant in the paradigm of constitutional reasoning in Venezuela, products of its historical context, legal positivism in the era of the 1961 Constitution and legal realism in the era of the 1999 Constitution. Furthermore, in the last Fourteen years of constitutional jurisprudence, judges have drawn on Ronald Dworkin’s adjudication theory to adjudicate rights; however this Dworkian approach has often been more of a mask for what is essentially a legal realist approach.

An appreciation, through a survey of past and current jurisprudence about constitutional rights, demonstrates an evolution in the interpretation of the Constitution. For instance, during the seventh decade of the twentieth century, the Supreme Court’s constitutional reasoning displayed in different cases articulated a normative justification in support of formalism, principally considering arguments that resemble originalist, textualist, and positivist requirements, or technical elements, which emphasize the structure or hierarchy of norms, precedent, and the logically organized system of rules. The story of Venezuela’s constitutional jurisprudence, far from being a static process, is rather a dynamic one, where cases intersect with one another. Just when the new century began, a new constitutional system was put in place, and the Supreme Court took an unprecedented turn in the decision-making practice. Social concerns took central stage in the discussions of
constitutional issues making it fashionable for the Court to consider political, economic, and social considerations to solve difficult disputes. Thus began the era of the realist approach.

Since 1999, and especially in cases related to individual freedoms, judges gradually but persistently rejected the formal constraints established by more than forty years of formalism in the adjudication of rights, in favour of a distinctive justification that really attended the growing social challenges beneath constitutional issues. In many ways, the decisions of the Supreme Court tried to enforce practical solutions to difficult and complex situations, considering law as an instrument to social change. However, the Court on many high-profile cases regarding individual freedoms, such as freedom of expression, employed arguments that undermined its authority as an objective and neutral institution, simply ruling based on the personal, political and moral views of its judges rather than according to the Constitution. Alongside the recent functionalist turn, Dworkin’s theory of adjudication also served to justify interpretations of the Constitution in many controversial cases, though not necessarily in the rigorous way demanded by that essentially formalist theory. As often as not, the arguments drawn from Dworkin’s moral reading of the Constitution by the Supreme Court justified the judges’ personal preferences in constitutional decisions. As a result, it can be argued that constitutional decisions have become practically the imposition of personal views, or the enforcement of the head of the State’s will. This has drawn particular attention in regards to individual rights, in particular that of freedom of expression. While Venezuela had some trouble to protect this constitutional right during the formalist era of constitutional jurisprudence, the more functional reasoning in constitutional issues and even the invocation of Dworkin’s theory of adjudication since the 1999 Constitution did not help to truly guarantee citizens their fundamental right to express freely. On the contrary, in the last Fourteen years, judges have openly and defiantly rejected this fundamental constitutional right.

In order to strengthen the lost of authority of the Supreme Court’s constitutional jurisprudence, this study provides a comprehensive understanding of the real value of principles, using Dworkin’s vast and complete contributions to the subject, together with the perspective of Chief Justice Aharon Barak in his particular judicial expertise outlining, as he does, the importance of purposes in constitutional interpretation. Based on these perspectives, this study outlines a new approach to constitutional interpretation, one which
attempts to reconcile: a) the priorities of formalism and the underlying principles of the Constitution such as the rule of law, and b) the priorities of functionalism and social welfare, ensuring that the decisions of the Supreme Court are true to the concrete objectives (purposes) that the new Constitution sets out to achieve, not just in word but also in reality.

This means that judges should focus on recognizing freedom of expression as a constitutional principle grounded in Venezuela’s history, culture, and identity, beneath, which lays the purpose of a truthful, democratic, and respectful society. The purposes that lie behind the principles of the Constitution can make consistent and objective contributions towards mitigating the rights controversy. In this chapter, conclusions, implications, and recommendations from the study are presented in three main sections: (a) a general summary, (b) main conclusions, and (c) some implications for practice and future research.

**General Summary**

Several important findings have emerged from the detailed study of more than fifty years of constitutional jurisprudence in Venezuela. This thesis provides a precise description of the evolution of the constitutional adjudication in this Latin American country. First, the ways and means by which judges in Venezuela decide constitutional issues have changed over time. After a long period of instability and dictatorship, the 1961 Constitution brought stability and democracy to Venezuela and the flourishing of a formal account to assume with consistency and predictability the reading of the Constitution. Even if judges rarely overtly adopt legal theories, they are all products of a process of legal education, which necessarily does so. Even tough there is no mention of a particular legal theory in the Supreme Court’s jurisprudence, this study has found that in the era of the 1961 Constitution, judges gave preference to formalism presented as legal positivism. The comprehensive study of forty years of constitutional jurisprudence made it possible to determine that judges used diverse arguments to justify their decisions under a formal constitutional reasoning. The application of black-letter law dismissed any possibility to consider the context or any other external aspect. Often the Court invoked the plain meaning of terms and phrases as a straightforward approach, faithful to the true understanding of the Constitutional text.

The semantic meaning governed the constitutional decision-making process. This formal account to constitutional adjudication characterized by a mechanical appearance, in
its purest form limited Supreme Court judges to find dictionary definitions or apply verbatim the plain meaning of words. In other cases, however, the Court acknowledged the intent of the framers of the Constitution to decide constitutional issues. This study found that the Court gave primary weight to the written text, but as constitutional jurisprudence evolved judges justified their decisions based on the discovery of the original meaning of the text, emphasising the intentions of the framers of the Constitution. In many constitutional cases in Venezuela, judges developed their own originalist theory. Essentially, the judges’ task was to ascertain the will of those who drafted the 1961 Constitution. In parallel with the originalist account, the Court evaluated constitutional disputes with strict procedures and formal criteria linked to the system of rules to maintain the predictability of the Supreme Court decisions. This formal account for the adjudication of constitutional rights was predominately coherent with a logical method and deductive reasoning to reach results. Just when the Supreme Court had a variety of decisions, judges began to follow the case-law established by their predecessors. Past decisions progressively began to become part of the constitutional decision-making process. The Court not only considered formal criteria and procedures but also began to recognize the lessons learned in previous constitutional judgments. This study found that the evolution of constitutional jurisprudence made this civil law country honour previous judgement and follow the criteria established by prior judges. For decades, the Supreme Court maintained a formal reasoning to arrive to conclusions in constitutional cases, in which judges used a logical, stable, and consistent application of the law, especially with precedent decisions, in order to make this institution reliable.

However, as the country grew and developed, the federal government broadened its scope and magnitude in all kinds of new duties. This study found that in many cases during the end of the eighties and the beginning of the nineties judges of the Supreme Court emphasised preserving the hierarchy of the legal system. Their formal argument was that the validity of rules in the legal system could only be determined by a higher norm, the Constitution. The Court relied on the hierarchical structure of the Venezuelan legal system to render its decisions. Venezuela’s jurisprudence exclusively during the era of the 1961 Constitution was characterized by legal positivism, in which formal legal reasoning was predominant. The Court defended a normative reasoning towards the Constitutional adjudication of rights, which made the constitutional jurisprudence seem predictable and
stable. However, there were difficult cases in which the Court had to exercise discretionary powers to elucidate Constitutional rights.

In the end of the nineties began a transition period where the Court recognized that judges needed to exercise their discretion when dealing with cases for which no previous legislation determined the specific outcome, particularly since more complex and contested cases came before the Court, in which facts did not squarely fall within the core meaning of the textual words. The problem that judges found with the application of rules came largely from the fact that they were not precise enough to always provide adequate grounds for adjudication, especially with constitutional rights. This might raise some legal questions not contemplated in the terms of the constitutional text. This demonstrates that the interpretation of the Constitution has been a dynamic process that changes over the years. The ruling of the Supreme Court regarding the Constitutional Assembly became a landmark decision that marked the end of forty years of formalism in Venezuela.

The promulgation in a national referendum of the 1999 Constitution brought an immediate transformation of Venezuela’s constitutional jurisprudence. The entrenchment of more social rights and the proclamation of the Democratic Social State of Law and Justice in the blueprint of the new Constitution brought a new dynamic in terms of constitutional judging. The Court began to acknowledge external factors, such as economic, political, and social concerns, involving a blend of legal, policy, ideology, and personal convictions to capture the real issues that needed practical solutions. The implication of this model of constitutional judging is that judges must be flexible when engaging with changing social issues. After examining the Venezuelan constitutional jurisprudence from the last Fourteen years and reviewing prominent scholars, this study found that the decision-making model used by constitutional judges is closely associated with the jurisprudential theory of legal realism. Since the proclamation of a new Constitution in the twenty-first century, the Supreme Court’s jurisprudence has been considering facts and outcomes rather than rules and formal criteria, indicators of a functionalist reasoning. Instead of judges focusing on abstract considerations to determine the meaning of the constitutional text, the functionalist style adopted by the Supreme Court in Venezuelan gives judges a more important role to play. The Court began to see the outcomes of its decisions, as an instrument for social policy, which emerged from the impossibility to apply in a neutral or objective manner the
literal meaning of the constitutional text. The judges’ rulings on constitutional matters prove
the scepticism from the Court concerning the separation of powers theory and the tension
between judicial supremacy and the political question doctrine. This study demonstrates that
the Court has openly detached from the formalist style of constitutional judging of the
twentieth century to devise concrete and practical solutions in the new century. While it is
the responsibility of the Court, based on the written text, to provide meaning to the
constitutional text, the constitutional jurisprudence must advance the solutions that are most
needed in society.

The sceptical attitude towards rules has made the Court emphasize the assumption that
rapid social change needs real solutions from the highest bench. However, in other
constitutional cases the Court considered all possible effects emphasising on the
interdisciplinary matters that permeates and flows from several possible solutions. Judges
expanded the contextual analysis of the constitutional text bringing political, economic, and
even psychological considerations to fill in the gaps between the text and social issues. In
this mode, the Court is no longer interested in formal criteria and procedures, which, in the
view of the judges, restrain the power of the Court to provide concrete solutions. The
expanded contextual reasoning on constitutional judging has made the Court more interested
in evaluating the impact of its decisions to shape society. The welfare claims implied the
need for solutions, which made the Court reject formal rules to focus on the outcome of a
constitutional case. However, the judges’ emphasis on their own political, social, economic
and personal views to decide constitutional matters has veered the Court into a dangerous
zone. This is particularly evident in high profile cases regarding individual freedoms. The
public perceives a lack of autonomy and objectivity from the Court, which puts the authority
of the judges in peril.

Another important finding is that alongside the recent functionalist turn of the Supreme
Court’s constitutional jurisprudence, Dworkin’s theory of adjudication has also served to
justify the constitutional judging in many controversial cases. In Dworkin’s view, a moral
reading of constitutional rights requires invoking moral principles inherent to the
constitutional text to provide the best answer during difficult controversies. However, after
studying Fourteen years of constitutional jurisprudence in Venezuela, it is possible to say
that judges in the name of the moral reading of constitutional rights have used their
discretion to give more importance to their own personal convictions hidden as a genuine interpretation of the Constitution. This explains why judges have been considering political ideals in their different judgements regarding the interpretation of the constitutional text. The Court’s concept of political morality does not necessarily reflect the spirit of Venezuelan constitutionalism. Political rhetoric coming from the highest Court of the land often implies a dichotomy between the proper role of judges and the interpretation of the law. The best indicator is the fact that in cases regarding individual freedoms the Court used Dworkin’s arguments to justify personal convictions in the adjudication of constitutional right; judges were thus perceived as acting like politicians.

The Venezuelan constitutional jurisprudence regarding freedom of expression displays an evident tension in the constitutional protection of this right. Although the goal of solving the most crucial issues of the more vulnerable is admirable and shared by millions of people, it does not justify the limitation of every citizen’s right to express freely their ideas, opinions and thoughts. The cornerstone of a democratic society is the protection of freedom. It is crucial for a legitimate free and independent society to guarantee the enjoyment of fundamental rights. However, judges are imposing their own particular agenda, and thereby eroding the legitimacy and authority of their decisions. This study demonstrates that the Supreme Court of Justice in Venezuela resorts to legal theories, such as legal positivism, legal realism, and Dworkin’s adjudication approach to support its jurisprudence. Nonetheless, the protection of individual rights, particularly freedom of expression has taking a step back, deteriorating Venezuela’s democracy. To address this issue, this study proposes an approach that reconciles the priorities of formalism and the underlying principles of the Constitution with the priorities of functionalism and social welfare to ensure that decisions are true to the objectives (purposes) of the Constitution.

The proposed approach looks forward to reconcile the formal respect for the rule of law and the functional application of the Constitution to promote a better society. As this study has demonstrated, the Court’s exclusive reliance on personal, political and economic factors, among others, in its constitutional rulings has affected negatively the authority of the judicial branch and democratic process. In order to provide a solution to this issue, this study argues that it is necessary to find a new approach which best interprets the values, objective and goals of the Constitution in the context of Venezuela’s history, culture and identity. In
concert with this, constitutional rulings dealing with high profile cases should rely on principles that represent the foundational consensus that brings legitimacy to the Constitution. In this regard, Dworkin advocates for judges to decide according to legal principles, rather than with political or personal views, to provide justice and fairness. Judges hold the intellectual discipline and scope of knowledge to sidestep prejudice in favour of consistently appropriate principles. According to Dworkin, constitutional interpretation is both art and social practice. Judges, as creative interpreters, shall provide meaning to constitutional precepts by fitting the interpretation given in previous precedents or legal practices, which help to justify making the law the best it can be. In other words, for Dworkin, judges cannot concentrate solely on the structure of the Constitution, but also on the precedents and legal practices, as a whole.

However, it is impossible to set aside the constant references from judges to participate actively in the solutions of social concerns that novel cases bring to the Court. This is particularly so because of the 1999 Constitution’s specific reference to the Social State. This functional understanding of the Constitution is not an invitation for judges to impose their opinions, but to reflect in their decisions the history, culture, and democratic tradition of the country, something that Chief Justice Aharon Barak of the Supreme Court of Israel advocates for with his theory of purposive interpretation. Barak’s practical judicial expertise is internationally acclaimed and is particularly important because of his experience dealing with the most difficult and contested cases in a country surrounded by controversy. The best possible interpretation of the Constitution, in Justice Barak words, must guide judges to fulfill the subjective and objective purposes of the constitutional text. The purpose of the norm, Justice Barak insists, has two foundations: the subjective and the objective purpose. The relationship between the founding fathers intentions and the modern basic notions of the legal system reflect the basic aspirations of a community.

Constitutional purposive interpretation is a holistic approach that takes into account the subjective and objective purposes when dealing with the abstract words of a constitution. The Court must study the provision in question and its relation with the entire legal text as a whole to uncover its purpose. Judges must synthesize the intentions of the framers and the intentions of the system as a whole to accomplish the ultimate purpose of the Constitution. The objective purpose of the Constitution is subject to change over time. In Justice Barak’s
perspective, the Constitution is a living document, following the metaphor that the Constitution is a *living tree*. It is therefore natural that the objective purposes of the Constitution reflect the contemporary values and conception of society. In Justice Barak’s view, essentially, instead of being trapped in abstract analysis judges must remain flexible and take into account the needs for a concrete realization of the constitutional text.

The academic qualities in both arguments of Dworkin and Barak represent a perfect combination for elucidating the most obscure constitutional dilemmas. There is no doubt that constitutional solutions must aspire to justice and fairness. This study has identified that in both theories there are similarities and differences, and it is possible to reconcile their main characteristics for the sake of a comprehensive approach to constitutional adjudication. The best approach for the Court to regain its authority and provide concrete solutions regarding constitutional dilemmas is to reconcile the formal and well-established constitutional principles and the functionalist aspect of their purposes. These principles embodied in the Constitution best represent the history, culture, and identity of the nation. Constitutional principles go beyond the reach of temporary changes in popular perception or the whims of those who hold power. They are untouchable pillars of the democratic rule of law as providing the normative framework for governance. To honour them is fundamental to the democratic premise that this new Constitution emerged to promote the interest of its citizen to live in an equal, free, and respectful society. Thus, its precepts are the expression of constitutional principles derived from the history, culture and identity of Venezuela. These principles take precedence over personal beliefs, political ideologies, or moral prescriptions. Constitutional principles offer authoritative standards to best justify the bridge of the rigid written text of the Constitution with the need to give a suitable solution to social changes.

Judges should focus on identifying the concrete purpose of constitutional principles in order to apply them in current social issues. The purposes embodied in the principles of the Constitution are the aspirations to social justice in an evolving context. Judges can no longer accept mechanical application of constitutional norms or the use of personal, political, or moral opinions. Particularly, when the Court has to deal with rights and freedoms they have exhausted the fair reading of the text and must go beyond it in order to provide a clear answer to difficult controversies that raise heated debates in the social, political, and economic spectrum. Yet, the Court must remain authoritative for the sake of the democratic
system and respect for the rule of law. The principles entrenched in the Constitution are a clear and consistent set of standards that embed concrete practical purposes, which aid judges to promote democratic values. This offers a dual objective; first, constitutional principles are a self-restraining mechanism for judges to decide only according to these standards, and second, the purposes of these principles ensure that judges meet the concrete concerns of contemporary society.

Venezuela’s Constitution embraced a more inclusive and comprehensive set of social, political, and economic rights as desirable goals of the Democratic Social State of Law and Justice. However, freedom of expression has suffered unprecedented restrictions. Liberty, equality, and respect are not just words written in a forgotten document. On the contrary, the Constitution is a vibrant document that requires judges to embrace its mandate of justice and fairness towards a dignified life for society as a whole. To ensure the constitutional right of freedom of expression, first, the Court must set aside their personal, political, and moral views in the adjudication of this fundamental right. Second, the Court must attempt to see freedom of expression as a constitutional principle grounded in Venezuela’s history, culture, and identity that embed the aspirations of a truthful, democratic, and respectful society. In other words, the Supreme Court’s constitutional jurisprudence regarding freedom of expression must address the changing needs and social concerns by grasping the social justice objectives of the Constitution. The specific solutions derived from the goals of the Democratic Social State of Law and Justice may need to place limitations on this foundational right based on a truthful, respectful, and democratic society, which in the end is the ultimate purpose of this constitutional principle.

The challenges of constitutional judging in a complex modern society require concrete and practical solutions. In the case of freedom of expression, it is difficult to name a country in which the right to express freely thoughts and opinions is not an integral part of its constitutional text and Venezuela is not an exception. On the contrary, if there is one thing this study has demonstrated in the historical overview is that freedom has a significant place in Venezuela’s history, culture, and identity. In concert with this, the practical and concrete connection of this constitutional principle to the Social State of Justice and Law, as a unique goal entrenched in the new Constitution, is the aspiration of living in a truthful, respectful, and democratic Venezuela. Yet the limitations to this fundamental right should come from
the understanding of its purpose, giving judges the flexibility to address progressive changes in a specific social and historical framework. It is possible to admit that the policy considerations that judges must face when they have to decide hard cases dealing with individual rights such as freedom of expression can be avoided. Instead of considering political ideologies or moral prescriptions, it is possible for the Court, after reviewing the facts and evidences of a particular case, to recognize the purpose of this constitutional principle, which is no other than a respectful, democratic, and truthful society. For example, citizens have the right to express their opinions, ideas, or criticism, and voice their concern over illegal activity, incompetence, and injustice.

The Supreme Court of Venezuela in its reasoning shall draw its purpose of establishing a democratic society from the constitutional principle of freedom of expression, guaranteeing the right to speak and write openly without State interference. However, the uniquely problematic nature of expressing ideas freely is that the word “expression” tends to embrace a large number of different situations. It is inevitable that judges may need to provide restraints in some cases to this constitutional principle as its purpose unveils respect towards individuals or groups that are part of Venezuelan society. In concert with this, the communication between individuals, groups, corporations, and the State requires a degree of accuracy or truth, as is ascertained by the purpose of this constitutional principle. This approach of constitutional interpretation can appeal to judges who want to consider the social, economic, and political effects in their decisions without relaxation or rejection of the fidelity of law. The spirit of the Constitution is inherent in the purposes of its principles.

Conclusions

This study analyses trends across the evolution of the Venezuelan constitutionalism. It presented briefly and clearly the constitutional history of Venezuela during nearly two centuries. The story of Venezuela’s Constitution goes beyond the newly promulgated 1999 Constitution. It goes far beyond the origins of the entrenchment of the first constitutional rights in the 1811 Constitution, when Venezuelans proclaimed their independence from the Spanish Empire, including the disputes for the establishment of a new independent country as the First Republic, guided by Francisco de Miranda, one of the leading figures in initiating the quest for independence in South America. Even though the
War of Independence obscured the construction of a well-established constitutional framework, it opened the possibility for a prominent military and political leader to rise. Simón Bolívar, *The Liberator*, was a major contributor for the political and constitutional ideals of his time in South America. This study detailed the emergences and declines of constitutional documents during the years of war for the independence of Venezuela. It also explained the complexity around the modifications, reforms, and promulgation of new constitutions during this tumultuous period. This includes the diverse mechanism used, constitutional assemblies, congress reforms, or presidential mandates, to establish a new government framework. This historical overview goes across Venezuela’s struggle with charismatic personalities, the *Caudillos*, who played with the emotions of the masses for their own selfish interests, which ended in a bloody civil war. These disputes made the country suffer terrible loses and the subsequent enactment of several constitutions. Time for peace arrived but with the establishment of a long autocratic period disguised under the promulgation of new constitutional documents. After the death of Juan Vicente Gómez in 1935, one of the longest dictators in Venezuelan history, a transition period began to lead the way for a democratic institutionalization of this country. This study found that the vast majority of social, political, and economic rights emerged during the democratic period of 1947, while the consolidation was during the 1961 Constitution, when Venezuela finally accomplished what has been called an ‘exceptional democracy.’ The failure of economic growth and social development opened the doors for a new constitutional regime. The 1999 Constitution set the goals of a *Democratic Social State of Law and Justice* that transformed constitutional judging.

The investigation of constitutional jurisprudence in the Supreme Court of Venezuela has documented important findings that can be utilized by academics, jurists, judges, politicians, journalists, and law students to explain constitutional judging. This study demonstrates the shifts and trends in the Supreme Court constitutional jurisprudence over five decades indicating that legal theories, regularly without mention, have served to justify rulings regarding the most high profile cases. Particularly since the 1961 Constitution, Venezuela’s constitutional jurisprudence was consistently linked to the arguments of formalism, in the name of legal positivism, from the verbatim application of the written words, the founding father’s original intentions, the formal procedures and formal criteria to
the respect for the hierarchy of norms as coherent and logically-deducted answers. This study indicates the rise of legal realism in Venezuela’s constitutional jurisprudence using the arguments of the judges’ rulings in more than Fourteen years of case-law. Since the proclamation of the 1999 Constitution, it is evident that Supreme Court judges shifted from a formal application of the law to a more functional understanding of the constitutional precept. This constitutes an important finding for this study because it demonstrates the historical evolution of constitutionalism in Venezuela, in parallel with the trends in constitutional judging of the Supreme Court. Another important finding is the indication that judges used Dworkin’s theory of adjudication in their decisions, reading morally the Constitution to camouflage their personal values and political ideology, while restricting fundamental individual rights, such as freedom of expression. This study proved that the Supreme Court has been unsuccessful in protecting the fundamental right to express freely ideas, opinions and thoughts, which are, to this day, considered the most important freedoms in Venezuela’s constitutional jurisprudence. In light of this, the study adopted a comprehensive paradigm based on Dworkin’s arguments of principles and Justice Barak’s purposive theory to provide a concrete solution to this issue. In accordance to these authors, principles maintain a cohesive and rational argument that best answers all cases, and purposes link the subjective (intention of the authors) and the objective (intention of the constitutional system) to ultimately find that they share the same goal.

This study attempts to provide arguments for the modification of the prevailing constitutional reasoning behind Supreme Court rulings in Venezuela and contributes an alternative approach to the unsuccessful interpretive approaches of the past and present. In summary, this approach presents a reconciliation of the formalist rule of law concerns and the priorities of functionalism and social welfare, ensuring that the decisions of the Supreme Court actually succeed in transforming the Venezuelan society. The Constitution exists to build a fair, free and democratic society, in which principles of liberty, equality and social justice are the cornerstone of the rule of law and good governance. These basic principles do not merely remain general, since they embody several concrete purposes to ensure fundamental justice.
This study has proven that personal, political, and moral views do not have part in the interpretation of rights and freedoms. Instead, the Court shall confirm the link between the principles derived from Venezuela’s history, culture and identity as well as the best understanding of their concrete purposes to reach the social goals of a Democratic Social State of Law and Justice. In the cases of individual liberties, such as freedom of expression, judges must focus on valuing the aspirations established in the concrete purpose of this constitutional principle. The aspiration for a truthful, democratic and respectful society is the authentic purpose of the constitutional principle of freedom of expression. This approach provides judges with arguments to function with authority for the sake of the democratic system and respect for the rule of law. Indeed, the authority of the Supreme Court of Justice resides in giving a true and concrete meaning to the always evolving, changing, and adapting Constitution for the sake of a better future. In the end, citizens must have faith in the wisdom of judges to achieve concretely the purpose of the Constitution. The Supreme Court faces stiff challenges ahead, times change, new issues arise, and it becomes more difficult to give proper answers. Constitutional interpretation must account for the articulacy of principles and their transformative purposes. The legitimacy of constitutional jurisprudence stands on the confidence that the Court will remain faithful to the fundamental principles meant to accomplish their evolving purposes to cope with current problems and current needs. It is time for judges to ensure that the spirit of the Constitution measures up to the vision of our time.

**Recommendations and Implications for Practice and Future Research**

The evidence derived from this study of the Supreme Court of Justice’s entire reasons for constitutional judgments over five decades suggest that a new approach to interpret the Constitution is needed to preserve and encourage Venezuela’s vast set of rights and freedoms. After having examined the reasons for constitutional judgments rendered by the highest Court and evaluating their outcomes, it is regrettable to witness that individual freedoms appear more often to be in the danger zone, affecting the credibility and authority of the Supreme Court. This study presented an alternative approach that incorporates the key relationship between constitutional principles and their purposes in an unconventional way to bridge the gap between formalism and functionalism, which is crucial in delivering concrete solutions in the context of the changing Venezuelan society. Principles are viewed
as primarily intended to maintain the formal rule of law and successfully represent the tradition, culture, and identity of the Venezuelan constitutionalism. Yet, the principles entrenched in the constitutional text are not merely formalistic representations. They point to the achievement of purposes to address the changing needs of society as set out in the Constitution. The purposes of these principles represent the goals, aspirations, and objectives that the spirit of the Constitution aims to accomplish for the sake of a socially responsible, just, and democratic nation. Indeed, the Constitution’s lasting brilliance is that its principles embed purposes that cope with contemporary social transformations.

The current findings add substantially to the comprehension of the challenges of constitutional judging in Venezuela. This study presents in a pedagogically useful way an exhaustive analysis of the constitutional jurisprudence of the Venezuelan Supreme Court of Justice. It facilitates the understanding of the role that legal theories play in constitutional reasoning behind the most difficult rulings, particularly in cases related to liberty, religion, or equality, in which judges have the responsibility to give meaning to these values in a complex web of facts, policies, and laws, producing a determinate answer to concrete controversies. Further research is necessary to develop standards for the required application of social goals set in the 1999 Constitution. Moreover, these findings suggest several courses of action for constitutional jurisprudence in Venezuela, including deeper analysis of the purpose of the constitutional principle of freedom of expression.

The findings of this study have a number of important implications for future practice, including an extensive research regarding other principles, such as equality, solidarity, and liberty entrenched in the text of the 1999 Constitution. In addition, the scope and limitations of the respective social goals of the Democratic Social State of Law and Justice are embedded in the above-mentioned principles. Moreover, this study provides information that can be useful for further research on other central freedoms. This include religious freedom, one of the most fundamental liberties included in the text of the Venezuelan Constitution, which generally provokes controversial discussions at the highest Court, in reference to the limitations of the exercise of this right or the discrimination of diverse religious groups because of their faith. Another freedom is the right to assembly, essential to life in an independent society, which in the last Fourteen years, appears to have suffered greater restrictions by the federal government in Venezuela under the premises of avoiding the
marches or demonstrations to turn violent or destructive. The freedom of information entrenched in the Venezuelan Constitution has taken an interesting turn in this digital age. It has become essential to access content in the World Wide Web without government censorship or restrictions. This presents a challenge for the Court when it needs to balance privacy law and online security, as well as data access to hold accountable governmental officials. As social media is in continuous evolution and constantly growing in the virtual world, new constitutional issues are emerging rapidly. Supreme Court judges are responsible for upholding the rule of law with the vision of solving changing needs and concerns in a constantly evolving Venezuelan society. The findings of this exhaustive study are limited by the use of a particular individual freedom, freedom of expression. What is now needed is further research to develop even more the suggested approach to tackle the interpretation of other constitutional rights. These findings can be strongly argued and that is a great reason to encourage future investigations to provide better understanding of the implementation of the social justice goals of the vast constitutional rights entrenched in the 1999 Constitution. Future researchers should therefore concentrate on taking this information and provide an improved understanding of the purposes of constitutional rights to better interpret the Venezuelan Constitution in those difficult high-profile cases.

Perhaps the most important application of this study is to generate a discussion between those involved in Venezuela’s constitutional theory to find the best possible answer to the most contested constitutional controversies. It is the role of the Supreme Court to decide accordingly with the Constitution upon which our democracy is based. Venezuela’s constitutionalism reveals that judges can always apply, adapt, and interpret the constitutional text but must uphold the rule of law for the legitimacy and authority of the Supreme Court. In addition, social goals embedded in the Constitution are concretely operative for the judges to apply them in their rulings, as it is their vital role in the achievement of a just and fair society. These findings were made possible only by the systematic selection of a large sample of cases from five decades of Venezuelan constitutional jurisprudence.

Hopefully, this study will inspire further research in constitutional theory not only in Venezuela and in other Latin American countries, but also in other part of the world, to best approach the interpretation of constitutional rights for the sake of democratic governance. Other recommendation for further research is the continuous study of the constitutional
jurisprudence of Venezuela’s Supreme Court in light of continuous changes in the next decades. There is, therefore, a definite need for research to explore the legal reasoning behind the unique responsibilities of Supreme Court judges in diverse constitutional controversies. Another practical implication of the findings of this study is that it can support other research about constitutional theory in Venezuela. This includes further investigation of the protection of rights and freedoms and the underlying theories about the general character of law. The aim of this work was not to provide a conclusive theory about how to best interpret the Constitution, but to provide a workable approach that can be further improved upon to reconcile the formal rule of law and the functional social objectives embedded in the Venezuelan Constitution.
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APPENDIX A

Fig 1 An Example of the Principled-Purposive Approach in Practice: A Decision of Freedom of Expression (An answer to RCTV case)\textsuperscript{830}

<table>
<thead>
<tr>
<th>Request - Competence</th>
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<tbody>
<tr>
<td>In resolving this appeal, we first unfurl the facts as alleged by herein plaintiff: The appellant sought <em>amparo (protection)</em> to 2007 decision RCTV \textsuperscript{831} --- the court contravenes Provisions 57 and 58, 21, 22, 23 of the Constitution, which respectively guarantee freedom of expression, legal equality and due process; the court decides not to renew the licence or concession to operate as a TV station. In this case, Venezuela Telecommunications Commission (CONATEL) accused the station of violating the <em>Telecommunications Act</em> because it had refused in multiple occasions to broadcast the President’s speeches; moreover, it refused to follow strictly application procedures and deadlines for renewal of its Concession (although RCTV Directives and employees argue they have met all requirements and CONATEL applied ‘administrative silence’ to their application). In addition, the government, particularly the President, previously revealed his decision of not renewing the concession of the Licence. The President said publicly that the concession for that <em>fascist channel is finished; RCTV was controlled by Venezuela’s pro-imperialist elites</em>. Plaintiffs alleging State’s responsibility in connection with restrictions on freedom of expression through intimidation, acts of harassment, and physical and verbal abuse of Journalists, reporters and employees of the media. Plaintiff requests that the Venezuelan State breached its obligations by violating Provision 3 (right to human treatment), 57 and 58 (freedom of expression and Provision 49 right to a fair trial and right to judicial protection in connection with the general obligation to respect and ensure human rights set forth in Provisions of Title I of the Constitution. The referral of the case to the Supreme Court is justified by the need to obtain justice and reparation for the injured parties. The previous decision constitutes a reasonable limit to the right of freedom of expression established in the Constitution. The Supreme Court must be competent to examine the merits of this case and the petition must be admissible under the Constitution. Based on the arguments of fact and of law set forth below and without prejudging the merits of this matter.</td>
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<tr>
<th>Arguments of Facts\textsuperscript{832}</th>
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<tr>
<td>The Bolivarian Republic of Venezuela (hereinafter “the State” or “the Venezuelan State”) was responsible for violations of the human rights of Mr. Marcel Granier and 22 other shareholders, executives and/or journalists at the television station Radio Caracas Televisión (RCTV) (hereinafter “the alleged victims”) RCTV, a media outlet, is operated as a free-to-air VHF (very high frequency) television station broadcasting news and airing opinion-based programs. According to the petitioners, RCTV</td>
</tr>
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</table>

\textsuperscript{830} A detailed analysis of this case is in chapter 7 of this Dissertation.
\textsuperscript{831} *Radio Caracas Televisión, RCTV*, 2007 supra note 695.
maintained an independent editorial line that was critical of the government and of the process known as the “Bolivarian Revolution.”

According to the petitioners, the State decided not to renew RCTV’s license or concession to operate as a television station in order to silence that media outlet and thus prevent it from airing anti-government opinions, criticism and news (the petitioners argue that as far back as 2003, independent television stations or channels in Venezuela faced the threat of losing the concessions they needed to operate). They thus maintain that the real reason why the State refused to renew RCTV’s concession was to punish it for its opposition and to silence the only free-to-air television signal with nationwide coverage that was reporting information and ideas of every sort. They also point that by means of a court proceeding to which the alleged victims were not party, the State decided on its own initiative to takeover RCTV’s broadcasting equipment, which it did without giving the alleged victims a court hearing or due process, and without paying them compensation.

The petitioners contend that this, combined with the State’s failure to respond to the remedies filed by the alleged victims, would constitute a violation of the rights to a fair trial, to freedom of thought and expression, to private property, to equality and non-discrimination, and to judicial protection, recognized in articles 57 and 58 of the 1999 Constitution of Venezuela. The petitioners also allege that in May 2007, persons unaffiliated with RCTV, and later, a group of executives, journalists and other staff filed petitions with the Constitutional Chamber of the Supreme Court seeking amparos relief and injunctive relief against the Ministry of Communications and other state entities, because of the decision not to renew RCTV’s frequency. However, the Supreme Court declared these petitions inadmissible and assigned CONATEL (State institution which awarded the concession to Social Venezuelan TV (TEVES) the right to use RCTV’s facilities and equipment. The petitioners filled petition with CONATEL, requesting that the property not affected by the Constitutional Chamber’s Injunctions be handed over to RCTV in 2009, however they never responded to petitions. Finally, the petitioners contend that the petition is admissible because of an unwarranted delay in rendering a final judgment. As of the date (02/14/2013), the Venezuelan State has not filed its response to the petition. The petition is also admissible with respect to the alleged violation of the right to private property protected under TITLE I of the Constitution and to the detriment of the alleged victims who are RCTV shareholders.

In conclusion the decision not to renew RCTV’s concession (and to hand over its tangible assets to the State under the conditions herein described) is a retaliatory measure whose effect was to materially punish those who exercised their freedom of expression by way of a media outlet and to prevent them from exercising that freedom in the conditions they had. The petitioners contend that the measure is not a legitimate exercise of the state’s authority; instead, it is the product of a discriminatory decision calculated to punish the shareholders, executives and journalists at RCTV because of its editorial line, which they claim is self-evident in the statements made by the highest-ranking government officials when discussing the opinions and information aired by

that media outlet and the evidence that disproves the formal reasons given in the
document reporting that the concession was not being renewed.

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<tr>
<th>Legal Arguments: Considerations to decide</th>
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Constitution-protected rights, such as the right to due process and the right to judicial
protection (Provision 49) and the right to freedom of expression (provisions 57, 58, 108
and 153) of the Constitution, which relates to Provisions 108 and 143 and equality
provisions: 1,2,21,22,23,and 75. The Free Press and Speech Provisions 57 and 58 are
deceptively simple and straightforward.

Freedom of expression is a necessary condition for human beings’ fully
development in society. Thus, Provisions 57 and 58 are founded on respect for human
dignity, work, solidarity and the prevalence of general interest. Therefore, this Court
respects freedom of expression, the realization of human beings as individuals within a
society. But not only seeks the realization of individual freedom of expression,
including the realization of the rule of law, democratic, participatory and pluralistic.
The political being developed in a democratic state, only if citizens speak freely
disseminate their thoughts, receive truthful and impartial and if necessary establish
mass communication cannot therefore be the exclusive monopoly of anyone, not even
the State. Certainly, whatever theory underlying policy behind the constitutional order,
the law prescribes the formal technique. However, there are other principles such as due
process, equal protection, which cannot be violated and should be protected strictly to
ensure rule of law, stability, continuity and transparency. Equality and due process are
also rights protected by the Constitutional text. The equal protection principle invokes a
principle to the effect that Venezuelan government must treat everyone as of equal
status and with equal concern without any discrimination, which has been imposed by a
majority (the government) on a minority in part as a badge of the latter’s inferiority (for
not being in power).

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<th>THEORETICAL JUSTIFICATION</th>
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The Supreme Court of Venezuela has articulated a decision that denied a TV
broadcaster the right to express freely, favouring the national executive’s decision to
shut it down. This is the 2007 case of Radio Caracas Televisión (RCTV), under the
arguments that the Court was responsible to privilege the general interest restricted the
broadcaster’s individual right. Any difficult case, for example the case of RCTV, where
freedom of expression is in question, the best possible approach to deal with it in the
Venezuelan context by using the purposes behind principles approach. According to
this view, the Constitution should be interpreted in accordance with the principle
involved in the controversy and its underlying purposes or objectives in accordance
with the history, culture, and identity of the Venezuelan constitutional system. In the
case of RCTV if is interpreted in a manner consistent with the approached advocated
the result would be different.

After an assessment of the case, it is possible to elucidate that the right involved
in this controversy is that of freedom, one that Venezuelans have fought over for
centuries to finally see it entrenched in the Constitution. More precisely, this case refers to the right of freedom of expression. The Venezuelan Constitution of 1999 is the product of centuries of evolution. From the constitutional heritage is possible elucidate that there are written constitutional principles that over centuries characterized Venezuela’s constitutional arrangements. There are explicitly written in the 1999 Constitution to remind Venezuelan the cornerstone of this nation. Provision two of our Constitution enunciates them, as liberty, equality, solidarity, social responsibility. These principles provide the Constitution with the legitimacy that is vital to sustain its text. Equality as one of the principles written in the Constitution established that no one is above the law. Especially those who are the representative of the people should give the example and adhere to conduct themselves as said in the Constitution. In the context of this case, even if the President of the Republic is the head of the State and the representative of the people who elected him to guide the country for a better future has certain high status in society. This should not be confused with the idea that he or her is above the Constitution. After an assessment of the case in question is possible to elucidate that the principle involved in this controversy is one that Venezuelans has fought over centuries to finally see it entrenched in the Constitution, Freedom. In this particular case is more specifically represented in the right of freedom of expression. Everyone has the right to express thoughts, opinions and even criticism freely. This right is not absolute and limitations are explicitly establishing in situations like war propaganda, hatred messages and intolerance against religious belief.

The right of freedom of expression under the 1999 Constitution is subject to a particular restriction in very specific circumstances. In this context, it is important to understand that in the case of RCTV these explicit restriction do not apply to the facts and evident provided. Moreover, it is possible to elucidate from the language of the constitutional text that this norm has a purpose to achieve in Venezuela society. From the particular internal architecture of this norm written in the Constitution this purpose must be compose by the achievement of a respectful, truthful and democratic society. There are all linked to each other to certainly infuse the principle involve a more dynamic nature. In the concrete problem to elucidate, components of the purpose of this right underscore here are reflected in the constitutional text and not in a particular ideology or personal preference. In fact, the provision restricts hatred, propaganda, and intolerance; if this is taking with a different perspective these restrictions are prescribing respects between members of society.

Another component of the purpose of this fundamental right is the opportunity for the exchange freely of different opinions, ideas and thoughts that considering as a whole ensures that truth prevails. And the last but not least, when it is guarantee that everyone can write, speak, broadcast, disseminate a message without any interference by the governmental authorities is possible to affirm that it is a democratic society. These components of the main purpose of the right to freedom of expression provide the compelling reasons to answer the case in question. RCTV one of the oldest TV station of the country has been shut down by the President allegedly because it has become a treat to the government. As the President announced in national TV that he had to shut down this TV station because it was contrary to the interest of the country. However, in terms of accomplishing the respect for different views, including those that
might be considers against the government, there must be guarantees that this TV network can broadcast its views as there are others who might disagree and can disseminate views through their own channels, including the government’s channel. Everyone has the right to choose which one they prefer to watch, and it is not up to the State to decide which one they should watch. There is no tension between freedom of expression and the social welfare. On the contrary, freedom of expression has a particular role to play in providing the opportunity to everyone without any distinctions. This includes the opportunity to choose which channel they prefer to watch, or the newspaper they prefer to read, or radio they want to listen, just to name a few.

It is necessary for the faithful interpretation of the right to freedom of expression that there is respect for different ideas, opinions, thoughts, even though there are critical of the government in place. Otherwise, it will be very difficult for members of society elucidate the truth behind all arguments they are been exposed. It is important that the Court permits the flow of different opinions and criticism to give everyone, individually or collectively the opportunity to make their own views regarding the subject in discussion. In this particular case, if there are different comments, opinions, and criticism disseminated by the TV network, it is ultimately to the population to have a frank and truthful discussion and weigh the evidence that has been presented to determine the veracity of the allegations. In fact, if the messages emanated from the TV network RCTV are dangerous to the populations, then it is more than ever needed an open discussion to determined if in fact there are such and let the free debate between respectful citizens find the best solution.

This component of truth as part of the purpose of this right provide a clear argument against the closure of a TV station, dismissing thousands of workers and putting in risk the stability of the country. On the contrary, it is necessary to consider different points of views, even those who are catalogued by some as dangerous, to find the truth behind the issue in question. This corresponds with the purpose of this right that is the accomplishment of a truthful society. But there is no possible to have a discussion if there is not guarantee that everyone can express their views, opinions and ideas without the threat of been punished.

The interpretation of the constitutional text must be done to protect constitutional rights that are entrenched to achieve particular goals or objective in society. That is particularly important in this case, because freedom of expression has been part of Venezuela’s constitutionalism since the Venezuelans decided to become a free country. First entrenched in the Constitution of 1811, freedom of expression has been constantly integral part of the Venezuelan subsequent constitutional texts.834 Even with a robust list of social economical rights, the 1999 Constitution also blue printed this right as representative of the undisputed principles that are part of the constitutional text. In this context, the last but not least component of its purpose is to achieve a democratic society where people can voice their opinion to secure that elected officials are hold accountable for their actions. It is the duty of the Court to ensure that pluralism of ideas, opinions and views are permitted without the threat of sanction, including those of TV

834 Mariñas-Otero, Constituciones de Venezuela, supra note 25.
stations that might be considered dangerous because democracy is a fundamental value in Venezuela.

**DECISION**

The Court provides *amparo* to RCTV, protecting its right of freedom of expression, renewing its Concession, returning the property to its owners, and paying the double for damages and the reparation and costs of the TV station.

The Constitution must be applied to RCTV case using a the purpose of principles approach taking into account the principles and purposes of the Constitution in the Venezuelan context. A principled and purposive view of freedom of expression recognizes that this particular right or freedom may have a different value depending on the principles and purposes of the Constitution and brings into sharp relief the aspects of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. This approach is more sensitive to the reality of the dilemma posed by the particular facts of a case and is more conducive to finding a fair and just compromise between competing values under of the 1999 Constitution.

The decision of the renewal of RCTV concession responds to the need to honour specific values of freedom in Provisions 57 and 58 of the Constitution, and “to ensure respect for and full enjoyment of individual freedoms and fundamental rights of human beings under the rule of law; aware that consolidation and development of democracy depends upon the existence of freedom of expression; and that, freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals.”

This decision fully recognizes RCTV’s work of almost forty years, because “freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information.” Recalling that freedom of expression is a fundamental right, essential in democracy and recognized in the international law to which Venezuela is subscribed.

The importance of the right or freedom of expression, therefore, must be assessed in Venezuelan historical and cultural context rather than only in the abstract formal criteria and its purpose must also be ascertained in such context. The values in conflict in the context of this particular case are the right of the public to receive transparent and time information through a TV channel and the right of government to transmit and community to the Venezuelan society truthful information required for the proper functioning of democracy. Freedom of expression is of fundamental importance of a democratic society and should only be restricted in the clearest of circumstances. It is

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836 Ibid
also essential to a democracy, and crucial to the rule of law, that the Court ensures that
the free press and speech can function openly.

A TV station thus must be free to comment and report upon government
proceedings to ensure that the public are in fact properly informed, that this TV station
can be seen by all to operate openly in the penetrating light of public scrutiny. It is only
through the press (newspapers, radio and TV) that most individuals can really learn of
what is occurring in the country. The members of the public, as ‘listeners’ or ‘readers,’
have a right to receive information pertaining to public institutions, in particular the
courts. Here, there is not doubt that 2007 decision of RCTV represses freedom of
expression by deciding to shutdown the station. The limits imposed by Provisions 57-
58 constitute pressing and substantial concerns for the purposes of Provisions 2-3 of the
Constitution; both do not interfere as little as possible with the fundamental right of
freedom of expression. The restrictions of not approving its license, the denial of
applying the due process and equality are too extensive and go much further than
necessary to protect the objective of the legislation. The RCTV decision its restrictive
and results is seen as a very substantial interference with freedom of expression and
substantial reduces other human rights as established in above mentioned legislation.
Any need to protect the Venezuelan principle of Social State of Law and Justice could
have been accomplished by far less sweeping measures. Because the decision of not
renewing RCTV’s license contravene the Constitution (not only provisions 57 and 58
but also, Provisions 21,49,108 and 143), and in light of the conclusion that it cannot be
justified pursuant to 75 of the Constitution, it is not necessary to deal with the argument
based on Provisions 108 and 143 of the same Constitution.

REPARATION OF COSTS

For the above reasons, this Constitutional Chamber of the Supreme Tribunal of Justice,
administering justice and for the authority of law declares:

Based on the factual and legal arguments given above, the Court find and declare that:837 (a.) the Venezuelan State is responsible for violation of the right of the victims
to freedom of expression recognized in Provisions 57, 58 as well as 21, 22 and 23 of the
Venezuelan Constitution, in conjunction with the general obligation to respect and
ensure human rights enshrined in Human Rights instruments; (b.) the Venezuelan State
is responsible for violation of the right of the victims to a fair trial and judicial
protection, recognized in Provision 49 of the Constitution and, in conjunction with the
general obligation to respect and ensure human rights enshrined in international
instruments above mentioned; and (c.) the Venezuelan State is responsible for violation of
the right to humane treatment recognized in Provision 3 of the Constitution, in
conjunction with the general obligation to respect and ensure human rights enshrined
international instruments above mentioned. In light of the foregoing, the Court requests
to order that the State:

a.) Adopt all the measures necessary to prevent any acts, whether by state agents or by

837 “RCTV Case” IACHR requests to the Inter-AmericanCommission. Retrieved April 12, 2013:
private individuals, that might obstruct media and related workers from seeking, receiving and imparting information; b.) Adopt all the measures necessary to respond with due diligence to any acts, whether by state agents or private individuals, that obstruct media and related workers from seeking, receiving and imparting information; c.) Carry out an impartial, thorough investigation with a view to prosecuting and punishing all those responsible for the facts in the instant case and make public the findings of those investigations; d.) Ensure to all journalists, employees and directives mentioned as the plaintiffs of the case the exercise of the right to freedom of thought and expression, and in particular the exercise of their work activities; e.) Provide reparation for the material and non-pecuniary damages occasioned by the conduct of the State organs to them. f.) Pay the court costs and legal expenses incurred by the victims and their representatives in pursuing the case, both at the local level and in the Venezuelan jurisdiction. The Court, once it has heard the victims' representatives, to order the Venezuelan State to pay the costs and fees duly substantiated.

**Conclusion:** Based on the foregoing factual and legal considerations, the Court concludes that the Venezuelan State is responsible for violation of the rights to freedom of thought and expression (Provisions 57, 58 of the Constitution), a fair trial (Provision 49), judicial protection (Provision 49) and humane treatment (Provision 3) recognized in the Constitution, in connection with the obligation to respect and ensure rights enshrined in Provisions of International Law, in the terms and to the detriment of the victims mentioned in the report on merits.

**SUPPORTING EVIDENCE**

<table>
<thead>
<tr>
<th>Source</th>
<th>Date</th>
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<tbody>
<tr>
<td>Radio Caracas Televisión, RCTV</td>
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</tr>
<tr>
<td>T.S.J., Sala Constitucional, Exp. Nº 07-0197</td>
<td></td>
</tr>
<tr>
<td>T.S.J., Sala Constitucional, Exp. Nº 1381</td>
<td></td>
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<tr>
<td>Radio Caracas Televisión, RCTV v. Ministry of Communications</td>
<td>14/8/1990</td>
</tr>
<tr>
<td>C.S.J., Sala Político Aministrativa, Exp. Nº 599-90</td>
<td></td>
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<tr>
<td>Comité de Oyentes Interactivos de la Radio (OIR)</td>
<td>25/05/2007</td>
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<tr>
<td>T.S.J. Sala Constitucional, Exp. Nº 07-0731</td>
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<tr>
<td>Witness testimony available at the IACHR (Inter-American Court of Human Rights).</td>
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**APPENDIX B**

Fig 2 Social, Economic and Individual Rights in the 1961 Constitution

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<table>
<thead>
<tr>
<th>Provis.</th>
<th>Rights &amp; Freedoms</th>
<th>Provis Article</th>
<th>Rights &amp; Freedoms</th>
</tr>
</thead>
<tbody>
<tr>
<td>58</td>
<td>Individual Rights</td>
<td>95</td>
<td>Economic Rights</td>
</tr>
<tr>
<td>59</td>
<td>Right to life</td>
<td>96</td>
<td>Social justice</td>
</tr>
<tr>
<td>60</td>
<td>Right to honor, reputation, or private life.</td>
<td>97</td>
<td>Economic freedom</td>
</tr>
<tr>
<td>61</td>
<td>Personal liberty &amp; safety.</td>
<td>98</td>
<td>No-monopolies</td>
</tr>
<tr>
<td>62</td>
<td>Right to Non-Discrimination.</td>
<td>99</td>
<td>Right to Private Initiative</td>
</tr>
<tr>
<td>63</td>
<td>Home is inviolable.</td>
<td>100</td>
<td>Property rights</td>
</tr>
<tr>
<td>64</td>
<td>Correspondence in all its forms is inviolable.</td>
<td>101</td>
<td>Author rights</td>
</tr>
<tr>
<td>65</td>
<td>Free transit</td>
<td>102</td>
<td>Expropriation for social reasons &amp; guarantee payment.</td>
</tr>
<tr>
<td>66</td>
<td>Right to Religion and faith</td>
<td>103</td>
<td>Prohibition of confiscation</td>
</tr>
<tr>
<td>67</td>
<td>Freedom of Speech</td>
<td>104</td>
<td>Right to land property</td>
</tr>
<tr>
<td>68</td>
<td>Right to communicate to public entity and to obtain appropriate reply.</td>
<td>105</td>
<td>Means of communication or transport</td>
</tr>
<tr>
<td>69</td>
<td>Defense is an inviolable right at every stage and step of a trial.</td>
<td>106</td>
<td>Latifundium is contrary to the social interest.</td>
</tr>
<tr>
<td>70</td>
<td>No one may judge except by his natural judges.</td>
<td>107</td>
<td>Protection and conservation of the natural resources.</td>
</tr>
<tr>
<td>71</td>
<td>Right of association</td>
<td>108</td>
<td>Participation of foreign capital in national economic development.</td>
</tr>
<tr>
<td>72</td>
<td>Right to meet with others</td>
<td>109</td>
<td>Right of opinion in matters of interest to economic life.</td>
</tr>
<tr>
<td>73</td>
<td>Social Rights</td>
<td>110</td>
<td><strong>Political Rights</strong></td>
</tr>
<tr>
<td>74</td>
<td>The State shall protect associations.</td>
<td>111</td>
<td>Right to vote</td>
</tr>
<tr>
<td>75</td>
<td>The State shall protect the family.</td>
<td>112</td>
<td>Citizens of 18 years old are voters.</td>
</tr>
<tr>
<td>76</td>
<td>Motherhood shall be protected.</td>
<td>113</td>
<td>Citizens of 21 years old may be elected &amp; are fit to hold public office.</td>
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<tr>
<td>77</td>
<td>Protection of children</td>
<td>114</td>
<td>Freedom and secrecy of Vote</td>
</tr>
<tr>
<td>78</td>
<td>Health protection</td>
<td>115</td>
<td>Right to associate &amp; participate in political parties</td>
</tr>
<tr>
<td>79</td>
<td>Improve living conditions of rural/Indian populations</td>
<td>116</td>
<td>Right to demonstrations</td>
</tr>
<tr>
<td>80</td>
<td>Right to Education</td>
<td>85</td>
<td>Right to strike</td>
</tr>
<tr>
<td>81</td>
<td>Free Education &amp; Private Education.</td>
<td>86</td>
<td>Special protection to women and youth workers.</td>
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<tr>
<td>82</td>
<td>Right to Education</td>
<td>87</td>
<td>Social security</td>
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<td>83</td>
<td>Teachers’ Education &amp; Social welfare</td>
<td>88</td>
<td></td>
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<tr>
<td>84</td>
<td>Professional associations</td>
<td>89</td>
<td></td>
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<tr>
<td>85</td>
<td>Protection of culture, history &amp; art.</td>
<td>90</td>
<td></td>
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<tr>
<td>86</td>
<td>Right to work</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>87</td>
<td>Labor &amp; workers Protection</td>
<td>92</td>
<td></td>
</tr>
<tr>
<td>88</td>
<td>Work hours, vacations &amp; leisure time</td>
<td>93</td>
<td></td>
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<tr>
<td>89</td>
<td>Equal wages for equal work</td>
<td>94</td>
<td></td>
</tr>
<tr>
<td>90</td>
<td>Employment security</td>
<td>95</td>
<td></td>
</tr>
<tr>
<td>91</td>
<td>Service benefits.</td>
<td>96</td>
<td></td>
</tr>
<tr>
<td>92</td>
<td>Collective labor relations</td>
<td>97</td>
<td></td>
</tr>
<tr>
<td>93</td>
<td>Work Unions</td>
<td>98</td>
<td></td>
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<tr>
<td>94</td>
<td>Right to strike</td>
<td>99</td>
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<td>95</td>
<td>Special protection to women and youth workers.</td>
<td>100</td>
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### APPENDIX C

**Fig 3 Rights and Freedoms in the 1999 Constitution**

<table>
<thead>
<tr>
<th>Provis.</th>
<th>Political, Social, Cultural, Econ., Aboriginal &amp; Environment Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fundamental Principles</strong></td>
<td>Freedom, equality, justice &amp; international peace.</td>
</tr>
<tr>
<td>1</td>
<td>Life, liberty, justice, equality, solidarity, democracy, social responsibility, human rights, ethics, and political pluralism.</td>
</tr>
<tr>
<td>2</td>
<td>Essential purposes of the State: protection &amp; development of the individual, democracy, peace, prosperity &amp; welfare.</td>
</tr>
<tr>
<td>3</td>
<td>Decentralized Federal State</td>
</tr>
<tr>
<td>4</td>
<td>Sovereignty Right</td>
</tr>
<tr>
<td>5</td>
<td>Participatory democracy, alternative &amp; pluralist government.</td>
</tr>
<tr>
<td>6</td>
<td>Supremacy of Constitution</td>
</tr>
<tr>
<td>7</td>
<td>Symbols of native land.</td>
</tr>
<tr>
<td>8</td>
<td>Spanish is official language</td>
</tr>
<tr>
<td><strong>Duties, Human Rights &amp; Guarantees</strong></td>
<td>Right to individual human rights without any discrimination.</td>
</tr>
<tr>
<td>9</td>
<td>Free development of personality.</td>
</tr>
<tr>
<td>10</td>
<td>Equality before the law.</td>
</tr>
<tr>
<td>11</td>
<td>Individual rights are guaranteed including those no written in the Constitution.</td>
</tr>
<tr>
<td>12</td>
<td>International law (executed &amp; ratified by Venezuela) has constitutional rank.</td>
</tr>
<tr>
<td>13</td>
<td>The application of Rule of law most beneficial to the defendant.</td>
</tr>
<tr>
<td>14</td>
<td>Constitutional supremacy</td>
</tr>
<tr>
<td>15</td>
<td>Right to free, accessible, impartial, transparent justice</td>
</tr>
<tr>
<td>16</td>
<td>Right to be protected by the courts in the exercise of constitutional rights.</td>
</tr>
<tr>
<td>17</td>
<td>Right of access of data &amp; Petition to the court for the updating, correction or destruction of any records.</td>
</tr>
<tr>
<td>18</td>
<td>State is obliged to legally punish offenses against human rights committed by its authorities.</td>
</tr>
<tr>
<td>19</td>
<td>State has the obligation to make full reparations to the victims of human rights violations.</td>
</tr>
<tr>
<td>20</td>
<td>Right on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, to address petitions &amp; ask for protection.</td>
</tr>
<tr>
<td><strong>Political Rights</strong></td>
<td>Right to participate freely in public affairs.</td>
</tr>
<tr>
<td>21</td>
<td>Suffrage is right.</td>
</tr>
<tr>
<td>22</td>
<td>Citizens at age 18 are qualified to vote.</td>
</tr>
<tr>
<td>23</td>
<td>Convicted people ineligible to run for any office filled by popular vote.</td>
</tr>
<tr>
<td>24</td>
<td>Right to transparent accounting from public officers.</td>
</tr>
<tr>
<td>25</td>
<td>Right of association for political purposes through democratic methods &amp; financial accountability.</td>
</tr>
<tr>
<td>26</td>
<td>Citizens have the right to demonstrate, peacefully.</td>
</tr>
<tr>
<td>27</td>
<td>Guarantee the right of asylum and refuge.</td>
</tr>
<tr>
<td>28</td>
<td>Participation and involvement of people in the exercise of their sovereignty in political affairs.</td>
</tr>
<tr>
<td><strong>Social &amp; Family Rights</strong></td>
<td>Protection of families as a natural association in society, and as the fundamental space for the overall development of persons.</td>
</tr>
<tr>
<td>29</td>
<td>Motherhood and fatherhood are fully protected, whatever the marital status is.</td>
</tr>
<tr>
<td>30</td>
<td>Protection of marriage, which is based on free consent and absolute equality of rights and obligations of the spouses.</td>
</tr>
<tr>
<td>31</td>
<td>Children and adolescents are full legal persons and shall be protected by specialized courts, organs and legislation.</td>
</tr>
<tr>
<td>32</td>
<td>Young people have the right and duty to be active participants in the development process.</td>
</tr>
<tr>
<td>33</td>
<td>Guarantee senior citizens the full exercise of their rights and guarantees.</td>
</tr>
<tr>
<td>34</td>
<td>Right of handicaps to the exercise of his/her abilities &amp; to its integration into the family and community.</td>
</tr>
</tbody>
</table>

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839 *Constitución de la República Bolivariana de Venezuela 1999, supra* note 308.
Right to adequate, safe & comfortable, hygienic housing, with essential basic services.

Health care

Right to public health system: promotion and prevention.

Financing of the public health system is the responsibility of the State.

Social Security as nonprofit public service to guarantee health.

Right and duty to work.

Equality and equitable treatment of men and women in the exercise of the right to work.

Labor right: work is a social fact and shall enjoy the protection of the State.

Working hours shall not exceed eight hours per day or 44 hours per week.

Right to a salary to live with dignity & cover basic material, social and intellectual needs.

Right to benefits & compensation for length of service and protection in the event of dismissal.

Stable employment & restrictions of unjustified dismissal.

Labor rights: liability of person for whose benefit service provided through intermediary or contractor.

Union democracy: Workers have the right freely to establish union organizations.

Employees have the right to voluntary collective bargain. Collective bargaining agreement covers all active workers.

Workers have the right to strike.

**Culture and educational rights**

Cultural creation is free: right to invest in, produce and disseminate creative work

Guarantee the protection & preservation of the cultural values: autonomy of the public administration of culture.

Right to folk culture: equal protection.

Guarantee the issuance, receiving and circulation of cultural information (folklore, art, writers, science and other creators.

Education is a human right and a fundamental social duty; it is democratic, free of charge and obligatory.

Every person has the right to a full, high-quality, ongoing education under conditions and circumstances of equality.

Persons of recognized good moral character and proven academic qualifications shall be placed in charge of education.

Professions requiring a degree and the conditions that must be met, including, professional organization membership, shall be determined by law.

Permission to found and maintain private educational institutions under the strict inspection and vigilance of the State.

Environmental education is obligatory in the various levels and modes of the education system.

Media communications, public and private, shall contribute to civil education.

Autonomy of universities as a principle and status that allows all members to devote themselves to the search for knowledge.

Promotion & development of research activities in science, humanism and technology.

Right to sports and recreation as activities beneficial to individual and collective quality of life.

**Economic Rights**

Free of economics & promotion of private initiative: all persons may devote themselves freely to the economic activity of their choice.

Monopolies shall not be permitted.
Economic crime, speculation, hoarding, usury, the formation of cartels & other related offenses, shall be punished severely in accordance with law.

Right of property is guaranteed.

Confiscation of property shall not be ordered and carried out. Exceptions: crimes committed against public patrimony or property deriving from business, financial or any other activities connected with unlawful trafficking in psychotropic and narcotic substances.

Right of access to goods and services of good quality, as well as to adequate and non-misleading information concerning the contents and characteristics of the products.

Right of workers and the community to develop associations of social and participative nature such as cooperatives, savings funds, mutual funds and other forms of association.

**Rights of Native People (Indigenous Rights)**

Right to the lands they ancestrally and traditionally occupy, and which are necessary to develop.

Guarantee the right to collective ownership of their lands.

Exploitation by the State of the natural resources in native habitats shall be carried out without harming the cultural, social and economic integrity, & likewise subject to prior information and consultation with the native communities concerned.

Right to maintain and develop their ethinical and cultural entity. The State shall promote the appreciation and dissemination of the cultural manifestations of the native peoples, who have the right to their own education and culture.

Right to a full health system that takes into consideration their practices and cultures

Right to maintain and promote their own economic practices based on reciprocity, solidarity and exchange; their traditional productive activities and their participation in the national economy.

Right to collective intellectual property rights in the knowledge, technologies and innovations of native peoples.

Right to participate in politics.

Native peoples, as cultures with ancestral roots, are part of the Nation

**Environmental Rights**

Right, individually and collectively, to protect, maintain and enjoy a safe, healthful and ecologically balanced life and environment.

State shall develop a zoning policy taking into account ecological, geographic, demographic, social, cultural, economic and political realities, in accordance with the premises of sustainable development.

State shall prevent toxic and hazardous waste from entering the country, as well as preventing the manufacture and use of nuclear, chemical and biological weapons.

The 1999 Constitution promotes in 129 provisions, out of 350 provisions, respect for human needs, values, rights and principles without discrimination of any kind, as it is rooted in the history, culture, and identity of the Venezuelan society.

**Unwritten rights**

Those rights that are not written in this Constitution are also recognized in Venezuela: In addition, the 1999 Constitution acknowledges respect for the international system based on regional human rights instruments, such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The Organization of American States is the principal organism of the region that structures all the signature countries “to strengthen cooperation and advance common interests; it is the region’s premier forum for multilateral dialogue and concerted action” through the Inter-American Commission and the Court of Human Rights. They have been given the responsibility to protect human rights in the region: “protection for people who have suffered violations of their rights by the state and who have been unable to find justice in their own country.”
APPENDIX D

Fig 4 Principles & Purposes of the Constitutions of 1961 and 1999

<table>
<thead>
<tr>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Might be associated to strict rules that seek to place determinate, enforceable limits on public actors.</td>
<td>Might be associated with standards or balancing tests that seek to provide public actors with greater flexibility.</td>
</tr>
<tr>
<td><strong>Aims or Goals</strong></td>
<td></td>
</tr>
<tr>
<td>maintaining the independence and territorial integrity of the Nation,</td>
<td></td>
</tr>
<tr>
<td>strengthening its unity</td>
<td></td>
</tr>
<tr>
<td>ensuring the freedom, peace, and stability of its institutions;</td>
<td></td>
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<tr>
<td>protecting and uplifting labor,</td>
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<tr>
<td>upholding human dignity,</td>
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<tr>
<td>promoting the general wellbeing and social security,</td>
<td></td>
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<tr>
<td>achieving an equitable participation by all in the enjoyment of wealth,</td>
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<tr>
<td><strong>Principles:</strong></td>
<td></td>
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<tr>
<td>social justice that ensure to all a decent existence useful to the community</td>
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<tr>
<td>promoting the development of the economy in the service of man;</td>
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</tr>
<tr>
<td>maintaining social and legal equality, without discrimination on account of race, sex, creed, or social conditions;</td>
<td></td>
</tr>
<tr>
<td>Government is and always shall be democratic, representative, responsible, and alternating.</td>
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<tr>
<td>Venezuela constitutes itself in a <em>Democratic Social State of Law and Justice</em> (1999-2013)</td>
<td></td>
</tr>
<tr>
<td><strong>Purposes:</strong></td>
<td></td>
</tr>
<tr>
<td>1. the protection and development of the individual</td>
<td></td>
</tr>
<tr>
<td>2. respect for the dignity of the individual</td>
<td></td>
</tr>
<tr>
<td>3. the democratic exercise of the will of the people</td>
<td></td>
</tr>
<tr>
<td>4. the building of a just and peace-loving society</td>
<td></td>
</tr>
<tr>
<td>5. the furtherance of the prosperity and welfare of the people and</td>
<td></td>
</tr>
<tr>
<td>6. the guaranteeing of the fulfillment of the principles, rights and duties established in this Constitution.</td>
<td></td>
</tr>
<tr>
<td>7. education</td>
<td></td>
</tr>
<tr>
<td><strong>Principles:</strong></td>
<td></td>
</tr>
<tr>
<td>1. Freedom and independence</td>
<td></td>
</tr>
<tr>
<td>2. Equality</td>
<td></td>
</tr>
<tr>
<td>3. Justice</td>
<td></td>
</tr>
<tr>
<td>4. International peace</td>
<td></td>
</tr>
<tr>
<td>5. <em>Democratic social state of law and justice</em></td>
<td></td>
</tr>
<tr>
<td>6. Life</td>
<td></td>
</tr>
<tr>
<td>7. Liberty</td>
<td></td>
</tr>
<tr>
<td>8. Equality</td>
<td></td>
</tr>
<tr>
<td>9. Solidarity</td>
<td></td>
</tr>
<tr>
<td>10. Democracy/participatory/plural/elective/decentralized</td>
<td></td>
</tr>
<tr>
<td>11. Social responsibility</td>
<td></td>
</tr>
<tr>
<td>12. Human rights</td>
<td></td>
</tr>
<tr>
<td>13. Ethics</td>
<td></td>
</tr>
<tr>
<td>14. Political pluralism</td>
<td></td>
</tr>
<tr>
<td>15. Federal state/decentralized</td>
<td></td>
</tr>
<tr>
<td>16. Sovereignty</td>
<td></td>
</tr>
<tr>
<td>17. Supremacy of the Constitution</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX E

Fig 5 Arguments Embedded in Cases that May Interconnect

<table>
<thead>
<tr>
<th>FORMALISM APPROACHES</th>
<th>FUNCTIONALISTM APPROACHES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formalist approaches might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together. Formalist approach promises stability, predictability and continuity of analysis over time. Main approaches and arguments embedded in landmark decisions were grouping in the following manner:</td>
<td>Functionalist approaches might be understood as induction from constitutional policy and practice, with practice typically being examined over time. Functionalist approach in differenty cases promises adaptability, flexibility and evolution. Main approaches and arguments embedded in landmark decisions were grouping in the following manner:</td>
</tr>
<tr>
<td>a) original intent</td>
<td>a) Emphasis on policy or political decision-making (Social Justice).</td>
</tr>
<tr>
<td>b) text meaning</td>
<td>b) Emphasis on Practical Solutions: Filling the gaps (lacunas).</td>
</tr>
<tr>
<td>c) emphasis on formal requirements and/or technical elements</td>
<td>c) Emphasis on the Interdisciplinary Matter.</td>
</tr>
<tr>
<td>d) emphasis on the structure (supremacy of the Constitution)</td>
<td>d) Non – Legal Facts and Experience.</td>
</tr>
<tr>
<td>e) Emphasis on the reliance on precedent &amp; the binding jurisprudence.</td>
<td>e) Emphasis on the Judge’s own Political Economic or Personal Inclinations or Preferences</td>
</tr>
</tbody>
</table>

GOALS

Venezuelan formalism might be understood as giving priority to rule of law values such as original, intent and textual meaning, predictability, and continuity in law. Rights adjudication connotes relatively formalist inquiries of rules, and sharp lines or bright-lines, have the validity of constitutional principles and are sanctioned by the same formal criteria as those by which the present Constitution is adopted.

Judicial formalism is expressed by loyalty to principles and the solution of legal questions deductively, supremacy of the law, and rule of law and on existing precedents or historical record. Preference to the Constitution above any other law.

Venezuelan functionalism, in turn, might be understood as emphasizing pragmatic, interdisciplinary, and policy values like social justice in law. Little or non use of precedents. Checks and Balances connote relatively functionalist inquiries of standards, and flexible interactions.

Most decisions are based on intrinsically political or moral thinking of the Constitution based on innovative interpretation of the Social State of Law and Justice. Considerations of judicial policy that are not derived from the purely legal principles and perhaps – in certain cases – that even contradicted these principles.
APPENDIX F

Fig 6 Summary of Cases & Approaches Distributed by Dates

<table>
<thead>
<tr>
<th>Time Frames</th>
<th>CONSTITUTIONAL CASES[^6]</th>
<th>Legal Theory/Approach</th>
<th>#</th>
</tr>
</thead>
</table>
| 1962-1979   | *Lola y Laura Gutiérrez v. Enriquecimiento sin Causa, 1962*  
*Ley de Reforma Agraria, 1963*  
*Néstor Moreno v. Municipalidad Distrito Federal, 1964*  
*Alberto Solano, 1969*  
*Francisco Wytack, 1971*  
*Juan Jiménez, 1978*  
*Consejo de guerra permanente de Caracas, 1979)* | Original Intent | 8 |
| 1968-1993   | *CompuLab Services International C.A., 1976*  
*C. Oropeza, 1987*  
*V. Ríos, 1989*  
*Albornoz v. Roppolo, 1991*  
*Monagas, 1993* | Text Meaning: Analysis of Words | 5 |
| 1980-1998   | *Acción Popular de Inconstitucionalidad, 1980*  
*Rondalera, 1981*  
*Andrés Velásquez, 1983*  
*Guillén v. Mene Grande Oil, 1984*  
*Héctor Valverde Aristimuño, 1986*  
*Gladys Rachadel, 1986*  
*Augusto Olivo Gómez, 1986*  
*Registro Autónomo Permanente, 1986* | Different Formalist Approaches | 8 |
| 1967-1996   | *José M. Sánchez v. José Ferrera, 1967*  
*Rafael Alfonzo, 1976*  
*Compañía Española Petróleos v. M. Hacienda & Minas Hidrocarburos, 1981*  
*B. Fajardo, 1980*  
*L. Medrano v. Auto Sill, 1983*  
*Guillén v. Mene Grande Oil, 1984*  
*Del Acqua C.A., 1984; R. Jiménez, 1988*  
*D. Roa v. Seguros la Seguridad C.A., 1990*  
<table>
<thead>
<tr>
<th>Year Range</th>
<th>Cases</th>
</tr>
</thead>
</table>
M. Morales, 1990  
Fedecámaras v. Ley del Seguro Social, 1994  
B. González, 1995  
Banco del Orinoco, S.A., 1995  
M. Pérez, 1996 |
J. Jiménez, 1968  
Constitucionalidad Ley Reform Parc. Ley Orgánica Poder Judic, 1969  
Dr. Ferrer v. Zulia Bar Association, 1969  
City Council District Plaza v. C.A. Electricidad de Caracas, 1970  
Cervecería Modelo CA, 1979  
Consulta del Consejo de Guerra, 1979  
I. Terán, 1983  
J. Moreno, 1990 |
R. Márquez, 1998  
Perfumería La Diadema Capital C.A., 1995  
CAMRADIO, 1982  
I.C. Oropeza, 1987  
María Eugenia Díaz v. Military Tribunal, 1981  
J. Guzmán, 1990  
Radio Caracas Televisión RCTV v. Min. of Communications, 1990 |
| 1999-2011  | Cases: Transition from Formal Application of the Law to a More Flexible Approach  
1998  
Asamblea Nacional Constituyente, 1998  
Enfermos de Sida v. Ministerio de la Defensa, 1998  
Mata Millán, 2000 |
| 1999-2005 | Servio Tulio León Briceño, 2000 |
| 2002-2009  | Asodeviprilara, 2002  
Re: Referéndum Consultivo, 2003  
Reelección Presidencial, 2006  
Rudolph Augusto Thomás v. Mayra Serrano, 2005 |
| 2002-2009  | Contextual Facts: the Democratic Social State of Law and Justice |
| 1961-2013 | **Corpoturismo, 2001**  
**INSACA v. Ministerio de Sanidad y Asistencia Social, 2001** | **Solutions:**  
**Filling the Gaps** | 3 |
| 2000-2006 | **Dilia Parra Guillén, 2000**  
**Baker Hughes, 2001**  
**Asociac. Civil Comerciantes del Ctro Comercial San Ignacio, 2002**  
**Luis Esteban Palacios and others, 2006** | **Emphasis on Interdisciplin. Matter** | 4 |
| 2009-2011 | **Leopoldo López, 2011**  
**Martín Javier Jiménez & Rafael Celestino Belisario, 2011** | **Judge’s Politic. Economic. Personal Inclinations** | 2 |
| 1999-2011 | **Freedom of Expression Cases**  
**Dworkin’s Adjudicative Theory (1999-2011)** | **Different Functionalist Approach to Freedom of Expression** | 4 |
| 1999-2011 | **Elias Santana, 2001**  
**Radio Caracas Televisión, RCTV, 2007**  
**Comité de Oyentes Interactivos de la Radio (OIR), 2007**  
**Rafael Chavero Gazdik, 2001**  
**William Dávila Barrios et al., 2000**  
**Hermán Escarrá, 2001**  
**Eduardo Lapi García y Biaggio Pilieri, 2008**  
**Ricardo Fernández Barruecos, 2011**  
**Juramentación Presidencial (Ponencia Conjunta), 2013**  
**Presidente Encargado, 2013** | **Moral Reading** | 7 |
| 1999-2011 | **Cases: 83** | | |
GLOSSARY OF TERMS

Cases (Landmark Cases): Court judgments and judicial decisions from Venezuelan Supreme Court public law cases (1961-2012). Selected cases fulfilled one or more of the following guidelines: a) clearly milestone decisions on a particular area that has made history in Venezuela; b) generally considered important by specialists in Venezuela, legally, socially, and/or politically; c) of probably especial interest to the foreign legal scholar and/or social scientist because of the nature of the dispute at issue and/or the judicial reasoning.

Case Law: for this study the case law approach was used as part of the research approach to explore each of the selected judicial decisions developed by the Supreme Court in the eras of the 1961 and 1999 Constitutions that show the set of existing rulings which have made new interpretations of the law. Central to this examination is the scrutiny and analysis of arguments, approaches or judicial styles embedded in each case, resembling such legal theories.

Constitutional Interpretation: constitutional judging or constitutional construction is the process by which judicial decisions are made by the Court justified by the Constitution. Constitutional judging takes a more important role, giving the judiciary an overwhelming power to decide the sense, scope, and priority of such desirable goals entrenched in the constitutional text.

Constitution of 1961 is the written Constitution enacted in 1961 (that contains 250 Provisions or Articles) and was the traditional supreme law or Magna Carta of Venezuela during almost four decades that includes the core of rights and an agreed set of principles and rules by which Venezuelan nation was run from 1961 to 1998. Those values and principles have been preserved and protected by the institutions of the State, such as the judiciary system, separation of power, and the rule of law.

Constitution of 1999 is the recent enacted Constitution, which is the twenty-sixth written Magna Carta or the current supreme law in Venezuela (that contains 350 Provisions or Articles), approved by popular referendum in 1999. The essential parts of this Venezuelan State’s Constitution are the core of rights that are valued by the Venezuelan society and the principles of rule of law that are to be preserved and protected by the institutions of the State, such as the separation of powers, and the judiciary system, ruling Venezuelan citizens in the way they shall be involved in the decision-making process.

Constitutional democracy has been a system that has been functioning for more than fifty years in which the Venezuelan people constitutionally oversee the exercise of the political authority they conferred on their representatives through the written constitution. The shared conceptual foundation of this expression in Venezuela is to secure the structure of regulations that provide a framework to enjoy rights and freedoms, such as the right to participate in the political, social and economic development of our society.

Constitutional Supremacy refers to the idea that legal systems are based on hierarchical structure and supremacy of constitutional rules, principles and/or purposes. According to this view, the normative force of the most ordinary of laws is afforded by higher laws in the legal hierarchy and eventually by the constitution itself.
Constitutional Evolution: That is, the Constitution evolves and progresses with society. The Constitution has evolved throughout the Venezuelan history from independence to democracy. The course of constitutional evolutionary history, particularly in the era of the Constitutions of 1961 and 1999, plays an important role in the direction of jurisprudence.

Constitutional Principles: are those bedrock standards that have endured the test of time to become the pillars of the constitutional system. In the case of Venezuela, these principles are explicitly articulate on provision second of the 1999 Constitution, such as liberty, justice, equality, social responsibility among others that historically, culturally, and traditionally have been part of Venezuelan constitutionalism since independence to the democratic era.

Democracy: has been a political system for more than five decades in Venezuela in which all the people have governed themselves, either directly or indirectly, through representatives chosen by them periodically through free and fair elections. Accordingly, elected governments’ primary duty has been to guarantee the respect and observance of all human rights within their jurisdiction.

Democracy (Exceptional Democracy): the era of the 1961 Constitution has been described by Venezuelan law scholars and political scientists as an ‘exceptional democracy,’ and the main reason for that label, was the enjoyment, for the first time in Venezuelan history, of a long, stable, prosperous, and peaceful period of almost forty years of democracy and rule of law. Venezuelans were proud of its country, which by the time was an example of prosperity, and progress in Latin America. Of the twenty-six written constitutional texts of Venezuela, starting from its independence in 1811, the 1961 Constitution was the document that established electoral procedures that enabled citizens to vote freely, in universal, secret, and fair elections for the head of the state and congress representatives, making Venezuela’s democratic consolidation possible. From 1961 to 1999 Venezuela took the path of civil and democratic rule, contrary to the rest of Latin America, which, by the time, in 1961, kept dictatorships, under strong military rulers.

Democracy (Participative Democracy): The drafters of the 1999 Constitution strove to provide citizens the opportunities to make meaningful contributions to decision-making process, rather than just elected public officials. In fact, provision 62 encourages civil vitality, voluntary action, and community responsibility to carry the public affairs. And provision 70 describes explicitly that the participation and involvement of people in public affairs is the direct application of the principle of sovereignty. In addition, it enumerates way that citizens are empowered to make their voices heard during important decisions.

Democratic Social State of Law and Justice: Provision two (2) of the 1999 Constitution states that the Bolivarian Republic of Venezuela constitutes a Democratic Social State of Law and Justice that defends the superior values of life, freedom, justice, equality, solidarity, democracy, social responsibility and, in general, human rights, ethics and political pluralism. Provision 3 of this 1999 Constitution clearly states that the essential purposes of the State are the protection and development of the individual and respect for the dignity of the individual, the democratic exercise of the will of the people, the building of a just and peace-loving society, the furtherance of the prosperity and welfare of the people and the
guaranteeing of the fulfillment of the principles, rights and duties established in this Constitution. Education and work are the fundamental processes for guaranteeing these purposes. These desirable goals are the purposes of fundamental principles or superior values written in the Constitution to accomplish justice and fairness.

**Formalism:** is a jurisprudential theory that refers to the strict adherence of the logical and gapless norms, disregarding any political and social concerns, in order to deduce the answer to the controversy. Concepts of formalism, textualism, and positivism are used interchangeably in this study by the very fact that judges for four decades of jurisprudence rationalized in their decisions a fixed, coherent, gapless, autonomous, and comprehensive character of the law. Of course, there are differences between each of these concepts, and not everyone will agree with a particular definition, yet in order to explain the complexity of the judges’ own approaches to constitutional jurisprudence for four decades, it is useful to employ a particular label. Venezuelan judicial decisions in the era of the 1961 Constitution reflect certain arguments that resemble legal positivism theory as for example formalism related to the following approaches:

- **Original Intent** (the sovereignty of commands) is based on the argument that to truly give meaning to the Constitution, the original intentions of the framers, ratifiers, or founding generation must be the primary sources of constitutional interpretation.

- **Text Meaning** (analysis of words) is an approach used to interpret the Constitution by letting the plain meaning of the words dictates in a straightforward manner the answer to constitutional questions. At the beginning of the 1960’s the Court argued that the text itself presented in its original language offered the most convenient way to solve the controversy.

- **Emphasis on Formal Requirements and/or Technical Elements** is an approach to interpret the Constitution in which the decision shows its adherence to the prescribed form and procedural methodological requests of the constitutional norm.

- **Reliance on Precedent & the Binding Jurisprudence:** refers to Stare decisis and Precedent-Based adjudication, which is the doctrinal approach based on the rules that are generated by judicial precedents.

- **Stare decisis** refer to the practice of treating precedents as binding on future judicial decision-making. A precedent of a judicial decision establishes a rule or principle that a court or other judicial body may consider for subsequent cases with similar facts or issues.

- **Emphasis on the Structure: Hierarchy of Norms & Logic System of Rules:** it is an approach to interpret the Constitution in which the decision is based on the logic ladder of rules and emphasis is given to the structure of norms.

**Functionalism:** is a jurisprudential theory that focuses on the substantive goals that the norms are meant to achieve in society, shaping constitutional outcomes by enhancing the welfare of society. Judges are more concerned with the consequences of their decisions, which the law is seem as a tool for the benefit of society rather than an obstacle to social change. Venezuelan judicial decisions in the era of the 1999 Constitution embed arguments related to the following approaches:
- **Emphasis on policy or political decision-making**: This approach is the policy-making aspect of the decisions emanating from the judicial branch, which is not a unified collection of thought. This approach refers to the arguments used by judges who consider adjusting decisions to sociological, economic, moral, and political issues as preferences of dominant political forces. Judges rely on political views, social concerns, and moral predilections of the society to reach their decisions. The Supreme Court has used this argument, based on the notion of *Social State of Law and Justice* in aid of giving meaning to particular constitutional rights and freedoms.

- **Emphasis on Practical Solutions: Filling the gaps (lacunas)**. According to this approach to interpret the Constitution, the *non-legal facts and experiences* are the arguments used by judges associated with filling the gaps between the written rule and justice. The aim of the Court is to present constitutional interpretation as a more “creative” process to understand society’s complex issues, rather than a “mechanical jurisprudence.” This argument deals with the responsibility of judges to provide a meaning to constitutional provisions.

- **Emphasis on the Interdisciplinary Matter**: the style to interpret the Constitution which refers to a holistic view to decide a specific case. It has also been used to designate the judges’ various versions of law, based on different broad number of disciplines.

- **Filling the gaps (lacunas), Non – Legal Facts and Experiences**: are the arguments used by judges associated with filling the gaps between the written rule and justice. The aim of the Court is to present constitutional interpretation as a more “creative” process to understand society’s complex issues, rather than a “mechanical jurisprudence.” This argument deals with the responsibility of judges to provide a meaning to constitutional provisions.

- **Emphasis on the Judge’s own Political Economic & Personal Inclinations or Preferences**: It is an approach to interpret the Constitution which has been used to designate the judges’ various versions of law, based on the judges’ own experience, beliefs, opinions and/or political, economic or personal preferences.

*Fundamental rights* are a group of rights recognized by the Constitution as requiring a high degree of protection from government encroachment. These rights have are considered indispensables to live in a democratic society. Any limitation to these rights generally must be scrutinized by the Supreme Court to be upheld as constitutional.

*Freedom of Expression Right in Venezuela*: is a basic foundation of democracy established in Articles 57 and 58 of the Constitution of 1999. According to which, freedom of speech is the political right to communicate citizens’ own opinions and ideas. Venezuelan society values this right as essential for democracy to thrive and for the personal development and dignity of every individual and is vital for the fulfillment of other human rights. The Court’s current struggle is to how best interpret this constitutional right.

*Jurisprudence approaches in Venezuela*: Judges’ own interpretation of constitutional language. Judges are major protagonists of the most discussed issues in the country regarding rights adjudication. Judges have to offer, to the extent possible, guarantees to the infringement of individual, social, political, economic, indigenous, environmental rights by the unlawful exercise of power and authority. The law mind-sets that a judge brings to the
judicial process might influence how that judge regards the use of their law wisdom. Given the progressive changes evidenced in contemporary society, it is almost impossible to understand current debates without understanding judges’ styles and approaches of jurisprudence. According to this study, principles and purposes of the Constitution shall prevail, being the Court’s responsibility to rule accordingly in any case.

*The Rule of Law:* means that everyone is subject to the law; that no one, no matter how important or powerful, is above the law. The rule of law requires an independent and strong judiciary to ensure the efficient its enforcement to ensure freedom and avoid tyranny. The rule of law is legal accountability to control those in power in order to preserve and protect rights and freedoms. In this sense, our liberties are safe where everyone is subject of the court.

*True Venezuelan identity* is embedded in the constitutional text: the unique culture, characteristics and condition of being Venezuelan, as well as the many symbols and expressions that set Venezuelans apart from other peoples and cultures of the world. The identity of Venezuela revolves around the aspirations of this society for social justice, brotherhood, and freedom that make this nation unique.
Vitae

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