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The Legal Death of the Latin American  
Democracy: Bolivarian Populism's Model for  
Centralizing Power, Eliminating Political  
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**The Legal Death of the Latin American Democracy:**  
Bolivarian Populism's Model for Centralizing Power, Eliminating Political Opposition,  
and Undermining the Rule of Law

*"The death of democracy is not likely to be an assassination from ambush. It will be a slow extinction from apathy, indifference, and undernourishment."*

-Robert M. Hutchins, American educator and writer

**ABSTRACT:**

Over the past decade, Hugo Chavez has remade the Venezuelan polity into his own image, centralizing power and undermining his rivals. The most striking feature of the changes in Venezuelan government is the fact that the changes have been made through ostensibly legal mechanisms; that is, Chavez used Venezuelan democratic institutions to centralize power. Chavez's blueprint for power-centralization is straightforward: (1) he convened a constitutional constituent assembly to rewrite the previous constitution, (2) he created a doppelganger Congress and Supreme Court, gradually transferring power from the existing Congress and Court to the new institutions, and (3) he dissolved the original Congress and Supreme Court, leaving only his hand-picked versions of the legislature and judiciary. Bolivia's President Evo Morales and Ecuador's President Rafael Correa have already begun to copy Chavez's approach. Democracy's supporters must meet this rising authoritarian tide by supporting increased rule of law reform in Latin America.

**ARTICLE:**

On February 15, 2009, Venezuelans took to the polls and approved a constitutional amendment removing presidential term limits. Hugo Chavez, the Venezuelan president, championed the referendum as the "perfect victory"<sup>1</sup> and proclaimed that his now unlimited tenure was opening "wide the gates of the future."<sup>2</sup> The removal of term limits, however, was just the latest in a string of changes to the Venezuelan government that have centralized power in

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<sup>1</sup> Ian James, *Meltdown Threatens Chavez Triumph*, MIAMI HERALD, February 16, 2009.

<sup>2</sup> Carmen Gentile, *Voters Grant Extended Rule to Chavez*, WASH. TIMES, Feb. 16, 2009.

Chavez's hands. A decade ago, Venezuela was a functioning (albeit not perfect) democracy with a separation of powers between coordinate branches of government. Today, Chavez has replaced the judiciary and legislative branches with his own hand-picked lackeys, centralized power in the executive branch, and cleared the way for a lifelong term of office.

The most striking feature of the changes in the Venezuelan polity is the fact that the changes have been made through ostensibly legal mechanisms; that is, Chavez used Venezuelan democratic institutions to centralize power. Alongside the official changes through legal channels, Chavez and his supporters have engaged in illegal tactics to silence opposition through intimidation and coercion.<sup>3</sup> This dual track of legal changes to government accompanied by illegal acts of coercion has resulted in an empowered Hugo Chavez and a government that is fundamentally unable to check Chavez's agenda.

Policy makers must confront this assault on the rule of law in Latin America. The Venezuelan centralization of power represents a dangerous potential path for the countries in the region; Bolivia's President Evo Morales and Ecuador's President Rafael Correa have both already mirrored several of Chavez's power centralization moves. Paraguay and Nicaragua might be next. These changes threaten to undo decades of commitment and millions of dollars that have been spent in trying to develop Latin American democracies and instill the rule of law.

This article analyzes the Venezuelan power centralization in several ways. In Part I, this article discusses Chavez's institutional "reforms." By examining the seminal Spanish-language documents relied upon by Chavez, the article explains exactly how Chavez was able to navigate the legal channels to fundamentally undermine the rule of law in Venezuela. Part II discusses

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<sup>3</sup> See, e.g., *Chavez's Groundwork for Lifetime in Office*, WASH. TIMES, Feb. 13, 2009 ("Student-led opposition groups, whose evocative slogan is 'No Means No,' have faced intimidation and violence. Members of the anti-Chavez press have been beaten and killed.").

how the Venezuelan Bolivarian Revolution has been mirrored by other nations. Part III argues that democracy's supporters should meet the Bolivarian challenge with a renewed emphasis of rule of law reform and a commitment to Latin American democracy.

### **I. The Legalistic Death of the Venezuelan Democracy**

Hugo Chavez was able to centralize power by first paralyzing other branches of government and then replacing them. As described *infra*, Chavez would first create a doppelganger body (a new legislature or new court) and then begin to favor the new doppelganger over the original entity. Over time, Chavez would abolish the original institution and transfer all power to his new creation. In that way, he was able to quietly replace the coordinate branches of government.

This type of power centralization is not unprecedented: democracies have become undemocratic before. Probably the most often cited example is the Weimar Republic's collapse into fascism before World War II. A powerful and charismatic public speaker, Adolf Hitler won election based on the popularity of his criticisms of the Versailles settlement.<sup>4</sup> Once in power, Hitler pushed through a number of centralization measures to consolidate his power. On March 24, 1933, the Reichstag passed the Enabling Act, which gave the cabinet full legislative power and the ability to deviate from the Weimar Constitution.<sup>5</sup> On July 14, 1933, the Reichstag passed a law prohibiting any political party other than the Nazis.<sup>6</sup> The Nazis also passed a number of laws and decrees that reduced the powers of regional and local governments and abolished representative assemblies.<sup>7</sup> The judiciary was likewise attacked; when the Supreme Court

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<sup>4</sup> For a history of Adolf Hitler's rise to power, see *Int'l Military Trib. (Nuremberg), Judgment and Sentences (October 1, 1946)*, 41 AM. J. INTL L. 172 (1947).

<sup>5</sup> *Id.* at 178-79.

<sup>6</sup> *Id.* at 179.

<sup>7</sup> *Id.*

acquitted three of the four defendants charged with complicity in a fire set at the Reichstag, Hitler stripped the Supreme Court of jurisdiction and established a new “People’s Court” to try cases.<sup>8</sup>

Chavez’s Venezuela is neither as centralized as Nazi Germany nor are Chavez’s coercive measures as brutal as Hitler’s. Their blueprints for power centralization, however, are substantially similar. Both were military veterans, Chavez a Venezuelan paratrooper and Hitler a decorated war hero in World War I. Both participated in failed coups in their early political careers, Chavez in a failed 1992 endeavor and Hitler in the 1923 Beer Hall Putsch. Both were imprisoned for their involvement in the coup attempt, and both spent their time in prison contemplating their return to power through democratic election. Both came to power on the heels of persistent political corruption and inability to address social problems such as income inequality. Both rode the wave of popular support to power. And both were able to use their countries legal systems to create autocracy where democracy had stood.

a. Chavez’s Rise to Power and the Origins of the Bolivarian Revolution

Hugo Chavez was profoundly affected<sup>9</sup> by what he perceived as the government’s inability to alleviate the plight of the country’s poor and eagerness to send the military to quell protestors.<sup>10</sup> Chavez held the government, and its constitution, in such contempt that he

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<sup>8</sup> *Id.*

<sup>9</sup> *See generally* ALEIDA GUEVARA, CHAVEZ, VENEZUELA AND THE NEW LATIN AMERICA (2005) (Che Guevara’s daughter interviews Chavez on his views of the Bolivarian revolution).

<sup>10</sup> “Background Note: Venezuela,” United States Department of State (February 2007). Venezuela’s return to democracy in the 1960s failed to bring about the economic and political equality for which the people were starving. The weakening economy limited the extent to which the government could allocate patronage, a major source of its legitimacy. The party’s subsequent loss of political capital made the apparent and pervasive corruption less tolerable. Tensions reached its pinnacle on February 1989, when a riot broke out in the streets of Caracas and hundreds of people were killed. This incident, commonly referred to as “Caracazo,” represented a much larger disillusionment with the political leadership and the policies of the time. It had enormous political ramifications that reverberated throughout the political, social, and military circles. *Id.*

attempted a coup d'etat in 1992 to overthrow the government.<sup>11</sup> The government was able to resume control and Chavez's coup ultimately ended in failure. Despite the coup's failure, Chavez emerged politically successful from the entire ordeal. Chavez's arrest provided the opportunity to voice his complaints with the traditional establishment and list a series of demands, such as cost-of-living clauses for wages, tax reform facilitating a redistribution of wealth, and renegotiation of debt.<sup>12</sup> These demands were extremely popular and his actions were viewed as an attempt for change. Ironically, Chavez's failed overthrow of the democratically elected government acted as the catalyst for his own democratic ambitions.

Hugo Chavez refers to his political philosophy as the Bolivarian Revolution. The movement is the repackaging of a new form of populism. Based on Hugo Chavez's interpretations of Simon Bolivar, Simon Rodriguez, and other leftist leaders, Bolivarianism advocates income and land redistribution, the mobilization of the state's resources to increase the poor's standard of living in the attempt to achieve "social justice," and asserting a nationalistic stance to regain a supposed loss of sovereignty during and following the Cold War.<sup>13</sup>

Another crucial characteristic of the Bolivarian Revolution is its apparent propensity to concentrate power.<sup>14</sup> The founding members and their ideology instilled a willingness to supersede legal constraints to achieve their objectives. This notion has gained popularity after 40 years of observed political ineptitude. Following the 1992 coup, Hugo Chavez emerged as a folk hero and the Bolivarian revolution expanded its popularity, symptomatic of the endemic shift

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<sup>11</sup> MICHAEL MCCAUGHAN, *THE BATTLE OF VENEZUELA* 66 (2005).

<sup>12</sup> Steve Ellner, *The Radical Potential of Chavismo in Venezuela: The First Year and a Half in Power*, *Latin American Perspectives* 28, no. 5 (September 2001): 9.

<sup>13</sup> See RICHARD GOTT, *IN THE SHADOW OF THE LIBERATOR: HUGO CHAVEZ AND THE TRANSFORMATION OF VENEZUELA* 175 (2000).

<sup>14</sup> Kurt Weyland, *The Rise and Decline of Fujimori's Neopopulist Leadership*, *THE FUJIMORI LEGACY: THE RISE OF ELECTORAL AUTHORITARIANISM IN PERU* 13-19 (Julio Carrion, ed., 2006).

towards authoritarian maneuvers. Hugo Chavez's insistence to wear his red beret during campaigns may have foreshadowed the large role the military came to play in Chavez's administration and its centralized organizational structure.

Several ex-guerrilla fighters the 1960s joined the Hugo Chavez's movement, bringing not only their leftist ideology but also a militaristic perspective. For example, Kleber Ramirez criticized the historical structure of the Venezuelan state, citing its limited capacity. He called for a stronger national executive, the elimination of state legislatures, and reorganization of the municipal government, which he argued would form bedrock of a new democracy.<sup>15</sup> Another patron of the movement, Argentinean historian Norberto Ceresole, echoed an already growing sentiment that democracy in Latin America was beginning to fail.<sup>16</sup> Furthermore, his prescription for a decaying system involved replacing it with a strongman government buttressed by the military.<sup>17</sup> Following Chavez's electoral victory at the polls in 1998, Ceresole decided to travel to Venezuela in order to promote a more "progressive" military government.<sup>18</sup> In sum, Bolivarianism rationalizes a populist and occasionally an authoritarian governance method.<sup>19</sup>

Armed with widespread public support, Chavez set out to remake the Venezuelan government. As described *infra*, Chavez first attacked the legislative branch, then attacked the judicial branch, and finally removed executive term limits.

b. Step #1: Chavez Undermines the Congress By Creating a National Constituent Assembly

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<sup>15</sup> DANIEL HELLINGER & STEVE ELLNER, VENEZUELAN POLITICS IN THE CHAVEZ ERA: CLASS, POLARIZATION, AND CONFLICT RAMIREZ 88 (2003).

<sup>16</sup> Ellner, *supra* note XXX, at 6.

<sup>17</sup> *Id.* at 6. Noberto Ceresole supported importing a government model similar to that of Egypt's Gamal Abdel Nassar.

<sup>18</sup> Although Noberto Ceresole undoubtedly influenced Hugo Chavez at an early stage, Chavez ultimately ended the friendship and forced Ceresole out of Venezuela for political reasons.

<sup>19</sup> Harold A. Trinkunas, *Defining Venezuela's 'Bolivarian Revolution'*, 85 MIL. REV. 39, 40 (2005).

Hugo Chavez's actions as president illustrate that he had no intention of defending and upholding Venezuela's constitution at the time. Several times during his campaign, Chavez stated that the constitution was "moribund" and lacked legitimacy. He sought to radically and systematically transform Venezuela's political institutions. In order to achieve this objective, he needed to write a new constitution that would eliminate certain obstacles and create new institutions that would ultimately be responsive to him. The establishment of the National Constituent Assembly proved the mechanism through which Chavez would achieve these lofty ambitions.<sup>20</sup>

In April 1999, Chavez announced a referendum for the establishment of a National Constituent Assembly ("ANC") to craft a new constitution for the country. The Venezuelan public responded favorably to Chavez's promise that radical change and a new Constitution would help alleviate the rampant corruption and injustice the plagued Venezuela. Eighty-five percent of the voters favored the referendum.<sup>21</sup> Moreover, eighty-two percent of the voters accepted that the newly created institution define its own limitation, creating the opportunity for the new body to assume powers for which the 1961 Constitution did not allow.<sup>22</sup> The July 25, 1999 election for ANC delegates resulted in an overwhelming victory with Hugo Chavez's leftist coalition, the Patriotic Axis (Polo Patriotico), which won 122 of 131 seats.<sup>23</sup> With an ANC

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<sup>20</sup> Larry Rohter, *Venezuelans Applaud Leader's Assault on System*, N.Y. TIMES, Sep. 5, 1999, at A13.

<sup>21</sup> HARVEY F. KLINE AND HOWARD JOHN WIARDA, *LATIN AMERICAN POLITICS AND DEVELOPMENT* 259-60 (2000).

<sup>22</sup> *Id.* at 259.

<sup>23</sup> Larry Rohter, *Venezuelan Leader Moves a Step Closer to Broad New Powers*, N.Y. TIMES, 13 August 13, 1999, at A5.



composed primarily of those politically and ideologically aligned with him, Chavez began to solidify his centralization of power.<sup>24</sup>

In August, the ANC officially commenced operations. While Congress and the ANC ostensibly operated with a “cohabitation” relationship,<sup>25</sup> in reality the Congress was under constant duress from the Assembly. The Congress’s acceptance of such a disadvantageous position resulted from fear that it would be disbanded altogether. Chavez and his supporters made clear their distrust towards the Congress and many within the administration called for its immediate abolition.<sup>26</sup> Eventually, cohabitation gave way to complete domination by the Assembly. On August 25, 1999, the ANC stripped the Congress of its right to pass laws or even meet.<sup>27</sup> The ANC had completely replaced the preexisting legislative authority in Venezuela.

c. Step #2: Chavez Targets the Judiciary

i. *The Decision on the Judicial Reorganization Decree*

The ANC almost immediately exceeded its mandate to draft a new constitution and instead set out to “restructure the state”<sup>28</sup> by displacing the Supreme Court.<sup>29</sup> The Venezuelan Judiciary came under direct assault from the ANC when, in August 1999, the Assembly declared a “judicial emergency.”<sup>30</sup> The Judicial Emergency Decree appointed a seven-person commission, staffed by a majority of Chavez-supporters, to review over 2,000 claims of corruption and incompetence among judges and congressmen and the power to fire those found

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<sup>24</sup> Larry Rohter, *Venezuelans Give Chavez All the Powers He Wanted*, N.Y. TIMES, December, 16, 1999, at A11.

<sup>25</sup> RICHARD GOTT, *IN THE SHADOW OF THE LIBERATOR: HUGO CHAVEZ AND THE TRANSFORMATION OF VENEZUELA* 157 (2000).

<sup>26</sup> Ellner, *supra* note XXX, at 13. Unlike Ecuador, members of the MVR noted that Colombia had successfully suspended Congress in recent history, emboldening their resolve to import this model.

<sup>27</sup> Rohter, *supra* note XXX, at A8.

<sup>28</sup> *Chavez’s Power Grab*, THE ECONOMIST (28 August 1999).

<sup>29</sup> *Id.*

<sup>30</sup> *The Venezuelan Lesson*, WASH. POST, Sep. 8, 1999, at A22.

to be corrupt. The Judicial Emergency Commission had jurisdiction to investigate the Justices of the Supreme Court, the members of the Judicial Council, and approximately 1,200 judges.<sup>31</sup> The ANC's Decree threatened to eviscerate any independence the Judiciary had from the Executive; any judge could be removed from office if the four Chavista members of the Judicial Emergency Commission so desired.

While judicial oversight was in no way part of the ANC's legal mandate,<sup>32</sup> the Venezuelan Supreme Court nevertheless upheld the appointed commission's constitutionality in an eight to six decision.<sup>33</sup> Ironically, the majority opinion based its argument on the principles of the rule of law: "The Supreme Court reaffirms its submission to the rule of law and its willingness to collaborate with other branches of government. It therefore offers to contribute to the principal aims of the Judicial Emergency Decree."<sup>34</sup> The majority relinquished any authority to override the decisions made by the ANC and "unofficially confirmed the supra-constitutional right of the ANC."<sup>35</sup> The decision was so controversial that the Chief Justice Supreme Court, Cecilia Sosa, resigned in protest over the decision.

The *Decision on the Judicial Reorganization Decree* was widely believed to be a result of Chavez's intimidation of the Court—many thought that if the Court confronted the ANC then Chavez would have simply dissolved the Court. Chief Justice Supreme Sosa lamented that the

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<sup>31</sup> Juan Jesus Aznarez, "La Presidenta del Supremo Venezolano Dimite y da por enterrado el Estado de Derecho," *El Pais Digital* (25 August 1999) 1209.

<sup>32</sup> Decision on the Judicial Reorganization Decree, Supreme Court (Plenum) (Venezuela) Aug. 23, 1999, [www.tsj.gove.ve/informacion/acuerdos/acp-23081999.html](http://www.tsj.gove.ve/informacion/acuerdos/acp-23081999.html) [hereinafter "Decision on the Judicial Reorganization Decree"] (J. Sosa, dissenting) (discussing the limited nature of the ANC's mandate and the established Supreme Court precedent limiting the ANC's purview").

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Brenda Brown Perez, *Judicial Suspensions and Due Process Under Venezuela's New Democratic Model*, 19 J. NAT'L A. ADMIN. L. JUDGES 127 (1999).

court had “committed suicide to avoid being murdered.”<sup>36</sup> President of the Chamber of Deputies, Henrique Capules Radonsky, echoed Sosa’s sentiments and said that the Supreme Court had acted out of self-preservation: “[T]his action by the [Supreme Court] was an action to preserve their existence within the republic...that there was great incertitude in these actions by the [Supreme Court] because in essence the ANC could for example, at any moment in time, institute the Death Penalty, and there existed no judicial organism by which an action by the ANC could be declared illegal or unconstitutional.”<sup>37</sup> The decision to cooperate with the ANC did not save the Judiciary; rather, the ANC took the *Decision on the Judicial Reorganization Decree* as an invitation to institutionalize its hold over judges.

Less than four months after the *Decision on the Judicial Reorganization* was decided, Chavez finally buried the Supreme Court. On December 22, 1999, the ANC created the Supreme Tribunal of Justice to replace the old Supreme Court.<sup>38</sup> The old Supreme Court Justices were all removed from the Judiciary as a new crop of pro-Chavez judges took the reins of Venezuela’s highest court.<sup>39</sup> The Supreme Tribunal of Justice asserted jurisdiction over its predecessor’s docket. The era of an independent high court in Venezuela had ended.

ii. The Aftermath of the *Decision on the Judicial Reorganization Decree: A Dependent Judiciary and a Controlling Executive*

The judicial system that developed in Venezuela after the *Decision on the Judicial Reorganization Decree* resulted in a judiciary that was substantially dependent on the caprices of the Executive.<sup>40</sup> Chavez and the ANC were able to maintain control over the Judiciary by (1)

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<sup>36</sup> *Chavez’s Power Grab*, *supra* note XXX.

<sup>37</sup> Brown-Perez, *supra* note XXX, at 128.

<sup>38</sup> Michael McCaughan, *Venezuela Issues Urgent Appeal for Volunteers*, IRISH TIMES, December 28, 1999.

<sup>39</sup> *Id.*

<sup>40</sup> See Lauren Castaldi, Note, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT’L L. 477, 494-499 (2006).

denying judges tenure, (2) “packing” the Supreme Tribunal of Justice to ensure that a majority of the Justices remained pro-Chavez, (3) limiting the manner in which judges could be nominated, and (4) suspending judges perceived to impair the Bolivarian Revolution.

First, the Chavez administration has kept the vast majority of judges classified as provisional and therefore afforded a lower degree of protection.<sup>41</sup> According to a 2003 Organization of American States (OAS) report, only 183 of the 1,772 judges in Venezuela were tenured.<sup>42</sup> By denying judges tenure, the Emergency Judicial Commission can remove judges without even affording them a trial; for example, Supreme Tribunal of Justice President Ivan Rincon Urdaneta explained that the March 2004 removal of three Caracas judges did not warrant a hearing because they were “temporary judges with short terms.”<sup>43</sup> The ultimate result of this perpetual tenuous employment is that judges are subject to arbitrary removal and are more susceptible to political pressures.<sup>44</sup>

Second, the Venezuelan government “packed” the Supreme Tribunal of Justice in order to get a favorable majority. Even though Chavez had replaced the old Supreme Court with his Supreme Tribunal of Justice in 1999,<sup>45</sup> the Tribunal had grown too independent for his liking by 2004.<sup>46</sup> In May 2004, the ANC passed the Organic Law of the Supreme Tribunal of Justice (*Ley Organica del Tribunal Supremo de Justicia*) that severely changed the composition of

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<sup>41</sup> Castaldi, *supra* note XXX, at 496.

<sup>42</sup> “Report on the Situation of Human Rights in Venezuela,” Inter-American Commission on Human Rights (29 December 2003) 118.

<sup>43</sup> Castaldi, *supra* note XXX, at 495.

<sup>44</sup> *Id.* For further discussion on the affects on the judiciary from arbitrary removal, see Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2000*, 37 UNIVERSITY OF MICHIGAN LAW JOURNAL 818, 820 (2004).

<sup>45</sup> See MICHAEL MCCAUGHAN, *THE BATTLE OF VENEZUELA* 66 (2005).

<sup>46</sup> Some speculate that Chavez desired a change to the Tribunal in order to reverse an earlier decision acquitting those responsible for a failed 2002 coup d’etat against Chavez. The Supreme Tribunal had dismissed the charges against four military officers who participated in the coup, citing that there was no real coup but rather only a “power vacuum.”

Venezuela's highest court.<sup>47</sup> The new law increased the number of judges from twenty to thirty-two and the twelve new judges would be selected via a majority vote in the Chavez-controlled ANC.

The decision to enlarge the Supreme Tribunal was ostensibly to increase the Tribunal's capacity to handle its large caseload, but many skeptics claimed that the move was actually a carefully calculated political maneuver.<sup>48</sup> The ANC's statement that judicial nominees must self-identify with the "process"—that is, nominees must adhere to the Bolivarian revolution—strongly suggests that Tribunal's enlargement was political in nature. The Supreme Tribunal, now firmly in the hands of pro-Chavez judges, declared that it had the right to review any of the decisions of any court. Consequently, any controversial issue revolving around the constitutionality of an act will ultimately be heard by a group that has made clear its allegiance to Chavez.

Third, the Organic Law changed the way the judicial branch deals with changes in the nomination process of judges. Article 8 of the Law calls for a two-thirds majority in the National Assembly to receive confirmation. The vote can occur up to four times, allowing time for political jostling and pressure, if need be. If the nominee does not receive the required amount of votes after four attempts, then a simple majority within the National Assembly suffices. The eventual simple majority rule seems to make the two-thirds requirement superfluous. Since a majority of the National Assembly belongs to President Chavez's political coalition and wants to see his vision carried out, the democratic process of selecting members of the Supreme Court is jeopardized because of the tyranny of the majority.

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<sup>47</sup> "Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela," Human Rights Watch, Vol. 16, No. 3 (June 2004), <http://www.hrw.org/reports/2004/venezuela0604/index.htm>, (last visited May 10, 2007).

<sup>48</sup> In similar fashion, Franklin D. Roosevelt's threatened to "pack the court" in 1937 when the U.S. Congress struck down his New Deal legislation.

Fourth, the Organic Law created the means for arbitrary suspensions of judges, making them more likely to preserve the status quo and not upset the National Assembly. The same problems that arose from the simple majority rule in the nomination process reemerges in two specific mechanisms that effectively neutralize a judge. Although the law permits removing a judge with a two-thirds majority, the National Assembly can suspend a judge pending a hearing and reject appointments to the court with only a simple majority. A judge can be suspended for up to 10 days before having a hearing if he violates his or her duties outlined by Article 265 of the constitution and Article 12 of the Tribunal of Supreme Justice law. However, in practice, these 10 days are not observed and several suspensions have carried on for a prolonged period of time, even indefinitely. The selectivity of respecting the 10 days allotted by the constitution also points to a potential for political abuse.

d. Step #3: Chavez Removes Term Limits and Secures Indefinite Rule

As described *supra*, Chavez completed his authoritarian maneuvers on February 15, 2009 with the removal of presidential term limits.<sup>49</sup> Article 230 of the previous Venezuelan Constitution had allowed a president to be re-elected only once.<sup>50</sup> Chavez had found this limitation too constricting, and began to work towards its removal.

His first attack on Article 230 came in December 2007, when Chavez sponsored a constitutional amendment that would have eliminated term limits as part of an omnibus set of 69 public policies that would have also instituted communal councils and collective property, effectively nationalized banks, nationalized large parts of the agriculture and oil industries, empowered authorities to detain citizens without charge, and declared “the mandate to unify

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<sup>49</sup> Ian James, *Meltdown Threatens Chavez Triumph*, MIAMI HERALD, February 16, 2009.

<sup>50</sup> VENEZUELAN CONSTITUTION, Art. 230 (1999).

Latin America.”<sup>51</sup> While the Chavez-supported legislature approved this massive reform,<sup>52</sup> the majority of Venezuelan voter rejected the referendum and the presidential term limitation remained intact. Only 14 months later, however, Chavez once again pushed for indefinite rule. The voters responded this time, and Chavez now stands ready to run for another term in 2012.<sup>53</sup>

e. A Chavez-centric Polity

Chavez’s attack on potential opponents did not stop with the judiciary and legislature. His next target was the unofficial fourth branch of government, the media. The most prominent example of Chavez’s anti-media campaign was the government’s refusal to renew the broadcast license for Radio Caracas Television (RCTV), the most vocal opposition news source.<sup>54</sup> Even though RCTV was Venezuela’s oldest television station, Chavez did not hesitate in replacing RCTV with state-run TVes, which showed cartoons and old movies during the protests accompanying RCTV’s closure.<sup>55</sup> Chavez’s repression of RCTV has been repeated against other media outlets that choose to criticize the Venezuelan president.<sup>56</sup>

The result of Chavez’s “reforms” has been a Venezuelan state that insulates its executive from democratic challenge. As the Economist Intelligence Unit states, “[t]he constitution gives significant political power to the executive . . . [i]n practice, Mr. Chavez retains even more influence than stipulated under the constitution.”<sup>57</sup> For example, after Venezuelans rejected a series of Chavez-supported reforms in December 2007, Chavez secretly pushed 26 laws through

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<sup>51</sup> See *Chavez’s Groundwork for Lifetime in Office*, WASH. TIMES, Feb. 13, 2009; Juan Forero, *Chavez Wins Removal of Term Limits*, WASH. POST, Feb. 16, 2009, at A10.

<sup>52</sup> *Venezuela Congress OKs Ending Chavez Term Limits*, Reuters Online, Nov. 2, 2007.

<sup>53</sup> Ian James, *Meltdown Threatens Chavez Triumph*, MIAMI HERALD, February 16, 2009.

<sup>54</sup> Jens Gould, *Is Caracas Stifling the Media?*, TIME, May 29, 2007.

<sup>55</sup> *Id.*

<sup>56</sup> See *Venezuela Begins Shutdown of 34 Radio Stations*, REUTERS ONLINE, Aug. 1, 2009 (Chavez refused to renew the broadcast licenses for 34 opposition television stations).

<sup>57</sup> *Venezuela Risk: Political Stability Risk*, THE ECONOMIST INTELLIGENCE UNIT, July 23, 2008.

the legislature that effected most of the measures rejected in the national referendum.<sup>58</sup> Chavez has systematically eviscerated the Venezuelan legislature and judiciary's ability to control his power.<sup>59</sup> As Fulbright Scholar Brenda Brown Perez writes, as a result of Chavez's constitutional maneuvering, "Venezuela lost any semblance of 'balance of powers,' at least in the context in which it was previously known in a judicial sense."<sup>60</sup>

One of the most striking aspects of Chavez's power centralization has been the fact that it was done via legal channels; Chavez used ostensibly legal mechanisms to strip potential opponents of power. Simply put, democracy is not necessarily permanent. Seventy years ago, a German ex-military officer won election and passed a series of laws that morphed a democracy into an autocratic state.<sup>61</sup> Today, a Venezuelan ex-military officer has done the same.

## **II. The Venezuelan Model Could Be Followed in Other Latin American Countries**

The real danger of the Venezuelan model for undermining the rule of law via legal mechanisms is the fact that other countries have begun to follow Venezuela's lead. Chavez has not been a passive bystander in this process; he has actively pursued the "exportation" of his Bolivarian revolutions and has spent millions on Leftist candidates. By finessing constitutions and pushing through legislation, other Chavez-supported leaders have tightened the executive's reins on control.

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<sup>58</sup> Jaime Daremblum, *Venezuela's Weak Strongman: Chavez does not speak for the South American left*, THE WEEKLY STANDARD, Aug. 18, 2008.

<sup>59</sup> See Brenda Brown Perez, *Judicial Suspensions and Due Process Under Venezuela's New Democratic Model*, 19 J. NAT'L A. ADMIN. L. JUDGES 125 (1999).

<sup>60</sup> See *id.* at 154.

<sup>61</sup> See *id.*; *Venezuela's Hugo Chavez's Arms Shopping Spree*, FINANCIAL TIMES – GLOBAL NEWS WIRE, Aug. 9, 2008.



Bolivia's Evo Morales, in many ways Chavez's protégé, has begun to follow the populist trend in centralizing power and nationalizing major industries.<sup>62</sup> Since coming to power on December 18, 2005, Morales has actively pursued a populist agenda. He has also followed Venezuela's example by setting up a constituent assembly to change constitution provision that limit his power.<sup>63</sup>

First, Morales has attacked judicial independence. For example, after several judges ruled against his expansive socialist programs, Morales publicly criticized the judges and called for members of the Constitutional Court to be tried by Congress.<sup>64</sup> Morales's threats violated the judicial independence clause of the Bolivian Constitution, which reads: "the magistrates and judges are independent in the administration of justice and are subordinate only to the Constitution and the law."<sup>65</sup>

Second, when he found that the Bolivian constitution too constrictive, Morales undertook a massive series of constitutional reforms that were approved on January 25, 2009.<sup>66</sup> In standard populist fashion, Morales removed the constitutional term limitation on presidents and added a new Article 168 that will allow him to serve another term.<sup>67</sup> The new constitution includes a litany of other changes that give the government a greater control over the economy, broadens

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<sup>62</sup> On his hundredth day in office, Morales nationalized Bolivia's oil and gas reserves, ordering the military to occupy Bolivia's gas fields and giving foreign investors a six-month deadline to comply with demands or leave. See Carin Zissis, *Bolivia's Nationalization of Oil and Gas*, Background, Council on Foreign Relations, May 12, 2006, available at <http://www.cfr.org/publication/10682/>. Bolivia also recently joined the Bolivarian Alternative for the Americas, a socialist trade group that previously consisted of Cuba and Venezuela. The new three-nation pact is now calling itself the "Axis of Good," and is actively working to expand its membership. *Id.*

<sup>63</sup> Alvaro Vargas Llosa, *Honduras's Coup is President Zelaya's Fault*, WASH. POST, July 1, 2009.

<sup>64</sup> *Bolivia: IBA Calls on President Morales to Desist from Undermining the Rule of Law*, International Bar Association, June 25, 2007, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5DDE8323-44A8-47D2-88D6-E1C045658633>.

<sup>65</sup> BOLIVIAN CONSTITUTION, Title III, Art. 6 (2005) ("Los Magistrados y Jueces son independientes en la administración de justicia y no están sometidos sino a la Constitución y la ley. No podrán ser destituidos de sus funciones, sino previa sentencia ejecutoriada.").

<sup>66</sup> Terry Wade, *Bolivia's Morales wins referendum, Eyes Re-Election*, REUTERS, January 26, 2009.

<sup>67</sup> BOLIVIAN CONSTITUTION, Title II, Art. 168 (2009).

the nationalization of private industries, and increases the rights of indigenous people.<sup>68</sup> The new constitution also changes the judicial independence clause to read: “The following are guarantees of judicial independence: (1) judges will act in conformity with the judicial profession, (2) the budgetary autonomy of the judicial organs.”<sup>69</sup> It is unclear whether this change from the “subordinate only to the Constitution and the law” language is merely cosmetic or whether there has been a substantive right in the judiciary’s ability to decide the law.

In short, Bolivia has strengthened the power of the Bolivian executive, undermined private property rights, and attacked the judiciary when it resisted his progressive agenda. While the Bolivian polity is not as Morales-centric as the Venezuelan government is Chavez-centric, the stage has been set for further power centralization. Given how Morales has followed Chavez’s example thus far, it is not unlikely that Morales would continue down the path towards autocracy.

Ecuador’s Rafael Correa, Nicaragua’s Daniel Ortega, and Paraguay’s Fernando Lugo are three other possible populist leaders who might follow Chavez’s lead. While Ecuador,<sup>70</sup> Nicaragua, and Paraguay have not engaged in the wholesale centralization efforts that Venezuela and Bolivia have effected, leaders in Quito, Managua, and Asuncion have been receptive to populist rhetoric and policy. In sum, the rule of law in other Latin American countries might fall prey to the same forces currently at work in Venezuela.

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<sup>68</sup> Arthur Brice, *Bolivarian vote on constitution could help president*, CNN ONLINE, January 25, 2009, <http://edition.cnn.com/2009/WORLD/americas/01/23/bolivia.referendum>.

<sup>69</sup> BOLIVIAN CONSTITUTION, Title III, Art. 178 (2009) (“Constituyen garantías de la independencia judicial: (1) El desempeño de los jueces de acuerdo a la carrera judicial (2) La autonomía presupuestaria de los órganos judiciales.”).

<sup>70</sup> Ecuador has started down the Chavista path, and President Rafael Correa has already convened a constitutional convention to rewrite Ecuador’s constitution. See Alfonso Soto, *Ecuador’s Correa easily wins referendum: exit poll*, REUTERS ONLINE, Apr. 15, 2007, available at <http://www.reuters.com/article/worldNews/idUSN1424273920070415>.

### III. Rule of Law Reform: Defending Against the Attack on Democratic Rule

The Venezuelan example demands that democracy's supporters help nations attempting to resist the slide into autocracy. The "shield" against autocratic centralization should come in the form of rule of law reform, where democratic institutions are developed and strengthened.

Rule of law, as a general preposition, states that governments should respect the laws of a nation and recognize the decisions of the judiciary.<sup>71</sup> Organizations like the World Bank, the Inter-American Development Bank ("IDB"), and United States Agency for International Development ("USAID") have all emphasized the importance of engaging in rule of law reform in Latin America. As USAID describes, rule of law reform in Latin America advances American interests by promoting democracy:

By helping countries to establish just and effective legal systems, the United States is able to strengthen democracies in the region, increase their legitimacy in the eyes of citizens, and bolster support for their democratic institutions. Judicial reform not only supports the idea of democracy for which the U.S. stands, it actually aids the mechanics of democracy, as well, ensures that justice functions effectively and transparently.<sup>72</sup>

Strong judiciaries and an institutionalized belief in the importance of the separation of powers are critical in ensuring democracy's longevity. A detailed analysis of discrete rule of law reform lies outside the scope of this article; rather, this article simply posits that a renewed emphasis on rule of reform is the appropriate response to Venezuela's attempt to export its Bolivarian Revolution. Future rule of law reform efforts should, however, build upon lessons learned from previous rule of law reform efforts.

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<sup>71</sup> Lauren Castaldi, Note, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT'L L. 477, 481 (2006).

<sup>72</sup> See The Importance of the Rule of Law, USAID, [http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/rule/index.html](http://www.usaid.gov/locations/latin_america_caribbean/democracy/rule/index.html); cf. Glenn Kessler & Robin Wright, *Rice Describes Plans to Spread Democracy*, WASH. POST, Mar. 26, 2005, at A1 (describing the Bush administration's argument that the spread of democracy insulates countries against radical terrorism).

a. The History of Rule of Law Reform in Latin America

Broadly speaking, rule-of-law reform institutionalizes the idea that the law has a clear meaning, applies equally to everyone, and supports civil liberties.<sup>73</sup> Beyond that expansive definition, however, there is much debate over what exactly is encompassed in the field. Thomas Carothers, founder and director of the Democracy and Rule of Law Project, astutely observes that the majority within the rule-of-law reform camp are lawyers and thus places a larger emphasis on the judiciary and law enforcement institutions more generally. This has led to the interchangeability between the phrases “rule-of-law reform” and “judicial reform.”<sup>74</sup> The critical component of rule-of-law reform, whether it is in the judiciary or elsewhere in the government, is an intent to reinforce the public’s faith in the law as an effective instrument of public policy.<sup>75</sup>

The history of rule-of-law promotion illustrates an evolution in the movement’s objectives and criteria as a better understanding of the problem developed. The movement in Latin America really started gaining speed during the mid-1980s when bilateral and multilateral agencies began to progressively increase assistance targeting judicial reform. USAID spearheaded the movement with a succession of legal framework programs in Central America. The transition from the bilateral agencies to the World Bank and the Multilateral Development Banks (MDBs) really took hold during the 1990s, signaling a change in the priorities of rule-of-law reform. By 1999, the World Bank and the IMF were responsible for 30 rule-of-law reforms

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<sup>73</sup> LUCE B. TREMBLAY, *THE RULE OF LAW, JUSTICE, AND INTERPRETATION* 154-56 (1997).

<sup>74</sup> Thomas Carothers, *CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION* 135 (2004).

<sup>75</sup> See Chief Justice Thomas J. Moyer, *Commission on the 21<sup>st</sup> Century Judiciary*, 38 AKRON L. REV. 555, 565 (2005).

in the region, totaling \$302 million. This pivotal moment signified the shift from a focus on criminal justice to limited focus on commercial-related legal matters.

Rule-of-law promotion gained momentum after the Cold War primarily because it was believed that such reform aids free market capitalism and democratic liberalization. The fall of the Berlin Wall symbolized the triumph of market capitalism and democracy. The collapse of the Soviet Union and its puppet regimes left a vacuum, a gap that was filled by ideas espoused by the West. As a result, the “third wave of democratization,” as Samuel Huntington calls it, swept through Latin America and Africa during the 1980s and 1990s. As newly elected governments came to power all over the world, and especially in Latin America, they were caught in the euphoria of the time and transitioned to market economies in a rapid manner, often via orthodoxy policies.<sup>76</sup>

The World Bank is illustrative of how international organizations have undertaken rule of law reform.<sup>77</sup> The World Bank first engaged rule-of-law reform because of its perceived connection to economic and democratic consolidation. The World Bank argued that the rule-of-law reform promotes the enforcement of contracts, property rights, and a solid regulatory framework, which reinforces the free market and subsequently increases development. As former World Bank executive director Moises Naim noted, the rule of reform is essential to the

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<sup>76</sup> ELIANA CARDOSO & ANN HELWEGE, *LATIN AMERICA’S ECONOMY: DIVERSITY, TRENDS, AND CONFLICTS* at 181-82 (MIT Press, 1992).

<sup>77</sup> The World Bank was founded in 1944 with the mandate to support post-war reconstruction and has since expanded to the broader mandate of reducing worldwide poverty. It is the product of what is commonly known as the Western Liberal Democratic International Order, which was committed to an open world economy and the stabilization of socioeconomic welfare. THAZHA VARKEY PAUL & JOHN A. HALL, *INTERNATIONAL ORDER AND THE FUTURE OF WORLD POLITICS* at 126-30 (Cambridge UP, 1999). More specifically, the World Bank seeks to promote economic growth by promoting low fiscal deficits, cutting subsidies as part of a larger push to prioritize public expenditures, a broad tax base with moderate marginal rates, market determined interest rates, an outward oriented economic policy, encouraging foreign direct investment, deregulation, and privatization. John Williamson, *What Washington Means by Policy Reform*, *MODERN POLITICAL ECONOMY AND LATIN AMERICA: THEORY AND POLICY* 18-23 (Jeffrey Frieden, Manuel Pastor Jr. and Michael Tomz eds., 2000)

second phase of market reforms, which entails building institutions such as tax agencies, customs service, and antitrust agencies, and overall improving governance.<sup>78</sup> Furthermore, economic globalization and the introduction of international investors are reinforcing the need for rule-of-law reform by demanding that governments to be more transparent and accountable to investors' needs.<sup>79</sup>

Operating under this economic mindset, the World Bank's early rule-of-law reforms concentrated primarily on commercial and other areas considered pertinent towards economic development. This narrow attention became institutionalized when the World Bank's General Council stipulated in 1990 that any of its reform initiatives must have a "direct and obvious implication for economic development."<sup>80</sup> As a result, the World Bank dealt with lowering transaction costs associated with securing property and contract rights by targeting judicial and related administrative agencies. It did not address peripheral issues such as judicial independence, access to justice, constitutional law, criminal law, or the protection of human rights.

b. General Guidelines for Effective Rule of Law Reform

The field of rule-of-law reform is a relatively new one that is still evolving as reformers attempt to isolate best practices and useful paradigms for repetition.<sup>81</sup> Nevertheless, several broad principles for effective rule of law reform can be delineated.

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<sup>78</sup> PETER B. KENEN, *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* 199 (1994).

<sup>79</sup> ROBERT E. LITAN, *FINANCIAL SECTOR GOVERNANCE: THE ROLES OF THE PUBLIC AND PRIVATE SECTORS* 212-14 (2002).

<sup>80</sup> Memorandum of Vice President and General Counsel, "Issues of Governance in the Governing Members: The Extent of Their Relevance under the Bank's Articles of Agreement," (World Bank, December 21, 1990), at 38 (*quoted in* *Halfway to Reform*, *supra* note 26, at 25).

<sup>81</sup> See Shelby R. Quast, *Lessons from the Past and the Challenges Ahead: Rule of Law in Post-Conflict Societies: What is the Role of the International Community*, 39 *NEW ENG.L. REV.* 45, 45 (2004).

First, the reform efforts must enforce judicial independence. The teeth of rule-of-law reform stems from the institutions that are targeted by it. Rule-of-law promoters tend to focus on the stewards of justice: the courts, prosecutors, police, and judges.<sup>82</sup> Reforms attempt to increase the fairness, competence, and efficiency in each of these institutions.<sup>83</sup> Although not all academics agree upon which institutions need to be targeted, the police, the judicial branch, and their subsidiaries are generally believed to have the most direct effect on rule of law and subsequently these institutions have received the greatest amount of attention.<sup>84</sup> While this emphasis on the judiciary may be a byproduct of the overabundance of lawyers in the field,<sup>85</sup> some statistical evidence supports the contention that judicial reform allows for the greatest gains in establishing the public's faith in the government.<sup>86</sup>

The importance of judicial independence warrants special discussion. As stated in a 1996 report by the Lawyers Committee: "Judicial independence is the most important measure of commitment—the willingness of the government to take concrete steps to reduce political influence in judicial appointments and court operations."<sup>87</sup> Judicial independence, vis-à-vis the coordinate branches, is such an important indicator because independence is fundamental to the

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<sup>82</sup> Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 891 (1997) ("The importance which people place upon the motives and character of the judge, police officer, or mediator with whom they are dealing suggests one of the difficulties in instituting a rule of law within a society. Although the rule of law suggests a focus upon the neutrality of procedures, even within such procedures people are strongly affected by their views about the particular authorities with whom they are dealing.") (internal citations omitted).

<sup>83</sup> Mark Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*, (Boulder, CO: Lynne Rienner Publishers, 2002) 141.

<sup>84</sup> LINN A. HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 2 (2007).

<sup>85</sup> Carothers, *supra* note XXX, at 135-138.

<sup>86</sup> Juan Enrique Vargas, *Tools for the Design of Judicial Offices*, Judicial Studies Center, Santiago, Chile (2003).

<sup>87</sup> *Halfway to Reform: The World Bank and the Venezuelan Judicial System*, Lawyers Committee for Human Rights and Programa Venezolano de Educacion, Aug. 1996, <http://www.humanrightsfirst.org/pubs/descriptions/halfway.htm>.

other tasks judiciary carries out; the courts cannot hold government officials accountable, resist political pressures, or effectively administer justice if the courts are subject to the whims of the Executive.

Second, rule of law reform must take place in a comprehensive way. On a micro level, rule of law should focus on shortening the time to process claims, transitioning to a more open adversarial approach with proceedings in open court, making a judge's decisions public, and explaining citizens' legal rights to the public.<sup>88</sup> On a more macro level, reformers should establish the judiciary as an independent branch of government vis-à-vis the other branches. This protection of the separation of powers, a principle dating back to the Baron of Montesquieu,<sup>89</sup> reinforces the public's faith in the law because only an independent judiciary can ensure that government officials are not above the law.<sup>90</sup>

Effective rule of law reforms require both micro and macro level measures; faith in the law requires both micro steps that safeguard individual rights and macro steps that protect the judiciary from executive encroachment. Future rule of law efforts should build upon the lessons learned from the World Bank's experience and address judicial independence, access to justice, constitutional law, individual criminal law, and the protection of human rights.

#### **IV. Conclusion**

Democracy is not a static construct; rather, it can mature or regress over time. The Venezuelan example illustrates how the current political climate in Latin America can support a

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<sup>88</sup> SIMON A. ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING 241 (2005).

<sup>89</sup> BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 181 (Thomas Nugent trans., Hatner Publ'g Co. 1949) (1748).

<sup>90</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 292-93 (Peter Laslett ed., 2d ed. rev. with amends. 1970) (1690). For example, in Asia law is seen as a means to facilitate the state in its activities. This is rule by law not rule-of-law.



slide into autocracy undertaken in the name of a populist revolution. The economic crisis that has gripped the global economy since the end of 2008 will only exacerbate the fundamental conditions that gave rise to the autocratic slide.

Over the past two decades, Latin America has emerged from its checkered history of autocratic rule. Democracy has taken root, truth and reconciliation commissions have been formed, and economic policies have been opened. But the threat of autocracy still looms. Under the guise of Chavez-style populism, a slide away from the rule of law lingers as a wolf in sheep's clothing. The international community must recognize the threat of the Venezuela example and actively support the region's democracies from following in Chavez's footsteps. Only then will Latin America be able to ensure that the end of the 20<sup>th</sup> century was the beginning of a true democratic era and not just the region's democratic moment.