

University of Salvador
School of Law
Legal Opinion

I, hereby, come to state my academic opinion, as requested by University of Salvador, Vice Dean, School of Law.

In reference to the constitutionality of the Bolivarian Republic of Venezuela's project on International Cooperation, approved as a Project-Law, in its first discussion by the National Assembly in June 14, 2006, I must express -first of all- that the 1999 Constitution on its article 52 establishes the right of association. This fundamental right finds its uphold in the gregarious essence of the human being, for this means to entail him with his fellow creatures in the attainment of their common interests. It is necessary in general, to emphasize how important it is for a civil society to have citizen participation tuned in the quest for consolidating democratic regimes. Hence, it is worthwhile to remember that classic or liberal constitutionalism was reluctant to accept the right of association, just as it is demonstrated in its absence in the Man and Citizen Declaration of August 26, 1789; or in the Constitutive Amendments to the "Bill of Rights" As Perez Royo stated "only in the XX century, and after the unmistakable affirmation of **democratic legitimation**, as fundamental to the State, it would change the perspective from which the right of association would be considered as such. From the initial prohibition, to its posterior tolerance, so it would pass its consideration as **an essential piece to the State organization**"¹

In the Venezuelan's case, the fundamental text expresses "**All citizens have the right to associate with licit purposes, in accordance to the Law. The State shall be obligated to facilitate the exercise of this right**".

Just as it is basically intrinsic to the human being the right to associate, it has found its place in international law documents, which in compliance with article 23, of same, has constitutional hierarchy. Henceforth, it may be cited, as examples, article 16 of the Human Rights American Convention (or San Jose Pact of Costa Rica), within the regional system and article 22 of the International Civil and Political Rights Pact, at universal level.

Within the context referent to article 16 of San Jose Pact, the Inter American Human Rights Court has expressed in the "Baena Ricardo and others vs. Panama case" in its final sentence pronounced on February 2, 2002 it is stated that association "is to be understood as a right and a freedom: as a right to constitute associations without restrictions other than those allowed under paragraphs 2 and 3 of that conventional precept, and freedom as inherent to all person of not to be compelled or obliged to associate".

Under the perspective imposed by the Venezuelan Constitution, there is no doubt about the State's faculty to issue a decree to regulate activities, so stated in its respective law, as long as, it is within the boundaries expressed by a legal principle.

¹ See Perez R., Javier, "Course on Constitutional Law", tenth edition, Marcial Pons, Madrid and Barcelona, 2005, p. 442. Underlining is ours.

In general terms the Venezuelan Supreme Court, Constitutional Chamber, in sentence 85 of January 24, 2002 (Mortgage Debtors vs. Banking Superintendence) ruled that **“Power is to be exercised only through juridical norms, inasmuch as the law regulates all the State activities and that of administration, in particular... Such conception is embedded in the standing constitution, where all activity is covered by law; laws approved by a legislative body and other powers, and decrees dictated by the executive branch, which may not contradict the letter or spirit of the law”**²

However the use of categories highly bothersome observed in that regulation, which are excessive, inclusive and different to the agency’s will, being proposed in there, it may be objectionable in its constitutional validity, for it serves a reality opposite to the necessary legal guidelines.

In that sense, article 25 of the norm –above mentioned- is exceedingly diaphanous when stipulates that **“All act dictated, in exercise, by the Public Branch which violates or lessens the rights guaranteed by this Constitution and the law, is null”**

The decree encounters a limit in the hierarchical order –in reference- of the norms regarding the right to associate and where the State is to play the role of **“facilitator”**.

It is clear, then, that the constitutional wall on the legality of association may not be taken as an excuse to interfere in the livelihood of groups or organizations, **if it has not concretely alleged a behaviour that infringes the objective legality.**

Now, if the precept, in the above mentioned article 52 is coordinated using a systematic and congruous interpretation, with the values expressed in article 1 (international peace) and article 2 (“human rights pre-eminence”, “political pluralism”), it shall be noticed that, there is not remedy but to close that association ought to be free (nevertheless sponsored), unless the group in question commits illicit acts. In any case, it should be, as a general presumption, in favour of, but not against the right of association in tenor of **“in dubio pro libertate”** international rule.

Thus far five laws and various agencies regulate the association’s activities from tax regulations, registering under Civil Code, and fulfilment of environmental, labor and currency norms.

This tight fit and punctual standard is not present in the project in question. In fact, the juridical regime intended to implement in the subject of International Cooperation (article 1) is one where structures are created to control associations (article9), with registering functions (articles 10 to 13), that shows a stern-like supervision over the NGO’s that would, at the end, denaturalize the right being under regulation.

It is worthwhile to point out that given the vagueness of the language used in the project, it has, already, been subject of worries by the Inter American Human Rights Commission, as it was expressed in Guatemala City, in July19, 2006, when it asked the Venezuelan government for information, under the terms of article 41 of their Convention.

² See “Public Law Review” vol. 89 to 92, Venezuelan Juridical Edition, Caracas, 2002, p.92. Underlining is ours.

In consequence, I hold the opinion that: not being present those controls by which it may be shown an adequate relationship of proportion between, the means chosen by the legislator and the objective in itself of the regulation, and in accordance with the “**rule of reason**” then I believe that as it is, the Project, would not pass the “constitutionality test”.

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