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## Constitutional and Administrative Rights of Private Enterprise in Venezuela and Their Protection

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## **Constitutional and Administrative Rights of Private Enterprise in Venezuela and Their Protection**

The state shall protect associations, state corporations, corporate entities and communities whose purpose is the fulfillment of mankind's goals as well as those of the social order, and shall promote the organization of cooperatives and other institutions designed to improve the economy of the nation.

Article 72—The Constitution of the Republic of Venezuela.

The present Constitution sought practical and useful solutions to the question of Federalism, clarifying the scope of residual jurisdiction and determining the boundaries of power of the various organs of the Federal Republic. The Constitution laid down the bases upon which a just and appropriate administrative mechanism could be organized in accordance with the country's needs, such mechanism demanding the fulfillment of their responsibilities by public officials, and the sanctioning of abuses of power and violations of the law.

RAFAEL CALDERA, *THE VENEZUELAN CONSTITUTION AFTER 15 YEARS*, at 13.

The limits upon administrative acts resulting from the exercise of discretionary power, which are imposed by general principles of law and the social order, are extensive. Among these general principles are those of manifest injustice, irrationality, good faith, means having to be proportional to the ends, equality of application, and in general all the principles derived from the rights and fundamental liberties of persons, since it is clear that public administration cannot, in the name of its discretionary competency, violate those sacred constitutional principles which are the basis of the social and juridical order.

ALLAN R. BREWER-CARÍAS, *DECISIONS OF THE SUPREME COURT AND STUDIES IN ADMINISTRATIVE LAW*—Volume I, at 32.

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\*The author is practicing law in Paris. He would like to thank Mr. Howard R. King who assisted in this work.

## I. Constitutional Protection of Business in the United States

In the United States, where the Constitution is a rather skeletal document which has been woven together by thousands of U.S. Supreme Court decisions over almost two hundred years of judicial history, individuals, business entities, and other organizations have all looked to that durable and elastic document for protection from governmental abuses which have threatened their very survival. In Venezuela, where the constitution looks more like a legal and social treatise than a simple framework of rights, and where prior Supreme Court decisions (*jurisprudencia*) are important but not "stare decisis,"<sup>1</sup> individuals, businesses,<sup>2</sup> immunity-stripped congressmen,<sup>3</sup> and bankers under the threat of extradition<sup>4</sup> have also looked to the document for shelter from alleged abuses of sovereign power, and with increasing success.

Nevertheless, it can be stated that in Venezuela nonstate entities across the board are less free and less protected than their counterparts in the United States. While Venezuelan private enterprise is in fact vested with a "bundle of rights,"<sup>5</sup> and while there do exist sophisticated and accessible procedures for challenging constitutional and administrative abuses, in practice, the constitutional-right affirmation process is still most definitely underworked. For this reason, a detailed analysis of substantive rights afforded to private juridical entities in Venezuela and the procedures for the affirmance thereof is in order. Throughout this article there will appear various parallels drawn between the constitutional and administrative orders of the two sister republics: the United States and Venezuela.

While most laymen believe that constitutions in general are primarily concerned with rights of individuals (freedom from unreasonable searches

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<sup>1</sup>Under American law, a principle of law which has been established through a series of court decisions is generally binding on the courts under the doctrine of *stare decisis*. However, this doctrine is not applied universally; it may be applied with more or less precedential force as the circumstances of a specific case dictate. *United States v. Cooke*, 399 F.2d 433 (5th Cir. 1968), *cert. denied*, 394 U.S. 922, 89 S. Ct. 1187, 222 L. Ed. 2d 455.

<sup>2</sup>VEN. CONST., art. 98. This article states that private enterprise is to be protected by the State.

<sup>3</sup>*Id.* art. 143-46. These articles grant broad immunities to members of Congress which are to be protected by the State and which may only be taken away when the Supreme Court of Venezuela finds grounds for a trial and a majority of the chamber to which a member of Congress belongs approves of the removal of the immunities.

<sup>4</sup>*Id.* art. 64. A citizen of Venezuela may not be banished from the country by the government unless that citizen consents to the banishment.

<sup>5</sup>*Id.* art. 72. This article makes a blanket grant of protection to corporate entities whose purpose coincides with the purpose of the State. It reads as follows:

The state shall protect associations, corporate bodies, societies, and communities that have as their purpose the better fulfillment of the aims of human beings and of social life, and shall promote the organization of cooperatives and other institutions devoted to the improvement of the public economy.

and seizures,<sup>6</sup> freedom of speech,<sup>7</sup> freedom of the press,<sup>8</sup> right to life,<sup>9</sup> liberty,<sup>10</sup> property,<sup>11</sup> privacy,<sup>12</sup> equal opportunity,<sup>13</sup> etc.), any second-year law student enrolled in a course in U.S. constitutional law can affirm that the bulk of that course revolves around the constitutional rights of the American businessman, asserted in his individual or corporate capacity, to be free from what is in his mind onerous legislation, unconstitutionally promulgated.

Whereas much individual constitutional litigation stems from specific state or federal legislation (both subject to federal constitutional dictates and therefore scrutiny by the Supreme Court),<sup>14</sup> the constitutional rights affirmed and sought to be enforced by private enterprise and other large

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<sup>6</sup>U.S. CONST., amend. IV. This is a principle which is primarily used in excluding evidence in criminal cases. See *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). However, this principle provides no protection for unreasonable searches or seizures by private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921).

<sup>7</sup>*Id.* amend. I. The lone restriction on an individual's freedom of speech is the "clear and present danger under the circumstances" test enunciated in *Schneck v. United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). Only if this test is met can the government restrict an individual's freedom of expression.

<sup>8</sup>Freedom of the press is a variation of freedom of speech. The media has the right to print or broadcast any information which is true without fear of liability or censure. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). Furthermore, as a "watchdog" for the public, the media has a right of access to the courtroom under the freedom of press. *Richmond Newspapers, Inc. v. Virginia*, — U.S. —, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

<sup>9</sup>U.S. CONST., amend. XIV, § 1; amend. V. No person shall be deprived of his life without due process of law, and then such penalty shall not be administered capriciously. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

<sup>10</sup>*Id.* The right of liberty covers rights to contract, choose a profession (see notes 20, 21, *infra*), and the right to free movement, including travel. The right of travel may only be restricted in extreme circumstances in which the government's interest of protecting the public is compelling. *Zemel v. Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

<sup>11</sup>*Id.* The government may not take an individual's or business' property without paying just compensation. *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). However, if the government provides additional rights for the use of another parcel of property owned by the entity elsewhere, then there is no taking and no compensation is due. *Penn Central Trans. Co. v. New York City*, 438 U.S. 64, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

<sup>12</sup>*Id.* The First Amendment also grants individuals a right of privacy which has been expanded to cover such concepts as the right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); to have an abortion, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); and even the right to die, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

<sup>13</sup>*Id.* amend XIV, § 1. Equal opportunity is a principle which is co-extensive with equal protection under the laws which extends to all citizens of the United States. See *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) (desegregation of public schools); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 18 L. Ed. 2d 1010 (1967) (invalidating a state statute prohibiting interracial marriage); and, *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (upholding "a special affirmative action" admissions policy for minority students while requiring a state medical school to accept a white student who claimed reverse discrimination).

<sup>14</sup>Congress derives much of its constitutional power for regulating business from the commerce clause, U.S. CONST., art. I, § 8, cl. 3, which states;

The Congress shall have the power . . . to regulate commerce with foreign nations and among the several states.

private organizations are often triggered by alleged transgressions of the Constitution committed by federal, state, and municipal administrative agencies<sup>15</sup> in addition to the above-mentioned legislation. Even in the United States, still arguably the most "laissez-faire" of developed nations, executive delegations of administrative functions and the formation of a body of administrative law have, for many decades already, become absolute necessities for the effective management of the country.<sup>16</sup>

Since administrative charters, rulings, and decrees oftentimes take the place of legislation, constitutional appeals from such rulings and the ultimate Supreme Court opinions as they affect private enterprise have become inextricably linked to principles of administrative law.<sup>17</sup> This concurrence and overlap exists in virtually all of the world's legal orders, resulting in the pre-eminence of constitutional law in public administration since the former is the only legal force which can regulate the awesome exercise of power by the modern nation state.<sup>18</sup>

The U.S. businessman, libertarian lawyer, and concerned citizen alike, as much as he or she might be concerned about "creeping big brotherism" and the federal government's recent participation in affairs deemed to be exclusively private, still believe for the most part that the right to make a profit,<sup>19</sup> the right to contract,<sup>20</sup> the right to pursue a particular career or liveli-

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This clause is also the basis of most challenges to Congress' power to regulate business. U.S. courts have attempted to balance this broad power against the necessity for a free-flowing stream of commerce. Venezuela does not have such a concern for the flow of commerce due to its strong, centralized national government and relatively dependent local government units and businesses.

<sup>15</sup>Actions of administrative agencies are also subject to review by the federal courts, unless such review is specifically precluded by statute. There is a presumption that administrative action is reviewable by the federal courts. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).

<sup>16</sup>Congress perceived the necessity of particular expertise in the areas of government which evolved as the day-to-day operations of government became more complex. Congress's solution to the problem was the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, (1970), which prescribed minimum procedures and safeguards for rulemaking and enforcement by administrative agencies.

<sup>17</sup>While there is a presumption that administrative actions are reviewable (*see* note 15, *supra*), an appeal to the courts must meet the justiciable standards of standing, *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 1 (1970); ripeness, *Abbott Laboratories, supra*, and exhaustion of all available administrative remedies, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938) and 5 U.S.C. sec. 704 (1970). *See* notes 28, 29, 34, *infra*.

<sup>18</sup>In the United States and Venezuela, administrative actions are reviewable on appeal to the supreme court of each country. In the United States, agency actions are generally only reviewed as to questions of law, and great deference is given to an agency's expertise. However, in Venezuela an appeal is much more like a *de novo* proceeding in which the court hears evidence from all interested parties. *See* note 59, *infra*.

<sup>19</sup>The right to make a profit is a fundamental concept of American free enterprise which is only ignored in times of war. *Dorchy v. Kansas*, 272 U.S. 306, 47 S. Ct. 86, 71 L. Ed. 248 (1926); *Lafayette Dramatic Productions, Inc. v. Ferentz*, 9 N.W.2d 57, 305 Mich. 193 (1943).

<sup>20</sup>U.S. CONST., art. I, § 10. A state may only impair the obligations of contracts when the state's interest is legitimate, its means are reasonable, and the interest outweighs the private interest of the contract. *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

hood,<sup>21</sup> and the "right," in the words of the eminent jurist, Justice Brandeis, "to be left alone"<sup>22</sup> still exist in the United States and will be protected by their Constitution. This feeling stems from the relative absence of regional and national planning and social control in the United States as compared to the Latin American and Western European social-welfare states and, of course, the Communist-bloc nations.<sup>23</sup>

Whether the difference in governmental roles exists due to developmental histories or philosophical or cultural proclivities, such a debatable point is not within the ambit of this article. What is clear, however, is that the above-listed rights, generally perceived to exist in the United States, do not exist so overtly in Venezuela, and the shock is rather stunning to the American businessman, libertarian, and concerned citizen upon initial contact with Venezuela's constitutional system.

Nevertheless, after having attained some degree of practical experience, the American businessman will learn that many of the rights he and his company possessed in the United States do exist in Venezuela, although they be somewhat watered down by the constitutional clause which reserves to the state, to be balanced against all rights granted to entrepreneurs, the sovereign rights to plan and control the economy, regulate development, and insure the public welfare.<sup>24</sup> Of course, this implied right of the U.S. federal and state governments to plan and develop also exists in their respective constitutions, but its parameters are less encompassing (general words of the Preamble of the Constitution and the "necessary-and-proper clause," Paragraph 18 of Section 8, Article I of that document). More importantly, judicial opinions of the Supreme Court of the United States, which under the common-law principle of "stare decisis" form an integral part of the interpretation of the Constitution, have never reserved to the federal government the broad right to plan and develop *at the expense* and *to the detriment* of private enterprise. A definite balance as alluded to above exists in both the United States and Venezuela, but the points at which the legal scales are in equilibrium are quite different in the two countries.<sup>25</sup>

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<sup>21</sup>While the right to pursue a career or business is a basic right under freedom of liberty, it is subject to regulation by the government under its police powers, *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934); and it may not infringe upon another entity's right to hire those services. *VanZandt v. McKee*, 202 F.2d 490 (5th Cir. 1953).

<sup>22</sup>Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This right springs from the right to privacy but does not extend to a right to be free from public comment. *People v. Robert R. McBride & Co.*, 159 Misc. 5, 288 N.Y.S. 501 (1936).

<sup>23</sup>While the U.S. government does closely regulate industry and business through administrative agencies such as the Federal Trade Commission and legislation under the commerce-clause powers of Congress, it has not gone to the extreme regulation of allocating various segments of industry and business to government-controlled monopolies as the social-welfare states have done.

<sup>24</sup>VEN. CONST., art. 98. See note 2, *supra*.

<sup>25</sup>It should be noted that one of the significant areas in which Venezuela business is less restricted than its American counterpart is antitrust legislation. Although monopolies (other than state-owned industries) are illegal, all practices falling short of outright monopoly are

When an American businessman in his homeland wishes to challenge an administrative regulation or a piece of legislation, he compares the specific regulation with one or more rights he feels are granted or reserved to private enterprise in the U.S. Constitution and/or in one of the court decisions interpreting it. He attempts to show a patent contradiction between the norms involved, which, if proven, would prevent application of the legislative norm according to the American juridical hierarchy.<sup>26</sup> The businessman may, if he so chooses, buttress his argument with certain general principles of constitutional law and the social order, among them, those not specifically mentioned in the Constitution, but inherently existing in the American people in accordance with the Ninth Amendment to the Constitution.

Furthermore, there exist various general principles of administrative law, forged out by text writers, judicial decisions, and the Federal Administrative Procedure Act,<sup>27</sup> whose application may also be urged. They are virtually identical to the general principles of Venezuelan administrative law which appear in the third quotation in the preface to this article.

The aggrieved American businessman, providing he can demonstrate a "ripe"<sup>28</sup> controversy and "standing,"<sup>29</sup> must also demonstrate to the Supreme Court, or to a lower state or federal court, which can also in the first instance declare a particular governmental act unconstitutional in the United States,<sup>30</sup> the irreconcilable contradiction between the administrative or legislative norm and the constitutional one. In doing so, the business-

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technically permissible, including price-fixing, tying arrangements, exclusivity discounts, etc. However, the present government under the leadership of President Luis Herrera Campins has promised to introduce antitrust legislation before the end of his term of office, and drafts are already before the Congress.

<sup>26</sup>A party may raise his constitutional challenge in either state or federal court depending on factors of jurisdiction and justiciability. See notes 28, 19, and 31-34, *infra*. An ultimate appeal to the Supreme Court may be by either a direct appeal on the federal question which the Court must summarily affirm or dismiss or hear on the merits, or it may be by writ of certiorari which may be granted solely by the discretion of the Court. See Sup. Ct. R. 15, 23.

<sup>27</sup>5 U.S.C. § 551, *et seq.* (1970). This act was originally enacted in 1946 and has been the cornerstone of modern American administrative law since that time.

<sup>28</sup>The ripeness requirement allows the courts to refuse to hear cases which have been brought prematurely, meaning that no case or controversy exists at that time which the courts may decide. The basic test for ripeness is a governmental response, either threatened or actual, to conduct of the complainant, thus giving rise to a case which is ripe for adjudication. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

<sup>29</sup>The standing requirement is a method by which the courts ensure that the proper party is seeking remedy for the injury complained of. The complainant must establish injury, in fact or threatened, which has a direct causal link to the governmental action complained of by the complainant. *Warth v. Seldin*, 422 U.S. 490, 955 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

<sup>30</sup>Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), federal courts have assumed the power of judicial review as to determining the constitutionality of federal and state laws. This power extends to all federal courts with powers under Article III of the Constitution, especially the lower federal district courts and courts of appeals, as a "check" on legislative power. Therefore, in the absence of review by a higher federal court, a federal district court's decision on constitutional questions is the supreme law of the land. *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916 (1960), *aff'd*, 265 U.S. 569, 81 S. Ct. 754, 5 L. Ed. 2d 806. Since this power is a "check" on legislative power, it logically extends to state courts as well.

man's attorney must make use of prior Supreme Court decisions which support his case and which, in our common-law system of jurisprudence, are technically binding on the court. The Supreme Court, if the case should reach such heights of appellate review, may, of course, choose to decide the controversy on grounds such as lack of jurisdiction,<sup>31</sup> mootness,<sup>32</sup> no standing,<sup>33</sup> or on other general principles of law<sup>34</sup> and side-step the constitutional issue.

If a businessman or any citizen should succeed in his attempt to have a particular governmental act declared unconstitutional, he or she is then able to do what the legislature said could not be done or, in the alternative, does not have to do that which the law said had to be done. In addition, damages and reimbursement may be recoverable. In all cases, there is an immediate nonapplication of the law, and the legislative body or executive agency is under constitutional mandate to revoke or rectify its unconstitutional act.<sup>35</sup> Of course, if Congress or the administrative agency involved

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However, a state court may not overrule a decision of any federal court on a constitutional question. Bush, *supra*.

<sup>31</sup>U.S. CONST., art. III, § 2. Jurisdiction in the federal courts may be had only in cases in which a substantial federal question is involved, there is a diversity of citizenship between the parties or the claim arises under admiralty or maritime law. To meet the requirements of federal-question jurisdiction, one of the parties must raise an issue which arises under a federal statute, treaty or the Constitution and that issue must have a substantial impact upon the outcome of the suit. *Louisville v. Nashville Railroad v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 125 (1908). Diversity jurisdiction arises when the parties are citizens of different states or one party is a foreign citizen and the other is a citizen of a State. In addition to a diversity between the parties, the amount in controversy must exceed \$10,000. 28 U.S.C. § 1332 (1970). Citizenship is established by the domicile and intent of the party to make that domicile his home at the time the action is filed. *Janzen v. Goos*, 320 F.2d 421 (8th Cir. 1962). Admiralty jurisdiction arises when the claim is to be determined by American maritime law, either statutory or common law. American law applies to a claim when either the plaintiff or defendant has substantial contacts with the United States. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, L. Ed. 1254 (1952); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970).

<sup>32</sup>Courts invoke the mootness doctrine when the issue or case has lost its controversy and a decision would not benefit either party. *DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974).

<sup>33</sup>When no standing exists, the court will dismiss the case since it does not render advisory opinions. *Muskrat v. United States*, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911). See note 29, *supra*.

<sup>34</sup>The courts also avoid hearing cases for other reasons. The Eleventh Amendment of the Constitution grants the states an immunity from suits by their citizens in federal court. The political-question doctrine is invoked to avoid decisions in cases in which the other two branches of government are involved in which there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or in which "initial policy decisions of a non-judicial discretion are required for decision of the case." *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The abstention doctrine is used by the courts to avoid a decision in injunction proceedings in which a collateral state proceeding has begun for reasons of comity to the state courts. *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). Finally the courts use the exhaustion-of-remedies doctrine to give state courts and administrative agencies an opportunity to correct their errors. Myers, *supra*. See note 17, *supra*.

<sup>35</sup>Once a statute is declared unconstitutional, it is generally considered null and void from the date of its enactment. *Chicago, Indianapolis & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913). However, declaring a statute unconstitutional does not



refuses to comply with the decision of the Supreme Court, another and far more serious constitutional crisis arises which is not a topic within the scope of this article.

The biggest obstacle to a U.S. businessman in commencing and maintaining a constitutional law suit, other than counsel fees,<sup>36</sup> is the necessity of showing standing; it must be shown in all suits raising questions of constitutionality that the litigant himself has been harmed or will imminently be harmed, either pecuniarily or in some other way in which he possesses a right not to be harmed. Another mode of inducing litigation of a constitutional issue is to fail in the first instance to obey a presumably legal decree, regulation or law, and when the penalties are enforced, appeal their enforcement by alleging the defense of unconstitutionality of the norm.<sup>37</sup> Obviously, a decision to challenge legislation or governmental action by such a method is a risk for an individual or a corporation since an individual risks his freedom and a corporation risks payment of fines, penalties, and criminal prosecution for noncompliance with orders of the government or administrative agencies.<sup>38</sup> Nevertheless, the option is always available, although it is more often utilized by those involved in popular social causes than by businessman.

Among the plethora of substantive constitutional rights which have been asserted by private enterprise and upheld by the Supreme Court with fluid consistency are those mentioned in the adjacent chart. Before proceeding to a discussion of the Venezuelan constitutional affirmation procedures, a comparative table indicating the rights guaranteed in Venezuela is also presented.

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prevent a narrower interpretation of the statute in the future enabling it to regain constitutional status. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

<sup>36</sup>Attorneys' fees are an important consideration in any case since the attorney is also in business to make a profit. However, once an attorney begins a case, he is expected to complete the case absent compelling reasons allowing for his withdrawal in the discretion of the court. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-32.

<sup>37</sup>This mode of appeal is generally accomplished after conviction in criminal cases by writ of habeas corpus or by appeal to the next highest court in civil cases. Writs of habeas corpus are filed by persons in state or federal custody in violation of the laws of Constitution of the United States. 28 U.S.C. § 2254, 2255. A person filing such a writ must satisfy the exhaustion doctrine before the court will entertain his appeal. See note 34, *supra*.

<sup>38</sup>Two administrative agencies which authorize such sanctions are the Internal Revenue Service and the Federal Trade Commission. Any entity which evades payment of income taxes may be subject to a maximum fine of \$10,000 or five years' imprisonment, or both. IRC § 7201. Those entities who violate the Federal Trade Commission's regulations against the restraint of trade are subject to criminal sanctions of \$50,000 or one-year's imprisonment, or both, 15 U.S.C. § 1 (1970), or civil sanctions in a suit by another private party of treble damages. 15 U.S.C. sec. 15a (1970).

**Comparative Constitutional Rights  
of Private Enterprise  
United States**

<i>Right Description</i>	<i>Source in Constitution</i>
1. Right to domestic tranquility and to preservation of the general welfare.	Preamble
2. Right to uniform imposition of taxes, tariffs, and duties.	Art. I, Sec. 8, cl. 1
3. Right not to have interstate commerce unreasonably burdened.	Art. I, Sec. 8, cl. 3
4. Congress prohibited from passing ex-post-facto laws and bills of attainder.	Art. I, Sec. 9, cl. 3
5. Full faith and credit given to commercial judgments of sister states.	Art. IV, Sec. 1
6. Privileges and immunities of the various states (i.e., right to vote, to travel).	Art. IV, Sec. 2; and Judicial Interpretation
*7. Freedom of speech, right to assemble for redress of economic grievances.	1st Amendment
*8. Freedom from unreasonable searches and seizures, including those of corporate documents.	4th Amendment
*9. Freedom from double jeopardy and self-incrimination, right to "due process."	5th Amendment
*10. Freedom from cruel and unusual punishment.	8th Amendment
*11. Right to equal protection, right to go bankrupt, implied right of private enterprise to exist, freedom to contract.	5th Amendment and 14th Amendment

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\*Form part of the Bill of Rights.

**Comparative Constitutional Rights  
of Private Enterprise  
Venezuela**

<i>Right Description</i>	<i>Source in Constitution</i>
1. Right to an eternally democratic, representative, and responsible government.	Article 3
2. Right to unrestricted development of the personality.	Article 43
3. Freedom from retroactive laws, except those with lesser penalties.	Article 44
4. Foreigners generally to possess the same rights as Venezuelans.	Article 45
5. Nullity of all governmental acts taken beyond the scope of public power.	Article 46
6. Reservation to all entities in Venezuela of all rights inherent in the order of natural justice.	Article 50
7. Rights of privacy, dignity, freedom from cruel and unusual punishment, self-incrimination, double jeopardy, involuntary servitude, and right to travel and to assemble.	Articles 58-71
8. Right to use the organs of administrative justice to defend private rights according to law.	Article 68
9. Right of free association, right of business entities to be maintained provided they further the social order.	Title III, Chapter IV
10. Freedom to pursue a particular livelihood, right to work.	Title III, Chapter IV
11. Freedom to devote oneself to the entrepreneurial activity of one's choice without other limitations than those provided by law.	Article 96
12. Limited right to have private enterprise protected.	Article 98
13. Limited constitutional guarantee to possess private property.	Article 99

<i>Right Description</i>	<i>Source in Constitution</i>
14. Constitutional acknowledgment of accepted international law principles regarding confiscation of foreigners' property.	Article 102
15. Constitutional requirement that the law set up a rigid code regarding behavior of public administration.	Article 122
16. Constitutional link between administrative abuses and the Supreme Court of Justice.	Article 206

## II. Constitutional Protection of Business in Venezuela

In Venezuela the framers of the 1961 Constitution wanted to avoid even the slightest ambiguity regarding who would put the brakes on legislative and administrative abuses. Says the Constitution:

The powers of the *Corte Suprema de Justicia* (The Supreme Court of Justice) are: . . . To declare the partial or total nullity of national laws and other acts of legislative bodies that are in conflict with this Constitution.<sup>39</sup>

The court shall also declare the total or partial nullity of state laws, municipal legislation, and other local acts that are contrary to the Constitution.<sup>40</sup> It shall resolve clashes that might exist between various legal norms and declare which are to prevail. It shall declare the nullity of regulations and other acts of the national executive and those of the ministries and other agencies of the executive branch.<sup>41</sup> These constitutional decisions shall only be rendered by an absolute majority of the magistrates of the Court.<sup>42</sup>

The present Venezuelan Constitution, the twenty-fourth in the nation's history, clearly states that the *Corte Suprema de Justicia* is the highest court in the land, there being no recourse from its decisions.<sup>43</sup> The Court shall function in topical divisions referred to as *Salas*, which are determined by law and which shall have at least five justices each.<sup>44</sup>

As did the Founding Fathers of the United States, and perhaps even more so, the Venezuelan constitutional framers went to great theoretical lengths to maintain the professionalism and the independence of the highest court in the land.

<sup>39</sup>VEN. CONST., art. 215, par. 3.

<sup>40</sup>*Id.*, ¶ 4.

<sup>41</sup>*Id.*, ¶ 6.

<sup>42</sup>*Id.* art. 216. While the U.S. Constitution does not explicitly provide this power "to review and annul" for its Supreme Court, the Court has assumed this power since the landmark decision of *Marbury*, *supra*. See note 30, *supra*.

<sup>43</sup>*Id.* art. 211.

<sup>44</sup>*Id.* art. 212.

In order to be a magistrate of the *Corte Suprema de Justicia* one must be a Venezuelan by birth, an attorney, and over thirty years of age.<sup>45</sup> In addition to the above requirements, a potential justice of the high court may not ever have been imprisoned for having committed certain crimes in the course of public duty.<sup>46</sup> Finally, the law may place further professional and scholastic requirements upon members of the Court.<sup>47</sup>

Similar to those in the United States, the terms of the Supreme Court's justices are protracted to insulate the court from political tremors. Unlike in the United States where justices are appointed for life, Venezuelan magistrates are elected by the two Chambers of the Legislature in joint session for nine-year terms. The terms are staggered such that one-third of the court is replaced every three years.<sup>48</sup>

### *General Considerations*

The constitutional and administrative remedies available to businessmen in Venezuela, theoretically, have much in common with those in the United States (substantively and procedurally); for the most part, however, the actual differences in constitutional and administrative law practices outweigh the similarities at this juncture in time.

In the first instance, the basic disparity arises from the fact that in civil law countries such as Venezuela, the statutes, codes or series of regulations (of which the Constitution is one) are the principal foundations of law, and judicial opinions center around very specific norm applications or rejections. Therefore, Venezuelan *jurisprudencia* (written legal opinions) of one judge, while persuasive and valuable, need not be followed by other magistrates, even in lower courts, nor by the same judge in an almost identical subsequent case.<sup>49</sup> Not having a constitution neatly knitted together by a history of judicial precedent, the "raw" words of the Venezuelan Constitution are less clear than their North American counterparts inasmuch as a binding and illustrative prior judicial opinion cannot simply be looked up in a legal encyclopedia and cited definitively.<sup>50</sup>

Furthermore, Venezuela has had twenty-three prior constitutions in its history as a nation, and the present constitution, ratified in 1961 by the twenty states,<sup>51</sup> has still not achieved the total constitutional reverence which time and legal development should eventually bring. Because many

<sup>45</sup>*Id.* art. 213.

<sup>46</sup>This requirement is implicit in the requirement that a magistrate be a lawyer. *Id.* art. 207.

<sup>47</sup>*Id.* art. 213.

<sup>48</sup>*Id.* art. 214.

<sup>49</sup>Venezuela does not recognize the doctrine of *stare decisis*. See note 1, *supra*.

<sup>50</sup>Venezuelan constitutional law is not presently codified, and therefore a uniform interpretation and application of the Venezuelan Constitution cannot be achieved.

<sup>51</sup>The Preamble to the Venezuelan Constitution states that the legislative assemblies of the states of Anzoátegui, Apure, Aragua, Barinas, Bolívar, Carabobo, Cojedes, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Nueva Esparta, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy, and Zulia ratified the document.

Venezuelans do not take their constitution as seriously as do their American neighbors, there is a tendency in this Latin American country to defer to governmental regulations which may be inconsistent, irrational, and unconstitutional.

However, if Rafael Caldera is correct when he says the Constitution "is not a document which reads one way and is enforced in quote another," then after twenty years of strength and legitimacy, it now seems to be the correct moment in time to utilize the substantive and procedural guarantees present in the Constitution, especially in the event that a Venezuelan governmental entity or individual should exceed constitutional limits on their power.

In the area generically termed *civil liberties*, the Venezuelan Constitution has received a more thorough workout than in other areas. The Fortunato Herrera case,<sup>52</sup> the closing of a local radio station for unpopular antigovernmental opinions,<sup>53</sup> the Owens-Illinois nationalization,<sup>54</sup> and the Carlos Bordoni<sup>55</sup> matter are four relatively recent examples of legislative and administrative decrees or actions which were deemed to be in direct conflict with the Constitution. Venezuelan constitutional jurisprudence is growing rapidly and encouragingly, and, thanks to a brilliant constitutional law professor at the Central University, Dr. Allan R. Brewer-Carías,<sup>56</sup> it is being codified topically for use by jurists and attorneys alike. With continued citizen awareness of the fact that a true constitutional democracy means majority rule of the governing party, but only within the rules of the game as laid down by the Constitution, the corner will be turned in Venezuela. Businessmen with international experience can take the lead in this process which exists and is begging for implementation. Private enterprise possesses a plethora of rights in search of affirmance, limited only perhaps by the practical fears a businessman (especially if foreign) might have, of insulting a ministry with which he has ongoing commercial and industrial relations. Once again, however, the political undercurrents and strategy behind implementing constitutional procedures affect neither the existence

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<sup>52</sup>This case involved the immunities of two representatives of the Venezuelan Congress who were being investigated. Their immunities under Articles 143-46 were upheld by the Supreme Court of Justice. See note 3, *supra*.

<sup>53</sup>Venezuela does not grant a broad freedom of speech to its media as the United States does. See note 8, *supra*.

<sup>54</sup>VEN. CONST., art. 101. Expropriation by the Venezuelan government must be for the public benefit, and fair compensation must be paid. Foreign corporations do not have to sell to the government just because the government has an interest in the corporation. These requirements are very similar to the U.S. requirements for governmental "taking." See note 11, *supra*.

<sup>55</sup>Carlos Bordoni was a Venezuelan banker, born in Italy, who fought extradition for prosecution for fraud. Bordoni was successful under Article 64 of the Venezuelan Constitution which prohibits banishment of a citizen without the citizen's consent. See note 4, *supra*.

<sup>56</sup>Dr. Allan R. Brewer-Carías is a law professor at the Central University in Caracas and has authored several articles and books concerning the interplay of administrative law and the Constitution in Venezuela.

nor the correctness of such procedures, and, if done properly, challenging a constitutional abuse will actually bring respect to the challenger.

The preamble of the 1961 Venezuelan Constitution indicates that among the purposes of the state shall be to insure liberty, peace, and the stability of institutions. Work shall be given a noble role, human dignity shall be protected, and the general welfare shall be maintained. Social equality and equality before the law are deemed essential, and discrimination with regard to sex, race, creed or social condition is expressly prohibited. Neither rich nor poor, nationals nor foreigners, may be discriminated against, and the universal rights of man, collectively and individually, are secured. Economic imperialism shall be obliterated as an instrument of international politics promises the Preamble.<sup>57</sup>

### *Enforcement of Constitutional Rights*

In accordance with the 1961 Constitution, the following "acts of state" are subject to the recourse of unconstitutionality:

1. National laws;
2. State laws;
3. Municipal ordinances;
4. Acts of Congress, National Legislative Assemblies or those of Municipal Councils acting in legislative fashion;
5. Governmental Acts of the National Executive; and
6. Executive Regulations.<sup>58</sup>

Administrative disputes are governed by different although similar constitutional remedies referred to as *contencioso-administrativo*.<sup>59</sup>

The most impressive and most frequently used method of constitutional appeal in Venezuela is the "popular action." This type of action may be instituted by any person, natural or juridical, within the territorial limits of Venezuela for the minimal cost of *papel sellado* (Bs. 0.50) and a *timbre fiscal* (Bs. 1.00) for each party to the action.<sup>60</sup> This type of action is not an adversary proceeding, and, therefore, the complaining party need have no interest in the outcome and need not have exhausted any remedies. This is in direct opposition to the U.S. rule.<sup>61</sup> In a "popular action" the complaining

<sup>57</sup>The disparity of the focuses of the U.S. Constitution and the Constitution of Venezuela becomes clear upon examination of their respective preambles. The focus of the U.S. document is on the people and formation of the Union; whereas, the Venezuelan document focuses on the Republic and the preservation of and promotion of business, work, and the economy.

<sup>58</sup>VEN. CONST., art. 215.

<sup>59</sup>This term describes the remedies afforded under administrative-law procedures. Much like the United States, Venezuela has administrative agencies which promulgate regulations which may be attacked on appeal to the Supreme Court of Venezuela. However, this appeal is much more similar to a *de novo* proceeding or administrative hearing than an appeal under American law. See note 18, *supra*.

<sup>60</sup>These minimal amounts for filing an appeal contrast sharply with the \$10,000-minimum requirements for jurisdiction and the costs of actually filing the appeal. See note 31, *supra*.

<sup>61</sup>Venezuela has no requirement for standing in order to sue. See note 30, *supra*.

party files his written complaint with the Supreme Court. The Procurator General then must file his opinion within thirty days. This opinion is generally filed as an *amicus curiae* or "friend of the court" rather than as an adversary. The Supreme Court *en banc* then issues its opinion within thirty days. There are no briefs filed with the court (only the complaint and the opinion of the Procurator General), and no oral arguments are made before the Court.<sup>62</sup> The Supreme Court may find the law or statute which is attacked unconstitutional on the grounds complained of or for other grounds which it may find aside from the complaint.<sup>63</sup> Since the Court has exclusive and original jurisdiction in these matters, no further appeals may be taken, and no rehearings will be granted. It should be noted that while the Court may declare a law unconstitutional, that ruling only prevents the law from being enforced; it does not annul it.<sup>64</sup> The "popular action" is quite accurately named since it provides easy access to the Supreme Court to contest the constitutionality of a law and insures a relatively quick resolution of the matter.

Another method of constitutional review of a law is that of anticipatory review. In this procedure, a law which has been passed over the veto of the President immediately goes to the Supreme Court. The Procurator General then files his opinion with the Court, and the Court issues its opinion thereafter within six days. The law must be upheld by the Court in order to become enforceable.<sup>65</sup> This method has been utilized infrequently due to the obvious limitations on the circumstances under which it may be used.

Constitutional appeals from administrative rulings, as opposed to laws or statutes, are taken by proceedings similar to those in the United States. A person complaining of the constitutionality of an administrative ruling must establish a direct, personal, and legitimate interest in the proceeding.<sup>66</sup> The complaint is brought before the *Sala Politico-Administrativa* of the Supreme Court.<sup>67</sup> However, the proceeding is not adversary in nature. Any citizen may present evidence, and the Procurator General<sup>68</sup> files an opinion. The court then investigates the matter and checks with other

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<sup>62</sup>Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L. J. 804 (1974). This procedure is directly in conflict with the case or controversy" requirement for United States courts and their refusal to render "advisory opinions." Muskrat, *supra* note 33. See notes 29, 33, *supra*.

<sup>63</sup>*Id.* Only in extreme circumstances will the United States Supreme Court explicitly strike down a law for reasons other than those presented to it.

<sup>64</sup>*Id.* See note 35, *supra*.

<sup>65</sup>*Id.* at 806. This procedure also conflicts with the "advisory opinion" doctrine. See note 62, *supra*.

<sup>66</sup>This standing requirement for administrative rulings is quite similar to the "adversely affected or aggrieved" standard for appealing administrative rulings in the United States. 5 U.S.C. § 702.

<sup>67</sup>VEN. CONST., art. 216. The Venezuelan Supreme Court is divided into divisions, *salas*, according to expertise. In addition to the judges of the *Sala Politico-Administrativa*, there must also be two magistrates from the other *salas* at the appeal.

<sup>68</sup>*Id.* art. 202, ¶ 1. The Procurator General must be called in all actions involving constitutionality. However, his American counterpart, the U.S. Attorney General, is generally only involved in cases in which the United States is a party to the action.



branches of the government on the "tip" which the citizens provide it. It should be noted that these actions against administrative decisions have a statute of limitations of six months from the promulgation of the regulation.<sup>69</sup> In this type of proceeding, the court actually assumes the role of a "watchdog," since it appears to serve the same role as the administrative courts in the United States.

Obviously, the Venezuelan judicial system is much more concentrated than its United States counterpart. The facts of its sole power of constitutional review and lack of justiciable requirements for invoking its jurisdiction place upon the Supreme Court of Venezuela a duty and burden of responsibility which the United States Supreme Court has never assumed nor desired to assume.

### *General Trends in Venezuelan Public Law*

The general trend that could be noted in Venezuelan constitutional and administrative law during the last ten years was one away from the so-called liberal-bourgeois state towards the rapidly evolving democratic social-welfare state. Nevertheless, as countless Venezuelan law professors point out, the trend does not mean elimination of protection of business entities and individuals in the country but rather "that there are simply considerations to be looked after other than those of unlimited profits and individual expression." For this reason, it becomes all the more important to protect the constitutional rights that do exist in Venezuela, especially when their violation decreases creativity and dynamism.

### **Conclusion**

What conclusion can safely be drawn from the contrast between the broad and enthusiastic constitutional dictates as they appear on paper in the Venezuelan Constitution and the present undeveloped state of constitutional law practiced in the country?

Only that the gap is clearly diminishing.

It is becoming increasingly true that with respect to key business decisions which depend upon governmental policies in areas such as price regulation, consumer protection, capital markets, Latin American integration, bankruptcy, right to work, freedom to contract, foreign capital regulation, and freedom of speech, there exists a great deal of constitutional protection and very sophisticated modes of enforcement. All that remains to be acquired is the confidence to utilize such. With serious legal counsel, private enterprise in Venezuela can take advantage of what the rule of law offers to it.

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<sup>69</sup>J. ANDUEZA, *LA JURISDICCION CONSTITUCIONAL EN EL DERECHO VENEZOLANO* (1974), at 53. There are no set time limitations for appeals of administrative rulings in the United States. The only toll would be the mootness doctrine. See note 32, *supra*.

While the Law of Public Administration<sup>70</sup> and the diverse remedies of administrative relief are important, the Constitution itself should not be forgotten by the industrialist, the merchant, nor by their lawyers when taking inventory of their "tools of the market place."

The words of Rafael Caldera should guide us all at this stage of Venezuela's development:

In this way (constitutional obedience), democracy, which cost all of us so much, shall continue to be the most legitimate title of national pride and the best lever of the profound change that Venezuela is completing and will fulfill in this historic era.

Venezuelans should rally behind their Constitution, especially in good times. Their purpose must be to sanctify the document and nourish its traditions so that when oil income diminishes and the waves get choppy (as they undoubtedly will), its cherished goals are not whittled away by expediency and fear.

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<sup>70</sup>The Law of Public Administration is still the single greatest avenue for complaints by business against government rulings, orders, and regulations which interfere or inhibit business operations. A thorough knowledge of the administrative procedures and remedies in the country or countries of operation is a quintessential tool which a business lawyer must be familiar with in order to be an effective advocate for his client's rights.

**Recent Developments in  
Venezuelan Constitutional Law**

<i>Date</i>	<i>Event</i>
May 21, 1976	Judicial Section of Fedecámaras at its XXXII Assembly in Puerto La Cruz emphasizes lack of judicial and constitutional security in the country. Key points are unnecessary proliferation of legislation, poor legislative drafting, errors in the Official Gazette, abuse of power, arbitrary administrative action, and contradictions between Supreme Court and Lower Court Decisions.
July 30, 1976	Former President Carlos Andrés Pérez presides over the promulgation of the Organic Law of the Supreme Court of Justice. He is quoted as having stated: <p style="margin-left: 40px;">I remind you that in my first message to Congress I said I would make all efforts possible during my term in office to organize administrative jurisdiction, and such has been achieved in this law. Regional courts shall be established to protect the citizen in the first instance from erroneous decisions of the almighty and privileged state.</p>
July 31, 1976	Dr. Allen Brewer-Carías, Professor Emeritus of the Central University, publicly blames Venezuelan political parties for the state's inefficiency, stating that formal guarantees of human rights are in the constitution but not enforced.
August 14, 1976	José Ramón Medina, Former Fiscal General de la República, remarks that the decision taken by the Supreme Court regarding detained deputies Fortunato Herrera and Salom Meza Espinoza is an example of the perfect functioning of the democratic system.
August 16, 1976	Marino Recio, noted business commentator, states in a newsletter bearing his name that with regard to the Owens-Illinois case: <p style="margin-left: 40px;">In a constitutional sense, owners of a firm are not obligated to sell their enterprise when the government expresses an interest in buying it. If expropriation is to be done, the purchase of shares must be done by means of the expropriation laws.</p>

- November 8, 1976      Noted Perezjimenista, Alejandro Gomez Silva, is publicly quoted as affirming that the present Election Law is unconstitutional in that it unjustly and antidemocratically distributed more election money to the two principal parties in a discriminatory fashion.
- February 24, 1977      In order to enforce recently promulgated labor regulations, in Official Gazette, 31.18-2 there appear various resolutions which establish Tripartite Commissions to rule on the Labor Law's interpretation.
- May 22, 1977          More than a year after the nationalization of the iron ore industry (a constitutionally permissible act), a coordinating commission is constituted which will regulate the commercialization of iron ore.
- May 12, 1978          Pursuant to Finance Ministry Resolution appearing in the Official Gazette No. 31.485, the interest rates to which the corpus of Venezuelan laborers' benefits are subject is increased.
- November 2, 1979      Local bankers once again are in an uproar in view of apparently imprudent and non-businesslike governmental regulation of banking matters and mortgage rates.
- August 13, 1980       Various governmental development banks and agencies have been created. Constitutional authorization is granted to increase Venezuela's capital contribution to the Interamerican Development Bank.
- August 15, 1980       Venezuela has always required a tax solvency certificate for its citizens and alien residents to leave the country. This procedure is of dubious constitutionality in Venezuela and certainly is unconstitutional in the U.S. On this date, this procedure is essentially eliminated.
- February 28, 1981      President Luis Herrera advocates vast reduction in time and money spent on presidential elections. While most Venezuelans would welcome such a change, minority parties will probably challenge constitutionality of same, indicating they are put in unfair position vis-à-vis the ruling party.

