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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**VENEZUELA**

**PRELIMINARY OPINION**

**ON THE LEGAL ISSUES RAISED BY DECREE No. 2878  
OF 23 MAY 2017 OF THE PRESIDENT OF THE REPUBLIC  
ON CALLING ELECTIONS  
TO A NATIONAL CONSTITUENT ASSEMBLY**

**On the basis of comments by**  
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**Ms Veronika BÍLKOVÁ (Member, Czech Republic)**  
**Mr Kaarlo TUORI (Member, Finland)**  
**Mr José Luis SARDON (Member, Peru)**  
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## I. Introduction

1. By letter of 26 June 2017, the Secretary General of the Organization of American States (OAS) requested the Venice Commission to prepare an opinion on the legal issues raised by the Decree of the President of Venezuela No. 2878 of 23 May 2017 on calling elections to the Constituent Assembly. The Committee of Ministers of the Council of Europe authorized the Venice Commission to proceed on the basis of this request.
2. Ms Paloma Biglino, Ms Veronika Bílková, Mr Kaarlo Tuori, Mr José Luis Sardon and Mr José Luis Vargas Valdez acted as rapporteurs for this opinion.
3. On 28 June 2017, the Secretariat of the Venice Commission wrote a letter to the Ambassador of Venezuela in Belgium, inviting her to inform the authorities of Venezuela about the request for an opinion as well as the availability of a delegation of the Commission to travel to Venezuela and meet with the authorities and other stakeholders. No reply has been received to date.
4. In the light of the nature of the decree and the proximity of the elections to the Constituent Assembly, called for 30 July 2017, the Bureau authorized the rapporteurs to send the OAS and the Venezuelan authorities and to publish a preliminary opinion on this matter prior to the Plenary Session of October 2017.
5. The present preliminary opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the original Spanish version of the Presidential decree.
6. *This preliminary opinion was sent to the Organization of American States and to the Venezuelan authorities on 21 July 2017 and was published on the same day on the Venice Commission's website. It will be submitted to the Commission for endorsement at its 112<sup>th</sup> Plenary Session on 6-7 October 2017.*

## II. Background

7. On 1 May 2017, the President of the Republic of Venezuela, sitting with the Cabinet of Ministers, issued Decree No. 2830 whereby, invoking Articles 348, 70, 236 § 1 and 347 of the Constitution, he called the election of a National Constituent Assembly (NCA) "in the sectorial and territorial fields, which will be organized by the National Electoral Council, through universal, direct and secret ballot" (CDL-REF(2017)032) .
8. On 23 May 2017, the President of the Republic, sitting with the Cabinet of Ministers, issued Decree No. 2878 whereby on the basis of Articles 347, 348 and 70 of the Constitution, in his capacity as "*convocante*" (convener), he fixed the rules for such election ("*bases comiciales*") (CDL-REF(2017)032).
9. On 24 May 2017, the National Electoral Council (CNE) announced that the elections would take place on 30 July 2017.
10. On 4 June 2017, the President of the Republic, through Decree No. 2889, supplemented Presidential decree No. 2878<sup>1</sup> in respect of the *bases comiciales* by exhorting the National Constituent Assembly to be elected on July 30, to submit the draft of the new Constitution for approval in a popular referendum pursuant to Article 70 of the Constitution of 1999.

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<sup>1</sup> <https://fr.scribd.com/document/350820952/Gaceta-Extraordinaria-N-6-303>

11. On 6 July 2017, the vice- President of the CNE announced that General assemblies of indigenous peoples would elect their 8 representatives to the Constituent Assembly on 1 August.<sup>2</sup>

### **III. Constitutional framework**

12. The relevant provisions of the 1999 Constitution of the Bolivarian Republic of Venezuela read as follows:

#### Article 1

*The Bolivarian Republic of Venezuela is irrevocably free and independent, basing its moral property and values of freedom, equality, justice and international peace on the doctrine of Simon Bolivar, the Liberator.*

*Independence, liberty, sovereignty, immunity, territorial integrity and national self-determination are unrenounceable rights of the Nation.*

#### Article 2

*Venezuela constitutes itself as a Democratic and Social State of Law and Justice, which holds as superior values of its legal order and actions those of life, liberty, justice, equality, solidarity, democracy, social responsibility and, in general, the pre-eminence of human rights, ethics and political pluralism.*

#### Article 5

*Sovereignty resides untransferable in the people, who exercise it directly in the manner provided for in this Constitution and in the law, and indirectly, by suffrage, through the organs exercising Public Power.*

*The organs of the State emanate from and are subject to the sovereignty of the people.*

#### Article 21

*All persons are equal before the law, and, consequently:*

*1. No discrimination based on race, sex, creed or social standing shall be permitted, nor, in general, any discrimination with the intent or effect of nullifying or encroaching upon the recognition, enjoyment or exercise, on equal terms, of the rights and liberties of every individual. [...]*

#### Article 23

*The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favourable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power.<sup>3</sup>*

#### Article 63

*Suffrage is a right. It shall be exercised through free, universal, direct and secret elections. The law shall guarantee the principle of personalization of suffrage and proportional representation.*

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<sup>2</sup> News on the official Web-site of the CNE [http://www.cne.gob.ve/web/sala\\_prensa/noticias.php](http://www.cne.gob.ve/web/sala_prensa/noticias.php) on 6 July 2017.

<sup>3</sup> No similar provision exists to regulate the status of other treaties or of customary international law.

Article 70

*Participation and involvement of people in the exercise of their sovereignty in political affairs can be manifested by: voting to fill public offices, referendum, consultation of public opinion, mandate revocation, legislative, constitutional and constituent initiative, open forums and meetings of citizens whose decisions shall be binding among others; and in social and economic affairs: citizen service organs, self-management, co-management, cooperatives in all forms, including those of a financial nature, savings funds, community enterprises, and other forms of association guided by the values of mutual cooperation and solidarity. The law shall establish conditions for the effective, functioning of the means of participation provided for under the present article.*

Article 187

*It shall be the function of the National Assembly:*

*1. To legislate in matters of national competence and as to the functioning of the various branches of National Power. [...]*

Article 236

*The following are attributions and duties of the President of the Republic:*

- 1. To comply with and enforce this Constitution and the law.*
- 2. To direct the activity of the Government. [...]*
- 8. To issue executive orders having the force of law, subject to authorization in advance by an enabling act. [...]*
- 10. To issue regulations for the application of laws, in whole or in part, without altering the spirit, purpose and reason for being of the laws.*

Article 340

*The purpose of an amendment is to add to or modify one or more articles of the Constitution, without altering the fundamental structure of the same.*

Article 342

*The purpose of constitutional reform is to effect a partial revision of this Constitution and replacement of one or more of the provisions hereof, without modifying the fundamental principles and structure of the text of the Constitution.*

*The initiative for a constitutional reform emanates from the National Assembly, by resolution approved by a majority vote of the members, from the President of the Republic sitting with the Cabinet of Ministers, or at the request of registered voters constituting at least 15% of the total number registered with the Civil and Electoral Registry.*

Article 347

*The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution.*

Article 348

*The initiative for calling a National Constituent Assembly may emanate from the President of the Republic sitting with the Cabinet of Ministers; from the National Assembly, by a two thirds vote of its members; from the Municipal Councils in open session, by a two-thirds vote of their members; and from 15% of the voters registered with the Civil and Electoral Registry.*

Article 349

*The President of the Republic shall not have the power to object to the new Constitution. The existing constituted authorities shall not be permitted to obstruct the Constituent Assembly in any way. For purposes of the promulgation of the new Constitution, the same shall be published in the Official Gazette of the Republic of Venezuela or in the Gazette of the Constituent Assembly.*

Article 350

*The people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights.*

13. Venezuela is a Member of the United Nations, the Organization of American States (OAS)<sup>4</sup> and several specialized international organizations. It has signed and ratified the majority of the UN human rights treaties including the International Covenant on Civil and Political Rights as well as the 1969 American Convention on Human Rights which, however, it denounced in 2013.

14. Venezuela also signed the Inter-American Democratic Charter.<sup>5</sup>

**IV. General remarks and main applicable standards**

15. This opinion stems from the premise that constitutional change does not necessarily imply a constitutional break. In a democratic and constitutional State, the fundamental agreement should prevent the constituted ordinary bodies from transforming themselves into the constituent power. Otherwise the Constitution would be subject to the whims of the political majority of the moment and the distinction between ordinary and constitutional politics would disappear. Furthermore, the constitutional procedure to renegotiate the foundational pact should establish mechanisms to guarantee that such renegotiation takes place within the boundaries of democracy and the rule of law. If there is a constitutional procedure to partially or fully change constitutional order, it must be implemented with this basic principle of constitutional technique in mind.

16. Hence, a democratic Constitution must foresee the appropriate mechanisms to implement fundamental changes, including supermajorities, direct approval from the people and other methods of control that ensure constitutional continuity. If these are not included or if the procedure is weak, the Constitution may empower a constituted power to, by itself, control most aspects of constitutional change.<sup>6</sup>

17. The Venice Commission has previously, consistently pointed out that the procedure for adoption of constitutional amendments or, to the extent possible, even new constitutions must abide by the provisions of the Constitution in force. Indeed, the Commission strongly endorses the principle of “constitutional continuity”, under which even new constitutions should be

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<sup>4</sup> In April 2017, Venezuela undertook legal steps to withdraw from the OAS; this is an on-going process that will take up to 24 months.

<sup>5</sup> [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm)

<sup>6</sup> See Vega, Pedro de, “Constitutional Reform and the Issue of Constituent Power” [La reforma constitucional y la problemática del poder constituyente], Madrid, Tecnos, 1985. ISBN 84-309-1217-7. Vega, Pedro de, “Constitutional reform as a defence of the Constitution and the Democracy” [“La reforma constitucional como defensa de la Constitución y de la Democracia”], II Jornadas de Derecho Constitucional sobre la reforma de la Constitución, Zaragoza, Fundación Manuel Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, 2006, págs. 1-27. Hauriou, Maurice, “Principles of public and constitutional law” [Principios de derecho público y constitucional], translated to Spanish by Carlos Ruiz del Castillo, Madrid, Editorial Reus, 1927.

adopted following the prescribed amendment procedures in the old one – thus strengthening the stability, legality and legitimacy of the new system.<sup>7</sup>

18. Properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time. In contrast, if the rules and procedures on constitutional change are open to interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself. In this sense, the Commission has repeatedly stressed that a duly, open, informed and timely involvement of all political forces and civil society in the process of reform can strongly contribute to achieving consensus and securing the success of the constitutional revision even if this inevitably takes time and effort. For this to happen, states' positive obligations to ensure unhindered exercise of freedom of peaceful assembly, freedom of expression, as well as a fair, adequate and extensive broadcasting of the arguments by the media are equally relevant.<sup>8</sup>

19. The Venice Commission has also consistently expressed the view that the choice of an electoral system is a sovereign decision of a state through its political system. There are different electoral systems, and multiple options on how they are presented are found across the OSCE region and member states of the Venice Commission. States have wide discretion in designing electoral systems, provided that international conventions and standards, guaranteeing, in particular, universal, equal, free and secret suffrage, are respected.<sup>9</sup>

20. Article 25 of the United Nations International Covenant on Civil and Political Rights guarantees that “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.

21. General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, in paragraph 6, establishes that “*citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b).*” Later on, in paragraph 21, the General Comment explains that “[t]he principle of one person, one vote, must apply, and within the framework of each State’s electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”

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<sup>7</sup> Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001, and numerous country specific opinions.

<sup>8</sup> Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001, §§ 204, 205.

<sup>9</sup> Venice Commission, Joint opinion with the OSCE/ODIHR on the draft laws of the Republic of Moldova on amending and completing certain legislative acts (electoral system for the election of the Parliament), CDL-AD(2017)012, § 25.

22. The Code of Good Practice in Electoral Matters of the Venice Commission,<sup>10</sup> sets out the five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. In section 2.2, the Code states: "*Equal voting power: seats must be evenly distributed between the constituencies.*

*i. This must at least apply to elections to lower houses of parliament and regional and local elections.*

*ii. It entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged.*

*iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.*

*iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity)."*

23. These principles are also established in regional and transnational declarations such as the American declaration of the rights and duties of man (1948, Article XX), the American Convention on Human Rights (Article 23), the Inter-American Democratic Charter (2001), the African Charter on Human and Peoples' Rights (1981, Article 13.1) and the Asian Charter of Rights (1998, Article 5.2) among other instruments, which declare a general right to political participation to be a fundamental principle.

## **V. Analysis**

### **A. The power of the President of the Republic to call the election of the National Constituent Assembly**

24. The 1999 Constitution makes a distinction between amendments to the Constitution, a constitutional reform (*stricto sensu*) and the preparation of a completely new constitution by a constituent assembly. The three forms of constitutional reforms (*largo sensu*) regulated by Title IX of the Constitution, differ by the extent to which they modify the Constitution. Amendments seek to "*add to or modify one or more articles of the Constitution, without altering the fundamental structure of the same*" (Article 340). A constitutional reform seeks to "*effect a partial revision of this Constitution and replacement of one or more of the provisions hereof, without modifying the fundamental principles and structure of the text of the Constitution*" (Article 342). Finally, a reform through a constituent national assembly is appropriate, when the intention is that of "*transforming the State, creating a new juridical order and drawing up a new Constitution*" (Article 347).

25. The initiative of President Maduro is aimed at repealing the 1999 Constitution and adopting a new one. Out of the three forms of constitutional reforms, the third one – that of the constituent national assembly – is thus appropriate. This is indeed the form that President Maduro has opted for in his Decrees.

26. According to Article 347, the *original constituent power* of the people of Venezuela may be exercised by calling a National Constituent Assembly. In turn, Article 348 lays down that the *initiative* for calling a NCA may emanate from the President of the Republic sitting with the Cabinet of Ministers; from the National Assembly, by a two thirds vote of its members; from the

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<sup>10</sup> *Code of good practice in electoral matters. Guidelines and explanatory report.* Adopted by the Venice Commission at its 52<sup>nd</sup> session (Venice, 18-19 October 2012), guideline II.2.a



Municipal Councils in open session, by a two-thirds vote of their members; and from 15% of the voters registered with the Civil and Electoral Registry.

27. The question has arisen as to whether “initiative” in this context means the right to convene the NCA or only the right to declare a referendum, consulting the people as to whether to convene a National Constituent Assembly or not. The wording of Articles 347-348 may be taken to mean that Article 348 regulates merely the power to initiate the procedure which can lead to the establishment of a National Constituent Assembly, while Article 347 entrusts “the people of Venezuela” with the decision to convene the assembly. The decision should obviously be taken through a referendum. According to this interpretation, the President, too, would only have the power of initiative, and convening the assembly would require the approval of the President’s initiative (or that of the other bodies entitled to do so) in a referendum.

28. In its decision 378/2017 of 31 May 2017, the Constitutional Chamber (*Sala constitucional*) of the Supreme Court (*Tribunal Supremo de Justicia*, TSJ), which in the Venezuelan constitutional system is entrusted with constitutional review, instead pronounced the constitutionality of Presidential decree 2830. The TSJ ruled that “it is neither necessary nor constitutionally mandatory, to call for a consultative referendum prior to calling for a National Constituent Assembly, because that is not explicitly established in any of the provisions in Chapter III of Title IX [of the Constitution].” The TSJ distinguished the current situation from that prior to the adoption of the 1999 Convention, when a referendum on whether to convene a constituent national assembly had been held. According to the TSJ, in 1999 a referendum on the convocation of the National Constituent Assembly was needed because the Constitution then in force did not include any provisions on such an assembly.<sup>11</sup>

29. Decision 378/2017 of the TSJ does not account for the different wording (the exercise of the original constituent power by the people of Venezuela by calling the election of the NCA vs. the power of the President to take the initiative to call the elections of a NCA), of the constitutional provisions at issue. The TSJ also fails to counter the – apparently evident - explanation to these provisions either: the intention to regulate in the new constitution the procedure for adopting a new constitution which was already followed in 1999 but without an explicit basis in constitutional provisions; a procedure which also includes a referendum on the convocation of a National Constituent Assembly.

30. The TSJ’s decision does not address several other issues. First, while Articles 347 and 348 of the Venezuelan Constitution are unclear about the content and consequences of an initiative to call a National Constituent Assembly, according to Articles 341 § 3 and 344, constitutional amendments and major reforms should be submitted to referendum within 30 days following the congressional approval. If even these minor changes to the constitution are bound to be subject to a public consultation, then it can be reasonably assumed that its major renegotiation should be too. The same logic can be found in Articles 74 and 218, according to which partial or total abrogation of laws should be submitted to referendums. In the Venezuelan system, it is to be expected that in matters of supreme importance for the country, such as the adoption of a new Constitution, the ways allowing the people to express its opinion as broadly and directly as

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<sup>11</sup> Some authors have expressed the view that the Constitution divides the process of the initiation of the constitutional reform carried out through the constituent national assembly into two stages: the initiative and the convocation of the assembly. Whereas the initiative belongs to all the entities enumerated in Article 348 of the Constitution, the convocation is reserved to the people, which should express its will by means of a referendum (as it did in 1999) See, for instance, Vicente Díaz, Consideraciones sobre una constituyente, *El Nacional*, 3 de mayo de 2017; A Constituent Assembly in Venezuela is No Substitute for Elections: WOLA Calls on Venezuela to Announce Electoral Timetable, WOLA, 15 May 2017.

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possible, are to be favoured. These encompass, but are not limited to, holding a national referendum on whether to establish the constituent national assembly or not (*ex ante* referendum), creating the assembly through public elections, and having the text of a new constitution approved or rejected in a national referendum (*ex post* referendum). Second, Decree 2878 does not allow for a democratic decision regarding the need to revisit the constitution. This could undermine the People's "leadership" and "means of participation" in constituent initiatives (see Articles 5 and 70 of the Constitution). Third, the President's direct call for a NCA assumes that only one of the Public Powers (i.e. the Executive Branch) has enough attributions to impose a renegotiation of the social contract, ignoring the other State organs through which the People of Venezuela exert their sovereignty (e.g. the National Assembly); this raises an issue in terms of democratic and egalitarian principles, and of the separation of powers, as stated in articles 1, 2, 5, 19, 21 and 136 of the Constitution. The Venezuelan President, as only one of the constituted powers, should not be entitled to call for a National Constituent Assembly without calling a referendum.

31. In 1999, both *ex ante* and *ex post* referendums were held, giving the people of Venezuela the possibility to get involved in the process and feel ownership over it. Even if holding referendums before and after the Constituent Assembly were not a constitutional requirement under the 1999 Constitution, it would seem appropriate and in line with democratic standards to do so. After all, the Decree 2878 stresses that the main motivation behind the whole process is to give the people the possibility to express its view and to create a system that would overcome internal political tensions and would guarantee peace. This effort can only be successful, if the people - i.e. all parts of the society - get actively involved in the constitutional process. Making the people, the holder of the "the original constituent power" (Article 347), participate in the constitutional reform as broadly as possible, also is a constitutional requirement, though concrete forms of this participation are to be determined in concrete cases (within the limits of Article 70). The elections of the members of the Assembly, foreseen by Decree 2878, hardly suffice in themselves to satisfy this requirement.

32. In conclusion, in the light of the wording of the relevant constitutional provisions, against the background of the previous constitutional experience of Venezuela and in the absence of compelling arguments to the contrary, the Venice Commission is of the view that the question of whether or not the decision on the convocation of a National Constituent Assembly may only be taken by the people of Venezuela through a referendum may not be considered to have been finally settled.

#### **B. The competence of the President of the Republic to establish the rules for the election of the National Constituent Assembly**

33. The 1999 Constitution does not include any explicit provisions on the composition and election of the National Constituent Assembly. Nor does the electoral legislation in force do so. Decree No. 2878 itself fixes these rules ("*bases comiciales*").

34. The Decree bases the power of the President to establish the rules on the election of the NCA on two main arguments. Firstly, the Preamble of the Decree affirms that he is the authority which has called the Constituent Assembly. Secondly, the same text mentions the powers of the President enumerated in Article 236 § 1 and Article 236 § 2 of the Constitution. However, neither of these arguments seems to be sufficient for justifying the enacting of a new electoral system by decree of the executive power. In fact, Art. 2 of the Constitution states that Venezuela constitutes itself as a Democratic and Social State of Law. According to the democratic principle and the rule of law, the Executive does not have the power to enact a new electoral system that departs from the laws in force.

35. It is true that Art 348 of the Constitution attributes the initiative for calling the National Assembly to the President. However, the power of initiative is only the power of starting the process and not the power of establishing substantive rules on it.

36. The proceedings for the election of the previous National Constituent Assembly called by the former President of the Republic in 1999 are a precedent on this matter that must be taken into account. On this occasion, the rules for the election of the Assembly were proposed by the President and were implemented by the National Electoral Commission, in the “*Bases comiciales para el referendun consultivo sobre la convocatoria de la Asamblea Nacional Constituyente*” of 23 March of 1999. However, this norm was not only approved by these institutions. The *Bases* were submitted to the citizens in the referendum held on 25 April 1999 and were approved by the majority of the voters.

37. Article 236 §1 of the Constitution states that the President has the attribution and the duty to comply with and enforce the Constitution and the law. Article 236 § 2 affirms that the President has the power to direct the activity of the Government. None of these powers gives the President the authority to change the electoral system established by the law. Moreover, the first of these articles obliges the President to comply with the law and the Constitution in force. According to Article 187 § 1 of the Constitution, the National Assembly is the only institution which can enact laws. Article 236 § 8 of the Constitution provides that the President can adopt decrees with force of law only upon explicit authorisation by the “*ley habilitante*”, and paragraph 10 of the same article provides that he can “issue regulations for the application of laws, in whole or in part, without altering the spirit, purpose and reason for being of the laws”. Now, in the present case neither a general law on the elections of the National Constituent Assembly, nor any “enabling law” have been enacted by parliament. In a state governed by the rule of law, the supremacy of the legislature in adopting legislation must be ensured: the executive may only legislate on the basis of an explicit constitutional provision, on the basis of a delegation of powers explicitly defined in a legislative act and under the control of parliament and the judiciary.<sup>12</sup>

38. Since the end of the XVIII century, constitutional theory and constitutional norms attribute the passing of laws to parliaments, not only because of the representative nature of these institutions, but also because of their plural composition and the publicity which characterized their proceedings. In parliaments, minorities have the freedom to express their opinion and citizens have the right to know what is decided by their representatives and for which reasons.

39. In Venezuela’s constitutional system, the President of the Republic is elected by the people and, for this reason, has direct democratic legitimacy. However, he or she takes decisions without the requirements imposed by public debate. Decree n° 2879 states that the widest sectors of the country have been consulted. However, this type of consultations does not ensure the same guarantees as parliamentary proceedings especially in favour of minorities.

40. The Code of Good Practices on Electoral Matters<sup>13</sup> states some principles that should be followed in order to avoid the problem mentioned above. In order to ensure regulatory levels and stability of electoral law, the Code provides that rules of electoral law must have at least the rank of a statute. The Code gives some powers to the executive in electoral matters, but only for enacting rules on technical matters and details.

41. A further reason why the President cannot legislate on the electoral system lies in his position according to the Constitution. Chapter III of Title IV of the Venezuelan Constitution does not rule only on the changing of the Constitution, as contemporary constitutions usually do, but also on the radical transformation of the State “creating a new juridical order and drawing up a new Constitution”. As Article 347 states, this power rests with the people and must be expressed by the National Constituent Assembly. This Assembly is the only institution that is not subordinated to the Constitution in force since it is constituent. Its powers are limited

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<sup>12</sup> Venice Commission, Rule of Law checklist, CDL-AD(2016)007, Benchmark A. Legality, item 4. Law-making powers of the executive, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)

<sup>13</sup> *Code of good practice in electoral matters.*, guideline II.2.a

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because the Assembly must respect the values declared by Article 350, i.e. democratic values and human rights. However, the Assembly can create a totally new power and establish new relationships between powers and citizens, always respecting these limits.

42. The President of the Republic does not have this high level of power. His is a constituted power, created by the Constitution and under the Constitution and the laws. Neither his direct election nor his power of initiating the calling of the National Assembly suffice to change this subordinate position.

43. In the past, the Venice Commission has repeatedly underscored the need for public discussion and broad consultations with all electoral stakeholders with respect to electoral reform.<sup>14</sup> These requirements are still more vital at the moment of enacting norms on the election of a National Constituent Assembly. More than at any other time, electoral rules “should be subject to open debate at the national level, as public discussion will enrich the comparative perspective and the analysis of other experiences. This will also enhance the transparency of the process of developing electoral legislation as well as ensure confidence in the adopted electoral legislation.”<sup>15</sup>

44. In conclusion, in accordance with the principle of the rule of law and with the Constitution of Venezuela, the power to determine the rules for the election of the National Constituent Assembly belongs to the National Assembly only.

### **C. The rules for the election of the National Constituent Assembly**

45. Decree 2878 establishes that the 553 members of the National Constituent Assembly are elected in two different ways: 364 members are elected by territory, and 181 are elected by sectors. 8 members are elected by the General Assemblies of Indigenous Peoples.

46. The Constitution of Venezuela does not include any explicit provisions on the composition and election of the National Constituent Assembly. The Constitution however provides for the recognition of equality as a fundamental value (Articles 1 and 2), equality before the law (Article 21), the right to free, universal, direct and secret elections (Article 63) and elections “by universal, direct, personalized and secret ballot” to the National Assembly (Article 186). The general principles concerning the exercise of public power and the election of the organs exercising this power have also to be respected. These include the principle of equality, which in electoral legislation takes the form of the requirement of one person – one vote as well as the requirement of the equal weight of individual votes; a requirement which can only be deviated from for constitutionally pertinent reasons, such as the objective of guaranteeing the political representation of ethnic minorities or indigenous peoples.

47. The following three main aspects of the electoral rules established by Presidential Decree 2878 will be analyzed below:

1. the election of two thirds of its members in electoral districts that replicate the municipal division of Venezuela’s territory;
2. the corporatist election of the remaining third; and
3. the large number of members of the assembly.

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<sup>14</sup> For example in “*Armenia, Second Preliminary Joint Opinion on the Electoral Code, as amended on 30 June 2016*” CDL-AD(2016)031, Para 22.

<sup>15</sup> Ibid.

1. *Electoral districts replicate the municipal division of Venezuela's territory*

48. Of the 553 members of the National Constituent Assembly, 364 will be elected in electoral districts that replicate the municipal division of Venezuela's territory. In Venezuela, there are a total number of 335 municipalities (*municipios*); 23 of them are capitals of regions (*municipios capitales*), and one is the national capital (*distrito capital*). Decree 2.878 apparently attempts to take into account the difference in population between these entities, but its effort is clearly insufficient. The municipalities are divided into three categories: Caracas - the national capital (with a population of 1,943,901,<sup>16</sup> approximately 1/16<sup>th</sup> of the whole population of Venezuela) - will elect seven members; the 23 regional capitals will elect two members each; and the remaining 311 municipalities will be single member electoral districts.

49. This scheme does not reflect the distribution of Venezuela's population because of two main reasons. First, the electoral districts drawn in this way are unequally large in terms of the number of voters. This entails that the relative political weight of each vote will be very different depending on the place of the residence of the voters.<sup>17</sup> Secondly, whereas in the 311 common *municipios* the majoritarian system is used, in the 23 *municipios capitales* and the single *distrito capital* the proportional system is used. This again gives unequal strength to votes depending on the place of the residence of the voters. In all, this system benefits rural areas with a low number of voters and harms the country's most populated districts.

50. The Venice Commission has stated on many occasions that each country is free to select the electoral system that is in the country's best interest<sup>18</sup>. However, the constitution and international standards establish some limits which must be respected. Equality is guaranteed by Article 1, 2 and 21 of the Constitution of Venezuela. Equality of suffrage is guaranteed, inter alia, by the Universal Declaration of Human Rights (Article 21 § 3) and by the American Convention on Human Rights (Article 23). The Venice Commission's Code of Good Practice in Electoral Matters (para 2) underscores that equal suffrage imposes equal voting power. Equality entails a clear and balanced distribution of seats among constituencies on the basis of people (population, number of resident nationals, number of registered voters and possibly the number of voters) and not territories in the election of lower chambers. The Code recognizes that geographical criteria may be taken into consideration. However, the permissible departure from the norm should not be more than 10% and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity).<sup>19</sup>

51. This territorial criterion also departs from the principles on which the election of Congress (National Assembly) members, legislative and municipal councils, and the design of electoral districts are based, as stated by articles 10,<sup>20</sup> 12,<sup>21</sup> 13<sup>22</sup> and 19<sup>23</sup> of the Organic Law for Electoral Processes of Venezuela.

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<sup>16</sup> This figure results from the 2011 census. In 2013 the *Instituto Nacional de Estadística* indicated the figure of 2,077,621. More recent official data is not available.

<sup>17</sup> The two extremes in the distribution of the Venezuelan population between municipalities are Maroa and Caracas. By 2011 estimates, Maroa has a population of only 2,029, while Caracas has one of 1,943,901. This means that the vote of a citizen in Maroa will have, approximately, 136 times the political weight of one in Caracas.

<sup>18</sup> For example, recently in the *Report on proportional electoral systems: the allocation of seats inside the list (open/closed list)*, adopted by the Council for Democratic Elections at its 50th meeting (Venice, 19 March 2015) and by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL-AD(2015)001, para 9.

<sup>19</sup> Guideline I.2.2.

<sup>20</sup> Artículo 10 - Base poblacional para diputados y diputadas. En cada estado y en el Distrito Capital, se elegirán tres diputados o diputadas a la Asamblea Nacional, más un número de diputados y

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52. In conclusion, the electoral rules based on territorial representation set out in Decree 2878 violate the democratic principle of equal voting power.

2. *The corporatist election of the remaining third of its members*

53. Pursuant to Decree 2878, 181 members of the National Constituent Assembly will be elected through a corporatist system. Decree 2878 identifies seven sectors to be represented in the assembly:

- a. Businessmen and businesswomen
- b. Peasants and fisherman and fisherwomen
- c. People with disabilities
- d. Students
- e. Workers
- f. Communes and Communal Councils

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diputadas igual al resultado de dividir el número de su población entre una base de población igual al uno coma uno por ciento (1,1%) de la población total del país.

<sup>21</sup> Artículo 12 - Integración de los consejos legislativos. Para integrar los consejos legislativos de los estados se elegirá el número de legisladores y legisladoras que resulte de la aplicación de la siguiente escala: Hasta 700.000 habitantes: siete (7) legisladores o legisladoras. De 700.001 a 1.000.000 habitantes: nueve (9) legisladores o legisladoras. De 1.000.001 a 1.300.000 habitantes: once (11) legisladores o legisladoras. De 1.300.001 a 1.600.000 habitantes: trece (13) legisladores o legisladoras. De 1.600.001 y más habitantes: quince (15) legisladores o legisladoras.

<sup>22</sup> Artículo 13 - Integración de los concejos municipales. Para integrar los concejos municipales y demás cuerpos colegiados de elección popular, se elegirá el número de concejales y concejalas que resulte de la aplicación de la siguiente escala: Hasta 15.000 habitantes: cinco (5) concejales o concejalas. De 15.001 a 100.000 habitantes: siete (7) concejales o concejalas. De 100.001 a 300.000 habitantes: nueve (9) concejales o concejalas. De 300.001 a 600.000 habitantes: once (11) concejales o concejalas. De 600.001 y más habitantes: trece (13) concejales o concejalas.

<sup>23</sup> Artículo 19 - Circunscripciones electorales. Para la elección de los cargos nominales a los cuerpos deliberantes, el Consejo Nacional Electoral conformará circunscripciones electorales que se registrarán por los lineamientos siguientes: 1. Para la elección de cargos nacionales y estatales, la circunscripción electoral podrá estar conformada por un municipio o agrupación de municipios, una parroquia o agrupación de parroquias, o combinación de municipio con parroquia, contiguas y continuas de un mismo estado, a excepción de las circunscripciones indígenas las cuales no tendrán limitación de continuidad geográfica. 2. Para la elección de cargos municipales y demás cuerpos colegiados de elección popular, la circunscripción electoral estará conformada por una parroquia o agrupación de parroquias contiguas y continuas. 3. Para la elección de los cargos señalados en los numerales anteriores, en los municipios o parroquias de alta densidad poblacional, las circunscripciones podrán conformarse en comunidades o comunas, considerando la dinámica política, económica, social y cultural de dichos espacios. 4. Para la conformación de las circunscripciones electorales, se determinará un índice poblacional. A tales fines se establecerá la población general en los estados, Distrito Capital, municipios o ámbito territorial de conformidad con lo establecido en la Ley. Dicha población general se dividirá entre el número de cargos a elegir nominalmente, la cifra resultante será el índice de la población correspondiente. 5. A los fines de que en cada estado, distrito o municipio, los cargos nominales a elegir se correspondan con los índices poblacionales establecidos para la conformación de las circunscripciones electorales, se podrán agrupar municipios o parroquias contiguas y continuas, hasta alcanzar el índice correspondiente o múltiplo de éste. De conformidad con lo establecido en la presente Ley, el Consejo Nacional Electoral establecerá las circunscripciones electorales, aplicando con mayor precisión posible los índices poblacionales.

g. Pensioners<sup>24</sup>

54. This system raises two issues:

- the pertinence of the distribution of the population into these categories can be questioned; and
- there is a risk that a large number of people are excluded from this second vote.

55. The number of representatives of each sector is distributed according to the rules stated in Art 2, which establishes that there will be one representative for each 83.000 voters included in the electoral register of each sector. According to Article 5 of Decree 2878, no elector can be registered in more than one sector's register to avoid duplicity of voting. Art 6 states that candidates must be put forward by the sectors with the support of 3% of the register to which they belong. Finally, Art 4 establishes that the constituency for the election of representatives of the Communes is the region and the electoral system is majoritarian. In the case of the other sectors, the constituency is national and the electoral formula is also majoritarian. As a result of these rules, electors are divided by categories; they vote by categories, and are elected only by citizens registered in their category.

56. This is not the first time in history that corporative representation has been established. Under Franco's dictatorship, Article 2 of the Spanish Law of Cortes of 17 July 1942<sup>25</sup> divided voters and representatives by sectors, such as the official Syndicate, families and municipalities. Under Salazar's dictatorship, Article 5 of the Portuguese Constitution of 1933 defined Portugal as a "unitary and corporative republic" and ruled in its Title III and IV on family and other moral and economic corporations that the State should create<sup>26</sup>. In Italy, under Mussolini's dictatorship, Law n° 129 of 19 January 1939<sup>27</sup> abolished the Chamber of Deputies and instituted the Chamber of Fasci and Corporations, which was integrated by the members of the National Council of National Fascist Party and the members of the National Council of Corporations. This last body was organized in seven sections, such as industry, agriculture or commerce.<sup>28</sup>

57. This kind of representation has at times been defined as "corporative democracy". Nevertheless, it is possible to put in question its democratic character since it has been adopted under notoriously anti-democratic regimes. One of the pillars of democracy is popular sovereignty. Since the beginning of constitutionalism, the nation (in the French tradition) or the people are conceived as an entity created by social contract and which governs directly or through freely chosen representatives.

58. The distinction between constituent power and constituted power that also inspires Chapter III of Title IV of the Venezuelan Constitution is based on this principle. Both categories were identified for the first time by E. Sieyès in *What is the third State?* at the beginning of the French Revolution. According to the author, only the nation has the right to frame the constitution and "no type of delegated power can in any way alter the conditions of this delegation".<sup>29</sup> However, the nation cannot be divided into orders since "a political society cannot be anything but the whole body of the associates".<sup>30</sup> As E. Sieyès clearly stated, the nation is "a body of people

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<sup>24</sup> The president of the Venezuelan Electoral Management Body, Tibisay Lucena, subsequently announced the distribution of representatives by sectors as follows: Businesspeople: 5, Peasants and fisherman and fisherwomen: 8, People with disabilities: 5, Students: 24, Workers: 79, Communal councils and communes: 24 and Pensioners: 28.

<sup>25</sup> <http://ficus.pntic.mec.es/jals0026/documentos/textos/leycortes.pdf>

<sup>26</sup> <https://www.parlamento.pt/Parlamento/Documents/CRP-1933.pdf>

<sup>27</sup> <http://storia.camera.it/img-repo/ods/2013/06/25/CD1710000017.pdf>

<sup>28</sup> [http://www.zaoerv.de/02\\_1931/2\\_1931\\_2\\_b\\_628\\_2\\_635\\_1.pdf](http://www.zaoerv.de/02_1931/2_1931_2_b_628_2_635_1.pdf)

<sup>29</sup> Emmanuel-Joseph Sieyès, "What is the Third Estate?" 1789, <http://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf> pg. 11.

<sup>30</sup> *Ibid.* pg. 13.



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who join to together to live under common laws and be represented by the same legislative assembly”.<sup>31</sup>

59. Since then, democratic representation is based on the idea that people are a unity that expresses its will mainly by the election of a parliamentary chamber. Each representative does not represent only the citizens that have voted for them but all the citizens of the country, and the parliament represents all the people.<sup>32</sup> Some of the requirements of democratic suffrage enumerated by the Code of good practice on electoral matters are based on these deep-rooted ideas. This is the case of equality.

60. Article 1 of Decree 2878 declares that the election of the National Constituent Assembly will be run by “universal, direct and secret vote”. However, in a very noteworthy omission, the article does not impose equality as a voting requirement.

61. Contemporary democracies proceed from the idea that all citizens are part of the people and, for this reason, they share an equal juridical status. It means that, in elections, they must have equal voting rights and equal voting power. The division of citizens in various sectors according to professional activities and the existence of separated records, one for each sector, create differences that are not legitimate. It assumes that the members of the occupational and/or interest groups cannot reach a comprehensive understanding of the common good in society. Indeed, the division of electors in sectors not only breaks the electoral body in categories but also breaks the equal position of citizens with regard to the law.

62. The seven sectors identified by Decree 2878 reflect quite different criteria. Arguably, businessmen, workers, pensioners and students may be considered as distinct social categories. However, the categories of people with disabilities, communes, communal councils, peasants and fishermen do not follow the same or even an identifiable logic. The list contained in Decree 2878 therefore appears arbitrary.

63. Such a system can generate negative consequences that infringe international standards on electoral matters and human rights. One significant problem is the way in which electoral registers are prepared. The Code of good practices declares that “the proper maintenance of electoral registers is vital in guaranteeing universal suffrage” and requires that “there must be permanent electoral registers”.<sup>33</sup> However, Article 5 of Decree 2878 states that the registers of the various sectors are made up of the data that institutions, guilds and associations provide to the National Electoral Council. Thus, there are no guarantees on the inclusivity and accuracy of these data, which could be easily manipulated by the bodies which provide the information. As the number of sectorial representatives is not clearly specified in the Decree, and the National Electoral Council is allowed to discretionally group those sectors according to their similarities, the election of representatives of labour sectors poses an important risk for democracy, because it opens the door to negotiation of specific candidatures in exchange for benefits in taxation, permits, or others.

64. Furthermore, the Decree imposes that farmers, fishermen, entrepreneurs, students and workers must be associated in order to vote. It should be noted in the first place that the need to have registered at “official institutions, guilds, and legally recognized associations” in order to be eligible to vote as part of these sectors clearly infringes another fundamental right: freedom

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<sup>31</sup> Ibid. pg. 3.

<sup>32</sup> These ideas were clearly formulated in 1774 by E. Burke in his capital Speech to the Electors of Bristol. He said that “Parliament is not a congress of ambassadors from different and hostile interests”, but “Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole”. <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>.

<sup>33</sup> Guideline I. 1.2.



of association. Indeed, article 20 of the Universal Declaration of Human Rights states that “no one may be compelled to belong to an association”.

65. In addition, the system assumes that Venezuela’s society is divided in occupational and interest groups whose members are duly registered before the State. This assumption would require substantiation. According to a 2012 study by the International Labour Organization (ILO), without taking into account the agricultural sector, 47,5% of the Venezuelan labour force work in the informal economy. This large part of the Venezuelan labour force is not registered in any “official institutions, guilds, and legally recognized associations”. The same may be true for businessmen that operate in the informal sector. Therefore, the corporatist election of a third of the members of the National Constituent Assembly will exclude a very significant proportion of Venezuelans who should be able to participate. Indeed, the system entails that those citizens that do not belong to any of the sectors referred in the Decree will be allowed to vote only for the Municipal representatives, whereas those who do belong to those sectors will vote for both the municipal and sectorial representatives. This represents a flagrant violation of the principle of equality of votes.

66. In conclusion, the electoral rules based on sectoral representation set out in Decree 2878 violate the egalitarian principle of “one citizen, one vote”, as established by articles 1, 2, 21 and 63 of the Constitution of Venezuela, as well as the democratic principle of equal voting rights.

### 3. *The large number of members of the Constituent Assembly*

67. The National Constituent Assembly will be composed of a very large number of members: 553. This contrasts with other recent Constituent Assemblies convened in Latin-America.<sup>34</sup> In terms of size and population, the two most similar Latin-American countries to Venezuela are Colombia and Peru. Both of them rewrote their Constitutions in the 1990s, as Venezuela also did. However, the assemblies that carried out such task were composed of just seventy and eighty members, respectively. Even in Venezuela, the 1999 National Constituent Assembly was composed of just 131 members - a number quite similar to the 130 member assembly that approved Ecuador’s 2008 Constitution.

68. As an author rightly notes<sup>35</sup> “the formation of large assemblies /.../ can have an adverse effect on their proceedings”. It might be difficult not only to secure consensus among such a large number of members but also to hold debates and complete work within a reasonable time frame. The example of the National Assembly of Kenya, which had 629 members, demonstrates this quite clearly. Indeed, having a higher number of members, even if this number were motivated by a laudable effort to ensure as broad political participation of various social and political groups as possible, might turn out to be counter-productive and actually paralyse the work of the Assembly. To work properly, an assembly must not only be sufficiently representative, but also small enough to allow for meaningful debate.

69. In conclusion, the foreseen number of members of the National Constituent Assembly appears to be too large to enable the Assembly to hold meaningful debates, reach consensus and complete its work within a reasonable timeframe.

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<sup>34</sup> As an example from another continent, it may be recalled that the Constituent Assembly of Tunisia elected in 2011 was composed of 217 members.

<sup>35</sup> Yashi Ghai, *The Role of Constituent Assemblies in Constitution Making*, International IDEA – 2012, <http://www.constitutionnet.org/vl/item/role-constituent-assemblies-constitution-making-yash-ghai-international-idea-2012>

## VI. Conclusion

70. The Venice Commission has been asked by the Organization of American States (OAS) to prepare an opinion on the legal issues raised by the calling by the President of Venezuela of elections to a National Constituent Assembly.

71. President Maduro has issued three decrees (2830 of 1 May 2017, 2878 of 23 May 2017 and 2878 of 4 June 2017), whereby he has called the election of a National Constituent Assembly, has fixed the rules for such election and has encouraged that Assembly to submit the draft constitution to referendum.

72. Decree 2878 establishes that the 553 members of the National Constituent Assembly are to be elected in three different ways: 364 members by territory and 181 by sectors. 8 members are to be elected by the General Assemblies of the Indigenous Peoples. As for the territorial representation, in the 311 common municipalities the majoritarian system is to be used, in the 23 regional capitals and the single national capital the proportional system is to be used. As for the sectoral representation, seven sectors have been identified to be represented in the assembly (businessmen and businesswomen; peasants and fisherman and fisherwomen; people with disabilities; students; workers; communes and communal councils and pensioners).

73. The Decrees under consideration raise several issues which have been analysed in the present opinion.

74. As regards the power to call the elections of the National Constituent Assembly: in the light of the wording of the relevant constitutional provisions, against the background of the previous constitutional experience of Venezuela and in the absence of compelling arguments to the contrary, the Venice Commission is of the view that the question of whether or not the decision on the convocation of a National Constituent Assembly may only be taken by the people of Venezuela through a referendum may not be considered to have been finally settled.

75. As regards the power to establish the rules for the election of the National Constituent Assembly: the Venice Commission considers that, in accordance with the principle of the rule of law and the Constitution of Venezuela, the power to determine the rules for the election of the National Constituent Assembly belongs to the National Assembly only, which has to adopt a specific piece of legislation.

77. As regards the rules for the election of the National Constituent Assembly set out in Decree 2878: the Venice Commission considers that the rules based on territorial representation violate the democratic principle of equal voting power, and the rules based on sectoral representation entail a flagrant violation of the democratic principle of equal voting rights. In addition, the number of members of the National Constituent Assembly appears to be too large to enable the Assembly to hold meaningful debates, reach consensus and complete its work within a reasonable timeframe.

78. The Venice Commission wishes to stress that in the case of the election of a new National Constituent Assembly, the need for consensus must be especially emphasized. As the Venice Commission has previously stated, this procedure is one of the most sensitive issues of any constitution. It is also a highly political issue that can only be determined in light of the history of the country and its political and legal culture. For this reason, the adoption of a new and good Constitution should be based on the widest consensus possible within the society and a wide and substantive debate involving the various political forces, non-government organizations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. For this to happen, states' positive obligations to ensure unhindered exercise of

freedom of peaceful assembly, freedom of expression, as well as a fair, adequate and extensive broadcasting of the arguments by the media are equally relevant.

79. The shortcomings of the procedure and of the electoral rules for the election of the National Constituent Assembly of Venezuela are such as to undermine the credibility of the attempt to prepare a new constitution.

80. The Venice Commission remains at the disposal of the authorities of Venezuela and the Organization of American States for any further assistance in this matter they may require.