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Global Perspectives on Freedom of Association: Peru

Miluska Orbegoso Silva

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Project Lead
Professor Maria Cahill
School of Law
University College Cork
Cork, Ireland
www.associationalfreedom.org

Editors of the Global Perspectives on Freedom of Association collection
Professor Maria Cahill, School of Law, University College Cork
Dr. Seán Ó Conaill, School of Law, University College Cork
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Freedom of Association in Peru

Dr. Miluska Orbegoso Silva[*]

I. Introduction

Before beginning with the jurisprudential analysis of freedom of association in Peru, it is appropriate to make some clarifications that we believe are relevant to understand the study presented below. Peru has a presidential form of government and a unitary state. The current Constitution dates back to 1993 and reflects, in its organic part, the classic division of powers (executive, legislative and judicial) and in the dogmatic part, a list of fundamental rights, in accordance with the provisions of Article XXVI of the Declaration of the Rights of Man and the Citizen.[1] It is a country that is part of the European-continental legal family, also known as Germanic-Romanic, which it inherited as a result of the Spanish conquest.

In this regard, it should be noted that there is, in addition to a Supreme Court of Justice (the highest jurisdictional body for the resolution of conflicts), a Court of Cassation (a Constitutional Court).[2] The Peruvian Constitutional Court is entrusted with the control of the constitutionality of norms and is responsible for: 1) hearing, in a single instance, the action of unconstitutionality; 2) hearing, in the last and final instance, decisions denying *habeas corpus*, *amparo*, *habeas data*, and compliance actions; 3) hearing conflicts of competence, or of powers assigned by the Constitution, in accordance with the law.[3] The Constitutional Court thus becomes, as stated in the Constitution, the highest interpreter of the Constitution, and it is in its case-law that we find the reflections and analysis on the content of fundamental rights.

In this regard, and focusing on the subject that concerns us, we must point out that freedom of association, in the Peruvian legal system, is stated in the Political Constitution of Peru of 1993

[*] Facultad de Derecho, Universidad Panamericana, Campus México.

[1] 'A Society in which the guarantee of Rights is not established, nor the separation of Powers determined, does not have a Constitution'.

[2] For more information on this subject, see L Castillo Córdova, *El Tribunal Constitucional Peruano y su dinámica jurisprudencial* (Palestra Editores, Lima, 2008).

[3] Article 20 of the Peruvian Constitution of 1993.

in its Article 2.13, which reads as follows: 'Every person has the right: ... To associate and to establish foundations and various forms of non-profit legal organisations, without prior authorisation and in accordance with the law. They cannot be dissolved by administrative resolution'.

In this research, it has been significant to find that, although Peruvian academic opinion is scarce in terms of the analysis of this freedom from the constitutional point of view, Peruvian case-law, especially from the Constitutional Court, is abundant in this sense, despite being a European-continental country, with more positivist than jurisprudential traits. This, we believe, is nothing more than a manifestation of the vital role played by judges in the creation of law and even more so by the Constitutional Court, as the highest interpreter of the Constitution, in accordance with Kelsen's theory.[4]

Likewise, it is not surprising that this right is enshrined in the Constitution, since it is based, like all fundamental rights, on human dignity. In this sense, Article 1 of the Constitution states that: '[t]he defense of the human person and respect for their dignity are the supreme purpose of society and of the State.' Therefore, Article 2, accordingly, collects an open list of rights that emanate from dignity and that must be protected by citizens and authorities and interpreted in the light of international treaties.

II. Constitutional Protection of the Freedom of Association

As previously mentioned, the freedom of association is set forth in Article 2.13 of the Constitution. This article states that everyone has the freedom to associate and to establish foundations and various forms of non-profit legal organisations, without prior authorisation and in accordance with the law, and that these cannot be dissolved by administrative resolution.

Under Peruvian law, freedom of association is a right of both individuals and associations.[5] And so it has been developed both by Peruvian case-law and academic opinion. In this sense, we can affirm that freedom of association finds constitutional recognition and, what is more, it

[4] H Kelsen, *Teoría Pura del Derecho* (Mexico: Editorial Colofón, 2009).
[5] On this subject, see R Beaumont Callirgos, *Anuario de Derecho Constitucional Latinoamericano* (Bogotá: Konrad Adenauer Stiftung, 2012) 117-137.

must be understood as part of the block of constitutionality[6] and its content must be interpreted not only in accordance with the constitutional text and by the national courts, but, above all, it must be read and understood in the light of the international treaties ratified by Peru and, in particular, by the Inter-American Court of Human Rights.

(i) Historical Recognition

If we wish to make a brief historical review, we can point out that the freedom of association was first recognised in the Constitution of 1856, then in the Constitutions of 1860, 1867, 1920, 1933, 1979 and, currently, in the Constitution of 1993. However, we believe that this is not enough, so we will proceed to highlight the evolution and singularities that this right has had in Peruvian constitutional history.

The Peruvian constitutional history of freedom of association begins with the Constitution published on October 19 1856, since it had not been included in previous constitutions. Article 28 of the Constitution of 1856 reads: '[a]ll citizens have the freedom to associate peacefully, whether in public or in private, without compromising public order'. Therefore, we can point out that the freedom of association was not recognised from the beginning by liberalism. On the contrary, it is possible to read different examples of prohibition to the freedom in the legislation due to the political character that it entails from its origins.

Freedom of association appears for the first time in 1856 in the constitutional text and is repeated in the following Constitutions with minor variations (Article 29 of the 1860 Constitution and in Article 27 of the 1867 Constitution). Subsequently, it was the 1920 Constitution that changed its content and, moreover, assimilated it with the right of freedom to contract. Thus, Article 37 of the Constitution of 1920 states that: '[t]he Nation recognises the freedom to associate and to contract. Its nature and conditions are governed by law'. This text was repeated in Article 27 of the 1933 Constitution.

The novelty of the aforementioned wording is that it includes the development and regulation of this right by law (constitutional development law, which is part of the constitutionality

[6] This concept refers to the fact that the Constitution is not only a document, but it is conformed by all the other sources of law where the Constitution is developed, for example: international treaties, laws in general, case-law, academic opinion, etc. This concept was created by Louis Favoureau in France.

framework). This mandate is materialised by Law 4223 of January 20, 1921, which specifies: 1) the requirements for associations or corporations whose main purpose is the general interest to enjoy legal personality; 2) that they will obtain legal personality from the day that they are authorised by the Government with the approval of their bylaws.

Likewise, it is necessary to point out that, although the Civil Code of 1852 had already been enacted by then, it did not state anything regarding the freedom of association. However, it is in the Code of Commerce of 1853 where the possibility of the formation of commercial companies by two or more persons was already regulated, characteristics of which are maintained in the formation of current corporations.[7]

Subsequently, the 1979 Political Constitution of Peru was enacted, which included the freedom of all persons to associate and create foundations for lawful purposes without prior authorisation in Article 2.11. It also stated that Associations were to be registered in a public registry. And, finally, that these could not be dissolved by administrative resolution.

In this regard, it is not surprising that the indicated wording was influenced by the new international instruments and contemporary constitutions of the time. Thus, it is a common comment in Peruvian academic opinion that the similarity between the content of the Constitution of 1979 and the Spanish Constitution of 1978, with respect to the freedom of association, is evident. Article 22 of the Spanish Constitution of 1978 reads as follows:

> '1) The freedom of association is recognised; 2) Associations that pursue ends or use means defined as criminal offenses are illegal; 3) Associations formed under this article shall be registered for the sole purpose of publicity; 4) Associations may only be dissolved or suspended from their activities by virtue of a reasoned judicial decision; 5) Secret associations and those of a paramilitary nature are prohibited'.

Lastly, our current Constitution, the Constitution of 1993, makes some changes in its wording and includes the freedom of association, adding the right to form various forms of non-profit

[7] M Rubio Correa and others, *Los derechos fundamentales en la jurisprudencia del Tribunal Constitucional: análisis de los artículos 1, 2 y 3 de la Constitución* (Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2013) 445.

legal organisations, which shall be regulated by law.[8] It also states that the organisation will be constituted without prior authorisation and that it cannot be dissolved administratively. And, finally, the reference to the registration of the association in a public registry is eliminated.

Finally, if we would like to make a comparison between the current Constitution and its predecessor, we must point out that both articles are quite similar; however, we can find two substantial differences. First, the 1979 Constitution established that associations must be registered in a public registry. Now, the fact that the 1993 Constitution has not included this provision in its wording does not eliminate the requirement for an association to be registered in order to acquire legal personality. However, we must specify that this is not an obstacle to the exercise of the freedom of association, since it is not necessary to register an association of persons in order to exercise the freedom of association. In fact, the exercise of the freedom of association does not require the incorporation of a registered association.[9] And, secondly, we can find that the 1993 Constitution states, in fact, that the right to establish institutions includes the right to use the various forms of non-profit legal organisations.

(ii) Constitutional Grounds

Broadly speaking, freedom of association, being a fundamental right, grounds its protection and constitutional recognition on human dignity, which in general terms can be defended as the value that every human being has, by the mere fact of being human, and which makes them the heart and purpose of everything created. In this regard, Article 1 of the Constitution reads: '[t]he defense of the human person and respect for their dignity are the supreme end of society and of the State'. And, consequently, Article 2 reads: '[e]veryone has the right to ...'. This has already been widely interpreted both by Peruvian case-law and academic opinion[10] as an express recognition of the Constitution to human dignity, that is, as the basis of all the rights contained[11] in the Constitution.

[8] The latter had already been introduced in the 1920 Constitution and was removed in the 1979 Constitution.
[9] Rubio Correa (n 7).
[10] V Garcia Toma, 'Human dignity and fundamental rights' (2018) 51 Law & Society 13-31.
[11] We like the expression "collected" better than "recognised" because the former refers to something that pre-exists the constitutional text, while the latter refers to something that is created from the Constitution; and in the case of fundamental rights, these emanate from human nature itself and not from a text.

However, if we look for a concrete or more specific basis as to why the freedom to associate constitutes a true fundamental right, both academic opinion and case-law agree that we can find it in the freedom of man, in his free will or in what has been studied as the free development of personality (or also known as the right to the pursuit of happiness[12]). Therefore, we can say, that freedom of association:

> '... is based on the freedom of human beings to coexist more closely with others of the same species and to seek common objectives with alliances of permanence in time and in an institutional fashion. What the right of free association allows is the free and permanent integration of various persons to pursue objectives or purposes jointly, the only limit to which is that they be legitimate. The State must respect the choice of purposes of the associated persons and may intervene in this only as an exception, when constitutional principles and values are affected'.[13]

In short, it is based on the freedom of human beings and on their need for socialisation or union with other human beings (or even associations) in order to develop objectives that they could not achieve on their own.

In this vein, we can also find a broad reference in the case-law of the Constitutional Court when developing the basis of freedom of association. Thus, in a case decided by the Constitutional Court in 2004,[14] it was stated that the freedom of association: 'is ... the attribute that can be conceived as that right by which every person may freely and permanently join with others, in accordance with certain objectives or purposes, which ... although they may be of different orientations, have as a necessary correlate their conformity with the law.'

Likewise, the Constitutional Court held in a case in 2004[15] that freedom of association: '... is conceived as a necessary means for peoples' autonomy to expand towards ways of solidary and fruitful coexistence. This authority stands as a manifestation of personal freedom within the coexistential life, so that people unite to achieve a common goal …'. Also, in a later case

[12] 1776 Declaration of Independence of the United States of America.
[13] Rubio Correa (n 7).
[14] File N° 4241-2004-AA/TC.
[15] File N° 1027-2004-AA/TC.

decided in 2007 the Constitutional Court[16] highlighted the importance of human socialisation, stating that:

> 'The freedom of association, then, stands as a manifestation of personal freedom within the life of coexistence for the purpose of people joining together to achieve a common goal. This is explained to the extent that a large part of the life plans of human beings depend, for their crystallisation, on cooperation and interaction with others in order to achieve objectives that, if done alone, they would not be able to achieve. Consequently, this freedom is recognised to be the base for principles such as the autonomy of will, self-organisation and the principle of altruistic purpose.'

III. Content of Freedom of Association

Once we have developed the position of freedom of association in the constitutional order, it is now time to stop and try to answer what the content of this freedom is, because we know that little can be understood about a right if it is not unraveled. If its content has not been exposed, it is difficult in to protect the right[17] through the relevant procedural mechanisms, which, in the case of Peru, is the *amparo*.[18]

Therefore, in this section we will seek to comment on the development of the freedom of association, both at the jurisprudential and doctrinal levels.

At the jurisprudential level, the highest interpreter of the Constitution, the Constitutional Court, has been developing broad and well-known criteria about freedom of association that have to do with, *inter alia*, the different areas, elements, content, and limits of the right. In this sense, we can point out that freedom of association in Peru has been interpreted and its content delimited in Peruvian case-law in a rigorous and abundant manner. Therefore, jurists have developed comments and theories based on what the Constitutional Court has stated, which has helped to resolve conflicts within the association, even in commercial matters.

[16] File 0009-2007-PI/TC and file 0010-2007-PI/TC.
[17] L Castillo Cordova, 'El contenido constitucional de los derechos fundamentales como objeto de protección del amparo' (2010) 14 Anuario Iberoamericano de Justicia Constitucional 89-118.
[18] This is the constitutional procedural mechanism to protect human rights in Peru.

In view of this, it is especially relevant for this case to highlight the reflections that the Constitutional Court has had over the years on the meaning, in plain words, of freedom of association.

(i) Elements of the Freedom of Association

The Constitutional Court has been quite clear in identifying the elements that are part of the freedom of association and in that sense, it has pointed out that it is made up of four indispensable elements as we can read in a case held by the Constitutional Court in 2009.[19]

In the first place, with respect to the holder of the right, it has specified that the freedom to associate is an individual right, but that its effective exercise is fundamentally collective. That is, since it is a right of freedom, the holder of the right is the person, the human being. Nevertheless, it is recognised that it is a right that becomes effective or materialises collectively, that is, in union with others.

In this vein, we believe that freedom of association presents a double ownership that corresponds to the two ways of exercising this freedom: on one hand, as a voluntary and free action of the human person; and on the other hand, through the association itself, which results from human creation, as the holder of the freedom.[20] By this, we refer to the two dimensions of the freedom of association: an individual one, where the freedom of association is owned by the individual as such, or as a member of an association; and a collective one, as a right of the association, as such, that is, as an entity or body.[21]

On the other hand, the second element is that it is a freedom that implies freedom of integration (freedom to associate in the strict sense or positive freedom to enter to the association), the power not to compulsively accept this situation (freedom not to associate or negative freedom) or, simply, to renounce it at any time, despite having accepted it at some time or circumstance (freedom to disassociate oneself associatively). In other words, the Constitutional Court

[19] File 03071-2009-PA/TC.
[20] A Martín Huertas, *El contenido esencial del Derecho de asociación* (Madrid: Congreso de los Diputados, 2009) 324.
[21] M Mendoza Escalante, *Derechos Fundamentales y Derecho Privado, Eficaciacia de los derechos fundamentales entre particulares y su protección procesal* (Lima: Grijley, 2009) 127.

includes the different contents of freedom of action in general, which implies both a negative and a positive dimension.[22]

Thirdly, the Constitutional Court points out that an association does not require any type of administrative authorisation in order to be configured as such. On this juncture, there have been extensive discussions in the past, since the current Constitution of 1993 did not expressly incorporate a provision regarding the registration of the association as its predecessor did. Therefore, it is clarified that in order to exercise the freedom of association, an administrative authorisation is not required. However, a different issue is that in order to carry out certain types of activities, such authorisation is required, since it allows the association to acquire legal personality and this entails other purposes.

Likewise, the Constitutional Court refers to the temporal element of the freedom of association and points out, as a fourth element, that freedom of association is a freedom that implies a certain permanence or continuity in time. And finally, as a fifth element (on which, we must point out, there is discrepancy among the academic opinion as we will see below) that with respect to the purpose for which it is structured, the freedom of association is not conditioned to any particular objective or variable; that is to say, it is not a requirement that it be a non-profit association.

(ii) Essential Content of Freedom of Association

Regarding the content of freedom of association, we are convinced that, like any other right, it has an essential content, which emanates from the right itself[23] and it is only the interpreter's task to unravel its content. The Constitutional Court, developing the theory of essential content, has gathered in two sentences why freedom of association is constituted.

Thus, a judgment of the Constitutional Court in 2004 it was stated that:

'the essential content of the freedom of association is constituted by the following:

[22] File Nº 06863-2006PA/TC.
[23] Regarding this aspect, see L Castillo Córdova, 'El significado del contenido esencial de los derechos fundamentales' (2014) 13 Foro Jurídico 143-154.

a) The freedom of association, understood as the freedom of the individual to establish associations, as well as the possibility of freely belonging to those established, and carrying out the necessary activities in order to achieve their own purposes. Therefore, we can understand that the freedom of association consists of the freedom that people have to join together in order to achieve a common objective. Association is a generic right to collaborate among humans and takes various shapes. The freedom of association does not necessarily lead to the formation of associations distinct from the associates in order to be exercised; on the contrary, the colligation of persons for a common purpose is sufficient; the Civil Code itself recognises unregistered associations, foundations or committees.

b) The freedom not to associate, i.e., the freedom that no one is obliged to join or leave an association. In this regard, the academic opinion states that our Constitution is silent with respect to the scope of the freedom not to associate. However, in application of the provisions of the Fourth Final and Transitory Provision of the Constitution, this article must be interpreted in accordance with the Universal Declaration of Human Rights and with the international treaties and agreements ratified by Peru in such matters, so it is appropriate to analyse Article 16 of the American Convention on Human Rights, which states the following: 1) All persons have the freedom to associate freely for ideological, religious, political, economic, social, cultural, sports or any other purposes. 2) The exercise of such a right may be subject only to such restrictions as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others. 3) The provisions of this article do not prevent the imposition of legal restrictions, and even the deprivation of the exercise of the freedom of association, on members of the Armed Forces and the Police. The aforementioned article establishes that the freedom of association, of which the freedom not to associate is a part, may only be restricted in exceptional cases, for reasons that are specifically indicated. In this sense, restrictions on the right not to associate may only be established in the interest of national security or public order, to protect public health or morals, or for the protection of the rights and freedoms of others. In other words, it is a freedom that

can only be limited in exceptional cases, and such exceptions must be interpreted restrictively.'[24]

Thus, we can understand that two dimensions are included: positive and negative. The right to freely associate or establish an association for lawful purposes with the person or persons deemed convenient; the right to join an already existing association and remain as an associate; and the freedom of self-organisation and self-regulation; as well as the negative aspect, which contains the principle that no one can be forced to belong or join an association compulsorily, that is, the right to refuse to join or remain in it, which recognises the freedom of the associate to resign at any time and therefore cease to belong or separate from the association in the same voluntary manner in which they were allowed to join. For some, the negative aspect also includes the freedom of the associate not to be unjustly or arbitrarily separated.[25]

c)The power of self-organisation, the possibility for the association to establish its own organisation. And in the latter term[26], specifies that such self-regulation "cannot contravene the legal system, since this freedom is exercised within a constitutional space in which other fundamental values and goods are combined"[27]. That is, as long as the statutory rules do not contravene fundamental rights, such as the principle of non-discrimination[28]. In this regard, the Constitutional Court, in accordance with Article 16 of the American Convention on Human Rights has positively established that: "(...) it shall only be appropriate to restrict the freedom of association (...) in exceptional cases, on grounds or in a specified manner", i.e., "in the interest of national security or public order, to protect public health or morals, or for the protection of the rights and freedoms of others"[29]. Therefore, in the event that the activities or purposes of the association are contrary to public order or good customs, Article 96 of the Civil Code authorises the Public Prosecutor's Office to judicially request its dissolution; it should be noted that in our legal system the Associations cannot be dissolved "administratively" (i.e., "by

[24] Decision of the Constitutional Court issued on July 14, 2006 in File_3507_2005_PA_TC on the *amparo* proceeding filed by Mr Carlos Peña Estrada and others against the Administrative Branch of the Education Sector Administrative Workers of the Loreto Region and the Loreto Regional Directorate of Education.
[25] File Nº 06863-2006PA/TC.
[26] File N° 09332-2006-PA/TC
[27] The same concept is also established the File N° 1027 -2004-AA/TC, File N° 02939-2008-AA, File N° 4241-2004-AA/TC and File TC_0010-2007-PI/TC.
[28] File N° 02247-2020PA/TC.
[29] Constitutional Court Ruling File N° 3507-2005-PA/TC.

administrative resolution"), but must be declared by the judiciary, as a guarantee of the freedom of association[30].

IV. Some Relevant Matters

As a last item of study for this research, we would like to focus on some relevant aspects of this freedom of association that have caused the most legal conflicts in the constitutional order. In this regard, when we analyse freedom of association we can identify that there are different cases linked to the life of the association and its members. In view of this, we would like to focus on two issues that have been extensively dealt with by academic opinion and case-law, with the sole purpose of clarifying the content of this freedom in the Peruvian constitutional legal order.

(i) Regarding Profit Motives

The first issue we would like to focus on is the wording of the Constitution regarding freedom of association, which has given rise, in the past, to different interpretations, not only by jurists but also by the Constitutional Court itself.

In this sense, we can see that the current Constitution, unlike the previous ones of 1856, 1860, 1867, 1920, 1933 and 1979, seems to limit the scope of freedom of association only to non-profit organisations. And this could be understood as such from a literal interpretation of the 1993 constitutional text, which states in Article 2, section 13, that everyone has the freedom ’to associate and to establish foundations and various forms of non-profit legal organisations, without prior authorisation and in accordance with the law. They cannot be dissolved by administrative resolution.’ This wording raises the first question as to whether the freedom to associate as drafted in the aforementioned section includes those associations in which the partners seek a profit-making purpose.

If we review the case-law criteria from the Constitutional Court, we must point out that there was a mutation in the criterion of the High Court, since in the past it stated that associations entitled to freedom of association could not have a profit-making purpose. However, at the

[30] A Huaripata and L Alberto, ‘El derecho de asociación y su regulación en el ordenamiento jurídico peruano’ (2010) 717 Revista Crítica de Derecho Inmobiliario 205.

present time, it should be noted that the concept of free association includes both civil associations (regulated in the Civil Code) that are non-profit, and enterprises (regulated by the General Law of Corporations) that do have a profit-making purpose.[31]

In order to answer this question, through a harmonic interpretation of the Constitution, we can identify that the Constitution itself, specifically Article 59, states that:

> 'The State stimulates the creation of wealth and guarantees freedom of work and freedom of enterprise, commerce and industry. The exercise of these freedoms must not be detrimental to morals, health or public safety. The State provides opportunities for improvement to the sectors that suffer from any inequality; in this sense, it promotes small enterprises in all their forms.'

Therefore, we could conclude by saying that the Constitution itself gives us an answer by stating that all types of associations are entitled to freedom of association, since the State promotes and protects all types of enterprises.

Likewise, in 2006, the Court issued another judgment in which it corrected the jurisprudential criterion, stating:

> '... and with respect to the purpose for which it is structured, the freedom of association is not conditioned to any particular objective or variable. Although some academic opinion has certainly believed to find an identification between the freedom of association recognised by the Constitution (Article 2, section 13) and the association recognised by the Civil Code (Article 80), it is convenient to specify that, for constitutional purposes, the purposes of such an attribute are not only the well-known non-profit purposes, but all kinds of objectives. This conclusion, although it may seem contradictory to the constitutional text, is not so if we consider two essential arguments, one based on domestic constitutional law and the other on international human rights law (supranational constitutional law).

[31] Rubio Correa (n 7).

11) With regard to the first argument, the same constitutional text recognises in Article 2(17) the right of every person to participate not only individually, but also in association, in the political, economic, social and cultural life of the nation. In short, this means that, from a broad perspective (that offered by the right of participation), the freedom of association can be exercised not only for non-profit purposes, but also for objectives that, contrary to what has been said, are lucrative (the well-known economic purposes represent no other thing).

12) Furthermore, this collegiate body considers that the subject of the purposes of the freedom of association is not really such a serious matter if one takes into account the existence of controls subject to the law or the existence of reasonable limits for each type or variant of associative activity. Analogising the regime of the freedom of association to the *ius privatist* conception of 'association" means disregarding several aspects not only doctrinal but also historical. None of our preceding Constitutions (neither that of 1856, where this attribute was recognised for the first time, nor the subsequent ones of 1860, 1867, 1920, 1933 and, above all, that of 1979) have demanded that the freedom of association must have non-profit purposes as a presupposition.

13) In short, we consider, in accordance with the first argument set forth above, that, both in application of the principles of unity and practical concordance and in observance of the provisions of our historical Constitution, it is incorrect to affirm that the purposes of the freedom of association must only be of a non-profit nature'[32].

Thus, we can conclude that the Court uses two arguments to maintain that the purposes of an association can be for profit: firstly, it states that nowhere in the Constitution does it say that the purposes of an association must be non-profit and, consequently, that there is no need to distinguish where the law does not distinguish; and secondly, taking an historical interpretation, it points out that the preceding Constitutions did not exclude profit-making purposes for the exercise of the right of free association either. Therefore, we can conclude that 'the purposes of the association can be lucrative and non-profit from the literal point of view of the current

[32] File N° 4938-2006-PA/TC.

Constitution and historically from the traditional content of the Peruvian Constitutions on the matter'.[33]

(ii) Disciplinary power: self-organisation

A second issue on which we would like to focus, and which is of special relevance, is the right to self-organisation that every association has. This has been recognised as part of the essential content of freedom of association by the Constitutional Court, as mentioned above, and from which the disciplinary power that the association has over its members, within the association, is derived.

Our Constitutional Court has stated[34] that within the power of self-organisation or self-regulation is the disciplinary power of the association over its members, either by contemplating the faults or by establishing the procedures within which the responsibility of the associates is determined, as well as the sanction of definitive separation. The rules of the sanctioning process must be established in the bylaws and this process is also allowed to be regulated. When this happens, the regulations are not registered in the public registry, but it is advisable that they be approved by the Board of Directors and/or the Assembly of Associates. That being the case the association is empowered to establish the rules that will regulate its sanctioning function.[35] In this sense, within this same freedom of association or, in other words, within its constitutionally protected content, there is also the freedom for the association created to have its own organisation, which is materialised through its bylaws. Such statute represents the *pactum associationis* of the institution created by the associative act and as such binds all the partners belonging to the social institution.

Now, it is necessary to point out that freedom of association is not unrestricted and that it has limits, as the Constitutional Court has stated:

> '[T]he enjoyment of this freedom may yield to constitutional imperatives, such as other fundamental rights and other constitutional goods. In the case off self-organisation, it is of interest to question the limits of the power of self-organisation, which is reflected in

[33] Rubio Correa (n 7) 455.
[34] Files N° 01258-210-PA/TC and N° 3312-2004-AA/TC
[35] M Romero Antola, 'La justicia interna en las asociaciones' (2016) 12 LUMEN 75.

> the possibility for the association's board of directors to regulate its own activities. Of course, such regulation cannot contravene the legal system, since this freedom is exercised within a constitutional framework in which other fundamental values and goods are combined'.[36]

In short, we can conclude by saying that it is the Constitutional Court's criterion that the freedom of association is a constitutional right, but that it must align with the right to a private due process within said association. And this should be understood as such because the Constitution and the rights contained therein are binding on everyone, including the members of an association. Therefore, it must be understood that the irradiation effect of fundamental rights means that these rights permeate even within the statute and rules or agreements between private parties; and, therefore, procedures that violate due process and violate the fundamental rights of associates by establishing unconstitutional separation procedures cannot be envisaged.[37]

[36] File No 09332-2006-PA/TC.
[37] Rubio Correa (n 7) 560.