

## REASONED OPINION OF JUDGE DE ROUX RENGIFO

The determination of whether the facts of this case did or did not violate the right to property embodied in Article 21 of the American Convention presented certain specific difficulties. The alleged victims had evidently an acquired right to a pension and this right, considered in the abstract, formed part of their patrimony. However, the execution of that right in a monthly pension payment of a specific amount should have ensued from weighing the domestic constitutional and legal norms that would allow questions such as the following to be clarified:

How and to what extent was the existence of two regimes, one related to the public sector and the other to the private sector, relevant, for the effects of a pension?

Could the pension of individuals subject to the public sector regime, such as the alleged victims, be equalized with the salary received by employees subject to the private sector regime?

What procedure should have been followed when all the employees of the public entity in question became subject to the private sector regime?

In that case, would it have been possible to equalize the pensions with the salary received by employees subject to the public sector regime, but employed in entities other than the one in which the alleged victims were working?

Did the fact that, for several years, the State calculated and paid the monthly pensions of the alleged victims by equalizing them with the salary of employees subject to the private sector regime lead to the creation, in favor of the said victims, of a right that their pension should continue to be subject to this specific type of equalization?

The Court has acted appropriately by abstaining from entering into these questions of substance – in some of the considering paragraphs there are affirmations that appear to be addressed at resolving them in a specific sense, but in general the Court has avoided them.

It is obvious that the disputes to which these questions gave rise or will give rise can only be decided by the domestic courts. The competence of the Inter-American Court is limited to ensuring that the appropriate procedures are followed, respecting the right of access of justice and, when appropriate, the right to an effective remedy of protection.

With this reference to the effective remedy, we enter into the surest part of the terrain on which the judgment is grounded. In the case under consideration, it has been duly proven: that the victims filed applications for protective measures (*acciones de garantía*) to avoid their pensions being reduced; that these actions resulted in judgments which ordered the monthly pensions to continue to be calculated and paid as they had been before the corresponding reduction (in other words, that ordered that the *status quo* should be maintained); and that these judgments were disregarded by the State. This constitutes an evident violation of Article 25 of the Convention, and so the Court decided.

The State has argued that these judgments contained an order addressed to a public entity – the Superintendency of Banks and Insurance – distinct from the one that

was supposed to make the payments, according to the legal norms in force at the time: the Ministry of the Economy and Finance. And, it has alleged that the latter was not cited in the proceeding in which the respective judicial decisions were made.

I would like to set out some of the reasons for which, in my opinion, the Court was right in rejecting those arguments (some of these reasons are additional to, and others different from the ones that the Court advanced in its considerations):

- Article 25 of the American Convention refers to a “simple and prompt” recourse and, in any case, to an “effective recourse” for protection against violations of the fundamental rights recognized by the domestic laws or by the Convention itself.
- The corresponding judicial proceeding should not be subject to formalism or ritualism that is inappropriate for a recourse aimed at the prompt safeguard of the fundamental rights of the individual.
- There is nothing to prevent the domestic legal system from adopting provisions concerning the due integration of the adversary proceeding into the respective procedure, but these provisions may not disregard the special nature of the corresponding recourse.
- As provided for in legislation or established by case law in some countries, the judge of the recourse must abstain from delivering a restraining order when joint litigation has not been established and should proceed *de oficio* to take measures to incorporate the adversary proceeding.
- When evaluating the argument that the plaintiff addressed the recourse against the wrong entity, it is necessary to consider whether the plaintiff proceeded reasonably and advisedly when he indicated the respondent entity. (In this respect, it should be recalled that the victims in this case submitted their applications for amparo against the Superintendency of Banks and Insurance before Decree Law 25792 transferred the obligation to continue paying the respective pensions to the Ministry of Economy and Finance).
- In view of the prompt nature of the recourse, it is also necessary to take into account whether the State entity that was not formally summoned to the proceeding, knew about it in any way or intervened in it in any way and could, consequently, have appeared at the said proceeding to defend itself (there is evidence in the file that the Ministry of Economy and Finance was aware of the application for amparo and the compliance proceeding).
- In the case of applications for protective measures, it is necessary to consider whether there are close functional and operational relations between the respondent entity and the one that should be present in order to incorporate the adversary proceeding concerning the matter submitted to judicial examination.
- Regarding the incorporation of the adversary proceeding, in applications for protective measures, the plaintiff should not be responsible for situations resulting from the internal restructuring of the State and the redistribution of competences and responsibilities among its different entities.

I also consider that the Court was right to link the violation of the right to property (Article 21) with the right to an effective recourse (Article 25). Since the Court abstained from elucidating the questions posed at the beginning of this document, in principle, it lacked the grounds for declaring that the five pensioners suffered a deprivation of their patrimony. After all, the rulings on the applications for protective measures provided the pensioners with recognitions that clearly have patrimonial effects. By disregarding them, the State violated the pensioners' right to property.

The Court - again, with reason - prefers succinct and sober language. Consequently, it does not like to use expressions with a conceptual emphasis, particularly if they have philosophical embellishments. This is almost always sensible. However, at times, it would be useful to have those emphases; and, I believe this is true in the instant case.

In my opinion, the Court should have made it clear, in the corresponding considering paragraphs, that it considered that there had been a violation of the right to property of the pensioners, *conceived in the terms of* the judgments on the applications for protective measures, or - and this is another way of saying it - *inasmuch as* that right had been violated by the failure to comply with these judgments. By avoiding the use of expressions such as these, the judgment to which this separate opinion refers may suggest that the Court found that Article 21 of the Convention had been violated without being related to a violation of Article 25, which is not the case.

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I share the Court's decision to abstain from declaring that Article 26 of the American Convention has been violated, but the reasons which lead me to do so are different from those set out in the considering paragraphs of the judgment.

In the instant case and for the above-mentioned reasons, the Court did not attempt to rule on the merits of the question of what the rights of the five pensioners were under domestic law, nor did it attempt to determine whether the reduction in the pensions corresponded to a valid interpretation of the real purport of the pre-existing legal provisions, or to a modification (more exactly, a reduction) of the normative standards relating to the recognition of the right to a pension and its payment. In these circumstances, the Court lacks a solid basis to declare that Article 26 has been violated and this is what it should have argued in order to act in consequence.

The Court took a different line of reasoning. It indicated that the progressive development of economic, social and cultural rights should be measured in function of their increasing coverage of the entire population, and not in function of the circumstances of a very limited group of pensioners, who were not necessarily representative of the prevailing situation.

The reference to the fact that the five victims in this case are not representative of most Peruvian pensioners is pertinent - they are not, in view of both their number and the amount of the pensions they have received.

However, the reasoning according to which only State actions that affect the entire population could be submitted to the test of Article 26 does not appear to have a basis in the Convention, among other reasons because, contrary to the Commission, the Inter-American Court cannot monitor the general situation of human rights, whether they be civil and political, or economic, social and cultural. The Court can

only act when the human rights of specific persons are violated, and the Convention does not require that there should be a specific number of such persons.

Carlos Vicente de Roux-Rengifo  
Judge

Manuel E. Ventura-Robles  
Secretary