

**SEPARATE CONCURRING OPINION OF JUDGE AD HOC
EMILIO CAMACHO PAREDES**

RICARDO CANESE V. PARAGUAY

I share the conclusions of this judgment, and consequently support it. However, the issues raised and the responsibilities determined have prompted some reflections that I feel obliged to set forth in this opinion.

1. Filing a criminal prosecution does not entail criminal conduct, because *injuria* and slander are classified in the penal legislation (Arts. 150 and 151, Act 1160) and (370-slander- and- 372-*injuria*- of the former Penal Code); in other words, the proceeding was initiated on the basis of legal provisions that were in force at the time, and are still in force in the current penal legislation. Consequently, the Paraguayan State cannot be blamed automatically for having initiated criminal proceedings. The initiation and the proceedings of the case must be examined carefully, as the Inter-American Court of Human Rights has done, together with the conduct of the judges who allowed serious procedural irregularities to be committed that affected the fundamental rights of the appellant, and which, in this specific case, show that an external determination could prevail over the proper administration of justice.

2. Personal freedom and, particularly, freedom of movement (Art. 41 of the Constitution) and Article 22 of the Convention were seriously restricted by preventing him [Ricardo Canese] from leaving the country, despite the permission he requested repeatedly. The attitude of the judicial agents who repeatedly denied him permission to leave the country was illegal and unconstitutional, openly arbitrary and unjustifiable, in the case of a person who had convincingly demonstrated his domicile in the country, and that he was airing a matter of public interest. Moreover, the case related to a candidate to the presidency of the country, a municipal councilor, exercising his profession and with all his family residing in the country.

The judge of first instance did not allow the case to be opened to evidence! The judge did not allow the proposed witnesses to testify. Furthermore, the complainants were not cited and, even so, the proceeding went forward.

3. The following are the most relevant judicial decisions for an adequate understanding of the case:

In final judgment No. 17 of March 22, 1994, the judge of first instance condemned him [Canese] to four months' imprisonment and a fine of 14.950.000 Gs.; in decision and judgment No. 18 of November 4, 1997, the Third Chamber of the Court of Criminal Appeal modified the sentence **and condemned him to two months' imprisonment and a fine of 2.969.000 Gs. for slander, absolving him of injuria.-**

In decision and judgment No. 179-May 2, 2001- the Supreme Court of Justice, confirmed the conviction imposed by the Court of Appeal.-

In decision and judgment No. 1362 of December 11, 2002, the Supreme Court of Justice. Admitted the appeal for review and annulled judicial decisions: S.D: 17-22-III-94 of the First Criminal Court of First

Instance, and decision and judgment No. 18 of November 4, 1997. It absolved Canese of guilt and pardoned him.

Decision and judgment No. 804 of April 27, 2004, of the Supreme Court of Justice admitted the petition for clarification filed by Mr. Canese against decision and judgment No. 1362 of December 11, 2002, and ordered the complainant to pay the costs of the entire proceedings.

The Supreme Court of Justice considered that the plaintiff had failed to expedite the action (six months) – interlocutory order No. 1645; this constitutes a reluctance to use the supervisory powers (*facultades ordenatorias*) recognized in procedural legislation and, basically, the obligation to apply the Constitution over and above any procedural obstacle or tactic, at least in cases such as this one, in which the passage of time made the arbitrariness to which Mr. Canese was subjected more evident every day (see Sapena, Josefina. Constitutional case law. Arbitrariness¹). In this respect, the Inter-American Court has firmly established that judges “who are in charge of directing the proceeding, have the duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due legal process to formalism and impunity,”² which is what evidently happened in the instant case, directly affecting Mr. Canese's constitutional rights.

4. In interlocutory order No. 409 of April 29, 1994, the First Judge of First Instance for Civil Affairs prevented his departure from the country. The request for authorization to leave the country occupies a special chapter and this is how the Inter-American Court considered it, because it was obviously not a tactic for absconding. The judge, or the judges who refused the requests to leave the country, and those who allowed this to continue over such a long period of time, evidently violated constitutional guarantees and the rights established in the Convention. Clearly, responsibilities should be disaggregated and determined in due course, because the responsibility of the judge who denied permission differs from that of the judge who allowed the restriction to be maintained for such a long time, and from that of the judge who intervened for a short time.

5. **Freedom of the press and public interest. The debate occurred on a matter of public interest, an aspect that was obviously not considered by the judges involved in the case.** This is the only way to understand the extreme severity in the criteria adopted, which converted a simple trial for slander and *injuria*, at least in the sphere of precautionary measures, into a typical case of judicial arbitrariness. More than eight years without any judicial instance using its supervisory powers (*facultades ordenatorias*) to guide the proceeding back to its normal channels.

The complainants were private individuals, not the Paraguayan State. The case involved a conflict between individuals on matters of evident public interest. **The partners of CONEMPA were involved in matters of public interest and, consequently, the primacy of this over private interests must be**

¹ Sapena, Josefina. Constitutional case law

² Case of Myrna Mack-Chang, para. 211.

acknowledged, as expressly established in Article 128 of the Paraguayan Constitution.-

In this case, the criminal conviction can be seen as an indirect limitation of freedom of expression, which violated Article 13 of the American Convention.-

6. Prohibition to leave the country and reasonable duration. **Eight years elapsed from the final decision of first instance, until a final judgment was handed down. The arguments indicated in the judgment show that there existed a clear restriction to leave the country during almost eight years; this constituted a flagrant and arbitrary violation of the presumption of innocence (Art. 17(1)), of individual liberty and security (Art. 9 of the Constitution) and the right to a defense (Art. 16 of the Constitution);** all these rights recognized in Article 8(1) and 8(2) of the Convention. He [Canese] received a completely different treatment to other defendants, who, for the most part, enjoy procedural guarantees; also his right to equality was disregarded (Arts. 46 and 47 of the Constitution). On this point, the attitude of the judicial agents involved is striking, because, systematically and repeatedly they denied his requests for permission to leave the country, reaching the inadmissible extreme of maintaining a precautionary measure for more time than the maximum sanction possible; in these proceedings, the latter was only 18 months at first and then nothing – when the Court of Appeal revoked the sanction of imprisonment, and the Supreme Court of Justice annulled the whole proceeding.

7. The judges did not apply the Constitution or the *iura novit curia* principle, as they should have done; they should have rectified the proceedings and not conformed to what the defense did or did not do. That argument is inadmissible when fundamental rights are at stake, which even involved the responsibility of the Paraguayan State, that was a party jointly and severally as established in article 106 of the Constitution. Moreover, the decisions of second and third instance did not consider the conduct of the judges who permitted a precautionary measure to continue for many years.

8. In our opinion, the precautionary measure, which was arbitrary, illegal and irrational, was the measure that caused most harm. **The CIVIL PROCEEDING WAS NOT EXHAUSTED; consequently, in principle, compensation for non-pecuniary damage could not be established coercively, because it would have established a jurisdiction parallel to the ordinary jurisdiction,** creating a supplementary judiciary, in violation of Article 137 of the Constitution, which establishes the priorities within the legal system. This could even have led to an erroneous use of international human rights treaties. International treaties and conventions are ranked below the Constitution and, it is especially evident that, in the instant case, it was not a matter of denying a right, but of indicating that the civil action for compensation should have been filed, and that the Paraguayan State is able to guarantee this type of trial, as shown by the case of Napoleón Ortigoza, Hilario Orellado *et al.*,³ where the Paraguayan State was condemned to pay many millions of guaranis for compensation and non-pecuniary damage, as a result of civil actions following the annulment of the judgment by the Supreme Court of Justice.

³ This is established in a final judgment of the Supreme Court of Justice.

The latter annulled the judgment which had condemned Ortigoza to more than twenty years' imprisonment (and somewhat less to the other defendants) during the dictatorship.

Nevertheless, it should be indicated that the extended procedure followed by the parties and, particularly the authentic anguish suffered by the appellant, victim of an inadmissible precautionary measure, with the consequent damage, requires this Court to rule on the claim for compensation. As the chapter of this judgment on considerations establishes, "the State's international responsibility arises immediately from an internationally wrongful act, although it can only be declared after the State has had the opportunity to repair the act using its own mechanisms."

The Court has reiterated in its judgments that "it is a principle of international law that any violation of an international obligation that has caused damage gives rise to the obligation to remedy it adequately."⁴ Hence, in application of the provisions of Article 63(1) of the American Convention, if the Court finds the State has violated a right or freedom protected by the Convention, "it shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated [...and,] if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party." In the instant case, in accordance with this norm, the Court ordered the reparation corresponding to Mr. Canese for the damage caused by the violations of the Convention declared in the judgment. It is the State's obligation to comply with the measures of reparation ordered by the Inter-American Court.

The appellant cannot be obliged to reinitiate the whole judicial procedure claiming compensation; nor can the domestic constitutional legislation of the respondent country be disregarded, or the clear requirement of exhaustion of the ordinary remedies that have been created. The Court has established a case law whereby, having verified the existence of a damage in the penal jurisdiction with the corresponding sanction, it can require the respondent State to reach an agreement on compensation with the plaintiff (see pp. 501 to 750 – Faúndez Ledesma). Moreover, it should not be forgotten that the fundamental purpose of the appellant has always been to demonstrate the arbitrariness committed by the State and its judicial agents, particularly by maintaining almost indefinitely a restrictive precautionary measure that exceeded any legal or rational consideration.

We have to observe that there was arbitrariness in the contested judicial decisions. It is inadmissible to punish an individual with a precautionary measure for years; even longer than the possible maximum sanction that existed. Also, the State exposed itself to incalculable patrimonial damage, deriving from the obligation to provide reparation that arises from the unlawful conduct of the judges involved in the case. This type of conduct by officials cannot be allowed under the rule of law.

⁴ *Case of the Gómez-Paquiyaúri brothers*. Judgment of July 8, 2004. Series C No. 110, para. 187; *Case of 19 Merchants*. Judgment of July 5, 2004. Series C No. 109, para. 219; and *Case of Molina-Theissen case. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 39.

The judges, who are in charge of directing the proceeding, always have the duty to ensure proper compliance with the law. This has been established by the Inter-American Court: **“In light of the above, the Court deems that the judges, who are in charge of directing the proceeding, have the duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due process to formalism and impunity.”**⁵

This means that, necessarily the Inter-American Court must consider the functioning of the respondent State's domestic judicial organs, as established in the Juan Humberto Sánchez case: “In order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings,”⁶ so as to establish whether all the procedures were in accordance with the international provisions to which the respondent State is a signatory.

Articles 15 and 18 of the Paraguayan Code of Civil Procedure establish the supervisory powers (*facultades ordenatorias*) of the judges and the obligation to apply the Constitution in the first place. Failure to comply with this can even lead to a sanction, as established in Act 1084, pursuant to the principle of the priority of the laws established in article 137 of the Constitution

9. The domestic process is not exhausted as regards reparation for non-pecuniary and pecuniary damage; moreover, no claim has even been filed; nevertheless, for the reasons set out above, it is necessary to stipulate the amount.

The case records clearly show that Article 8 of the American Convention on Human Rights (Right to a Fair Trial) has been violated, by arbitrarily maintaining a restrictive measure without valid legal grounds. This arbitrariness is also clear from the sentences delivered in the case, all of them much shorter than the duration of the restrictive measures. Hence, the right established in Article 10 of the American Convention materializes.

Furthermore, and we repeat this, maintaining a precautionary measures for years is not in keeping with any of the principles and guarantees at stake: due process of law (Articles 16 and 17 of the Constitution), presumption of innocence (Article 17(1)), reasonableness of judicial decisions (Article 8 of the Convention) and Article 46 and ff. of the Inter-American Convention. According to the principles established by the Inter-American Court for determining the reasonableness of the duration of a proceeding:⁷ a) complexity of the case, b) procedural activity of the interested party, and c) conduct of the judicial authorities, it is not possible to consider as valid a precautionary measure that was in force for over eight years and proceedings that continued even longer, to then reach a judicial decision annulling all the previous proceedings.

⁵ Case of Myrna Mack-Chang, para. 211.

⁶ ICourHR. Case of Juan Humberto Sánchez, para. 120, Judgment of June 7, 2003.

⁷ Case of Hilaire, Constantine and Benjamin. Judgment of June 21, 2002.

In some case, a prolonged delay can even *per se* constitute a violation of judicial guarantees; this should be indicated by the Inter-American Court and rectified by the Paraguayan State. Finally, we should mention that the Paraguayan State is making efforts to improve the exercise of human rights and to achieve their effective judicial protection, and it has been the same Supreme Court of Justice that has issued corrective decisions in this case, thus placing Paraguay on the right path towards respect for human rights.

Emilio Camacho-Paredes
Judge *ad hoc*

Pablo Saavedra-Alessandri
Secretary