CONCURRING OPINION OF JUDGE DIEGO GARCÍA-SAYÁN
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF *LÓPEZ MENDOZA V. VENEZUELA*
OF SEPTEMBER 1, 2011

1. The case decided by the Court refers to an individual victim, Mr. Leopoldo López Mendoza, and a legal situation and matter, wherein the "main point" is identified by the Court as:

> *100. The main point of this case lies in the sanctions of disqualification imposed on Mr. Lopez Mendoza by way of a decision of an administrative body, applying Article 105 of the LOCGRSNCF, which prevented him from registering his candidacy for an elective office.*

2. Given this central point, the Court has established the international responsibility of Venezuela for affecting, *inter alia,* the right established in Article 23(2) of the American Convention on Human Rights, which states: *"[t] he law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."*

3. As the main theme in this case is the right of Mr. Lopez Mendoza to register hi candidacy for elective office and because the Court declared a violation of the right to be elected, turning to, among others, that established in Article 23(2) of the Convention, it so corresponds to compliment the interpretation of this Tribunal regarding said provision and the effects delimited in this case. The matter faced by the Court in this case is also related to the sanctioning power of the administration and its limits in regard to passive suffrage.

4. For the reasons presented in the Judgment, the Court has concluded that in this case Article 23(2) of the American Convention was violated. However, sustaining said conclusion exclusively based upon a literal interpretation of the regulation and not complimenting it with an explanation and further reasoning, as with other tools for interpretation, it could lead to incorrect conclusions if taken beyond the scope of the case and used for other situations that affect political rights. Which, specifically, could be interpreted in a manner that weakens the State's institutional powers when faced with scourges of corruption.

5. From a, not only literal but also systematic and evolutionary interpretation of Article 23(2), that, also, incorporates the working papers [travaux preparatoire] of the Convention as complimentary criteria, this concurring opinion provides an alternative perspective. But, it should not lead to the conclusion that Mr. López Mendoza's right to be elected was not violated.

<u>Comprehensive interpretations of Article 23(2)</u>

6. An additional analysis of the wording "*only"* and "*sentencing by a competent court in criminal proceedings"* of Article 23(2) of the Convention is convenient. In particular, it is relevant to determine if this wording entirely excludes the possibility of imposing limitations on holding public office through legal means other than by way of criminal proceedings or through administrative or disciplinary proceedings. A systematic evolutionary**,** and teleological interpretation, as well as an instrumental complimentary one of the working papers of the American Convention leads us to different conclusions.

7. The Court has carried out, in a different case,[1] a determination of the term "*only,"* and it established that it must be interpreted in a systematic manner with Article 23(1) and the other provisions of the Convention and the basic principles that form it**.** In particular, it established that the reasons enshrined in this Article are not restrictive, but rather can be regulated by taking into account factors such as the historic, political, social, and cultural necessities of a society.

> *166. The inter-American system [does not] impose a specific electoral system or a specific means of exercising the rights to vote and to be elected. The American Convention establishes general guidelines that determine a minimum content of political rights and allows the States to regulate those rights, within the parameters established in the Convention, according to their historical, political, social and cultural needs, which may vary from one country to another and even within one country, at different historical moments.*

8. The systematic analysis, taking into account the elements of this case, leads, first, to an analysis of this regulation of the American Convention in relation to other international, universal, and regional instruments, that regulate restrictions on political rights. In addition, it is necessary to consider the scope and repercussion of international instruments adopted in the framework of the fight against corruption, all of which came into effect after the American Convention in 1969.

9. In this order of analysis, it is noteworthy to mention that in the other international legal systems for the protection of human rights there is no specific reference to means or mechanisms that regulate the right to stand in an election or to passive suffrage. The universal system and other regional systems have also not stipulated a regulation that establishes that States can only restrict passive suffrage by way of "*sentencing by a competent court in criminal proceedings*."

10. In the universal forum, Article 25 of the International Covenant on Civil and Political Rights[2] does not include possible reasons to restrict or regulate political rights similar to Article 23(2) of the Convention. It does establish that these rights may not be limited by "*unreasonable restrictions***.**" The European Convention, in Article 3 of Protocol 1,[3] only establishes the obligation to guarantee "*free elections."* In some cases, the European Court has established that States Parties may establish requirements for a candidates registration in an election, and that in this regard, more stringent requirements may be imposed than

---

[1] *Case of Castañeda Gutman V. México. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184.

[2] Article 25 of the International Covenant on Civil and Political Rights establishes 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; (c) To have access, on general terms of equality, to public service in his country."

[3] Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (right to free elections) states that "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

those established for the right to vote.[4] Lastly, in the African Charter on Human and People's Rights there is no regulation similar to that of Article 23(2) of the American Convention.

11. The conceptual and normative framework of the international obligations in the fight against corruption, for their part, points to certain guidelines that govern State conduct in the implementation of the United Nations Convention Against Corruption[5] and of the Inter-American Convention Against Corruption. 6These instruments have specified obligations that are not limited to criminal proceedings to combat conduct related to the phenomenon of corruption. 7.

12. In regard to the evolutionary interpretation, this approximation has been constant in as much as the Inter-American Court as well as the European Court has established that human right treatises are living instruments, whose interpretation must accompany the evolution of the times and current living conditions. 8This Court has used comparative national law when considering domestic[9] regulations or jurisprudence of domestic tribunals[10] to analyze controversies in contentious cases. The European Court has also used comparative law as a mechanism to assess a State's subsequent practice. 11

---

[4] "States enjoy considerable latitude in establishing criteria governing eligibility to stand for election, and in general, they may impose stricter requirements in that context than in the context of eligibility to vote". ECHR, *Case of Paksas v. Lithuania*, Judgment of 6 January 2001, para. 96, *Case Ždanoka v. Latvia,* Judgment, of 16 March 2006, para. 115; *Case Ādamsons v. Latvia,* Judgment of 24 June 2008, para 111; Case *Tănase v. Moldova*, Judgment of 27 April 2010, para. 156, y *Case Yumak y Sadak v. Turkey,* Judgment of 30 January 2007, para. 109.

[5] Article 30(8) of the United Nations Convention Against Corruption notes that criminal action "shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants."

[6] In the Final Report on Venezuela, on March 25, 2010, drafted by the Inter-American Convention against Corruption and the Follow-Up Mechanism for its Implementation (MESICIC), recommendations were provided for adjusting criminal norms based on the legislation that restricts political rights in non-criminal forums. *Cf.* Recommendation 1.2.2. of the Final Report of March 25, 2010, related to the implementation of the Bolivarian Republic of Venezuela of the Convention, drafted by the Expert Committee of the the Inter-American Convention against Corruption and the Follow-Up Mechanism for its Implementation. Sixteenth Reunion of the Committee of Experts. March 22-26, 2010. Washington, DC (OEA /Ser.L. SG/MESICIC/doc.248/09 rev. 4).

[7] For example, Article 8(6) of the United Nations Convention against Corruption (Codes of Conduct for Public Officials) states: "[e]ach State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article."

[8] *Cf. Case of the Mapiripan Massacre V. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, para. 106. See also, ECHR, *Case Tyrer v. The United Kingdom*, Judgment of 25 April 1978, Series A no. 26, para. 31.

[9] In the Case of Kawas Fernández regarding Honduras, the Court considered in its analysis "considerable number of States Parties to the American Convention have adopted constitutional provisions which expressly recognize the right to a healthy environment." *Case of Kawas Fernández V. Honduras. Merits, Reparations and Costs.* Judgment of April 3, 2009, Serie C No. 196, para. 148.

[10] In the case of Heliodoro Portugal and Tiu Tojín, the Court considered judgments from tribunals in Bolivia, Colombia, México, Panamá, Perú, and Venezuela regarding the nonexistence of a statute of limitations for permanent crimes such as enforced disappearance. *Cf. Case of Heliodoro Portugal V. Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 186, para. 111 and Case of Tiu Tojín V. Guatemala. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 87. Moreover, in the Case of Anzualdo Castro, the Tribunal used rulings of constitutional courts in American states to support the delimitation it has established for enforced disappearance. *Cf. Case of Anzualdo Castro V. Perú. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 22, 2009. Series C No. 202, para. 61. Moreover, in the case of Gomes Lund et al. and Gelman, the Court took into account the rulings of the high courts of the region regarding the prohibition of amnesties in the case of gross human rights violations and the prohibition of referendums that limit access to justice of victims in these cases of grave violations. *Cf. Case of*

13. From the information at hand in the case file, it appears that in the region there are different systems regarding the disqualification of public officials that result in restrictions on passive suffrage: i) political system, that consists of a political trial carried out by a legislative body, generally against high-ranking officials syndicated for faults or crimes[12];ii) judicial system by way of a criminal proceeding,[13] and iii) administrative, system, disciplinary or entrusted to the judicial electoral authority.[14] From this examination, it can be concluded that the use of one system does not exclude another system.[15] By observing this context of comparative law, it can be said that these judicial and institutional practices of the States Parties are related to the international obligations at hand regarding the principles and instruments of anti-corruption previously mentioned.

14. The teleological interpretation takes into account the purpose established in the various standards that regulate political rights. In Article 23(2) of the Convention, possible reasons are stipulated for the restriction or regulation of political rights, and it clearly seeks that it not be left to the will or discretion of the ruling authority**,** in attempts to safeguard that the political opposition may exercise its rights without undue restrictions. That is the clear purpose of the regulation. The restrictive mechanism of rights, thus, must offer sufficient guarantees to comply with the purpose of protecting rights and liberties of persons, democratic systems, and the political opposition. It must be understood, therefore, that the judgment of must be the strictest possible, regardless of the means used to effectuate the restriction.

15. In what regards the working papers of the Convention, as supplemental standards for interpretation, no debate nor basis is found in these papers on the terms "*only […] sentencing by a competent court in a criminal proceeding."* This standard was included only in the last discussion of the Article on political rights, due to a proposal from the Brazilian

---

Gomes Lund et al. (Guerrilha do Araguaia) V. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Serie C No. 219, paras. 163 to 169, and *Case of Gelman V. Uruguay. Merits and Reparaciones.* Judgment of February 24, 2011 Serie C No. 221, paras. 215 to 223.

[11] For example, in the case TV Vest As & Rogoland Pensionistparti against Norway, the European Court took into account a document of the "European Platform of Regulatory Authorities" wherein a comparison was carried out of 31 countries of ther egion, in order to determine in which countries paid political publicity was allowed and in which this sort of publicity was free. *Cf. Case TV Vest As & Rogoland Pensionistparti v. Norway*, Judgment of 11 December 2008, para. 24. Similarly, in the case of Hirst against the United Kingdom, the Court considered "the legislation and practices of State Parties" to determine which countries restricted to right of those convicted of a crime from voting; the legslation of 48 countries was analyzed. *Cf. Hirst v. United Kingdom*, Judgment of 6 October 2005, paras. 33 to 39.

[12] Examples of the foregoing are Articles 59 and 60 of the National Constitution of the Republic of Argentina, Article 110 of the Political Constitution of the United Mexican States. *Cf.* Brief of final arguments of the representatives of the victim (case file on the Merits, tome III, folios 1361 and 1362).

[13] For example, Article 43 of the Criminal Code of Colombia, Articles 260 and 264 of the Criminal Code of Argentina or Article 24 of the Federal Criminal Code of Mexico, cited in the Carpizo's expert report. *Cf.* Expert report rendered by public notary (*affidavit)* by expert witness Jorge Carpizo McGregor on January 20, 2011 (case file on the Merits, tome III, folios 872, 873, and 878).

[14] Pursuant to that information, that is the case of Brazil, Colombia, Costa Rica, México, Perú, and the Dominican Republic.

[15] It is, for example, the case of México. A normative analysis in Mexico, allows for evidence of the establishment of a political trial (Article 110 of the Constitution), in the criminal process (Article 24 of the Federal Criminal Code of Mexico) and the administrative or disciplinary sanction (Article 13 of the Federal Law on Responsibility of Public Officials).

delegate.[16]The Colombian delegate and the member of the Commission on Human Rights presented objections.[17] Nevertheless, the amendment was approved and it was added to the final text of Article 23. However, the reason or motivation for which the amendment was presented was not presented and the debate regarding it is unknown. Thus, it is not possible to conclude, with absolute clarity, the intent of the States with regard to the incorporation of said term in Article 23 of the American Convention.

16. From the means of interpretation referred to in the preceding paragraphs, it can be concluded that the term *"only"* of Article 23(2) of the Convention does not provide a restrictive list of possible reasons for a restriction or regulation of political rights. Similarly, the term *"sentencing by a competent court in a criminal proceeding"* does not necessarily assume that this may be the only type of proceeding that may be used to impose a restriction. Other judicial forums (such as the judicial electoral authority, for example) may have, in this way, legitimacy to act. What is clear and fundamental is that whatever the means used, it must be carried out with full respect to the guarantees established in the Convention, and moreover, be proportional and foreseeable.

17. In light of a evolutionary and systematic interpretation of Article 23(2) and heeding to the living nature of the Convention, whose interpretation must accompany the evolution of the times and current conditions of institutional development, what is important is that the authority be of a judicial nature, in a broad sense, and not restricted to a criminal court. In this case, the sanction was not imposed by a judicial authority.

Proportionality and foreseability of the sanction imposed

18. Notwithstanding that the sanction of disqualification was not imposed by a judicial authority, in this case, the Court has also established the State's responsibility for the violation to the obligation to provide cause, the right to defense, and the right to judicial protection that all stemmed from the imposition of the sanction of disqualification (paras. 149, 150, and 185). Specific arguments were not provided on the relevance of the facts, the level of responsibility, and the harm to the public good, all of which would have provided cause in a qualitative and quantitative manner to justify the magnitude of the sanction of disqualification and length of the sanction as the one imposed. Moreover, and considering the interpretation already stated of Article 23(2), it is, in my opinion, important to determine if in the exercise of its sanctioning power, the State heeded to the principles of proportionality and foreseeability.

19. In regard to the issue of proportionality of the sanction imposed by the Comptroller General to the detriment of Mr. Lopez Mendoza, what should first be noted is that given this involves a restriction on the right to passive suffrage, that is, the right to register as a candidate for an elective office, the paths used must be more strict and narrow**.** Among other reasons because in these cases it is not only the person who seeks to run for office,

---

[16] "The delegate of Brazil (Carlos A. Dunshee de Abranches) proposed that the end of paragraph 2, 'as appropriate,' be deleted, and that 'or sentencing [,] by a competent court [,] in a criminal proceeding'" be added. Minutes and Documents of the Inter-American Specialized Conference on Human Rights. Minutes of the Thirteenth Session of the Commission "I", Doc 54, November 18, 1969, San Jose, Costa Rica, pg. 254.

[17] "The DELEGATE OF COLOMBIA (Mr. Pedro Pablo Camargo) felt that if 'in criminal proceedings' was added, all political matters would to be subject to criminal prosecution and this would deny all other rights contained in section 2. A Member of the Human Rights Commission (Mr. Justino Jiménez de Arechaga) not[ed] that the variation between the text of the Project and the Working Group's proposal would raise sensitive issues with which care must be taken." Minutes and Documents of the Inter-American Specialized Conference on Human Rights. Minutes of the Thirteenth Session of the Commission "I", Doc 54, November 18, 1969, San Jose, Costa Rica, pg. 254.

but also the collective interest of the voters that is affected. It is not therefore a situation, equal to that of appointed officials, regardless of the path (free appointment or competition).

20. As I have emphasized some lines above, it is fundamental that the State have efficient and effective administrative mechanisms to combat and punish acts of corruption. It is also noteworthy that in this case –wherein Mr. Lopez Mendoza's hand in a crime was not proven criminally –the "additional" sanction was notoriously more severe than the "principle" sanction (a fine). Particularly when this involves a person, Mr. López Mendoza, who has made his participation in electoral life his life project. The high impact of the sanction in regard to Mr. Lopez Mendoza's political rights, prevented him from running as a candidate for Metropolitan Mayor of Caracas, and eventually, other elective offices.

21. In light of the facts of this case, we must ask if the exercise of the sanctioning power of the administration may affect the right to passive suffrage. In other words, if by way of that forum, a citizen may be prevented from participating as a candidate in an electoral race. I share and agree with that established by the Court in that the exercise of the sanctioning power of the State cannot affect the right to passive suffrage and that this power lies only in the hands of a judicial authority taking into account the scope of the affected right.

22. Nevertheless, from my point of view and going beyond this case, this type of restriction does not need to be exclusively reserved to a criminal court, but rather it may extend to other judicial authorities that has been previously established in the respective legal systems who comply with the obligation to respect and assure the guarantees established to this effect.

23. Regarding the same topic, proportionality, from what is found in the case file, it follows that the conduct attributed to Mr. Lopez Mendoza were not the most severe. The Organic Law of the Comptroller General of the Republic and the National System of Fiscal Oversight (hereinafter, LOCGRSNCF) established that the amount of the fine was determined based on the severity of the fine and the type of detriment.[18]While the State argued that the sanctions were not accumulated and that recidivism existed, the protruding lack of gravity in the conduct being attributed to Mr. Lopez Mendoza is evident in the fact that the fines imposed were not the most severe fines legally available. The fine applied for the "facts of the PDVSA" was of the lowest of the applicable fines.[19] The fine applied in relation to the "facts of the Mayor's Office" is a fine that ranks at an intermediary level of the applicable fines.[20]

---

[18] Article 94 of the LOCGRSNCF states that those found responsible may be punished "according to the seriousness of the offense and the type of damage caused, with fine[s] of one hundred (100) to [...] one thousand (1,000) tax units to be imposed by supervisory bodies referred to in [the] Law." Organic Law of the Comptroller General of the Republic and the National System of Fiscal Oversight, published in the Official Gazette No. 37.347 on Monday, December 17, 2001 (case file of attachments to the application, appendix 1, page 1419).

[19] According to the deciding order of the Office of Determination of Responsibility on October 29, 2004, the fine imposed on Mr. Lopez Mendoza was of one million two hundred forty-two thousand bolivares (Bs, 1,243,200.00), that is, equivalent to 168 tax units (UT). Indeed, according to the order, the value of the current Tax Unit was seven thousand four hundredbolivars (Bs. 7400.00). Cf. Deciding Order of the Office of Determination of Responsibility of the Office of Special Procedures of the Comptroller General of the Republic of October 29, 2004 (case file of annexes to the application, Annex 34, Volume V, pages 2614-2616).

[20] According to the deciding order of the Office for the Determination of Responsibility of November 2, 2004, the fine imposed on Mr. Lopez Mendoza was of eight million, one hundred and forty thousand bolivares (Bs. 8,140,000.00), that is, equivalent to 550 tax units (TU). According to that order, the value of the current Tax Unit was fourteen thousand eight hundredbolivars (Bs. 14,800.00). *Cf.* Deciding Order of November 2, 2004 issued by

24. It must also be considered that these facts did not lead to the initiation of a criminal proceeding. The inexistence of a criminal prosecution allows us to infer, specifically, that Mr. Lopez Mendoza's actions could not be associated with more severe conduct, those of which may justify a sanction such as a restriction on political rights.

25. As such, the disproportion between the sanction imposed as the "principle" sanction and the one imposed as the "additional" sanction (disqualification from running as a candidate) is irrational. While it is alleged that in the domestic legislation there is no relationship between the fine and disqualification, [21] given the circumstances of the case – wherein, as established in the Judgment, sufficient cause is not provided for the sanction of disqualification – the difference is manifestly unreasonable between the fines imposed as principle sanction against Mr. López Mendoza (for U.S. $ 1000 and $ 4000) and the sanction of disqualification that he also underwent, which implies a restriction from running as a candidate for 6 years. The high impact of the sanction on the political rights of Mr. Lopez Mendoza barred him from running as candidate for mayor of Caracas or other elected office.

26. Political rights and the use of them serve to strengthen democracy and political pluralism. As the Court has stated, "*[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part,"* and it constitutes *"a 'principle' reaffirmed by the American States in the OAS Charter, the basic instrument of the Inter-American System.*" [22] In the Inter-American System, the relationship between human rights, representative democracy and political rights in particular, is reflected in the Inter-American Democratic Charter. [23] In this Inter-American instrument it is stipulated that among other essential elements of a representative democracy is the access to power and its exercise, which is subject to the rule of law and the holding of periodic, free, and fair elections based on universal suffrage and secret balloting as an expression of the sovereignty of the people.

27. In analyzing the strict proportionality of the sanction, we must consider that not only are the rights of those seeking to run affected, but the collective interests of the voters is also harmed. This requires that the restriction be analyzed in a stricter manner when it comes to elected officials as opposed to appointed officials, in which case there is no involvement of citizens in the selection of these officials. This leads us to conclude therefore that, in regard to persons elected by popular vote or who intend to run, restrictions on passive suffrage can be exercised only to the extent strictly necessary to protect the fundamental legal rights from the most serious attacks that place them in harm or dangers way.

---

the Office of Determination of Responsibility of the Office of Special Procedures of the Comptroller General of the Republic (case file of annexes to the application, attachment 34, tome VI, folios 3356).

[21] The Constitutional Chamber of the Supreme Court of Venezuela has stated in its Judgement No. 1266 of August 6, 2008 that: "it is not valid to [affirm] that proportionality was violated because there is no correspondence between the main sanction andthe additional sanction." Judgement No. 1266 of the Constitutional Chamber of the Supreme Court of Justice of August 6, 2008 (case file of appendix to the application, volume I, annex 27, pages 584 to 642). According to this reasoning, the sanctions of disqualification are a consequence of the declaration of administrative responsibility and do not depend on the other sanctions.

[22] The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 34.

[23] Organization of American States. *Inter-American Charter.* Approved on the first full session of the General Assembly of the OAS, held on September 11, 2001, during the twenty-eight Extraordinary Period of Sessions, Article 3.

28. Another aspect to consider is the foreseeability of the sanction of disqualification being imposed. The parties presented arguments concerning the temporal period used by the Comptroller to impose additional sanctions, once the administrative responsibility is declared and imposed for the corresponding fine. The Political-Administrative Chamber of the Supreme Tribunal of Justice, taking into account the general rule on statute of limitations of punitive administrative actions (under Article 114 of the LOCGRSNCF), in the jurisprudence that arose after the facts of this case, has set a maximum term of five years for the sanction of disqualification to be adopted. [24]

29. Mr. Lopez Mendoza disqualification due to the events related to PDVSA occurred approximately five months after the declaration of administrative responsibility was final (para. 204), [25] while the disqualification for the events surrounding the Mayor's Office of Chacao was imposed about six months after the resolution that established declaration of responsibility was final (para. 204). [26] While the time between the declaration of responsibility and the imposition of the disqualification itself was not excessive, it has been held (para. 205) that the domestic legislation does not establish a fixed period or time for the Comptroller to exercise this power.

30. The decision of the Political-Administrative Chamber, designed to work around this regulatory gap with the statute of limitations of the administrative action, does not meet the standard of foreseeability or legal certainty of the legislation. As was set out in paragraph 205 of the Judgment, the "foreseeability test" involves proving that the legislation clearly delineate the scope of discretion that may be exercised by the authority and define the circumstances in which it may be exercised in order to establish appropriate safeguards to prevent abuse. [27] The uncertainty regarding the period within which it could impose a restriction on the right to be elected is not compatible with the legal certainty in a sanctioning proceeding that restricts such rights. Furthermore, a period of five years is not reasonable to ensure predictability in the enforcement of the restriction because it is too long a period and, therefore, incompatible with the requirement that a sanctioning proceeding conclude when the appropriate liability is established, in order that the accused does not wait for a long time in the setting of a sanction established as punishment for his

---

[24] Article 114 of the LOCGRSNCF establishes that "[t]he administrative sanctioning or recovery actions derived from this law, are prescribed for a period of 5 (years), unless in special Laws different periods are established. Said term will begin to run as of the date that the events, actions, or ommissions from which administrative responsibility took place, the imposition of fines or reparation; neverthless, when the infractor is a pubic official, the perspcription will begin to run as of the date of cessation of the charge for the period of the occurrence of the irregularity. […]" Judgment No. 01516 of October 20, 2009 (Exp. Nº 2005-5270) issued by the Accidental Chamber of the Supreme Tribunal of Justice and judgment No. 00782 of July 27, 2010 (Exp. No. 2008-0871) issued by the Political-Administrative Chamber of the Supreme Tribunal of Justice. Cited in the final written brief of the State (case file on the Merits, tome III, folio 1459).

[25] On March 28, 2005, the motion for reconsideration was decided, which finalized the declaration of administrative responsibility for the facts related to PDVSA, and on August 24, 2005, the Comptroller General of the Republic issued Resolution No. 01-00-000206, which imposed the sanction of disqualification for 3 years.

[26] On March 28, 2005, the motion for reconsideration was decided, which finalized the declaration of administrative responsibility for the facts related to Chacao Mayor's Office, and on September 26, 2005, the Comptroller General of the Republic issued the Resolution No. 01-00 -235, which imposed the sanction of disqualification for 6 years.

[27] In this regard, the European Court has established that "a law which confers a discretion must indicate the scope of that discretion […]. The degree of precision required of the "law" in this connection will depend upon the particular subject-matter. […] Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference." ECHR, *Case Malone v. The United Kingdom*, Judgment of 2 August 1984, Series A no. 82, para. 67 y *Case Olsson v. Sweden*, Judgment of 24 March 1988, Series A no. 130. para. 61.

responsibility. Moreover, the lack of a fixed, predictable, and reasonable period may lead to an arbitrary exercise of discretion over sanctions at an unexpected time for the sanctioned person (para. 205).

31. Therefore, taking into account the comprehensive interpretation of the norm established in Article 23(2) of the Convention, upon assessing the right to be elected of a citizen and the failure to meet the requirements of foreseeability and proportionality, the restrictions determined by the administrative authority was not justified nor consistent with the Convention.

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary