CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
CASE OF LÓPEZ MENDOZA *V*. VENEZUELA,
JUDGMENT OF SEPTEMBER 1, 2011
(MERITS, REPARATIONS, AND COSTS)

Introduction.

I render this concurring opinion with that decided in Judgment stated in the title, hereinafter the Judgment, and in particular Declarative Paragraph, N°1 and in Deciding Paragraph N°s 2, 3, and 5, all of the Judgment's Operative Paragraphs,[1] in order to highlight, first, that from its mere reading, it is evident that Article 23(2) of the American Convention on Human Rights, hereinafter the Convention,[2] is clear, simple, and categorical, specifically in what in regards orders, namely, that "*the exercise of the rights and opportunities referred*" in numeral 1 of said Article, particularly that which refers to the right to "be elected*(…),"*[3] can be regulated "*only*" by, among others, "*sentencing by a competent court in criminal proceedings."*

Second, with this concurring vote, it is my attempt to call attention to that strictly pertaining to the law, specifically, Public International Law,[4] which is the nature of this Judgment, considering that the result confronted[5] by that provided in Article 23(2) of the Convention both with the Resolutions of the Comptroller General of the Bolivarian Republic of Venezuela, hereinafter the State,[6] which imposed upon Mr. Lopez Mendoza the sanction of disqualification from holding public office, as well as that enshrined in Article 105 of the Organic Law of the Comptroller General of the Republic and the National System of Fiscal Oversight, hereinafter the LOCGRSNCF, of the State,[7] and the amparo to which these rendered decisions, was achieved by applying objective and teleological methods of interpretation referred to in the Vienna Convention on the Law of Treaties, hereinafter the Vienna Convention, namely, the rules relating to good faith, the terms of the treaty, the context of those terms, and the object and purpose.[8]

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[1] See paragraph 249 of this Judgment..

[2] *"The 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] *"Every citizen shall enjoy the following rights and opportunities: a). to take part in the conduct of public affairs, directly or through freely chosen representatives; b). to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c). to have access, under general conditions of equality, to the public service of his country."*

[4] Article 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) of the United Nations (UN)**: "***The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."*

[5] *"The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."*

[6] See paragraphs 58 and 81 of this Judgment.

[7] See paragraph 33 of this Judgment.

[8] Art.31(1*):"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

1.- Good faith.

The "*bona fides*" applies from the assumption that States Parties to the Convention intended to use it and, in what pertains to said kind, include in it Article 23(2). In that sense, what the Judgment does is discover or scrutinize what they, as the creators of the regulation, in this regard actually agreed upon, deeming that this agreement leads to, according to the principle "*pacta sunt servanda,"*[9] the obligation to comply with that being agreed upon, even with primacy to what the respective national or domestic laws provide. [10]

It is for this reason that it did not proceed to invoke in orders, domestic legislation and jurisprudence of the State concerned nor of other States also Parties to the Convention, let alone an assumed primacy of national law over International law,[11] as background to argue the compatibility with Article 23(2),[12] because the intention was precisely to determine whether these laws are consistent and conform to the requirements of the latter.

2.- The terms.

That agreed upon by the States Parties to the Convention is stated, moreover, in the terms used in Article 23(2), namely, the wording, "*only*" and "*sentencing by a competent court in criminal proceedings,"* without providing, however, "*a special meaning"*[13]*,* but rather, to the contrary, an "*ordinary*" meaning, with the purpose of expressing what is regularly or normally intended by them.

It turns out that the word "*only*" means, pursuant to the Spanish Language Dictionary,[14] "that which excludes or has the force and virtue to exclude" or "*exclusive, single, excluding any other*" from which it follows that the grounds or reasons for the Law to regulate the exercise of political rights are solely those set out in that Article, wherein ""*sentencing by a competent court in criminal proceedings,"* is stated.

Certainly, if the States Parties to the Convention had wanted to enshrine in Article 23(2) the specific grounds for regulating the rights and opportunities referred to in Article 23(1) therein or allow sentencing by another court or other judicial body distinct from a criminal court or in proceedings similar to criminal ones, they would have said so expressly or directly or would have used different terminology, for example, "*such as*" or "*among others.*" But they did not do so. On the other hand, there is no indication in the record indicating that upon establishing Article 23(2), the intent or aim was to include other types of proceedings or courts that are not criminal.

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[9] Article 26 of the Vienna Convention: *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."*

[10] Article 27 of the same Convention: *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."*

[11] See paragraph 103 of this Judgment.

[12] See paragraph 105 of this Judgment.

[13] Art.31(4) of the Vienna Convention: *"A special meaning shall be given to a term if it is established that the parties so intended."*

[14] Real Academia Española, Vigésima segunda edición, Madrid: Espasa Calpe, 2001. (definition does not pertain to English translation).

3.- The context of the terms.

It is also not in the record that there was an agreement between the States Parties to the Convention related or linked to Article 23(2) or made in regard to this,[15] or subsequently, interpreting it, [16] nor is there evidence of an ulterior motive for which said agreement stands [17] and that would support a different interpretation to that provided in the Judgment.

It is important to note, in this regard, that the fact that in the legislations of some States Parties to the Convention, they provide that a noncriminal body may impose the sanction of disqualification from being elected, [18] in this way reflecting that it is a practice that "*establishes the agreement of the parties regarding its interpretation*." First, because it involves the legislation of only some of the States Parties to the Convention, and therefore, insufficient to assume a widespread practice in the field. Second, because it does not provide anything to suggest that, in dictating those laws, the purpose was to comply with that provided in the Convention. And third, since, pursuant to the Law of Treaties, practice does not imply the modification of a treaty. [19]

It follows to note that it is not appropriate to invoke[20] what has been done in the record of the Inter-American Convention Against Corruption,[21] to argue that it is possible to interpret Article 23(2) of the Convention in such a way that it allow the regulation of the exercise of political rights through a sentence imposed by an administrative authority. This is because what is that instrument provides for the obligation of States Parties to it to criminalize acts of corruption and even refers to criminal jurisdiction, [22] and nowhere has or contemplates that the penalty for that offense may be imposed by an administrative body, whence it follows that, in any way,

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[15] Art. 31(2). of the Vienna Convention: *"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."*

[16] Art. 31(3)(a) of the same Convention: "*There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;"*

[17] Art. 31(3)(b) "*There shall be taken into account, together with the context …(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;"*

[18] See paragraph 103 of this Judgment.

[19] Note that draft article 38 of the Vienna Convention, which provided "*A treaty may be modified by subsequent practice in the application of the treaty when ... it denotes the agreement of the parties to amend the provisions of the treaty*" was suppressed by a majority of the States participating in the Conference which adopted the Vienna Convention.

[20] Art. 31(3)(c) of the Vienna Convention:"*There shall be taken into account, together with the context …(c) "any relevant rules of international law applicable in the relations between the parties.."*

[21] See paragraph 103 of this Judgment.

[22] Article V: "*Jurisdiction. 1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense in question is committed in its territory. 2. Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory.3. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the alleged criminal is present in its territory and it does not extradite such person to another country on the ground of the nationality of the alleged criminal. 4. This Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law."*

is directly or indirectly, an amendment or interpretation of the provisions of the Convention, but precisely the opposite.

4.- Object and purpose.

Finally, if one considers the "object and purpose" of the Convention, namely the commitments of due respect and protection of human rights which States parties undertake, [23] one can not but conclude that what is intended by Article 23(2) is, therefore, to restrict or regulate as little as possible the rights and opportunities set forth in Article 23(1), including the right to be elected or the right of passive suffrage,[24] and it is for this reason that, under this perspective, the same conclusion is made as in the Judgment that, incidentally, agrees with the principle of *pro homine* established in Article 29 of the Convention,[25] which requires interpretation in favor of broader respect for human rights.

5.- Supplementary means.

Now, considering the foresaid, and also, that neither are the supplementary means mentioned in the record, but neither are grounds provided to obtain them, there is no reference regarding the supplementary means of interpretation under the Vienna Convention[26] that could alter the conclusion which the Judgment has so provided.

Conclusion.

Thus, in the latter, Article 23(2) has been interpreted and applied, as provided in Article 63(1) of the Convention, [27] concluding that both Article 105 of the LOCGRSNCF as well as that stated in protection of this by the Comptroller General of the Republic of State, imposing the aforementioned sanctions, is contrary to the Convention and, therefore, has generated international responsibility. [28]

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[23] Art. 1(1) of the Convention: *"The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition*."

[24] See paragraph 107 of the Judgment.

[25] *"No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."*

[26] Art. 32: "*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."*

[27] ***"****If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, 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****."***

[28] Art. 12 of the the *draft articles* to *responsibility* of *States for internationally* wrongful *acts* preparted by the ILC of the UN "*There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.."*

The mentioned ruling conforms, therefore, to the nature of the jurisprudence,[29] without attempting to generate, in practice, a new regulation, different and contradictory to that provided in Article 23(2) of the Convention, namely, the Judgment has proceeded by establishing the direction and scope of the latter according to the only possible alternative application.

The Judgment for which I render this opinion is, therefore and simply, the expression of the realization, in a specific case submitted before the Court,[30] of the judicial function that has been conferred upon the Court, for which it does not have the authority to change that provided in the Convention, a role that is assigned specifically to the States Parties, [31] in keeping, moreover, with the provisions of General International Law[32] and that, without doubt, must be carried out pursuant to standards that are more broad than those that refer exclusively to the Administration of Justice.

EVG.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

[29] *Art.* 38(1)(b) of the Statute of the International Court of Justice: **"** The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: b. international custom, as evidence of a general practice accepted as law…. subject to the provisions of Article 59… as subsidiary means for the determination of rules of law."

Art. 59 of the same text*:* **"**The decision of the Court has no binding force except between the parties and in respect of that particular case**.."**

[30] See note Nº 29.

[31] Art. 76(1): *"Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary Gener."*

Art. 77(1): *"In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection."*

[32] Art. 39, first phrase, of the Vienna Convention: *"A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide"*