

**CONCURRING AND PARTIALLY DISSENTING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF CASA NINA V. PERU**

**JUDGMENT OF NOVEMBER 24, 2020**

***(Preliminary objections, merits, reparations and costs)***

1. With my usual respect for the majority decision of the Inter-American Court of Human Rights (hereinafter "the Court"), the purpose of this opinion is to point out some discrepancies with the Court's analysis of the merits in relation to the international responsibility of the State of Peru (hereinafter "the State" or "Peru"). Also, to explain my partial dissent with the third operative paragraph which declares violations of judicial guarantees, together with the right to remain in the post under general conditions of equality and the right to work of Julio Casa Nina.
2. On this basis, I will address the following points: (i) the practice of addressing the alleged violations in a single operative paragraph and the justiciability of the economic, social, cultural and environmental rights; (ii) the ambivalent interpretation of Article 23 in relation to the removal from office of public officials; (iii) the absence of a relationship between the notions of job stability and the criteria that condition provisional appointments: the term, and (iv) the scope of the concept of control of conventionality in relation to the obligation to amend provisions of domestic law and the concept of an effective judicial remedy.
3. This opinion supplements the position already expressed in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,<sup>1</sup> *Dismissed Employees of PetroPeru et al. v. Peru*,<sup>2</sup> *San Miguel Sosa et al. v. Venezuela*,<sup>3</sup> *Cuscul Pivaral et al. v. Guatemala*,<sup>4</sup> *Muelle Flores v. Peru*,<sup>5</sup> *the National Association of Discharged and Retired Employees of the National Tax*

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<sup>1</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>2</sup> Cf. *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>3</sup> Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>4</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>5</sup> Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

*Administration Superintendence (ANCEJUB-SUNAT) v. Peru*,<sup>6</sup> *Hernández v. Argentina*<sup>7</sup> and the *Indigenous Communities of the Lhaka Honhat (Our Land) Association) v. Argentina*;<sup>8</sup> as well as my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*<sup>9</sup> and *Poblete Vilches et al. v. Chile*.<sup>10</sup>

**i) The practice of addressing the alleged violations in a single operative paragraph and the justiciability of the economic, social, cultural and environmental rights**

4. In previous separate opinions I have described in detail numerous arguments that reveal the logical and legal contradictions and inconsistencies from which the theory of the direct and autonomous justiciability of the economic, social, cultural and environmental rights (hereinafter "ES CER") under Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") suffers. Indeed, this position assumed by the majority of the Court's judges since the case of *Lagos del Campo v. Peru* disregards the rules of interpretation of the Vienna Convention on the Law of Treaties,<sup>11</sup> distorts the nature of the obligation of progressivity,<sup>12</sup> ignores the intention of the States reflected in the Protocol of San Salvador,<sup>13</sup> and undermines the Court's legitimacy;<sup>14</sup> just to mention some of the arguments.
5. On this occasion, it is not my intention to dwell on the points indicated above, but rather to focus attention on a practice related to this legal position that is manifested when declaring

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<sup>6</sup> Cf. *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>7</sup> Cf. *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>8</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.**

<sup>9</sup> Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. **Concurring opinion of Judge Humberto Antonio Sierra Porto.**

<sup>10</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. **Concurring opinion of Judge Humberto Antonio Sierra Porto.**

<sup>11</sup> Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 13.**

<sup>12</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 10.**

<sup>13</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. **Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 3.**

<sup>14</sup> Cf. *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 23.**

the violations in the operative paragraphs and also when addressing the allegations in a single chapter.

6. First, as I have pointed out in the cases of the *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*<sup>15</sup> and *Hernández v. Argentina*,<sup>16</sup> the Court has randomly and without justification, modified its method of presenting the operative paragraphs of its decisions, seeking to render invisible the internal disagreements concerning the scope of Article 26.
7. Furthermore, this method, which groups together in a single operative paragraph the declaration of all the violations, avoids revealing the divergent positions concerning the justiciability of the ESCER to the detriment of the legitimacy conferred by the unanimous position of the Court in relation to the other rights that were violated. I refer to the fact that, although the principal legitimacy, or legitimacy of origin, of the Court's decisions is based on the majority established in the Rules of Procedure, this is evidently perceived more clearly when all the judges are in agreement with the final decision. In this case, the fact of grouping together in a single operative paragraph the violations of Articles 8(1), 23(1)(c) and 26, did not show the unanimity of the Court in condemning the violations, or the partial discrepancy in relation to Article 26.
8. Second, in this case, the majority considered that it was appropriate to address the arguments on the merits in a single section and to declare the violation of judicial guarantees, the right to remain in the post under general conditions of equality and also the right to work of Mr. Casa Nina in a single operative paragraph. As can be observed from the examination of the merits, which analyzes the alleged violation of the right to work in only two paragraphs (108 and 109), it is clear that this is only explained and justified by its relationship to the right to remain in office under general conditions of equality. Thus, this not only demonstrates the futility of the analysis of Article 26 of the Convention, but also highlights how the method of grouping the alleged violations in a single chapter blurs the edges of the rights protected by the Convention and weakens the quality of the Court's arguments when substantiating the alleged violations.
9. This foregoing is the reason for this separate opinion because, although I agree with the declaration of the violation of Articles 8(1) and 23(1)(c) and, consequently, voted in favor of the third operative paragraph, I only did so due to the violation of those two articles. The method used by the Court in this judgment did not allow me to adequately express my legal position, because I

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<sup>15</sup> Cf. *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 6.**

<sup>16</sup> Cf. *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2019. Series C No. 395. **Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 17.**

consider that, not only is the justiciability of the right to work not legally viable in the proceedings before the IACtHR, but even that, based on the criteria developed in case law, the violation of Article 26 has not been proved in this case.

**ii) The ambivalent interpretation of Article 23 in relation to the removal from office of public officials**

10. In addition to the criteria that led me to accord my partial vote to the third operative paragraph, I find it relevant to refer to some problematic elements of the analysis of the merits, starting with the interpretation of the meaning and scope of Article 23 of the Convention. In the instant case, the Court found that the violation of the right of access to public office under general conditions of equality had been violated, considering that the decision that terminated the appointment of Mr. Casa Nina was arbitrary, since it did not respond to the permitted causes in order to ensure his independence in the office of provisional prosecutor. Even though I agree with this reasoning, I should note that the Court overlooked a very important debate that the case again brought to the table related not to Article 23(1)(c) but rather to Article 23(2).
11. The instant case elaborated on a jurisprudential position based on previous decisions relating to judicial officials<sup>17</sup> in relation to the criteria for removal from office, in which the issue of the literal interpretation of the limitations to political rights contemplated in Article 23 was not addressed. The Court indicated, "[...] this specific guarantee for prosecutors, applied in the same way as the protection mechanisms recognized for judges results in the following: (i) that removal from office is exclusively due to the permitted causes, either by a proceeding that complies with judicial guarantees or because the mandate has ended; (ii) that prosecutors can only be dismissed because of serious disciplinary offenses or incompetence, and (iii) that any process against prosecutors must be settled using fair, objective and impartial proceedings, pursuant to the Constitution or the law, because the discretionary removal of prosecutors gives rise to the objective doubt about their effective possibility of exercising their functions without fear of reprisals."<sup>18</sup>
12. To the contrary, in the recent decision in the case of *Petro Urrego v. Colombia*, the Court reiterated the position taken in the case of *López Mendoza v. Venezuela*<sup>19</sup> according to which "[...] Article 23(2) of the American Convention makes clear that this instrument does not allow any administrative body to apply a sanction involving a restriction (for example, imposing a

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<sup>17</sup> Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, and *Case of Rico v. Argentina. Preliminary objection and merits.* Judgment of September 2, 2019. Series C No. 383.

<sup>18</sup> Cf. *Case of Casa Nina vs. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2020. Series C No. 419, para. 80.

<sup>19</sup> Cf. *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 107.

sanction of disqualification or dismissal) on someone due to social misconduct (in the performance of public service or outside of this) that affects the exercise of their political rights to elect and be elected. This may only occur through a judicial act (judgment) by a competent judge in the corresponding criminal proceedings.”<sup>20</sup> On this occasion, although the Court based its position on a literal and teleological interpretation of the article, it accorded a differentiated category to the political rights of officials elected by popular vote, which is not justified by the literal meaning of the article, without explaining the grounds for its position.

13. The fact is that neither then nor now has the Court addressed the fact that Article 23 does not recognize differences in treatment between the political rights of public officials based on the manner of their appointment, even though it has founded its reasoning on an interpretation that is fundamentally literal.<sup>21</sup> Moreover, the Court has not provided sufficient arguments when propounding differences in the level of protection of the rights of public officials in its case law.
14. In addition, the void persists between the scope of Article 23(2) and the specificity of the hypotheses proposed for the limitation of political rights. The decision explicitly indicates that, in the case of prosecutors, removal from office – as a form of limitation of political rights – is acceptable under the Convention even though this was not ordered based on “sentencing by a competent court in criminal proceedings.” The latter also leads us to consider that the Convention does not establish an absolute prohibition that, in certain circumstances, prevents disciplinary law affecting stability in office.

**iii) The absence of a relationship between the notions of job stability and the criteria that condition provisional appointments: the term**

15. As I indicated when referring to the Court’s practice of addressing the alleged violations in a single chapter, blurring the scope of each of the Convention’s rights and affecting the solidity and rigor of the decision, I consider that the analysis made in this case of the right to job stability in relation to judicial guarantees and the right of access to public office under general conditions of equality leads to confusions that result in a reduction in its sphere of protection.
16. The Court asserts that the determination of a specific term or condition in the resolution appointing a provisional prosecutor is sufficient to ensure his job stability, not only as an element

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<sup>20</sup> Cf. *Case of Petro Urrego v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of July 8, 2020. Series C No. 406, para. 96.

<sup>21</sup> Article 23. Political rights.

1. 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.

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.

necessary to protect the independence of this type of official, but also his right to work.

17. This is a position that lacks certainty. The determination of a specific term in the appointment resolution does not prevent stability in office depending on the discretionality of the appointing authority. The determination of a period of time, in most cases months (three months, six months or even a year), still leaves the renewal or termination of the employment relationship to the discretion of the appointing authority and cannot prevent the official from being exposed to external pressures or having his independence affected due to the lack of security about the renewal of the term.
18. I consider that we can truly speak of stability in office in the case of provisional officials if their permanence is exclusively subject to the holding of a competitive selection procedure or to the commission of a disciplinary or criminal offense. It cannot be argued that, based on precarious short-term contracts, job stability is protected as a component of the right to work, because the determination of a specific term does not ensure the continuity in office or avoid discretionality in the termination decision.

**iv) The scope of the concept of control of conventionality in relation to the obligation to amend provisions of domestic law and the concept of an effective judicial remedy**

19. In general, it could be said that the control of conventionality, as a mechanism of the inter-American system of human rights, consists in: (i) the obligation not to apply domestic laws that are contrary to the Convention, and (ii) interpreting the Convention and domestic law together to establish which would be the most favorable to the protection of the human rights of those concerned. The elements of this control have been extensively developed in the Court's case law and are consolidated on the basis of its judicial practice and that of the domestic authorities.
20. In the instant case, the Court analyzed the control of conventionality from two angles. On the one hand, it considered that domestic law needed to be amended in relation to the guarantee of irremovability of prosecutors in Peru; on the other hand, it considered that the right to an effective judicial remedy had been violated because the domestic authorities had not applied the inter-American standard.

**a. Article 2 of the Convention: obligation to amend provisions of domestic law**

21. First, it has to be pointed out that the Court considered that the absence of a term or condition in both the appointment and the removal of Mr. Casa Nina was justified under the provisions of domestic law. Consequently, it criticized not only the authorities' interpretation of domestic law, but also the failure to enact norms leading to the effective observance of such guarantees. Lastly, it ordered the State to make the necessary amendments to its laws to adapt them to the criteria of the Convention.

However, it recognized that, before this measure became effective, it corresponded to all the relevant officials to make an interpretation in keeping with the obligations under international law.

22. The formula adopted in the operative paragraphs reveals a possible contradiction because, if it is possible to make an interpretation of the laws that is in keeping with the Convention, then it is not necessary to make an explicit amendment of them. Decisions that entail State obligations to amend domestic laws should be founded on an evident and irresolvable contradiction with the human rights established in the Convention. In any case, I understand the Court's purpose in simultaneously requiring that domestic law be interpreted in keeping with the Convention and its case law, on the one hand, and the amendment of the law, on the other, is based on consequential logic: If the domestic agents of justice understand that the literal meaning of the domestic laws is contrary to the Convention in the terms indicated in the Court's judgment, it will be necessary to amend the laws.
23. Ultimately, I believe that, in its decisions, the Court should favor the exercise of the control of conventionality by the corresponding interpretation to avoid the delays inherent in amendments to the law, which usually involve lengthy procedures and impede the prompt application of the norms of the Convention and the standards established by the Court.

Humberto Antonio Sierra Porto  
Judge

Pablo Saavedra Alessandri  
Secretary