

**CONCURRING OPINION OF**  
**JUDGES NANCY HERNÁNDEZ LÓPEZ AND PATRICIA PÉREZ GOLDBERG**  
**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF HENDRIX V. GUATEMALA**  
**JUDGMENT OF MARCH 7, 2023**  
**(Merits)**

Concurring with the majority decision of the Inter-American Court of Human Rights (hereinafter, “the Court”), we issue this opinion<sup>1</sup> in order to explain why the condition established in the domestic laws of Guatemala, consisting in requiring nationality by naturalization of those who exercise the notarial function, does not contravene Article 24 of the American Convention on Human Rights (hereinafter, “the Convention” or “the American Convention”) in relation to Articles 1(1) and 2 of this instrument.

1. First, the judgment based its deliberations on determining whether or not Mr. Hendrix was in a similar factual situation to nationals who exercise the notarial function in Guatemala. It made this analysis because, only if the alleged victim had been in a similar situation, would it have been in order to examine whether or not an unjustified differentiated treatment had existed, with the consequent violation of the right to equality established in Article 24 of the Convention.
2. The judgment asserts that, in Guatemala, those who exercise the notarial profession must not only be Guatemalan nationals, but also – among other requirements – they must prove that they have roots in the country. This requirement is justified owing to the many different functions performed by notaries, all of which lead to the conclusion that they exercise a public role that must be subject to the principle of accountability and permanent oversight. This permanent oversight can only be exercised with regard to notaries if they have roots in the country.
3. In this specific case, the judgment concluded that Mr. Hendrix never had either temporary or permanent residence in Guatemala because he was a foreign citizen who lived in Guatemala intermittently while performing functions for an agency of the United States government.<sup>2</sup> Thus, as Mr. Hendrix had no roots in the country in which he sought to exercise the notarial function, he was not in a similar factual situation to other notaries in Guatemala. Consequently, the judgment concluded that the State had not violated Article 24 of the Convention, in relation to Articles 1(1) and 2 of this instrument.
4. While sharing the Court’s reasoning on this point and, evidently, the conclusion that exonerates the Republic of Guatemala from international responsibility, we believe that, in this case, the Court should have examined whether or not the nationality requirement for those who exercise the notarial profession in Guatemala constitutes a discriminatory

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<sup>1</sup> Article 65(2) of the Inter-American Court’s Rules of Procedure: “Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment.”

<sup>2</sup> Para. 69.

treatment that violates the right to equality because this is the central issue of the case brought before the Court.

5. In this regard, first, it should be recalled that, in the case of foreign nationals, it cannot be considered that every difference in treatment by the State constitutes discrimination. As this Court has established, a difference in treatment is considered discriminatory when it has no reasonable and objective justification; that is, when it does not seek a legitimate objective and when there is no proportionality between the means used and the end sought.<sup>3</sup> In other words, in the instant case, in order to determine whether the restriction of the exercise of the notarial profession by a foreign national who has not acquired Guatemalan nationality is compatible with the American Convention and the relevant standards established by this Court, we must examine its legality and its objective, and also the suitability, necessity and proportionality of the requirement.
6. Regarding the first aspect – namely, that the restriction be established by law – it should be recalled that article 2(1) of the Notarial Code establishes that, to exercise the notarial function, it is necessary to be Guatemalan by birth, at least 18 years of age, a lay person, and domiciled in the Republic. Regarding the expression “Guatemalan by birth,” the Constitutional Court interpreted article 2(1) of the Notarial Code in relation to article 146 of the Guatemalan Constitution, and therefore modified the literal text of the said norm and determined that the allusion to “a Guatemalan by birth” should be understood as “by birth and/or naturalized.”<sup>4</sup>
7. We must now ask ourselves what objective the State was seeking when imposing the restriction and whether or not it was compatible with the provisions of the Convention.<sup>5</sup> In this regard, the objective alleged by the State of ensuring that notaries had roots in, or an attachment to, the country in order to guarantee the principle of accountability is legitimate. Indeed, those who exercise the notarial function in Guatemala perform a public function; they are auxiliaries of the administration of justice in non-contentious matters, and they are subject to the principle of accountability by means of permanent oversight by their professional association. Thus, the restriction has an objective that falls within the general interest and, therefore, does not contravene the Convention. Also, as indicated by expert witness Orellana during the public hearing, the nationality requirement seeks to enhance the independence of the exercise of the notarial profession, which is not met merely by the requirement of roots.<sup>6</sup> Thus, roots alone do

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<sup>3</sup> Cf. *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 200; *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2016. Series C No. 315, para. 125, and *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs.* Judgment of June 22, 2022. Series C No. 453, para. 49.

<sup>4</sup> Cf. Expert opinion of Gabriel Orellana Rojas provided to the Court during a virtual hearing held on March 28, 2022.

<sup>5</sup> Article 30 of the Convention: “The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

<sup>6</sup> In this regard, during the public hearing expert witness Orellana stated that:

Therefore, the problem I see here is that, under the Latin notarial system, the notary must be independent in his criteria and in his actions. A foreign notary, for example, a United State notary, could, under certain circumstances, find himself bound by decisions taken by the State Department, by the FAC bureau or any other bureau of the United States that, at a certain moment, classifies certain Guatemalans as unable to enter into legal or commercial relations, transactions and operations with United States citizens. In that case, at a certain moment, this United States notary, who is working and exercising his profession in Guatemala ceases to have the most essential characteristics for a Latin notary, which is his independence, because he will no longer obey his own conscience, or his own

not guarantee the objectives established by law, but rather only one of them, that of accountability, omitting independence, which is central in the exercise of the notarial function.

8. Consequently the measure adopted by the State of Guatemala is suitable to achieve the legitimate objectives sought because the nationality requirement makes it possible to ensure permanent oversight and accountability and reinforces the concept of the independence of notaries. It is an appropriate state measure to achieve the State's legitimate objectives.
9. Lastly, it is necessary to examine whether the nationality requirement is a necessary and proportionate measure taking into account the functions performed by a notary in Guatemala. Nationality can be considered a legal and political relationship that connects a person to the State; it binds that person to the State by ties of loyalty and fidelity and ensures his diplomatic and consular protection.<sup>7</sup> This means that the individual acquires and exercises the rights and responsibilities inherent in membership of a political community. It is worth underlining that the exercise of the public function by notaries is a right, but it is also an obligation because its exercise cannot be denied if requested. The State delegates public functions to the notary by law, and vests him with attestation authority; thus, it is reasonably possible to require the notary to have a legal and political relationship that binds him to the State. The State has competence to establish the system for the attribution of attestation authority that guarantees oversight of the delegated function and effective accountability. Based on these considerations, it may be concluded that the nationality requirement established in the laws of Guatemala is both necessary – because there are no alternatives that permit full compliance with the said objective – and strictly proportionate. Regarding the latter, the sacrifice inherent in the restriction is not exaggerated or excessive in relation to the advantages obtained by this limitation.<sup>8</sup> It should not be forgotten that notaries are vested with attestation authority in the exercise of their functions and, in the case of Guatemala, they are also auxiliaries of the administration of justice. Accordingly, the requirement that such persons be nationals of the State on behalf of which they act does not signify a disproportionate restriction.
10. Additionally, given that the requirement of nationality includes the possibility of

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interests; rather, he knows that if he does not comply with the mandates of the State Department or any other United State public entity that has this authority, he will be failing to exercise the profession or the mandate he has received from the State of Guatemala, which, in this case, is totally unrelated to that relationship. In other words, here, we are losing sight of the characteristic of independence that the Latin notary should have. [...] Also, let us suppose that he could have roots without having nationality; then, the other aspect we face is that any measure that he takes of a precautionary [nature], a bond, a surety, whatever, this is not going to be a complete guarantee that this foreign notary will enjoy total independence in relation to the requirements of Guatemalan law because if, tomorrow, Mr. Hendrix receives a subpoena from the United States preventing him from attending to a list of potential clients in the Republic of Guatemala, he is not independent. Opinion provided by Gabriel Orellana before the Inter-American Court of Human Rights on March 28, 2022.

<sup>7</sup> *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 91 and *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 35. It is also worth pointing out that the said Advisory Opinion OC-4/84 indicates that: "while it is traditionally accepted that the determination and regulation of nationality are matters for each State to decide, contemporary developments reveal that international law imposes certain limits on the broad discretionary powers enjoyed by States in that area and that, currently, the regulation of nationality involves not only the jurisdiction of the States, but also the requirement of the full protection of human rights," para. 32.

<sup>8</sup> *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 83.

obtaining this by naturalization as a result of the decision of the Guatemalan Constitutional Court, we consider that this establishes a less restrictive measure because it allows foreigners to exercise the notarial function when they have become naturalized Guatemalans, rather than completely denying them access to the exercise of this profession; thus, it constitutes a less onerous restriction. We consider that the State's decision was not based on a regulation issued specifically and deliberately to be applied to the alleged victim with a discriminatory purpose due to his condition as a foreigner, or owing to his national origin, and we therefore conclude that the requirement of nationality by naturalization contained in article 2(1) of the Notarial Code of Guatemala is an objective and reasonable requirement that responds to the particular characteristics of the Guatemalan notary.

11. Based on the above, we conclude that the restriction imposed by the State is legitimate, complies with international standards, and does not violate Article 24 of the American Convention on Human Rights in relation to Articles 1(1) and 2 of this instrument.

Nancy Hernández López  
Judge

Patricia Pérez Goldberg  
Judge

Pablo Saavedra Alessandri  
Registrar