

**OPINION OF JUDGE AD HOC ROBERTO DE FIGUEIREDO CALDAS IN RELATION TO
THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN
GARIBALDI V. BRAZIL, DELIVERED ON SEPTEMBER 23, DE 2009.**

I. Introduction

1. Even though I fully agree with the terms of the judgment, prepared collectively and seeking consensus, I submit this opinion with my own reasoning in the hope that it will contribute to a profound reflection by Brazil and other jurisdictional countries; this Court has repeatedly ruled that States were guilty of failing to comply with a reasonable time for deciding litigations without finding a preventive or definitive answer.

2. The violation of the rights to judicial guarantees and judicial protection established in Articles 8(1) and 25(1) of the American Convention on Human Rights has proved to be a constant reality, even if not a permanent one.

3. The Court follows the procedure of acting and delivering judgment only in specific cases and precisely when these are submitted to its jurisdiction. It avoids making a general analysis of the human rights situation in a State *sub judice*. Its intention is that delivery of the judgment and presentation of the grounds will help the State re-examine its own course of action in order to rectify its path, and also to help other jurisdictional States of the inter-American human rights system make their own self-assessment of whether they are in compliance with the Convention.

4. It is worth stating that the purpose of the Court's judgments is to provide a model and an example for the actions of the States. Moreover, the Court expects the States to comply with its decisions and comply with them, irrespective of whether they were handed down against them or against another State.

5. However, as this case deals with the excessive delays in the judicial system and the consequent impunity – chronic evils that always go hand in hand, and for which our Continent does not appear to have an adequate remedy in order to attain the objectives of the Convention – it is worth trying to illuminate the path for those who will follow.

6. The purpose here is not just to punish a violation of the Convention, but to act preventively so that the unjust delay that violates the Convention does not occur. And also not to let the situation reach the stage of violating the Convention because, before this happens, the whole system should function preventively so that the delay never occurs, or only from time to time but not as a general rule.

7. The fundamental goal should be to respect the “reasonable time” (Art. 8(1); but how? This is the question that the nations of the Americas should take up in order to find an answer.

8. In this opinion, I wish to outline a simple model capable, if duly followed by the States, of creating the conditions to resolve judicial delays definitively, easily, promptly and inexpensively.

9. Despite the complexity of the subject matter and the claim made by this statement, since a judicial opinion should also maintain the characteristics of a “simple and prompt” proceeding in order to be understood by the general public with a basic education, I will refrain from presenting a parenthesis with the relevant historical or philosophical explanation.

II. In favor of a distributive model for the Judiciary

10. Consequently, it is time to turn to the question posed: what must be done to obtain simple, prompt justice?

11. Answer: change the usual conception (model or principles) of retributive justice – in force throughout most of the Continent – for distributive justice.

12. There is no innovation or novelty in this. These two principles were initially described by Aristotle, in Ancient Greece, more than two thousand years ago. More recently, John Rawls prepared a contemporary synthesis,¹ which has influenced various judicial reforms.

13. There are just two types of justice followed by contemporary courts: retributive (also called commutative, restorative, rectifying, corrective, sinalagmatic or arithmetic) and distributive (also known as proportionate or geometric).

14. The retributive model is the one that sentences the individual who has broken the law, the debtor, to pay the victim, or creditor, merely what he took from him. In other words, to make retribution, to restitute, taking into consideration just the facts, acts, things or services in question, in a merely arithmetic proportion and in fairly reasonable terms, totally disregarding the individuals involved. There are numerous cases in the courts; violation of a reasonable time and impunity are constant.

15. On the contrary, the distributive model is the one that sentences the individual who has broken the law, or the debtor, to pay the victim, or creditor, more (or much more) than the property that was taken from him or the injury suffered. In other words, in addition to the necessary restitution, it sentences the offender to pay something more, taking into consideration not just the facts, acts, things or services in litigation, but the characteristics or merit of the individuals involved in the dispute, to the extent that they are unequal, such as for example full knowledge of the criminal or injurious act, intent to commit it, acknowledgement of guilt, intention of postponing payment to the creditor, financial capacity, property, rights, schooling, function, position. In other words, personal factors can increase or reduce the sentence. In this model, geometric proportion can be introduced in values that are consequently higher.

16. In the distributive model, it is prohibited to litigate in bad faith and the person who does so is punished. There is fear that the creditor will obtain justice. Consequently, it is more effective in preventing litigations and greatly reducing the number of cases in court, especially those artificial disputes concerning simple collections, repeated by thousands, with little real litigation substance, and that only exist because the debtor wants to postpone the payment of his debt and take advantage of property that belongs to another person.

17. If we take a look at the global panorama, it can be said that, in general, in countries where justice is prompt and respected by society, and feared by offenders and criminals, where the ability to punish prevails, the number of cases is limited, the country is usually developed, and the model is distributive.

18. Distributive justice is the appropriate model for countries that are trying to develop, and overcome the delay in processing court cases, corruption and impunity.

19. If the countries of the Americas changed their model and their method of sentencing, there would be a considerable reduction in the excessive number of judicial actions, the

¹ In 1967, in his article "Distributive Justice", developed further in his classic 1971 study "A Theory of Justice."

increases in justice-related expenditure, and the construction of new prisons, and accelerated automation and procedural reforms. If no changes are made, the chronic and tragic situation of justice in our countries will only get worse.

20. We must also change the way we approach judicial reforms; it is not enough merely to reduce the time it takes to process a case by about one-third, for example, because the system has already collapsed. We need to reduce the length of the delay of court proceedings much more, ten or twenty times more, aiming at dealing with rulings that can be processed rapidly, making remedies truly simple and prompt, and achieving respect for least a reasonable time. To the contrary, the consequence will be that the Inter-American Court will continue to deliver judgments based on the slowness of the proceedings indefinitely.

21. The general public must be guaranteed access to real, substantial justice; not access to a merely theoretical, rhetoric, symbolic, unreal, virtual, nominal, partial and relative justice.

22. As stated by Bobbio, *“una sociedad en la que el gobierno adopte medidas de justicia distributiva que conviertan a los ciudadanos en iguales no sólo formalmente o frente a la ley, como se suele decir, sino también sustancialmente”*² [A society in which the Government adopts measures of distributive justice that converts the citizens into equals, not only formally or before the law, but also substantially].

III. International protection of the human right to jurisdictional services within a reasonable time

23. We should remember the words of a 1920 address by Ruy Barbosa, the brilliant Brazilian jurist, whose bust adorns the entrance hall of the Inter-American Court of Human Rights (beside the Venezuelan, Andrés Bello). According to Barbosa, *“justiça atrasada não é justiça, senão injustiça qualificada e manifesta”*³ [Delayed justice is not justice, but true manifest injustice]. This is possibly an elaborate version of the universal juridical aphorism in several languages, for example: *justiça atrasada é justiça denegada*, “*justice différée est justice refusée*,” “*justicia atrasada es justicia denegada*,” in other words, “*justice delayed is justice denied*.”

24. The idea of justice done is inconceivable if the injured individual does not receive prompt reparation or, at the very least, does not obtain it within a reasonable time, which varies from one level of the courts to another. While a case is pending judgment, neither party feels that he has received justice.

25. Slowness discourages resorting to the courts to settle disputes (with serious repercussions on the right of access to justice) and a factor that encourages the individual who does not comply with his social obligations or the criminal to act without worrying much about whether or not he will be prosecuted, because most of them are not or, when they are, the offense has prescribed.

26. This is why human rights have established access to justice and to the settlement of disputes within a reasonable time, since the 1948 Universal Declaration of Human Rights:

² BOBBIO, Norberto. *De la ideología democrática a los procedimientos universales*. Jurídica Boletín Mexicano de Derecho Comparado, No. 103, January-April 2002. Available at: <http://www.juridicas.unam.mx/publica/rev/boletin/cont/103/inf/inf10.htm>. Access: 14 Nov. 2007.

³ BARBOSA, RUY. *Oração aos moços*. São Paulo: Russel, 2004, p. 47.

"Article VIII - Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." (Bold added by the author.)

"Article X - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

27. The American Declaration of the Rights and Duties of Man, also dating from 1948, includes similar terms in relation to access to justice and even clearer wording as regards the guarantee of promptness in the hearing of the dispute by the courts and by the public administration:

"Article XVIII. Right to a fair trial. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." (Bold added by the author.)

"Article XXIV. Right of petition. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon." (Bold added by the author.)

28. By indicating that the State's omissions violate the rights of those subject to its jurisdiction, the Court seeks to implement the provisions of the American Convention on Human Rights (Pact of San José, Costa Rica), adopted by the Organization of American States (OAS) on November 22, 1969, which entered into force at the international level on July 18, 1978, in accordance with its Article 74(2).

29. In the case of Brazil, this important treaty came into force at the international level on September 25, 1992, when it deposited its instrument of adherence before the OAS, and at the domestic level on November 9, 1992, with the publication in the Official Gazette of the Union⁴ of the Presidential Decree which made it an obligation erga omnes.

30. The following are the provisions of Articles 8 and 25 of the Convention:

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a **reasonable time**, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. [...]" (Bold added by the author.)

Article 25. Right to Judicial Protection

1. Everyone has the right to **simple and prompt recourse**, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. [...]" (Bold added by the author.)

31. The protection that international law provides for a prompt trial, within a reasonable time, is clear; based on the foregoing Brazil is evidently not complying with this.

32. The fact that, for a long time, the case law of the Inter-American Court of Human Rights has been very firm in this regard is extremely important. This can be seen from its first two judgments in this regard in 1997; the first of which was *Genie Lacayo v. Nicaragua*, of January 29, 1997.

33. Subsequently, but still the same year, the Court heard *Suárez Rosero v. Ecuador* during the first session presided by Judge Antônio Augusto Cançado Trindade who, with his

⁴ Official Gazette of the Union of 9/11/92, Section 1, p. 15,562/15,567.

careful and abundant reasoning, established a unanimous position.

34. In fact, the above-mentioned decisions are in line with the case law of the European Court of Human Rights, where there had been several earlier precedents in this regard.

35. Consequently, the requirement of promptness in judicial proceedings is not new, and goes back to the most important treaties for the protection of human rights, which should be implemented by Brazil⁵ and throughout the Americas.

IV. Conclusion

36. The Court found that the Brazilian State had violated Articles 8(1) and 25(1) of the Convention, and the States members of the inter-American human rights system should heed this ruling, in the sense of reforming their judicial bodies to adjust the processing of cases to the duration required by the norms and by the citizens of the Americas, transcending this stage of chronic non-compliance with legal time limits by the courts and by the rest of the system, such as the police, in the instant case, whose investigation took more than 60 times the legal 30-day time limit to conclude the inquiry.

37. Delays are among the most serious judicial errors committed by the State, and must be compensated according to international law. Procedural promptness engenders fluidity and respect in social relations, appropriate to the level of development to which the nations of the Americas aspire.

Roberto Figueiredo Caldas
Judge *Ad Hoc*

Pablo Saavedra Alessandri
Secretary

⁵ According to the precept established in the Constitution by Constitutional Amendment No. 45, of 2004: "Art. 5. (...) LXXVIII –Everyone shall be ensured a reasonable duration of proceedings in the judicial and administrative sphere, and the means to guarantee promptness in their processing."