

## SEPARATE CONCURRING OPINION OF JUDGE JACKMAN

I have voted in favor of this judgment because I am in complete agreement with the conclusions reached by the Court, as well as with the operative paragraphs.

Nevertheless, I feel obliged to put on record a certain level of disagreement with the *ratio decidendi* of the Court in relation to the violation by the State of Nicaragua ("the State") of the rights embodied in Article 23 of the American Convention on Human Rights ("the Convention"), to the detriment of the YATAMA candidates.

The specific focus of this opinion is the Court's analysis (in paragraphs 214 to 229 of this judgment) of the State's responsibility in relation to Article 23(1)(b) of the Convention. I propose to consider this analysis, taking into account the provisions of Article 1(2) and Article 2.

Article 1(2) establishes that:

2. For the purposes of this Convention, "person" means every human being.

Article 23(1)(b) establishes that:

1. Every citizen shall enjoy the following rights and opportunities:  
[...]
- 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

Article 2 stipulates that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The principal arguments of this judgment concerning the violation of political rights (Article 23) and the right to equal protection of the law (Article 24) committed by the State can be summarized as follows:

(1) The 2000 Electoral Act only permitted participation in electoral processes through political parties, a form of organization alien to the customs, organization and culture of the "indigenous and ethnic" communities of the Atlantic Coast (para. 214).

(2) There is no provision of the American Convention that allows it to be established that citizens should belong to a political party in order to stand as candidates for public office. The Convention recognizes that, for electoral purposes, other forms of political organization may be appropriate and even necessary to attain common goals, by encouraging or ensuring the participation of specific groups (para. 215).

(3) According to domestic laws, the State is obliged to respect the forms of organization of the communities of the Atlantic Coast. The State has not demonstrated the existence of an urgent public interest that would justify the requirement for YATAMA to become a political party so that its members can

participate as candidates in the elections or that the latter must participate through political parties (para. 218).

(4) **Based on these considerations** (emphasis added), the restriction imposed constituted an undue limitation of the exercise of a political right, “taking into account the circumstances of the instant case, which are not necessarily comparable to all the circumstances of all political groups that may be present in other national societies or sectors of a national society” (para. 219). “[A]ny requirement for political participation designed for political parties, which cannot be fulfilled by groups with a different form of organization, is also contrary to Articles 23 and 24 of the American Convention” (para. 220).

In my understanding, the *ratio* described in point (4) *supra* is an unnecessarily indirect and potentially confusing interpretation of the nature of the right embodied in Article 23(1)(b), the language and purpose of which could not be more clear. A “citizen” – who must obviously be an “individual” and not a group, in the terms of Article 1(2) – has an absolute right **“to vote and be elected”** in democratic elections, as established in the said article. In this way, any requirement that a “citizen” must be a member of a political party or of any other form of political organization to exercise that right clearly violates both the spirit and letter of the norm in question.

It is completely irrelevant whether that requirement can or cannot be “complied with by groups with a different form of organization,” such as YATAMA in the instant case. It is the individual right of the individual “citizen” that is proclaimed and must be protected by the Court. I am concerned that by including questions of culture, customs and traditional forms of organization in its ruling on this issue, the Court is running the risk of reducing the protection that should be available to every “citizen” under the jurisdiction of every State, irrespective of his culture, customs or traditional forms of association.

Consequently, in my opinion, merely by imposing the requirement under discussion, the State violated the right of the members of YATAMA to vote and be elected.

My opinion is supported by a careful reading of the relevant sections of the *travaux préparatoires* of the Convention. From these, it is clear that the Conference that drafted and adopted the Convention specifically rejected a proposal that could have included in the current Article 23(1), a right to belong to political parties, the activities of which would be “protected” by law.

It would be a great shame if this judgment of the Court opens the way to interpretations of this important article that the authors of the Convention, in their wisdom, made an effort to exclude.

Oliver Jackman  
Judge

Pablo Saavedra-Alessandri  
Secretary