

CONCURRING OPINION OF JUDGE DIEGO GARCÍA-SAYÁN

1. This is the first case that the Inter-American Court of Human Rights hears on the crucial issue of political rights. To the significance with which this circumstance alone endows the case is added its intrinsic importance for the affirmation and protection such rights in situations such as those described therein.

2. Regardless of this case, there is no doubt that the exercise of political rights and the fundamental components of democracy are delicate matters that, in the past and nowadays, have affected vital aspects of the life of the region's population. Governments emerging from military coups are a thing of the past, but today's reality reveals a multitude of threats to democracy and to political rights that pose daily challenges that must be confronted in almost all the countries of the region. The Court, with this judgment, strengthens and develops vital aspects of the political rights stipulated in the Convention. For all these reasons, I consider it necessary to emit this concurring opinion that seeks to add other considerations and perspectives to those already included in the judgment, which I support completely.

3. As the judgment truly states, representative democracy is determinant throughout the system of which the American Convention on Human Rights forms part. Indeed, from the start, the Organization of American States (OAS) was explicit in stating that democracy and its promotion is one of the basic purposes of the Organization. Already, in 1948, the OAS Charter proclaimed the fundamental rights of the person, without distinction based on race, nationality religion or sex, and stipulated that respect for human rights was one of the fundamental obligations of States. Among the first objectives of the OAS was the *"...promotion and strengthening of representative democracy."*

4. Thus, since the inception of the OAS, democracy and respect for the essential human rights were conceived as interdependent. This connection is present in the preamble to the Charter, in the American Declaration of the Rights and Duties of Man and, particularly, in the American Convention on Human Rights. The 1959 Declaration of Santiago described this conceptual unity between human rights and democracy when defining inter-American democratic standards. Subsequently, Resolution 991, "Rights and democracy," established that the members of the OAS should strengthen their democratic systems through the full respect for human rights.

5. This is the context for the provisions of Article 23 of the Convention on political rights. It is a significant component of a broad normative process for the conceptual affirmation of political rights which, evidently, are not exhausted by the contents of the provisions of the Convention. Based on the grounds and findings set out in the judgment, the Court considers correctly that this is one of the rights violated by the State of Nicaragua in the instant case. The grounds for the violation of political rights in *YATAMA v. Nicaragua* make it advisable to consider the plentiful body of arguments and opinions that have been developed in the inter-American system over recent decades concerning the exercise of political rights in the affirmation of democracy, one of the essential obligations of the States Parties to the inter-American system.

6. Throughout the 1990s, democratic values were reaffirmed at the global and inter-American levels. Within the inter-American system, important decisions were adopted at the hemispheric Summits and at the OAS General Assemblies designed to strengthen democratic principles, and the first steps were taken to produce what was later, with the Inter-American Democratic Charter, called the "collective

defense of democracy.” In this process, Resolution 1080 of 1991, the 1992 Protocol of Washington, and Resolution 1753 of 2000 in relation to the case of Peru stand out. This process has gradually consolidated the notion that there is no opposition between the principle of non-intervention and the defense of democracy and human rights, among other reasons because the commitments to defend human rights and democracy are made by countries in the free exercise of their sovereignty.

7. It is a well-known fact that the list of human rights has never been static. It has gradually been defined and embodied in legal instruments with the development over time of society, the organization of the State, and the evolution of political regimes. This explains why we are currently seeing the development and expansion of political rights, and even what some have called the “human right to democracy.” This development is expressed in the Inter-American Democratic Charter, the juridical instrument that the inter-American system has engendered to strengthen democracy and related rights. Its first article stipulates that: *“The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.”*

8. Following the same rationale, the inter-American system has been defining and refining the concept of democracy, strengthening the evolutive meaning of political rights above and beyond the text of the provisions of Article 23 of the Convention. This development has to be borne in mind when deciding a contentious case on the matter as, indeed, the Court has done in this judgment.

9. In this case, the Court has ruled on the alleged violation of political rights (Article 23 of the Convention) and on equality before the law (Article 24 of the Convention), in addition to the violation of Articles 8 and 25. This separate opinion does not need to repeat the findings of the Court that are set out in the judgment in the Case of YATAMA. As I pointed out above, I fully share the content of this judgment and refer to it. Nevertheless, it gives rise to some reflections of a general nature on political rights that are prompted by this specific case.

10. Article 23 of the American Convention on Human Rights stipulates a series of State obligations with regard to political rights. These are grouped into three types of rights which entail State obligations as a logical counterpart: (1) to take part in the conduct of public affairs, directly or through freely chosen representatives (Art. 23(1)(a); (2) 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 (Art. 23(1)(b), and; (c) to have access, under general conditions of equality, to the public service of [one's] country (Art. 23(1)(c). In this judgment, the Court declares that all the rights embodied in Article 23(1) have been violated. The Court also declares that Article 24 of the Convention has been violated as regards the right to equality and non-discrimination.

11. A first general consideration is that, in this case, the political rights which the Court considers that Nicaragua has violated have been violated twice. On the one hand, because the provisions of Electoral Act No. 331 of 2000 violated Article 23 owing to the ambiguity of several of its provisions, the obstacles that it established to the electoral participation of organizations other than political parties, and the requirements that it establishes for the presentation of candidates in at least 80% of the municipalities of the respective districts and 80% of the total number of candidacies. On the other hand, because the State has failed to comply with its obligation, established in Article 1(1) and 2 in relation to Article 23, to produce the appropriate conditions and mechanisms for the participation in public affairs of those who wished to be candidates in the Atlantic Coast of Nicaragua as members or representatives of YATAMA, an organization that represents the indigenous peoples of this region of the country.

12. The right to participate in Government, as all juridical categories, has evolved and has been reformulated with historical and social progress. Indeed, its conceptualization has been enhanced over the period that has elapsed since the adoption of the Convention almost 40 years ago. Although, in the initial instruments of the OAS, the reference to representative democracy and political rights was almost exhausted in the right to vote and be elected, the text of the Convention was already an important step in the evolutive meaning of political rights including other important components such as the nature of elections (“...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 voter...” Art. 23(1)(b)).

13. In recent years, this evolution has developed substantially the concept of the right to take part in the conduct of public affairs, which, nowadays, is a reference point that includes a very wide variety of components that can range from the right to support the removal of elected authorities, to supervise public administration, to have access to public information, to propose initiatives, to express opinions, etc. Indeed, the broad and general concept of the right “to take part in the conduct of public affairs,” as it appears in the Convention, has been refined and expanded.

14. At the beginning of the twenty-first century, the member countries of the Inter-American system share an important characteristic that was almost exceptional when the American Convention on Human Rights was adopted in 1969: all the Governments have been democratically elected. The actual context, resulting from complex political and social processes, has given place to new problems and challenges as regards the participation of the citizen in the conduct of public affairs. This has had an impact on the provisions of the fundamental juridical instruments of the inter-American system.

15. It was in this context that the Inter-American Democratic Charter emerged, adopted by consensus by all the countries of the system in 2001, following a broad consultation process of civil society throughout the continent. In this and other aspects, the Charter embodied conceptual developments which, at that time, were derived from this new situation, giving a new formal dimension to a series of juridical categories, and constituting a transcendental landmark in the inter-American system as regards the evolutive content of political rights. Among other aspects, the Democratic Charter develops the concept of the said right to take part in the conduct of public affairs and, as a counterpart, the State's obligations in this regard.

16. The Inter-American Democratic Charter emphasizes the importance of the citizen's participation as a permanent process that strengthens democracy. Thus, the Charter declares that “*Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order*” (Article 2). This general declaration acquires a fundamental teleological meaning for the conceptual development of political rights that the Charter itself establishes in its Article 4. The foregoing constitutes an approach based on consensual expression, which is directly related to the interpretation and application of a broad provision such as the one contained in Article 23 of the American Convention.

17. Indeed, Article 4 of the Inter-American Democratic Charter enumerates a series of “essential components” of the exercise of democracy that express the conceptual development of the right to take part in the conduct of public affairs, and that are condensed in this inter-American instrument. It underscores a series of State obligations which are merely the counterpart of the rights of citizens:

“...Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press.” In the absence of progress in clarifications such as these, which the American community has adopted consensually, it is evident that the said right to take part in the conduct of public affairs would be frozen in time, and not reflect the changing requirements of the democracies in our region.

18. The second component of political rights, as expressed in Article 23 of the Convention, is “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” (underlining added). This provision refers us to one of the fundamental requirements of representative democracy that has inspired the normative and purposes of the inter-American system since its conception. It stresses that elections should be genuine and periodic and also the characteristics of the vote: universal, equal and secret, in order to comply with a requirement that is also mentioned in Article 23: to guarantee the free expression of the will of the voters. It is evident that, unless this essential ingredient is present, other forms of participation would be weakened as they would not encounter, in elections, a way to build strong democracies for assuming and exercising public office.

19. In this judgment, the Court has revealed clearly the findings that lead it to conclude that, in this case, the State of Nicaragua has violated the norm cited in the preceding paragraph. Consequently, I refer to this reasoning and these conclusions. In this regard, Article 23 is very clearly formulated and the proven facts show that this violation occurred. Nevertheless, taking into account the complexities of political processes in general, and of electoral processes in particular, it cannot be ignored that the components established in the said provision of Article 23 are, at this point in juridical evolution, insufficient and the countries of the inter-American system have understood this.

20. The wealth of the political, social and juridical processes that the region has undergone has been expressed in a parallel process of refinement of the fundamental characteristics of electoral processes and the vote of the citizen. The varied and eventful course of the political processes has revealed that, in order to guarantee “the free expression of the will of the voters,” the component of “universal and equal suffrage by secret ballot” was essential but, also, insufficient, given the very different threats and difficulties posed by the reality. Thus, the difficulties – or facilities – of access to means of communication, the complexities in the registration of candidates or the characteristics of the electoral rolls, became serious problems in a context in which, owing to the new political context, “universal and equal suffrage by secret ballot” no longer appeared to be an issue.

21. Therefore, as in other components of the political rights mentioned in Article 23(1) of the Convention, the fundamental concept of the “free expression of the will of the voters” has been enhanced by important institutional evolutions in domestic law and in the inter-American system itself in light of which this general provision of the Convention must be interpreted and applied, with regard to both the rights of the citizens and the obligations of the State. As regards the right to take part in the conduct of public affairs, the Inter-American Democratic Charter has summarized and expressed the current consensual status in the inter-American system with regard to the “free expression of the will of the voters.”

22. Indeed, the Charter reiterates principles that coincide in general with the contents of the Convention when it indicates that: *“Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting*

and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government” (Article 3).

23. As we can see, at least two important aspects of the requirements that the Convention already contained were clarified and developed by the Inter-American Democratic Charter: (a) not only the access to power but also its exercise should be subject to the rule of law; in this way, the “legitimacy of exercise” is added as an inter-American principle to the already recognized “legitimacy of origin”; (b) the pluralistic system of political parties and organizations. The political parties merit a specific additional consideration in the Charter, since it stipulates that *“The strengthening of political parties and other political organizations is a priority for democracy. Special attention will be paid to the problems associated with the high cost of election campaigns and the establishment of a balanced and transparent system for their financing”* (Article 5, underlining added). Reading the American Convention in light of these conceptual evolutions that the inter-American consensus has expressed in the Democratic Charter shows that the free expression of the will of the electors would be affected if authorities elected under the rule of law (legitimacy of origin) exercise their functions in violation of the rule of law.

24. In relation to political parties and organizations, this is an absolutely central issue that has direct repercussions as regards the rights of those who tried unsuccessfully to be candidates for YATAMA on the Atlantic Coast of Nicaragua. Curiously, this issue is not mentioned explicitly in the OAS Charter or in the American Convention. However, the conceptual essence of representative democracy presumes and requires ways of representation that, in light of the provisions of the Democratic Charter, would be the parties and “other political organizations” that should be protected and also strengthened according to the provisions of Article 5.

25. With regard to political parties and “other political organizations,” a first issue to mention is that, since they are considered essential elements for channeling the free will of the voters, it is the State’s obligation to provide the conditions for strengthening these means of representation; *contrario sensu*, to abstain from adopting measures that could weaken them. The Democratic Charter mentions explicitly the issue of the financing of electoral campaigns as a matter to which attention should be paid, and also emphasizes the need to ensure *“the establishment of a balanced and transparent system for their financing.”* Without mentioning it, the Democratic Charter is conveying that, faced with possible imbalances and inequalities, a counterbalancing system should be ensured in order to achieve the desired equality. Accordingly, this clearly calls for effective actions that preferably benefit those affected by such imbalances and inequalities.

26. In the instant case, it has been proved that YATAMA’s form of organization in order to take part in the 2000 electoral process met with difficulties owing to the provisions of Electoral Act No. 331 of 2000. This violated the rights of those who intended to be candidates, and affected the principle that it is possible to organize in ways other than political parties in order to exercise the right to take part in the conduct of public affairs, in this case prejudicing an organization that represented the indigenous peoples of this part of Nicaragua. Consequently, the State not only obstructed their participation but also did not adopt the necessary measures to facilitate the participation of an organization such as YATAMA.

27. In this line of reasoning, it should be understood that granting the necessary facilities to the so-called “political organizations” is designed to generate the conditions for expanding and consolidating the participation of the citizens in the conduct of public affairs. This should not be understood as opposing but rather as

complementing the existence of the political parties and strengthening them, since they are a necessary means of representation and participation in a democratic society. In this perspective, it is perfectly legitimate and concordant with the letter and spirit of the Convention that, within the national system of laws, there are homogeneous norms that emphasize the participation of political parties in the electoral processes as well as regulations designed to strengthen their representative and democratic nature, without detriment to their independence from the State. In addition, it is legitimate that domestic laws should include legal provisions concerning "other political organizations," aimed at facilitating the participation of specific sectors of society, as could be the case of the indigenous peoples.

28. The third component of political rights protected by Article 23 of the Convention stipulates that every citizen should "... have access, under general conditions of equality, to the public service of his country" (underlining added). This aspect of political rights has to be understood systematically in relation to both the other explicit components of the political rights contained in Article 23(1), and the rest of the Convention and the inter-American legal system, in particular Article 24 of the Convention which refers to the right to equality and non-discrimination.

29. In this regard, when considering the provision of Article 23 on the "general conditions of equality," this should be referred to two aspects that can and should be understood concurrently and simultaneously. First, the norm establishes that it is necessary to guarantee access to public office to everyone "under general conditions of equality." This means that specific measures should be promulgated to facilitate the access to public office of the sectors of the population that may face special disadvantages and, thus, inequality – as could be the case of the indigenous peoples. In this case, it has been proved that Nicaragua did not adopt such measures; to the contrary, the 2000 Electoral Act created obstacles to this access.

30. Second, this general provision on access to public service, consistent with Article 29 of the Convention should be interpreted not only in relation to appointments or designations by the authority but also with reference to the public service that is exercised by popular election. In other words, the Court does not accept a restrictive interpretation referring only to public office or positions derived from appointments and designations. This is, without doubt, the meaning of this provision that seeks, precisely, to stress the principle of equality in the specific sphere of public service.

31. The above should be read and interpreted in close connection with the provisions of Article 24 of the Convention as regards equality and non-discrimination. As the judgment states, Article 24 of the Convention prohibits discrimination *de facto* and *de jure* with the obligation that this entails for the State to respect the said principle of equality and non-discrimination for all the rights embodied in the Convention and in all domestic laws that it adopts. In this regard, the provisions of Article 23(1)(c) are designed to emphasize the significance that the Convention accords to the principle of equality and non-discrimination in the right to take part in the conduct of public affairs.

32. Consequently, given the proven facts in this case in light of the reasoning derived from the provisions of Article 23(1)(c) concerning the general conditions of equality and of Article 24 concerning equality and non-discrimination, the State's obligation not to tolerate practices or norms that could have a discriminatory effect is clear. This should not be understood as contrary to homogeneous rules and conditions for all of society and all citizens with regard to the full exercise of political rights.

Diego García-Sayán
Judge

Pablo Saavedra-Alessandri
Secretary