

DISSENTING OPINION OF JUDGE AD HOC
ALEJANDRO MONTIEL ARGÜELLO

1. Under Nicaraguan legislation, the Electoral Power, independent of the three traditional branches of government, is responsible for the organization, administration and supervision of elections. The highest body of the Electoral Power is the Supreme Electoral Council, which has jurisdictional and administrative functions. It is evident that the registration of candidates to participate in the elections was an electoral jurisdictional function that required a decision on whether a party or alliance of parties presenting a request was legally authorized to present it, whether the request complied with the legal requirements, and whether the candidates fulfilled the necessary conditions.

2. In this case, the Supreme Electoral Council exercised its functions by denying the registration of the candidates presented by YATAMA for mayors, deputy mayors and municipal councilors in the Autonomous Regions of the Atlantic Coast for the elections held in 2000. The resolution issued by the Supreme Electoral Council constituted the culmination of a process to determine whether YATAMA had the right to present candidates and, concerning this process, no specific violation has been alleged of the judicial guarantees contained in Article 8(2) of the Convention, which, using a broad interpretation, has been applied to many types of proceedings and not merely to criminal proceedings.

3. Regarding Article 23 (Right to Participate in Government) of the American Convention on Human Rights it has been alleged that it has been violated because the YATAMA candidates were prevented from participating in the elections. It has also been alleged that Article 24 (Right to Equal Protection) has been violated, because the YATAMA candidates were required to comply with the same conditions as non-indigenous candidates, and that Article 25 (Judicial Protection) has been violated, because a recourse to protect participation in the elections had not been provided for.

4. It should be noted that Article 23(2) grants the States the right to regulate the exercise of political rights exclusively on the basis of age and some other conditions. Regulations for other reasons are contrary to the Convention and constitute violations of rights. Nevertheless, the regulations that are permitted, even though only with restrictions, refer to the individual, because this provision cannot be interpreted in the sense that all other regulations, even though they do not refer to the individual, violate human rights, since it is evident that in order to hold elections, it is necessary to regulate the parties that can participate in them, the nomination of the candidates of these parties, and many other issues. It is on the basis of these regulations that elections can be held in an orderly manner and be representative of the people's will, and it was in application of these permitted regulations that the Supreme Electoral Council denied the registration of the YATAMA candidates.

5. With regard to Article 24, it was precisely in application of the principle of equality that the indigenous candidates were required to fulfill the same conditions as the non-indigenous candidates. With the exception of very special cases, a State cannot have different laws for each of the races that compose it for the election of authorities who exercise their functions in territories inhabited by different races, such as the municipalities of the Autonomous Regions.

6. In relation to Article 25, it should be noted that, in its Advisory Opinion OC-9/87 ("Judicial Guarantees in States of Emergency," para. 27), the Court stated that: "in the Spanish text of the Convention, the title of this provision (Article 8(1) of the Convention), whose interpretation has been specifically requested, is "Judicial Guarantees."¹ This title may lead to confusion because, strictly speaking, the provision does not recognize any judicial guarantees. Article 8 does not contain a specific judicial remedy, but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention."

Article 25 of the Convention is entitled "Judicial Protection" and establishes the right to a simple and prompt recourse before a competent court or tribunal and, later describes the State's undertaking "to develop the possibility of judicial remedy."

These two provisions have been interpreted as if they established the remedy of amparo as obligatory in all cases, but this is not so.

7. Nicaraguan electoral legislation establishes a series of remedies against lesser electoral officials, which, in some cases, can reach the Supreme Electoral Council, but it expressly excludes the remedy of amparo in relation to electoral issues, as do the laws of many other countries. Also, many other countries, like Nicaragua, exclude judicial decisions from the remedy of amparo because they consider that ordinary recourses are sufficient to guarantee human rights. In the instant case, when the Supreme Electoral Council ruled on YATAMA's request for the registration of its candidates, it was not exercising a simple administrative function, but was acting as a judicial tribunal on electoral matters and, consequently, the remedy of amparo which YATAMA applied for before officials of the Judiciary was inadmissible against this decision. As the grounds for this legal provision, it should be recalled that the high level of partisan politicization that exists in many countries makes it preferable not to politicize the Judiciary; and this would inevitably happen if it was entrusted with electoral matters. Thus, both because this was a jurisdictional decision and because it dealt with an electoral issue, the remedy of amparo was inadmissible.

8. Since this case refers to permitted regulations, it is outside the Court's competence to examine the Supreme Electoral Council's resolution to determine whether it was issued in correct application of the Nicaraguan electoral laws. This would be equivalent to converting the Court into a higher court of appeal than all the national courts, distancing it from its functions of interpretation and application of the provisions of the Convention. Moreover, the Court cannot consider Nicaraguan laws in the absence of any evidence that they are contrary to human rights and bearing in mind that, under the same laws, YATAMA took part in the 2004 local elections without any problem.

9. To conclude I would like to put on record the reasons for my dissent on the points relating to the publication of this judgment, the reform of the law, and the adoption of other measures, because, as I said in paragraph 14 of my opinion in the Serrano Cruz Sisters v. El Salvador, judgment of March 1, 2005, Article 63 of the Convention does not entrust the Court with promoting human rights and the points cited constitute promotion rather than reparation for the victims.

10. The contents of the preceding paragraph should not be interpreted to mean that I consider that Nicaraguan laws are perfect as regards the treatment of the indigenous peoples who inhabit the Atlantic Coast. The Government of Nicaragua,

¹ "Right to a Fair Trial" in the English text

respectful of the rights of the indigenous communities, is aware of the defects. Consequently, the 1995 constitutional reform defined the autonomy regime for the ethnic communities and, in 1987, the Statute of Autonomy of the Atlantic Coast Regions was enacted (Act No. 28) while, in 2003, the Act concerning the Communal Property of the Indigenous Communities and Ethnic Communities of the Autonomous Regions of the Atlantic Coast was promulgated (Act No. 445). Moreover, it has created an office of the Special Adviser on Atlantic Coast Affairs within the Presidency of the Republic, and the position is currently filled by one of the persons who testified during the oral stage of this case.

11. I have dissented from the operative paragraphs on pecuniary and non-pecuniary damage and reimbursement of expenses in favor of YATAMA and its candidates, because they are not justified in the absence of human right violations. Furthermore, even if a violation had occurred, this judgment constitutes sufficient reparation, bearing in mind that the only expectation of the claimants was to take part in the elections and that occupying public office, particularly the positions disputed in these elections, constitutes a civic duty and an honor, and should not be considered a source of income. In addition, it is important to point out that YATAMA participated fully in the 2004 elections for local authorities. In numerous cases, the European Court of Human Rights has decided that its declaration that the State has violated human rights constitutes sufficient reparation and the instant case merits the application of this case law, taking its circumstances into account.

Alejandro Montiel Argüello
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary