

INTER-AMERICAN COURT OF HUMAN RIGHTS

**ADVISORY OPINION OC-6/86
OF MAY 9, 1986**

**THE WORD "LAWS" IN ARTICLE 30
OF THE AMERICAN CONVENTION ON HUMAN RIGHTS**

REQUESTED BY THE GOVERNMENT OF URUGUAY

Present

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Jorge R. Hernández Alcerro, Judge

Also present:

Charles Moyer, Secretary, and
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The Government of Uruguay (hereinafter "the Government" or "Uruguay"), by means of communication of August 14, 1985, submitted to the Inter-American Court of Human Rights (hereinafter "the Court") a request for an advisory opinion on the scope of the word "laws" used in Article 30 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention").

2. In a note of October 31, 1985, the Secretariat of the Court, acting pursuant to Article 52 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), requested written observations on the issues involved in the instant proceeding from the Member States of the Organization of American States (hereinafter "the OAS") as well as, through the Secretary General, from the organs listed in Chapter X of the Charter of the OAS.

3. The President of the Court directed that the written observations and other relevant documents be filed in the Secretariat before January 10, 1986 for consideration by the Court during its Fourteenth Regular Session, which was held January 13-21, 1986.

4. Responses to the Secretariat's communication were received from the Governments of Costa Rica and Jamaica. Furthermore, Raúl Emilio Vinuesa, an Argentinian Professor of Law, presented his points of view on the request as **amicus curiae**.

5. A public hearing was held on Thursday, January 16, 1986 to enable the Court to receive the oral arguments of the Member States and the OAS organs on the issues raised in the request.

6. The following representatives appeared at this hearing:

For the Government of Costa Rica:

Carlos José Gutiérrez, Agent and Minister of Foreign Affairs,
Manuel Freer Jiménez, Agent and Legal Adviser of the Ministry of Foreign Affairs

For the Inter-American Commission on Human Rights:

Edmundo Vargas Carreño, Executive Secretary, by virtue of the representation conferred on him by the President of the Commission.

I

7. In the considerations that gave rise to the request, the Government points out that

(t)he question is whether the word "laws" used (in Article 30) refers to laws in the formal sense --legal norms passed by the Legislature and promulgated by the Executive Branch in the manner prescribed by the Constitution-- or in the material sense, as a synonym for the entire body of law, without regard to the procedure followed in creating such norms and the normative rank assigned to it within the hierarchical order of the particular legal system (para. 2).

8. Those same considerations suggest that

(a)nother factor to be taken into account is the indispensable harmonization of the Pact of San Jose with the other basic instruments of the inter-American juridical system, especially the Charter, which makes "the effective exercise of representative democracy" (Art. 3(d)), one of the principles of the American States.

Obviously, representative democracy is based on the Rule of Law which presupposes that human rights are protected by law (para. 8).

II

9. This request for an advisory opinion has been presented to the Court by the Government of Uruguay, a State Party to the American Convention and a Member State of the OAS. Under Article 64(1) of the Convention, "the member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." The request of the Government seeks an interpretation of Article 30 of the Convention and therefore comes under the terms of Article 64.

10. The instant request for an advisory opinion must be considered within the framework provided by paragraph 1 of Article 64 of the Convention, even though that clause has not been specifically invoked. This conclusion is evident because what has been requested is the interpretation of an article of the Convention and no question has been raised regarding the "compatibility of any of its domestic laws with the aforesaid international instruments" (Art. 64.2).

11. We are here dealing with a request for the interpretation of a particularly relevant norm that concerns the application of the restrictions that may be placed on the enjoyment or exercise of the rights or freedoms recognized in the Convention. It is, therefore, admissible pursuant to the terms of the Convention and the Rules of Procedure. On the other hand, there is no reason for the Court to invoke the discretionary powers implicit in its advisory jurisdiction, which would have enabled it to decide against rendering the opinion ("**Other treaties**" **Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)**, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 31; **Restrictions to the Death Penalty (Arts. 4.2 y 4.4 American Convention on Human Rights)**, Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 28). The Court, therefore, admits the request for advisory opinion and will now proceed to answer it.

III

12. The Convention establishes:

Article 30. Scope of Restrictions

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.

13. This article must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of this treaty in their context and in the light of its object and purpose" (Art. 31, Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention")). The terms used limit the restrictions that may be placed on the rights or freedoms recognized in the Convention to those cases where such restrictions derive from laws that meet the requirements imposed by the article itself.

14. Article 30 refers to the restrictions that the Convention itself authorizes with respect to the different rights and freedoms recognized therein. It must be emphasized that, under the Convention (Art. 29(a)), all acts directed toward the

suppression of any one of the rights set forth therein are illicit. In exceptional circumstances and under conditions precisely spelled out, the Convention allows the temporary suspension of some of the obligations assumed by the states (Art. 27). Under normal circumstances, there can only be "restrictions" to the enjoyment and exercise of such rights. The distinction between restriction and suppression of the enjoyment or exercise of rights and freedoms derives from the Convention itself (Arts. 16(3), 29(a) and 30). We are here dealing with an important distinction and the amendment introduced on the matter during the last stage of the drafting of the Convention, at the Specialized Conference of San José, to include the words "to the enjoyment or exercise," clarified this point conceptually (**Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos**, OEA/Ser.K/XVI/1.2, Washington, D.C. 1973 (hereinafter "Actas y Documentos") repr. 1978, esp. at 274).

15. The Court will now analyze the question of whether "the word 'laws' used (in Article 30) refers to laws in the formal sense --a legal norm passed by the Legislature and promulgated by the Executive Branch in the manner prescribed by the Constitution-- "or whether, on the other hand, it is used "in the material sense, as a synonym for the entire body of law (ordenamiento jurídico), without regard to the procedure followed in creating such norms and the normative rank assigned to it within the hierarchical order of the particular legal system."

16. The question before us does not go beyond inquiring as to the meaning that the word "laws" has in Article 30 of the Convention. It is, therefore, not a question of giving an answer that can be applied to each case where the Convention uses such terms as "laws", "law", "legislative provisions", "provisions of the law", "legislative measures", "legal restrictions", or "domestic laws." On each occasion that such expressions are used, their meaning must be specifically determined.

17. Notwithstanding the above, the criteria of Article 30 are applicable to all those situations where the word "laws" or comparable expressions are used in the Convention in referring to the restrictions that the Convention itself authorizes with respect to each of the protected rights. In effect, the Convention does not limit itself to setting forth a group of rights and freedoms whose inviolability is assured to each individual, but also refers to the special circumstances in which it is possible to restrict the enjoyment or exercise of such rights or freedoms without violating them. Article 30 cannot be regarded as a kind of general authorization to establish new restrictions to the rights protected by the Convention, additional to those permitted under the rules governing each one of these. The purpose of the article, on the contrary, is to impose an additional requirement to legitimize individually authorized restrictions.

18. In reading Article 30 in conjunction with other articles in which the Convention authorizes the application of limitations or restrictions to specific rights or freedoms, it is evident that the following conditions must be concurrently met if such limitations or restrictions are to be implemented:

- a) that the restriction in question be expressly authorized by the Convention and meet the special conditions for such authorization;
- b) that the ends for which the restriction has been established be legitimate, that is, that they pursue "reasons of general

interest" and do not stray from the "purpose for which (they) have been established." This teleological criterion, the analysis of which has not here been requested, establishes control through the deviation of power;

- c) that such restrictions be established by laws and applied pursuant to them.

19. The meaning of the word "laws" must be sought as a term used in an international treaty. It is not, consequently, a question of determining the meaning of the word "laws" within the context of the domestic law of a State Party.

20. In this regard, the Court takes into account the fact that the legal regimes of the States Parties to the Convention each have their source in a different tradition. Some States Parties can be said to form part of the Common Law system while others follow the Civil Law system. Their constitutional systems evince peculiarities which can be traced to their individual juridical and political developments. The concept of "laws" employed can not be interpreted in the abstract and, consequently, must not be divorced from the context of the legal system which gives meaning to the term "laws" and affects its application (Cf. Eur. Court H. R., **The Sunday Times case**, judgment of 26 April, 1979. Series A no. 30, para. 47).

21. The meaning of the word "laws" in the context of a system for the protection of human rights cannot be disassociated from the nature and origin of that system. The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power.

22. In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily. Although it is true that this procedure does not always prevent a law passed by the Legislature from being in violation of human rights --a possibility that underlines the need for some system of subsequent control-- there can be no doubt that it is an important obstacle to the arbitrary exercise of power.

23. The above may be inferred from the "principle" --a term used by the Permanent Court of International Justice (**Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City**, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65, p. 56)-- of legality. This principle, which is found in almost all the constitutions of the Americas drafted since the end of the 18th century, is one and the same as the idea and the development of law in the

democratic world and results in the acceptance of the existence of the so-called requirement of law (*reserva de ley*), by which fundamental rights can only be restricted by law, the legitimate expression of the will of the people.

24. Under democratic constitutionalism, the requirement of law (*reserva de ley*) in cases of interference in the realm of freedom is essential to the legal protection and full existence of human rights. For the principles of legality and requirement of law (*reserva de ley*) to be an effective guarantee of the rights and freedoms of the individual, not only must the latter be formally proclaimed but there must also be a system that will effectively ensure their application and an effective control of the manner in which the organs exercise their powers.

25. As far back as 1789, the Declaration of the Rights of Man and the Citizen stated in its Article 4 that

Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has for its only limits those that secure to the other members of society the enjoyment of these same rights. These limits can be determined only by law.

Since that time, this concept has been a fundamental principle of democratic constitutional development.

26. From that perspective, one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature. Such an interpretation would lead to disregarding the limits that democratic constitutional law has established from the time that the guarantee of basic human rights was proclaimed under domestic law. Nor would it be consistent with the Preamble to the American Convention, according to which "the essential rights of man are... based upon attributes of the human personality and... they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

27. Within the framework of the protection of human rights, the word "laws" would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise would be to recognize in those who govern virtually absolute power over their subjects. On the other hand, the word "laws" acquires all of its logical and historical meaning if it is regarded as a requirement of the necessary restriction of governmental interference in the area of individual rights and freedoms. The Court concludes that the word "laws," used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.

28. The Convention not only requires a law in order to legitimate restrictions to the enjoyment or exercise of rights or freedoms, but also demands that such laws be enacted " for reasons of general interest and in accordance with the purpose for which such restrictions have been established. " The concept that those restrictions

which are permitted must be applied " with the purpose for which such restrictions have been established " was already recognized in the Draft Convention on Human Rights drawn up by the Inter-American Council of Jurists (1959). That Draft stated that such restrictions "shall not be applied with any other purpose or design than that for which they have been established" (**Inter-American Yearbook on Human Rights, 1968**, Washington, D.C.: General Secretariat, OAS, 1973, at 248). On the other hand, the requirement that the application of the restrictions be in accordance with "laws enacted for reasons of general interest" is the result of an amendment introduced in the final draft at the Specialized Conference of San Jose in 1969 (Actas y Documentos, **supra** 14 at 274).

29. The requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (Art. 32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic states, the main purpose of which is "the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness" (American Declaration of the Rights and Duties of Man (hereinafter American Declaration), First Introductory Clause).

30. "General welfare" and "public order" are terms of the Convention that must be interpreted with reference to the treaty, which has its own philosophy under which the American States "require the political organization of these States on the basis of the effective exercise of representative democracy" (Charter of the OAS, Art. 3(d)); and the rights of man, which "are based upon attributes of his human personality," must be afforded international protection (American Declaration, Second Introductory Clause; American Convention, Preamble, para. 2).

31. In this connection, the Court has already stated that

Within the framework of the Convention, it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values. In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual.... The Court must recognize, nevertheless, the difficulty inherent in the attempt of defining with precision the concepts of "public order" and "general welfare." It also recognizes that both concepts can be used as much as to affirm the rights of the individual against the exercise of governmental power as to justify the limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasize that "public order" or "general welfare" may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content (See Art. 29(a) of the Convention). Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of "a democratic society," which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention (**Compulsory Membership in an Association Prescribed by Law for the**

Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 66 and 67).

32. Law in a democratic state is not merely a mandate of authority cloaked with certain necessary formal elements. It denotes a content and is directed towards a specific goal. The concept of "laws" referred to in Article 30, interpreted in the context of the Convention and in the light of its object and purpose, cannot be examined solely in terms of the principle of legality (See **supra** 23). In the spirit of the Convention, this principle must be understood as one in which general legal norms must be created by the relevant organs pursuant to the procedures established in the constitutions of each State Party, and one to which all public authorities must strictly adhere. In a democratic society, the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the "effective exercise of representative democracy," which results in the popular election of legally created organs, the respect of minority participation and the furtherance of the general welfare, **inter alia** (See **supra** 22).

33. The Declaration of Mexico affirmed that the "purpose of the State is the happiness of man in society. The interests of the community should be harmonized with the rights of the individual. The American man cannot conceive of living without justice, just as he cannot conceive of living without liberty" ("Declaration of Mexico" of March 6, 1945, para. 12. **The International Conferences of American States**, Second Supplement, 1942-1954. Washington, D.C.: Pan American Union, Department of Legal Affairs, 1958 at 75).

34. The meaning of the word "laws" in Article 30 cannot be disassociated from the intention of all the American States, as expressed in the Preamble to the Convention, "to consolidate in the hemisphere within the framework of democratic institutions a system of personal liberty and social justice based on respect for the essential rights of man" (Preamble of the Convention, para. 1). Representative democracy is the determining factor throughout the system of which the Convention is a part. It is a "principle" reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system. The Convention itself expressly recognizes political rights (Art. 23), which are included among those rights that cannot be suspended under Article 27. This is indicative of their importance in the system.

35. The "laws" referred to in Article 30 are, therefore, normative acts directed towards the general welfare, passed by a democratically elected legislature and promulgated by the Executive Branch. This meaning is fully consistent with the general context of the Convention, in line with the philosophy of the inter-American system. Only formal law, as the Court understands that term, can restrict the enjoyment and exercise of the rights recognized by the Convention.

36. The above does not necessarily negate the possibility of delegations of authority in this area, provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention.

37. The necessary existence of the elements inherent in the concept of law in Article 30 of the Convention leads to the conclusion that, for purposes of the

interpretation of this Article, the concepts of legality and legitimacy coincide, inasmuch as only a law that has been passed by democratically elected and constitutionally legitimate bodies and is tied to the general welfare may restrict the enjoyment or exercise of the rights or freedoms of the individual.

V

38. Consequently, in reply to the question presented by the Government of Uruguay on the interpretation of the word "laws" in Article 30 of the Convention,

THE COURT IS OF THE OPINION

Unanimously,

That the word "laws" in Article 30 of the Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this ninth day of May, 1986.

Thomas Buergenthal
President

Rafael Nieto Navia

Rodolfo E. Piza E.

Pedro Nikken
Zamudio

Héctor Fix-

Héctor Gros Espiell
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