

Concurring opinion of the Judge *ad hoc* Arturo Alfredo Herrador Sandoval in the case of Fermín Ramírez v. Guatemala

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"GUATEMALA IS A STATE OF TRANSITION, GUATEMALAN DEMOCRACY, THE PRODUCT OF DECADES OF GENERATIONAL FIGHTING, IS STILL YOUNG BUT PROMISING"

I. Introduction

In my quality of judge *ad hoc* appointed by the State of Guatemala I concur in my opinion with the eminent jurists that make up the Court, with whom I have had the undeserved honor of working on the present case.

The Inter-American Court of Human Rights as the highest instance of regional jurisdiction in this subject must always remain faithful to the principles that inspired its creation, reaffirming its purpose to consolidate democracy and full respect for human rights in the American Continent.

During the last decade the State of Guatemala has been repeatedly accused before this regional instance, some times for having maintained and promoted a hostile policy with regard to the human rights of its inhabitants, and, in others, for not having the political will or sufficient strength to vigorously defend them.

The present case escapes by far the previously mentioned situations.

As with the rest of the democracies of this part of the continent, the Guatemalan one is permanently besieged by the groups of factual power that co-opt the institutionalism of the State that must so necessarily be strengthened. The endemic problems of poverty and extreme poverty afflicting the country have only worsened the crime phenomena that threatens with devouring the Constitutional State causing with its whirl a dangerous undermining of the credibility of the judicial courts as the only ones legitimately empowered to exercise and apply justice.

The rates of common violence cause a daily impact on citizen awareness generating a sensation of defenselessness and powerlessness before said hardships. Within this framework of action, the fight to make the Constitutional State prevail and for the defense of human rights reaches an enormous stature.

When the social dynamic, degenerated by the system's malfunctions causes us to face crimes as abominable as the one that motivated the process that culminated with this new punishment to the Guatemalan State; our wish would be that the justice system in its totality would operate in an optimal matter so the State, as the representative of the society and protector of the life and security of its habitants,

could transmit with the same certainty that these acts will not be repeated and that, if they are, the population can be sure that they will never go without punishment, since without excuse or pretext the most exemplary of the punishments established in the legal code in force will be imposed in order to establish a sound precedent that banishes the temptation to repeat this type of crimes that damage social conscience.

The present is a case in which the judges that examined the case coincided that it escapes the traditional turn of the matters submitted to the jurisdiction of this Honorable Court, where the States appear as the accused not for procedural violations, as in the present case, but for executing State policies that intentionally restrict the most elemental rights of its inhabitants.

Jurisdiction of the Court

The Honorable Court is competent to know the case of merit in virtue of the ratification made of the American Convention by the Guatemalan State on May 25, 1978 and of the acceptance of its jurisdiction on March 9, 1987.

As established in Article 62(3) of the American Convention, this Court is competent to know of all cases concerning the interpretations and application of the provisions of the Convention, that are submitted to it, provided that the State Party has previously recognized the jurisdiction of the Court, situation that does not permit doubts regarding said matter.

Despite the above, it is fair to mention that the Inter-American Commission on Human Rights, whenever possible, must support that the Court deal with paradigmatic cases that deal with situations that escape procedural slip-ups that affect a single individual tried and convicted in all instances by one of the State parties of the Convention for committing an abominable crime; to permit that this Honorable Court deal with those paradigmatic cases in which its intervention is of vital and urgent importance for the validity of human rights of groups of citizens that suffer from some type of violation that distances the signing States from the Convention, of its reason of existence as such and lead them astray from the purposes that the Convention seeks.

Of the procedural deficiencies

This case puts in evidence regretful and relevant mistakes of some operators of justice that committed errors not of bad faith in the process but of non-observance in the rigorous application of the procedural rules in force, situation that in a case as delicate as the present, whose sanction is the maximum punishment, must have been observed with extreme thoroughness. Failure to do so resulted in the Court having to issue a judgment against the State of Guatemala due to the procedural records because it was evident that said procedural omissions resulted in the violation of several of the precepts of the American Convention on Human Rights, as expressed in the operative paragraphs of the judgment of merit.

Trying to simplify as much as possible the detail of the procedural errors in which the different operators of justice that examined the case of merit participated, the following can be mentioned:

- a. The Office of the Public Prosecutor did not present its indictment for the right crime, nor does it appear on the record that it requested the modification of the writ of indictment, which it had the power to do pursuant to that established in Article 320 of the Guatemalan Code of Criminal Procedures.
- b. Regarding the Trial Court, even though it is true that it had the power to give the act a different legal classification to the one presented in the indictment or the order for trial to commence in the procedural stage of the judgment in virtue of the permissive rule that regulates that situation in Article 388 of the Guatemalan Code of Criminal Procedures; it is also true that said situation is motivated by the appearance of a new circumstance not mentioned in the order for trial to commence. This situation in the case of merit refers to the certainty of the Court regarding the strangulation of the minor as the cause of her death, situation that obviously modified the legal classification of the crime substituting that of aggravated rape for murder, and therefore the punishment to be imposed.

This situation places us under the legal rule established in Article 373 of the Guatemalan Code of Criminal Procedures having as a consequence the right of the parties to request the suspension of the debate in order to offer more evidence or prepare their intervention; right that was not used by the Office of the Public Prosecutor or the defense. However, the most evident violation to the due process occurs when despite having changed the legal classification of the crime and therefore its punishment, **THE TRIAL COURT DOES NOT PROCEED TO RECEIVE A NEW STATEMENT FROM THE DEFENDANT** as it was obliged to do based on that expressly stated in an imperative manner in the previously mentioned article.

The previous procedural errors resulted in the non-compliance by the State of Guatemala of the judicial guarantees enshrined in Articles 8(2)(b) and 8(2)(c) of the American Convention on Human Rights.

- c. Regarding the court-appointed defense counsel, it is obliged to request the suspension of the debate and demand that the Trial Court receive a new statement from the defendant, which it did not do.

IV. Of the Pardon

In what refers to this situation, it is currently not regulated in Guatemala's legislation, which *per se* constitutes a violation to Article 4(6) of the American Convention. Mr. Fermín Ramírez presented on July 27, 1999 a measure of grace to the President of the Republic (Alvaro Arzú) through memorial received in the Reception Office of the Ministry of Government. On that same date, that office forwarded the dossier with the request to the Head Office of that Ministry, who at the same time forwarded it to the General Secretariat of the Presidency on May 31, 2000 (when the Presidency was in the hands of Mr. Alfonso Portillo). Said appeal was denied (by President Portillo) through agreement 235-2000 of May 31, 2000 that was published in the Diario de Centroamérica on June 2 of that same year.

It is true that the President of the Republic was not obliged to pardon the convicted party, since this decision is essentially optional, however, before the apparent legal limbo generated by the annulment of decree 159 of the Legislative Assembly that

contemplated the pardon, and before the current situation of its non-regulation, this Court was compelled to declare the violation of the State of Guatemala in this sense.

Of the conditions of the prison

From the study of the record we can conclude that the conditions of the prison where Mr. Fermín Ramírez is located waiting the definitive judgment regarding his case, lacks the minimum conditions to guarantee the respect for his physical, psychic, and moral integrity, reason why it is necessary to leave evidence of the concern of this Court regarding the need that the State of Guatemala substantially improve the imprisonment conditions of its inmates, both of those subject to serving a sentence as of others that are awaiting its fulfillment in virtue of appeals that have not yet been decided, as is the present case.

Conclusion

As Judge *ad hoc* I express that the study, analysis, and debate of this case produced opposing feelings among those who participated in it.

As stated in the transcripts that document the deliberation of the present case, it was analyzed taking into consideration all possible problems, reflecting the decision issued, the unanimous concern of the Court regarding the complete respect of the State of Guatemala of even the minimum detail of the human rights of its inhabitants, in the understanding that because of this it must not stop guaranteeing their public security, which is the greatest challenge to be overcome in a Constitutional State.

As Judge *ad hoc* I issue opinions so that the State of Guatemala does not have to be on trial before this Court ever again for having implemented institutional policies of harassment, persecution, or systematic violation of the human rights of its inhabitants and so that this type of cases, where the violations occurred are the product, not of intent but of an imperfect observance of up to the minimum detail of the procedural formalities established, be reduced to their minimum expression as a result of the diligence, efficiency, and effectiveness of the procedural subjects and operators of justice that will correct them.

To consider that this judgment is *per se* a form of reparation to Fermín Ramírez proves the legal stature and fair vision of the Honorable Permanent Judges that analyzed the present case with which as Judge *ad hoc* I am pleased.

Arturo Alfredo Herrador Sandoval
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary