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File Number(s):	OC-12/91
Title/Style of Cause:	Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights
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Decided by:	President: Hector Fix-Zamudio Judges: Thomas Buergenthal; Rafael Nieto-Navia; Policarpo Callejas-Bonilla; Sonia Picado-Sotela; Julio A. Barberis
Dated:	6 December 1991
Citation:	Draft Legislation, Advisory Opinion, OC-12/91 (IACtHR, 6 Dec. 1991)
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THE COURT

refers to the request for advisory opinion as follows:

1. By note of February 22, 1991, the Government of the Republic of Costa Rica (hereinafter "the Government" or "Costa Rica") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") a request for advisory opinion pursuant to Article 64(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), regarding the compatibility of draft legislation to amend two articles of the Code of Criminal Procedure and to establish a Court of Criminal Appeal, currently before the Legislative Assembly, with Article 8(2)(h) of the aforementioned Convention.
2. The instant advisory opinion request presents the following questions:
 1. Whether the establishment of a Court of Criminal Appeal and the proposed amendments fulfill the requirements set out in Article 8(2)(h) concerning the "right to appeal the judgment to a higher court ?"
 2. Considering that Article 8(2)(h) of the Inter-American Convention of Human Rights refers only to the term "criminal offense" (delitos), what rule should be applied with regard to lesser violations of criminal law (contravenciones)?

The Government adds that its reason for seeking this advisory opinion is that it

has found it necessary to improve the current system of criminal procedure; to offer greater guarantees in the criminal courts; and to comply with the provisions of Article 8, paragraph (2)(h), of the American Convention on Human Rights, signed in San Jose, Costa Rica, on November 22, 1969, which reads as follows:

Article 8. Right to a Fair Trial

[. . .]

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[. . .]

h. the right to appeal the judgment to a higher court.

3. The Court has been asked to render an opinion about the compatibility of draft legislation with the Convention, on the following articles:

ARTICLE 474.- A defendant may file an appeal against:

- 1- A conviction for a criminal offense.
- 2- An acquittal or dismissal that imposes a preventive security measure (medida curativa de seguridad) for an indefinite period of time.
- 3- A ruling disallowing credit for time served.
- 4- An order that imposes a security measure (medida de seguridad) when it is deemed that the sentence served has not resulted in the rehabilitation of the defendant.

ARTICLE 475.- A plaintiff may appeal a judgment rendered by a Trial Court or a Criminal Court Judge, provided that the damages he has sustained are equal to or greater than the amount for which an appeal would be admitted in a civil proceeding, as provided by law.

ARTICLE 4°.- The Superior Court of Criminal Appeal is hereby established. It shall have its seat in the city of San Jose and shall be composed of such sections as the Plenary Court [of the Supreme Court] considers necessary for the exercise of its functions. Each section shall consist of three Superior Court Judges.

The members of the aforementioned Court shall have the same qualifications as are required for a Justice of the Supreme Court and shall receive a salary greater than that of Superior Criminal Court Judges, pursuant to the scale fixed for this purpose in the national budget. In addition to the provisions of this law, the regulations governing the organization and operation of Superior Criminal Courts shall also apply to the Court of Criminal Appeal.

This Court shall hear all appeals seeking the annulment, review or revision of judgments instituted with respect to matters before a Criminal Court Judge which involve the rulings to which Articles 472, 473, 475 and 476 of the Code of Criminal Procedure refer, when such remedies are admissible pursuant to the aforementioned Code.

4. The Government appointed as its Agent His Excellency Bernd H. Niehaus, Minister of Foreign Affairs and Worship. Subsequently, by note of July 10, 1991, the Government named

Licenciado Alvaro Jiménez-Calderón, Legal Director of the Ministry of Foreign Affairs and Worship, to be its Agent in all matters arising from this advisory opinion request.

5. By notes dated April 9 and 12, 1991, the Secretariat of the Court, acting pursuant to Article 52 of the Rules of Procedure of the Court, requested written observations and other relevant documents on the issues involved in this proceeding from the Member States of the Organization of American States (hereinafter "the OAS") and, through the Secretary General of that organization, from the organs listed in Chapter VIII of the Charter of the OAS.

6. The President of the Court directed that the written observations and other relevant documents be filed with the Secretariat before July 15, 1991.

7. Observations were received from the governments of Belize, Costa Rica and Uruguay.

8. The Government of Uruguay considered that

[. . .] the Court may not render the advisory opinion requested by the Government of Costa Rica because it does not comply with the provisions of Article 64(2) of the Convention.

In its OP 6/86 [The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6] regarding an advisory opinion request presented by Uruguay, the Court has stated: '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.'

According to the standards laid down by the Court in its most recent case law, only legal norms that have been approved by the legislative branch and promulgated by the executive branch qualify as proper subjects of an advisory opinion.

9. After reviewing the observations submitted by the Member States of the OAS, the Court issued an Order dated July 31, 1991, inviting the Government to present its views thereon. The Court also requested the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") to present all the information available to it regarding cases pending against Costa Rica in which a violation of Article 8(2)(h) of the Convention is alleged.

10. On October 1, 1991, responding to the aforementioned Order, the Government presented a communication declaring that:

[. . .]

After analyzing the objection of the Representative of Uruguay based on Advisory Opinion OC-6/86 (supra 8) of May 9, 1986, requested by the Government, this Ministry finds that the opinion in no way contradicts Advisory Opinion OC-4/84 (Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984.

Series A No. 4), for it deals with a different topic. We not only found that no conflict exists, but also that it in no way limits the Court's jurisdiction to accept or reject an advisory opinion request.

With regard to the advisory opinion on "The Word 'Laws'" (supra 8), the Government added that

[i]t is clear that that opinion deals specifically with the concept of laws as contained in Article 30 of the Convention, particularly since that article refers to restrictions that have been expressly authorized for legitimate ends or for reasons of general interest, without deviating from the purpose for which such restrictions were established (control through diversion of power) and that are provided for by laws and applied in accordance thereto.

11. In a communication dated September 30, 1991, the Commission informed the Court about the cases pending before it against Costa Rica for the alleged violation of Article 8(2)(h) of the American Convention. The Commission explained, among other things, that

[s]tarting in 1984, the Commission began to receive petitions charging Costa Rica with violations of the right guaranteed by Article 8(2)(h): "the right to appeal the judgment to a higher court." They charged specifically that the Code of Criminal Procedure (C.C.P.) of Costa Rica did not provide for an "appeal for dismissal or reversal" in certain crimes, including those involving sentences of less than two years imprisonment imposed by a "Trial Court" (Tribunal de Juicio) and sentences of less than six months' imprisonment imposed by a "Judge of a Criminal Court" (Juez Penal) (Art. 474, paras. 1 and 2 of the C.C.P.).

The Commission opened a total of nine case files involving the same alleged violation of Article 8(2)(h) of the Convention. However, the Commission only rendered an opinion in the first of these cases [. . .] Although it processed the remaining ones, the Commission did not make any findings in relation to them, pending compliance by Costa Rica with the Commission's recommendation that it conform its domestic legislation to the terms of the Convention, since such legislative amendments would have a gen-eral effect not limited to a single, concrete case, and would thus benefit all of the remaining petitioners.

[. . .]

II.

12. This request for an advisory opinion has been submitted to the Court pursuant to Article 64(2) of the Convention by Costa Rica, a Member State of the OAS. The request seeks an opinion regarding the compatibility of certain draft laws being considered by the Legislative Assembly of Costa Rica with Article 8(2)(h) of the Convention.

13. Article 64 of the Convention reads as follows:

Article 64

1. 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. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

III.

14. Pursuant to Article 64(2) of the Convention, Costa Rica has the right to submit an advisory opinion request to the Court regarding the compatibility of its domestic laws with the American Convention. But as the Court has emphasized on various occasions, this fact alone does not make every such request admissible, nor does it compel the Court to answer the questions submitted to it ["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]. Whether the Court will hear the request depends upon the resolution of a number of issues that must now be addressed first.

15. In its observations on the instant advisory opinion request, the Government of Uruguay submits that the Court lacks the power to grant the request because a proposed law is not a "domestic law" within the meaning of Article 64(2) of the Convention as that concept has been interpreted by the Court in its Advisory Opinion "The Word 'Laws'," where it ruled 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. ("The Word 'Laws'," supra 8, para. 38.)

The Government of Uruguay contends that only legal norms that have met these requirements qualify as "domestic laws" under Article 64(2) of the Convention and, hence, as proper subjects of an advisory opinion.

16. Article 30 of the Convention, to which Advisory Opinion "The Word 'Laws'" refers, reads as follows:

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.

17. When the Court interpreted the word "laws" as it appears in Article 30, it made clear that it was 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. ("The Word 'Laws'," supra 8, para. 16.)

Article 30 of the Convention is a very special provision which proceeds on the assumption that certain restrictions to the enjoyment of rights and freedoms may only be applied in accordance with laws that are already enacted and in force.

18. That Advisory Opinion and the definition of the word "laws" the Court adopted on that occasion consequently refer only to Article 30 of the American Convention and, without more, cannot be applied to Article 64(2) of that Convention. It follows that the argument of Uruguay does not provide a sufficient basis for rejecting the instant request.

19. In its Advisory Opinion "Proposed Amendments" (supra 10), the Court had the opportunity to interpret in extenso Article 64(2) of the Convention, which is the article on which Costa Rica relies. There the Government submitted a request for an advisory opinion regarding the compatibility with the Convention of a draft amendment to the Constitution.

20. On that occasion the Court held that, since the purpose of its advisory jurisdiction is to "assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process" [Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43, quoted in "Proposed Amendments," supra 10, para. 19],

to decline to hear a government's request for an advisory opinion because it concerned 'proposed laws' and not laws duly promulgated and in force, [. . .] might in some cases have the consequence of forcing a government [. . .] to violate the Convention by the formal adoption and possibly even application of the legislative measure, which steps would then be deemed to permit the appeal to the Court. (Ibid., para. 26.)

21. On that occasion, the Court stated, furthermore, that "the 'ordinary meaning' of terms [of a treaty] cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty." (Ibid., para. 23.)

22. The foregoing considerations led the Court, on that occasion, to accept the advisory opinion and to hold that, in certain circumstances and pursuant to the powers conferred on it by Article 64(2), the Court may render advisory opinions regarding the compatibility of "draft legislation" with the Convention.

IV.

23. The Court will now examine the specific facts relating to this advisory opinion request. These facts are relevant inasmuch as the Court has determined

the inadmissibility of any request for an advisory opinion which is likely to undermine the Court's contentious jurisdiction or, in general, to weaken or alter the system established by the

Convention, in a manner that would impair the rights of potential victims of human rights violations. ("Other Treaties," supra 14, para. 31. See also, Restrictions to the Death Penalty, supra 20, paras. 36-37.)

24. The Court asked the Inter-American Commission for information about pending cases charging Costa Rica with violations of Article 8(2)(h) of the American Convention (supra 9). According to the Commission, it has opened nine case files based on these allegations. In one of them, N° 9328, the Commission adopted Resolution N° 26/86 in 1986, which found Costa Rica to be in violation of Article 8(2)(h) of the Convention, recommended that Costa Rica adopt the appropriate legislative or other measures to remedy the situation, and decided to refer the case to the Court in the event that these measures were not taken within a period of six months. Thereafter, the Government asked for and received two additional six-month extensions from the Commission to comply with this resolution. In September 1988, the Commission again reminded the Government of Resolution N° 26/86. The following month, the Government asked for another six-month extension on the ground that relevant draft legislation had been sent to the Costa Rican legislature for enactment. The Commission granted the Government an extension of 120 days. In September 1989, the Government appeared before the Commission, presented the text of the proposed legislation, and asked for yet another extension until the next session of the Commission, which was scheduled for May 1990. Pending the adoption of the draft legislation, the Commission suspended its consideration of the remaining cases.

25. During its May 1990 session, when Costa Rica had still not complied with Resolution N° 26/86, the Commission considered once more whether to send the case to the Court. It decided not to take this action after being informed by Costa Rica that its Supreme Court had recently held that "Article 8(2)(h) of the Convention was self-executing." The Commission transmitted the Government's contention to the claimant in Case 9328, but received no reply. The Commission addressed similar communications to the claimants in the other cases pending against Costa Rica, but made no findings in relation to them.

26. The repeated extensions requested by the Government and granted by the Commission have noticeably delayed the disposition of these cases. In February 1991, five years after the Commission adopted Resolution 26/86, wherein it decided, inter alia, to refer the case in due course to the Court, Costa Rica sought an advisory opinion concerning draft legislation that, after all that time, still remains to be adopted.

27. Furthermore, as already noted, the Commission still has under consideration various petitions charging Costa Rica with violations of Article 8(2)(h) of the Convention. The Commission postponed for a long time the referral of one of these cases to the Court, while it suspended the processing of the remaining cases pending the fate of the draft legislation which was designed to introduce amendments that both the Commission and the Government consider capable of resolving the problem in the future.

V.

28. The Court believes that a reply to the questions presented by Costa Rica, could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to

the Court, without providing the victims with the opportunity to participate in the proceedings. Such a result would distort the Convention system. Contentious proceedings provide, by definition, a venue where matters can be discussed and confronted in a much more direct way than in advisory proceedings. This is an opportunity which cannot be denied to individuals who do not participate in the latter proceedings. Whereas the interests of individuals in contentious proceedings are represented by the Commission, the latter may have different interests to uphold in advisory proceedings.

29. Although it appears that the draft legislation might correct, as far as concerns the future, the problems that gave rise to the petitions against Costa Rica now before the Commission, a ruling by the Court could in the long run interfere with cases that should be fully processed by the Commission in the manner provided for by the Convention (In the Matter of Viviana Gallardo et al., No. G 101/81. Series A. Decision of November 13, 1981, para. 24).

30. All of the above clearly indicates that here the Court faces one of those cases where it should invoke its power to refuse to render an advisory opinion, lest it risk undermining the contentious jurisdiction in a manner that might impair the human rights of the claimants in the cases pending before the Commission.

VI.

31. For all these reasons,

THE COURT

unanimously,

decides that it will not render the advisory opinion requested by the Government of Costa Rica.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San Jose, Costa Rica, this sixth day of December, 1991.

Héctor Fix-Zamudio
President

Thomas Buergenthal
Rafael Nieto-Navia
Policarpo Callejas-Bonilla
Sonia Picado-Sotela
Julio A. Barberis

Manuel E. Ventura-Robles
Secretay