

CONCURRING OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ

The position taken by the Inter-American Court of Human Rights in this Advisory Opinion (OC-16) is at the cutting edge of the doctrine of criminal procedure today. With it, the Court advances into a realm that is, indeed, a "critical zone" for the protection of human rights, where human dignity is most at peril and where—in practice, not mere juridical or political rhetoric— a democratic State of laws either proves itself or crumbles.

While affirming that Article 36 of the Vienna Convention on Consular Relations confers certain individual rights upon detained foreign nationals, the opinion also recognizes the evolutive and expansive character of human rights. The lofty declarations of the late XVIII century established the fundamental rights, but were hardly an exhaustive catalogue of those rights. As time passed, new rights would emerge and be proclaimed that have by now have been incorporated into an extensive body of national constitutions and international instruments. Article 36 of that Convention is another addition to that list.

The history of democracy and human rights is closely interwoven with the evolution of the prosecutory system. The criminal justice process could not be a more fitting stage for the moral, juridical and political progress of mankind to unfold. The accused has evolved from being the target of the criminal justice process, to become instead the subject of a newly conceived juridical relationship, with rights and guarantees that are every citizen's shield against abuse of power. What we deem to be 'democratic criminal justice' recognizes and builds upon these rights.

The criminal justice process—understood in its broad sense, which also includes all prosecutory business that precedes courtroom prosecution of a case— has not remained unchanged over time. The elementary rights originally conferred have evolved into new rights and guarantees. What we now understand as due process of criminal law, the backbone of criminal prosecution, is the result of this long evolutionary ascent, nurtured by law, jurisprudence—including the United States' progressive jurispru-

dence- and doctrine. In a process that has played itself out at the national and international levels, the developments of the early years have been overtaken by new developments, and the years ahead will surely bring others. A democratic concept of criminal justice keeps due process in a state of constant evolution.

Advisory Opinion OC-16 is premised upon an express acknowledgment of this evolution, which is why it is at what might well be called procedure's "current frontier," certainly far beyond earlier boundaries. There is ample evidence of the steady, remarkable progress that procedure has made in the half century since the Second World War. The right to have defense representation at trial has been expanded and enriched with the addition of the right to have an attorney present from the time of one's arrest. The right to know the crimes with which one is charged has expanded to include the right to have an interpreter when one is unfamiliar with the language in which the proceedings are conducted. The right to testify on one's own behalf is now matched by its natural counterpart: the right not to incriminate oneself. These are but a few examples of the progress that procedural standards and practices have undergone; progress that must not be reversed.

With the new and different challenges that modern life poses, institutions that once seemed unnecessary have become indispensable. Every transformation gives rise to new rights and guarantees, which taken together constitute contemporary criminal due process. Thus, the increasing numbers of people migrating have triggered developments in various areas of the law, among them criminal procedure, with the introduction of the methods and guarantees needed when prosecuting aliens. Judicial development must take these new developments into account; concepts and solutions must be examined to see if they fit the emerging problems.

Aliens facing criminal prosecution —especially, although not exclusively, those who are incarcerated— must have the facilities that afford them true and full access to the courts. It is not sufficient to say that aliens are afforded the same rights that nationals of the State in which the trial is being conducted enjoy. Those rights must be combined with others that enable foreign nationals to stand before the bar on an equal footing with

nationals, without the severe limitations posed by their lack of familiarity with the culture, language and environment and the other very real restrictions on their chances of defending themselves. If these limitations persist, without countervailing measures that establish realistic avenues to justice, then procedural guarantees become rights 'in name only', mere normative formulas devoid of any real content. When that happens, access to justice becomes illusory.

Due process is never a finished product but rather a dynamic system constantly creating itself. The rights and guarantees that constitute due process are indispensable for due process. Where any one of them is lacking or diminished, there is no due process. In the end, the rights and guarantees of due process are essential parts of a whole, each one necessary for the whole to exist and survive. There can be no due process when a trial is not conducted before a competent, independent and impartial tribunal, or the accused is unaware of the charges against him, or has no opportunity to introduce evidence and present arguments, or where the verdict is not subject to review by a higher court.

Due process is undone when the accused does not have those rights and guarantees or is unaware of them. Their absence is not remedied by attempts to prove that even though the guarantees of a fair trial were lacking, the sentence that the court handed out at the end of the bogus criminal proceeding was fair. To contend that a supposedly fair outcome, i.e., a sentence befitting the subject's behavior, is sufficient to vindicate the procedure used to obtain that outcome merely resurrects the notion that "the end justifies the means" and is tantamount to arguing that a lawful outcome justifies unlawful procedure. Today, that adage has been turned around: "the legitimacy of the means justifies the ends"; in other words, a fair sentence that betokens the justice of a democratic society can only be achieved when lawful (procedural) means are used to accomplish it.

The criminal justice system would suffer a terrible setback if the effects of a right on a sentence had to be examined and demonstrated in the course of trial, on a case-by-case basis, to determine whether that right is necessary or relevant and whether exercise of that right is essential. This

would be a dangerous relativization of the system's rights and guarantees. It is possible—and even inevitable—that all rights would eventually be subject to the same kind of scrutiny. Courtrooms would have to consider what weight to assign any number of factors when deciding sentence: defendant's lack of defense counsel, defendant's ignorance of the charges, his unlawful arrest, the use of torture, unfamiliarity with procedural checks and balances, and so on. In the end, the very concept of due process would be torn asunder, with all the consequences that would follow.

The relatively new right of an accused alien to be informed of his right to seek consular protection was not invented by this Court in Advisory Opinion OC-16. The Court merely took a right already established in the Vienna Convention on Consular Relations and made it part of that dynamic body of law that constitutes 'due process' in our time. In short, it recognized its character and affirmed its importance.

The individual right under analysis here is now one of those rules whose observance is mandatory during a criminal proceeding. The principle of penal legality, applicable to procedure and not just to the system of criminal classification and penalties, presupposes prompt enforcement of those rules.

If the right to consular information is already part of the body of rights and guarantees that constitute due process, then violation of that right has the same consequences that unlawful conduct of that kind invariably has: nullification and responsibility. This does not mean impunity, as a new procedure can be ordered and carried out properly. As this possibility is widely recognized in procedural law, no further comment is needed.

Advisory Opinion OC-16 mainly refers to the applicability or application of the death penalty, although the principles of procedure the Court invokes are not necessarily confined to death penalty cases. It is true, of course, that capital punishment, the most severe under punitive law, casts its shadow over the issue that concerns us. The consequences of a violation of the right to consular information when a human life is at stake are infinitely more serious than in other cases—even though, technically

speaking, they are the same- and become irreparable consequences when that sentence is actually carried out. No precaution will ever be sufficient to ensure strict conformity with the proceeding in which a human life hangs in the balance.

With the position it took in Advisory Opinion OC-16, the Court is merely confirming many of the laws already on the books to perfect the criminal justice system. Acceptance of this position will help make criminal justice procedure what it can and must be: a civilized means to restore order and justice. Obviously, the Court's position is consistent with the evolution of criminal justice and the ideals of a democratic society that demands rigor in the methods it uses to dispense justice.



Manuel E. Ventura-Robles
Secretary



Sergio García-Ramírez
Judge