

American Convention on Human Rights—jurisdiction—freedom of expression—indirect restrictions—property rights—deviation of power—media pluralism

GRANIER v. VENEZUELA. Series C, No. 293. Preliminary Objections, Merits, Reparations and Costs. At <http://www.corteidh.or.cr>. Inter-American Court of Human Rights, June 22, 2015.

On June 22, 2015, the Inter-American Court of Human Rights (Court) decided that Venezuela's refusal to renew the broadcasting license of Radio Caracas Televisión (RCTV) in May 2007 constituted an indirect violation of the right to freedom of expression protected by the American Convention on Human Rights (Convention).¹ In a 6-1 decision, the Court found that, although the government's refusal to renew RCTV's license had allegedly been motivated on technical grounds, its real, but undeclared, purpose was to shut down a network that had taken a critical editorial stance toward the Venezuelan government (para. 198).² The Court also ruled, however, that Venezuela had not violated RCTV's property rights and that judicial independence and impartiality had not been violated in the related domestic litigation. By this landmark decision, the Court has resumed its vigorous protection of freedom of expression.

The proceedings began in 2010, when RCTV filed a petition with the Inter-American Commission on Human Rights (Commission), contending that, by not renewing its license, confiscating its equipment, and failing to provide due process, Venezuela had violated Articles 8, 13, 21, 24, and 25 of the Convention. The Commission concluded that Venezuela had breached the rights to freedom of expression and equality before the law and recommended that it allocate broadcasting licenses through an open and fair process. But Venezuela argued that its Constitution prevented it from complying with the Commission's recommendations.³ The Commission thus submitted the case to the Court in February 2013, almost six months after Venezuela denounced the Convention (on allegations that both the Commission and the Court were interfering with Venezuelan internal affairs) but before the expiration of the Convention's one-year "survival provision" (Art. 78(1)).⁴

Venezuela submitted two preliminary objections to the Court's jurisdiction. First, Venezuela argued that the Court lacked temporal jurisdiction. The Court rejected that argument because the actions at issue had occurred prior to Venezuela's denunciation of the Convention (para. 14). Second, Venezuela challenged the Court's personal jurisdiction, as the dispute involved the rights of a legal person. Again, the Court dismissed the objection by considering that it was called upon to adjudicate the potential violation of the rights of the petitioners, RCTV shareholders and employees—not the alleged violations of the rights of RCTV itself (para. 22).

¹ American Convention on Human Rights, Nov. 22, 1969, OASTS No. B-32, 1144 UNTS 123 [hereinafter Convention].

² Granier v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 293 (June 22, 2015) (in Spanish), at <http://www.corteidh.or.cr> [hereinafter Judgment]. Translations of the Judgment herein are by the author.

³ This assertion is surprising, as Article 23 of the Venezuelan Constitution establishes that international human rights treaties are directly applicable in Venezuela and that they take precedence over less favorable domestic law. CONSTITUCIÓN Art. 23 (1999).

⁴ Venezuela denounced the Convention by a note dated September 6, 2012, at http://www.oas.org/DIL/Nota_República_Bolivariana_Venezuela_to_SG.English.pdf.

Before the Court, the petitioners, the Commission, and Venezuela all argued that the Venezuelan political context was relevant to the case. This consideration led the Court to emphasize the tensions between Venezuela and some media outlets, particularly after the coverage by some private networks of the coup d'état of April 2002. In addition, the Court noted that after the events of 2002, several state officials announced that private media outlets that refused to change their editorial position would not have their broadcasting licenses renewed. These statements were reinforced by state-supported campaigns in newspapers and the publication of the *White Book on RCTV*, seeking to explain why “for the Venezuelan government it was ‘inconvenient’ to renew RCTV’s broadcasting license” (para. 86).

Despite those statements, RCTV did request the renewal of its license in early 2007. The request was denied on the grounds that the government had “decided to reserve use of that portion of the broadcast spectrum . . . to allow democratization of the broadcast media” (para. 92). Moreover, two days before RCTV’s license expired, the Constitutional Chamber of the Venezuelan Supreme Court issued a preliminary injunction temporarily conveying the use of all of RCTV’s assets related to broadcasting (such as antennae and transmitters) to the state (para. 95).⁵

On the merits, the Court addressed three issues: freedom of expression, judicial independence, and property. First, the Court reaffirmed that the right to freedom of expression has both individual and social (collective) functions, that this freedom formed the “cornerstone for the existence of a democratic society” and, most important, that it required protecting speech that was “disagreeable to the government or any segment of the population” (para. 140). Although the Court expressly recognized that states have the right to regulate broadcasting (para. 165), it determined as well that under Article 13 of the Convention states also have the duty to promote ideological pluralism in the media.⁶ It emphasized that media pluralism could not be assured by the mere existence of several media outlets but, instead, required “that the ideas and information broadcast are effectively diverse and addressed from diverging postures, without the existence of a sole viewpoint or stance” (para. 170).

The Court did not, however, find a direct violation of the right to freedom of expression. After noting that domestic law did not grant broadcasters an automatic right to have their licenses renewed (para. 178), but without making any reference to either applicable authorities or state practice, the Court determined that neither the Convention nor international law more generally compels a state party to renew a broadcasting license (para. 179). Accordingly, it held that Venezuela’s refusal to issue a new broadcasting license to RCTV did not constitute a *direct* violation of the right to freedom of expression under Article 13(1) of the Convention (paras. 180–81).

Yet the Court also held that the Convention precludes *indirect* restrictions of freedom of expression. It had previously ruled that the rights established in the Convention were susceptible to violations arising out of indirect actions.⁷ In the Court’s view, to determine whether an indirect action was arbitrary or violated a Convention right, the underlying reasons had to

⁵ Tribunal Supremo de Justicia, Sala Constitucional [TSJ,CC] [Supreme Court of Justice, Constitutional Chamber], 25 de mayo de 2007, Decisión No. 956.

⁶ Article 13(1) of the Convention, *supra* note 1, establishes that “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds”

⁷ See *Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 74 (Feb. 6, 2001); *Canese v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 111 (Aug. 31, 2004).

be taken into account (para. 189). To decipher the actual motives that led Venezuela not to renew RCTV's broadcasting license, the Court analyzed a series of statements made by high-ranking Venezuelan officials—mainly those of the president at the time, Hugo Chávez.

For example, President Chávez had declared that the media were “causing subversion . . . in this case fascist subversion” (para. 75). In December 2006—just five months before RCTV's broadcasting license was set to expire—he stated that “there will be no new license for that coupist [*golpista*] television channel that used to be called Radio Caracas Televisión, the license is over, the decision is already written” (para. 80). He continued in January 2007 by asserting that “[n]othing and no one will stop the decision not to renew the license of that channel,” and that “[s]queal, kick, no matter what they do, the license for that fascist station RCTV is over” (*id.*). On a similar note, the minister of telecommunications observed that RCTV had exercised a form of “media manipulation,” an “irresponsible attitude [that] had not changed . . . they did not rectify it” (*id.*).

Despite these statements, Venezuela insisted during the oral hearings that its refusal to renew RCTV's license had been based on technical considerations and “no other reason, no political reason” (para. 186). The Court was not persuaded. Rather, it considered that the officials' pronouncements had to be evaluated as a whole and reached its conclusions on the facts before it: namely, that since 2002 Venezuela had been warning the media that if they did not modify their editorial posture their licenses would not be renewed, and that the definitive decision not to renew RCTV's broadcasting license had been taken long before it was set to expire (paras. 193–94).

Those findings led the Court to declare that Venezuela had committed a *deviation of power* because it had used powers lawfully granted to the state “with the objective to align a media outlet editorially with the government” (para. 197). Moreover, the Court held that the ulterior motive behind Venezuela's decision not to renew the license was disapproval of RCTV's editorial stance. It affirmed that public officials have a duty to verify, within reason, the facts on which they base their opinions, particularly in situations of social tension or conflict (para. 195).

As regards the second issue, the alleged violation of due process and judicial independence, the Court reached two separate conclusions. On the one hand, it considered that the seven years during which the domestic challenge by RCTV to the decision not to renew its license had been stalled in an interlocutory appeal constituted an excessive delay that violated due process under the Convention (para. 270). On the other hand, it concluded, over two dissents, that there was insufficient evidence to rule that the domestic courts charged with deciding the case had lacked independence (para. 278). The dissenting judges argued that the judiciary had contributed to the deviation of power (Ventura Robles, J., diss. op., para. 8) and that the Court's prior decisions finding that Venezuela's judiciary lacked independence and impartiality should have been taken into consideration in this case (Vio Grossi, J., sep. op., at B(1)).

On the third issue, the Court found that Venezuela had not violated RCTV's property rights. Again, it divided the analysis into two sections. First, it decided that RCTV had no ownership rights over the airwaves, and consequently no property rights that could have been violated by the refusal to renew its broadcasting license (para. 342). The second prong of the analysis pertained to the potential violation of RCTV's property rights by the Constitutional Chamber's preliminary injunction, which had deprived the station of several of its assets. The Court declined to decide the issue on grounds that it lacked jurisdiction to determine whether

the property rights of a legal person had been violated (para. 352). Despite having disregarded that jurisdictional hurdle when dismissing Venezuela's preliminary objection on personal jurisdiction, it found that—unlike the right to freedom of expression—property rights do not involve a direct relation between the legal person affected and the physical persons who are the ultimate owners (para. 355). It also determined that the complexity of RCTV's corporate ownership, which included several intermediary holding companies, made it impossible to attribute any harm to the ultimate shareholders (para. 358).

Finally, in terms of reparations, the Court ordered Venezuela to allow RCTV to resume broadcasting temporarily at its former frequency and to return the assets that had been removed under the preliminary injunction. The Court, however, was careful to note that it was not, in any way, attributing any property rights over the airwaves to RCTV. Instead, it ordered Venezuela to implement an “open, independent and transparent” process (para. 382) to allocate the broadcasting license for that frequency. Because of the character and gravity of the violations and the suffering of the victims, the Court also ordered monetary reparations *ex aequo et bono*, arguing that it lacked the evidence needed to determine any claims for damages (para. 403).

As Judge Ventura Robles wrote, *Granier* is “without a doubt, the most important decision that the Inter-American Court of Human Rights has issued in matters of freedom of expression” (Ventura Robles, J., diss. op., para. 2). The judgment shows that the Court has reasserted its former staunch commitment to the protection of freedom of expression. Although the Court has historically taken strong positions in favor of freedom of expression, its 2013 decision in *Mémoli v. Argentina*⁸—a controversial 4-3 judgment in which, for the first time, it upheld a criminal conviction for defamation—was viewed as a step backward in protecting freedom of expression. Thus, Judge Ventura Robles argued, the *Granier* decision should be seen as overruling *Mémoli* (*id.*, para. 2).

The decision also deserves notice because of the situation involved. As the Court observed, RCTV was Venezuela's most long-standing and most viewed television station (para. 62; Pérez Pérez, J., diss. op., para. 10). It maintained a critical position toward the Venezuelan government (Ferrer Mac-Gregor, J., diss. op., para. 138), the last national TV station to do so. Shutting down RCTV meant, in practice, drowning out dissent. Although other private networks continued transmitting, they had assumed a complaisant attitude. Not surprisingly, RCTV's exit from the airwaves stirred political tensions and led to protests.

The most important part of the judgment is its finding that Venezuela had indirectly violated the right to freedom of expression of RCTV's shareholders and employees, and also that of the general population, who were “deprived of access to the editorial line that RCTV represented” (para. 198). The Court's argument in that regard is compelling. Its reliance on statements of high-ranking governmental authorities (most of them on live television) to determine the real motives behind the decision not to renew RCTV's broadcasting license makes a substantial contribution to the development of the institution of deviation of power in international law. Indeed, both judicial practice and academic commentary have tended to focus on

⁸ *Mémoli v. Argentina*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 265 (Aug. 22, 2013).

the similar—but less precise—notion of abuse of rights; yet deviation of power is a more accurate concept, as it centers on the “real but undeclared ends” of a policy decision (Ferrer MacGregor, J., *diss. op.*, para. 7).

Another significant aspect is the decision’s discussion of the responsibilities of governmental authorities when making public declarations (para. 195). It may sound paradoxical or even oxymoronic, but the protection of human rights, including free speech, may require limiting the free speech rights of state actors. The Court reached this conclusion rather tangentially (and in a tone that was more of an admonition than the establishment of a legal obligation). The gist of the Court’s finding is that state officials, because they wield great influence on the public and are duty bound to safeguard human rights, cannot disregard those very rights in their public declarations; nor can they purvey distorted pictures of the truth. This concept bears keeping in mind in the context of emerging democracies and other situations of institutional fragility.⁹

Although the Court’s analysis of indirect restrictions on freedom of expression is laudable, other meaningful issues were underdeveloped or imprecisely discussed. For example, the basis for asserting the Court’s temporal jurisdiction would have benefited from more extensive treatment but was relegated to a single paragraph (para. 14). The Commission submitted the case to the Court after Venezuela denounced the Convention, but while the one-year survival provision remained in force. A similar situation had arisen when Trinidad and Tobago withdrew from the Convention.¹⁰ In those cases, as in this one, the Court asserted that it had jurisdiction to decide a case brought after the respondent state denounced the Convention, on grounds that the facts involved had taken place prior to the denunciation.

Yet this issue requires a more nuanced analysis. International adjudication is still largely dependent on state consent, and states may withdraw their acceptance of the jurisdiction of an international court or tribunal. Here, the Court could have delved deeper into the nature of survival clauses in treaties and how some international obligations linger even after a state has expressed its will to renounce them.

In addition, the Court did not uniformly apply its analysis of its personal jurisdiction. Even though its competence is limited by its understanding of “person” (which excludes legal entities),¹¹ the Court found that the media, similarly to unions and political parties, are vehicles for the exercise of certain human rights (para. 148).¹² Therefore, it held that “restrictions on freedom of expression are frequently materialized through state or individual actions that harm not only the legal person that constitutes a media outlet, but also large numbers of physical persons, like the shareholders or the journalists who work there . . . and whose rights may also

⁹ Judge Caldas also considered the possibility of applying the provisions of the Convention to private actors such as the media. He stated that “[t]he issue here is under what terms the relation between private agents and the public sphere stands. As holders of power, those entities must be regulated and made responsible. As actors in the public sphere . . . they have public duties.” Judgment, Caldas, J., *sep. op.*, para. 57.

¹⁰ *E.g.*, *Caesar v. Trinidad and Tobago, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005)*; *Hilaire, Constantine, and Benjamin v. Trinidad and Tobago, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002) (joined cases)*.

¹¹ Article 1(2) of the Convention, *supra* note 1, states: “For the purposes of this Convention, ‘person’ means every human being.”

¹² The European Court of Human Rights reached similar conclusions in *Glas Nadezhda Eood v. Bulgaria, App. No. 14134/02, paras. 50–52 (Eur. Ct. H.R. Oct. 11, 2007)*; *Groppera Radio AG v. Switzerland, 173 Eur. Ct. H.R. (ser. A), paras. 47–51 (1990)*.

be affected” (para. 151); and it noted that “today an important part of journalism is carried out by means of legal persons” (para. 152). In sum, whereas only individuals enjoy the right to freedom of expression, those rights are often exercised through legal persons or institutions.

By concluding that Venezuela’s conduct had indirectly affected the freedom-of-expression rights of RCTV’s shareholders, journalists, and the general public, the Court sidestepped a jurisdictional obstacle that would otherwise have barred it from hearing the case. That interpretation gives *effet utile* to Article 13 of the Convention. Excluding legal persons from the scope of the Convention would drastically reduce the protection granted to media outlets—like newspapers, websites, and television and radio stations—which play a key role in contemporary mass media but are organized as legal persons.

Nevertheless, the Court did not apply that criterion throughout the case. On the contrary, it relied on its lack of competence to adjudicate cases involving legal persons in refusing to rule on the potential violations of RCTV’s property rights (para. 348). The Court reasoned instead that the complex corporate structure of RCTV prevented it from determining the potential harm to the ultimate shareholders caused by the taking of RCTV’s property through the Constitutional Chamber’s preliminary injunction (para. 358). That is perhaps the most questionable aspect of the decision. As Judge Ferrer Mac-Gregor pointed out in his dissent, the preliminary injunction was “a seizure of property without compensation” (Ferrer Mac-Gregor, J., diss. op., para. 16), and, moreover, “it is neither complex nor hard to establish a direct relationship between the loss of value of the shares and the economic harm to the assets of RCTV’s shareholders” (*id.*, para. 93).

Perhaps the Court’s reluctance to apply the same extensive jurisdictional interpretation when dealing with property rights can be ascribed to an unspoken normative hierarchy of the rights established in the Convention. There is evidence that some judges placed a higher value on the aspects of the case involving freedom of expression than on those involving property rights. Certain judges, for example, questioned the relevance of the economic interests of the RCTV shareholders (Pérez Pérez, J., diss. op., paras. 2, 11; Caldas, J., sep. op., paras. 13–16). Yet subjective considerations about the rights that the victims claimed were violated do not lead to the sound and equal application of the law. Neither does the Convention—at least expressly—establish a hierarchy of rights.¹³

Another questionable aspect of the judgment is the Court’s reasoning in failing to find that the Venezuelan judiciary was neither impartial nor independent. Despite its prior rulings that the Venezuelan judiciary was not independent,¹⁴ the Court indicated that no particular evidence in that regard had been provided in this case. But, as Judge Vio Grossi argued in his separate opinion, “the lack of independence of the Venezuelan judiciary [previously] verified is a public and notorious fact” (Vio Grossi, J., sep. op., at B(3)). Two of the dissenting judges also observed clear signs of lack of judicial independence in the domestic legal processes (Ferrer Mac-Gregor, J., diss. op., para. 135; Ventura Robles, J., diss. op., paras. 8–10). The Court may have been acting with caution to avoid adding insult to injury in a decision that was sure to generate strong reactions by Venezuela. If those policy considerations did inform the decision,

¹³ The Court, however, has stated that the right to life is fundamental. See *Castillo González v. Venezuela*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 256, para. 122 (Nov. 27, 2012) (in Spanish).

¹⁴ *Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 197, para. 127 (June 30, 2009); *Apitz Barbera v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 182, para. 267(7) (Aug. 5, 2008).

applying them to this case would reflect a lack of judgment. Venezuela had already denounced the Convention; thus, the Court should have had free rein to make a decision without any political or pragmatic constraints.

Nevertheless, the Court's decision in *Granier* is a strong precedent that, by developing the notion of deviation of power and curtailing indirect restrictions, contributes to the elaboration of the international protection of freedom of expression. Yet this saga does not end well for the victims. Although the Court's decisions are directly applicable under Venezuelan law, the Venezuelan Supreme Court has already rejected the decision as unenforceable,¹⁵ which is how it has dealt with some of the Court's previous decisions. Moreover, as Venezuela has denounced the Convention, further proceedings cannot be brought before the Court. The only remaining international remedy is to present a report to the General Assembly of the Organization of American States, an approach with scant possibilities of actual consequences.¹⁶ Therefore, despite a clear win at the Court, the applicants can hardly expect Venezuela to comply. *Granier*, then, perhaps serves as a reminder of one of the main shortcomings of international adjudication, the lack of effective enforcement measures.

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¹⁵ TSJ,CC, 10 de septiembre de 2015, Decisión No. 1175.

¹⁶ Article 65 of the American Convention, *supra* note 1, reads, in pertinent part: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report . . . It shall specify, in particular, the cases in which a state has not complied with its judgments . . ."