

SOURCE: Official Register Supplement 566, 08-IV-2009

DATE: 13 April 2009

REGARDING: Declaration of partial unconstitutionality of Arts. 3 y 13 of the Organic Law regarding the State Attorney General and the mandatory interpretation of Art. 44 of the Organic Law of Customs.

Resolution No. 002-09-SAN-CC of the Constitutional Court: Always keeping in mind the needs of our subscribers and considering the importance of the legal standard in question, please find attached the full text of:

“SENTENCE No. 002-09-SAN -CC

CASE 0005-08-AN

Presiding Constitutional Judge: Dr. Ruth Seni Pinoargote

I

BACKGROUND:

Summary of Admissibility

The present noncompliance action was brought before the Constitutional Court for the Transition Period on November 25, 2009.

In accordance with Art. 7 of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transition Period, the General Secretary hereby certifies that no other action has been brought with an identical subject, object or claim.

On January 20, 2009, the Admissibility Chamber qualified and admitted the noncompliance action designated as No. 0005 – 08 – AN. Once the action was admitted, it was assigned to the First Chamber of the Constitutional Court for the Transition Period.

In this respect, on January 28, 2009, the First Chamber of the Constitutional Court for the Transition Period accepted jurisdiction over the action in accordance with the procedures set forth in Art. 27 of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transition Period.

On February 4, 2009, the action was assigned according to the procedures set forth in Arts. 436, numeral 5, of the Political Constitution of the Republic of Ecuador; 9, second section, and 10 of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transition Period. From that point, Dr. Ruth Seni Pinoargote assumed over the action designated as No. 0005 – 08- AN, as **Presiding Judge**.

Details of the Claim

Identification of the legal standard, general administrative act, sentence or report with which compliance is demanded.

Law Restating the Law regarding Persons with Disabilities, Art. 23

Orthopedic and non-orthopedic vehicles.- The importation of orthopedic and non-orthopedic vehicles intended for the transportation of persons with disabilities, without regard to such persons' age, shall be authorized by the National Council for Persons with Disabilities and shall enjoy the exemptions referred to in the previous article, under the following circumstances:

- a) In the case of orthopedic vehicles, when such are intended to be and will be driven by persons with disabilities or with restricted mobility, who are unable to make use of another type of vehicle;
- b) When such vehicles are intended for the transportation of persons, without regard to such persons' age, with serious disabilities or reduced mobility, who are unable to drive themselves; such vehicles are to be driven exclusively by duly authorized persons certified by the National Council for Persons with Disabilities.

Those vehicles that may be imported shall be of a model year up to three years old as of the date of the authorization. Such person with a disability, who will benefit from this right, may import a vehicle only one time, without prejudice to his or her need to import another vehicle, upon due justification.

The claimants argue that noncompliance with the cited provision has led to noncompliance with provisions contained in a series of international human rights instruments, to which Ecuador is a party. Among these are the following:

The International Covenant on Economic, Social and Cultural Rights of the United Nations

Article 11

(...) Recognize the right of everyone to an adequate standard of living.

General Comment No. 5 of the Committee on Economic, Social and Cultural Rights regarding persons with disabilities, in respect of Article 11 of the (ICESCR)

(...)It is also necessary to ensure that support services, including assistive devices are available for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights.

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"

Article 18

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(...)Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality.

The Convention on the Rights of Persons with Disabilities

Article 20, paragraph b

(...)States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by: Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

The Cartagena Agreement and the Jurisdiction of the Tribunal of Justice of the Andean Community

Article 1

(...) One of the objectives of sub-regional integration is a consistent improvement in the standard of living of the inhabitants of the Sub-Region.

Andean Declaration on Human Rights

Article 48

(...) The Presidents reiterate their commitment to comply with and to require compliance with the rights and obligations set forth in the United Nations Declaration on the Rights of Persons with Disabilities (1975); in international instruments intended to promote and protect the human rights of persons with disabilities, such as the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999); and in other declarations, resolutions and agreements regarding social protection adopted under the framework of the United Nations, the International Labor Organization, the World Health Organization, and the Pan American Health Organization.

Law of the State Attorney General

Article 13

(...) Regarding the resolution of consultations.- Without prejudice to the powers of the Legislative Branch, the Constitutional Court and the Judicial Branch set forth in the Political Constitution of the Republic and in the law, the State Attorney General shall assess and resolve those legal questions, which shall be of a binding nature, in respect of the meaning or the application of constitutional, legislative or other legal norms, at the request of the highest authorities of public sector bodies and entities and of the legal or conventional representatives of private legal persons with social or public purposes, except in the case of matters that have been resolved by judges or courts of the Republic, or that are at the time being heard before such judges or courts, as such cases are pending resolution, including those actions or claims that are being heard before or that should be brought before the Constitutional Court.

Resolution No. 0770 – 07 – RA

Constitutional protection action admitted before the Constitutional Court of Ecuador, finding for the claimant, Ms. Silvia Game, confirming the resolution of the Third Civil Chamber of Pichincha, and therefore directing CONADIS (the Ecuadorian National Council on Equality for Persons with Disabilities, or “CONADIS” as per the acronym in Spanish) to issue the corresponding authorization for the importation of a vehicle with a model year up to three years old as of the date of the authorization by CONADIS.

Resolution No. 335 – 98 – TC

The Constitutional Court, through its resolution dated December 9, 1998, published in Official Register No. 118, on January 28, 1999, in reference to the unconstitutionality action brought in respect of several articles of the General Regulation regarding Persons with Disabilities, annulled Article 76, excepting the phrase “imported vehicles shall be of a model year up to three years old as of the date of the authorization.”

Identification of the Authority or Individual Respondent

The public authorities, who, in the claimants’ opinion, have failed to comply with the aforementioned legal standards, are:

- a) the State Attorney General;
- b) the General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation.

Identification of the clear, express and enforceable obligation to act or not to act, with which compliance is demanded

In respect of the State Attorney General

The State Attorney General, by way of official letter No. 01421, dated June 23, 2008, and in respect of the resolution requested by the Executive Director of the National Council for Persons with Disabilities regarding the validity, application and enforceability of Art. 23 of the Law Restating the Law regarding Persons with Disabilities, primarily indicated that:

Article 23 of the Law Restating the Law regarding Persons with Disabilities makes an express reference to the right to import new and used orthopedic and non-orthopedic vehicles of a model year of up to three years old as compared to the current model year at the time of the corresponding authorization, to be used for the transportation of persons with disabilities. Such article, according to the opinion of the State Attorney General, is contradictory to Article 27, paragraph i, of the Organic Law of Customs, Article 50 of the Law of Transit and Terrestrial Transport, and Article 6 of the Convention on Complementation of the Automotive Sector, as well as in respect of environmental and consumers’ rights. Therefore, the State Attorney General indicated that Article 23 of the Codification of the Law regarding Persons with Disabilities is unenforceable, with the direct result that the importation of non-orthopedic vehicles and vehicles up to three model years old is disallowed. It should also be noted that the National Council for Persons with Disabilities presented an appeal for review in respect of the State Attorney General’s decision, which was rejected by way of a letter dated August 4, 2008.

Due to this, the claimants, Silvia Game Muñoz and Alfredo Luna Narváez, brought a noncompliance action, given that, in their opinions, noncompliance with Article 23 of the Codification of the Law regarding Persons with Disabilities is not permissible, particularly in consideration of the repercussions and violations that could result in respect of the legal context of constitutional and international human rights, which form part of the Ecuadorian legal framework.

In addition to the international human rights standards that are said to have been violated, and which are set forth in the preceding paragraph, the accusation of noncompliance with Article 13 of the Law of the State Attorney General must also be considered. This legal standard contains, in the opinion of the claimants, a clear obligation “not to act,” which prohibits the State Attorney General’s pronouncement in respect of matters that have been resolved by judges or courts of the Republic or that are being heard before such judges or courts, as such cases are pending resolution, including those actions or claims that are being heard before or that should be brought before the Constitutional Court. In this respect, there are resolutions issued by the Constitutional Court of Ecuador regarding cases No.335 – 98 – TC and 0770 – 07 – RA.

In respect of the General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation

The claimants argue that the importation proceedings before the Ecuadorian Customs Corporation have been suspended as a result of the declaration of the State Attorney General, which prevents them from importing vehicles of a model year up to three years old and non-orthopedic vehicles.

Ms. Silvia Game offers Resolution No. 077 – 07 – RA as evidence to support her claim, which found for her in her constitutional protection action, and therefore ordered CONADIS to issue its authorization for the importation of a vehicle of a model year up to three years old at the time of the CONADIS authorization. The claimant notes that, despite the fact that the authorization was issued as per the orders of the aforementioned court, the CAE (the Ecuadorian Customs Corporation, or “CAE” as per the acronym in Spanish) has not provided its authorization for the importation of an orthopedic vehicle of a model year up to three years old, due to the State Attorney General’s decision.

In the companion case, Mr. Alfredo Luna presents Constitutional Court Resolution No. 335 – 98 TC as evidence in support of his claim. Similar to Ms. Silvia Game’s claim, the CAE has not provided its authorization for his importation of an orthopedic vehicle of a model year up to three years old, due to the State Attorney General’s decision.

Identification of the rights alleged to be violated by the failure to comply

- a) Articles 35, 47.4 and 47.10 of the Constitution of the Republic: Rights of Persons and Groups in Need of Special Attention.
- b) Article 11.2 of the Constitution of the Republic: the Principle of Equality and Non-Discrimination.

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In the claimants' opinions, the constitutional rights violated by the alleged failure to comply has led to the violation of other rights set forth in certain international human rights instruments ratified by Ecuador.

Specific Petition

a) That the State Attorney General comply with the legal provisions set forth herein and replace his decisions dated June 23 and August 4, 2008, with a new decision that complies with the violated legal provisions;

b) That the Ecuadorian Customs Corporation comply with the legal provisions set forth herein and issue the corresponding authorizations for importation in our cases, as well as in each and every case when any citizen presenting the corresponding authorization from CONADIS so requests;

c) The claimants hereby declare that the present action is brought in order to enforce their rights and the rights of the general population who suffer from similar circumstances: this action is brought because the declarations of the State Attorney General affect all persons with disabilities, and, because the position of the CAE has been recurrent and reiterated, and is based on the declarations of the State Attorney General. The claimants further declare that both institutions should be held liable for damages.

Response to the Claim

Arguments of the Delegate of the State Attorney General

The National Director of Support Functions, the delegate of the State Attorney General, stated that the action presented does not comply with Arts. 75 and 76 of the rules set forth by the Constitutional Court, given that the State Attorney General, in the exercise of his powers as set forth in Arts. 3 and 13 of the Organic Institutional Law, was neither in violation of nor failed to comply with any legal standard. The State Attorney General has not violated any law; rather he has issued a declaration, the analysis of which was based on Arts. 163 and 272 of the Constitution in force at the time, and which were included in the new Constitution currently in force. The claimants may not argue that they were unable to enforce resolutions issued by the Constitutional Court due to the State Attorney General's declaration. The questions posed that the State Attorney General responds to the application of constitutional, legislative, regulatory and other legal standards. The present case is regarding the application of Art. 23 of the Codification of the Law regarding Persons with Disabilities, published in Official Register No. 250 on April 13, 2006. According to the provisions of the second paragraph of Art. 76 of the Rules issued by the Constitutional Court, the State Attorney General is not the authority required to comply with any sentence or report in respect of the case under analysis. Given that the State Attorney General has not violated any legal standard, sentence or international human rights instrument whatsoever, the State Attorney General requests that the present action be dismissed.

Arguments of the General Manager of the Ecuadorian Customs Corporation

Economist Santiago León Abad, General Manager of the CAE, stated that Ms. Silvia Game Muñoz and Mr. Alfredo Luna Narváez presented the corresponding requests for the authorization to import an (automatic) orthopedic vehicle of model year up to three years old

as compared to the current model year at the date of authorization issued by CONADIS. These requests were reviewed by the CAE. The General Manager details chronologically the claimants' letters to and proceedings before the CAE, from which it may be concluded that on various occasions, the CAE requested that the claimants present an invoice or pro forma in order to identify the vehicles to be imported, in accordance with the requirements set forth in Article 44, paragraph b, of the Organic Law of Customs, and Article 31 of the Law of State Modernization. In the case of Mr. Luna Narváez, the importation order exempt from tax duties was authorized in 2000, in compliance with Resolution No. 335 – 98 – TC, issued by the Constitutional Court and published in Official Register Supplement on January 28, 1999.

As a consequence of the above, the Court is requested to dismiss the noncompliance action, as it does not meet the requirements set forth by the Constitution. The CAE insists that it has attended to the claimants' requests in a timely manner, and in fact it was the claimants themselves who failed to present the necessary paperwork to the CAE in order to finalize their respective proceedings, which to date are still pending.

Determination of the Legal Issues that Must be Resolved in Order to Decide the Case

In order to decide on the merits of the case, the full sitting Constitutional Court for the Transitional Period considers it necessary to systematically consider the arguments before it in the case, based on its resolution of the following legal issues:

What is the legal nature, scope and effect of the Noncompliance Action as established in Article 93 of the Constitution of the Republic, and Article 74 *et seq.* of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transitional Period?

Can the declaration that a legal standard is unenforceable, as part of the exercise of powers conferred to an actor by Articles 3 and 13 of the Organic Law regarding the State Attorney General, result in a violation for noncompliance?

Can the issuance of a ruling by the State Attorney General affect definitive legal rulings established by a previous declaration? The non-retroactive nature of the declarations issued by the State Attorney General.

Does Article 23 of the Law Restating the Law regarding Persons with Disabilities contain an express and enforceable obligation to act or not to act?

Which is the body charged with authorizing the tax-free importation of orthopedic and non-orthopedic vehicles of a model year up to three years older than the current model year at the time of the authorization by CONADIS?

Does Article 44 of the Organic Law of Customs confer on the Ecuadorian Customs Corporation the authority to rule on the applicability or the non-applicability of a legal standard? Or is such authority a complementary formal requirement?

What is the nature, scope and effect of a declaration of unconstitutionality in respect of legal standards related to the provisions set forth in numeral 3 of Article 436 of the Constitution of the Republic?

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What is the legal character of the declarations issued by the State Attorney General?

What are the interpretative techniques that should be used when there is a conflict between fundamental rights? What are the interpretative techniques inherent in the paradigm of the Constitutional Rule of Law State?

According to the Constitution of the Republic currently in force, what is the highest authority in terms of constitutional control and interpretation?

Under the framework of the Constitution of the Republic currently in force, does the State Attorney General have the power to issue binding interpretations of constitutional precepts?

What is constitutional reductionism?

What is conditional constitutional interpretation? What are its effects?

II

CONSIDERATIONS AND REASONING

Jurisdiction of the Constitutional Court

The full sitting Constitutional Court for the Transition Period is competent to hear and to resolve the present case, in accordance with the provisions set forth in Article 27 of the Transition Regime, published with the Constitution of the Republic in Official Register No. 449 on October 20, 2008, and the resolution published in Official Register Supplement No. 451 on October 22, 2008.

In accordance with Article 93 of the Constitution of the Republic, the noncompliance action is intended to guarantee the application of the legal standards that comprise the legal system, as well as compliance with sentences or reports from international human rights organizations, when the standard or decision with which compliance is sought contains a clear, express and enforceable obligation to act or not to act, in accordance with Art. 74 of the Rules of Procedure for the Exercise of Jurisdiction of the Constitutional Court for the Transition Period, published in Official Register Supplement No. 466, on November 13, 2008.

Given that it is the Court's duty to resolve this issue, the Court will proceed to undertake the corresponding analysis on the merits.

Considerations of the Constitutional Court for the Transition Period regarding the Legal Issues Identified

Legal Nature, Scope and Effects of the Noncompliance Action

The current Constitution of the Republic contains considerable and substantial differences from the Political Constitution of 1998. For example, in respect of judicial guarantees of the constitutional rights in question, there has been a significant advance in the judicial protection of rights. While the constitutional guarantees provided in the Political Constitution of 1998 were characterized by their merely precautionary nature, the new judicial guarantees are widely known to declarative, broadly reparative and exceptionally precautionary. That is,

from the moment of activation of a judicial guarantee, the constitutional judge, through his or her sentence, is in a position to review the merits of the matter in controversy, and as a consequence, is obligated to rule on any violation of a right and to mitigate the consequences that such violation may have caused. As such, Article 86, numeral 3, of the Constitution of the Republic, regarding General Provisions for Judicial Guarantees, and Article 44, numeral 3, of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transition Period, establish that: (...) The judge shall resolve the case by a sentence, and in the case that there has been a violation of rights, must declare that such violation has occurred, order comprehensive reparations, whether tangible or intangible, and specify and individualize both the positive and negative obligations with which the party to whom the judicial decision is addressed must comply, and the circumstances under which such obligations must be undertaken. For its part, the connotation of judicial guarantees is directly related to the obligation of the constitutional judge to ensure that public acts do not violate rights. Definitively, the protection provided by the new guarantees is in keeping and compatible with the paradigm of the Constitutional State as set forth in Article 1 of the Constitution of the Republic.

As such, the noncompliance action forms a part of the new judicial guarantees put in place by the Constitution. In the past there was no similar constitutional guarantee, which sought to enforce the efficacy of the judicial system. Precisely because of this, it is necessary to determine the precepts in respect of which the action may be undertaken.

Regarding the objective of the action:

- a) To guarantee the application of standards or administrative acts of a general character, whatever their nature or legal hierarchy, which make up the judicial system;
- b) To guarantee compliance with the decisions or reports of international human rights bodies.

Regarding requirements for admissibility:

- a) The standard or decision with which compliance is sought must contain a clear, express and enforceable obligation to act or not to act.
- b) It must be verified that the standard, administrative act of general character, decision or report of an international human rights body is not enforceable through ordinary judicial channels.

Once the nature, effects and precepts in respect of admissibility that govern the noncompliance action have been confirmed, it is appropriate to proceed to an analysis on the merits related to the alleged noncompliance of the State Attorney General, and the General Manager and Assistant Regional Manager of the Ecuadorian Customs Corporation.

With respect to the alleged noncompliance of the State Attorney General

The claimants argue that the decision issued by the State Attorney General, which prohibited the importation of non-orthopedic, pre-owned vehicles on a tax-free basis for persons with disabilities, is in violation of Article 23 of the Law Restating the Law regarding Persons with Disabilities, Article 13 of the Organic Law regarding the State Attorney General, and a series of international human rights instruments ratified by Ecuador.

In this respect, it should be noted that Article 216 of the Political Constitution of 1998 (in force at the time of the issuance of the State Attorney General's declaration), and Articles 3 and 13 of the Organic Law regarding the State Attorney General, confer upon the State Attorney General the authority to resolve questions posed and provide legal advice to public sector bodies and entities, as well as to private legal persons with public or social purposes, in respect of the meaning or application of constitutional, legal or other judicial standards. In compliance with the cited provisions, and based on the question presented by the National Director of the National Council for Persons with Disabilities, the State Attorney General declared that Article 23 of the Law Restating the Law regarding Persons with Disabilities was unenforceable. The central argument that resulted in such finding of unenforceability was based on Articles 163 and 272 of the Political Constitution of the Republic of 1998 (the Constitution in force at the time). Based on the aforementioned constitutional provisions, the State Attorney General determined that Article 23 of the Law Restating the Law regarding Persons with Disabilities was in contravention of Article 27, paragraph i, of the Organic Law of Customs, Article 50 of the Law of Transit and Terrestrial Transport, and Article 6 of the Convention on Complementation of the Automotive Sector. That is, based on an interpretation of judicial hierarchy, the State Attorney General declared that Article 23 of the Law Restating the Law regarding Persons with Disabilities was unenforceable, in order to allow for the enforceability of the other legal provisions. The legal provisions in question contained clear obligations that must be complied with, and precisely for this reason, the State Attorney General, upon detecting the contradictions, determined the impossibility of enforcing Article 23 of the Law Restating the Law regarding Persons with Disabilities. Through the present action, the claimants are seeking for this Court to order the State Attorney General to substitute his declarations dated June 23 and August 4, 2008, a purpose which cannot be achieved through the noncompliance action, unless a manifest event of noncompliance is discovered. The declaration that a normative law is unenforceable may not be characterized as an event of noncompliance, just as it is inappropriate to argue that enforceability is a synonym for compliance. In the event that an analysis of unenforceability were to violate fundamental rights, the protection action would be the appropriate legal venue to address such a claim. On the other hand, from the proceedings it may be observed that the claimants' allegations and petitions in respect of the ruling issued by the State Attorney General are related to an analysis of the constitutionality thereof, a subject which, due to principle of systematic interpretation of the Constitution, may not be the object of an analysis in the present noncompliance action. If the Constitution is an organic whole, its precepts must be interpreted in such a way as to definitively exclude any interpretation that nullifies or leaves any of its provisions without effect. In this respect, the procedures established by the Constitution for decision-making in certain situations may not be replaced with other mechanisms in the same constitutional text. In this way, the Constitutional Court for the Transition Period cannot allow the constitutionality of the resolution in question to be resolved through a noncompliance action, when the appropriate proceeding to make that determination would be the protection action.

With respect to the alleged violation of Resolution No. 0770-07-RA, it is important to remind the claimants that the effects of a constitutional protection (*amparo*) action in the past were binding on both parties, for the claimant as well as for the authority responsible for the unlawful act—in this case, the National Director for Persons with Disabilities. In addition, from the proceedings it can be observed that the *ratio decidendi* that resulted in the resolution of the protection action in favor of Ms. Silvia Game referred to the impossibility of claiming a fault in the law to justify the violation or ignorance of the rights guaranteed by the

Constitution. The State Attorney General's resolution does not refer to the material in question, and therefore does not incur any obligation not to act in accordance with Article 13 of the Organic Law regarding the State Attorney General.

In respect of the violation of Resolution No. 335-98-TC, which declared the unconstitutionality of various articles of the General Regulation of the Law regarding Persons with Disabilities, among them Article 76, excepting the phrase, imported vehicles shall be of a model year up to three years old as of the date of the authorization, it is necessary to note the following: The State Attorney General has not issued any resolution in respect of those provisions and phrases that were declared unconstitutional, and it must be noted that it is the declaration of unconstitutionality that provokes effects *erga omnes*, but not those points that were declared as such. The Constitutional Court's resolutions in this vein determined the unconstitutionality of the impugned provision or dismissed the claim, as being outside its jurisdiction. In these circumstances, no violation of the State Attorney General has been discovered with respect to the unconstitutionality resolution issued in respect of case No. 335-98-TC. The Attorney General ruled on the impossibility of importing pre-owned and non-orthopedic vehicles, issues which are governed both by Article 23 of the Law Restating the Law regarding Persons with Disabilities, as well as by Article 76 of the Regulation of the Law regarding Persons with Disabilities. These provisions, as previously mentioned, were declared unenforceable by the State Attorney General.

Given the above, it can be concluded that the State Attorney General's issuance of his resolution was in compliance with his powers as conferred by the Constitution and the law; therefore, no evidence has been presented during these proceedings of any failure to comply with respect to a legal standard, administrative act of a general character, decision or report of an international human rights body, which contains a clear, express and enforceable obligation to act or not to act.

With respect to the alleged noncompliance of the Ecuadorian Customs Corporation

In the opinion of the claimants, the importation proceedings authorized by the National Council for Persons with Disabilities were suspended by the Ecuadorian Customs Corporation as a result of the resolution issued by the State Attorney General, which prohibited the importation of non-orthopedic automobiles and of a model year up to three years old.

In this respect, it is important to note that in the application of the rule of constitutional interpretation *iura novit curia* (the judge knows the law) and the direct application of the Constitution, the constitutional judge, once a judicial guarantee has been raised, has the power to base his or her decision on constitutional provisions not raised by the parties or on arguments not based in the law. Under these parameters, this Court has discovered the following: It can be concluded from the evidence on the record that the State Attorney General issued his resolution, which is the object of the present action, on June 23, 2008—that is, later in time than the date on which the National Council for Persons with Disabilities authorized the importation of automatic vehicles of a model year up to three years old on a tax-free basis, in favor of the claimants. With respect to Ms. Silvia Game Muñoz, evidence has been presented that shows that she obtained her authorization to import on August 21, 2007, and in the case of Mr. Luna Narváez, his authorization was obtained on February 15, 2008. For this reason, it is clear that such resolution could not have been applied retroactively, much less have affected definitive judicial decisions issued under the auspices of Article 23 of the Law Restating the Law regarding Persons with Disabilities, published in the Official

Register on April 13, 2006. In addition, the National Director for Persons with Disabilities sent the consultation to the State Attorney General in respect of the enforceability of Article 23 of the Law Restating the Law regarding Persons with Disabilities after the National Council for Persons with Disabilities had already issued the authorizations for the tax-free importation of the automobiles requested by the claimants. That is, the State Attorney General's Resolution 01421 became binding on CONADIS in respect of those requests for authorization to import made after the resolution was issued. Furthermore, at the time that the claimants obtained the relevant authorizations from CONADIS, two binding resolutions issued by the State Attorney General at the time, Dr. José María Borja, on August 24 and 25, 2006, were in force.

The first of these resolutions was contained in official letter No. 27235, and referred to the question posed by the Director of the National Council for Persons with Disabilities in relation to the tax-free importation of vehicles for the use of persons with disabilities. In relevant part, the then-State Attorney General stated that:

(...) I refer to your official letter No. CND – 571, dated June 22, 2006, which requests a resolution in respect of the tax-free importation of vehicles for us by persons with disabilities....(...) Such persons also benefit from the aforementioned exemptions, the importation of orthopedic and non-orthopedic vehicles that will be used for the transportation of persons with disabilities, regardless of such person's age, and which importation must be authorized by the National Council for Persons with Disabilities, in those cases referred to in paragraphs a), b) and c) of Article 23 *id.*... (Underlined text added) Paragraph a) of the article in question refers to orthopedic vehicles, as well as non-orthopedic vehicles with a model year up to three years old as of the date of authorization.

From the foregoing, it is clear that the importation of tax-free vehicles is appropriate in the case of orthopedic vehicles and non-orthopedic vehicles of a model year up to three years old as of the date of authorization.

In official letter No. 27338, dated August 25, 2006, the State Attorney General stated that:

(...) I refer to your official letter No. 511 CND, dated June 7, 2006... (...) Based on the preceding legal analysis, I am of the opinion that persons with disabilities, whether total or partial, and regardless of age, have the right to import orthopedic and non-orthopedic vehicles, under the terms set forth in Articles 17 and 23, first paragraph, of the Law regarding Persons with Disabilities, and Article 3 of the General Regulation...

(...) Article 23, first paragraph, substituted by the Law Restating the Law regarding Persons with Disabilities, Codified, sets forth that the importation of orthopedic and non-orthopedic vehicles shall be authorized by the National Council for Persons with Disabilities, after the commissions referred to in Article 88 of the General Regulation of said law have established that such a right exists, and compliance with the requirements under Art. 89 of the General Regulation has been confirmed.

(...) It is the duty of the National Council for Persons with Disabilities to monitor the effective compliance with the Law regarding Persons with Disabilities and to demand the implementation of sanctions on any violators. The Council's responsibility is limited to authorizing the importation of orthopedic and non-orthopedic vehicles on a tax-free basis in such circumstances.

The resolutions in question guaranteed the application of Article 23 of the Law Restating the Law regarding Persons with Disabilities, and the importation of orthopedic and non-orthopedic vehicles of a model year up to three years old as of the date of authorization by CONADIS. Furthermore, they made it clear that the entity charged with issuing the corresponding authorizations—that is, analyzing the merits of the matter in question—is the National Council for Persons with Disabilities. It should be noted that according to Article 3, paragraph e, of the Organic Law regarding the State Attorney General, the resolutions of the State Attorney General are binding on the public administration, upon penalty of violating the resolution issued by failing to observe its provisions. Therefore all authorities of the public administration, which includes the Ecuadorian Customs Corporation, were required to conform their actions to the provisions of the resolutions issued at that time by the then-State Attorney General. Not to do so would have been in contravention of the principle of judicial security set forth in Article 82 of the Constitution of the Republic. The principle of judicial security is a guarantee that the State recognizes to protect the integrity and rights of individuals and their property, and if such integrity and rights are violated, the principle establishes the appropriate mechanisms to deal with such violation. Judicial security, in sum, in the context within which individual decisions are made, and therefore it is inevitable that an expectation arises that the legal framework is and will be reliable, stable and predictable. Therefore, it is indispensable that the decisions of public figures within a true constitutional State adhering to the rule of law are made according to the logic of the legal standard and not according to discretionary logic.

For these reasons, the resolution of the State Attorney General, which prohibits the importation of non-orthopedic vehicles of a model year of up to three years old, is not binding on the Ecuadorian Customs Corporation, and therefore, does not affect the claimants' rights. The effects of the resolution were binding as and from the time of its issuance. At the time that the claimants obtained their respective authorizations, there was no prohibition whatsoever related to the importation of non-orthopedic vehicles of a model year of up to three years old. On the contrary, Article 23 of the Law Restating the Law regarding Persons with Disabilities and the resolutions issued by State Attorney General José María Borja guaranteed such tax-free importation in favor of persons with disabilities.

It must be made clear that, in accordance with Article 23 of the Law Restating the Law regarding Persons with Disabilities and the resolution issued by State Attorney General on August 25, 2006, CONADIS, the body charged with authorizing the tax-free importation of non-orthopedic vehicles of a model year of up to three years old for the transportation needs of persons with disabilities. Therefore, once CONADIS' authorization has been issued, as in the case at hand, the Ecuadorian Customs Corporation must limit itself to complying with the obligation set forth in Article 23 of the Law Restating the Law regarding Persons with Disabilities, in accordance with Article 44 of the Organic Law of Customs. In the present case, the official letters dated May 12, 2008, written to the Assistant Regional Manager of the Ecuadorian Customs Corporation demonstrated the opportunity that was presented to the claimants, Silvia Game Muñoz and Alfredo Luna Narváez, to obtain and present the invoices, pro formas or similar documents, in the case of pre-owned vehicles (which were requested multiple times by the CAE in order to complete the transactions), that would have permitted the issuance of the respective importation orders. In this respect, and noting for the record that the evidence presented of the CAE proceedings shows that the CAE is waiting for such documentation to be presented by the claimants, "in order to process the claimants'

importation requests,” it is now up to the claimants to produce such invoices, pro formas or similar documentation.

However, the Ecuadorian Customs Corporation must be reminded that the obligation set forth in Article 44, paragraph b, of the Organic Law of Customs, is a “procedural” requirement, which is complementary to the importation authorization issued by the competent authority—in this case, the National Council for Persons with Disabilities. In accordance with Article 23 of the Law Restating the Law regarding Persons with Disabilities, and the resolution contained in official letter No. 27235, dated August 24, 2006, it is clear that it is not up to the CAE to decide on the enforceability or the unenforceability of Article 23 of the Law Restating the Law regarding Persons with Disabilities.

Article 76 of the Rules of Procedure for the Exercise of Jurisdiction of the Constitutional Court for the Transition Period provides that the noncompliance action must be directed against the authority, officer, judge, or individual, who has failed to comply with a legal rule, administrative act of a general nature, decision or report covered under Article 93 of the Constitution of the Republic. To date, the General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation have not been able to comply with the claimants’ requests, given the claimants’ failure to comply with Article 44 of the Organic Law of Customs—that is, the presentation of invoices or pro formas that identify the individual characteristics of the vehicles the claimants wish to import. However, from the record it may be concluded that a series of official letters issued by the CAE in 2007 clearly fail to comply with “the merits” of the obligations set forth in Article 23 of the Law Restating the Law regarding Persons with Disabilities, and the resolutions issued by the State Attorney General at the time, on August 24 and 25, 2006.

The official letters are the following:

a) Official Letter GGN – GAJ – DTA – OF – 1495, dated April 9, 2007, written by Economist Santiago León Abad, General Manager of the CAE, to Mr. Galo Cevallos Mancheno, the General Secretary of the Vice President of the Republic of Ecuador, which provides, in relevant part, that:

(...) We are unable to respond to the petition of Mr. Alfredo Luna, given that the exemption of an older vehicle is contrary to Article 203 of the Council of Foreign Commercial Investment, which states the following: “The importation of vehicles is permitted, provided that the vehicle is of the current model year as of the year of its importation, or the prior model year.” This provision is cited by “The Convention on Complementation of the Automotive Sector of the Andean Community,” which prohibits the importation of pre-owned vehicles within the territories of the member countries.

Official Letter GEJU – DTA – OF 129, dated May 23, 2007, written by Attorney Viviana Vásquez de Farías, Managing Legal Counsel of the Ecuadorian Customs Corporation, and written to Alfredo Luna Narváez:

(...) With respect to the Official Letter you refer to, the Ecuadorian Customs Corporation drafted Official Letter No. GGN – GAJ- DTA-OF -1495, dated April 9, 2007, written by Economist Santiago León Abad, General Manager of the CAE, stating that the Institution is unable to respond to your petition given that the vehicle you wish to import does not comply with the provisions set forth in Resolutions Nos. 184 and 203 of the National Council for

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International Commerce and Investment (“COMEXI,” for its acronym in Spanish), which permit the importation of vehicles, provided that the vehicle in question is of the current model year as of the year of its importation, or the prior model year, which provision is cited by “The Convention on Complementation of the Automotive Sector of the Andean Community,” which prohibits the importation of pre-owned vehicles within the territories of the member countries. Therefore, please find attached the aforementioned official letter, which responds to your repeated requests that an authorization be issued for the importation of a vehicle that is more than three years old.

c) Official Letter GGN – GEJU – DTA – OF 2833, dated July 5, 2007, written by Economist Santiago León Abad, General Manager of the CAE, to Ms. Silvia Game Muñoz:

(...) This Corporation is unable to authorize the importation of an orthopedic vehicle of a model year up to three years older than the current model year, in accordance with Article 23 b) of the Law Restating the Law regarding Persons with Disabilities, given that an international legal standard prohibits it, in order to protect the community and to allow its inhabitants to enjoy a healthy environment, among other concerns. Therefore, this General Manager may not accept your request, unless and until we are notified of a Judicial Decision duly executed by the respective court. (Underlined text added)

It is not only the case that the General Manager of the CAE has attributed to himself an authority he does not possess, but in addition, he contravened expressly the obligation set forth in Article 23 of the Law Restating the Law regarding Persons with Disabilities, and the content of the binding resolutions issued by the then-State Attorney General. Despite the fact that Ms. Silvia Game had obtained the importation authorization from CONADIS, in the form of Resolution No. 001 - 2007, the Ecuadorian Customs Corporation failed to comply with Article 23, which contains a clear, express and enforceable obligation.

Given the above, the claimants’ concern is justified, given that the CAE, under the same administration that is currently in place, denied their claims in the past. Despite the fact that on page 71 of the record of the proceedings, Economist Santiago León Abad is quoted as saying, “The Ecuadorian Customs Corporation has responded in a timely manner to the petitions of both claimants, however neither of them have provided the administration with the necessary documentation in order to process the resolution exempting their imports from the payment of customs duties, a right which has not been denied to either of them,” this is the same official, who, attributing to himself powers he did not possess in the past, denied such importation, but not on the basis of noncompliance with Article 44, paragraph b) (a procedural requirement), but instead based on the “substantive” hierarchy of law argument, which he was not competent to rule on, given the existence of a clear standard and two binding resolutions issued by the State Attorney General at that time, directly related to the matter in question.

In strict compliance with the provisions set forth in Article 93 of the Constitution of the Republic and Article 75 of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transition Period, the General Manager of the Ecuadorian Customs Corporation has failed to comply with Article 23 of the Law Restating the Law regarding Persons with Disabilities and the resolutions issued by the State Attorney General, which contained clear, express and enforceable obligations. The General Manager of the CAE’s failure to comply has resulted in the restriction of the claimants’ exercise of their

rights and the rights of persons and groups in need of special attention, as guaranteed by Articles 35, 47.4, 47. 10 and 11.2 of the Constitution of the Republic.

III

OTHER CONSIDERATIONS OF THE COURT

With respect to the filing of the present noncompliance action, the Court must review various legal instruments, among these, Resolution 01421 issued by the State Attorney General, Articles 3 y 13 of the Organic Law regarding the State Attorney General, and Article 44 of the Organic Law of Customs.

In analyzing the alleged failure to comply of the State Attorney General, the Court has concluded that the claimants' argument is related to the unconstitutionality of Resolution 01421, and not to the failure to comply with any other norm. Therefore, in accordance with the principle of systematic interpretation of the Constitution, this material cannot be the object of revision through the noncompliance action. Furthermore, this decision has already established that, when a judicial guarantee is raised, as the noncompliance action effectively is, the constitutional judge is authorized to review the merits of the matter in controversy. Finally, the Court notes that under the rule of constitutional interpretation *iura novit curia*, the constitutional judge may base his or her decision on allegations that were neither raised nor supported by the parties.

For the preceding reasons, based on the analysis of the merits of the case and in exercise of its powers conferred by Article 436, numeral 3, of the Constitution, this Court may not fail to rule upon the constitutionality of Resolution 01421 and other legal standards at issue in the case.

Legal Nature, Scope and Effects of the Court's *Ex Officio* Declaration of Related Legal Standards

In the same way that the Court determined the nature of the new judicial guarantees prior to its analysis of the relevance of an *ex officio* declaration of unconstitutionality in respect of related legal standards in respect of the *case sub judice*, it is necessary to provide context and to determine the scope of this new guarantee, which will allow the harmonization of the content of the legal framework with constitutional mandates and international human rights laws.

It is normal in a multinational state, such as Ecuador, which implies the recognition of various sectors advocating for special interests, that there is excessive passage of legislation, as a way to respond to society's demands. These factors increase the possibility of contradictions among legal and constitutional provisions. In this respect, Ferrajoli and Zagrebelsky describe the legal crisis, referring to so-called "legislative inflation"¹, or the crisis caused by the generality and abstraction of the law.²

To Ferrajoli, the phenomena of "inconsistency, lack of completeness, contradictions and gaps in the law are, within certain limits, insuperable problems in a constitutional law State."³

¹ See Luigi Ferrajoli, *Rights and Guarantees*, Madrid, Eds. Trotta, 2001, pp. 15-17.

² See Gustavo Zagrebelsky, *Ductile Law. The Law of Rights and Justice*, Madrid, Eds. Trotta, 2007, pp. 36-37.

³ Luigi Ferrajoli, *Op. Cit.*, pp. 28.

However, this does not mean that the legal sciences should not seek to combat these phenomena. Ferrajoli notes that the response to the legal crisis can be found within the law itself.⁴ One of the responses is the exercise of judicial guarantees and a more active role for judges: “inconsistency and the lack of completeness, even if they cannot be reduced past a certain point, can still be reduced through adequate guarantees.”⁵

The unconstitutionality of related legal standards may be included within the so-called “liberal guarantees,” which consist of the invalidation or overturning of acts that violate human rights.⁶ The objective is to protect the effective enforcement of constitutional supremacy, and for this, it is necessary that the Court find, among the cases submitted before it, that one or more legal standards is contrary to the Constitution. Since this is a new concept in the doctrine of Ecuadorian constitutional law, it is relevant to refer to its use in Comparative Law. In the Argentine case, for example, where constitutional control is decentralized, the *ex officio* declaration of unconstitutionality has developed through the country’s jurisprudence. The evolution of this concept has been slow and very careful,⁷ and currently is admissible as a tangential issue to the resolution of a case in litigation, and never in the exercise of constitutional control in the abstract. In addition, in order for such a declaration to proceed, such declaration must be indispensable for the success of either the claimant’s or the respondent’s argument.⁸

In the case of Ecuador, the power to declare related legal standards unconstitutional is expressly provided for in the text of the Constitution; however, the reference to the Argentine doctrine is worthwhile in order to justify the necessary and opportunity of this power, which has also been adopted by systems of decentralized constitutional control, with the justification of giving constitutional supremacy its full and proper scope, through the exercise of distinct judicial guarantees. There are cases, such as in Peru, in which the declaration of unconstitutionality of a related legal standard has been within the powers of the Constitutional Court since 1995. At that time, a declaration of unconstitutionality of a related

⁴ See *id.*, p. 34.

⁵*Id.*, p. 25.

⁶*Id.*

⁷*Ex officio* constitutional control in Argentina has been a concept recognized in the National Supreme Court’s jurisprudence since 1984, as a way of enforcing constitutional supremacy. Such a declaration is without general effects, other than the possibilities of reiteration or for application by judges in lower courts.

Detractors of this power cite the procedural principal of congruency (briefly, this refers to the relationship between the claim and the decision). However, an *ex officio* declaration of unconstitutionality in this type of decentralized system of control can also take place through application of the *iura novit curia* principle, which encourages judges to rule on points of law that were not raised or that were not properly plead by the parties, but without changing the essential nature of the claim. Argentine jurisprudence then began to indicate that without an express pleading by the parties, a judge could not rule on an issue.

This position has been deserving of criticism in the Argentine doctrine, as it implicitly accepts that the parties can withdraw a plea in respect of the unconstitutionality of a law, and in such case, a judge would not therefore be able to rule on this point.

Argentine jurisprudence gradually came to recognize that in order to allow for the *ex officio* exercise of constitutional control, it was necessary that there be a process that makes constitutionality issues evident. Although it has also been said that one of the parties must plead an unconstitutionality claim, this requirement has been discarded in the most recent Supreme Court decisions.

See Deborah L. Corral Brest, The Doctrine of National Constitutional Supremacy and its Essential Control Mechanism, 2006, pp. 1-9. Available online at : [http://www.e-derecho.org.ar/congresoprocesal/Supremac%EDa%20de%20laConstituci%F3n%20\(Corral%20Brest\).doc](http://www.e-derecho.org.ar/congresoprocesal/Supremac%EDa%20de%20laConstituci%F3n%20(Corral%20Brest).doc).

⁸ See National Supreme Court of the Republic of Argentina, Sentence, Case No. 102/1996, available online at: http://www.csjn.gov.ar/documentos/expedientes/datos_expe.jsp.

legal standard was only permissible in respect of “other precepts of the same standard.”⁹ However, the practical jurisprudence of the Peruvian Tribunal, as expressed in Sentence No. 022–96–I/TC, extended this power, and found that, “the ‘unconstitutionality of related legal standards’ not only refers to other provisions that form part of the same legal standard [...], but also to any other standard in the legal framework. [...] From this decision it can also be noted that the Tribunal did not specify what these other legal standards were, which, despite the fact that they had not been pled in the claim, would be equally unconstitutional.”¹⁰ The Peruvian Tribunal’s reasoning was partially supported by the Code of Constitutional Procedure effective since 2004, which, in Article 78, broadened the concept of the unconstitutionality of related legal standards to include normative precepts outside of the challenged legal doctrine. The most recent jurisprudence of the Peruvian Tribunal has declared that, “[w]hat this provision seeks to do is to remove impurities from the legal framework.”¹¹ Unlike in Peru and Colombia, which have declared that the declaration of unconstitutionality of related legal standards must be exercised as part of a claim brought in respect of the unconstitutionality of a legal standard, in Ecuador, in accordance with numeral 3 of Article 436, the Constitutional Court is competent to declare *ex officio* the unconstitutionality of related legal standards not only in ruling on a cause of action brought for reasons of alleged unconstitutionality, but generally “in those cases presented before it.” In addition, Article 428 of the Constitution provides for the possibility of *ex officio* constitutional control in ordinary judicial proceedings that are resolved in final instance before the Constitutional Court. Although speaking to two different competencies, both constitutional provisions reveal the clear intention of the framers to allow for *ex officio* constitutional control on the part of the highest Ecuadorian judicial authority by a variety of routes, and not only in ruling on dispositive constitutional causes of action. This power prevents the Court from being limited to taking a passive and impotent stance when it discovers unconstitutional legal standards. This interpretation makes perfect sense in light of the radical change in the conception of the Ecuadorian state, which, as of the entrance into force of the new Constitution, considers itself to be a constitutional rights and justice State. As Ferrajoli explains, “[t]he paradigm of the constitutional law State—that is, the guarantor model, is nothing more than this double function of law to law, which affects both dimensions of all normative phenomena: effectiveness and validity, form and substance.”¹² With this proposition, the author explains that the law should govern not only the form in which laws (or legal standards) are passed, but also that such law is materially in compliance with the State’s constitutional principles and values. This new conception of validity of legal standards gives a “material” character to the State’s democracy and “assigns to the judiciary a role of providing a guarantee to citizens against any type of violation of legal norms by public authorities.”¹³ This new concept of the State and the importance of constitutional justice charged to this Court, substantively justify the exercise of broad and complete powers of constitutional control in order to provide effective protection to human rights and constitutional supremacy. In these terms, this Court’s powers to analyze *ex officio* the unconstitutionality of related legal standards are justified and defined.

Unconstitutionality Analysis Related to Resolution 01421 of the State Attorney General

⁹ Law No. 26435, January 10, 1995, Organic Law of the Constitutional Court, Article 38.

¹⁰ Andean Judiciary Commission, Luís Alberto Huerta Guerrero, Unconstitutionality Proceedings in Peru, Preliminary Study, available at: <http://www.cajpe.org.pe/RJ/bases/jurisnac/proceso.htm#nueve>.

¹¹ Constitutional Tribunal of Peru, Case N.º 0012-2005-PI/TC, available online at: <http://www.tc.gob.pe/jurisprudencia/2006/00012-2005AI.html>.

¹² Luigi Ferrajoli, *op. Cit.*, p. 22.

¹³ *Id.*, p. 26.

a. Legal nature of resolutions issued by the State Attorney General

Prior to the analysis on the merits of the constitutionality of Resolution 01421, it is necessary to determine its legal nature, in order to determine how to proceed in the analysis thereof in accordance with Article 436, numeral 3, of the Constitution of the Republic.

With respect to the legal nature of administrative acts, Spanish doctrine indicates that such acts “can be reduced to three main categories:

- legal provision or standard;
- act or resolution;
- contract.”¹⁴

We are tasked, then, with fitting the State Attorney General’s resolution into one of these three categories. Beginning this analysis with the most obvious proposition, it is clear that the State Attorney General’s resolutions are not of a contractual nature, given that the essence of the contract is that “the legal relationship is determined by the common agreement of the parties.” The content of the resolution derives from the content of the question posed to the State Attorney General, but at no time are other parties involved in the determination of the resolution’s content.

The resolution of the State Attorney General is also not an administrative act, according to the declarations of the now-defunct Ecuadorian Constitutional Tribunal, and by author Rafael Oyarte. The Constitutional Tribunal declared that, “the resolutions of the State Attorney General, in resolving the questions posed to him or her, cannot be considered as administrative acts in the terms generally accepted by the doctrine of Administrative Law, given that they lack individual and direct effects.”¹⁵ Rafael Oyarte’s analysis proceeds along the same lines: the administrative is, “the unilateral declaration of the decision of a competent public authority, in exercise of its administrative authority, which results in subjective, concrete and immediate legal effects—that is, which create, modify or extinguish individual legal postures.”¹⁶ The State Attorney General’s resolution, however, is not an administrative decision, but an opinion issued to inform and advise the externalization of the decision of administrative body that raised the question.¹⁷

That leaves us to analyze the “norm” as the last main category of legal administrative acts. In this respect there are two contradictory positions: one the one hand, Rafael Oyarte characterizes the norm for its generality, universality, abstraction, mandatory nature and permanence, while Spanish administrative law doctrine questions this classic formulation and notes that, “a legal standard is characterized not by its abstraction and generality, but by the fact that it creates an objective right.”¹⁸

Oyarte rejects that idea that the State Attorney General’s resolution could be characterized as a legal norm for three reasons: in the first place, he indicates that the State Attorney General’s

¹⁴ Alfredo Gallego Anabitarte, Ángel Menéndez Rexach, et al., *Administrative Acts and Procedure*, Madrid, Marcial Pons Ediciones Jurídicas y Sociales S.A., 2001, p. 27.

¹⁵ Constitutional Tribunal of Ecuador, Case N° 003-2003-AA.

¹⁶ Rafael Oyarte Martínez, *Appeal Mechanisms in respect of the Resolutions of the State Attorney General*, in, *Forum Legal Review* No. 6, Simón Bolívar Andean University, Ecuador Campus. Quito, 2006, p. 193.

¹⁷ See Oyarte, p. 193 *et seq.*

¹⁸ Alfredo Gallego Anabitarte, Ángel Menéndez Rexach, *et al.*, *Administrative Acts and Procedure*, Madrid, Marcial Pons Ediciones Jurídicas y Sociales S.A., 2001, p. 31.

resolution is not general, because it is only binding on the administration; furthermore, “this resolution does not constitute a legal standard, but, precisely, an opinion in respect of the application of legal standards, without the ability to replace the laws and interpretative resolutions of the National Assembly and the Supreme Court.” Finally, there is no dispositive hierarchy with respect to such resolutions.

However, the real basis of such observations is highly debatable. In respect of the generality of the standard, as noted above, this is a characteristic that has been eroded and that does not correspond to the current legal reality (see *supra*, “legislative inflation”). In objecting to the principle of generality, Oyarte notes in his conclusions that the resolution is only binding on the public administration.¹⁹ But the resolution’s binding nature and its mandate to enforce, not to enforce, or to enforce in a certain way a given legal standard, necessarily includes the exercise of rights and prerogatives of all persons who are affected by the decisions of such administration. The evidence of this is found in the case at hand: after the resolution, the public administration was obligated not to enforce Article 23 of the Law regarding Persons with Disabilities, which has direct implications on the general rights of all persons with disabilities. Therefore the generality of the State Attorney General’s resolution is demonstrated.

Oyarte’s second objection classifies the State Attorney General’s resolution as an opinion in respect of the manner of enforcing legal standards, and denies it classification as a “legal standard in and of itself.” But departing from the idea that the legal standard “in and of itself” is what creates a legal right, the State Attorney General’s resolution meets this criteria, as described below (see *infra*). The Ecuadorian author justifies his position by arguing that the State Attorney General’s resolution cannot replace the resolutions of the former National Assembly and the Supreme Court, but this is denying “**what is**” based on “what should be.” There **should** be clear legal standards, and facts of each case that give rise to clear consequences that are manifest through obligations and rights, but the “what is” of the matter shows that due to the lack of clear legal standards, and the lack of resolutions from Congress or the Court, the State Attorney General, through his or her resolutions, creates objective law and modifies the legal framework of facts, obligations and rights.

Rafael Oyarte’s final objection is the absence of a normative hierarchy for the State Attorney General’s resolution. However, both the author’s affirmation, as well as the 1998 Constitution (Art. 272) and the 2008 Constitution (Art. 425), refer to “other acts by public authorities” in the final category of the normative hierarchy. It can be accepted that Article 272 of the 1998 Constitution only refers to the fact that all acts (whether normative or not) are subject to the superior hierarchy of the Constitution, and does not establish explicitly a specific judicial order; but Article 425 of the new Constitution expressly defines the hierarchy of powers, and the resolution is considered within the final normative category, as “an act of public authority.”

Including in the line of reasoning followed by Rafael Oyarte, the State Attorney General’s resolution approximates in large part the concept of the norm, and even more so in the line of reasoning followed by this Court, which considers this to a determinative factor in determining whether the State Attorney General’s resolution is normative or not, by identifying if it creates “objective law.”

¹⁹ Rafael Oyarte, *op. Cit.*, p. 222.

In this line of thinking, “[o]bjective law is a guideline, rule, or scale according to which, from the behavior of those subject to it, on a factual basis, arise rights and obligations. Objective law is based on the idea that under the premises designated thereby, rights and obligations are developed. Objective law is what provides legal grounds sufficient to dovetail a certain factual premise, with the rights and obligations that arise, endure and disappear with it. Objective law is the only law that supports and creates subjective rights and obligations.”²⁰

In the case at hand: prior to the State Attorney General’s resolution, Article 23 of the Law regarding Persons with Disabilities was in force and in full effect—that is, the corresponding tax benefits were recognized for the importation of non-orthopedic vehicles of a model year up to three years older than the current model year at the time of authorization. After the State Attorney General’s resolution, the tax benefit was no longer available. Therefore, the objective law in this case was modified and the State Attorney General’s resolution for our purposes should be considered a legal standard, which is subject to analysis according to the provisions set forth in Article 436, numeral 3, of the Constitution of the Republic.

b. Analysis of the substantive constitutionality of Resolution 01421

Constitutional and International Human Rights Law, as a Framework for the Entire Legal System

The prohibition of discrimination in respect of the right to equality includes the advancement and protection of persons with disadvantages. Keeping in mind the claimants’ conditions, and that they form part of a group with special needs as per the Political Constitution of 1998, and requiring special attention, as per Article 47 of the current Constitution of the Republic, it is the State’s duty to promote policies that provide treatment for persons with disabilities, and, working with society and families as a group, to procure equality of opportunity for persons with disabilities and to ensure their social integration. With this purpose, Article 47, numeral 4, of the Constitution of the Republic recognizes the right of persons with disabilities to tax exemptions. In accordance with the cited constitutional provision, Article 23 of the Law Restating the Law regarding Persons with Disabilities states that:

(...) Orthopedic and non-orthopedic vehicles.- The importation of orthopedic and non-orthopedic vehicles intended for the transportation of persons with disabilities, without regard to such persons’ age, shall be authorized by the National Council for Persons with Disabilities and shall enjoy the exemptions referred to in the previous article, under the following circumstances:

Those vehicles that may be imported shall be of a model year up to three years old as of the date of the authorization. Such person with a disability, who will benefit from this right, may import a vehicle only one time, without prejudice to his or her need to import another vehicle, upon due justification.

The legal standard is clear with respect to the identity of the group of beneficiaries (persons with disabilities), the type of automobile (orthopedic and non-orthopedic), the year of manufacture of the vehicle (vehicles up to three years old) and limitations (such importation is permitted only once, without prejudice to the need to import another vehicle, upon due justification). However, the State Attorney General declared that this law was unenforceable,

²⁰ Alfredo Gallego Anabitarte, Ángel Menéndez Rexach, *et al.*, *Administrative Acts and Procedure*, Madrid, Marcial Pons Ediciones Jurídicas y Sociales S.A., 2001, p. 32.

and in consequence, prohibited the importation of pre-owned and non-orthopedic vehicles. It is evident that this ruling was not in keeping with the fundamental principles of application of human rights as set forth in the text of the Constitution. In this respect, it should be noted that the inappropriate and disproportionate method of interpretation that the State Attorney General used, highlights compliance with a restrictive legalistic system that subsumes certain norms inherent to a Free State. Although it is true that the Law Restating the Law regarding Persons with Disabilities cannot be considered as an organic law, as long as the National Assembly does not declare it as such, its material content regulates the exercise of fundamental rights established in Articles 35, 47, numeral 4, and 47, numeral 10, of the Constitution of the Republic, and as regards international law, which, as per Articles 11, numeral 3, and 426 of the Constitution, forms part of the Ecuadorian legal framework, the dispositions thereof are of direct and immediate application by any public servant, whether acting in an administrative or judicial capacity. In accordance with Article 426 of the Constitution of the Republic, the Constitution and international human rights instruments ratified by the State that provide for rights that are more favorable than those contained in the Constitution, shall prevail over any other legal standard or act of a public authority. The State Attorney General has ignored a series of constitutional principles in respect of the application of the law, which, among these, we highlight the principle of progressivity and non-regression (Article 11, numeral 8, of the Constitution of the Republic), and the *pro homine* principle (Article 11, numeral 5, of the Constitution of the Republic). The former rules unconstitutional any act or omission of a regressive nature that unjustifiably diminishes, infringes or nullifies the exercise of rights. Therefore, the regression of the law is prohibited, unless there is strict scrutiny of the causes and consequences of such regression, an element that is not present in the State Attorney General's resolution. The principle of systematic interpretation of the Constitution requires a comprehensive analysis of the Constitution, and in this respect, it should be avoided, to the extent possible, that the application of one constitutional provision leave another without effect. In the case before the Court, the State Attorney General opted to enforce the Convention on Complementación of the Automotive Sector, the Organic Law of Customs, and finally, the Law of Transit and Terrestrial Transport, at the expense of the enforcement of Article 23 of the Law Restating the Law regarding Persons with Disabilities, which provides for the exercise of fundamental rights set forth in the Constitution and in international human rights instrument ratified by Ecuador, related to groups in need of special attention, as in the case for persons with disabilities. A right generally contemplated by the Constitution should benefit from the development of laws of lower hierarchy, which broaden its content and detail the ways in which it may be enforced, although the absence of such regulation is not a valid objection to violate or contravene the right. When infra-constitutional standards exist that refer to constitutional dispositions in respect of human rights, such standards only serve to develop the original content of the law. Analogously, it is not possible at international human rights law to attempt to apply a treaty while ignoring the other sources of law that may have succeeded it, clarified it or complemented it.²¹ When applying human rights standards of the national framework, it is impossible to apply the constitutional standard without making reference to the international or internal standards of a lower judicial hierarchy, which clarify or complement the constitutional right. At the moment when the State Attorney General attributed legal supremacy to the Convention on Complementación of the Automotive Sector, at the expense of Article 23 of the Law Restating the Law regarding Persons with Disabilities, he violated precepts enshrined in the Constitution and other international instruments, which logically should prevail over any other legal standard. Any convention or legal instrument in respect of commercial law must be limited by respect for

²¹ Cecilia Medina Quiroga, *The American Convention: Theory and Jurisprudence*, Santiago, Center for Human Rights, University of Chile School of Law, 2005, p. 5.

human rights, and therefore, human rights law will always prevail over commercial law. In addition, the international human rights instruments ratified by Ecuador prevail over any other legal standard of any position in the legal hierarchy, including, effectively, the Organic Law of Customs and the Law of Transit and Terrestrial Transport.

In respect of the principle of reasonability that should guide any duties of interpretation, and the legal argumentation in respect of constitutional laws and principles, it should be noted that the classification of groups in need of special attention, which includes persons with disabilities, is not a free denomination that carries with it a guarantee of double protections. On the one hand, this constitutional consideration implies that the interpreter or public servant must seek to act in such a way so as not to limit the exercise of others' rights. Second: without prejudice to the indisputable integrity of the Constitution, all interpretation of laws must seek, in a strict sense, to appropriately expand upon the content thereof. Under such circumstances, this Court finds that the use of legal mechanisms and expository interpretative techniques, must be undertaken in such a way so as not to limit the exercise of rights, as has in effect occurred in the present case.

Given that the State recognizes exemptions from tax laws for persons with disabilities, and that Article 23 of the Law Restating the Law regarding Persons with Disabilities presents a situation of fact in respect of the importation or orthopedic and non-orthopedic vehicles of a model year up to three years older than the current model year as of the year of the respective authorization by CONADIS, compliance therewith is fully justified in respect of the needs of differently abled persons. In conformity with Article 11.2 of the Constitution of the Republic, "all people are equal and enjoy the same rights [and as such] the State shall adopt affirmative measures to promote real equality [...]." It is clear that in light of considerations of formal and substantial equality, the constitutional judge must guarantee the rights of persons with disabilities, including through affirmation measures, which implies: a) the recognition of people's differences must be respected, and adequate attention must be given to social integration; b) differences in treatment must tend to create benefits for persons with disabilities, in a temporary or permanent manner; and c) such benefits are justified in respect of the condition of such persons with disabilities, as recognized by the State.

For the reasons herein expressed, the Court finds that the State Attorney General's analysis of enforceability and interpretation with respect to the legal, supra legal (the Automotive Convention), and constitutional standards in question, did not take into account the criteria of reasonability and proportionality in order to justify its purpose, which is even more important when taking into account that this decision in respect of the enforceability of the law has had direct repercussions on the exercise of inherent fundamental rights of persons with disabilities as a group. Such rights are recognized and guaranteed by the Ecuadorian legal system, which includes the Constitution of the Republic and the international instruments ratified by Ecuador, as well as legal standards of any other hierarchical level.

In light of the above, the Court finds that it is not permissible for the State Attorney General to have determined that the importation of vehicles of a model year of up to three years old would have serious environmental consequences, when, in reality, the country's pool of automobiles is made up of a large number of vehicles of the same model year as those in question, and includes vehicles that are even older than those contemplated by the law. Measures to avoid environmental pollution may not infringe upon human rights, and even less so in respect of those rights that apply to persons with disabilities. It is disturbing to the Court that, by using these interpretative techniques, the State Attorney General arrived at such a

conclusion, which in the Court's opinion is disproportionate, unreasonable, unconstitutional and in violation of the principles of a constitutional law State, as enshrined in Article 1 of the Constitution of the Republic.

The Weighting of Rights in the State Attorney General's Resolution

Vulnerable groups—those in need of special attention vs. the Environment—Consumers

In Resolution No. 01421, dated June 23, 2008, the State Attorney General, in exercise of the powers authorized to him by Article 276 of the Political Constitution of 1998 and Article 13 of the Organic Law regarding the State Attorney General, issued a binding resolution in respect of the enforceability and interpretation of Article 23 of the Law Restating the Law regarding Persons with Disabilities. This determination that such law was unenforceable not only affected normative legal standards, such as Article 27 of the Organic Law of Customs, Article 50 of the Law of Transit and Terrestrial Transport, but also constitutional precepts. In fact, the resolution in question, beyond basing its arguments in Articles 272 and 163 of the Political Constitution of 1998, with respect to constitutional supremacy and the supra-legal character of international instruments ratified by Ecuador, also ruled on constitutional provisions in respect of the defense of consumers' rights, and protection of the environment and vulnerable groups (now referred to as groups in need of special attention). The State Attorney General's central argument for the decision to prohibit the importation of vehicles of a model year up to three years old by persons with disabilities was as follows: (...) that the aforementioned provisions (Article 27 of the Organic Law of Customs, Article 50, first paragraph, of the Law of Transit and Terrestrial Transport, and Article 6 of the Convention on Complementation of the Automotive Sector), in addition to embodying constitutional principles linked to the defense of consumers' rights and to the protection of the environment, clearly prevent the equal guarantee of minimum safety standards for people who suffer from disabilities, and who seek to import vehicles in order to aid them in personal mobility, despite the fact that this purpose is completely in line with the State's duty to protect such persons, as per the provisions of Article 53 of the Constitution.

That is to say, the State Attorney General, through an interpretation of hierarchy of laws, restricted the exercise of the rights of a vulnerable group (currently referred to as a group in need of special attention) recognized by Article 11, numeral 2, and Article 47, numeral 4, of the Constitution of the Republic, and implemented through Article 23 of the Law Restating the Law regarding the Persons with Disabilities.

After having confirmed the method or technique of constitutional interpretation used by the State Attorney General, it is necessary to determine if the result obtained was constitutionally valid and fair. For this, it becomes necessary to refer back to the characteristics and assumptions that govern the paradigm of the Constitutional State and the methods of constitutional interpretation adherent thereto. Within the dominant legal doctrine of a Liberal State, that of positivism, the role of judicial interpretation is reduced to an exegetical process of subsuming and deduction of rules, with the judge as the spokesperson of the law. Under this framework, the judge was subject only to the law, and his or her job was to apply it, in an obligatory manner, whatever its content.²² In fact, under the paradigm of the Liberal State, the Parliament, composed of the *bourgeois*, was the body that exercised control over all functions

²² Carolina Silva Portero, Guarantees of Rights, in Neo-Constitutionalism and Society, Series on Justice and Human Rights, Quito, Ministry of Justice and Human Rights, 2008, p. 64.

of the State, and therefore, through legal channels, restricted rights, limited guarantees, and the Constitution and its principles (its material content) became of secondary importance.

Contrary to this, Article 1 of the Constitution of the Republic (2008) establishes a new form of the State model, profoundly distinct from that envisioned by the Political Constitution of 1998. [...] Ecuador is a Constitutional Rule of Law State. As such, Ecuador has adopted the formula of the paradigm of a Constitutional State, which includes, among other things, submission of every power, function, law or act to the Constitution of the Republic. Neo-constitutionalism seeks, then, to perfect the lawful State through the submission of all powers (including those legislative and executive) to the Constitution, and looking to the Constitution and not to the legal framework to resolve controversies. It should be noted that this places constitutional jurisprudence as a guarantee, and an instance of last resort for all legal matters, for the evaluation and determination of vicissitudes of the new political, economic and social schematic.²³ The following, among others, may be identified as symbolic characteristics of the Constitutional State:

- a) The existence of a rigid Constitution that, as a consequence, is not easily modified through ordinary legislative procedures;
- b) Judicial guarantees that allow for rule of law in accordance with the Constitution;
- c) The binding force of the Constitution, which implies the consideration of its textual provisions as a declarative body of law accepted as having a real legal nature of effective application;
- d) The extensive interpretation of the constitutional text, which is verified in light of its principles and norms, above all in the legal framework, making it possible to look for solutions to the simplest legal problems;
- e) The direct application of the Constitution to resolve not only conflicts between branches of government or between the government and its citizens, but also to resolve conflicts between individuals;
- f) The constitutional interpretation of the law; and
- g) The influence of the Constitution on political relations, which translates into the power of bodies with constitutional control to analyze the political basis of legal standards.²⁴

With these characteristics, neo-constitutionalism incorporates material content and binding precepts within the Constitution. The material aspect of the constitutionalization of the legal framework consists in the informed acceptance within the legal system of certain critical moral requirements in the form of fundamental rights. In other words, the law has acquired a

²³ Patricio Pazmiño Freire, *Constitutional Challenges, Perspectives on the 2008 Ecuadorian Constitution*, in *Neo-Constitutionalism and Society*, Series on Justice and Human Rights, Quito, Ministry of Justice and Human Rights, Constitutional Tribunal of Ecuador, 2008, p. 11.

²⁴ Ricardo Guastini, *The Constitutionalization of the Legal Framework: The Italian Case*, in Carbonell, Miguel, *Neo-Constitutionalism*, Madrid, Trotta Eds., 2003, pp. 49 - 70, in Juan Pablo Morales, *Substantive Democracy: Its Elements and Practical Conflicts*, in *Neo-Constitutionalism and Society*, Series on Justice and Human Rights, Quito, Ministry of Justice and Human Rights, 2008, p. 88.

powerful axiomatic charge; it has rematerialized.²⁵ That material content in respect of constitutionalism is reflected in principles (optimization requirements) and values, which generate an effect that radiates throughout the entire legal framework. As such, an appropriate form of constitutional interpretation will always interpret the law in light of the principles and values set forth in the Constitution. Constitutional principles underpin rights in a tangible way, and their structure (the type of standard), makes it necessary to use different methods of interpretation than the exegetic methods inherent to the Rule of Law. While the rules are applied within the framework of deference to the Constitution, legal principles are applied based on weighting. For this reason, weighting has become a basic methodological criterion for legal analysis, particularly in respect of legal analysis regarding fundamental rights.²⁶ In this respect, Miguel Carbonella states:

[...] In this context, I think it is important to remember that, as a consequence of the approval and entrance into force of the aforementioned substantive model of constitutional text, the jurisprudential practice of many constitutional tribunals and courts has changed in a relevant way. Constitutional judges and other judicial actors have had to learn to carry out their responsibilities under new interpretative parameters, which make legal analysis more complex. Throw in the interpretative techniques of constitutional principles themselves, weighting, proportionality, reasonability, the maximization of the legal effect of fundamental rights, trickle-down effects, the horizontal projection of rights (through the *drittwirkung*), the *pro personae* principle, etc.²⁷

Under these circumstances, the Constitutional Court for the Transition Period must engage in the weighting of rights in order to determine the principles that are in conflict in the present case, in order to next determine which of these must prevail in the specific circumstances, and therefore, which will be determinative in order to find a solution in the case at hand. The essential task of weighting consists in the relation between the so-called “law of weighting,” and a principle that may be explained in the following manner:

(...) The greater the degree of failure to satisfy or restriction of one of the principles, the greater will be the degree of importance of satisfaction of the other.²⁸

In this respect, it is necessary to ask if the restriction of the right of persons with disabilities to the tax-free importation of orthopedic and non-orthopedic vehicles of a model year up to three years old is justifiable in order to enforce environmental and consumers’ rights. In order to answer this question, this Court has considered it necessary to base its weighted analysis in the weighting formula prepared by German professor Robert Alexy. For this, it is necessary, in the first place, to define the degree to which one of the principles has been infringed or affected. The second step will be to define the importance of the satisfaction of the contravening principle. Finally, the third step, it must be determined if the importance of the

²⁵ Alfonso García Figueroa, *The Theory of Law in Periods of Constitutionalism*, in *Neo-Constitutionalism*, edited by Miguel Carbonell, Spain, Trotta Eds., 2003, p. 165.

²⁶ Carlos Bernal Pulido, *The Rationale for Weighting*, in *The Principle of Proportionality and Constitutional Interpretation*, in *Neo-Constitutionalism and Society*, Series on Justice and Human Rights, Quito, Ministry of Justice and Human Rights, 2008, p. 44.

²⁷ Miguel Carbonell, *Introduction to the Principle of Proportionality and Fundamental Rights*, in *The Principle of Proportionality and Constitutional Interpretation*, in *Neo-Constitutionalism and Society*, Series on Justice and Human Rights, Quito, Ministry of Justice and Human Rights, 2008, p. 11.

²⁸ Robert Alexy, *The Weighting Formula*, *La Fórmula del Peso*, in *The Principle of Proportionality and Constitutional Interpretation*, in *Neo-Constitutionalism and Society*, Series on Justice and Human Rights, Quito, Ministry of Justice and Human Rights, 2008, p. 15.

satisfaction of the contravening principle justifies the effect on or infringement of the other principle. It is important to note that the degree to which the principles are affected in the present case is not the only relevant variable to the determination, in the third step, if the satisfaction of the second principle justifies the effect on the first. The second variable is the so-called abstract weight of the relevant principles, which presupposes a hierarchy of rights, although numeral 6 of Article 11 of the Constitution of the Republic expressly states that, (...) The exercise of rights shall be governed by the following principles: 6. All principles and rights are inalienable, non-renounceable, indivisible, independent and of equal hierarchy. Therefore, the abstract weight variable is not applicable in the Ecuadorian case, and must be removed from the weighting formula. Beyond the proposed variables, there is a third to be taken into account, which is related to empirical assessments, related to the degree to which the measure under examination in the present case would project its effect upon the relevant principles.

From the preceding argumentation, it is possible to prepare a weighting formula that will determine the weight of each one of the rights in question, and therefore, help us to determine which of them should prevail in the present case.

For this, it is necessary to set out the variables in play:

D1 = Right to tax exemption for persons with disabilities (Arts. 47. 4 and 11.3 of the Constitution, implemented by Article 23 of the Law Restating the Law regarding Persons with Disabilities)

Pa D1 = Abstract weight of Right No.1 (D1) (not applicable in Ecuador's case, due to the provisions of Article 11, numeral 6, of the Constitution of the Republic)

AfD1= (degree to which the measure to be examined in the specific case will affect Right No. 1 (D1))

D2 = Environmental and Consumers' Rights

Pa D2 = Abstract weight of Right No. 2 (D2) (not applicable in Ecuador's case, due to the provisions of Article 11, numeral 6, of the Constitution of the Republic)

AfD2 = (degree to which the measure to be examined in the specific case will affect Right No. 2 (D2))

Professor Alexy's formula expresses that the weight of right D1 = in relation to right D2, in the circumstances of the case at hand, gives the quotient between the product of the effect on right D1 specifically, its abstract weight and the degree of certainty in respect of the empirical premises relative to the effect on D1, on the one hand, and the effect on right D2 specifically, its abstract weight and the degree of certainty in respect of the empirical premises relative to the effect on D2, on the other hand. Alexy argues that a numeric value can be attributed to the variables related to the effects on the principles and their abstract weights, in accordance with the three grades of the triadic scale: light = 1; medium = 2; and high = 4. In the case of the variables related to the security of the factual premises (s), they can be attributed the following values: certain = 1; plausible = 1/2; and not evidently false = 1/4.

The degree of restriction or effect on the right to tax-free imports, in the terms of Article 23 of the Law Restating the Law regarding Persons with Disabilities, for the aforementioned reasons (that is, the arguments on the merits relating to the hierarchy of the provisions of the constitution and international human rights, and the weighting of rights), is high, and therefore receives a value of 4. The abstract weight is not applicable to the present case for the aforementioned reasons.

Finally, in respect of the variables related to the degree of certainty regarding the factual premises, it is clear that the restriction of a right of this nature will deprive persons with disabilities of their autonomy, their rights to freedom of movement will be compromised, and, without doubt, this will directly affect the quality of life of this population. Therefore, a value of 1 is assigned.

In parallel, the level to which the right to a healthy environment, and consumers' rights, is satisfied, may be assigned as medium (2), given that the importation of vehicles of a model year up to three years old does not seriously infringe upon the environment, and is also not a principal and direct source of pollution. A three-year-old automobile has a high probability of providing the necessary level of security for the user (we are not discussing automobiles that are seven, eight, or 10 years old). Finally, with respect to the premises regarding the degree to which the right is affected, it is plausible (1/2) that the environment will never be free of pollution; however, as noted, under the conditions and circumstances provided for by law, a three-year-old automobile will not be a principal and direct source of pollution. It should be recalled that the exemption in respect of this type of vehicle is based on the needs of the group of people in question, and is not applicable to the general population.

Therefore, the application of the weighting formula to the right to a tax exemption for persons with disabilities gives the following result:

$$\frac{4 \text{ (D1)} \times 1 \text{ (AfD1)}}{2 \text{ (D2)} \times 1/2 \text{ (AfD2)}} = 4$$

In comparison, the weight of the right to a healthy environment and consumers' rights will be the following:

$$\frac{2 \text{ (D2)} \times 1/2 \text{ (AfD2)}}{4 \text{ (D1)} \times 1 \text{ (AfD1)}} = 0.25$$

The conclusion we reach from the application of the weighting formula, reflects the fact that the satisfaction of the right to a healthy environment and consumers' rights, with an affect of 0.25, does not justify the infringement of the rights of a group of people in need of special attention, as provided in Article 47, numeral 4, of the Constitution, and implemented by Article 23 of the Law Restating the Law regarding Persons with Disabilities, with an affect of 4. The latter figure prevails in the weighting analysis, and as a result, the Court must find that the restriction of persons' with disabilities right to the tax-free importation of automatic vehicles of a model year up to three years old is improper and unconstitutional.

The Constitutionality of Articles 3 and 13 of the Organic Law regarding the State Attorney General

Unlike the resolution of the State Attorney General, the normative character of these provisions is clear, and therefore, they may be analyzed directly in respect of the provisions set forth in Article 436, numeral 3, of the Constitution of the Republic.

For these purposes, it will be necessary to answer the following question:

Did the State Attorney General's opinion as to the application and meaning of the law constitute an interpretation?

In accordance with Article 237, numeral 3, of the Constitution of the Republic, the State Attorney General provides legal advice and binding responses to the legal queries of public sector bodies and entities, **in respect of the meaning or application of the law in matters that the Constitution or the law do not designate to other authorities or bodies.** Articles 3, paragraph e, and 13 of the Organic Law regarding the State Attorney General, in relevant part state that: Regarding the resolution of consultations.- Without prejudice to the powers of the Legislative Branch, the Constitutional Court and the Judicial Branch set forth in the Political Constitution of the Republic and in the law, the State Attorney General shall assess and resolve those legal questions, which shall be of a binding nature, **in respect of the meaning or the application of constitutional,** legislative or other legal norms, at the request of the highest authorities of public sector bodies and entities and of the legal or conventional representatives of private legal persons with social or public purposes, except in the case of matters that have been resolved by judges or courts of the Republic, or that are at the time being heard before such judges or courts, as such cases are pending resolution, including those actions or claims that are being heard before or that should be brought before the Constitutional Court. (The bold text is the Court's.)

Departing from the highlighted text, can an resolution issued by the State Attorney General in respect of the applicability or meaning of a legal standard constitute the exercise of legal and constitutional interpretation? To provide a concrete answer to this question, it is necessary first to determine what it means to interpret a legal standard. The María Moliner dictionary defines interpretation as "to attribute a determined significance to an expression or to a thing," whereas the Royal Spanish Academy's dictionary defines interpretation as "to explain or to declare the meaning of a thing, and primarily in the case of unclear texts." Within the legal doctrine, a classic definition of interpretation considers that this is a mediating activity, through which the interpreter explains the meaning of a problematic text. This problem may arise from a lack of linguistic clarity in the text, or from a determination that the legal consequences of two separate norms that apply to one set of facts are mutually exclusive or otherwise contradictory. According to this definition, the purpose of interpretation or "opinion in respect of application and meaning," is to avoid conflict between legal standards through the interpretation of a latent or hidden meaning that two distinct normative texts may present.

In this sense, it is evidence that an opinion in respect of the application and meaning of a legal standard that the State Attorney General undertakes in exercise of his or her powers conferred by Articles 3, paragraph e, and 13 of the Organic Law regarding the State Attorney General, constitutes an authentic exercise of legal **and even constitutional** interpretation. That is, through these provisions, the State Attorney General had the power to issue binding resolutions in respect of the form in which constitutional provisions should be understood and applied. As such, in the case at hand, the State Attorney General, through his resolution dated June 23, 2008, ruled on not only the application and meaning of legal standards, as are Article

23 of the Law Restating the Law regarding Persons with Disabilities, Article 27, paragraph i, of the Codification of the Organic Law of Customs, Article 50, first paragraph, of the Law of Transit and Terrestrial Transport, but also in respect of constitutional and international norms. The State Attorney General, by undertaking such constitutional interpretation, determined the form in which Articles 53; 163; 23, numeral 3; 92 and 272 of the Political Constitution of the Republic of 1998 (in force at the time) and Article 6 of the Convention on Complementation of the Automotive Sector, should be understood and applied.

It is necessary to recall that, under the Political Constitution of 1998, the Constitutional Court of Ecuador was not the highest authority in respect of constitutional interpretation, and therefore, there was no juxtaposition of authority with respect to the enforceability of the new Constitution of the Republic. The Constitutional Court of Ecuador, body charge with enforcing constitutional justice, has become the highest instance of constitutional control and interpretation. As such, Article 429 of the Constitution of the Republic states that: [...] The Constitutional Court is the highest authority in respect of constitutional control and interpretation, and of administering justice in this matter. Article 436, numeral 1, of the Constitution provides in this respect that: [...] The Constitutional Court shall exercise the following powers, in addition to those conferred upon it by law: 1. Act as the highest authority in respect of interpretation of the Constitution and of international human rights instruments signed by the State of Ecuador, through its decisions and sentences. Its decisions will be of a binding nature. In accordance with the cited provisions, Article 237, numeral 3, of the Constitution of the Republic states that: (...) The State Attorney General shall exercise the following powers, in addition to those conferred upon him or her by law: 3. The provision of legal advice and binding responses to the legal queries of public sector bodies and entities, in respect of the meaning or application of the law in matters that the Constitution or the law do not designate to other authorities or bodies. Due to this, it is clear that Article 13 of the Organic Law regarding the State Attorney General, in respect of the provision of binding responses to legal queries in respect of the meaning or application of constitutional standards, is manifestly in conflict with the cited constitutional provisions.

Although the resolution that is the object of the present proceedings was issued in accordance with the Political Constitution of 1998, **the Court orders** the State Attorney General to comply with the Constitution currently in force and definitively to abstain from issuing resolutions in respect of questions posed as to the application or meaning of the provisions of the Constitution or international instruments ratified by Ecuador. In accordance with the Constitution of the Republic currently in force, such interpretation is a power reserved to this Court. The State Attorney General must limit him or herself to the resolution of questions posed as to the meaning and application of legal standards of a lower hierarchy.²⁹

This Court recognizes, as has the Supreme Court of Peru in similar circumstances, that, “[t]he declaration of unconstitutionality is [...] one of the most delicate powers that can be conferred on a court; it is a highly serious act, which should only be looked to in the case of strict necessity, in situations in which the repugnance of the constitutional clause in question is manifest and indubitable, and of irreconcilable non-compatibility.”³⁰ In this same vein, the Colombian Court holds as a maxim the respect for the “principle of the conservation of law, according to which constitutional tribunals must always seek to conserve to the maximum degree possible those laws issued by the Legislature, in accordance with respect for

²⁹Constitutional Court of Ecuador for the Transition Period, Sentence No. 0005 – 2009 – IC.

³⁰National Supreme Court of the Republic of Argentina. Case No. 102/1996, http://www.csjn.gov.ar/documentos/expedientes/datos_expe.jsp.

democratic principles(Sentence C-100/96. Legal Principle No. 10).”³¹ Both the Colombian and Peruvian courts have developed procedures in order to avoid indiscriminate declarations of unconstitutionality in respect of legal standards and to respect this principle of the conservation of law. In Colombia, the court applies a declaration of “conditional constitutionality” which consists of a limitation of the content of the provision in question, in order to be able to keep it as part of the legal framework, in keeping with the principle of conservation of law. As such the conditional sentence may declare that only certain interpretations of a determined law are valid, and establishing in this manner which interpretations of the law in question fall within the legal framework and which are not legitimately constitutional.”³² For its part, Peruvian jurisprudence has defined the principle of conservation of law as an “axiom [that] requires the constitutional judge to spare,” to the extent reasonably possible, the constitutionality of a challenged law, with the intention to protect judicial security and the governability of the State. That is, overturning a law in the legal framework as unconstitutional must be the last resort that can be employed. As such, the simple declaration of unconstitutionality should not be resorted to, unless such conclusion is necessary and inevitable.” In addition, Peruvian jurisprudence reinforces the principle of conservation of law through the application of principles of interpretation enshrined in the constitution, which “assigns a meaning to a law challenged as unconstitutional, in order to make it consistent and harmonious with the nexus of the text of the constitution.”³³ In respect of the application of these principles and a declaration of unconstitutionality as the “last resort,” the Peruvian Constitutional Tribunal has developed various alternatives to constitutional decisions.³⁴

Among these types of sentences, the “reductive” decision operating in an “ablative” manner is relevant to the resolution of the case at hand. These constitutional decisions “indicate that a part (phrases, words, lines, etc.) of the text in question is contrary to the Constitution, and has resulted in unconstitutionality [...]. As a result, the reductive decision restricts the scope of the application of the challenged law to some of the premises or legal consequences established literally in the text.”³⁵

In the case at hand, it would be a disproportionate measure to declare the total unconstitutionality of Articles 3, paragraph d, and 13 of the Organic Law regarding the State Attorney General, and would create an unnecessary gap in the Ecuadorian legal regime. On the other hand, it is also not viable that the manifest unconstitutionality of allowing the State

³¹ Constitutional Court of Colombia, Sentence C-065/97, paragraph 11. Available online at: <http://www.dafp.gov.co/leyes/3328.HTM>.

³² Constitutional Court of Colombia, Sentence C-492/00, paragraph 4. Available online at: <http://www.dafp.gov.co/leyes/3328.HTM>.

³³ Constitutional Tribunal of Peru, Sentence EXP. N.º 004-2004-CC/TC, available online at: <http://www.tc.gob.pe/jurisprudencia/2005/00004-2004-CC.html>.

³⁴ For example, decisions that declare an unconstitutionality action to be valid may be of three types: simple nullification, limitation of interpretation, and manipulative interpretation. The first option leaves a part or the entirety of the law without effect. The second two options declare the law as unconstitutional in respect of a particular interpretation thereof, and prevent that interpretation in the future.

Decisions in respect of a manipulative interpretation determine that the law contains unconstitutional content and in turn may be issued in five different ways, and within each two operations may be carried out, either integrally or alternatively. The two operations are the ablative (which reduces the scope of the law by eliminating parts or phrases that are “impertinent” thereto) and the reconstructive (which adds content to the law and gives it a new scope). The five types of manipulative interpretative decisions are: reductive, additive, substitutive, exhortative and conditional.

For a full discussion of “the typology and the effects of constitutional jurisprudence” see Constitutional Tribunal of Peru, Sentence EXP. N.º 004-2004-CC/TC, available online at: <http://www.tc.gob.pe/jurisprudencia/2005/00004-2004-CC.html>.

³⁵ *Id.*

Attorney General to interpret constitutional provisions or any other norms of a supra-legal character should stand.

Therefore, the power of the Court to declare the unconstitutionality of related legal standards must also be understood to apply in this case, in the form of the possibility of issuing a “reductive” decision in respect of unconstitutionality, and therefore removing from the legal framework only the words “constitutional provisions” from Articles 13 and 3, paragraph d, of the Organic Law regarding the State Attorney General, and leaving intact the State Attorney General’s other powers in respect of the resolution of legal queries posed in accordance with Articles 235, 236 and 237 of the Constitution of the Republic of Ecuador.

Constitutionality of Article 44, paragraph b), of the Organic Law of Customs

As a general rule, the importation of pre-owned vehicles is not permitted, and it is logical that paragraph b of the Organic Law of Customs would require that: the customs declaration be accompanied by the following documents: b) A commercial invoice and an insurance policy issued in accordance with the law.

The practical exercise of the wide range of rights invoked by the claimants, which have been referred to in various places throughout this decision, is reduced, at this point, to compliance with the general rules of customs declarations, in order for the respective importations to proceed. Therefore, it is appropriate to verify that the imposition of these requirements is constitutional, in the sense that they might prejudice persons’ with disabilities enjoyment of their human rights.

One of the rights recognized throughout this decision in favor of the claimants, as persons with disabilities, is the right to freedom of movement³⁶ in respect of “quality of movement,” which includes providing assistance or devices at a reasonable cost. Article 23 of the Law regarding Persons with Disabilities includes one manner in which freedom of movement is facilitated, by allowing for the tax-free importation of pre-owned, non-orthopedic vehicles.

However, it may be the case that the requirement of a “commercial invoice” by the Customs Law constitutes an obstacle, given that the good in question is pre-owned, and therefore renders this type of affirmative action for persons with disabilities without effect. The Convention on the Rights of Persons with Disabilities must prevail over other legal standards, as per Articles 424 and 425 of the Constitution, and if the requirement of a commercial invoice for the importation of pre-owned vehicles results in the unenforceability of Article 23 of the Law regarding Persons with Disabilities, it would be necessary to declare the relevant provision of the customs law unconstitutional. However, this Court has already expressed its position in respect of the declaration of unconstitutionality, which must be used as a last resort and which must also attend to the principle of conservation of laws. However neither is it a viable option to leave loose interpretations or unconstitutional fragments in the law, as was determined in analyzing the constitutionality of Articles 3 and 13 of the Organic Law regarding the State Attorney General. Again, for the resolution of this particular legal problem, another of the alternative decisions on constitutionality from the comparative jurisprudence is relevant. This time we are dealing with a limitation on interpretation, in which the body exercising constitutional control “declares the unconstitutionality of an erroneous interpretation [...]. As a consequence, in the future, legal actors shall be prohibited

³⁶The Convention on the Rights of Persons with Disabilities, Article 20.b.

from exercising and applying the form of interpretation declared to be contrary to the Constitution.”³⁷ This will now be the case in respect of paragraph b of Article 44 of the Organic Law of Customs: when dealing with the importation of pre-owned vehicles by persons with disabilities, in application of Article 23 of the Law regarding Persons with Disabilities, the term “commercial invoice” may not be interpreted so as to require the presentation of a document that is solely issued for new goods; instead, the presentation of an equivalent document that may be obtained in respect of pre-owned vehicles shall be considered to satisfy this requirement.

IV

DECISION

In light of the foregoing, in service of the administration of justice and by the authority vested in it by the Constitution of the Republic of Ecuador, the Constitutional Court for the transition period issues the following:

SENTENCE:

1.- The noncompliance action brought by Ms. Silvia Game Muñoz and Mr. Alfredo Luna Narváez against the State Attorney General, is hereby dismissed as inadmissible.

2.- The noncompliance action brought by Ms. Silvia Game Muñoz and Mr. Alfredo Luna Narváez against the General Manager of the Ecuadorian Customs Corporation is decided in favor of the claimants, in the following terms:

In accordance with Article 86, numeral 3, of the Constitution of the Republic and Article 44, numeral 3, of the Rules of Procedure for the Exercise of the Jurisdiction of the Constitutional Court for the Transition Period, the General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation are hereby required to comply with Article 23 of the Law Restating the Law regarding Persons with Disabilities, and with the resolutions issued by the State Attorney General on August 24 and 25, 2006. In addition, General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation are reminded that the resolution contained in Official Letter No. 01421 does not affect the claimants’ rights, given that it was issued after the claimants had obtained the respective authorizations from CONADIS, and were acting under the auspices of Resolutions Nos. 27235 and 27338, of August 24 and 25, 2006; therefore, Resolution No. 01421 may not be applied in a retroactive fashion. Therefore, upon receipt of the invoices, pro formas, or **similar documentation in the case of pre-owned vehicles** (which accredit the individual characteristics of the automobile to be imported and the respective transfer of ownership from the prior owner) **the General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation will limit themselves to issuing the respective orders** to allow the importations in favor of the claimants.

For these purposes, the CAE is afforded a period of 15 days, counted as of the date of the presentation of the invoices, pro formas, or **similar documentation (in the case of pre-owned vehicles)**, to issue the importation orders related to the automobiles to be imported by the claimants, which are: automatic vehicles (orthopedic vehicles in accordance with Article

³⁷ Constitutional Tribunal of Peru, Sentence EXP. N.º 004-2004-CC/TC, *op. Cit.*

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88 of the Regulation of the Law regarding Persons with Disabilities), of a model year up to three years old as of the date of the respective authorization by the National Council for Persons with Disabilities.

The General Manager and the Assistant Regional Manager of the Ecuadorian Customs Corporation are hereby reminded that failure to comply with sentences issued by the Constitutional Court is sanctioned under Article 86, numeral 4, of the Constitution of the Republic, which provides that:

(...) If a public servant fails to comply with the sentence or resolution, the judge will order his or her removal from his or her office or duties, without prejudice to any civil or criminal penalties that may apply.

3.- In exercise of the powers conferred upon this Court by Article 436, numeral 3, of the Constitution of the Republic, Resolution No. 01421, dated June 23, 2008, issued by the State Attorney General, Dr. Diego García, is hereby declared unconstitutional on the merits, and removed from the legal framework.

4.- In exercise of the powers conferred upon this Court by Article 436, numeral 3, of the Constitution of the Republic, it is hereby resolved, through the principle of reductionism of unconstitutionality, to remove the word “constitutional” from Article 3, paragraph e), and Article 13 of the Organic Law regarding the State Attorney General. As a result, in the future, the State Attorney General will abstain from issuing resolutions in which he or she interprets constitutional provisions, on pain of incurring in the arrogation of his or her powers.

5.- In exercise of the powers conferred upon this Court by Article 436, numerals 1 and 2, of the Constitution of the Republic, the conditional constitutional interpretation of Article 44, paragraph b), of the Organic Law of Customs is hereby declared, and therefore, the term “commercial invoice” shall be interpreted as a requirement in respect of new vehicles. Also, this requirement should be considered satisfied by the presentation of an equivalent document that may be obtained in respect of pre-owned vehicles that persons with disabilities seek to import.

6. This Sentence to be published in the Official Register. So notified.

Signed.) Dr. Patricio Pazmiño Freire, President.

Dr. Arturo Larrea Jijón, General Secretary.

Confirmation: I hereby confirm that the preceding Decision was approved by the full Constitutional Court for the Transition Period, with nine votes in favor (unanimous) of the following judges: Luís Jaramillo Gavilanes, Patricio Herrera Betancourt, Alfonso Luz Yunes, Hernando Morales Vinuesa, Ruth Seni Pinoargote, Nina Pacari Vega, Manuel Viteri Olvera, Edgar Zárate Zárate y Patricio Pazmiño Freire, in the court’s session of Thursday, April 2, 2009. I hereby certify.