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REPORT No. 338/21
PETITION 673-14
REPORT ON ADMISSIBILITY

ANA MARÍA SALAS
ARGENTINA

Approved electronically by the Commission on November 24, 2021.

Cite as: IACHR, Report No. 338/21, Petition 673-14. Admissibility. Ana María Salas. Argentina.
November 24, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Fabiana Marcela Quaini
Alleged victim:	Ana María Salas
Respondent State:	Argentina
Rights invoked:	Articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 17 (rights of the family), 21 (property), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention on Human Rights ¹

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	May 4, 2014
Additional information received at the stage of initial review:	September 26, 2017, September 28, 2017, and August 2, 2019
Notification of the petition to the State:	August 19, 2019
State's first response:	October 15, 2020
Additional observations from the petitioner:	February 15, 2021
Additional observations from the State:	June 28, 2021

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit instrument of ratification made on September 5, 1984)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	Yes
Rights declared admissible	Article 8 (fair trial), 21 (property), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, according to section VI
Timeliness of the petition:	Yes, according to section VI

V. FACTS ALLEGED

1. The petitioner alleges that the State violated the rights of Ms. Salas, who holds the office of judge in the Seventh Court of Labor of the First Judicial District of Mendoza, in enacting a law whereby judges are obligated to contribute five percent of their salary to finance health insurance services for people with disabilities, which restricts the principle of salary protection for judges.

¹ Hereinafter "the American Convention" or "the Convention."

² The observations submitted by each party were duly transmitted to the opposing party.

Legal framework

2. By way of context, the petitioner states that on December 29, 1988, the federal government enacted Act No. 23.660 and that Articles 8 and 9 thereof established that, by law, persons were included as beneficiaries of health insurance services and, as a result, had the duty to contribute.³ However, she asserts that, subsequently, in national decrees Nos. 9/93 and 1301/97, the government ruled that those beneficiaries had the right to choose the health insurance company of their preference, thereby creating a free-election system for contributors.

3. Based on the said norms, the petitioner holds that judges never have been obligated to hire or buy health services because their salaries are protected. She argues that Article 151 of the Constitution of Mendoza province clearly outlines the said principle of salary protection⁴ and allows each judge to buy the health insurance policy that they believe best fits their needs and those of their immediate family. The petitioner further states that the said provision must be interpreted in accordance with Article 110 of the Argentine National Constitution, which establishes that the remuneration that judges earn for their service may in no way be diminished while in office.⁵

4. In spite of the above, the petitioner claims that on November 15, 2011, the provincial authorities violated the said right by enacting Act No. 8373/11. The petitioner explains that, by enacting that rule, the Province of Mendoza adhered to national Act No. 24901, which establishes a system of basic benefits for habilitation and rehabilitation services for people with disabilities. To that aim, Article 3 of the said provincial law changed Article 21 of the Organizational Rules of the Health Insurance Company for State Employees (hereinafter "OSEP") and established that jurisdictional authorities of the Judicial Branch of the province of Mendoza, among other officials, were obligated to contribute to the said institution.⁶ This provision is worded as follows:

Article 3^o - To change Article 21 of the Organizational Rules of the Health Insurance Company for State Employees of Mendoza, Decree-Law No. 4373/63 as amended, which shall now read as follows: Art. 21- That all direct active members of the Health Insurance Institution who have been appointed as employees and/or public officers must, on a compulsory basis, pay a monthly contribution, for themselves and their immediate family, five percent (5%) from the date this Act becomes effective. (...). Those obligated to contribute to the OSEP are the Justices of the Judicial Branch of Mendoza, Provincial Legislators, Mayors, and Councilors, always in their condition of direct members.

³ Act No. 23.660. Art. 8^o- It is established by law that the following be included as beneficiaries of health insurance services: workers that provide services to employers, be it in the private sector or the public sector of the National Executive and Judicial Branches, in national universities or their independent and decentralized bodies, in companies and corporations of the State, in the Municipality of Buenos Aires City, and the National Territory of Tierra del Fuego, the Antarctic, and the South Atlantic Islands; b) retirees and pensioners of the national State and those of the Municipality of Buenos Aires City; c) beneficiaries of national non-contributory benefits. Art. 9^o- Also the following are included as beneficiaries: a) the immediate family of those in the categories specified in the previous article. Immediate family refers to the group made up by the policy holder's spouse, their single children aged no more than 21; non-emancipated minors; single children above age 21, and up to 25, who are under the policy holder's sole care and pursue regular studies officially recognized by the pertinent authority; handicapped children under the policy holder's care who are above age 21; the children of the spouse; minors whose legal and physical custody has been granted judicially or administratively and who meet the requirements in this subparagraph; b) persons living together with the policy holder who the latter treat as members of their family, proof of which shall be required according to the rules. The National Directorate for Health Insurance Companies may authorize, upon compliance with its requirements, that other blood-related ancestors or offspring of the policy holder who are under the latter's care be included as beneficiaries, in which case an additional contribution of one and a half percent (1.5%) shall be paid per each person included.

⁴ Constitution of the province of Mendoza. Art. 151.- Officials specified above shall be permanent during good conduct. They shall enjoy a remuneration to be determined by law and which may not be diminished while holding office. In no way may this salary protection involve the monetary correction of their remuneration through price indexes and/or any other adjustment mechanism, nor exempt them from generally imposed contributions to benefits or health insurance.

⁵ National Constitution of Argentina. Art. 110.- The Justices of the Supreme Court and the judges of the lower courts of the Nation shall hold their offices during good behavior and shall receive for their services a remuneration to be ascertained by law and which shall not be diminished in any way while holding office.

⁶ By way of information, the petitioner reports that Decree-Law No. 4373 of 1963 created this institution, the OSEP, in Mendoza to ensure the provision of health services to persons included in the state employment system of that province.

5. In the petitioner's opinion, the foregoing provision harms judges' right to property, in that not only does it obligate them to be part of the OSEP but also to finance a law that should be financed by the province. The petitioner believes that since the Argentine legal framework allows every individual to choose the health insurance company of their preference, it is impossible to obligate authorities to make that payment.

6. To conclude, the petitioner argues that the said provision harms judges' right to salary protection and, along with it, their judicial independence. She stresses that it is very striking that the rule at issue does not include those who are in the provincial executive branch, the State's attorney, the treasurer, among other officials. The petitioner believes that considering judges as mere public employees infringes many different rules of the legal system and opens the door to potential arbitrary reductions in salary.

Constitutional proceeding against Act No. 8373/11

7. Due to the damages caused by such a regulation, on January 11, 2012, a group of judges filed a constitutional proceeding against Article 3 of Act No. 8373/11, in which they claimed that this contravened Article 151 of the Constitution of the province of Mendoza and provision 110 of the National Constitution.

8. On February 17, 2012, the alleged victim requested to join the said proceeding. Nevertheless, on February 28, 2012, the Supreme Court of Mendoza rejected that request as overdue. Against that ruling, on March 6, 2012, Ms. Salas lodged a motion for nullity with a subsidiary appeal and, along with that, on June 6, 2012, she filed a special federal remedy. However, on November 20, 2012, and March 26, 2013, the Supreme Court of Mendoza rejected, respectively, both remedies. Finally, on April 22, 2013, the alleged victim filed an appeal of complaint to challenge both judgments. However, on November 5, 2013, the National Supreme Court of Justice denied this legal action. This decision was notified on November 12, 2013.

9. Regarding the main proceeding, the petitioner asserts that on June 18, 2018, the First Chamber of the Supreme Court of Mendoza rejected the complaint, on considering that obligatory membership in a health insurance institution does not violate the right to judicial independence and, accordingly, does not contravene Article 115 of the Constitution of the province of Mendoza nor Article 110 of the National Constitution. The Court said:

The guarantee of salary protection is not a privilege of judges and should not be considered as such because this is not for the purpose of sparing or exempting from decisions that may have an impact on their remuneration. This is a guarantee that enables the independence of judicial officers; not for personal or financial profit, but for the sake of the institution; thus, it must not be unreasonably used, especially when a social security matter is involved, like in the case at issue (...).

10. In the petitioner's opinion, the decision referred to upheld the violation of the rights of the alleged victims when the petition was under study.

Claims by the State

11. The State, for its part, alleges that the alleged victim failed to duly exhaust the domestic remedies. It contends that Ms. Salas did not file any legal remedy or action on her own behalf to challenge the facts herein reported, in that she is not part of case No. 104.863 "*Mirábile, Ricardo y otros c./ Provincia de Mendoza s./ acción de inconstitucionalidad*" (*Mirábile, Ricardo et. al. v. Mendoza Province, w/ref. to constitutional proceeding*). The State explains that the said proceeding is not a collective action and, consequently, it does not concern judges in general but exclusively those party to this proceeding.

12. The State holds that although the alleged victim sought to join the lawsuit as a supporting third party, the National Supreme Court of Justice rejected that claim as overdue. The State adds that, contrary to the petitioner's allegation, Ms. Salas, being a supporting third party, could not have enjoyed a filing period different from that given to the other parties to the proceeding. In the State's opinion, the reason of such a decision was rooted on non-arbitrary procedural grounds; therefore, it is to the IACHR to determine that the alleged victim

did not exhaust the available domestic remedies in proper and due form, as a result of which, the petition does not meet Article 46.1.a of the American Convention.

13. In addition, the State argues that the facts alleged do not constitute human rights violations. The State asserts that the complaint does not disclose how a salary reduction compromises the alleged victim's rights, in terms of the alleged financial ability to afford a decent standard of living, or generates an arbitrary interference in her private life, her honor or dignity, or the lack of protection of her family. Consequently, the State requests that the IACHR applies the provision of Article 47.c of the American Convention and shelves the instant petition.

14. Lastly, the State complains about the belated notification of the petition. It affirms that although the Executive Secretariat of the IACHR received the petition on May 4, 2014, this was notified only on August 19, 2019. To the State, the five-year delay to notify this petition causes a serious problem that affects its proper exercise of the right of defense.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

15. The IACHR observes that on June 18, 2018, the First Chamber of the Supreme Court of Justice of Mendoza upheld the constitutional nature of Article 3 of Act No. 8373/11; and as a result, it dismissed the constitutional action filed against that judgment by a group of judges. Based on the information submitted, the IACHR notes that the abovementioned judgment has a general impact inside the province of Mendoza and sets a precedent that not only affects the judges parties to the proceeding but also the alleged victim, in her position of judge of the province of Mendoza.

16. Although the said resolution by the Supreme Court of Justice of Mendoza was not adopted as a result of Ms. Salas' direct procedural action, it did resolve the aspects herein controverted by the petitioner, and fundamentally, it represented a valid avenue for bringing to the attention of the State the merits of the case reported in this petition. In previous reports concerning similar situations, the IACHR has held that it is not reasonable to require the alleged victims to continue exhausting additional remedies before lower courts if the highest judicial instance on constitutional matters has already ruled on the specific aspects they are contesting.⁷ Therefore, given the nature of the abovementioned final judgment of the Supreme Court of Mendoza, the IACHR considers that, given the characteristics of this case, the Commission finds that Article 46.1.a of the American Convention has been met. Similarly, since the domestic remedies were exhausted after this petition was filed, the petition meets the requirement of timeliness established in Article 46.1.b of the Convention.

VII. ANALYSIS OF COLORABLE CLAIM

17. For the purpose of admissibility, the Commission must decide whether the facts alleged may establish a violation of rights, under the provision of Article 47.b of the American Convention or if the petition is "manifestly groundless" or "obviously out of order," under subparagraph (c) of the said article. The assessment criterion of those requirements differs from that used for determining the merits of a petition. Likewise, under its mandate, the IACHR is competent to declare a petition admissible when it concerns domestic proceedings that may infringe any of the rights guaranteed by the American Convention. That is, based on said conventional rules, pursuant to Article 34 of the IACHR Rules of Procedure, the analysis for the purpose of admissibility focuses on the verification of said requirements, which refer to the existence of elements that, if proven, could *prima facie* lead to determine violations of the American Convention."⁸

18. In view of these considerations and having examined the elements of fact and law presented by the parties, the Commission deems that the allegations by the petitioner, concerning the possible violation

⁷ IACHR. Report No. 308-20. Admissibility. Kurt Heinz Arens Ostendorf *et al.* Peru. October 13, 2020, par. 19. See also: I/A Court H.R. Case of Artavia Murillo *et al.* ("In Vitro Fertilization") v. Costa Rica. Judgment of November 28, 2012, par. 27.

⁸ IACHR, Report No. 143/18, Petition 940-08. Admissibility. Luis Américo Ayala Gonzales. Peru. December 4, 2018, par. 12.

of the principle of judicial independence and the possible violation of the right to an impartial court, are not manifestly groundless and require an analysis of the merits. For if proven to be true, the facts alleged herein may establish violations of Articles 8 (fair trial), 21 (property), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights), regarding Articles 1.1 and 2 thereof, to the detriment of Ms. Ana María Salas. In this regard, the IACHR recalls that the remuneration of judges *“must not depend on the results of the judges’ work and must not be reduced during his or her judicial service.”*⁹

19. As to the complaint of an alleged violation of the rights recognized in Articles 5 (humane treatment), 11 (privacy), and 17 (rights of the family), the Commission observes that the petitioners have not presented allegations or enough evidence to consider, *prima facie*, their possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 21, 24, 25, and 26 of the American Convention, in relation to Articles 1.1 and 2;

2. To find the instant petition inadmissible in relation to Articles 5, 11, and 17 of the American Convention;

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of November, 2021. (Signed:) Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández (dissident vote), and Stuardo Ralón Orellana, Commissioners.

⁹ IACHR. Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas. December 5, 2013, par. 130.