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REPORT No. 339/21
PETITION 775-14
REPORT ON ADMISSIBILITY

RICARDO MIRABILE
ARGENTINA

Approved electronically by the Commission on November 24, 2021.

Cite as: IACHR, Report No. 339/21. Petition 775-14. Admissibility. Ricardo Mirabile. Argentina.
November 24, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Fabiana Marcela Quaini
Alleged victim:	Ricardo Mirabile
Respondent State:	Argentina
Rights invoked:	Articles 5 (personal integrity), 8 (right to a fair trial), 11 (protection of honor and dignity), 17 (protection to the family), 21 (private property), 24 (equality before the law), 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:	August 21, 2019
Notification of the petition to the State:	April 19, 2021
State's first response:	June 1, 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 of the instrument of ratification developed 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>:	No
Rights declared admissible:	Articles 8 (right to a fair trial), 21 (private property), 24 (equality before the law), 25 (judicial protection) and 26 (economic, social and cultural rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI.
Timeliness of the petition:	Yes, under the terms of Section VI.

V. FACTS ALLEGED

1. The petitioners report that the State violated Ricardo Mirabile's rights in his capacity as judge of the 16th Civil and Commercial Court of the First Jurisdiction of the Province of Mendoza when it enacted a law under which magistrates are obliged to give away five per cent of their salary to finance union-run health insurance funds to favor persons with disabilities, an action that curtailed the principle of protection of the salaries of judges (*principio de intangibilidad*).

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

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

Regulatory framework

2. The petitioners provide some context to the petition: on December 29, 1988, the national government passed Law No. 23,660 — Articles 8 and 9 thereof determine the persons that are mandatorily included as beneficiaries of union-run health insurance funds and hence must pay a contribution to one of these funds.³ Nevertheless, they note that, afterwards, by means of national decrees no. 9/93 and no.1301/97, the government established that the aforementioned beneficiaries had the right to choose the union-run health insurance fund of their preference, thus providing them with freedom of choice.

3. Upon the basis of the aforementioned regulations, the petitioners state that the magistrates were never under the obligation to affiliate nor to pay any contribution to a union-run health insurance fund, given the fact that their salaries are protected. In that regard, they argue that Article 151 of the Constitution of the Province of Mendoza clearly provides for this principle of protection of the salaries of judges.⁴ Therefore, it is up to each judge to hire whatever health insurance they consider acceptable for their needs and those of their family. The petitioners add that the aforementioned article must be interpreted pursuant to Article 110 of the Constitution of the Argentine Nation, which notes that the remuneration received by judges for their services shall not be diminished in any way while they are holding office.⁵

4. Notwithstanding the foregoing, the petitioners state that on November 15, 2011, the provincial authorities infringed said right when they passed Law No. 8,373/11. They explain that, by means of the aforementioned regulation, the province of Mendoza acceded to National Law No. 24,901, which established a basic health insurance system for the habilitation and rehabilitation of persons with disabilities. As a result, Article 3 of said provincial law amended Article 21 of the Charter of the Public Employees' Health Insurance Fund (hereinafter, OSEP) and established that the judicial authorities of the province of Mendoza, among other officials, were under the obligation to contribute to said system.⁶ The verbatim section of the aforementioned article reads as follows:

Article 3. Art. 21 of the Charter of the Public Employees' Health Insurance Fund (OSEP) of the province of Mendoza, that is, Decree Law No. 4,373/63 and its amendments, shall be amended as follows: Art. 21. The union-run health insurance fund's active affiliates who have been appointed to public employee and/or official positions are to be mandatorily levied a monthly contribution of five per cent (5%) on behalf of themselves and of their primary dependents,

³ Law No. 23,660. Art. 8. The following actors mandatorily fall under the category of beneficiaries of a union-run health insurance fund: a) Waged workers, either from the private sector or the public sector within the national executive branch and the judiciary; from national universities or their autarchic and decentralized entities; from state-run enterprises and corporations; from the Municipality of the City of Buenos Aires and from the National Territories of Tierra del Fuego, Antarctica and the South Atlantic Islands; b) Retirees and pensioners from national entities and from the Municipality of the City of Buenos Aires; c) Recipients of nationwide non-contributory benefits. Art. 9. Also included as beneficiaries are: a) Primary dependents of persons mentioned in the foregoing article. Primary dependents are the affiliate's spouse; single children under 21; non-emancipated persons due to their age or professional, commercial or labor activity; single children over 21 — up to and including the age of 25 — who are under the exclusive care of the affiliate and are currently taking studies that are officially recognized by the corresponding authorities; children with disabilities over 21 who are under the affiliate's care; spouse's children; underage children whose care and guardianship has been granted to the affiliate by a legal or administrative authority, and who meet the requirements set forth in this article; b) Persons living with the affiliate and who are treated as family members by them, in accordance with what is provided for by the regulations. The National Office of Health Insurance Funds shall have the right to authorize, pursuant to its own requirements, the granting of beneficiary status to other ascendants and descendants related to the affiliate by blood who are under their care. In these cases, there shall be an extra contribution of one and a half per cent (1.5%) per included person.

⁴ Constitution of the Province of Mendoza. Art. 151. Officials mentioned in the foregoing article shall not be removed from their offices as long as they maintain their good behavior. They shall receive a remuneration for their services, which shall be ascertained by law and which shall not be diminished in any way while holding office. Under no circumstances shall this protection be applied to the increase of their remuneration on the basis of price indexes and/or any other adjustment mechanisms, nor to general tax exemptions established in relation to social security or union-run health insurance funds.

⁵ Constitution of the Argentine Nation. Art. 110. The justices of the Supreme Court and the judges of the lower courts of the Nation shall hold their offices as long as they maintain their good behavior, and shall receive a remuneration for their services, which shall be ascertained by law and which shall not be diminished in any way while holding office.

⁶ By way of information, the petitioners report that said institution, the OSEP, was created in the province of Mendoza by the enactment of Decree Law No. 4,373 in 1963, with the aim of guaranteeing the provision of medical care to people under the province's public employment scheme.

as of the entry into force of this Law. [...] The following actors are under the obligation to contribute to the Public Employee's Health Insurance Fund (OSEP) as direct affiliates: magistrates of the judiciary of the province of Mendoza, provincial lawmakers, mayors and council members.

5. In the opinion of the petitioners, the foregoing article undermines the right to property enjoyed by magistrates, since in addition to forcing them to affiliate to OSEP, in doing so they would also be financing a law that should be financed by the province. They consider that, provided that the Argentine regulatory framework grants every person the possibility to choose the union-run health insurance fund or prepaid medical insurance that suits them best, it is not possible to oblige authorities to make the required payment.

6. Lastly, the petitioners hold that such an article undermines the right to the protection of magistrates' remunerations, as well as their judicial independence. With regard to this, they underscore that it is quite peculiar that members of the provincial executive branch, as well as the Public Prosecutor and the Public Treasurer, among other authorities, were left out of the regulation. The petitioners also believe that describing justices as mere public employees constitutes an infringement of several standards of the legal system, and that it opens the door to the possibility of a discretionary reduction of their salaries.

Unconstitutionality proceeding against Law No. 8,373/11

7. Due to the damages that would be inflicted by the aforementioned regulation, on January 11, 2012, Mr. Mirabile and a group of magistrates filed claim of unconstitutionality against Article 3 of Law No. 8,373/11, arguing that it contravened Article 151 of the Constitution of the Province of Mendoza and Article 110 of the National Constitution.

8. Once the appeal was lodged, Mr. Mirabile requested that, by virtue of Article 13 of Law No. 7,294,⁷ the case be tried by a group of deputy judges in lieu of the natural members of the Supreme Court of Justice of Mendoza, given that the interests of the judges and employees of the judiciary were being contested. Notwithstanding this, on November 14, 2012, the Supreme Court of Justice of Mendoza rejected such request, arguing that the intervention of deputy judges implied the removal of all the magistrates who were members of the judiciary, which was an action that should be reserved for extremely exceptional circumstances, since this situation could result in dissimilar judgements for similar cases. In line with the above, the Court considered that since the main proceeding entailed a judgement on an appeal of unconstitutionality, natural justices of the Supreme Court of Justice of Mendoza were responsible for deciding on the alleged situation.

9. On December 6, 2012, Mr. Mirabile filed an extraordinary federal remedy against the aforementioned ruling. Nevertheless, on March 26, 2013, the Supreme Court of Justice of Mendoza rejected his remedy once again. Faced with this situation, on May 22, 2013, the alleged victim lodged a complaint against the dismissal; however, this appeal was dismissed by the National Supreme Court of Justice on November 5, 2013. This ruling was notified on November 12, 2013.

10. With regard to the main proceeding, the petitioners report that on June 18, 2018, the First Division of the Supreme Court of Justice of Mendoza rejected the claim, given that it considered that a mandatory affiliation to a union-run health insurance fund did not violate the right to judicial independence, and thus, it contravened neither Article 115 of the Constitution of the Province of Mendoza nor Article 110 of the National Constitution. In the words of the Court:

The protection of magistrates' salaries does not constitute a privilege of magistrates nor is it conceived as such, since it does not exempt them from any decision that might have an effect on their remuneration. It is a guarantee of judicial independence; therefore, instead of being for the exclusive, personal benefit

⁷ Law No. 7,294/2004. Article 13 - The Special Deputy Judges shall intervene in all cases in which the interests of justices or employees of the Judiciary are contested.

of magistrates or their capital, it enhances the institution, which cannot suffer from irrational behavior, even more so when, as in the instant case, social security is involved. [...]

11. In the opinion of the petitioners, the aforementioned decision confirms the violation of the rights of the alleged victims while the petition was under consideration.

The position of the State

12. For its part, the State argues that the alleged victim did not exhaust the domestic remedies available in relation to his argument of being tried by impartial judges. The State holds that if Mr. Mirabile considered that the justices of the Supreme Court had taken a “clear stance since they had agreed to deem the law in question constitutional, and since they had quietly complied with the obligation imposed by such regulation on each of the Court’s members,” he should have challenged the magistrates in question, in pursuance of the domestic legal system’s regulations. In the view of the State, this was the appropriate means to resolve the alleged infringement. The failure to lodge such a remedy resulted in the unfulfillment of the requirement set forth in Article 46.1.a) of the American Convention, which speaks to this element of the petition.

13. In addition, the State argues that the facts alleged do not constitute human rights violations. It notes that the allegation does not indicate how a salary reduction jeopardizes the alleged victim’s rights in relation to the allegedly diminished “quality of life in terms of economy,” or how there is an arbitrary interference in his private life, his honor or his dignity, and much less, how this could make “his family vulnerable.” Consequently, the State requests the IACHR to enforce Article 47.c) of the American Convention, and to close the instant petition.

14. Lastly, the State alleges the untimeliness of the petition’s communication. It asserts that, in spite of the fact that the IACHR’s Executive Secretariat had received the petition on May 4, 2014, said document was transmitted to the State on August 21, 2019. In the opinion of the State, the five-year delay in the petition’s communication created serious inconvenience, which affected its due exercise of the right to defense.

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

15. The Commission notes that the State only disputes the exhaustion of domestic remedies in relation to the alleged victim’s claim to be tried by deputy judges, arguing that he should have filed an application for recusal. In that regard, the Inter-American Commission recalls that the requirement to exhaust all domestic remedies does not necessarily mean that alleged victims are obligated to exhaust all the remedies at their disposal. Therefore, if an alleged victim pursued the matter through one of the valid and appropriate options in accordance with the domestic legal system, and the State had the opportunity to remedy the matter in its jurisdiction, the objective of international law has been achieved.⁸ In the instant case, the IACHR notes that the alleged victim filed his appeal by means of an extraordinary federal remedy before the Supreme Court of Justice of Mendoza, and finally, before the National Supreme Court of Justice through a formal complaint. In consequence, the Commission considers that, with regard to this element of the petition, the requirement set for in Article 46.1.a of the American Convention is met. Likewise, taking into account that the petitioners filed the petition on May 4, 2014, and that the last ruling was notified on November 12, 2013, the petition complies with the time limit established in Article 46.1.b) of the Convention.

16. With regard to the objection to Article 3 of Law No. 8,373 and its effect on the rights of the alleged victim, the Commission notes that on June 18, 2018, the First Division of the Supreme Court of Justice of Mendoza confirmed the constitutionality of said regulation. Taking into consideration that the State has not disputed the exhaustion of domestic remedies on this point, and on the basis of the information provided by the petitioners, the IACHR considers that the petition meets the requirement set forth in Article 46.1.a of the

⁸ IACHR, Report No. 16/18, Petition 884-07. Admissibility. Victoria Piedad Palacios Tejada de Saavedra v. Peru. February 24, 2018; para. 12.

American Convention. In addition, given that remedies were exhausted once the petition had been filed to the IACHR, the requirement regarding timeliness set forth in Article 46.1.b of the Convention has been met.

VII. ANALYSIS OF COLORABLE CLAIM

17. For purposes of admissibility, the Commission must decide whether the facts alleged could characterize a violation of rights, according to the provisions of Article 47(b) of the American Convention, or whether the petition is “manifestly groundless” or “obviously out of order,” pursuant to subparagraph c of that article. The standard of appraisal of these extremes is different from the required to decide on the merits of a petition. Likewise, within the scope of its mandate, the IACHR is competent to declare a petition admissible if it refers to domestic proceedings which may violate rights guaranteed by the American Convention. In other words, pursuant to the aforementioned rules of the Convention and in accordance with Article 34 of the Rules of Procedure, the analysis on admissibility is centered in the verification of such requirements, which refer to the existence of elements that, if proven, could *prima facie* lead to determine violations of the American Convention.⁹

18. In view of these considerations and after examining the elements of fact and law set forth by the parties, the Commission considers that the allegations of the petitioners — which are related to the possible affectation of the principle of judicial independence and the possible infringement of the right to be tried by an impartial judge — are not manifestly unfounded and need to be studied on the merits since the alleged facts, if corroborated, could constitute violations of Articles 8 (right to a fair trial), 21 (private property), 24 (equality before the law), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, in relation to Articles 1.1 and 2 thereof, to the detriment of Mr. Ricardo Mirabile. In this sense, the IACHR recalls that justices’ individual remunerations “must not depend on the results of the judges’ work and must not be reduced during his or her judicial service.”¹⁰

19. With regard to the claim for the alleged violation of Articles 5 (personal integrity), 11 (protection of honor and dignity) and 17 (protection to the family) of the American Convention, the Commission notes that the petitioners have not provided sufficient arguments or grounds to consider *prima facie* their possible violation.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 8, 21, 24, 25 and 26 of the American Convention in accordance with Articles 1.1 and 2 thereof;

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

3. To notify the parties of this decision; to proceed with the merits of the case; 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 opinion), and Stuardo Ralón Orellana, Commissioners.

⁹ IACHR, Report No. 143/18, Petition 940-08. Admissibility. Luis Américo Ayala Gonzales v. Peru. December 4, 2018; para. 12.

¹⁰ IACHR, Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas. December 5, 2013; para. 130.