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REPORT No. 163/20
PETITION 1275-12
REPORT ON ADMISSIBILITY

EDUVIGIS DEL CARMEN ALARCÓN GÓMEZ AND OTHERS
CHILE

Approved electronically by the Commission on June 17, 2020.

Cite as: IACHR, Report No. 163/20, Petition 1275-12. Admissibility. Eduvigis del Carmen Alarcón and others. Chile. June 17, 2020..

I. INFORMATION ABOUT THE PETITION

Petitioner:	Eduvigis del Carmen Alarcón Gómez and others
Alleged victim:	Eduvigis del Carmen Alarcón Gómez and others ¹
Respondent State:	Chile ²
Rights invoked:	Articles 21 (private property), 24 (equality before the law) y 25 (judicial protection) of the American Convention on Human Rights ³ in relation to its article 1.1 (obligation to respect rights); and article XVI (social security) of the American Declaration of the Rights and Duties of Man ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	July 4, 2012
Additional information received at the stage of initial review:	September 9, 2013, November 13, 2013, November 11, 2014 and May 25, 2017.
Notification of the petition to the State:	June 28, 2017
State's first response:	December 1, 2017
Additional observations from the petitioner:	July 7, 2018 and August 17, 2018

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 instrument of ratification done on August 21, 1990) and American Declaration (deposit of instrument of ratification of the Charter of OAS done on June 5, 1953)

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	21 (private property), 24 (equality before the law), 25 (judicial protection) and 26 (cultural, social, and economic rights) of the American Convention in relation to its articles 1.1 (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law); and article XVI (social security) of the American Declaration.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on January 6, 2012.
Timeliness of the petition:	Yes

¹ The petition refers to sixty seven alleged victims duly individualized in the appendix of the present petition.

² According to what is established in article 17.2a of the Regulation of the Commission, Commissioner Antonia Urrejola Noguera, of Chilean Nationality, did not participate neither in the debate nor in the decision of the present matter.

³ Hereinafter "the American Convention" or "the Convention."

⁴ Hereinafter "the American Declaration" or "the Declaration."

⁵ The observations of each party were duly transferred to the opposing party.

V. FACTS ALLEGED

1. The petitioners, all professors of public education, allege that the Chilean State violated their rights to private property, equality before the law, and judicial protection by virtue of the enactment of a new system of retirement for professionals of the education public sector in 2008. This new regime established the obligatory nature for the worker to accept his retirement once the minimum age to retire was reached, what, in effect, occurred with the petitioners. Moreover, they claim that the system under which they retired is discriminatory for reason of gender due to the fact that the age for retirement is different for men and for women; which produces an unequal treatment because there are other professionals of the public sector who have retirement regimes that are more convenient; and that their claims were not attended by the courts.

2. As context, the petitioners mention that through Executive Order N° 3.500 of November 13, 1980, the State reformed its system of pensions, changing the previous system with defined benefits and managed by the State, to a financed system and managed by individuals, which activity was merely regulated by the State. On this matter, the petitioners allege that their affiliation to the new pension funds managing company is private, part of the referred new system was motivated by the fake promise that they would receive a higher retirement amount than the one expected with the old system and that besides, they were sold the idea that the “Cashier Departments” to which they were affiliated before were broke and without possibilities to pay their pensions in the future.

3. Thus, the petitioners allege that it was not until 2008 when they saw themselves affected by the new system of pensions due to the fact that on that year Law 20.158 was issued, this law establishes a retirement system for professionals of public education, establishing the obligatory nature of retiring when the minimum age for retirement was reached and without allowing them to continue as active workers in the education public sector and of course, without allowing them to continue receiving remuneration.

4. The petitioners claim that besides the system of pensions prevailing since 1981, it is discriminatory in terms of gender since the age for retirement for women is sixty years old while the age to retire for men is sixty five years old, which harms the people of female sex because they save less and as a result of this, they receive less funds by the time of retirement. Besides, they allege that said system creates an unequal treatment since the new regime does not apply for the members of the public force, creating a disparity of regimes that harms the professors of the public sector.

5. Thus, through documents written on December 31, 2008 and on January 6 and 21, 2009, the petitioners set out all the mentioned claims to the Superintendence of Pensions requesting it to pronounce over their social security rights. The Superintendence of Pensions, through resolution from February 27, 2009 communicated them their “lack of standing” –or lack of competence or of faculties- to compensate the plaintiffs or improve the retirement as it might be the case. Before this response, the petitioners filed a claim before the Labor Court of Santiago, requesting the equality of the amounts of the pensions to the replacement rate of 80%. However, through sentence of June 21, 2011, The Seventh Labor Court of Santiago dismissed their petition in its entirety reiterating the argument of “lack of standing” considering that it is the State the one that has the power according to Executive Order N° 3.500 of 1980 refuted, and not the Superintendence of Pensions.

6. Against the referred sentence, the alleged victims filed an appeal on July 22, 2011 before the Court of Appeals of Santiago, requesting the amendment regarding the lack of standing from the Superintendence of Pensions arguing that said administrative agency has the capacity to interpret and apply the established rules on Executive Order N° 3.500. However, on October 18, 2011, the Court of Appeals confirmed the appealed sentence. On November 7, 2011, the alleged victims filed an appeal for reversal before the Supreme Court of Justice insisting that the Superintendence of Pensions has the capacity to pronounce regarding the impugned legislation. Nevertheless, on December 30, 2011, that maximum court resolved that the filed appeal was groundless for being developed on the basis of facts not established by the trial court judges, by not reporting the violation of laws. Against this sentence, the petitioner filed an appeal for review on January 3, 2012, that was rejected on January 6 of the same year.

7. Finally, through communication of November 13, 2013, the petitioners informed the Commission that they received the title of debt expressed in money denominated “Bonus of Recognition” when they stuck to the

new regime of pensions in 1980. However, they did not provide more necessary information on this; for example, to know the amount that each of the petitioners had received, or how, or when this bonus was given to them.

8. The State, for its part, claims regarding the occurred facts to the petitioners, as a consequence of Executive Order N° 3.500, that the Commission lacks the power to pronounce on these, due to the fact that Chile deposited the instrument of ratification of the Convention on August 21, 1990.

9. Besides, Chile claims that the IACHR lacks competence on the matter under review regarding the alleged violations to the social security rights, given that the subjects that have to do with pensions are not of its jurisdiction. Regarding the exhaustion of domestic remedies, the State alleges that the petitioners had at their disposal the appeals that the national legislation foresees, both administrative and jurisdictional, to impugn the decisions that considered against their interests, such the appeal for annulment. It indicated that having obtained unfavorable results in these instances does not imply the violation to their rights whatsoever. On the other hand, it indicates that before the alleged violation to right to property, the petitioner could have exerted the constitutional action of protection before the Court of Appeals concluding that the domestic remedies were not exhausted by the petitioners.

10. Finally, the State holds that the Commission would act like a court of fourth instance if decided to analyze the present case provided that it would evaluate the interpretation and execution of domestic remedy that the Judicial Power of Chile has done within its jurisdiction, it holds that it is not possible that the alleged victims aspire to the revision and execution of the judgment given in the national headquarters and dictated under the rules of the due process.

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

11. In the present case, the Commission observes that the claims presented by the petitioners were equally set out by them in the internal jurisdiction. In this sense, besides the petitions that they sent to the Superintendence of Pensions, they went to all the existing agencies in the labor jurisdiction, exhausting this via through an appeal for reversal dismissed on December 30, 2011, and finally through the exercise of an appeal for review that was rejected on January 6, 2012. The State, for its part, alleges that the petitioners could have chosen to file other petitions contemplated by the internal legislation, as the one of annulment. Additionally, that the petitioners could have exerted the constitutional action of protection to repair the violations to the right of property.

12. In relation to what was set out by the State, the Commission reiterates its continuous position, according to which, the requirement of exhaustion of the internal remedies does not imply that the alleged victims have the obligation to exhaust all the possible remedies at their disposal. If the alleged victim set out the affair because of any of the valid and adequate alternatives according to the internal legal system and the State had the opportunity to remediate the affair in its jurisdiction, the purpose of the international rule was accomplished⁶. In the present case, the Commission observes, for the purpose of the analyses of admissibility, that the alleged victims went to the administrative agency in charge of verifying that the private funds of pensions fulfill the existing regulations, and then, they followed a route of exhaustion of judicial remedies on which their remedies were accepted for processing in all the agencies. On the other hand, regarding the response that the alleged victims received from the different organizations they went to, it is reasonable to think that for having set out their claims for the via of constitutional protection, they were going to receive an equally negative response, similar to the one that the one the labor jurisdiction gave them.

⁶IACHR, Report No. 70/04, Petition 667/01, Admissibility, Jesús Manuel Naranjo Cárdenas and others, Retirees from the Venezuelan Aviation Company VIASA. Venezuela, October 15, 2004, paragraph 52.

13. With regards to these considerations, the Commission concludes that the present petition fulfills the requirement of exhaustion of judicial domestic remedies, being the final decision issued on January 6, 2012; and given that it was presented to IACHR on July 4, 2012, it is clear that the same formally fulfills the requirements of admissibility established in articles 46.1.a and 46.1.b of the Convention.

VII. ANALYSIS OF COLORABLE CLAIM

14. According to its temporary competence, the Commission observes that the set of facts alleged by the petitioners passes in a period of time that, broadly encompasses from 1980 to this day. In this sense, the Commission considers that Chile deposited its instrument of ratification of the American Convention on August 21, 1990; therefore, the alleged facts by the petitioners that have been produced after this date or that have continuous effects that prolong after that date, will be analyzed based on the Convention. In turn, those facts that have occurred before August 21, 1990 will be analyzed as established by the American Declaration.

15. According to the plea from the State referred to the form of fourth instance, the Commission reiterates that within the frame of its commission, it is competent to declare admissible a petition and give a verdict on the affair when this refers to domestic procedures that could violate the rights guaranteed by the American Convention.

16. In correspondence with the foregoing, IACHR considers that the plea referred to the alleged discrimination for gender, as well as the impossibility to continue working once the retirement age is reached, and the lack of a real judicial decision according to the affair of the claims of the petitioners, these are not manifestly unfounded and constitute affairs that due to their legally complex nature merit an analysis on the merits from the Inter-American Commission. In this sense, if the facts are true, they could constitute violations to the rights protected in articles 21 (property), 24 (equality before the law), 25 (judicial protection), and 26 (cultural, social, and economic rights) of the American Convention in relation to its articles 1.1 (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law), in detriment of the alleged victims.

17. In relation with the claim over the alleged violation of article XVI (social security) of the American Declaration and considering what was said about the temporary competence of the Commission in this case, the Commission reiterates that once the American Convention comes into effect regarding a State, this, and not the Declaration, becomes the primary source of applicable law by the Commission each time that the violations of substantially identical rights established on the two instruments are alleged in the petition. Taking into account that article 26 of the Convention makes a general reference to the cultural, social, and economic rights and that these have to be determined in connection with the Chart of OAS and applicable instruments, the Commission considers that in cases on which it is alleged a specific violation of the Declaration related to the general contents of article 26, mentioned before, the analysis of its correspondence and identity is part of the stage of merits.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 21, 24, 25, and 26 of the American Convention on Human Rights regarding its articles 1.1 and 2;

2. To find the instant petition admissible in relation to Article XVI of the American Declaration of the Rights and Duties of Man; and

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 17th day of the month of June, 2020. (Signed): Joel Hernández, President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.

Appendix
List of Alleged Victims
Retired Professors of Public Education

1. Eduvigis Del Carmen Alarcón Gómez
2. Georgina Aída Andrade Bravo
3. Juana Agustina Andunce Riquelme
4. María Gloria Arancibia Franco
5. Ana María Arancibia Talavera
6. María Angélica Arcaya Oliva
7. Rosa Del Carmen Arias González
8. Isabel Del Carmen Arza Pizarro
9. Margarita Del Carmen Azagra Vergara
10. Alicia Del Carmen Bahamondes Albornoz
11. Ivonne Oriana Becerra Thon
12. Rosalía De Lourdes Bustos Cárcamo
13. Julia Mireya Bracelia Bustos Carmona
14. Cecilia Gimena Bustos Farías
15. Juana María De La Torre Belmar
16. Estela Teresa Díaz Rojas
17. Gustavo Lisandro Falk Venegas
18. Gladys Del Carmen Feeley Clavero
19. María Eugenia Fuentes Molina
20. Rosa Lidia Gac Ramírez
21. Gloria Inés Godoy Romero
22. Alicia Leonor González Blanchard
23. Nelly Del Carmen Gula Grez
24. Luzmira Del Carmen Gutiérrez Barahona
25. María Filomena Luengo Sepúlveda
26. Lidia Beatriz Maldonado Matus
27. María Eliána Marciel Nanjarí
28. Cecilia Florencia Mercado Ruiz
29. Fernando Rodolfo Miranda Domínguez
30. Nora Otilia Muñoz Carrasco
31. Ana María Muñoz Opazo
32. Alicia De Las Mercedes Navarro Gómez
33. Lucía Agustina Norambuena Mora
34. María Inés Olguín Berríos
35. Eliana Cristina Olguín Herrera
36. María Eliana Oyarzún Velloso
37. María Ester Pacheco Pacheco
38. Celinda Del Carmen Pizarro Garrido
39. Lina De Lourdes Ponce Fuentes
40. Gabriela Teresa Retamal Araya
41. Aída Rosales Garrido
42. Sara Del Carmen Rozas Balbontín
43. María Eliana Rubio Paredes
44. Jovita Lucy Rubio Paredes
45. María Elcira Saavedra Montecino
46. Gladys Eliana Salas Silva
47. Ana Rosa Salinas Fierro
48. María Angélica Salse Lillo
49. Elisabeth Del Tránsito Sepúlveda Acuña
50. Jaime Raúl Silva Hernández
51. Berta Petronila Suazo Duran

52. Paul Gilberto Tavilo Cisternas
53. Blanca Del Carmen Toro Varas
54. María Mercedes Ulriksen Godoy
55. Viviana Del Carmen Valencia Álvarez
56. Luisa Del Carmen Vega Chinel
57. Teresa Del Carmen Vera Aguirre
58. Gladys Margarita Vilches Arriagada
59. Ximena Del Carmen Villalobos Alanis
60. Hirma Josefina Zenteno Ahumada
61. Gloria De Las Nieves Zúñiga López
62. Bery Del Carmen De La Fuente González
63. Mariela Margarita Calderón Sandoval
64. Trinidad De Las Mercedes Navarrete Barahona
65. Cecilia De Las Nieves Navarrete Barahona
66. Carmen Leontina Seguel Monsalves
67. Inés Guillermina Lundin Román