

OEA/Ser.L/V/II
Doc. 95
29 April 2021
Original: Spanish

REPORT No. 90/21
PETITION 2011-13
REPORT ON ADMISSIBILITY

ALEXANDRA BENADO VERGARA, ALEJANDRA GALLO POBLETE ET AL.
CHILE

Approved electronically by the Commission on April 29, 2021.

Cite as: IACHR, Report No. 90/21, Petition 2011-13. Admissibility. Alexandra Benado Vergara, Alejandra Gallo Poblete et al. Chile. April 29, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioners:	<i>Corporación Humanas</i> -Regional Center for Human Rights and Gender Justice and Public Interest Clinic of the Human Rights Center at Diego Portales University
Alleged victim:	Alexandra Benado Vergara, Alejandra Gallo Poblete, and others ¹
Respondent State:	Chile ²
Rights invoked:	Articles 3 (right to juridical personality), 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights, ³ in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 4, 2013
Notification of the petition to the State:	November 12, 2018
State's first response:	April 16, 2020
Additional observations from the petitioner:	June 20, 2020

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 (instrument of ratification deposited on August 21, 1990)

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 3 (right to juridical personality), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention, in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof
Exhaustion or exception to the exhaustion of remedies:	Yes, according to Section VI
Timeliness of the petition:	Yes, according to Section VI

¹ The petition refers to D.G.B. and L.G.B. as alleged victims with confidential identity because of their minority of age.

² Under the provision of Article 17.2.a of the IACHR Rules of Procedure, Commissioner Antonia Urrejola Noguera, a Chilean national, did not participate in the discussion or the decision on this matter.

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

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners claim that the State infringed the rights of the alleged victims (hereinafter “Ms. Benado and Ms. Gallo”) to equal protection, the protection of the family, and judicial protection, among others, in two legal actions—one was an administrative action and the other a judicial one. They complain that the alleged victims were discriminated against based on their sex and their sexual orientation, that the state authorities denied Ms. Benado’s legal registration as the mother of D.G.B. and C.G.B.—which deprived the children of the right to filiation—; that filiation established by assisted reproductive procedures, which works differently for heterosexual couples, entails unequal treatment; that the state authorities did not address their claims.

2. By way of context, the petitioners say that under the National Law on Assisted Fertilization, the man and the woman that undergo together an assisted reproductive treatment will be recognized as the father and mother, which creates all types of legal effects, including the rights and obligations proper of the filial relationship. Moreover, they explain that the concept of filiation is protected by Title VII of the Chilean Civil Code and, more precisely through articles 182, 186, and 187 of this code.⁵

3. The petitioners say that Ms. Benado and Ms. Gallo are a lesbian couple who, using assisted reproductive procedures, had their children, D.G.B. and C.G.B. Nevertheless, the petitioners declare that, initially, only Ms. Gallo appeared as the legal mother of the children since she delivered them. Thus, on March 26, 2013, when D.G.B. and C.G.B. were three years of age, the alleged victims applied with the Civil Registry Office of Santiago for Ms. Benado’s maternity to be legally recognized. They allege that, however, the Civil Registry (*Oficina Civil Subrogante del Registro Civil*) told them that it was impossible to register the applicant because she was of the female sex.

4. Therefore, on April 12, 2013, Ms. Benado and Ms. Gallo filed an appeal for legal protection claiming that the above decision infringed their and their children’s rights to non-discrimination, family and private life, mental integrity, and to have one’s honor respected. However, on April 15, 2013, the First Chamber of the Court of Appeals found this remedy inadmissible on considering that the alleged victims sought to change the filiation rules in force by turning to a court of law without anything to establish an illegal act. Given this resolution, on April 18, 2013, Ms. Benado and Ms. Gallo submitted a petition for rehearing, which was rejected by the Court of Appeals on April 19, 2013, on considering that the applicants did not disprove the grounds of the appealed decision.

5. Subsequently, on April 25, 2013, the alleged victims filed an appeal against refusal to accept appeal. Nevertheless, on May 16, 2013, the Supreme Court of Justice dismissed it claiming the remedy’s inadmissibility regarding the nature of the appealed decision. On May 23, 2013, Ms. Benado and Ms. Gallo filed a petition for rehearing, but on June 6, 2013, the Supreme Court of Justice rejected it flatly under article 97 of the Organic Code of Courts.⁶ The petitioners claim that this decision, which was notified to them on June 6, 2013, exhausted the domestic remedies.

6. Due to the above considerations, the petitioners complain that the State discriminated

⁵ Article 182: The father and the mother of a child conceived by the application of assisted reproductive procedures are the man and the woman that undergo such treatment. Filiation established by the preceding rule cannot be disproved or replaced by another form of filiation. Article 186: Non-marital filiation shall be legally determined by the father’s, the mother’s, or both parents’ acknowledgement or the final resolution in filiation proceedings.” Article 187: A child shall be acknowledged through a declaration made for this specific purpose by the father, the mother, or both, as appropriate: (1) before the clerk of the Civil Registry Office when the birth of the child is being registered or at the civil marriage ceremony of the parents; (2) in a record submitted at any time, before any clerk of the Civil Registry Office; (3) through a public deed; (4) in a will. When it is only one of the parents that acknowledges the child, mention of the other parent will not be compulsory. The acknowledgement that is not on the birth certificate of the child shall be written in the margin thereof.

⁶ Organic Code of Courts. Article 97. Judgments issued by the Supreme Court in appeals on procedural or substantive grounds, for nullification in criminal matters, against refusal to accept appeal, for protection, for constitutional protection, and for rehearing of final decision are not subject to any appeal whatsoever, except for decisions in appeals for clarification, correction, or amendment as established in Article 182 of the Code of Civil Procedure. Appeals for the rehearing or review of the decisions referred to above shall be declared inadmissible and rejected flatly by the President of the Court, unless rehearing under articles 778, 781, and 782 of the Code of Civil Procedure is involved.

against the alleged victims based on their sex and their sexual orientation, as their application was rejected for the sole reason that they are a female same-sex couple. The petitioners allege that the impossibility to have Ms. Benado's and Ms. Gallo's maternity legally recognized is rooted in a traditional, conservative, and discriminatory understanding of the concept of family given the State's application of the concept of family that applies only to families made by a man and a woman. They stress that, to date, D.G.B. and C.G.B. are deprived of the rights they are entitled to as children regarding their other mother, Ms. Benado.

7. Finally, the petitioners inform that, currently, a bill on the filiation rights of children with same-sex parents is being discussed in Chile. They point out that this initiative has been a matter of legislative discussion since April 2016 and that it still has to be discussed by the Senate of the Republic, and that the Government has not furthered its processing.⁷

8. For its part, the State contends that this petition is inadmissible since the facts alleged do not constitute human rights violations. It affirms that the Civil Registry Office did not commit any illegal act because, in refusing to amend the birth certificates of children D.G.B. and C.G.B., this body acted within its competencies and in conformity with the rules in force. In this regard, the State points out that the domestic legal framework does not allow for a person to be acknowledged by two mothers because maternity is established by the act of birth, under article 31 No. 4 of Law No. 4.808 on the Civil Registry Office and article 113 1 and 5 of Decree-Law No. 2.128, by which the Organic Rules of the Civil Registry Service was approved.⁸

9. The State emphasizes that the alleged victims had the opportunity to turn to the domestic courts to submit their claims, regarding which the authorities issued well-founded decisions following legal proceedings held with due judicial guarantees. Accordingly, the State requests that the petition be declared inadmissible in accordance with Article 47 (b) of the American Convention, as the State considers that the petitioners want that the Commission work as a court of appeals, in contravention of its subsidiary nature.

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

10. The petitioners argue that the alleged victims exhausted the domestic remedies with the resolution by the Supreme Court of Justice, of which they were notified on June 6, 2013. For its part, the State has not disputed the exhaustion of domestic remedies nor referred to the timeliness of the petition. Considering the above and the information on the record, the Commission concludes that this petition meets the requirement on the exhaustion of domestic remedies and timeliness outlined in Article 46.1(a) and (b) of the American Convention.

VII. ANALYSIS OF COMPETENCE AND COLORABLE CLAIM

11. The IACHR deems that the allegations of a purported act of discrimination based on gender and sexual orientation, given the non-recognition of the filial relationship between the mothers and their children conceived through assisted procreation, are not manifestly groundless and that, on the contrary, they represent issues that require an analysis on the merits given their complex legal nature. Therefore, the IACHR considers that, if proved to be true, the allegations may establish violations of Articles 3 (right to juridical personality), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child), 24 (right to equal protection), and 25 (judicial protection) of the American Convention, in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof, to the detriment of Ms. Benado and Ms. Gallo and their children, D.G.B. and C.G.B.

⁷ A bill to regulate the filiation right of sons and daughters of same-sex parents, parliamentary motion submitted by senators Isabel Allende Bussi, Alfonso de Urresti Longton, Felipe Harboe Bascuñán, Ricardo Lagos Weber, and Adriana Muñoz D'Albora; April 22, 2016; Legislative Gazette No. 10.626-07.

⁸ Article 113. The following persons are required to file a declaration of birth: (1) The father, if he is known and can do this; and (5) the mother, as soon as she can make this declaration.

12. As for the alleged violation of Article 5 (right to humane treatment) of the American Convention, the Commission believes that the petitioners have not presented claims or evidence that allow it to determine, *prima facie*, a possible violation.

13. Regarding the State's claim about the fourth-instance formula, the Commission reiterates that, under its mandate, the IACHR is competent to declare a petition admissible when this concerns domestic proceedings that may be contrary to the rights protected by the American Convention.

VIII. DECISION

1. To declare this petition admissible regarding Articles 3, 8, 11, 17, 19, 24, and 25 of the American Convention on Human Rights, in connection with Articles 1.1 and 2 thereof;

2. To declare this petition inadmissible regarding Article 5 of the American Convention; 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 29th day of the month of April, 2021. (Signed:) Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Stuardo Ralón Orellana (dissenting opinion), Commissioners.