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Session:	Hundred and Eighteenth Regular Session (7 – 24 October 2003)
Title/Style of Cause:	Sonia Arce Esparza v. Chile
Doc. Type:	Decision
Decided by:	First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioners: Robert K. Goldman, Julio Prado Vallejo. Commissioner José Zalaquett, of Chilean nationality, did not take part in the discussion and voting on the present report, pursuant to Article 17(2)(a) of the Rules of Procedure of the Commission.
Dated:	10 October 2003
Citation:	Arce Esparza v. Chile, Petition 071/01, Inter-Am. C.H.R., Report No. 59/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by:	APPLICANTS: the Corporacion de la Morada and the Centro por la Justicia y el Derecho Internacional
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## I. SUMMARY

1. The present report addresses the admissibility of petition P071/01. Its processing was initiated by the Inter-American Commission on Human Rights (hereinafter “Commission” or “IACHR”) pursuant to the receipt of a petition on January 30, 2001 and supporting materials on August 27, 2001. The petition was filed by Sonia del Carmen Arce Esparza, the alleged victim, and the Corporación de la Morada (hereinafter “the petitioners”) against the Republic of Chile (hereinafter “the State”). Pursuant to a request by the petitioners, the Centro por la Justicia y el Derecho Internacional (CEJIL) was added as co-petitioner in October 2001.

2. The petitioners allege that certain articles of the Chilean Civil Code violate Ms. Arce Esparza’s rights under Articles 1, 2, 17, 21, 24 and 25 of the American Convention on Human Rights (hereinafter “the American Convention”) and Articles 1, 2, 5(a), 15(1), 15(2) and 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter “CEDAW”). In particular, the petitioners argue that Article 1749 of the Chilean Civil Code, which authorizes a husband to act as the sole administrator of his wife’s goods, violates the alleged victim’s rights. The petitioners maintain that other articles of the Chilean Civil Code concerning the administration of goods between spouses also violate the alleged victim’s rights, namely Articles 1750, 1752 and 1754 of the Civil Code. The petitioners assert that they satisfy the Commission’s admissibility requirements. They maintain that they are excused from exhausting domestic remedies, or in the alternative that they have exhausted all domestic remedies.

3. The State for its part contends that the petition should be declared inadmissible for failure to exhaust domestic remedies. They assert that Ms. Arce Esparza has not fully or properly invoke two adequate remedies: (1) the recurso de protección, and (2) the recurso de inaplicabilidad por inconstitucionalidad (hereinafter the “recurso de inaplicabilidad”).

4. As set forth below, pursuant to its examination, the Commission concludes that it is competent to take cognizance of the petitioners’ complaints concerning alleged violations of Articles 1, 2, 17, 21, 24 and 25 of the American Convention.

## II. PROCESSING BEFORE THE COMMISSION

5. On January 30, 2001 the Commission received a petition lodged by petitioners Sonia del Carmen Arce Esparza and the Corporación de la Morada. By a note dated March 21, 2001 the Commission informed the petitioners that the processing of the petition could not be initiated at that time because the information provided did not indicate exhaustion of domestic remedies.

6. On April 25, 2001 the petitioners sent the Commission a four-page response maintaining that they were excused from exhausting domestic remedies for lack of effective remedies. On May 9, 2001 the Commission sent a note to the petitioners informing them that there was still insufficient information on exhaustion of domestic remedies to begin processing the petition.

7. Then on August 27, 2001 the petitioners sent the Commission additional information on exhaustion of domestic remedies. By a note dated September 25, 2001 the Commission informed the petitioners that they had initiated processing of the petition. By a note of the same date, the Commission sent the pertinent parts of the petition to the State, with a request for a response within 90 days in accordance with Article 30(3) of its Rules of Procedure.

8. On October 17, 2001 the petitioner, Corporación de La Morada, sent a letter to the Commission requesting that the Centro por la Justicia y el Derecho Internacional (CEJIL) be added as co-petitioner. By a note dated November 1, 2001 the petitioner, Sonia Arce Esparza, similarly requested that CEJIL be added as co-petitioner.

9. On November 28, 2001 the State wrote to the Commission requesting an extension to submit its response. By note dated January 7, 2002, the Commission granted this request in accordance with Article 30(3) of the Rules of Procedures of the IACHR.

10. On January 22, 2002 the Commission received a letter from the petitioners requesting a hearing before the Commission and the State. This request was granted by the Commission in a note dated February 6, 2002. The hearing was held on March 6, during its 114<sup>o</sup> regular period of sessions, to hear the positions of the parties concerning the admissibility of the case under study. Both parties were duly represented and participated.

11. The State submitted its reply to the Commission on March 7, 2002. The Commission transmitted the State’s response to the petitioners on March 19, 2002, with any observations in response requested within one month. To date, the petitioners have not yet responded.

### III. POSITION OF THE PARTIES

#### A. The petitioners

12. The petitioners argue that certain Articles in the Chilean Civil Code violate Ms. Arce Esparza's protected rights under the American Convention and the CEDAW. In particular, the petitioners contend that the articles of the Civil Code related to the rights and obligations of spouses in the administration of goods violate Articles 1, 2, 17, 21, 24 and 25 of the American Convention and Articles 1, 2, 5.a, 15.1, 15.2 and 16.1 of the CEDAW.

13. On February 28, 1976 Ms. Arce Esparza married Patricio Salinas Arce, thereupon becoming subject to the provisions of the Civil Code relating to the administration of goods between spouses. In 1994, after the death of her parents, Ms. Arce Esparza inherited some real property. When she tried to sell this property, the real estate agent in charge of processing the sale refused to complete the transaction without the consent of Ms. Arce Esparza's husband as required by Article 1749 of the Chilean Civil Code.

14. The petitioners argue that Article 1749 in particular, as well as the other articles related to the administration of goods between spouses, violate Ms. Arce Esparza's protected rights. Article 1749 of the Civil Code deems the husband the head of the marital union and as such the sole administrator of the goods of the marriage as well as the wife's goods. "El marido es jefe de la sociedad conyugal, y como tal administra los bienes sociales y los de su mujer...".[FN2] This law requires the husband's consent for any decisions related to the disposal of his wife's property which means that Ms. Arce Esparza is unable to sell her property without the consent of her husband.

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[FN2] Article 1749 of the Chilean Civil Code.

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15. Article 1754 states that the wife cannot administer her own goods save in extraordinary circumstances. "[L]a mujer no podrá enajenar o gravar ni dar en arrendamiento o ceder la tenencia de los bienes de su propiedad que administre el marido, sino en los casos del artículo 138".[FN3] Article 1752 expressly states that the wife has no rights over the marital goods during the marriage. "[L]a mujer por sí sola no tiene derecho alguno sobre los bienes sociales durante la sociedad".[FN4] Further, Article 1750 of the Civil Code states that the husband's goods and the marital goods should be considered as one for purposes of third parties, such as creditors. "El marido es, respecto de terceros dueño de los bienes sociales, como si ellos y sus bienes propios formasen un solo patrimonio, de manera que durante la sociedad los acreedores del marido podrán perseguir tanto los bienes de éste como los bienes sociales; sin perjuicio de los abonos o compensaciones que a consecuencia de ello deba el marido a la sociedad o la sociedad al marido".[FN5] The petitioners believe that these challenged articles directly violate Ms. Arce Esparza's rights protected under the American Convention. In particular they violate her rights to equal protection and the right to enjoy full ownership rights, such as the ability to freely buy and sell land.

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[FN3] Article 1754 of the Chilean Civil Code.

[FN4] Article 1752 of the Chilean Civil Code.

[FN5] Article 1750 of the Chilean Civil Code.

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16. The petitioners maintain that the law does not offer any real alternatives for Ms. Arce Esparza to administer her own goods. One alternative would be for Ms. Arce Esparza to ask for her husband's consent to administer her own goods. The petitioners argue that this alternative is at once impossible (since Ms. Arce Esparza's husband cannot be located), and discriminatory since she would be required to depend on her husband's consent. Another alternative would be for Ms. Arce Esparza to ask a judge for permission to administer her own goods that would require Ms. Arce Esparza to show special cause (such as that her husband refused consent without justification). The petitioners consider that having to show special cause still unjustifiably limits Ms. Arce Esparza's right to administer her goods.

17. The petitioners argue that they have satisfied all of the Commission's admissibility requirements. Specifically as to the requirement of exhaustion of domestic remedies, the petitioners argue that they are excused from satisfying this under Article 46(2)(a) or, in the alternative, that they have exhausted domestic remedies.

18. The petitioners argue that they are excused from exhausting domestic remedies because both of the available remedies, the *recurso de protección* and the *recurso de inaplicabilidad*, are inadequate. Both have as prerequisites that there be an ongoing legal procedure in a lower court where the allegedly unconstitutional law is being applied against Ms. Arce Esparza before she has access to these remedies. This means that Ms. Arce Esparza would have to first go to a judge and ask for permission to administer her own goods and have that permission denied, before she could have access to the remedy. The petitioners argue that these remedies are inadequate for two reasons: First, by having to ask the judge for permission to administer her own goods, Ms. Arce Esparza would be submitting herself to the very discrimination that she is challenging. Second, these remedies do not address Ms. Arce Esparza's allegation that the challenged articles, even in the absence of direct application by a judge to prevent her from selling her property, violate her rights.

19. In the alternative, the petitioners argue that Ms. Arce Esparza has exhausted domestic remedies. On August 2, 2001 Ms. Arce Esparza filed a *recurso de protección* with the Santiago Court of Appeals (*Alta Corte de Apelaciones de Santiago*) that was denied on August 6, 2001. The Court stated that the appeal was denied because the facts as alleged fell outside the ambit of that remedy.[FN6] The petitioners contend that this denial of their appeal proves exhaustion of domestic remedies.

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[FN6] In its decision, the Santiago Court of Appeals stated, "los hechos descritos en la presentación de fojas 1 sobre pasan los márgenes del procedimiento del *recurso de protección* , toda vez que se cuestionan las disposiciones de una ley, cuya aplicación, de conformidad con la

Constitución Política del Estado, no es susceptible de impugnarse por esta vía...” See the Petitioners’ note to the Commission, dated August 27 2001 quoting the Santiago Court of Appeals.

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B. The State

20. The State has not controverted the substance of the petitioners’ claims. Rather the State argues that, first, the Chilean law does protect Ms. Arce Esparza’s rights and, second, that the petition should be denied for failure to exhaust domestic remedies.

21. It is the position of the State that Chilean law does protect Ms. Arce Esparza’s rights. The Chilean Constitution protects the right to equality before the law.[FN7] Furthermore, Chilean law expressly guarantees the right to equality before the law between men and women. “[H]ombres y mujeres son iguales ante la ley.”[FN8] Another Chilean law expressly guarantees everyone the right to full enjoyment of property rights. “[Todos tienen] derecho de propiedad en sus diversas especies y sobre toda clase de bienes [de tal manera que] nadie puede ser privado de este derecho...”[FN9] There is also a Chilean doctrine that says that all laws that predate the Constitution are deemed tacitly derogated where they conflict with Constitutional guarantees. In this case, says the State, Article 1749 predates the Constitution and should therefore not be enforced. Furthermore, the State asserts that anyone who attempts to enforce this law against an individual is violating that individual’s right and that when an individual’s right has been violated that individual has access to effective domestic remedies.

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[FN7] Constitution of the Republic of Chile, Article 2, No. 2.

[FN8] Article No. 19.611 of the Chilean Civil Code, of June 16, 2001.

[FN9] Article No. No. 24 of the Chilean Civil Code, of June 16, 2001.

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22. In this case, the State affirms that Ms. Arce Esparza has access to two effective remedies: (1) the recurso de protección, and (2) the recurso de inaplicabilidad. While the petitioners characterize the remedies as ineffective, the State considers that Ms. Arce Esparza failed to properly invoke them. In the case of the recurso de protección, the reason the claim was denied was because the victim did not challenge an illegal application of a law as required by the remedy. Rather she argued that the laws themselves violated her rights. In the case of the recurso de inaplicabilidad, the alleged victim has not yet tried to invoke this remedy or satisfy its prerequisite that there be an ongoing legal proceeding in a lower court where the allegedly unconstitutional law is being applied against her. Therefore, the State feels that the petitioners cannot argue that the remedies are inadequate until they have first tried to properly invoke them. The State further alleges that the exhaustion requirement has not been satisfied because petitioners, by their own admission, have not ever invoked the recurso de inaplicabilidad. For all these reasons, the State argues that the petition should be denied for failure to exhaust domestic remedies.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

23. Under Article 44 of the American Convention, the petitioners are authorized to lodge complaints with the IACHR. In the instant case, the alleged victim named in the petition is an individual whose rights under the Convention Chile undertook to respect and guarantee. With regard to the State, the Commission notes that Chile has been a party to the American Convention since August 21, 1990, the date on which the respective instrument of ratification was deposited. The Commission, therefore, is competent *ratione personae* to examine the petition.

24. The Commission is also competent *ratione loci* to take up the petition, inasmuch as it alleges violations of rights protected under the American Convention, said to have occurred within the territory of a State Party to that international instrument. The IACHR is also competent *ratione temporis* since the obligation to respect and ensure the rights protected by the American Convention was already binding upon the State at the time the events alleged in the petition occurred. Finally, the Commission is competent *ratione materiae*, inasmuch as the petition denounces violations of human rights protected under the American Convention.

B. Other requirements for the admissibility of the petition

a. Exhaustion of domestic remedies

25. Article 46 of the American Convention specifies that, in order for a case to be admitted, “remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.” This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework. When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted is excused. Article 46(2) of the Convention specifies that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging the violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of final judgment. Consequently, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31 of the Commission’s Rules of Procedure establishes that the burden then shifts to the Government to demonstrate which specific remedies remain to be exhausted and offer effective relief for the harm alleged.

26. The presentations of the petitioners and the State concur in indicating two remedies that would apply to the situation denounced, namely the *recurso de protección* and the *recurso de inaplicabilidad*. The petitioners maintain that both remedies are ineffective, as their invocation and exhaustion would require that the challenged norms first be applied through a specific judicial decision or proceedings concerning the administration or disposition of Ms. Arce Esparza’s goods. The petitioners argue that the alleged victim should be able to challenge the constitutionality of the norms in reference, as they presently affect her in terms of their discriminatory character, without being required to meet further conditions. In the alternative, they argue that the filing by the alleged victim of a *recurso de protección* fully satisfied the

Article 46 requirement of exhausting domestic remedies. The State, in summary, affirms that the application of the norms in a concrete situation is a procedural requirement, and that once satisfied, both remedies offer full potential for effective redress. Accordingly, it maintains that the alleged victim failed to properly invoke the recurso de protección in accordance with the applicable requirements, and completely failed to invoke the recurso de inaplicabilidad, and has thereby failed to satisfy the requirements of Article 46.

27. In analyzing the requirement of exhaustion of domestic remedies, the Commission first notes that the situation denounced before it concerns the effect of the challenged norms on the rights of the named victim. The basic contention is that the norms violate the rights of Ms. Arce Esparza to be free from discrimination and to the equal protection of the law simply by virtue of being in force. The Commission observes that the jurisprudence of the system confirms that distinctions in law based on personal status may, in and of themselves and absent any action of further application, give rise to State responsibility for failure to observe the obligations of equality and nondiscrimination.[FN10] In the present case, neither available remedy permits Ms. Arce Esparza to directly challenge the contested norms as they affect her rights by simply being in force. Both remedies require the alleged victim to subject herself to additional applications of the norms before she is able to challenge them. Therefore the Commission finds that the available domestic remedies are inadequate and that, consequently, the petitioners are excused from exhausting domestic remedies under Article 46 of the American Convention.

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[FN10] See IACHR, Report N° 4/01, Case 11.625, María Eugenia Morales de Sierra (Guatemala), January 19, 2001, generally and at para. 39; IACtHR, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994, Ser. A N° 14, para. 43.  
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28. Moreover, the terms of Article 46 require that the substance of the situation complained about before the Commission has been placed before the domestic courts. As the jurisprudence of the system has repeatedly affirmed, not every remedy formally or theoretically available need be exhausted; but rather, those that are adequate and effective to remedy the situation denounced. As noted, the parties concur that there are two potentially applicable remedies. While the petitioners maintain that neither offered the possibility of relief that was truly effective, Ms. Arce Esparza nonetheless invoked the recurso de protección as a means of seeking redress before the domestic courts. The substance of her claims was placed before the courts, and the action was dismissed for failing to challenge a particular judicial decision or proceeding taken under the challenged legislation. Ms. Arce Esparza thus placed her complaint before the domestic courts through one of the remedies the State has indicated as valid. In principle, once a petitioner has placed her complaint before the judiciary through a valid remedy, there is no requirement that she continue to invoke and exhaust additional remedies, nor has the State explained why the recurso de inaplicabilidad would offer different or better relief with respect to the situation denounced.[FN11] The Commission accordingly also finds that the petitioners exhausted domestic remedies to the extent required under Article 46.

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[FN11] As indicated in Article 31(3) of the Rules of Procedure of the Commission, a State alleging non-exhaustion of remedies has the burden to demonstrate which remedies remain available and effective. Pursuant to that Article and the applicable case law, the party alleging non-exhaustion must raise specific rather than generic allegations concerning the remedies available and their effectiveness. The allegations of the State with respect to the justification for invoking a further remedy, subject to the same conditions as that which was invoked and dismissed, have been generic. See IACHR, Report N° 72/01, Case 11.804, Juan Angel Greco (Argentina), October 10, 2001, at para. 49; Report N° 52/97, Case 11.218, Arges Sequeira Mangas (Nicaragua), Annual Report of the IACHR 1997, para. 95. For the principle that the invocation and exhaustion of one applicable remedy is, in principle, sufficient, see e.g., Eur.Ct. H.R., *McCann and others v. U.K.*, 18984/91, Sept. 3, 1993.

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b. Time period for submission of the petition

29. In accordance with Article 46(1)(b) of the Convention, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level.

30. According to the record before the Commission, in the present case notification of the denial of the *recurso de protección* was received by Ms. Arce Esparza on August 6, 2001, and the petition was received at the Secretariat on January 30, 2002. The Commission thus concludes that the petition meets the requirement of timely filing.

c. Duplication of proceedings and *res judicata*

31. Article 46(1)(c) sets forth that admission of a petition is subject to the requirement that the subject “is not pending in another international proceeding for settlement,” and Article 47(d) of the Convention stipulates that the Commission shall not admit a petition which “is substantially the same as one previously studied by” it “or by another international organization.” In the present case, the parties have not claimed and the proceedings do not indicate the existence of either of these circumstances of inadmissibility.

d. Characterization of the facts alleged

32. Article 47(b) of the American Convention sets forth that allegations which do not state facts tending to establish a violation shall not be admitted. The State has opposed the admissibility of the present petition by arguing, in essence, that the Constitutional protection of the right to equality supercedes the potentially incompatible distinctions set forth in the challenged legislation, and that the petition isn’t ripe because the alleged victim hasn’t been prevented from administering her property.

33. Whether the situation denounced characterizes a violation of Ms. Arce Esparza’s rights under the American Convention is a question for the merits stage of review. With respect to the question of characterization, however, the Commission wishes to reiterate that the existence of

legislation that includes distinctions based on personal status may in and of itself characterize a potential violation. “[A] norm that deprives a portion of the population of some of its rights—for example, because of race— automatically injures all the members of that race.”[FN12] In this regard, the Commission finds in the present case that the petitioners have stated claims which, if consistent with other requirements and shown to be true, could tend to establish the violation of rights protected under Articles 1, 2, 17, 21, 24 and 25 of the American Convention. In conformity with the terms of Article 29 of the American Convention, concerning interpretation and application, the Commission will refer to the terms of the Convention on the Elimination on All Forms of Discrimination (CEDAW) to the extent pertinent as a source of law in interpreting the State’s rights and obligations under the American Convention.

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[FN12] IACtHR, OC-14/94, supra, para. 43.

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## V. CONCLUSIONS

34. The Commission concludes that it is competent to take cognizance of the instant case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention.

35. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to the alleged violation of the rights recognized in Articles 1, 2, 17, 21, 24 and 25 of the American Convention.
2. To notify the parties of the decision.
3. To continue with the analysis of the merits of the case.
4. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 10th day of the month of October, 2003. (Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.