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Committee on Economic, Social and Cultural Rights

Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 149/2019*

Communication submitted by:	Luciano Daniel Juárez
Alleged victim:	The author
State party:	Argentina
Date of communication:	1 February 2018
Date of adoption of decision:	15 October 2020
Subject matter:	Procedure for appointing judges
Procedural issue:	Exhaustion of domestic remedies
Substantive issue:	Right to just and favourable conditions of work
Article of the Convention:	7 (c)
Articles of the Optional Protocol:	2 and 3 (1) and (2) (b)

1.1 The author of the communication, submitted on 8 January 2018, is Luciano Daniel Juárez, a national of Argentina born on 27 November 1978. He claims that the State party has violated his rights under article 7 (c) of the Covenant. The Optional Protocol entered into force for the State party on 5 May 2013.

1.2 On 16 December 2019, the Committee, acting through its Working Group on Communications, in accordance with rule 15 (5) of its provisional rules of procedure under the Optional Protocol, decided not to initiate the friendly settlement procedure requested by the author.

1.3 In the present decision, the Committee first summarizes the information and the arguments submitted by the parties, without reflecting the position of the Committee. It then considers the admissibility and merits of the communication.

A. Summary of the information and arguments submitted by the parties

The facts as submitted by the author

2.1 The author has been serving as a judge of first instance in the provincial court system of the city of Rosario, in the Province of Santa Fe, since 8 March 2012. On 24 November 2016, he took part in an open competitive examination that the Council of the Judiciary had organized to fill four vacant positions in chambers No. I, III and IV of Rosario Civil and

* Adopted by the Committee at its sixty-eighth session (28 September–16 October 2020).

Commercial Court of Appeal, the court immediately superior to the one on which he was currently serving. Face-to-face interviews were held with the candidates on 27 December 2016.

2.2 The results of the open competitive examination showed that the author "far exceeded the qualification criteria" and had obtained sixth place on the official roster. All four vacancies were filled with applicants ranked in one of the top five places. On 4 April 2017, the appointments to the vacant positions in chambers No. I, III and IV of Rosario Civil and Commercial Court of Appeal were formally approved.

2.3 The official roster remains valid for 18 months counting from the date of its approval by the legislature. When a vacancy arises, the executive branch may select a candidate who has passed the competitive examination to fill it. Subsequently, a further vacancy arose in chamber No. III of the same court and, on 9 and 30 May 2017, the author submitted written applications to the Minister of Justice and Human Rights and to the Provincial Governor, stating that, in accordance with article 26 of Decree No. 854/16, he should be appointed to fill the vacant position because he had obtained sixth place on the official roster, and asking for the roster rankings drawn up by the examiners to be strictly respected.

2.4 On 1 June 2017, the author learned that, without having considered his application, the Governor had sent the appointment dossier for the new member of chamber No. III of the Civil and Commercial Court of Appeal to the legislature, having selected the candidate in ninth position. The author notes that, in the nine most recent vacancies, the executive branch has not departed from the rankings on the respective official rosters when selecting persons to join the various chambers of the Civil and Commercial Courts of Appeal in the cities of Santa Fe de la Vera Cruz and Rosario.

2.5 On 5 June 2017, the author filed an application for reconsideration and requested an urgent administrative injunction against the Governor's decision to appoint another candidate and not to respect the roster drawn up following the competitive examination. In his application, the author stated that the nomination put forward by the executive branch was manifestly arbitrary and unlawful, since no reasons for it were given and it reflected unequal treatment in the value accorded to the roster drawn up by the Council of the Judiciary. The author also claimed that the Governor's decision had not included a detailed and comprehensive analysis of experience prior to the competitive examination, including, in particular, the author's prior experience, thereby undermining the transparency and openness of the selection process and justifying a review to ensure compliance with the Constitution and the law. The author also requested, as a precautionary measure, that the appointment dossier submitted to the legislature should be withdrawn provisionally pending the outcome of his application for reconsideration.

2.6 The regulations governing the administrative appeal procedure recognize the principle of effective government oversight.[1] However, none of the author's claims were either examined or addressed. The legislature set a deadline of 16 June 2017 for the submission of observations on the constitutionality and legality of the nominations and the author filed his challenge before this deadline. On 21 June 2017, he attended an interview convened by the Bicameral Commission on Agreements in which he was informed that the analysis carried out during the selection process is "merely political and that the Governor has the power to select whoever he wants". The author states that he tried in vain to convince the Commission that he had the right of access to public office on equal terms, without discrimination, and the right to have his complaints heard, and that the public authorities have a duty to act honestly and in good faith, in the interests of transparency in the public sector.

2.7 On 14 July 2017, by Decree No. 2038, the Governor appointed the candidate in ninth position on the roster drawn up following the competitive examination to serve as a judge in chamber No. III of Rosario Civil and Commercial Court of Appeal. On 7 August 2017, this candidate was sworn in by the Supreme Court of the Province of Santa Fe.

[1] Decree No. 4174/15, art. 1 (1), which establishes that: "Administrative procedures must be carried out in a lawful manner and must guarantee the possibility of recourse and appeal, under the terms and within the scope defined by law or regulations, before the competent public authorities and the possibility of obtaining from them a reasoned, useful and timely decision."

2.8 In a communication submitted on 13 November 2018, the author submitted the information requested in relation to the exhaustion of domestic remedies. He stated that he had not initiated *amparo* proceedings or an administrative appeal as these remedies would have been manifestly ineffective.

2.9 The author states that any *amparo* application or administrative appeal would undoubtedly have been dismissed either *in limine* or when the decision was issued. The State party's case law consistently holds that the appointment of judges is a non-justiciable political matter.[2] The author further states that, according to the Argentine courts, the legislature is the only authority empowered to take decisions on appointments. Accordingly, he considers that he has exhausted the domestic remedies available to him.

2.10 The author states that, although he challenged the nomination put forward by the executive branch, his appeal was not formally considered and the appointment dossier was approved by the legislature on 29 June 2017. Shortly thereafter, the decree of appointment was issued and the person selected for the position was sworn in. Since the new judge is protected by security of tenure, it was then impossible to pursue the challenge up to the Supreme Court.

2.11 The author adds that pursuing any kind of appeal procedure up to the final instance would have prolonged the case unjustifiably and would have exposed him to a risk of punitive legal costs.

The complaint

3.1 The author claims that the final stage in the process of selecting a new judge to serve in chamber No. III of Rosario Civil and Commercial Court of Appeal, which was concluded on 14 July 2017, was vitiated by the executive branch's decision to depart from the official roster rankings when selecting the judge, without explaining this decision. From the legal standpoint, nominations for appointments constitute administrative decisions and must therefore be duly justified, the authority that takes the decision having a duty to state the reasons that led it to act in a given manner. In addition, the executive branch failed to rule on the application for reconsideration that the author intended would resolve the situation.

3.2 Accordingly, the author alleges a violation of article 7 (c) of the Covenant in that the selection of the judge to serve in chamber No. III of Rosario Civil and Commercial Court of Appeal did not respect the official roster rankings, to the detriment of the candidates in sixth, seventh and eighth positions. The appointment is therefore incompatible with the right to be promoted recognized in the aforementioned article. The author maintains that any decision not to adhere to the roster rankings must be substantiated in order to guarantee the transparency of State activities, access to public information, the principle of openness in government decision-making and the independence of the justice system and to ensure that the best candidates are selected for the State's courts.

3.3 The author maintains that he has exhausted all effective domestic remedies. He considers that, because the executive branch did not resolve the application for reconsideration submitted, access to justice was frustrated. The author further maintains that, in any event, access to the court would have been ineffective, since the selection of judges is a matter not subject to review by the judiciary, according to a ruling of Santa Fe administrative chamber No. 1.[3] Similarly, according to the Supreme Court of the Province of Santa Fe, challenges to the appointment of a candidate nominated by the executive branch are a non-justiciable political matter.[4] The author also alleges that it was impossible to exhaust domestic remedies via the judicial channel following the appointment of another

[2] The author refers to the ruling of 28 June 2012 of the Supreme Court of the Province of Tucumán in the case of *López, Carlos E. v. Province of Tucumán*.

[3] The author refers to the judgment of Santa Fe administrative chamber No. 1 of 31 August 2009, *Ruiz, Mario Silvio v. Province of Santa Fe*, administrative appeal procedure concerning interim measures.

[4] The author refers to the judgment of the Supreme Court of Justice of Santa Fe of 17 November 2010, *Ferrer, Fernando Ignacio v. Province de Santa Fe*, *amparo* procedure concerning application for constitutional review.

candidate, since the new judge is protected by security of tenure pursuant to article 88 of the Constitution of the Province of Santa Fe.

State party's observations on admissibility

4.1 On 27 August 2019, the State party submitted its observations on the admissibility of the communication.

4.2 The State party recalls the principle of subsidiarity in the international system for the protection of human rights, which implies ensuring, in the first place, that the State itself can adopt the corrective measures that might be necessary. In this connection, the State party refers to the jurisprudence of the International Court of Justice,[5] the Inter-American Court of Human Rights[6] and the Human Rights Committee.[7]

4.3 The State party considers that the author has not exhausted domestic remedies because he failed to initiate legal proceedings of any form, believing that his petition would not be admitted and that he risked incurring punitive legal costs. The State party also maintains that the author has not substantiated his arguments and that he provides no evidence to explain his failure to take legal action.

4.4 The State party notes that there are judicial precedents at both the local and national levels that have upheld the rights of applicants for positions as judges when a legitimate right or interest of a candidate was considered to have been violated.[8] The State party submits that the author had access to appropriate and effective procedural mechanisms through which to raise the grievances that he is bringing before the Committee. Furthermore, it maintains that the legality of the actions of the State Administration may be challenged using the administrative appeal procedure or the independent interim protection mechanism regulated by Provincial Act No. 11330.

4.5 In addition, the State party asserts that the author could have applied for *amparo* as a means to obtain a judicial review of the actions of State bodies, and that *amparo* is a judicial mechanism designed to provide emergency protection for constitutional rights. *Amparo* proceedings are recognized both constitutionally and in law as a means of obtaining emergency protection for constitutional rights and are provided for in both the Constitution of the Province of Santa Fe and the Constitution of the Nation. Accordingly, the State party maintains that the author had access to specific procedural channels through which to raise the grievances he had about his situation. However, since he failed to raise the alleged violation before a court, the State party was given the opportunity neither to respond nor to provide reparation.

4.6 The State party therefore considers that the communication is inadmissible under article 3 (1) of the Optional Protocol.

Author's comments on the State party's observations

5.1 The author responded to the State party's observations on 29 December 2019. The author claims that the State party itself "frustrated any possibility of exhausting domestic remedies".

5.2 The author claims that, on 5 June 2017, before the deadline for submission, he filed a challenge against the appointment dossier for the vacancy of judge with the executive branch. However, his challenge was not formally addressed and the appointment dossier was approved by the legislature on 29 June 2017. The author maintains that the time period elapsed from the date on which he filed his application for reconsideration to the date on which the decree of appointment was issued amounted to 28 business days. On 7 August

[5] *Interhandel case (Switzerland v. United States of America)* preliminary objections, judgment of 21 March 1959, *International Court of Justice Reports 1959*, page 6.

[6] *Velasquez Rodriguez v. Honduras.* Merits. Judgment of 29 July 1988, para. 61, series C, No. 4.

[7] *T.K. v. France* (CCPR/C/37/D/220/1987) para. 8.3.

[8] The State party refers to the ruling handed down by the Supreme Court in the case of *Galindez, Nicolás Emmanuel v. Office of the Attorney General of the Nation* concerning *Amparo* Act No. 16986, dated 9 November 2017.

2017, the new judge was sworn in, making it impossible for him to pursue the challenge up to the Supreme Court. He alleges that it would not have been possible to pursue judicial channels to raise an issue that had already been settled before the deadline beyond which administrative remedies for challenging the "assumed rejection" could be considered exhausted. The author points out that, since the application for reconsideration submitted to the executive branch was not resolved, he did not have the opportunity to initiate the administrative appeal procedure provided for in Provincial Act No. 11330.[9]

5.3 The author states that administrative dispute proceedings, in the form of either the administrative appeal procedure or independent interim measures, were not feasible. Once the appointment dossier had been approved by the legislature, recourse to administrative appeal proceedings was manifestly impossible. Although the executive branch had not ruled on the administrative appeal and the deadline for it had not expired, access to the judicial channel was frustrated by the legislature's approval of the appointment, the subsequent issue of the decree and the swearing in of the selected candidate. The candidate chosen was protected by security of tenure and the matter became purely hypothetical. The author considers that this made it impossible for him to pursue the challenge to the Supreme Court – the final instance after which domestic remedies are considered to have been exhausted.

5.4 The author reiterates that *amparo* proceedings were not feasible and that, according to the established case law of the Argentine courts, the appointment of judges is a non-justiciable political matter.

5.5 The author notes that the State party has failed to explain how and in what way the procedural mechanisms available to raise his grievances would have been able to provide him with effective redress.

State party's additional observations

6. On 11 May 2020, the State party noted that the author's observations introduce no new evidence of significance and therefore reiterated the points set out in its response of 27 August 2019 and requested that the communication be declared inadmissible.

B. Committee's consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee considers the communication to be compatible with the provisions of the Covenant in that the author has provided facts and evidence enabling it to determine whether there has been a violation of his right to be promoted in his employment to an appropriate higher level, as established in article 7 (c) of the Covenant. In the judicial context, upholding this right requires there to be an independent and transparent mechanism for appointing, promoting, suspending and removing judges, and thereby guaranteeing judicial independence. The communication therefore raises an important substantive question.

7.3 However, the Committee notes the State party's argument that the communication is inadmissible under article 3 (1) of the Optional Protocol because the author failed to exhaust domestic remedies in that he did not even attempt to initiate a judicial suit or file an appeal, specifically either an administrative appeal pursuant to Provincial Act No. 11330 or an *amparo* application, as a means to protect his constitutional rights. The Committee also notes the author's argument that access to the courts was definitively frustrated owing to: (a) the failure to rule on the application for reconsideration filed with the executive branch; (b) the fact that the judge appointed has been sworn in and is therefore protected by security of tenure; and (c) the established case law which states that challenging the appointment of a candidate nominated by the executive branch is a non-justiciable political issue.

[9] Article 7 of Provincial Act No. 11.330 states: "Administrative Complaints. This mechanism cannot be initiated without first exhausting administrative channels in the form of mechanisms managed by the administration; and only claims brought and expressly or tacitly ruled on in prior administrative proceedings may be considered and judged."

7.4 The Committee notes the author's argument that the executive's failure to rule on his application for reconsideration and the fact that the process of appointing the chosen candidate to be the new judge was completed prevented him from lodging an administrative appeal. The Committee considers that the executive's failure to consider and rule on the application for reconsideration could be construed as an implicit rejection, as provided for in article 9 of Provincial Act No. 11330 regulating the administrative appeal procedure. According to this article, an implicit rejection is understood to exist if "the administrative authority does not issue a ruling within sixty days of being in a position to reach a definitive decision, or if it suspends the process for more than thirty days without justification, the various avenues of recourse accorded by the delay having been exhausted, in both cases thereby expediting the judicial process". The Committee considers that, even though the candidate appointed to the position of judge was protected by security of tenure from the moment of his swearing-in, this does not constitute a valid impediment to the author's ability to take legal action to assert the rights that in his opinion are due to him. There is nothing to prevent the judicial authority from taking action to protect the author's rights if it considers them to have been violated, provided it also takes account of the right of the person already appointed to the position; for example, it may decree that should a new vacancy arise, the author must be nominated to fill the post.

7.5 Similarly, the Committee notes the Supreme Court decision cited by the author,[10] in which it is stated that the possibility of challenging the official roster put forward by the Selection Committee of the Council of the Judiciary became purely hypothetical once each of the relevant authorities had given their approval and the appointed judge had taken office. The Committee notes that, according to the author, in the aforementioned case the petitioner filed for *amparo* with a view to obtaining a declaration of nullity in respect of the decision of the Selection Committee of the Council of the Judiciary that ranked him in last place on the roster following the competitive examination and consequently excluded him from participating in subsequent stages of the selection process. The author's statement does not mention the rights that were alleged to have been violated by the petitioner in the aforementioned *amparo* case. However, in accordance with article 43 of the Constitution of the Nation and article 17 of the Constitution of the Province of Santa Fe, applications or appeals for *amparo* are a judicial remedy through which the State party can enforce the rights and guarantees recognized in the Constitution, and also those recognized in a treaty or a law, as established by the Constitution. Thus, the Committee considers that *amparo* proceedings at either the provincial or national level would have afforded the author the possibility of invoking the violation of the right alleged in the present communication.

7.6 The Committee also notes the other judgments mentioned by the author and on which he bases his claim that court proceedings would have been ineffective since the appointment of judges cannot be subject to judicial review. The Committee considers the crux of these judgments to be the judiciary's refusal to interfere with the executive branch's discretionary power to nominate a candidate for positions awarded by competitive examination and that it was for this reason that the declaration of nullity in respect of the administrative decision was denied, leading to the dismissal of the claim *in limine*. However, in its communication, the State party refers to the case of *Galindez, Nicolás Emmanuel v. Office of the Attorney General of the Nation*, concerning *Amparo* Act No. 16986, in which, by means of an application for *amparo*, the Supreme Court recognized that several articles of the Regulations for Equal and Democratic Admission to the Office of the Attorney General of the Nation were unconstitutional. Although the court did not rule in favour of the petitioner in this case, it did consider the merits. For this reason, the Committee considers that the author's argument does not adequately substantiate his claim that the judicial remedies available to him, and specifically the administrative appeal and *amparo* procedures, would have been ineffective in determining the violation of the right invoked. The Committee considers that the lack of a favourable outcome in any of the cases cited above does not prove that the administrative appeal and *amparo* procedures are ineffective.[11] Furthermore, as stated above, the author

[10] Case of *Marinelli, Ernesto Luis, v. the State – Council of the Judiciary*, decision No. 495 (dispute No. 164) concerning *Amparo* Act No. 16986, Supreme Court of the Nation, 8 February 2011.

[11] Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, para. 67: "the mere fact that a domestic remedy does not produce a result favourable to the claimant does not in itself prove

failed to invoke before the domestic courts, even in general, the right that he believes is due to him pursuant to article 7 (c) of the Covenant and is seeking to invoke in the present communication. In this connection, the Committee considers that the author's subjective view that the possibility of obtaining a favourable outcome through any of the domestic remedies available was limited does not constitute an objective argument for contesting their effectiveness and therefore does not justify his failure to exhaust them. The requirement to have exhausted domestic remedies does not apply when the remedies offer no possibility of success. However, the author's doubts as to the effectiveness of a remedy or the likelihood of its succeeding are insufficient grounds for this exception to be applied. Lastly, the Committee recalls that, in line with international legal practices established by the human rights treaty bodies, mere doubt as to the chances of a particular remedy's succeeding do not excuse the author from exercising it.[12] The Committee therefore concludes that the communication is inadmissible under article 3 (1) of the Optional Protocol.

C. Conclusion

8.1 In the light of all the information provided, the Committee, acting under the Optional Protocol, considers that the communication is inadmissible under article 3 (1) thereof.

8.2 This decision will be communicated to the author and to the State party pursuant to article 9 (1) of the Optional Protocol.

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the non-existence or the exhaustion of all effective domestic remedies, since it could be, for example, that the claimant has failed to seek recourse to the appropriate procedure in a timely manner".

[12] Committee's decisions of inadmissibility, *A.M.B. v. Ecuador* (E/C.12/58/D/3/2014), para. 7.6; and *M.L.B v. Luxembourg* (E/C.12/66/D/20/2017), para. 7.4; and decisions of inadmissibility of the Human Rights Committee, *Kandem Foumbi v. Cameroon* (CCPR/C/112/D/2325/2013), para. 8.4; and *Garcia Perea et al. v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2.