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REPORT No. 47/18
PETITIO 975-07
REPORT ON ADMISSIBILITY

JASPER McDONALD HAMILTON
COSTA RICA

Adopted by the Commission at its 2126 session held May 4, 2018.
168th Special Period of Sessions.

Cite as: IACHR Report No. 47/18. Admissibility. Jasper McDonald. Costa Rica. May 4, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioning party:	Jorge Fisher Aragón
Alleged victims:	Jasper McDonald Hamilton
State denounced:	Costa Rica
Rights invoked:	Articles 12 (freedom of conscience and religion), 16 (freedom of association), and 17 (rights of the family) of the American Convention on Human Rights ¹ in relation to its Article 1.1 (obligation to respect rights); Articles 3 (obligation of nondiscrimination) and 4 (inadmissibility of restrictions) of the Protocol of San Salvador; Articles III (right to religious freedom and worship) and VI (right to a family and to protection thereof) of the American Declaration of the Rights and Duties of Man ² ; and other international treaties ³

II. PROCEDURE BEFORE THE IACHR⁴

Date on which the petition was received:	July 24, 2007
Date on which the petition was transmitted to the State:	February 4, 2014
Date of the State's first response:	April 28, 2014
Additional observations from the petitioning party:	June 14, 2017
Additional observations from the State:	September 4, 2017

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 ratification instrument April 8, 1970)

IV. ANALYSIS OF 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), 12 (freedom of conscience and religion), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, January 24, 2007
Timeliness of the petition:	Yes, July 24, 2007

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

² Hereinafter "the Declaration" or "the American Declaration."

³ Article 2 (4) of the Universal Declaration of Human Rights.

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

V. ALLEGED FACTS

1. The petition alleges violations of the human rights of Mr. Jasper McDonald Hamilton, who is an Evangelical pastor (hereinafter “the alleged victim” or “Mr. McDonald”), because Costa Rican law only confers civil recognition on marriages performed by ministers of the Catholic Church. Mr. McDonald feels he is wronged because the marriages that he, as an Evangelical pastor, performs are only recognized religiously and not before the law and third parties. In other words, these marriages must later be registered administratively.

2. In order to address this situation with the government authorities, on May 25, 1998 Mr. McDonald, as an Evangelical minister, filed a request with the Civil Registry to be given the marriage certificate book so that he could perform marriages that would be recognized before the law. When he received no response, the alleged victim reiterated his request on January 4 and December 14, 1999, and on July 10, 2000. Finally, on August 4, 2000 the General Director of the Civil Registry replied that his request was denied because according to Articles 23 and 24 of the Family Code, the power to perform marriages that are recognized before the law is only granted to ministers of the Catholic faith. In response to the denial of his request, on August 9, 2000 Mr. McDonald filed an appeal requesting reversal of the decision before a higher authority, which was ruled inadmissible on August 31, 2000 by the General Directorate of Civil Registration. For this reason his appeal was not elevated to the Elections Supreme Tribunal, the competent judicial authority on registry matters.

3. Consequently, on September 4, 2000 the petitioner filed a constitutional challenge to Article 23 of the Family Code in the Constitutional Chamber of the Supreme Court. This entity dismissed the appeal outright in a decision issued October 11, 2000 because it found that the petitioner had not exhausted administrative remedies, a procedural prerequisite for constitutional challenges.

4. After the unfavorable decision, on January 2, 2001 the petitioner filed a *recurso de amparo* against the General Directorate of Civil Registration before the Constitutional Court. On January 8, 2001 in the same court he filed another constitutional challenge to Articles 23 and 24 of the Family Code, stating that the *amparo* remedy was the most suitable vehicle for pursuing his claim. In his constitutional challenge, the petitioner alleged that the Articles in question violate the principles and protection afforded in Articles 12, 16.1, and 17.2 of the American Convention, since people who are not of the Catholic faith must go before a notary public or civil judge to get married, while their right to do so before a pastor or minister of their own faith is impeded. He also indicated that the privilege the law confers upon Catholic priests by giving them the functions of civil servants, discriminates against other faiths. On February 2, 2001 the Constitutional Court decided to reserve judgment on the *amparo* remedy until a decision was made in the constitutional challenge.

5. Later, on August 13, 2004, the Constitutional Court (Resolution 2004-08763), through a four-judge majority, “dismissed” the constitutional challenge, while the other three judges on the court dissented. Among other things, the majority found that Mr. McDonald lacked standing, because repealing this power of the Catholic Church would not benefit him directly; because it would not *per se* grant him the power to perform marriages that are recognized before the law; rather, the inequality before the law would be corrected in a negative sense. The Court also found that the selection of administrative auxiliaries is an act of trust by the State, which is based in this case on historic and demographic criteria. At no time did delegating this authority interfere with the capacity of other religions to perform marriages, and civil marriage is free of charge in Costa Rica.

6. Consequently, on January 28, 2005, the Constitutional Court dismissed the *amparo* remedy because it found that the General Directorate of Civil Registration had acted according to the law.

7. After the decision by the Constitutional Court on August 13, 2004, on September 12, 2005 the petitioner requested “a written opinion by the dissenting minority, and that notice be given of the majority decision as well as the minority dissent,” since, as is indicated in his request, “the dissenting opinion of the minority has been in the drafting stage since 2004.” On January 8, 2007, the petitioner filed a brief in which he stated that as of that date, the Constitutional Court had still not given notice that the written

decision had been issued. In response to that request and according to evidence in the petition file, the Constitutional Court issued notification by fax which reads: “we hereby notify in writing that the resolution dated August 13, 2004 [...] Sent on January 24, 2007 at 19:14 hours.

8. The minority opinion found that based on the principal of separation of powers, a prudent period of time should be given to the Legislative Assembly to correct the alleged discrimination by extending application of the law to cases not expressly included in it. It asserts that religious freedom should be practiced under equal conditions for all citizens, regardless of whether theirs is the faith of the majority, because this right is not based on numerical criteria, but rather dignity as a human being. It states that religious freedom should be enjoyed equally by all citizens. The petitioner embraces the arguments of the dissenting minority and places them before the IACHR as arguments relevant to the merits of his petition.

9. The State, in turn, first states that Costa Rica respects the free exercise of other religions, which is a right protected by Article 75 of the Constitution. The State asserts that the legal system vests Catholic priests with the administrative power to serve as public witnesses, which is what they attest to, and not to celebrate a religious rite of matrimony that is recognized before the law. Therefore, one must differentiate between a religious celebration and the legal effects that may derive from it. In this regard, the State affirms that priests are merely auxiliary public servants. The State stresses that all citizens are free to go before the corresponding administrative authority to register their marriages—even free of charge—and get their marriages, performed in the religion of their preference, to be recognized before the law. The State also argues that it delegates this purely administrative function under objective and regulated parameters in terms of the formalities of the proceedings entrusted to the priests.

10. The State underscores that people incur no costs at all when they appear before civil judges, as stipulated by law. It alleges that it is inappropriate to argue that the legislation in question constitutes any religious discrimination or violation of religious freedom, since conferring the power to bear public witness in marriage celebrations does not hamper the exercise of religious belief or infringe upon the right to form a family. In this regard, the State posits that the petitioner has full freedom to perform marriage ceremonies as a religious minister, and the aforementioned administrative rules in no way interfere with that freedom—not in a general sense in terms of his right to practice his faith or in terms of religious freedom.

11. Costa Rica argues, therefore, that if the petition were to be admitted it would violate the principle of subsidiarity of the inter-American system, because the petitioner would be using the Commission as a Court of fourth instance to appeal domestic judicial decisions. The State consequently requests that the petition be declared inadmissible in light of Article 46 of the Convention. The State also asserts that the petition has not been filed in a timely manner because the last judicial decision was rendered on January 28, 2005 and the complaint was not lodged before the Commission until July 2007, which is out of compliance with the six-month deadline.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

12. In light of the Information presented and arguments put forth by the parties, the Inter-American Commission observes that in this case Mr. McDonald, personally or through his legal representatives, filed several administrative and judicial remedies to challenge the legality and enforcement of Articles 23 and 24 of the Family Code. These articles, which grant ministers of the Catholic Church the power to have the marriages that they perform be recognized before the law, are the very reason that Mr. McDonald filed his claims, both before the domestic authority and before the Inter-American Commission. The Commission notes that, as alleged by the petitioner, the judicial decision that gave the final domestic ruling is Resolution 2004-08763 issued by the Constitutional Chamber of the Supreme Court on August 13, 2004, after an appeal was filed by a group of interested parties, including the petitioner. In this regard, the State does not question the exhaustion of domestic remedies. Therefore, the Commission concludes that this petition complies with Article 46.1 of the American Convention.

13. As for the timeliness of the petition, this was called into question by the State which argued that the time period started running the day the domestic proceedings concluded on January 28, 2005, when

the Supreme Court ruled on the amparo appeal subsequent to the Constitutional challenge. The Commission believes, as has been established, that said ruling was contingent on the decision regarding amparo, therefore that is the ruling that marks exhaustion of domestic remedies. With that in mind, the Commission observes that the notification of the amparo decision taken on August 13, 2004 issued by the Constitutional Court itself was not fully communicated to Mr. Jorge Fisher Aragón until January 24, 2007. Considering that the IACHR received this petition via fax on July 24, 2007, the Commission concludes that it was lodged within the deadline established in Article 46.1.b of the American Convention.

VII. COLORABLE CLAIM

14. The Inter-American Commission observes that, according to the information provided by the parties, the facts alleged by the petitioner may constitute, prima facie, violations of the rights set forth in Articles 8 (right to a fair trial), 23 (right to equal protection), and 25 (right to judicial protection) of the American Convention, in accordance with its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) to the detriment of Mr. Jaspar McDonald. Likewise, the IACHR will analyze in the merits stage the possible violation of Article 12 (freedom of conscience and religion) of the Convention.

15. As regards to the alleged violation of Article III (religious freedom) of the American Declaration, the IACHR has previously established that once the Convention enters into force for a given State, it is that instrument and not the Declaration that becomes the specific source of law to be applied by the Inter-American Commission, as long as the petition alleges violations of rights substantially identical to those set forth in the two instruments. In the instant case, the Commission has analyzed the rights under the American Declaration invoked by the petitioner in light of the American Convention.

16. As for the alleged violations of Articles 3 (obligation of nondiscrimination) and 4 (inadmissibility of restrictions) of the Protocol of San Salvador, the IACHR notes that Article 19.6 of said treaty limits its competence over individual petitions to matters involving Articles 8 and 13. As for the other articles of the Protocol, according to Article 29 of the American Convention, the Commission may take them into account to interpret and apply the American Convention and other applicable instruments.

17. Finally, the Commission observes that the petitioners have not offered sufficient claims or evidence to find a prima facie possible violation over the alleged violations of Articles 16 (freedom of association) and 17 (rights of the family) of the American Convention; and VI (right to a family and to protection thereof) of the American Declaration.

18. In addition, as regards the Universal Declaration of Human Rights, the Commission lacks competence to establish violations of that treaty, although it may take them into account in its interpretation of the standards of the American Convention during the merits stage of this case, under the terms of Article 29 of the Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 12, 24 and 25 of the American Convention, in connection with its Articles 1.1 and 2;

2. To declare the instant petition inadmissible in relation to Articles 16 and 17 of the American Convention and VI 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.

Done and signed in the city of Santo Domingo, Dominican Republic, on the 4th day of the month of May, 2018. In favor: Margarett May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice

President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan (dissenting opinion), Commissioners.