

EXPANSION AND EXCLUSION IN THE UNIVERSAL CHILD ALLOWANCE PROGRAMME IN ARGENTINA

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- *Litigation on access for mothers deprived of liberty* •

ABSTRACT

The justiciability of social rights has caught the attention of judges, human rights activists and scholars. However, the area of litigation linked to non-contributory benefits – especially income transfers to families living in poverty or vulnerability – is very recent.

In Argentina, the creation of the Universal Child Allowance programme expanded these policies massively; even so, some sectors continue to be excluded. This article revisits the only collective lawsuit presented until today, which is on the access of women deprived of liberty who live with their children four years and younger. For this small group of people, the government agencies considered that their “needs were already covered” and therefore, they should not be given access to the allowance. In response, in 2014, the Prison Attorney’s Office filed a collective habeas corpus petition in criminal court requesting that the women be included in the programme, and in late 2015, the Federal Criminal Court of Appeals handed down a favourable ruling on the case. What reasons and assumptions are used to justify exclusion in the case of an allowance programme with massive coverage? How are these policies reshaped by the interventions of the different branches of government? These are some of the questions that will be explored in this article.

KEYWORDS

Universal Child Allowance | Expansion-exclusion | Litigation | Mothers deprived of liberty

1 • The emergence and expansion of the Universal Child Allowance

States and governments play a central role in distributional conflicts and the material and symbolic production and reproduction of social hierarchies. A detailed look at concrete cases allows us to identify the impacts of policies, which may vary from contributing to the reproduction of existing inequalities or reducing them, to even creating new distinctions and forms of exclusion.

The political response of governments in the region to the high levels of poverty, unemployment, and informality caused by the “structural adjustment” processes, which were at their peak in the 1990s, was to provide coverage for families at risk due to their lack of income. A special emphasis was placed on those that were not fully integrated into the labour market - a key issue in market societies because of its direct impact on consumption and access to social rights. Part of this coverage was provided via conditional income transfer programmes (CITP). Originally emerging as isolated initiatives, CITPs had already spread to more than 20 countries and reached 120 million people in the region by the beginning of the new century. They were also extended to other regions of the world experiencing high levels of poverty and unemployment. This instrument was consolidated as part of a stable repertoire of social policies whose short-term objective consists of transferring income to raise families above the line of poverty or misery. In the medium term, by imposing a set of education and health related conditions people have to meet to receive the cash benefits, the policies sought to guarantee the use of health care and educational services so that the children would accumulate human capital.¹

In the case of Argentina, access to welfare and social rights has historically been structured around the combination of several principles: universality (based on the principle of universal citizenship), contributory (connected to the role of formally employed workers), and other residual/focused aspects (linked to criteria on merit/vulnerability). From the mid-20th century on, the contribution principle gained predominance with the expansion of benefits on the basis of formal employment relations, which led to the incorporation of numerous families into social security. However, the structural changes that began to occur in the mid-1970s, especially those linked to the labour market, were deepened in the 1990s and intensified during the 2001-2002 crisis. As a result, the contribution principle lost its coverage capacity and its strength as an insurance principle. This is why the Nestor Kirchner administration (2003 and 2007) adopted a “work-centric approach” to state intervention in the area of social security, which involved creating measures for formally employed workers.² This scheme differed politically and in terms of discourse from the previous period of “structural adjustment” and the 2001-2002 crisis. Yet, even with the recovery of the labour market, informal labour was not able to overcome the 30-point barrier, which poses an urgent challenge for labour and social policies in Argentina.

Having gone through experiences somewhat similar to the CITPs in place in the region (Unemployed Heads of Household Plan in 2002; Families for Social Inclusion Plan in 2005), in 2009, President Cristina Fernández created the Universal Child Allowance for Social Protection (AUH, in its acronym in Spanish) via Decree N°. 1602. AUH represents a significant step in the adoption of social policies with a rights-based approach. This can be said not only because of the emphasis in discourse as such, but since it was presented as something new: AUH was included in the classic social security scheme (that is, the traditional family allowances for formal workers) as a non-contributory subsystem that falls under the purview of the National Social Security Administration (ANSES in its acronym in Spanish). It therefore represents an advance in relation to CITPs, as it contains provisions for adjusting the amounts of the allowances (first through the increases made by the executive branch and then by law, with the adoption of Law N°. 27.160 on 15 July 2015, which regulates both increases in the allowances and the income levels to be eligible for it). Finally, contrary to CITPs, funding is not tied to a credit assistance organisation, but rather comes from the resources of ANSES itself.

This measure reaches families with adults who are informal workers and whose declared income is lower than one minimum living and mobile wage, as well as the unemployed who do not receive unemployment insurance benefits.³ It also covers the children of people working in private homes and of temporary workers registered in the agriculture and livestock sector. In 2011, the Universal Pregnancy Allowance for Social Protection (AUE, in its acronym in Spanish) (Decree N° 446/11) was set up as part of the non-contributory subsystem created for AUH. To be eligible for the benefit, the age limit for children is 18. This condition does not apply for people living with disabilities, for whom there are no age requirements. At the end of 2015, AUH was providing coverage to 3,624,230 children and adolescents under 18.

According to official data from the National Survey on Social Protection and Security of the Ministry of Labour,⁴ with these changes to the family allowance system, Argentina has succeeded in providing coverage for 75 per cent of all children and minors under 18 years of age. Of the remaining 25 per cent, half are without coverage due to problems in the processing of their claims or for not possessing a national identity card, and the other half, due to regulatory restrictions on family allowances and AUH. Migrants are one group excluded by the regulations. In relation to nationality, AUH requirements are high compared to those of its predecessors, as it demands that the children and adults be Argentinean, naturalised or legal foreign residents for a period of no less than three years. This aspect was highlighted by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁵ It also reveals a disconnect between the programme and changes made to regulations on migrant rights in Argentina in recent years.

We understand that these regulation-based forms of exclusion, that have been discussed so far, are part of the policy's limits. We will now turn to examining other types of exclusion that culminated in the launching of lawsuits.

2 • Merit taken to the limit: litigation on the exclusion of mothers deprived of liberty

There is a group that undoubtedly has little importance in quantitative terms, but that deserves special attention, not only due to the situation of extreme vulnerability in which its members find themselves, but also because they were not excluded by the regulation that gave origin to the AUH, but rather by arbitrary decisions made after its creation: women living with their children 4 years and younger in prison. The issue of people deprived of liberty was highlighted by the Committee of Economic, Social and Cultural Rights, together with the exclusion of migrants.⁶

Though beyond the scope of this article, it is worth noting that people deprived of liberty in general experience a wide range of difficulties in gaining access to social security benefits (allowances, occupational hazard insurance, social work, old age, and other pensions),⁷ even though they work in the context of confinement. This matter was addressed recently by the courts.⁸

Concentrating again on traditional family allowances, even though ANSES has warned on several occasions that people deprived of liberty must receive the said transfers, this has yet to happen. Work in contexts of confinement is organised by the Agency for Technical Cooperation of the Federal Prison Service (ENCOPE), a decentralised entity of the Federal Prison Service. ENCOPE currently defends the position that the legislation in effect does not foresee the possibility of people deprived of liberty receiving family allowances and therefore, they are, in fact, currently excluded from the programme. This is true even in cases where final conviction is still pending and therefore, workers deprived of liberty have not lost custody of their children.⁹ Paradoxically, ANSES should be the one to have the final say on this issue, as it is the authority responsible for the administration of the allowances programme.

In the concrete case of the AUH, it is interesting to note that ANSES Resolution N°. 393/09 (article 17) explicitly establishes the possibility of legal guardians collecting the allowance in cases where individuals deprived of liberty do not have custody of their children (as they have been convicted). However, women deprived of liberty who are pregnant or - as the criminal system itself permits - opted to keep their children under four years of age with them, have not succeeded in accessing the allowance. The National Prison Attorney's Office requested clarification on this matter from ANSES' legal services department. In Ruling N°. 46.205, it responded by affirming that

the Prison Service provides the mother with everything she needs to provide assistance and care for her child (article 195 of Law No. 24.660) (...) On this basis, this Office [of Family and Unemployment Allowances], (...), concludes that the Universal Child Allowance should not be paid to the parents, guardians and trustees of those mentioned.

It is clear, then, that *ad hoc* criteria are being introduced by lower level norms (ANSES rulings) to justify the exclusion of mothers and children in particularly vulnerable situations. In these cases, not only do mothers have custody of their children, but they find themselves responsible for their children's care in the strongest sense of the term. Therefore, it is worth recalling that the law that regulates these allowances in Argentina entitles the mothers to the benefits.

In light of this decision, the National Prison Attorney's Office filed a collective *habeas corpus* petition at Federal Criminal and Correctional Court Number 1 of Lomas de Zamora on behalf of 31 women deprived of liberty being held at the Federal Detention Centre for Women - Unit 31 in Ezeiza.¹⁰ The group of researchers from the Social Rights and Public Policy Interdisciplinary Working Group (University of Buenos Aires, UBA) participated as *Amicus Curiae*¹¹ in the proceedings. On 29 May 2015, the court rejected the use of *habeas corpus*, as it understood that "there is nothing that constitutes an illegitimate aggravation of the form and conditions of detention of the plaintiffs to justify the petition." It merely urged the Prison Service to take note of the situation, without taking the matter further. On 11 August 2015, a majority vote in Chamber III of the Federal Appeal Court in La Plata confirmed the lower court judge's ruling.

However, on 4 December 2015, Chamber IV of the Federal Criminal Court of Appeals admitted the case. In a majority vote, Judges Gustavo Hornos and Mariano Borinsky argued in favour of the use of the collective *habeas corpus* as a valid procedural mechanism for presenting a petition on the problem being denounced. They also highlighted that women deprived of liberty are subjects of the right to social security and, as such, they have the right to the benefits established by Law N°. 24.714 (AUH or Family Allowances). They emphasised, in particular, the fact that when lawmakers wanted to exclude specific cases from the family allowance regime, they did so and therefore, when the law does not make any distinction, no distinction should be made. In regards to the specific case of detained mothers who work in prison, Judges Hornos and Borinsky pointed out that the women pay their due contributions just like any other formal worker, which means they are covered by the family allowance regime. In the appeal ruling, it was highlighted that "granting the subsidy requested will contribute directly to the improvement of the conditions of minors living in the prison unit, thereby clearly safeguarding and protecting their interests." Later, ANSES presented an extraordinary federal appeal, which was declared inadmissible by the same Chamber of the Federal Criminal Court of Appeals on 14 July 2016. In view of this ruling, ANSES brought a complaint before the National Supreme Court of Justice. While the Supreme Court's decision is still pending, this does not stop the ruling from being enforced. At the time of the writing of this article, several state agencies were working to get the allowances paid. It remains to be seen what the implications for the access of persons deprived of liberty to family allowances (contributory and non-contributory) will be.

3 • Final considerations

In terms of public policy, the amount of the claim (31 women) leads us to believe that budgetary issues (which are so frequent in relation to the justiciability of social rights) will

not be raised. In a context of the judicialisation of social issues, the very dynamic of the bureaucracy that is to resolve this claim administratively and judicially, which was taken to the highest criminal court, undoubtedly requires more state resources than recognising the right asserted by such a small population in quantitative terms.

The interpretation proposed here suggests that this type of exclusion (in addition to the historical discrimination of these groups) must be understood in the Argentine context marked by social policies in which the symbolic and institutional fortress of the classical social security system - organised on the basis of formal employment relations - still plays a predominant role. The institutional arrangement proposed by AUH allows these distinctions to continue to be made, as it maintains the separation between formal workers (to which one must add, in this universe of classifications, other distinctions such as criminal and migratory ones) *versus* the rest of workers.

In general, the state bureaucracy (which is beginning to call on the judiciary)¹² has more room to define and redefine access criteria (via regulations and otherwise) for non-contributory policies than in other areas.

The access criteria are undoubtedly permeated by moral aspects: for example, what needs are (or are not) covered in the case of mothers deprived of liberty. In fact, with the ANSES ruling, a classical discussion in the area of social policies on the “needs that are covered (or not)” that give access to a policy (or not) has resurfaced. This debate emerged during the investigation process when the judiciary (the Federal Court of Lomas de Zamora) requested a detailed list of the type of products consumed by the women involved in the case from the “canteens” selling goods. In other words, as the moral sociology of money suggests, money that is not earned through work is seen as “donated money,” which gives one the authority to morally judge, classify, and “assess” those who receive it.¹³

We would like to note here that the argument that made the exclusion of women deprived of liberty possible - since their “needs were covered in prison” - reveals the tensions between certain principles of AUH. The very design of AUH distances it from cash transfers that restrict spending to only certain products, through the use of cards or vouchers or plans that distribute food products. AUH puts the decision on what goods each family needs or on “saving” the funds in the hands of the families - and concretely the women.¹⁴

As with all public policy analyses, the search for coherence and linear rationalities has not been productive. AUH is yet another example of a policy in which concepts that coexist with varying levels of tension and gain predominance according to the aspect being emphasised, the phase being analysed or the actors participating in it are crystallised. On the one hand, there is the expansion of coverage (3.6 million recipients), registration as part of the non-contributory social security scheme, open access for new recipients and the increases in the amount (which has been established by law since 2015). On the other, there are people who still do not have access to the policy and whose access is beginning to be determined by the courts (such as persons deprived of liberty).

NOTES

1 • For more information, consult the CEPAL (Comisión Económica para América Latina y el Caribe) database on non-contributory social protection programmes in Latin America and the Caribbean. Available at: <http://dds.cepal.org/bdptc/programa/>.

2 • These included: measures to promote job creation (public and private), restore wage levels, raise family allowances, incentives to register employees, suspension of dismissal without just cause, modifications to bankruptcy laws and limits on what employers can and cannot do, among others.

3 • For more information on the Universal Allowance, see Laura Pautassi; Pilar Arcidiácono and Mora Straschnoy, *Asignación Universal por Hijo para Protección Social de la Argentina. Entre la satisfacción de necesidades y el reconocimiento de derechos* (Santiago de Chile: Naciones Unidas, CEPAL, 2013). (Serie Políticas Sociales, no. 184).

4 • Ministry of Labour, *Protección y Seguridad Social en la Argentina. Resultados de la Encuesta Nacional de Protección y Seguridad Social 2011*, 1st ed. (Ciudad Autónoma de Buenos Aires: Ministerio de Trabajo, Empleo y Seguridad Social, 2014).

5 • The Committee highlighted that: “While welcoming the introduction of a universal allowance for children from poor families through Decree No. 1602/2009, the Committee notes with concern that for migrant families to be eligible, both the parents and the child must have legally resided in the State party for at least three years, unless the child is an Argentine national, in which case the residence requirement still applies to the parents, who must prove the legality of their residence by presenting their DNI for foreigners.” United Nations, *Observaciones finales del Comité de Protección de los Derechos de Todos los Trabajadores Migratorios y de sus Familiares* (Argentina: CMW/C/ARG/CO/1, September 23, 2011), 6.

6 • In Observation 20 of the Committee of Economic, Social and Cultural Rights, the Committee expressed its concern with the situation in relation to the AUH

and not only migrants, but also persons deprived of liberty and marginalised and disadvantaged people in general: “The Committee is concerned that requirements to receive the universal allowance for children (Asignación Universal por Hijo), which is granted by law, in practice exclude certain groups such as migrants and their children from receiving this benefit. The Committee calls upon the State party to consider adopting all the necessary measures to ensure the unrestricted coverage of the universal allowance for children, in particular those from marginalized and disadvantaged groups, such as children of migrant workers in an irregular situation and children of persons deprived of their liberty.” United Nations, Economic and Social Council, *Observaciones finales del Comité de Derechos Económicos, Sociales y Culturales* (Argentina: E/C.12/ARG/CO/3, December 14, 2011), 6.

7 • For more information, see: Sebastián Tedeschi, “Los derechos sociales de las personas privadas de libertad y el sistema penitenciario,” in Mariano Gutiérrez, *Lápices o rejas* (Buenos Aires, Del Puerto: 2012).

8 • For a discussion of this issue from a regulatory and legal perspective, see: Elsa Porta, *El trabajo en contexto de encierro* (Buenos Aires: 2016), Ediar.

9 • For more details on the issue of family allowances in the context of confinement, see: Rodrigo Borda, *El régimen de asignaciones familiares y la situación de las personas privadas de su libertad. ¿La cárcel es un límite infranqueable para los derechos (sociales)?* in *Revista de Derecho Penal y Procesal Penal* N° 4, año 2014, (Buenos Aires, Abeledo Perrot: 2014).

10 • For a description of the case, see: National Prison Attorney’s Office. 2015 Annual Report. The human rights situation in federal prisons in Argentina (pp. 368 to 373) Available at: http://www.ppn.gov.ar/sites/default/files/Informe%20Anual%202015_0.pdf.

11 • *Amicus curiae* (friend of the court) refers to presentations made by third parties to the lawsuit, which voluntarily offer their opinion on some legal

element or other related aspect to contribute to the resolution of the case. The Center for Legal and Social Studies and Dr. Elsa Porta (former judge of the National Labour Court of Appeal).

12 • The most important precedents were those linked to cases of exclusion brought on by the sudden cancellation of the Unemployed Heads of Household Plan (in 2002). 195 individual appeals were filed at the Federal Chamber of Appeals on Social Security with the goal of obtaining access to the policy legally. Also, the exclusion of migrants from non-contributory pensions caught the attention of various courts, including the National Supreme Court of Justice, which ruled that the high prerequisites in the “Daniela Reyes Aguilera. c/ Estado Nacional” (CSJN, 04/09/2007) case were unconstitutional. Until today, litigation on the collective impacts of this case is underway.

13 • An analysis based on this perspective can be found in: Ariel Wilkis, *La sospechas del dinero. Moral y economía en la vida popular* (Buenos Aires: Paidós, 2013).

14 • There is a controversy over female entitlement/conditionalities, which goes beyond the scope of this article. Very briefly, one position argues that through these measures, the state reinforces the role of “women-caregiver” to the point where benefits are suspended if a woman does not fulfil this role. As such, women are included in social security as mothers, along the lines of what is called “social maternalism”. Another position proposes that this kind of measure can strengthen women’s political autonomy (some women establish a link with the state for the first time, even if it is via a secondary law), physical autonomy (for example, as they are removed from situations of violence, even though there is no empirical evidence on this in Argentina) and economic autonomy, as they manage money, and due to their involvement in intra-family decision-making. For more information, see: Corina Rodríguez Enríquez, “Programas de transferencias condicionadas de ingreso e igualdad de género ¿Por dónde anda América Latina?”, Serie Mujer y Desarrollo CEPAL, N° 109, (Santiago de Chile, 2011).



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