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REPORT No. 163/17
PETITION 1323-07
REPORT ON ADMISSIBILITY

YNGRIT HERMELINDA GARRO VÁSQUEZ
PERU

Approved by the Commission at its session No. 2110 held on November 30, 2017.
166th Special Period of Sessions.

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PETITION 1323-07
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 PERU
 NOVEMBER 30, 2017

I. INFORMATION ABOUT THE PETITION

Petitioning party:	Yngrit Hermelinda Garro Vásquez
Alleged victim:	Yngrit Hermelinda Garro Vásquez
State denounced:	Peru
Rights invoked:	Articles 1.1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 8 (Right to a Fair Trial), 9 (Freedom from <i>Ex Post Facto</i> Laws), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention on Human Rights ²

II. PROCEDURE BEFORE THE IACHR³

Date on which the petition was received:	October 9, 2007
Additional information received at the initial study stage:	August 21, 2008
Date on which the petition was transmitted to the State:	August 12, 2011
Date of the State's first response:	December 4, 2014
Additional observations from the petitioning party:	April 28, 2017
Additional observations from the State:	August 18, 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 on July 28, 1978)

¹ In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguirguren Praeli, a Peruvian national, did not participate in the discussion or the decision on this matter.

² Hereinafter, "Convention" or "American Convention."

³ The observations presented by each party were duly transmitted to the opposing party.

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	8 (Fair Trial) and 25 (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; on July 31, 2007
Timeliness of the petition:	Yes, on October 9, 2007

V. ALLEGED FACTS

1. The petitioner indicates that on September 27, 1982 she was appointed as a temporary secretary at a Civil Court in the city of Lima, and later, on January 31, 1984, by a public competitive examination, she was appointed secretary attached to a Civil Court of Lima. She also indicates that the Evaluation Committee for Hiring Court Secretaries ruled to hire her as an administrative employee at the judiciary from April 1, 1988, and assign her the post of Secretary at a Civil Court; and that many times she was appointed as a Justice of the Peace. She asserts that on April 5, 1992 Decree-Law No. 25418 was issued, ruling the reorganization of several institutions, including the Judiciary, and that on June 26, 1992 Decree-Law No. 25580 came into effect, whose Article 3 ruled the dismissal of several employees, including the alleged victim.

2. She moreover alleges that a complementary provision in said Decree-Law limited the right to filing constitutional appeals, which was re-established through the publication of Law No. 27433 of March 10, 2001. She claims that in view of this, she was unable to lodge a constitutional appeal back then. The petitioner submits that on April 10, 2001 she presented a constitutional appeal against the State, before the First Provisional Corporate Court Specializing in Public Law, so that the application of Article 3 of Law No. 25580 be overturned, she be reinstated in “a post similar to that of a court secretary”; her years of work corresponding to the time she was unemployed be recognized; and the lost earnings and all the applicable benefits be paid. She indicates that on September 28, 2001, the First Court Specializing in Public Law rejected the constitutional appeal on the grounds that these are not appropriate to challenge a rule in the abstract but to challenge a rule’s actual application and that while the alleged victim should have presented the remedy within the term established by Law No. 23506, following the publication of Decree-Law No. 25580, she presented her complaint after the term had expired, which led to the application of the exception for expiration that the State had presented. She impugned this resolution, and the Sixth Civil Chamber of the Superior Court of Justice of Lima decided to confirm the resolution on the same grounds, through a judgment issued on April 16, 2002. As a result, the petitioner lodged an appeal for review before the Constitutional Court. On September 15, 2004 said court annulled the proceedings starting from the admissibility decision on the constitutional appeal, on the basis that under the legal provisions the complaint should have been notified to the Judiciary, not just to the Public Prosecutor.

3. The petitioner submits that, at the same time, in application of the recommendations made by the Executive Commission created by virtue of Law No. 27803—which is in charge of reviewing unlawful collective dismissals—on February 1, 2004, she was reinstated in the post of Judicial Secretary attached to the Superior Court of Justice of Lima. She alleges that her reinstatement was made through an employment contract for specific tasks, under the provisions of the private employment system (Legislative Decree No. 728), not under the state employment system (Legislative Decree No. 276, Conditions of Administrative Staff and Remunerations in the Public Sector) that was applicable to her situation because that was the employment system she belonged to before being removal from her post.

4. She asserts that on June 7, 2005, the Thirty-eighth Civil Court of Lima declared the constitutional appeal proceedings well-founded, and ordered her reinstatement as a Court Secretary. Said

Court concluded that she was removed from her post without disciplinary proceedings and that, in light of the legal ban to lodging a constitutional appeal, the period to file said remedy began on the date that said limitation was repealed; that is to say, on the date of publication of Law No. 27433; hence, the constitutional appeal was filed within the legally established term. Likewise, said Court dismissed the remedy in regard to the payment of her salaries, arguing that since what she demanded was compensation, not restitution, a constitutional appeal was inappropriate for that purpose. Subsequently, the State lodged an appeal and on August 17, 2006, the Sixth Civil Chamber of the Superior Court of Justice of Lima declared the constitutional appeal inadmissible on the grounds of the admissibility requirements set forth in the binding decision on case file 0206-2005-PA/TC of December 22, 2005—connected with a case other than the alleged victim’s case—, establishing that the specific legal remedy is the administrative legal action, because the matter at issue concerns the state employment system.

5. The petitioner asserts that she filed a constitutional appeal against said judgment, and that on January 9, 2007 the Constitutional Court partly admitted said constitutional appeal, ordering her reinstatement and stating that the lack of previous administrative-disciplinary proceedings infringed the right of due process. In addition, it declared that the demand for payment of lost earnings was out of order, on the basis that it is not a demand for restitution but for compensation; and it argued that the petitioner’s unworked time had to be considered “for the purpose of her time worked, seniority and social security contributions.”

8. The petitioner alleges the infringement of her right to labor, labor stability and other labor rights. She alleges the infringement of her rights to equality—in view of her selective dismissal—and to honor and reputation—in view of the statements by the then President in relation to the dismissed persons. Likewise, she submits that the principle of freedom from *ex post facto* laws was violated because “the hierarchy of laws and rules was not respected, and rules manifestly fraudulent and contrary to the law were applied instead.” She alleges lack of compensation and payment of earnings lost due to her dismissal, and damage to assets because of her unjustified dismissal from work. Additionally, she claims that, after being dismissed, she was precluded from applying to a state job openings due to Legislative Decree No. 276, under which dismissed state officers cannot be hired again in the public sector for a minimum period of five years; that, in practice, she was unable to work again in the public sector all throughout Fujimori’s government. She alleges the violation of legal safeguards because her dismissal was not decided through previous administrative-disciplinary proceedings, but through a Decree-Law; and the infringement of the right to judicial protection because between 1992 and 2001, she was unable to pursue a constitutional appeal. She asserts that when she lodged a constitutional appeal, she did it beyond the legally established term. Moreover, she indicates that she was reinstated in her post through a labor system different than the one she belonged to until her dismissal, which affected her training opportunities and promotion. Finally, she alleges that she was deprived of a subsidy for her mother’s funeral and burial services, and that she did not receive her social security benefits, such as holidays and bonuses.

9. The State claims that the petition is inadmissible. Firstly, it indicates that the Commission is not competent in regard to the claims of violation of the rights to labor, labor stability and other labor rights, since they are not set forth in the American Convention or Article 19.6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. In addition, it asserts that the petitioner has failed to pursue and exhaust the appropriate and effective domestic remedies concerning the payment of earnings lost due to her removal from work. In this regard, it submits that the petitioner does not indicate whether she resorted to the domestic jurisdiction pursuant to provisions in Article 46.1.a of the Convention, and that, in her case, exceptions to the prior exhaustion of domestic remedies are not applicable, for legal proceedings can be filed to protect her rights.

10. Likewise, the State asserts that the facts do not represent violations of the ACHR. As to the alleged violations of Article 9 of the ACHR, it affirms that the petitioner does not explain why there would be a violation. Concerning the alleged violations of Articles 8 and 25, it indicates that, in accordance with the Constitutional Court’s judgment, the alleged victim was reinstated in the post of Court Secretary at Civil Court No. 26 of Lima, in the framework of due process. Regarding the purported violation of Article 24 of the ACHR,

it submits that the claim is not connected with the right to equal protection by the law, for she does not indicate whether a domestic ruling has been issued or interpreted against her.

11. According to the State, although the petitioner's reinstatement was undertaken according to Legislative Decree No. 728, Resolution No. 024-2005-TR through which Law No. 27803 is applied establishes that "at the end of the training period state bodies will reinstate their former employees in posts similar to the ones they were removed from, provided that there are budgeted vacancies for so doing." With regard to the claim of lack of promotion as a result of being dismissed by Fujimori's government, the State indicates that the petitioner does not specify or prove such acts of discrimination. It also submits that she was promoted for the post of Provisional Judge several times, which means that she had an increase in her salary and social security benefits during the periods that she mentions; and that to be appointed as a judge, the petitioner must apply to and/or be elected in several competitive selection processes. In this regard, the State claims that, in her case, she does not mention any employee who, being in the same circumstances as hers, has been appointed as a judge. In relation to the payment of her mother's funeral and burial, the State submits that her demand was declared out of order because under the Supreme Decree regulating the matter, this subsidy is granted to the person who afforded the expenses, but she did not prove having afforded the expenses. Furthermore, it mentions several administrative rulings through which the State accepted to grant her compensation for the time worked, for holidays and for lost earnings, as well as for unworked days between 1992 and 2008, all of which are compensations by judicial order.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

12. The petitioner alleges that at the time of her dismissal she was precluded from lodging a constitutional appeal, that only in 2001 was she able to lodge a constitutional appeal, and that after filing several procedural remedies, on January 9, 2007, the Constitutional Court settled a constitutional appeal partly in her favor. This decision was notified to her on July 31, 2007. For its part, the State claims that the exception to the prior exhaustion of domestic remedies is applicable in light of the salaries lost due to her dismissal.

13. The Commission believes that considering the petitioner's alleged legal preclusion to file a constitutional appeal between 1992 and 2001, and the context of unclear information as to the appropriate remedy to pursue in cases of collective dismissals,⁴ the pursuit of a constitutional appeal in this context suffices to consider domestic remedies exhausted. In light of the foregoing, the Commission concludes that the alleged victim exhausted the domestic remedies through the judgment of which she was notified on July 31, 2007, pursuant to Article 46.1.a of the Convention. Since the petition was presented on October 9, 2007, it meets the requirement set forth in Article 46.1.b of the Convention.

VII. COLORABLE CLAIM

14. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proved, the alleged facts concerning the alleged victim's unlawful removal, and the legal preclusion of constitutional appeals, along with the fact that she has not yet received full compensation or payment of the earnings lost due to her dismissal, all may establish possible violations of Articles 8 and 25 of the American Convention, in relation to its Articles 1.1 and 2.

15. In regard to the claim of purported violation of Articles 9 and 24 of the American Convention, the Commission notes that the petitioner does not prove such purported violation; therefore, said claim is declared inadmissible.

⁴ In this regard: I/A Court H.R., Case of Huapaya Canales *et al.* v Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 24, 2015. Series C No. 296, par. 103; and I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado - Alfaro *et al.*) v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, par. 129.

16. Moreover, as to the State's claims of the Commission's lack of competence, the IACHR understands that the claims presented by the petitioner fall under its competence pursuant to the ACHR; therefore, there is nothing to indicate a possible issue of competence in this regard.

VIII. DECISION

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

2. To find the instant petition inadmissible in relation to Article 9 and 24 of the American Convention;

3. To notify the parties of this decision;

4. To continue with the analysis on the merits; and

5. 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 Washington, D.C., on the 30th day of the month of November, 2017. (Signed): Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.