

REPORT No. 58/13
PETITION 200-01
ADMISSIBILITY
PABLO YUPÁN GARCIA
PERU
July 16, 2013

I. SUMMARY

1. This report refers to petition 200-01, for which proceedings were initiated before the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," "Commission," or "IACHR" by Mr. Pablo Yupán García (hereinafter "the petitioner") against the Republic of Peru (hereinafter "Peru" or "the State"). That petition was received by the IACHR on March 28, 2001, and the petitioner therein alleges that the State violated to his detriment the right to a fair trial, equal protection, and judicial protection, enshrined in Articles 1.1, 8, 24, and 25 of the American Convention on Human Rights (hereinafter the "American Convention").

2. The petitioner alleges that on October 27, 1994 he was unjustly dismissed from the Electro Perú, S.A. company, where he had been working since 1974 as a mechanical technician and serving as the General Secretary of the Single Union of Electricity Workers of the National Electrical Sector, on the grounds of serious labor misconduct for having insulted the Chairman of the Board of the Electroperú S.A. company in a statement he made in the journal "Siete Días en la Noticia" on October 18, 1994. He states that according to the article published, Mr. Yupán García had allegedly blamed the company's Chairman of the Board for the Ventanilla Thermoelectric Station's operational failure because he had not provided an adequate budget to maintain the station. The petitioner alleges that he sent a letter of correction to the news outlet but that his statements only corroborated what was already public knowledge. He also indicates that the statements attributed to him were protected by the right to freedom of expression under Peru's Constitution, which protects union leaders. Finally, the petitioner maintains that the judicial proceedings initiated in Peru failed to respect due process guarantees.

3. For its part, the State states that the domestic proceedings were conducted properly and there was no violation of the petitioner's right to due process. In addition, the State argues that the petitioner's statements were technical and unrelated to the exercise of his labor and/or union rights and the right to freedom of expression does not protect those who commit crimes. Thus, the State alleges that the dismissal was appropriate based on the petitioner engagement in the one of the grounds denoting "serious misconduct" [*falta grave laboral*] as provided in Peruvian legislation.

4. After analyzing the positions of the parties and fulfillment of the requirements under Articles 46 and 47 of the American Convention, the Commission decides to declare the case admissible for purposes of examining the alleged violation of the alleged victim's rights as enshrined in Articles 13 and 25 of the American Convention in connection with Articles 16 and 1.1 of that instrument.

II. PROCESSING BY THE COMMISSION

5. The Commission received the petition on March 28, 2001 and acknowledged receipt thereof on June 13, 2001. Subsequently, the IACHR received another communication from the petitioner on December 10, 2001, and the IACHR acknowledge receipt thereof in its communication dated February 13, 2002.

6. The Commission forwarded the petition to the State on June 4, 2002, allowing a period of two months for the State to submit observations. The State submitted its observations in a communication dated August 7, 2002, which were forwarded to the petitioner on September 24, 2002, allowing a period of one month for the petitioner to submit observations. The petitioner submitted observations in a communication received on November 27, 2002, and the IACHR acknowledged receipt thereof on December 4, 2002. Subsequently, the petitioner sent additional information in communications received on June 3, 2003, December 3, 2004, and March 11, 2005, and the Commission acknowledged receipt of those communications on December 4, 2002, July 28, 2003, and April 4, 2005, respectively. These communications were sent to the State in a communication dated July 19, 2012, allowing a period of one month for the State to submit observations.

7. On May 12, 2011 the State asked that the petition be archived since it had been inactive since 2002, and the IACHR forwarded this request to the petitioner on June 13, 2011, for observations. The petitioner submitted his response in a communication dated July 27, 2011, which was sent to the State on August 31, 2011, granting it a period of one month to submit its observations.

8. On September 30, 2011 and August 24, 2012, the State submitted observations, which were sent to the petitioner for his information on October 10, 2011 and October 24, 2012, respectively.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

9. The petitioner states that Mr. Pablo Eugenio Yupán García had worked as a mechanical technician at the Electroperú S.A. company from August 27, 1974 until he was dismissed on October 27, 1994, when he was serving as General Secretary of the Single Union of Electricity Workers of the National Electrical Sector, allegedly for having engaged in serious misconduct under paragraphs a) and h) of Law 24514. According to the petitioner, the company justified the dismissal based on the fact that he had made statements to the press outlet "Siete Días de la Noticia," which were published on October 18, 1994, in which he allegedly blamed the company's Chairman of the Board for the Ventanilla Thermoelectric Station's operational failure because he had not provided an adequate budget for its maintenance.

10. The petitioner alleges that in his statements Mr. Yupán García was representing all of the company's workers, i.e., he was acting in his capacity as General Secretary of the union and that his statements did nothing more than corroborate what was already public knowledge. The petitioner states that when Mr. Pablo Yupán García made those statements, as a union leader, he could not be dismissed under Peruvian law until three months had passed since the conclusion of collective bargaining.

11. The petitioner states that on October 25, 1994, Mr. Yupán García sent a letter of correction to the publisher of the journal in which his statements had appeared, in which he pointed out that he was interviewed in his capacity as a union leader and that in his general comments he did not

point to the Chairman of the Board of Electroperú S.A. as being responsible for negligence in the Ventanilla case, since the Ventanilla Thermal Station belonged to the ETEVENSA company and, if there were negligence, the responsibility lay with that company. He states that in the correction letter he also pointed out that the article published ascribed to him qualifiers and concepts he did not express, twisting his version of the facts, and thus he asked that the letter of clarification be published.

12. The petitioner indicates that in response to the dismissal he filed an appeal against Electricidad del Perú, S.A. on November 9, 1994, seeking nullification of the termination and his subsequent reinstatement. This appeal was declared well-founded by the Fifth Labor Court of Lima in its decision of December 31, 1996, which ordered the reinstatement of Mr. Yupán García to his regular job given that the misconduct charged did not exist, since the employment relationship was suspended under Article 48.f) of Legislative Decree 728, due to the complainant's performance of union tasks and because the record had not clearly, precisely, and unequivocally established the seriousness of the alleged statements made by Mr. Yupán García, having confirmed the letter of correction sent to the journal. He states that on November 25, 1997, the Third Labor Court declared the decision of December 31, 1966 to be null and void, for which reason it resolved that a new opinion should be issued, "in the absence of criminal expertise offered as evidence by the defendant" (handwriting expertise), and referred the case to the 13th Labor Court of Lima, which issued a decision on August 12, 1999, declaring the appeal for nullification of the dismissal to be well-founded and ordered that Mr. Yupán García be reinstated to his regular position.

13. The petitioner states that when the earlier decision was appealed by Electroperú S.A., the Third Labor Court, in its decision of December 20, 1999, overturned the decision being appealed on the grounds that the serious misconduct charged was confirmed, since there was no cause and effect relationship between his union work and the dismissal and based on the decision of the Constitutional and Social Chamber of the Supreme Court of Justice of May 11, 1999, that determined that "labor law has defined insult without distinction or any additional qualifier to be serious misconduct." The petitioner alleges that a magistrate who had already heard the case before participated in this decision and that the court failed to consider that the plaintiff, based on his condition as General Secretary of the union, was protected by the guarantees established in Articles 23, 30, 31, and 49 of Decree-Law 25593 and Article 12.e) of Supreme Decree No. 011-92-TR. He states that in accordance with Article 12 of Supreme Decree No. 003-97-TR applicable in labor relations between employees and employers in private activity in Peru, the permit and license to perform trade union office is grounds for suspension of the labor contract and Article 29.d) of the same decree establishes that the dismissal of the workers' candidate or representative or of someone who has acted in that capacity is null.

14. The petitioner states that Peru ratified Convention 135 of the International Labour Conference on the protection that must be granted to the representatives of company employees, Article 1 of which establishes that they shall enjoy effective protection against any action that might harm them, including dismissal by reason of their status as a workers' representative. The petitioner also points out that Article 1 of ILO Convention 98 recognizes that workers must have adequate protection against any discriminatory action aimed at diminishing trade union freedom in relation to employment.

15. The petitioner indicates that he filed a cassation appeal with the Temporary Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic to challenge this decision, which appeal was declared inadmissible on September 26, 2000.

16. Regarding the alleged violation of the right to due process, the petitioner alleges that there were “irregularities and flaws” in the handling of the judicial appeals before the Labor Chamber.¹ The petitioner points out in particular that the Third Labor Chamber was made up of magistrates who were fractious and inclined toward the dictatorship. The petitioner also states that one magistrate on that court heard the case twice, specifically in the decisions of November 25, 1997 and December 20, 1999, when he should have recused himself on the second occasion and thus violated judicial guarantees. The petitioner also alleges that the Temporary Chamber that heard the cassation appeal lacked independence because it was created in January 2000. The petitioner alleges that the government had created the Chamber to hear labor cases, particularly those that involved union leaders, and for this reason brought together magistrates favorable to and supportive of the interests of the dictatorship. He points out that these events occurred during the era of the Fujimori government, and the state of law was broken, workers’ rights were smashed, neither collective bargaining agreements nor the right to work were honored, and union leaders were persecuted with dismissed from their workplaces in order to break the union movement.

17. The petitioner alleges that in the instant case the right to due process, the right to work, the right to equality, and the right to judicial protection were violated, to the detriment of Mr. Yupán García.

B. Position of the State

18. The State alleges that the dismissal of Mr. Yupán García was proper because the petitioner’s offense falls within the grounds for “serious misconduct” as provided in Peruvian labor law. The State argues that the cause for the dismissal is his having made erroneous statements to the detriment of his employer to the media, which in that era was massive.

19. The State indicates that Article 37 of Supreme Decree 003-97-TR, the Regulations of the Law on Productivity and Labor Competitiveness, establishes that “neither the dismissal nor the alleged motive are inferred or presumed; the accusing party must prove them.” It argues that in the complaint he submitted on November 9, 1994 Mr. Yupán García mentions that in the article published by the daily “Siete Días en la Noticia” he is responsible only for the expressions appearing in quotation marks, aiming to infer that the “you should know” column had been edited by the journalist responsible for that article. The State also alleges that the petitioner did not send to the journal the clarifying note of correction merited in such cases and for that reason the statements made by the journalist were validated. In addition, the State indicates that the petitioner never submitted any evidence in the labor proceeding that would clearly define his responsibility, such as the testimony of the journalist who conducted the interview. The State indicates that Mr. Yupán sent the letter of correction dated October 24, 1994 after the date the charges were filed and is thus untimely.

20. With respect to the alleged victim’s status as a union leader, the State argues that his statements were technical and were not made in the exercise of his labor and/or union rights. The State emphasizes that the physical location where the statements were made is irrelevant, in that the employee must comply with the duty of respect and loyalty as long as an employment relationship exists. It indicates that as a result trade union rights cannot be used as a protective shield by the alleged victim in order to evade the obligations he had as an employee of Electroperú S.A., since this does not

¹ Petitioner’s brief received by the IACHR on March 28, 2001.

involve an absolute right allowing the commission of illegal acts, but rather has limits and conflicts of interest and for this reason must be exercised in a responsible manner.

21. The State indicates that the objective of trade union rights is to ensure that workers are not dismissed without properly demonstrated just cause. Nonetheless, it states that in the instant case just cause did exist, i.e., the petitioner engaged in serious misconduct to the detriment of his employer by making statements without factual basis (defamation in accordance with Peruvian law), which statements were erroneous. The State alleges that although the petitioner referred to ILO Convention 98 establishing that workers must have adequate protection against any action aimed at dismissing them based on their participation in union activities outside of working hours, in the instant case the dismissal did not occur due to Mr. Yupán García's participation in "union activities," i.e., in mediation, disputes, strikes, collective bargaining, participation in social dialogue, or other similar activities.

22. The State stipulates that the domestic courts in this case respected and granted all the constitutional guarantees to the alleged victim throughout the domestic legal process, as well as due process. The State alleges that regardless of whether or not decisions adopted by the courts are favorable to the workers, there can be no question that they are the result of a process in which the Judicial Branch has acted in accordance with procedural and material provisions in effect on the date the events occurred. For this reason, it believes that it is inappropriate to assert that in this case the Judicial Branch has incurred in "irregularities and flaws" without producing any evidence to back up that assertion. The State also alleges that the bodies of the inter-American Convention do not function as a fourth instance.

23. Regarding the right to freedom of expression, the State notes that the exercise of that right is subject to the subsequent imposition of liabilities that must be specified by law and are necessary to ensure respect for others, and is thus subject to limitations and conflicts of interest, such as not exercising the right if one thereby causes the commission of a crime, such as defamation or serious misconduct in the workplace with the issuance of false information by the worker to the detriment of his employer. On this basis, the State asks that the Commission archive the petition.

24. With respect to the denial of the cassation appeal, the State alleges that the petitioner did not comply with any of the grounds specifically established by Peruvian legislation in order to file an appeal, and it was thus declared inadmissible. As a result, the State maintains that the judicial process concluded and the case was definitively archived, as there is no other appeal available under domestic law.

IV. ANALYSIS OF ADMISSIBILITY

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

25. The petitioner is authorized to submit a petition to the Commission as provided in Article 44 of the American Convention. The petition indicates as alleged victim an individual with respect to whom the State has assumed the commitment to respect and guarantee the rights recognized by the American Convention. As for the State, the Commission notes that Peru has been a State Party to the Convention since July 28, 1978, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

26. The Commission is competent *ratione loci* to consider the petition, in that it alleges violations of rights protected by the American Convention occurring within the territory of a State Party to the Convention. The IACHR is competent *ratione temporis* in that the obligation to respect and guarantee the rights protected in the American Convention applied to the State on the date when the violations of rights are alleged to have occurred according to the petition. Finally, the Commission is competent *ratione materiae* because the petition alleges violations of human rights protected by the American Convention.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

27. Article 46(1)(a) of the American Convention provides that in order for a complaint filed with the Commission to be admissible the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. This purpose of this requirement is to allow national authorities to hear the alleged violation of a protected right and, if appropriate, to have the opportunity to resolve it before it is heard by an international body.

28. In the instant case, the petitioner alleges that all standard avenues within Peruvian jurisdiction have been exhausted and that no effective appeal would be possible against the decisions that rejected his claims. The Commission notes that the Peruvian State did not submit the exception alleging a failure to exhaust domestic remedies, and it is thus deemed to have tacitly waived invoking that exception. Despite the tacit waiver by the State, the Commission considers it necessary to rule on the exhaustion of domestic remedies in the light of information appearing in the file.²

29. The Commission notes that, after being dismissed on October 27, 1994, Mr. Yupán García filed an appeal for nullification on November 9, 1994 against the Electricidad del Perú S.A. company based on his not having insulted the company's Chairman of the Board and on the fact that at the time he was dismissed he was acting as the General Secretary of the Single Union of Electricity Workers of the National Electrical Sector and was, therefore, protected by trade union rights. The 13th Specialized Labor Court declared the petition well-founded on December 31, 1996, considering that at the time Mr. Yupán García made the statements the employment relationship with the employer was suspended in that the petitioner was exercising license to carry out his trade union position and, therefore, could not be accused of the serious misconduct defined in Article 5(h) of the Labor Stability Law.

30. The Commission notes that given that the Electricidad del Perú S.A. company appealed the above decision, on November 25, 1997, the Third Labor Chamber declared the earlier decision null and void, based on the fact that the 13th Specialized Labor Court had rejected the expert handwriting testimony submitted by the respondent regarding the letter of correction sent by Mr. Yupán to the journal "Siete Días," and therefore his right to a defense had been violated. Consequently, on August 12, 1999, the 13th Court of Lima issued a first instance decision, declaring the petition submitted by the alleged victim to be well-founded.

² IACHR, Report No. 44/09, Petition 12.161, Peru, Ciro Abdías Boderó Arellano, March 27, 2009, para. 26; Report No. 41/09, Petition 459-03, Roberto Villeda Arguedas et al., Guatemala, March 27, 2009, para. 33; Report No. 107/06, Petition 12.318, Peru, Jorge Teobaldo Pinzás Salazar, October 21, 2006, para. 28.

31. Given that the Electricidad del Perú S.A. company again appealed the previous decision, on December 20, 1999, the Third Labor Court overturned the first instance decision and declared the petition unfounded, considering that “union leaders are subject to being dismissed for commission of serious misconduct, in that trade union law does not constitute special and privileged protection against a serious offense,” and that in the instant case the company had verified the commission of serious misconduct by Mr. Yupán in that he had sent the letter of correction to the press on October 25, 1994, i.e., after the charges were filed, and thus the letter was untimely.

32. The Commission notes that Mr. Yupán García submitted a cassation appeal [recurso de casación] against the earlier decision, which was declared inadmissible on September 26, 2000 by the Temporary Chamber for Constitutional and Social Law of the Supreme Court of Justice of the Republic, because, *inter alia*, the petitioner sought to apply international norms on protection of unionization and collective bargaining rights, as well as union leaders, which is not admissible in the cassation appeal venue.

33. Regarding the petitioner’s allegations indicating that the Peruvian government brought together magistrates who were favorable to and supportive of the interests of the dictatorship, and that one magistrate heard the case on two occasions, when he should have recused himself the second time, the Commission notes that the petitioner did not file a motion seeking the recusal of this magistrate who allegedly heard the case twice, and thus the petitioner did not exhaust the domestic remedies with respect to the alleged violation of Article 8 of the American Convention.

34. Consequently, the Commission observes that Mr. Yupán García filed all the ordinary remedies provided in his country’s legislation for the purpose of reversing the human rights violations of which he was allegedly the victim, except for those related to Article 8 of the American Convention. Regarding the remaining alleged violations, the Commission concludes that the petitioner has met the requirement under Article 46(1)(a) of the American Convention.

2. Deadline for submitting the petition

35. In accordance with the provisions of Article 46(1) of the Convention, in order for a petition to be admitted it must have been submitted within six months of the date on which the party whose rights are alleged to have been injured was notified of the final decision issued at the national level.

36. In the instant case, the final decision on the matter that appears in the file was issued on September 26, 2000, and the alleged victim was notified of that decision on October 11, 2000.³ Considering that the petition was submitted on March 28, 2001, the Commission deems that the instant case complied with the requirement stipulated in Article 46(1)(b) of the American Convention.

³ See annex to initial brief number 6 (in fine).

3. Duplication of proceedings and *res judicata*

37. Article 46(1)(c) establishes that the admission of a petition is subject to the requirement that the matter “is not pending in another international proceeding for settlement ” and Article 47(d) of the Convention stipulates that the Commission will not admit a petition that is “substantially the same as one previously studied by the Commission or by another international organization.” In this case, the parties have not alleged, and the record does not indicate, any of said inadmissibility circumstances.

4. Characterization of the alleged facts

38. For purposes of the admissibility report, at this stage in the proceeding the IACHR must resolve only whether facts are presented that, if proven, could tend to establish violations of the Convention, as stipulated in Article 47(b) of the American Convention, or whether the petition is “manifestly groundless” or “obviously out of order,” in accordance with paragraph (c) of the same article. The IACHR must perform a *prima facie* evaluation and determine whether the complaint provides the basis for the apparent or potential violation of a right guaranteed by the Convention, but does not need to establish the existence of that violation. The examination it must perform at this point is simply a summary analysis that does not entail prejudice or an advance opinion regarding the merits of the case. Neither the American Convention nor the Rules of Procedure of the IACHR require the petitioner to identify the specific rights alleged to have been violated by the State in the matter submitted to the Commission, although petitioners may do so. The Commission is responsible, based on the case law of the system, for determining in its admissibility reports which provision of the relevant inter-American instruments is applicable and the violation thereof could be established if the alleged facts are proven with sufficient evidence.

39. The information and allegations submitted by the petitioner indicate that Mr. Pablo Yupán García had been dismissed from his job with the Eléctrico Perú S.A. company for having made some statements to the journal “Siete Días en la Noticia,” in which he used negative qualifiers to refer to the Chairman of the Board. The petitioner alleged that Mr. Yupán García denied his responsibility for those statements by sending a letter of correction to the journal. He stated that Mr. Yupán’s statements are protected by his status as a union leader, in that he issued them as the workers’ representative. The State, for its part, argued that the reason for Mr. Yupán García’s dismissal was that he had made incorrect statements to the detriment of his employer, conduct that constitutes “serious misconduct” in the workplace, in that these were not facts related to his status as union leader but were technical in nature. Consequently, the State alleged that trade union rights cannot be used as a protective shield by the alleged victim in order to evade the obligations he had as an employee of Electroperú S.A. It stated that the exercise of the right to freedom of expression is subject to the subsequent imposition of liabilities, and does not protect someone who commits crimes such as defamation and calumny.

40. In this regard, the Commission observes that the petitioner had been dismissed for having expressed certain opinions that were considered defamatory against the Chairman of the Board of the company where he worked, and that his dismissal was based, as alleged by the State and as indicated in the documentation appearing in the file, on Articles 5.a) and h) of law 24.514,⁴ which

⁴ Article 5.a) of Law 24.514, governing the Right to Stability in Employment, establishes that “unjustified failure to perform workplace obligations, repeated resistance to orders from superiors related to one’s work and failure to observe internal workplace and industrial safety rules duly approved by the Administrative Labor Authority, which in all cases are serious, constitute serious misconduct.”

defines as “serious misconduct” an insult against the employer. Bearing in mind that Mr. Yupán García was serving as General Secretary of the Single Union of Electricity Workers of the National Electrical Sector, as well as inter-American case law on the subject of freedom of expression, the Commission considers it appropriate to study the merits for purposes of identifying whether or not the published statements for which he was dismissed are protected by Article 13 of the American Convention in connection with Article 16 of that instrument, i.e., whether the dismissal was carried out as a result of the legitimate exercise of his right to freedom of expression when he was serving as a union leader and whether or not he had access to an effective remedy under article 25 of the American Convention⁵.

41. The petitioner also alleges that in the judicial process that confirmed his dismissal there were numerous procedural irregularities, including the fact that the judges who heard his case failed to honor the principles of impartiality and independence. The State, for its part, argued that there were no irregularities in this judicial process and that the existence of an unfavorable decision does not mean that there was a violation of due process. On this point, the IACHR notes that the petitioner’s allegations are generic and have not been sufficiently explained or linked to the specific case for purposes of comprehending the potential impact on the actions filed by the alleged victim. Consequently, the Commission concludes that it does not have evidence that would allow it to infer the alleged establishment of violations of Articles 8 and 24 of the Convention by the Peruvian State.

42. Based on the foregoing, the Commission concludes that in the instant case the petitioner has formulated complaints that, if they are consistent with other requirements and prove to be true, could tend to establish a violation of the rights that enjoy protection in accordance with the American Convention, specifically those provided in Articles 13 (freedom of thought and expression) and 25 (right to judicial protection), in connection with Articles 16 (freedom of association) and 1(1) (obligation to respect and guarantee rights) of the American Convention.

V. CONCLUSIONS

43. The Commission concludes that it is competent to hear the instant case and that the petition is admissible in accordance with Articles 46 and 47 of the American Convention.

44. Based on the factual and legal arguments above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this case admissible with respect to the alleged violations of the rights recognized in Article 13 in connection with Articles 16 and 1(1) of the American Convention.

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Article 5.h of Law 24.514 establishes that it constitutes serious misconduct “to commit an act of violence, serious lack of discipline, or serious misstatement insulting one’s employer, his representatives, superiors, or work colleagues within the workplace or outside of it when the facts arise directly from the employment relationship. [...]”

⁵ See IACHR, Admissibility Report No. 152/10 of November 1, 2010, Alfredo Lagos del Campo, para. 38.

2. In addition, the Commission decides to declare inadmissible the allegations regarding the alleged characterization of violations of Articles 8 and 24.

3. To notify the parties of this decision.

4. To proceed with analysis of the merits of the case.

5. To make this report public and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 16th day of the month of July, 2013.
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Rosa María Ortiz, Second Vice-President; Felipe González, Dinah Shelton, and Rose-Marie Antoine, Commissioners.