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REPORT No. 142/18
PETITION 239-08
REPORT ON ADMISSIBILITY

NATIONAL ASSOCIATION OF RETIRED AND DISCHARGED
OFFICIALS OF THE JUDICIARY
PERU

Approved electronically by the Commission on December 4, 2018.

Cite as: IACHR, Report No. 239-08. Admissibility. National Association of Retired and Discharged Officials of the Judiciary. Peru. December 4, 2018.



I. INFORMATION ABOUT THE PETITION

Petitioner:	<i>Asociación Nacional de Magistrados Cesantes y Jubilados del Poder Judicial</i> (National Association of Retired and Discharged Officials of the Judiciary)
Alleged victims:	<i>Asociados de la Asociación Nacional de Magistrados Cesantes y Jubilados del Poder Judicial</i> (Members of the National Association of Retired and Discharged Officials of the Judiciary) ¹
Respondent State:	Peru ²
Rights invoked:	Articles 21 (property), 24 (equal protection), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention on Human Rights ³

II. PROCEDURE BEFORE THE IACHR⁴

Filing of the petition:	February 28, 2008
Additional information received at the stage of initial review:	June 6, August 12 and October 30, 2008
Notification of the petition to the State:	May 3, 2010
State's first response:	July 7, 2010
Additional observations from the petitioner:	September 30, 2010; June 21, 2011; February 5, June 19 and July 10, 2014; October 13, 2015
Additional observations from the State:	February 15 and September 6, 2011

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)

IV. 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 5 (humane treatment), 8 (fair trial), 21 (property), 25 (judicial protection) and 26 (economic, social and cultural rights), in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects), of the American Convention
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

¹ The petition refers to 63 alleged victims, individualized in the Appendix, 13 of whom are deceased retired and discharged judges who were identified as alleged victims when the petition was filed. In addition, by a document of October 30, 2008, 50 members of the Association were identified as alleged victims.

² Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not partake in the discussion or the decision on the instant matter.

³ Hereinafter "Convention" or "American Convention."

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

V. ALLEGED FACTS

1. The National Association of Retired and Discharged Officials of the Judiciary of Peru, comprised of retired and discharged judges, claims that the State has consistently infringed its members' pension rights. It explains that since 1992 they have been arbitrarily deprived of the right to have their pensions calculated and adjusted against the remunerations, allowances and other benefits paid to working judges, based on the category and length of service that pensioners had at the time when they stopped in the position. It argues that such infringement has persisted over the years, although the Constitution and Decree Law No. 20530 guarantee the priority, immediate and unconditioned payment of said benefits. It reports the State's unwarranted failure to fulfill several administrative and judicial resolutions that ordered the adjustment and payment of pensions from 2001.

2. The petitioner explains that the State's discriminatory refusal to adjust the members' pensions has negatively affected their living conditions because they are older persons whose social benefits are their means of support, thus their health and life have been put at risk. It claims that many discharged and retired judges suffering from illnesses would have recovered had their pensions and financial means necessary for accessing a health treatment been timely adjusted and paid. It also reports discriminatory treatment because the State has given pay rises and adjustments to all working and discharged public staff as well as an allowance for jurisdictional function to all working judges since the nineties, but has discretionally avoided paying the members of the Association. It asserts that by virtue of supreme decrees of 1996 and 1997, special allowances were granted in favor of public sector officials including discharged staff of the Public Prosecutor's Office, Tax Courts and Customs but excluding those of the Judiciary.

3. It indicates that due to the refusal to adjust their pensions, it filed several administrative complaints that were settled on May 30, 2001 through Resolution No. 041-2001 of the Judiciary's Executive Council. Under this resolution, the Judiciary's Supervisory Body was to adjust pensions including the allowance for jurisdictional function and the mobility incentive paid to working judges. The adjustment had to be made from 2001 and be paid with regular resources from the Treasury. Given the failure to comply with this resolution, on January 15, 2003 the petitioner lodged a writ of mandamus against the President of the Judiciary and the Minister of Finance and Economy. On August 15, 2003 the writ was settled in favor of the complainant; and on October 20, 2004, after an appeal, the Superior Court of Justice upheld the lower court's judgment, by establishing that the adjustment had to be made under the terms of Resolution No. 041-2001 and ordering the Ministry of Finance and Economy to provide the resources necessary for the adjustment.

4. Given the lack of compliance with that resolution, the Sixteenth Court issued several resolutions for its execution. By Resolution No. 97 of July 19, 2007 the Ministry of Finance and Economy was ordered to comply with the order to provide the Judiciary with funds to pay the adjustments, before the Judiciary fulfilled the payment of the adjusted pensions earned from April 2001 and their interests. The Judiciary filed an appeal against that decision; however, by Resolution No. 113 of April 3, 2008 the appeal was found out of order and the Judiciary again was made to fulfill the abovementioned order primarily in order to protect fundamental rights. The petitioner submits that only in 2009 did the Judiciary adjust pensions for the period of 2005-2009, and that payments were made starting in 2010. The petitioner claims that the State belatedly fulfilled part of its obligations and, contrary to the Supreme Court's order, the adjustments were calculated from 2005 and not from April 2001, which demonstrates the violation of the alleged victims' right to an effective remedy to protect them and provide redress for the infringements they have been subjected to.

5. Furthermore, the petitioner alleges that the administrative authorities of the Judiciary, in belatedly beginning to execute the resolution, acting as both judges and parties, proceeded to monthly reduce by 50 per cent the adjusted pensions of discharged and retired officials belonging to the Association. As a result, the petitioner claims that the reduction on pensions, which were calculated based on the period of 2005-2009 but unpaid, infringes the law and severely affects their rights. It argues that after several unsuccessful complaints presented to the Judiciary, on February 16, 2011, it requested the Sixteenth Court to rule the end of such arbitrary reductions, to limit reductions to the annual 18 per cent established by the law and to order a new adjustment of Association members' pensions earned from 2001. Therefore, the

petitioning party affirms that the State is responsible for the unwarranted and arbitrary delay to execute judicial orders; however, it does not inform the result of said judicial proceeding.

6. The State claims that the facts alleged in the instant petition do not establish human rights violations because pensions are granted pursuant to the applicable legal framework. It indicates that the administrative resolutions giving rise to the mandamus proceeding are unlawful because they do not conform to the budget law. As for the execution of the sentence in the mandamus proceeding, it affirms that the State has made the adjustments proportionally and taking into account priorities and the available resources by adopting measures to “progressively” achieve the full realization of the claimed rights “based on the available resources.”

7. Additionally, the State argues that the IACHR lacks subject-matter jurisdiction in relation to the alleged violation of pension rights because the pension matters are beyond its jurisdiction and because the fact that judicial sentences were allegedly unfulfilled does not mean that they did not rule on pension rights. Moreover, the State claims that the Commission would work as a court of fourth instance if it decides to examine the instant petition, as it would analyze the interpretation and enforcement of the domestic law undertaken by the Peruvian Judiciary within its jurisdiction. It submits that it is impossible to grant the alleged victims a review of decisions issued by domestic courts under the rules of due process. It adds that the petition was filed when the proceeding on the writ of mandamus was being processed; that domestic remedies were not exhausted and that the proceeding is pending settlement in the national jurisdiction.⁵

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

8. In relation to the alleged failure to adjust the alleged victims’ pensions, on October 20, 2004 the First Civil Chamber of the Superior Court of Justice of Lima ruled in their favor, ordering that the adjustment be made under the terms of Administrative Resolution No. 041-2001. Due to the purported failure to comply with that sentence, the Sixteenth Civil Court of Lima issued several resolutions ordering the execution of the abovementioned sentence, the last of which dates from April 3, 2008. The petitioner claims that the pensions were adjusted starting in 2010 in a partial and belated way. For its part, the State argues that when the petition was filed the writ of mandamus was being processed; that, therefore, domestic remedies were not exhausted. In relation to petitions concerning an alleged failure to comply with judicial resolutions, the IACHR has established that once such situation has been reported through the mechanisms foreseen by the domestic law, it is the competent judicial body’s duty to adopt the necessary measures to ensure the execution of the sentence at issue.⁶ Consequently, considering that the execution of the sentence allegedly began in January 2010, the Commission believes that the petition meets the exception set forth in Article 46.2.c of the Convention.

9. With respect to the alleged unlawful reduction of the adjusted pensions of retired and discharged judges as well as the arbitrary and unwarranted failure to undertake the adjustment ordered by the Superior Court of Justice of Lima, the petitioner indicates that after several administrative remedies, on February 16, 2011 it requested the Sixteenth Court to order a new adjustment and the end of arbitrary reductions; but it does not indicate the result of said legal proceeding. For its part, the State does not submit observations on the requirement concerning the exhaustion of that allegation. The Commission takes into account the claim that the violation of the right to adjusted pensions was due to the alleged failure to execute the judicial order to calculate, adjust and pay the pensions. Consequently and given the characteristics of the instant petition and the claim that there is an unwarranted delay in the payment of the adjusted pensions pursuant to the resolution of October 20, 2004 of the Superior Court of Justice of Lima, the IACHR deems that the exception established in Article 46.2.c of the American Convention applies to the instant petition.

⁵ In addition, the State invokes the exception set forth in Article 46 of the Convention, in relation to the alleged victim Félix Bautista Barzola, who allegedly presented an individual petition. Yet as the Commission informed the State on December 27, 2017, said petition was archived on October 7, 2017.

⁶ IACHR, Report No. 106/10, Petition 147-98. Admissibility. Oscar Muelle Flores. Peru, July 16, 2010, par. 29.

10. As for the requirement of timeliness, the instant petition was received on February 28, 2008 and the purported facts in this complaint allegedly began following the confirmation of the resolution of October 20, 2004 that ruled the payment of pensions, and persist to date, because it is alleged that said resolution has not been duly fulfilled. Therefore, in view of the context and the characteristics of the present case, the Commission believes that this petition was filed within a reasonable period.

VII. ANALYSIS OF COLORABLE CLAIM

11. The IACHR takes into account the context referred to by the petitioner, including the domestic legal framework of pensions, formed by Decree Law No. 20530 and its subsequent amendments among other rules, as well as the elements submitted by the parties. In light of this, it deems that the impossibility claim by the alleged victims of receiving adjusted pensions must be analyzed in the merits stage in order to determine if this establishes a violation of the rights recognized in Articles 21 (Property), and 26 (Economic, Social and Cultural Rights) of the American Convention, in accordance with Articles 1.1 and 2 thereof.

12. Moreover, the Commission believes that, if proven, the claims on the unwarranted delays attributable to administrative and judicial authorities, and the alleged failure to fulfill a judicial order and its impact in the case of older persons could establish violations of the rights recognized in Articles 5 (Humane Treatment), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention in connection with Article 1.1 thereof.

13. In regard to the claim about the purported violation of Article 24 (Equal Protection) of the American Convention, the Commission observes that the petitioner does not present enough evidence to *prima facie* establish such possible violation.

14. As for the allegations of the State concerning the establishment of a court of fourth instance, the Commission recognizes its lack of competence to review judgments issued by domestic courts acting within the scope of their jurisdiction and in conformity to due process and judicial guarantees. Nevertheless, it reiterates that within the framework of its mandate the Commission is competent to declare a petition admissible and rule on the merits when said petition concerns domestic proceedings that may involve violations of rights protected by the American Convention.

15. Lastly, the Commission is competent *ratione materiae* because the petition concerns possible violations of rights protected through the American Convention, an instrument ratified by the State of Peru and the primary source of the State's legal obligations.⁷

VIII. DECISION

1. To find the instant petition inadmissible in relation to Articles 5, 8, 21, 25 and 26, in connection with Articles 1.1 and 2 of the American Convention;

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

Approved by the Inter-American Commission on Human Rights on the 4th day of the month of December, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño,

⁷ IACHR, Report No. 38/09. Case 12.670. Admissibility and Merits. National Association of Ex-Employees of the Peruvian Social Institute. Peru, March 27, 2009, par. 68.

First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.

Appendix
List of alleged victims

Members of the National Association of Retired and Discharged Officials of the Judiciary

1. Moisés Crispin Contreras
2. Victor Mario Pantigoso Rosado
3. Felipe Hermes Mayca Baca
4. Celso Becerra Balcazar
5. Felix Bautista Barzola
6. Honorio Arce Alvarez
7. Juan Adrian Torres Valdivia
8. Camilo Niño de Guzman Almanza
9. Maria Celinda Mezarina Gavidia de Muñoz
10. Odon Termopilo Calderon Bernaola
11. Eduardo Pablo Leturia Romero
12. Ismael Benigno Paredes Lozano
13. Julio Cesar Fernández Urday
14. Hugo Fernando Javier Manchego Adrian
15. Juan Bautista Bardelli Lartirigoyen
16. Guillermo Figallo Adrianzen
17. Jorge Martínez Sarmiento
18. Luis Santos Alvarez Zevallos
19. Juan Vicente Ugarte del Pino
20. Alberto Perez Mariño
21. Rogelio Galvan Garcia
22. Herminio Leoncio Rafael Ortega
23. Maximo Antezana Espinal
24. Walter Linares Paredes
25. Jose Trinidad Lopez Mendoza
26. Pedro Pablo Maldonado Pimentel
27. Ciro Warthon Riveros
28. Rafael Ramos Gutierrez
29. Julio Ciro Armaza Chambi
30. Hector Rene Antonio Rodriguez Cateriano
31. Cesar Augusto Valencia Salazar
32. Luis Eduardo Villanueva Fernandez Hernani
33. Domingo Vasquez Caceres
34. Jose Manuel Nuñez Nuñez
35. Alfonso Lazo Herrera
36. Jaime Gilberto Delgado Medina
37. Sergio Segundo Escarza Escarza
38. Angel David Llerena Huaman
39. Luis Alberto Ibañez Barreda
40. Jesus Eduardo Lazo Herrera
41. Arturo Dennis Samuel Lazo Berenguel
42. Oscar Raul Diaz Valverde
43. Pablo Rene Valdivia Rodriguez
44. Jose Villegas Zambrano
45. Jose Petronio Ricalde Mansilla
46. Damaso Humberto Concha Serrano
47. Humberto Cajahuanca Vasquez
48. Oswaldo Salas Matos
49. Herminio Yañez Herrera
50. Yony Doraliza Pajuelo Maguiña

Deceased retired and discharged judges

51. Jesus Hernani Marquez
52. Abraham Vera Fernandez
53. Javier Aquiles Trabuco Flores
54. Vidal Camacho Trujillo
55. Luis Humberto Lucar Chinchá
56. Eduardo Yangali De los Ríos
57. Augusto Valerio Zavaleta Jiménez
58. Pablo Fernando Romero Diez Canseco
59. Luis Rolando Mendoza Valenzuela
60. Frida Grossman Samanez
61. Gloria Elsa Bernal Matallana
62. Pedro René Tarazona Espinoza
63. Carlos Ángel Tovar Chávez