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**REPORT No. 208/19**  
**PETITION 2364-12**  
REPORT ON ADMISSIBILITY

YOLANDA GALLEGOS CANALES  
PERU

Approved by the Commission on December 6, 2019.

**Cite as:** IACHR, Report No. 208/19, Petition 2364-12. Admissibility. Yolanda Gallegos Canales.  
Peru. December 6, 2019.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Elmer Siclla Villafuerte <sup>1</sup>
<b>Alleged victim:</b>	Yolanda Gallegos Canales
<b>Respondent State:</b>	Peru <sup>2</sup>
<b>Rights invoked:</b>	Articles 8 (right to a fair trial), 11 (right to privacy), 23 (right to participate in Government), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention on Human Rights <sup>3</sup> in relation to its Article 1.1

**II. PROCEEDINGS BEFORE THE IACHR<sup>4</sup>**

<b>Filing of the petition:</b>	December 30, 2012
<b>Additional information received at the stage of initial review:</b>	April 22, 2013
<b>Notification of the petition to the State:</b>	October 14, 2014 <sup>5</sup>
<b>State's first response:</b>	January 16, 2015
<b>Additional observations from the petitioner:</b>	March 2, July 29, 2016 and October 19, 2016, September 18, 2017
<b>Additional observations from the State:</b>	August 31, and September 16, 2016, June 26, 2017

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of instrument made on July 28, 1978)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 8 (right to a fair trial), 23 (right to participate in Government), 25 (right to judicial protection) and 26 (progressive development) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, July 2, 2012
<b>Timeliness of the petition:</b>	Yes, December 30, 2012

<sup>1</sup> The original petition was filed by Renata Anahí Bregaglio Lazarte and from November 2, 2015, the alleged victim appointed Mr. Siclla Villafurerte as her representative.

<sup>2</sup> In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, of Peruvian nationality, did not participate in either the discussions or the decision in the present case.

<sup>3</sup> Hereinafter "the American Convention" or "the Convention".

<sup>4</sup> The observations submitted by each party were duly transmitted to the opposing party.

<sup>5</sup> The alleged victim is currently undergoing treatment for thyroid cancer diagnosed in 2012 and thus requested that her petition be prioritized.

## V. FACTS ALLEGED

1. The petitioner alleges that Mrs. Yolanda Gallegos Canales (hereinafter "the alleged victim" or "Mrs. Gallegos") worked in the Judiciary as a Full Justice of the Magistrates Court of Ate Vitarte of the Judicial District of Lima, as from December 19, 1984. In 2009, she was summoned for an individual evaluation and confirmation proceeding,<sup>6</sup> ending on February 12, 2010, with the decision of the National Magistrates Council (hereinafter "CNM") not to confirm her in her post as a district judge. The alleged victim challenged this decision through an extraordinary appeal, which was found to be without merit on April 23, 2010.

2. He indicates that on July 2, 2010, the alleged victim filed an *amparo* action against the CNM requesting that its two decisions be declared null and void for failure to comply with the duty to state grounds for the decision,<sup>7</sup> which was declared inadmissible on May 11, 2011. Then, she filed an appeal motion with the Fifth Civil Chamber of the Superior Court of Justice of Lima, which upheld the decision. She then filed a constitutional grievance complaint with the Constitutional Court who by a decision dated May 3, 2012 – and served on the alleged victim on July 2, 2012 – found that the duty to provide grounds had not been infringed and dismissed her claim.<sup>8</sup>

3. He considers that the proceedings established for the evaluation and confirmation of magistrates fail to comply with the guarantees required by the American Convention and fail to meet international standards relating to the independence of the judiciary, among other reasons because: 1) it is not a disciplinary proceeding to examine an accusation, but rather a disguised vote of confidence and a legal device enabling the CNM to put pressure on judges and separate those who do not submit to their will;<sup>9</sup> 2) they do not comply with the requirement of a double instance, since the only available remedy is an extraordinary review by the CNM; 3) the CNM decisions fail to comply with the duty to provide grounds.<sup>10</sup> He adds that, although the organic law of the CNM provides for a nine-member council, proceedings were conducted with only seven members.

4. With specific regard to the proceedings leading to her non-confirmation, he argues that her rights were violated because: 1) her judicial independence was infringed when the CNM considered her decision in a specific case - not to open an investigation against a citizen - as reprehensible conduct,<sup>11</sup> despite the fact that her decision was later upheld by higher courts;<sup>12</sup> 2) she failed to receive an evaluation in certain areas that were of obligatory evaluation according to the applicable regulations, in some cases on the ground that the information was untimely, even though the delay was attributable to the Judicial Branch itself; 3) her evaluation was based on false information regarding her absences and delays; and 4) her interview was not conducted in a measured manner since she was treated like an accused under interrogation, and the CNM unreasonably demanded that she had memorized the doctrines of the different disciplines of the law.

<sup>6</sup> Process regulated by resolution 635-2009 of the CNM that, according to Article 154 of the Constitution, has the power to confirm judges and prosecutors of all levels every seven years. According to this same article, the confirmation proceedings are independent of disciplinary measures.

<sup>7</sup> Among other reasons, the petitioner argued that there was a failure to comply with the duty to state grounds for the decision because she was not evaluated in the area of "case management" despite the fact that this was a mandatory area according to the rules of the evaluation proceedings.

<sup>8</sup> The Constitutional Court confirmed that its competence to review decisions of the CNM is limited verification of compliance with the requirements of adequate grounding and prior hearing of the party concerned. He also indicated that, after seven years in office, the right of judges and prosecutors to remain in office becomes "relative" and turns at best into a right "to an expectation to continue in office, as long as they undergo the process of confirmation successfully."

<sup>9</sup> He emphasizes that, although not disciplinary proceedings, its consequences are more serious because justices removed by a disciplinary proceedings can reenter the judiciary after 5 years; while those who are not re-confirmed, in practice, can never reenter.

<sup>10</sup> He indicates that in a friendly settlement agreement ratified by the IACHR, the State acknowledged its international responsibility for not ensuring effective judicial protection – in particular sufficient grounds for decisions taken – in the proceedings before the CNM, and undertook to adapt the corresponding legal framework, which it has failed to do. (IACHR, Friendly Settlement, Report No. 50/06 Petition 711-01 and others, Peru, March 15, 2006)

<sup>11</sup> It was a complaint of sexual abuse and mixed forms of abuse against two children in which the petitioner decided not to open criminal proceedings on the grounds that the children's statements were contradictory.

<sup>12</sup> He considers that her right to equality before the law was violated because, although the CNM described her decision as incomprehensible and the fundamental reason for her non-confirmation, a superior judge who signed the confirming order of the decision was confirmed by the CNM.

5. The State, for its part, requests that the petition be declared inadmissible on the basis of Article 47 (b) of the American Convention. It indicates that the petitioner's non-confirmation was based on her obvious incompetence shown during the course of her interview, where she failed to answer several questions regarding a specific case as well as those of a general nature. It points out that the CNM considered that the magistrate's decision not to open an investigation into a case involving crimes against the sexual freedom of two 4 and 6 year old children on the ground of alleged contradictions in the statements was unreasonable or irrational; and that, despite being a criminal law specialist, she could not answer when asked the difference between specific active bribery and specific passive bribery. It alleges that the petitioner failed to state during the evaluation and confirmation proceedings the questions she later presented to the IACHR. In any case, it argues that the areas the petitioner claims were not evaluated, or were evaluated on incomplete or incorrect information, did not influence the result of the proceedings, as her poor performance in the personal interview was the determining factor.

6. In the State's view, the petitioner is inappropriately attempting to use the Commission as a court of fourth instance in order for it to review the decision of the Constitutional Court which upheld the validity and constitutionality of the procedure followed by the CNM. Likewise, it points out that Mrs. Gallegos' evaluation was confirmed in judicial proceedings in accordance with all due process guarantees.

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

7. The petitioner has indicated that domestic remedies were exhausted with the Constitutional Court's decision ruling her constitutional grievance appeal inadmissible. The State has failed to refer to potentially unexhausted remedies available to the petitioner at the domestic level. Therefore, the Commission concludes that the petition fulfills the requirements of Article 46.1 (a) of the American Convention. Since the final decision was served on the alleged victim on July 2, 2012, and the petition was filed on December 30, 2012, the petition meets the timeliness requirement for submission established in Article 46.1 (b) of the Convention.

## **VII. ANALYSIS OF COLORABLE CLAIM**

8. The Commission considers that, if verified as true, the facts alleged by the petitioner indicating that her confirmation proceedings failed to comply with the guarantees of due process and violated judicial independence, as well as the alleged lack of a second instance, could characterize possible violations of Articles 8 (right to a fair trial), 23 (right to participate in Government), 25 (right to judicial protection) and 26 (progressive development) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).

9. With respect to the claims of alleged violations of Articles 11 (right to privacy) and 24 (right to equal treatment) of the American Convention, the Commission observes that the petitioner has not offered allegations or sufficient support to allow *prima facie* consideration of their possible violation.

10. Lastly, with respect to the State's arguments regarding the fourth instance formula, the Commission recognizes that it is not competent to review the decisions adopted by domestic authorities acting within the sphere of their competence and applying due process guarantees. However, it points out that within the framework of its mandate, it is competent to declare a petition admissible and to rule on the merits when referring to domestic proceedings that could be in violation of rights guaranteed by the Convention.<sup>13</sup>

<sup>13</sup> IACHR, Report No. 40/18. Admissibility. Nelson Enrique Giraldo Ramírez and family. Colombia. May 4, 2018, para. 20; IACHR, Report No. 81/18. Petition 190-07. Admissibility. Edgar José Sánchez Duarte. Colombia. July 7, para. 18.

**VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 8, 23, 25 and 26 of the Convention in relation to its Articles 1.1 and 2;
2. To find the instant petition inadmissible in relation to Articles 11 and 24 of the 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 6<sup>th</sup> day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.