Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 43/99; Case 11.688
Session:	Hundred and Second Regular Session (22 February – 12 March 1999)
Title/Style of Cause:	Alan Garcia Perez v. Peru
Doc. Type:	Decision
Decided by:	Chairman: Professor Robert K. Goldman; First Vice-Chairman: Dr. Helio Bicudo; Second-Vice Chairman: Dean Claudio Grossman; Commissioners: Prof. Carlos Ayala Corao, Dr. Alvaro Tirado Mejia.
Dated:	11 March 1999
Citation:	Garcia Perez v. Peru, Case 11.688, Inter-Am. C.H.R., Report No. 43/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)
Represented by:	APPLICANT: Judith de la Mata de Puente

I. SUMMARY

1. In a petition received by the Inter-American Commission on Human Rights (hereinafter "the Commission") dated August 19, 1996, together with supplementary information submitted on October 2, 1996, attorney Judith de la Mata de Puente filed a claim stating that the Republic of Peru (hereinafter "Peru" or "the State") violated certain rights of Mr. Alan García Pérez, former President of Peru, by passing a law which stipulates that the term of the statute of limitations on a criminal action is interrupted when a judge declares the defendant guilty of contempt of court for having fled from criminal proceedings against him. In the application of this law, Mr. García Pérez, who does not reside in Peru, was declared guilty of contempt of court in a proceeding in which he was being charged with illegal enrichment by the Peruvian Courts, which have also declared the term of the statute of limitations on the corresponding criminal proceeding to be interrupted until Mr. García Pérez brings himself before the law. The petitioner alleges that, as a consequence of the facts cited above, the State, to the detriment of Mr. García Pérez, violated the right to a fair trial established in Article 8 of the American Convention on Human Rights (hereinafter "the Convention"), as well as his rights with regard to the application of ex post facto laws set forth in its Article 9. The State alleges that it did not violate any of Mr. García Pérez's rights and that he failed to exhaust remedies under domestic law. The Commission decides to admit the petition, to proceed to examine the merits of the matter, and to place itself at the disposal of the parties to try to reach a friendly settlement to the matter, based on respect for the human rights protected under the Convention.

II. PROCESSING BY THE COMMISSION

2. On October 15, 1996, the Commission opened the case, transmitted the pertinent parts of the complaint to the Peruvian State, and asked it to respond within 90 days. On June 3, 1997, the petitioner provided additional information. On December 1, 1997, the State presented its response. Both parties have presented additional information on several occasions.

III. POSITIONS OF THE PARTIES

A. The Petitioner

3. The petitioner contends that Law Nº 26.641, known as the "Contempt of Court Law," which was passed by the Peruvian Congress on June 18, 1996, and establishes that the term of the statute of limitations on a criminal action is interrupted when a judge declares the defendant guilty of contempt of court,[FN1] was directed against him personally and was designed to affect his rights and to prevent the statute of limitations from running its course. He points out that Law Nº 26.641 violates the principle that laws may not be retroactive and constitutes political interference in the judicial process.

[FN1] The law states, in its Article 1, that, "in cases of contempt of court, it shall be officially interpreted that the jurisdictional principle of not being condemned in absentia shall apply notwithstanding interruption of the term of the statute of limitations, which applies as long as there is irrefutable evidence that the accused is eluding trial, until such time as he brings himself before the law. The judge presiding over the proceedings pronounces when a person is in contempt of court and the statute of limitations is suspended." Article 3 states that Articles 1 and 2 are applicable to the current proceedings.

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4. The petitioner points out that the Special Criminal Court of the Supreme Court of Justice, in a divided opinion handed down on September 6, 1996, passed a judgment in which it applied Law No. 26,641 to the proceedings under way against Mr. García Pérez, thereby declaring him guilty of contempt of court and suspending the term of the statute of limitations in the case being handled by the Court, until such time as Mr. García Pérez should bring himself before the law. Mr. García Pérez appealed that decision, invoking the remedy of invalidity of the law, and on April 4, 1997, a decision with regard to his appeal confirmed the previous decision, which therefore became final.

5. The petitioner cites the fact that in Peru there are two mechanisms for controlling the constitutionality of laws: diffuse control, provided for in Article 138 of the Peruvian Constitution, according to which any judge can decide not to apply a law or rule in a specific case he is hearing if he considers that the legal principle is unconstitutional, and concentrated control, provided for in Article 200 of said Constitution, in which the Constitutional Tribunal can declare that a law is unconstitutional, whereupon it ceases to have effect. In this regard, the petitioner states that he made an unsuccessful request to the legal body in question to exercise its authority regarding diffuse control of the constitutionality of laws in order that Law Nº 26.641 not be applied in the proceedings under way against him.

6. He also states that he did not initiate any action to have Law Nº 26.641 declared unconstitutional for the following reasons: (1) he had already attempted to prevent application of the Law in the aforementioned request to have it declared unconstitutional through the mechanism of diffuse control; (2) it was materially impossible to obtain a favorable outcome for strictly political reasons, since the Constitutional Tribunal was made up of members chosen through political arrangements between the official majority and a sector of the opposition (a political group known as the FIM), and thus it lacked independence and impartiality and would never have found in favor of Mr. García Pérez; (3) he was prevented from doing so under the provisions of Article 203 of the Peruvian Constitution, which requires a petition signed by 5,000 citizens in order to initiate such an action; and (4) even if his attempt to have the Law declared unconstitutional had been successful, the decision in his favor could not have been applied retroactively, given the stipulations of Article 204 in the Peruvian Constitution, and therefore such a decision could not have remedied the legal situation allegedly infringed by Law Nº 26.641.

B. The State

7. The State maintains that neither Law Nº 26.641 nor its application to the specific case of Mr. García Pérez violates any right, and it claims that Mr. García Pérez has failed to exhaust his remedies under domestic law because he did not attempt to have the law declared unconstitutional.

IV. ANALYSIS

The Commission proceeds to examine the admissibility requirements of a petition, set forth in the American Convention, as follows:

A. Jurisdiction

8. The Commission has prima facie jurisdiction to examine the petition in question. The petitioner has the legitimate right to come before the Commission and has presented grievances in regard to failure by agents of a State party to abide by rules set forth in the Convention. The facts alleged in the petition took place when the Peruvian State had already assumed the obligation to respect and guarantee the rights established in the Convention.[FN2] The Commission concludes that this case falls within its jurisdiction.

[FN2] Peru ratified the American Convention on Human Rights on July 28, 1978.

B. Admissibility Requirements of the Petition

a. Exhaustion of Remedies Under Domestic Law

9. The petitioner stated at the outset that he had exhausted his remedies under domestic law when he requested the appropriate jurisdictional court to invoke the power of diffuse control

regarding the constitutionality of laws and not to apply Law Nº 26.641 to the proceedings against him, and again when his request was denied in a decision handed down by the Special Criminal Court of the Supreme Court of Justice dated September 6, 1996 and confirmed on April 4, 1997 by the Supreme Court of Justice.

10. The State, for its part, has responded to the effect that the request referred to in the previous paragraph did not constitute exhaustion of remedies under domestic law, pointing out that in order to have exhausted his remedies under domestic law, Mr. García Pérez would have had to file a claim of unconstitutionality against Law Nº 26.641.

11. In his rejoinder, the petitioner said that he had been prevented from filing a claim of unconstitutionality by Article 203 of the Peruvian Constitution, which requires a petition signed by 5,000 citizens in order to initiate such an action, and that in any case such an action would not have constituted an effective remedy of his situation, because even if he had successfully won the case of unconstitutionality, such a finding in his favor would not have been applied retroactively, given the provisions of Article 204 of the Peruvian Constitution, according to which a finding by the Tribunal that a legal norm is either wholly or partly unconstitutional may not apply retroactively.

12. The State responded that it had been Mr. García himself who had abstained from filing an action of unconstitutionality and had claimed that it was impossible to exercise that right, when in reality he had not taken any steps to collect the signatures of citizens who might consider Law Nº 26.641 unconstitutional, an initiative that had not been promoted by any natural or juridical person.

13. The parties having thus stated their positions in regard to the remedies under domestic law, the Commission proceeds to analyze whether or not said remedies have been exhausted. As mentioned above, the State maintains that an action of unconstitutionality against Law Nº 26.641 was the domestic remedy that should have been exhausted.

14. The core of the complaint is that by means of Law Nº 26.641 the State created a new cause for interrupting the term of the statute of limitations in a criminal case, and that application of the Law to the criminal proceedings against Mr. García Pérez-- case that was initiated prior to the creation of said Law--in the form of a definitive interlocutory judgment had resulted in the indefinite suspension of said proceeding.

15. The Commission observes from the above that, irrespective of the allegations by the parties, the case against Mr. García Pérez has not concluded, for which reason it might be thought, at first sight, that since a final decision has not been handed down, the remedies under domestic law have not been exhausted. Nevertheless, one of the fundamental aspects of the complaint is, precisely, that upon application of the above-cited Law, the criminal proceeding against Mr. García Pérez has been suspended indefinitely by means of a definitive interlocutory judgment.

16. Thus, within this case, which is still pending, an incident occurred which gave rise to a definitive interlocutory judgment, which is the immediate cause of the petition under study,

namely, concrete application of a law which the petitioner contends is in violation of certain rights that are guaranteed under the Convention. Hence there is a procedural incident in which it is claimed that the human rights of the alleged victim have been violated. In this situation, it would appear that the only option available to the victim for bringing the case to a close would be to consent to the act that he claims is in violation of his rights.

17. Consequently, even if "in virtue of the public order of human rights, even the eventual consent of a victim to a violation does not validate the violative act of a State, nor does it affect the competence of the international organ to whom the States have entrusted their protection",[FN3] the Commission cannot require that the alleged victim, in order to ultimately exhaust his remedies under domestic law, consent to the application of said act. Also, the Inter-American Court of Human Rights has established that "the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective."[FN4] To assume that case has not concluded and that therefore the remedies under domestic law have not been exhausted would imply that the Commission would be prevented from hearing the case of the alleged violation. Therefore, in regard to the situation described above, the Commission considers that the alleged victim was prevented from exhausting his remedies under domestic law and thus that the exception to the requirement to exhaust domestic remedies, stipulated in Article 46(2)(b) of the Convention, applies.

[FN3] IACHR, Maria Eugenia Morales de Sierra case. Report Nº 28/98, Case 11,625 (Guatemala), published in the Annual Report of the IACHR, 1997, paragraph 33.
[FN4] I/A Court H.R. Velásquez Rodríguez case, Preliminary Objections, Judgment of June 26, 1987. Series C No.1, paragraph 93.

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18. The foregoing point having been clarified, the Commission notes that the discussion of the parties has focused on the remedies invoked by the alleged victim against the procedural incident that arose, in the understanding that they both recognize, and the Commission agrees, that said appeals might have made it possible to remedy the situation of the alleged victim even if the case in question had continued.

19. In this line of thinking, the request that the judge not apply Law Nº 26.641 to the ongoing case against Mr. García Pérez, based on the authority granted to him in Article 138 of the Constitution not to apply a legal norm that is incompatible with a principle contained in the Constitution, was rejected. This proves that Mr. García Pérez invoked and exhausted the remedy at his disposal to try to prevent Law No. 26,641 from being applied to his case.

20. With regard to the action of unconstitutionality that the State maintains was the domestic remedy which should have been exhausted, the Commission notes that "where a State claims that a petitioner has failed to discharge the requirement of exhaustion, the former bears the burden of indicating the specific remedies which remain available and effective."[FN5] If the exercise of a domestic remedy is conceived in such a manner that for practical purposes it is not available to the victim, then indeed there is no obligation to exhaust it, regardless of how theoretically effective the remedy might be to rectify the alleged legal infringement.

[FN5] IACHR, Maria Eugenia Morales de Sierra case, Report Nº 28/98, Case 11.625 (Guatemala), published in the Annual Report of the IACHR, 1997, par. 28. See also Article 37.3 of the Regulations of the Commission, and, for example, Inter-American Court of Human Rights, Velásquez Rodriguez case, Preliminary Objections, Judgment of June 26, 1987. Series C, no. 1, paragraph 88.

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21. In applying the foregoing postulates to the present case, the Commission notes that Article 203 of the Peruvian Constitution strictly specifies the parties who have active legal competence to bring suit in regard to unconstitutionality, to wit:

1. The President of the Republic; 2. the Attorney General (Fiscal de la Nación); 3. the Ombudsman; 4. Twenty-five per cent of the legal number of members of Congress; 5. five thousand citizens, with signatures verified by the National Board of Elections...; 6. the Presidents of the Region, with the agreement of the Regional Coordination Council, or the provincial prefects, with the agreement of their Council, on matters within their competence; 7. professional associations, on matters within their area of specialization. (underlining by the Commission).

22. Based on the article cited above, the Commission concludes that Mr. García Pérez did not have access to an internal remedy with regard to unconstitutionality, which is the remedy that the State maintains should have been exhausted, since, not holding any of the positions indicated above, the only option he had for acquiring legal competence to initiate a proceeding on the subject of unconstitutionality was to bring together another 4,999 citizens who would join him in filing such a suit, which unquestionably implies that said internal remedy is conceived in such a manner as to be unavailable to the alleged victim, because he does not have active legal competence to do so. Therefore, bringing a suit of unconstitutionality was not an internal remedy that Mr. García Pérez had to exhaust before turning to the Commission.

23. In arriving at the foregoing conclusion, the Commission felt it unnecessary to analyze whether or not the unconstitutionality suit referred to was an effective remedy for rectifying the alleged legal infringement. Nevertheless, the Commission considers it appropriate to note that in the case under study the petitioner has said that he did not initiate the action in question because the composition of the Constitutional Tribunal was such that it was incapable of making an independent decision, given the political bonds that made it subordinate to the executive branch. Now, when the Constitutional Tribunal has only four judges, because three were removed--and decisions on constitutional matters require six votes--he could not in fact do so.

24. Thus, at the present moment when the case is being assessed by the Commission, and this question should be examined, conditions do not in fact exist for the full exercise of domestic remedies–i.e., there is no material means of meeting the formal condition of six favorable votes in the Constitutional Tribunal for the simple reason that there are not enough voting members. In other words, the Tribunal fails to meet the material conditions for considering not only the present case of Mr. Alan García Pérez but also any other constitutional matter.

25. From the foregoing it emerges that the only remedy available to the alleged victim for remedying the alleged legal infringement was to invoke the power of diffuse control regarding the constitutionality of laws to invalidate the decision of September 6, 1996 handed down by the Special Criminal Court of the Supreme Court of Justice, which he did at the appropriate time. However, a verdict unfavorable to the petitioner was returned on April 4, 1997.

26. For all the above reasons, the Commission concludes that the requirements stipulated in Article 46(1)(a) and b) of the Convention with regard to the exhaustion of remedies under domestic law have been met, which does not preclude the Commission from examining in its report on the merits of the case, for example, the possible violation of the right to a fair trial and the right to due process through the passing and application of Law Nº 26.641.

b. Timeliness of Presentation

27. With regard to the foregoing, the Commission concludes that the requirement set forth in Article 46(1)(b) of the Convention has been met.

c. Duplication of Proceedings or of a Previously Examined Petition

28. The Commission understands that the subject of the petition is not pending settlement in another international proceeding, nor does it duplicate a petition already examined by this body or any other international agency. Therefore, the requirements set forth in Articles 46(1)(c) and 47(1)(d) are also found to be satisfied.

d. Grounds for the Petition

29. The Commission considers that, in principle, the complaint of the petitioner refers to facts that could characterize a violation of rights guaranteed by the Convention. The petitioner alleges violation of Articles 8 and 9 of the Convention. The Commission feels that if the alleged events are proven, they might constitute violations of the Convention. Nonetheless, that analysis will be performed by the Commission in the report on the merits of the case, since in this phase of the proceedings the Commission is to simply decide on the admissibility of the case. Inasmuch as there is no evidence that the petition is groundless or out of order, the Commission considers that the requirements set forth in Article 47(b) and 47(c) of the Convention have been met.

30. In effect, Law Nº 26.641 established that the term of the statute of limitations on a criminal action is interrupted when the plaintiff is declared to be in contempt of court. That rule was not part of the legal code in force until then.

V. CONCLUSIONS

31. The Commission considers that the present case falls within its jurisdiction and that the case is admissible, in accordance with the requirements set forth in Articles 46 and 47 of the Convention.

On the basis of the arguments of fact and law expounded above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare that the present case is admissible.
2. To notify the petitioner and the State of that decision.
3. To continue to analyze the basic issues.
4. To place itself at the disposal of the parties, with a view to reaching a friendly settlement of the matter based on respect for the human rights protected under the Convention and to invite both parties to indicate whether or not they are disposed to do so.
5. To publish the present Report and include it in the Annual Report of the Commission to the General Assembly of the Organization of American States.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C. on the 11 day of the month of March 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice Chairman; Claudio Grossman, Second Vice Chairman; Commissioners, Carlos Ayala Corao and Alvaro Tirado Mejía.