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REPORT No. 8/23
PETITION 1847-19
REPORT ON ADMISSIBILITY

DAVID VÍCTOR ARUQUIPA PÉREZ AND GUIDO ÁLVARO MONTAÑO DURÁN
BOLIVIA

Approved electronically by the Commission on February 24, 2023.

Cite as: IACHR, Report No. 8/23. Petition 1847-19. Admissibility. [David Víctor Aruquipa Pérez and Guido Álvaro Montaña Durán]. Bolivia. February 24, 2023.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Derechos en Acción and Rielma Mencias
Alleged victims:	David Víctor Aruquipa Pérez and Guido Álvaro Montaña Durán
Respondent state:	Bolivia
Rights invoked:	Articles 3 (juridical personality), 8 (fair trial), 11 (privacy), 17 (family); 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights ¹

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	August 21, 2019
Additional information received at the stage of initial review:	August 26, 2019, and June 29, 2021
Notification of the petition to the State:	June 15, 2021
State's first response:	October 14, 2021
Additional observations from the petitioner:	November 10, 2021

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 instrument of ratification on July 19, 1979)

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

Duplication of procedures and international res judicata:	No
Rights declared admissible:	Articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 17 (family); 24 (equal protection), and 25 (judicial protection) of the American Convention
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

V. ALLEGED FACTS

1. The petitioners allege that the State violated the rights of Mr. David Víctor Aruquipa Pérez and Mr. Guido Álvaro Montaña Durán, since it has not yet recognized, in a final decision, their common-law marriage as same-sex partners, allegedly in violation of their rights to nondiscrimination, privacy, and family life.

¹ Hereinafter the "American Convention."

² The observations submitted by each party were duly forwarded to the opposing party.

Alleged victims' request for registration of their common-law marriage

2. On October 5, 2018, the alleged victims asked the registrar on duty at the Vital Records Service (hereinafter SERECI) to register their same-sex common-law marriage/partnership, explaining that their relationship had been steady, continuous, and exclusive for almost ten years, in line with their plan for a life together.

3. However, on November 5, 2018, the Vital Records Section Chief served the alleged victims note JSRC-SERECE-LP-No. 5217/2018, which rather than directly responding to the request, only included an attached report from the SERECI Inspection Unit. The report read as follows: *"On October 5, Mr. David Víctor Aruquipa Pérez and Mr. Guido Álvaro Montaña Durán were informed that their same-sex common-law marriage could not be registered, since there were no regulations or operational procedures in place for doing so."* The petitioners further specify that the quoted document asserted that both the American Convention and the relevant constitutional case law recognize the right only of men and women to marry and raise a family. Based on these arguments, the report concluded that the request for registration was inadmissible.

4. On November 8, 2018, the alleged victims submitted a brief to the SERECI Departmental Director for La Paz in which they asked for a response to their request, in the consideration that the forwarding of a legal report written by a different official did not fulfill the procedural requirements stipulated in national law. On December 4, 2018, this Departmental Director responded with note SERECI-LP-DD-No. 722/2018, affirming that the current national framework precludes the common-law marriage of persons of the same sex.

Filing of motion for reconsideration and specific constitutional review

5. On December 17, 2018, the alleged victims submitted a motion for reconsideration of this decision, to the aforementioned SERECI Departmental Director for La Paz. On February 1, 2019, the Director determined, in note SERECI-LP-DD-No. 770/2018, that the motion was inadmissible, since it had not been filed against an administrative ruling, but rather against an act carried out by an administrative body of government. In response, on February 12, 2019, the alleged victims filed an appeal to the SERECI agency head for reconsideration. While the appeal was being processed, they also submitted a brief in which they asked the SERECI National Director to file for specific constitutional review³ of Article 168 of Law 603,⁴ to have it declared unconstitutional and obtain preferential application of the American Convention and the Inter-American Court of Human Rights case law.

6. However, on February 21, 2019, in Resolution SERECI No. 1/2019, the SERECI National Director decided not to admit the action for constitutional review, arguing that beyond the defects in how it was submitted, same-sex common-law marriage is not protected under Bolivian law. Following the procedure established in the law, on February 25, 2019, the Director then sent this resolution, plus the relevant records, to the Plurinational Constitutional Court for review.

7. The petitioners state that although the aforementioned court had ten days to reach a decision, the alleged victims' representatives were not notified of Constitutional Decree 89/2019-CA, in which the Plurinational Constitutional Court Admission Committee resolved to ratify the Director's rejection of the filing, until July 3, 2019. This decree argued the following:

[...] SERECI administrative procedures do not include registration of same-sex common-law marriages, from which it follows that there can be no regulated motions for reconsideration or appeals to the agency head against denial of such unions. Furthermore, the petitioners' supplementary motion for reconsideration of the administrative act was not brought within the period of ten days established in

³ Constitutional Procedural Code. Article 79. - (Legal standing) The following have legal standing to file for specific constitutional review: the judge, court, or administrative authority that, *sua sponte* or upon the request of one of the parties, considers the decision in the lawsuit or administrative proceeding in question to depend on the constitutionality of the regulation to be reviewed.

⁴ Law 603. Article 168. (Grounds for nullity). I. A marriage is null if: (a) it was not celebrated by the registrar; (b) it is not between a man and a woman; (c) a party engages in bigamy or multiple common-law marriages; (d) it was entered into by persons with an impediment established in this Code; (e) the consent thereto derived from an error, intentional misconduct, or violence; and (f) consent was not granted.

Article 64 of the Law of Administrative Procedure for filing this type of motion [...]. Therefore, the lack of any pending process or proceeding in which the questioned regulation would have to be enforced prevents this Court from moving to admit this specific constitutional review [...]

8. On July 8, 2019, the alleged victims asked the SERECI National Director for a definitive decision in administrative proceedings, and on August 13, 2019, the Director, referencing Constitutional Decree 89/2019-CA of the Plurinational Constitutional Court, indicated that the highest body of justice had already concluded that “*there is no administrative procedure for registering a common-law marriage between two persons of the same sex, from which it follows that there can be no regulated motions for reconsideration or appeals to the agency head against denial of such unions.*”

Decision on the appeal to the agency head and filing of an action for constitutional relief (amparo)

9. The petitioners indicate that they initially considered this decision to have brought the process to a close, but then the SERECI National Director issued Resolution 002/2019 on September 11, 2019, changing the course of the issue and duly handing down a decision on the alleged victims’ appeal at last. In that decision, the Director confirmed the denial of the request for registration, reiterating that the Plurinational Constitutional Court had affirmed that there can be no motions for reconsideration or appeals to agency heads against the rejection of same-sex unions, meaning there is no channel for an appeal in this situation.

10. The petitioners state that the SERECI National Director’s decision, as set forth in an administrative ruling, opened the doors for the alleged victims to present a legal challenge through an action for constitutional relief. Accordingly, on February 10, 2020, they filed such an action. On July 3, 2020, the Second Constitutional Law Division of the La Paz Departmental Court of Justice, in Constitutional Resolution 127/2020, found for the petitioners and ordered the SERECI National Director to issue a new high-level resolution, applying the principle of nondiscrimination, the highest standard of protection, and control of compliance, among other guidelines.

11. The petitioners indicate that although the Court granted SERECI a period of ten business days to issue this new high-level resolution, SERECI decided not to do so, and instead notified the alleged victims, through a simple note, that in order to protect legal certainty, it had asked the Plurinational Constitutional Court to issue a generic precautionary measure suspending Constitutional Resolution 127/2020 until the decision was confirmed or revoked. However, the petitioners indicate that to date the Plurinational Constitutional Court has not responded to the request for the precautionary measure.

SERECI Resolution 03/2020 and procedural status of the case

12. The petitioners report that in view of the alleged victims’ repeated requests to the Second Constitutional Law Division of La Paz to enforce its ruling on SERECI, on October 6 and 29, 2020, respectively, the Division, through two resolutions, ordered the SERECI National Director to comply with Constitutional Resolution 127/2020, under penalty of law. Consequently, six months after the resolution had been adopted, on December 9, 2020, SERECI, through the Vital Records Department Chief, complied with the constitutional ruling; and in High-level Resolution 03/2020 ordered the registration of the common-law marriage of Mr. Aruquipa Pérez and Mr. Montaña Durán.

13. Despite this favorable outcome, the petitioners underscore that the Plurinational Constitutional Court remains to hand down a review decision confirming or revoking Constitutional Resolution 127/2020. The petitioners state that until the Court issues its decision, Mr. Aruquipa Pérez and Mr. Montaña Durán’s status will remain uncertain.

Petitioners’ claims

14. Based on the foregoing considerations, the petitioners maintain that the State violated the alleged victims’ rights, since it has not yet issued a firm decision recognizing their common-law marriage; and that consequently, the grounds for filing this petition persist. Along these lines, they argue that the

administrative proceedings and judicial processes used to respond to Mr. Aruquipa Pérez and Mr. Montaña Durán's request were riddled with irregularities, such as the failure to comply with the deadlines set by national law, inadequate grounds for the decisions adopted in disregard of conventional parameters, and the use of procedural requirements. As an example, they emphasize that SERECI abused the process with its request for precautionary measures, since it distorted the legal purpose and nature of that legal concept, with the only objective of avoiding compliance with the constitutional resolution and likewise circumventing the control thereof.

15. With regard to the exhaustion of domestic remedies, the petitioners argue that the exception provided for in Article 46.2(c) of the American Convention does apply, since the Plurinational Constitutional Court has not yet made a final instance ruling on this dispute. The petitioners maintain that although constitutional relief is defined as an immediate legal action, the Court took cognizance of the case on September 10, 2020, and has not yet made a decision. Along these lines, they argue that given the legal nature of the constitutional relief proceedings to date, this delay in ruling on the alleged victims' claim is unjustified.

16. In this regard, it adds that, although the State argues that the Plurinational Constitutional Court has not resolved the matter because on March 25, 2021, it required expert information, in reality said body only called for the presentation of amicus curiae, granting only the period of five days to receive such information. Likewise, regarding the delay generated in the resolution of cases due to the health emergency, the petitioner emphasizes that, in accordance with Advisory Opinion 9/87 of the Inter-American Court, an action for constitutional relief is a guarantee that cannot be suspended.

State claims

17. In turn, the State counters that the grounds for this international petition no longer exist. It affirms that on July 3, 2020, the Second Constitutional Law Division of the La Paz Departmental Court of Justice issued Constitutional Resolution 127/2020, thereby granting the protection that the alleged victims had requested; consequently, for the first time in Bolivia's history, on December 9, 2020, the Vital Records Service issued Resolution 003/2020, which made it possible to recognize Mr. Aruquipa Pérez and Montaña Durán's common-law marriage. Hence, the State is asking the IACHR to, in accordance with Article 48.1(b) and (c) of the American Convention, declare this petition inadmissible and order that it be archived.

18. Without prejudice to the foregoing, the State also argues that this petition is inadmissible due to the petitioners' failure to exhaust domestic remedies. It affirms that, in accordance with domestic law, Constitutional Resolution 127/2020 is pending review by the Plurinational Constitutional Court. It also asserts that the deadline is currently suspended, since the Court, based on Article 7 of the Constitutional Procedural Code,⁵ called for complementary expert information, which it considered necessary in order to analyze the case in question. Based on this, it asks the Commission to declare that the case does not fulfill the requirement established in Article 46.1(a) of the Convention.

19. The State also argues that the denounced acts were not human rights violations. In this respect, it states that, although the Vital Records Service initially denied the alleged victims' request, later the Second Constitutional Law Division of the La Paz Departmental Court of Justice revoked this decision and ordered registration of Mr. Aruquipa Pérez and Mr. Montaña Durán's common-law marriage. In the State's opinion, this decision shows that the alleged victims had an adequate, effective remedy to achieve protection of their rights. Therefore, it asserts that, if the national proceedings are analyzed as a whole, the State clearly resolved the issue under parameters aligned with the American Convention, and the facts reported thus do not represent a violation of the alleged victims' rights.

20. It highlights that the action for constitutional relief has been developed within reasonable time frames, even more so taking into account that although the alleged victims filed said appeal on February

⁵ Constitutional Procedural Code. Article 7. - (Complementary expert information). I. The Plurinational Constitutional Court, where applicable and when it deems necessary, may call for complementary expert information; the Court will define the form this information must take and will grant a period of up to six months for delivery of the expert report. II. All deadlines will be suspended until the complementary expert information is produced.

10, 2020, they rectified it on March 4, 2020; and, subsequently, once the health emergency and quarantine have been declared throughout the territory of the Plurinational State of Bolivia, due to the spread of COVID-19; Through Circular 4/2020, the Supreme Court of Justice ordered to "*suspend work activities in (...) Departmental Courts of Justice and Provincial Judicial Seats in the nine departments of the country, as of Monday, March 23, until the issuance of an express statement (sic) issued by the competent authority*", which was extended to the Constitutional Chambers. It adds that, in the same way, the Plurinational Constitutional Court signed the Jurisdictional Agreement of the Full Chamber TCP-SP 003/2020 of March 18, which ordered the suspension of procedural deadlines for the cases that are in process and pending. resolution.

21. Along these lines, it argues that through Circular No. 11/2020-SP-TDJLP of March 30, 2020, the Departmental Court of Justice of La Paz determined, among others, that the Constitutional Courts on Duty of the TDJ-LP, only resolve the Freedom Actions during the validity of the quarantine decreed by the National Government; and, subsequently, through Circular No. 15/2020-SP-TDJLP of May 29, 2020, the Departmental Court of La Paz determined that, in response to the determinations made by the Central and Departmental Government, in the application of the dynamic and conditional quarantine, the Constitutional Chambers restart judicial activities from June 1, 220, in shifts of two per week, "with preference, and not exclusively, the claims that due to their merit require priority attention"; aspect that led to the fact that in the specific case a hearing was set for July 3, 2020.

22. Consequently, it affirms that if the national actions are analyzed as a whole, it is clear that the State resolved the matter raised under parameters consistent with the American Convention, therefore the facts exposed did not materialize in a violation of the rights of the alleged victims. Based on the above considerations, the State considers that the facts reported by the petitioners do not demonstrate that the alleged victims' right to legal personality was violated, since the petitioners' claim is that Mr. Aruquipa Pérez and Mr. Montaña Durán were unable to register their common-law marriage, which would not entail the erosion of their legal identities.

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

23. The petitioners request application of the exception provided for in Article 46.2(c) of the American Convention, since to date no definitive legal decision has been made on the alleged victims' claims. In turn, the State counters that the petitioners failed to exhaust the domestic remedies, since the case is pending judgment before the Plurinational Constitutional Court.

24. In this respect, the Commission observes, fundamentally, that both parties agree that a definitive decision on this issue by the Plurinational Constitutional Court is still pending. Accordingly, the IACHR considers that it must be determined whether the exception provided for in Article 46.2(c) of the Convention is applicable, as the petitioners claim.

25. In this regard, the Commission first reiterates, as it has consistently done, that Article 46(2) of the Convention, by its nature and purpose, is a norm with autonomous content compared to the substantive norms of the American Convention. Therefore, the determination of whether the exceptions to the rule of exhaustion of domestic remedies are applicable to the case in question must be carried out previously and separately from the analysis of the merits of the matter, since it depends on a different standard of appreciation. that used to determine the possible violation of Articles 8 and 25 of the Convention. The IACHR has also stressed that there are no conventional or regulatory provisions that specifically regulate the period of time that constitutes unjustified delay, for which reason the Commission evaluates case by case to determine if said delay is configured⁶. In this line, the Inter-American Court has established as a guiding principle for the analysis of eventual unjustified delay as an exception to the rule of exhaustion of domestic remedies, that "in no way should the rule of prior exhaustion lead to stopping or delaying until the futility of international action in aid of the

⁶ IACHR, Report N° 14/08, Petition 652-04. Admissibility, Hugo Humberto Ruíz Fuentes. Guatemala. March 5, 2008, para. 68.

helpless victim”⁷. In other words, in the opinion of the Commission, the complementary nature of the international protection provided for in the American Convention also implies that the intervention of the organs of the Inter-American System is opportune so that it can have some kind of useful effect in the protection of the rights of the alleged victims.

26. Along these lines, in order to determine if the alleged delay did in fact occur, it is essential to jointly analyze the administrative procedure that was followed and its resultant constitutional processes, given the tight relationship between them. Based on this premise, the IACHR notes that almost four years have gone by without a definitive response from the State authorities to Mr. Aruquipa Pérez and Mr. Montaña Durán’s request; and that, furthermore, as per the information currently in the file, this delay appears to be mainly attributable to the SERECI officials and the domestic judicial bodies, which issued various decisions alleging, among other arguments, the lack of an obligation to recognize common-law marriages between persons of the same sex, and the lack of a means to process the complaint in domestic law.

27. Likewise, although the State argues that the absence of a pronouncement by the Plurinational Constitutional Court confirming Constitutional Resolution No. 127/2020 is due to the health emergency decreed in the country, the Commission considers that, even if the validity is accepted. Despite this argument, said situation does not allow us to explain why during 2021 and 2022, after the resumption of jurisdictional activities, a final decision on this matter was not adopted. In a similar vein, the Commission considers that the suspension of time limits decreed by the Plurinational Constitutional Court in this case for the purpose of receiving complementary expert documentation does not justify the lack of a definitive ruling at the judicial level during these two years, given that no It clearly appreciates to what extent said information was required to resolve a matter such as the present, in which a controversy of pure law in the constitutional sphere is analyzed, directly related to the protection of the human rights of the alleged victims.

28. Based on these considerations and taking into account that the delay in confirming the marriage celebrated by the alleged victims has a daily impact on their lives, since they do not have the legal certainty to make decisions and take steps as spouses, the IACHR concludes that the exception provided for in Article 46.2(c) of the American Convention is applicable. Furthermore, since the petitioners filed this petition on August 21, 2019, the Commission also considers it to have been submitted in a reasonable time, pursuant to Article 32.2 of its Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIMS

29. In the first place, the Commission reiterates that the evaluation criterion of the admissibility phase differs from that used to rule on the merits of a petition. at this stage, the IACHR must carry out a prima facie evaluation to determine whether the petition establishes grounds for the violation, possible or potential, of a right guaranteed by the Convention, but not to establish the existence of its violation. This determination on the characterization of violations of the American Convention constitutes a primary analysis, which does not imply prejudging the merits of the matter. For purposes of admissibility, the Commission must decide whether the alleged facts may characterize a violation of rights, as stipulated in Article 47.b) of the American Convention or whether the petition is "manifestly unfounded" or is "obviously unfounded". total inadmissibility", according to 47.c) of the American Convention.

30. In view of these considerations, and after examining the elements of fact and law set forth by the parties, the Commission deems that the alleged failure to recognize the alleged victims’ common-law marriage in a timely fashion and the discriminatory impacts of the delay on their private and family lives, are not clearly unfounded, and a study of their merits is called for, as the alleged acts, if corroborated, could violate Articles 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 24 (right to equal protection), and

⁷ Inter-American Court of Human Rights, Velásquez Rodríguez vs Honduras, Preliminary objections, judgement del 26 de junio de 1987, párr. 93

25 (right to judicial protection) of the American Convention with regard to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects), to the detriment of the alleged victims in the terms hereof.⁸

31. Likewise, following its precedents on similar claims,⁹ the IACHR observes that the potential discrimination and legal vulnerability to which the alleged victims assert they were subjected due to their sexual orientation, could have affected their psychological integrity. Therefore, in the merits stage, the IACHR will also analyze the potential violation of Article 5 of the American Convention.

32. Lastly, the Commission considers that the petitioners have not provided elements that would make it possible to determine, *prima facie*, that Article 3 (right to juridical personality) was violated.

VIII. DECISION

1. Declare this petition admissible with regard to Articles 5, 8, 11, 17, 24, and 25 of the American Convention.

2. Declare this petition inadmissible with regard to Article 3 of the American Convention.

3. Inform the parties of this decision; proceed with the analysis of the merits; publish this decision; and include it in the annual report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of February 2023. (Signed:) Julissa Mantilla Falcón, President; Stuardo Ralón Orellana (dissenting vote), First Vice President; Margarette May Macaulay, Second Vice President; Esmeralda Arosemena de Troitiño, Joel Hernández García, Roberta Clarke and Carlos Bernal Pulido (dissenting vote), Commissioners.

⁸ The IACHR recalls that it has already resolved petitions in the admissibility stage in which the absence of the figure of marriage in favor of people of the same gender is claimed. In this regard, see: IACHR, Report No. 393/20, Petition 2096-13, Admissibility, Diego Fernando Falconí Trávez and Edmondo Alessio Pezzopane, Ecuador, November 18, 2020; and Report No. 390/20, Petition 946-12, Admissibility, César Antonio Peralta Wetzel et al., Chile, November 23, 2020.

⁹ IACHR, Report 390/20, Petition 946-12, Admissibility, César Antonio Peralta Wetzel et al., Chile, November 23, 2020; and Report 393/20, Petition 2096-13, Admissibility, Diego Fernando Falconí Trávez and Edmondo Alessio Pezzopane, Ecuador, November 18, 2020.