**CONCURRING OPINION OF**

**JUDGE HUMBERTO ANTONIO SIERRA PORTO**

##### INTER-AMERICAN COURT OF HUMAN RIGHTS

**Advisory Opinion OC-24/17**

**OF NOVEMBER 24, 2017**

**REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, And equality and non-discrimination with regard to SAME-SEX COUPLES**

**STATE OBLIGATIONS IN RELATION TO CHANGE OF NAME, GENDER IDENTITY, AND RIGHTS DERIVED FROM A RELATIONSHIP BETWEEN SAME-SEX COUPLES (INTERPRETATION AND SCOPE OF ARTICLES 1(1), 3, 7, 11(2), 13, 17, 18 AND 24, IN RELATION TO ARTICLE 1, OF THE AMERICAN CONVENTION ON HUMAN RIGHTS)**

1. With my usual respect for the decisions of the Court, I submit the following concurring opinion attached to Advisory Opinion – 24/17 (hereinafter “OC-24”) with the intention of presenting in detail the reasons why I voted in favor of operative paragraphs 3 and 5 of the decision. The analysis will be made as follows: A. Introduction; B. The requirement of law (“*reserva de ley*”) in the American Convention; C. The requirement of law and the functions of law in relation to human rights, and D. the Costa Rican case.
2. **INTRODUCTION**
3. The purpose of this opinion is to elaborate on one aspect of a specific point that, although it was touched on by the Court in the text of OC-24, was not developed fully and extensively: this is the bases on which the powers of the Executive branch are founded to regulate human rights by regulations in certain cases. Thus, the main hypothesis of this opinion is to demonstrate that the principle of legality and the guarantee of the requirement of law cannot be used to prevent the full exercise of human rights, because this principle and the consequent guarantee also have limits.
4. In this regard, paragraph 161 of the opinion establishes that: “it can […] be indicated that the procedure for a change of name, amendment of the photograph and rectification of the reference to sex or gender in the records and on the identity documents so that these conform to the self-perceived gender identity does not necessarily have to be regulated by law, because it should consist of a simple procedure to verify the applicant’s intention.” [[1]](#footnote-1)
5. Meanwhile, paragraph 171 of OC-24 determines, with regard to the Costa Rican procedure for changing identity data so that it conforms to the self-perceived gender identity of the applicant, that “[t]he State of Costa Rica, to ensure a more effective protection of human rights, may issue regulations that incorporate these standards into an administrative procedure that it may provide in parallel.”[[2]](#footnote-2)
6. Consequently, the intention of this opinion is to present in detail the reasons why I voted in favor of operative paragraphs 3 and 5 of OC-24 and, in more general terms, to examine the international principle on which the Inter-American Court determined the need for States to introduce – by regulation and in specific circumstances –ways other than the voluntary jurisdiction proceeding in the case of requests to change data in official records and documents based on the self-perceived gender identity. It describes what, in my opinion, is the *ratio decidendi* for the Court’s decision that the Executive branch, or the Administration, as applicable, may issue, in certain circumstances such as those of this case, regulations that ensure the effective observance of human rights.
7. **THE “REQUIREMENT OF LAW” IN THE AMERICAN CONVENTION**
8. I consider that this Advisory Opinion of the Court did not rule clearly and systematically on the circumstances in which a “law” in a formal and substantive sense[[3]](#footnote-3) is required for States to comply with their international obligations. The Opinion adopted by the Court refers to the possibility that the procedure to amend the photograph and rectify the reference to sex or gender in the respective public records does not necessarily need to be regulated by a law, but rather this can be done by a regulation or a decree issued by the Executive branch.
9. During the public hearing held on May 16 and 17, 2017, the delegation from the Office of the Costa Rican Ombudsperson referred to the problem underlying the position of some public institutions that insist on the need to apply the “requirement of law” to allow the exercise of a right such as the right to gender identity. In this regard, this Office indicated that, “in the jurisprudence […] and, in reality, in the discourse, above all, in the Legislative Assembly, there is a tendency to reverse the idea of the principle of the “requirement of law”; in other words, increasingly we see in statements of both the Constitutional Chamber and legislators that a law must be enacted to allow an action, although not necessarily to limit it […]. In the opinion of the Office of the Ombudsperson, under the Civil Registry’s current normative framework, an amendment would not be necessary, but rather simply an interpretation by this Court that permits applying a control of conventionality directly to interpret that there is no restriction to the right to identity that limits the possibility of a name change using administrative channels.”[[4]](#footnote-4)
10. Regarding the “requirement of law,” it should be recalled that, historically, this mechanism was created to distribute the legislative competence between Congress (Parliament) and the Executive (King) at a time when the basis for the State’s legitimacy was the result of the concurrence between the democratic principle and the monarchic principle. Nevertheless, today, the normative status of the Constitution is derived from the democratic principle (whether it be called the sovereignty of the people or national sovereignty), and the basis for the validity and effectiveness of laws in the domestic sphere lies with the will of the people.
11. According to this logic of democratic legitimacy, the main grounds for the fundamental rights and freedoms recognized in the American Convention include the democratic principle and the values inherent in the rule of law. Thus, the Inter-American Court has indicated that “[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.”[[5]](#footnote-5)
12. Nevertheless, I consider it appropriate to recall that the Court has indicated that the mere existence of a democratic regime does not guarantee, *per se*, permanent respect for human rights.[[6]](#footnote-6) In this regard, the Court has asserted that “[t]he democratic legitimacy of specific acts or deeds in a society is limited by the international norms and obligations that protect the human rights recognized in treaties such as the American Convention, so that the existence of a truly democratic regime is determined by both its formal and substantial characteristics.”[[7]](#footnote-7) It is a historical reality that rights, and particularly those of minorities or sectors subject to deeply-rooted discriminatory stereotypes, may be subject to abuse by the parliamentary majorities.
13. The Court also ruled on the “requirement of law” in matters related to fundamental rights in the order on monitoring compliance in the *case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. In the order, the Inter-American Court indicated that the need to regulate the technique of *in vitro* fertilization “should not represent an impediment to the exercise of the human rights to privacy and family life,”[[8]](#footnote-8) because such rights should “have direct legal effects.”[[9]](#footnote-9) On these grounds, added to the fact that the Court did not indicate what specific type of norm should be issued to comply with its judgment,[[10]](#footnote-10) the Court considered that the technique of *in vitro* fertilization “could be carried out and monitored under the laws, technical regulations, medical protocols and health standards or any other applicable type of norm.”[[11]](#footnote-11) This was established to prevent the rights protected by the Court’s judgment becoming illusory.[[12]](#footnote-12) The foregoing was understood to be “without prejudice to the Legislature issuing a subsequent regulation in keeping with the standards indicated in the judgment.”[[13]](#footnote-13)
14. That said, it is undeniable that the Court has been consistent in indicating the “requirement of law” for certain actions of the public authorities, specifically those aimed at limiting basic rights. From its early jurisprudence, this Court has indicated that “[i]n the spirit of the Convention, this principle [of legality] must be understood as one in which general legal norms must be created by the relevant organs pursuant to the procedures established in the Constitutions of each State Party, and one to which all public authorities must strictly adhere. In a democratic society, the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the ‘effective exercise of representative democracy,’ which results in […] the respect for minority participation and the furtherance of the general welfare, *inter alia*”[[14]](#footnote-14) [underlining added].
15. Bearing this in mind, I consider that Article 2 of the Convention[[15]](#footnote-15) is especially relevant to determine whether it is necessary to issue laws in the formal sense so as to respect and ensure the rights recognized in the Convention. Regarding the general obligation to adapt domestic laws to the Convention, on several occasions the Court has asserted that “[u]nder the law of nations, a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken.”[[16]](#footnote-16) In the American Convention this principle is contained in Article 2, which establishes the general obligation of each State Party to adapt its domestic law to the provisions of the Convention in order to ensure the rights recognized therein, which means that the domestic legal measures must be effective (principle of the *effet utile).*[[17]](#footnote-17)
16. In this regard, I consider that the scope of Article 2 cannot be understood as if this provision meant that the fundamental rights and freedoms always require a law or “legislative interpretation.” In my opinion, it would be a reasoning *ad absurdum* to understand that no fundamental or human right could be applied, respected or made effective if there was no legislation. Thus, human rights treaties are typically considered to be self-executing treaties. For example, it would be irrational to consider that, without laws allowing conscientious objection in educational matters, the right to freedom of thought could not be effective.
17. Consequently, the “requirement of law” is not a mechanism that seeks to weaken the effectiveness of international human rights treaties and cannot be used as a mechanism to suspend their effectiveness. To the contrary, the American Convention calls for an integral reading and States must ensure its practical effects on this basis.
18. In this regard, it is pertinent to recall that, since the landmark judgment in the case of *Velásquez Rodríguez v. Honduras*, the Court has considered that the obligation to ensure rights entails “the duty of the States Parties to organize the government apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”[[18]](#footnote-18)
19. That said, the doctrine of the control of conventionality developed by the Court means that not only the enactment or elimination of provisions under domestic law ensures the rights contained in the American Convention in keeping with the obligation included in Article 2 of this instrument. It also requires the development of state practices leading to the effective observance of the rights and freedoms that the Convention embodies. Consequently, the existence of a norm does not guarantee, *per se*, that its application is satisfactory. It is also necessary that the application of the laws or their interpretation, as judicial practice and a manifestation of state public order, is adapted to the purpose sought by Article 2 of the Convention.[[19]](#footnote-19)
20. This means that the Convention – and the rights recognized therein – have direct legal effects, which supposes or signifies that all judicial agents have a direct application mandate and, in general, this does not require *interpositio legislatoris*, legislative interpretation.
21. Consequently, in my opinion, it is necessary to weigh the requirements of legality against the categorical imperative of the validity and effectiveness of human rights and against the direct effects of the international treaties that recognize and protect them. The only restrictions or limitations that are permitted, as noted above, are those that require the intervention of the people’s representatives through the State legislature. However, this does not mean that laws, in the formal or substantive sense, are always required to make human rights effective or to ensure their respect and guarantee. Indeed, it would be erroneous to consider that the regulation of a right is the same as its restriction or limitation. As indicated, the guarantee of the “requirement of law” seeks to create a system of checks and balances that calls for greater democratic legitimacy when restricting the exercise of a right, but it is not viable to require this same standard when the purpose is to guarantee a specific right, especially when the intention is to protect those who face numerous inequalities.
22. **THE “REQUIREMENT OF LAW” AND THE FUNCTION OF LAW IN RELATION TO HUMAN RIGHTS**
23. Based on the considerations in the preceding section, even though the importance of the guarantee of the “requirement of law” has been emphasized as a safeguard and a limitation to the restriction by the State of the rights contained in the Convention, it was also noted that this same “requirement of law” cannot be used as a mechanism to obstruct real compliance with the fundamental rights or to suspend the full force of human rights. Neither the “requirement of law,” nor the principle of legality, nor the will of parliamentary majorities can be used to nullify human rights; such mechanisms cannot diminish the effectiveness of the rights, and they cannot be used as grounds to oppress certain sectors of society.
24. A recurring argument used to consider that the “requirement of law” is a mechanism that always requires *interpositio legislatoris* for the application and enjoyment of human rights, consists in understanding that the “requirement of law” is a mechanism to establish the content of the essential core of fundamental or human rights (as appropriate in the domestic or the international sphere). That is, we can only determine the intangible content of human rights if the legislator defines this in a law. This argument seeks to make the law a requirement *sine qua non* for the effective enjoyment of the right. This way of understanding the validity of treaty-based rights and, possibly, fundamental constitutional rights (when these coincide, I insist) is based on understanding that in order to regulate a right a “formal” law must be produced; that is, a law enacted by the Legislature. This argument is erroneous, among other reasons, because the very concept of the core or essential content means that the law cannot nullify or modify it.[[20]](#footnote-20)
25. The starting point for the need to use the “requirement of law” is that, although *prima facie* it is necessary – in certain circumstances, *interpositio legislatoris* is a treaty-based requirement – it may be desirable but not essential for the effective enjoyment of the human rights recognized in the Convention.
26. The distinction between the two scenarios in which the principle of the “requirement of law” would or would not be applicable can be evaluated and analyzed by approaching the problem of the “requirement of law” in the case of fundamental rights from the perspective of the role played by the law in relation to those rights.
27. Thus, in general, it could be understood that, essentially, the law has three functions in relation to the fundamental human rights: (i) it systematizes them within the legal system by weighing and harmonizing them; (ii) it establishes or defines human rights, and (iii) it updates the content of human rights.
28. Regarding the first function, that of systematizing human rights within the legal system by weighing and harmonizing them, it should be recalled that human rights permeate the whole legal system. Accordingly, all laws are directly or indirectly related to them, either by establishing limits, conditions or assumptions for their exercise, or by defining precedence *prima facie* when there is a conflict between human rights or between these rights and other internationally protected rights.
29. However, when the right and its essential content is clearly described in the American Convention on Human Rights, or eventually in domestic law (for example, in the Constitution), the existence of laws to weigh or harmonize them is not essential (although always desirable). In this situation, in specific cases, the legal protection provided by domestic law may be sufficient. For example, the foregoing could be implemented by the effective protection of these rights by either ordinary mechanisms or special mechanisms such as the *amparo* proceeding or the remedy for protection of constitutional rights. Consequently, the laws that weigh rights may not be necessary, despite their importance and validity. The need to weigh and harmonize rights that could conflict does not negate the validity of rights that are worded clearly. The requirement of weighing rights is a concept that is not opposed to the effective validity of the treaty-based rights.
30. Based on the above and bearing in mind the *pro persona* principle, it can be understood that laws to weigh rights do not constitute a requirement *sine qua non* for the validity or the protection of various human rights, such as the right to life and to dignity. Indeed, the *pro persona* principle contained in Article 29 of the American Convention stipulates that no provision of this Convention shall be interpreted as: “(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party […].”[[21]](#footnote-21) A correct interpretation, *favor libertatis,* does not understand that the “requirement of law” is a prerequisite for the effective exercise or enjoyment of the right to life or, in this case, to a name and to recognition of juridical personality.
31. With regard to the second function, which relates to establishing or defining human rights, it is understood that, as a general rule, legal definitions of fundamental rights contained in the Convention and in the Constitutions of the States are extremely abstract and general, so that it is for the interpreters – in particular, the legislators – to establish the scope of these rights as well as their sphere of application, and to indicate their boundaries and their internal limits. Therefore, under this function, according to which implementing legislation is required when the right is “merely expressed,” the sphere of the “requirement of law” becomes pertinent when the wording of the right is vague or ambiguous so that it does not permit, with acceptable levels of objectivity, the application and/or respect for the right in specific cases. Consequently, if clarification of the content of human rights is sought, the enactment of a formal law is necessary and the “requirement of law” arises.
32. In this regard, it should be clarified that not all provisions that define the sphere of conduct protected by a human right should be covered by a formal and substantive law, because this would suppose an impossible burden for the legislator who would be required to define, in abstract, all the possible manifestations of the fundamental right regulated. Furthermore, it would entail the risk that those conducts that were part of the sphere of protection of the right and had not been explicitly included would not be protected by the domestic mechanisms for the defense of human rights.
33. The third role that the law plays is that of updating the content of human rights. Indeed, the legal system should evolve in parallel to society and cannot ignore the changes in society, at the risk of becoming ineffective. Thus, in the case of human rights, the law must maintain in effect the scope of the rights and freedoms recognized by the Convention and by domestic law. Thus, the law must regulate new ways of exercising human rights, closely linked to technological progress and developments. Like the function of establishing rights, the laws that update rights, indicate meanings, scopes and contents that the law did not foresee or that simply did not exist when the right was established. One example of this would be the scope of freedom of expression and *habeas data*, which could not be imagined 50 or 100 years ago. However, it cannot be supposed that updating the scope of the provisions occurs exclusively through the enactment of new laws, because the Legislature usually does not have the capacity to respond promptly to the new needs; thus, in many cases, this evolution is implemented by the organs with competence to interpret human rights treaties or the Constitutions of the States.
34. In conclusion, the direct judicial effectiveness, the normative effects of the rights established in the American Convention, is compatible with the existence of the “requirement of law” when this is necessary or appropriate in accordance with the functions of the definition, harmonization or updating of rights. However, in the absence of a law, the exercise of the treaty-based rights and the obligation to ensure their effective enjoyment allows judges to take a decision that protects those whose rights have been violated. Furthermore, in situations in which the requirements of defining, weighing or harmonizing rights are not essential for determining the obligations derived from the treaty-based right, in addition to judicial protection, the right may be protected by regulation – or rather there is obligation to protect it in this way.
35. **THE CASE OF COSTA RICA**
36. Regarding the specific situation referred to in the questions raised by Costa Rica in the request for an advisory opinion concerning the regulation of the procedure to amend the data in the official records and document to conform to the self-perceived gender identity, it can be seen that the rights to a name and to recognition of juridical personality are established in the American Convention.[[22]](#footnote-22) Furthermore, the recent case law of the Inter-American Court has clearly established that the right to identity is a right protected by the American Convention even though it is not expressly established among the treaty provisions.[[23]](#footnote-23)
37. Consequently, regarding the hypotheses for the name change procedure based on gender identity, there can be no doubt about the right in question or how it is expressed. Accordingly, in the situation described in OC-24 regarding the judicial nature of the procedure, its regulation in order to give effect to an individual’s gender identity does not constitute a law of “implementation” in the sense that the provision regulating the procedure must comply with the functions of defining or updating a right. Moreover, the situation does not necessarily entail a weighing or harmonizing function, because the procedure for recognition of gender identity does not refer, nor should it refer to a disputed issue, to a learning process, to the settlement of a dispute, or to the determination of rights.
38. To the contrary, as indicated in this Advisory Opinion, it is a procedure that should be merely declarative and “may never become an occasion for external scrutiny and validation of the sexual and gender identity of the person requesting its recognition.”[[24]](#footnote-24) Indeed, it has been established that “any decision concerning a request for amendment or rectification based on gender identity should not be able to assign rights, it may only be of a declarative nature because it should merely verify whether the applicant has met the requirements related to the request.”[[25]](#footnote-25)
39. Therefore, the position maintained in this opinion and, in my understanding, in the Advisory Opinion, is that the nature of the provision that regulates the procedure for recognition of the self-perceived gender identity corresponds to those provisions that constitute or define human rights that are clearly described in the American Convention (the rights to a name and to recognition of juridical personality – Articles 18 and 3 of the American Convention) or in the case law of the Inter-American Court (right to identity). Thus, taking into account that this type of regulation regarding the path for recognition of the right to a change of name does not necessarily need to be included in a law, although it should be included in a general legal norm (*supra* para. 27), this type of procedure can be regulated by administrative regulations or decrees issued by a State’s Executive branch.[[26]](#footnote-26)
40. **CONCLUSION**
41. Based on the above, I consider that I have explained in greater detail the reasons why I have agreed with the position of the Inter-American Court in this matter. This is an extremely important issue for the effective enjoyment of human rights, not only in Costa Rica, but also in other countries of the region where a restrictive interpretation of the guarantee of the “requirement of law” has prevented or paralyzed the regulation of such rights. For example, in some States of the region this same argument has been used to obstruct the regulation of two issues on which it is urgent to have clarity regarding their application; these are access to abortion in the three situations in which it is permitted, and the type of procedures required to be able to apply euthanasia legally. Thus, I hope that this opinion contributes to convincing States to consider that the guarantee of the “requirement of law” cannot be used as an obstacle to the development of rights and, particularly, to compliance with the obligations of international law that they assume on ratifying human rights treaties such as the American Convention.

 Humberto A. Sierra Porto

 Judge

 Pablo Saavedra Alessandri

 Secretary

1. OC-24, para. 161. [↑](#footnote-ref-1)
2. OC-24, para. 171. [↑](#footnote-ref-2)
3. See, in this regard, The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 26, 27 and 32. [↑](#footnote-ref-3)
4. *Cf.* Public hearing of May 16, 2017, intervention of the Office of the Costa Rican Ombudsperson. [↑](#footnote-ref-4)
5. *Habeas corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26. [↑](#footnote-ref-5)
6. *Cf.* *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 239. [↑](#footnote-ref-6)
7. *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 239. [↑](#footnote-ref-7)
8. *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36. [↑](#footnote-ref-8)
9. *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36. [↑](#footnote-ref-9)
10. *Cf.* *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 35. [↑](#footnote-ref-10)
11. *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36. [↑](#footnote-ref-11)
12. *Cf.* *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36. [↑](#footnote-ref-12)
13. *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36. [↑](#footnote-ref-13)
14. The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 32. [↑](#footnote-ref-14)
15. Article 2. Domestic Legal Effects: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms. [↑](#footnote-ref-15)
16. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 68; and *Case of Heliodoro Portugal v. Panama*. P*reliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 179. [↑](#footnote-ref-16)
17. *Cf.* *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 288. [↑](#footnote-ref-17)
18. *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 166. [↑](#footnote-ref-18)
19. *Cf.* *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 338. [↑](#footnote-ref-19)
20. The problem of when it should be understood that the “requirement of law” is necessary, and also the limits and purpose of this mechanism have been the subject of debates in Colombian constitutional jurisprudence owing to the sphere of competence of the statutory law to regulate fundamental rights (art. 152(a)). The main criterion traditionally employed by the Colombian Constitutional Court consists in using the concept of “essential content” as a criterion to determine the need to enact laws. Some aspects of this discussion can be seen in my separate opinion to the Judgment of the Constitutional Court of Colombia C-662 of 2009 on the President’s objections to the draft Sandra Ceballos Act establishing actions for the comprehensive treatment of cancer in Colombia. [↑](#footnote-ref-20)
21. American Convention on Human Rights, Article 29. [↑](#footnote-ref-21)
22. American Convention on Human Rights, Article 3. Right to Recognition of Juridical Personality. Every person has the right to recognition as a person before the law. Article 18. Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary. [↑](#footnote-ref-22)
23. *Cf.* *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 122; *Case of Fornerón and daughter v. Argentina*. Merits, reparations and costs. Judgment of April 27, 2012. Series C No. 242, para. 123, and *Case of Rochac Hernández et al. v. El Salvador*. Merits, reparations and costs. Judgment of October 14, 2014. Series C No. 285, para. 116. Also, OC-24, para. 90: “[… r]egarding the right to identity, the Court has indicated that, in general, it may be conceived as the series of attributes and characteristics that individualize a person in society and that encompass several rights according to the subject of rights in question and the circumstances of the case. The right to identity may be affected by numerous situations or contexts that may occur from childhood to adulthood. Although the American Convention does not specifically refer to the right to identity under this name, it does include other rights that are its components. Thus, the Court recalls that the American Convention protects such elements as rights in themselves; however, not all these elements will necessarily be involved in all cases that concern the right to identity. Moreover, the right to identity cannot be confused with, or reduced or subordinated to one of the rights that it includes, nor to the sum of them. For example, a name forms part of the right to identity, but it is not the only component. In addition, this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention).” [↑](#footnote-ref-23)
24. OC-24, para. 158. [↑](#footnote-ref-24)
25. OC-24, para. 160. [↑](#footnote-ref-25)
26. *Cf.* OC-24, paras. 161 and 171. [↑](#footnote-ref-26)