

Advisory Opinion Requested by Costa Rica on 18 May 2016 Observations

Never Stand Still

Law

Sydney, 29 November 2016

To: Judge Roberto F Caldas
President
Inter-American Court of Human Rights
Avenida 10, Calles 45 y 47, Los Yoses, San Pedro, San José, Costa Rica

Re: Observations with respect to the Advisory Opinion Requested by Costa Rica

Dear Judge Caldas,

We hereby submit observations with respect to the Advisory Opinion requested by Costa Rica on 18 May 2016. More specifically, we make observations with respect to questions 1 and 3, in addition to preliminary considerations on consensus interpretation by the Inter-American Court.

We hope you find these observations useful in the work the Court has ahead of itself. Should you wish to discuss any of those points further, please do not hesitate to contact us.

Sincerely,



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[enclosed]

Observations to the Inter-American Court of Human Rights on the Advisory Opinion Requested by Costa Rica on 18 May 2016

The main purpose of the advisory opinion requested by Costa Rica is to consolidate the understanding of the Inter-American Court of Human Rights (“the Court” or “IACtHR”) with respect to the status and rights of LGBTI persons, and whether juridical persons can fall under that category and claim rights under the American Convention on Human Rights (“the American Convention” or “ACHR”). In this respect, three different questions were posed to the Court, as follows:

1. The protection given by Articles 11.2, 18 and 24 in conjunction with Article 1 of the ACHR to the recognition of name changes of persons, in accordance with their gender identity;
2. The compatibility of the practice in the application of Article 54 of the Civil Code of the Republic of Costa Rica, Law 63 of 28 September 1887, to persons who wish to change their name by virtue of their gender identity, with Articles 11.2, 18 and 24 in conjunction with Article 1 of the Convention; and
3. The protection given by Articles 11.2 and 24 in conjunction with Article 1 of the ACHR to the recognition of property rights flowing from a bond between persons of the same sex.

In what follows, we will address the first and third questions posed by the government of Costa Rica. Before directly answering those questions, though, we think it is worthwhile to make some general comments on the interpretation of the American Convention on matters of social controversy across the Americas, such as this one.

Preliminary Observations: The Interpretation of the American Convention in Matters of Social Controversy

The General Approach to the Interpretation of the Convention (Article 29 ACHR)

This article of the Convention is not cited in the request for an advisory opinion. However, we believe that the Court should consider it, in the exercise of its competences under the principle of *iura novit curia*. Consideration of this provision is essential, we believe, because it orients the interpretation of the entirety of the Convention.

Although not cited in the decisions regarding the rights of transgender persons, article 29 of the Convention provides support for the Court’s current approach. Article 29 (also known as the ‘*pro homine*’ principle) is the Convention’s ‘in built’ mechanism for ensuring the Convention is interpreted

in a manner which protects human rights. The Convention thus chooses to favour a beneficial interpretation over the plain and ordinary meaning of the text.¹

When the Court found that sexual orientation and gender identity were categories protected by Article 1(1) of the Convention, it took a *pro homine* approach:

human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolving interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.²

The Court should therefore employ article 29 of the Convention in considering whether the Convention grants protection as regards recognition of a change in a person's name based on their gender identity.

Interpretation of the American Convention in Socially Controversial Matters

In matters of social controversy, a number of interpretive tools is used, most notably the notion of "consensus interpretation", first developed by the European Court of Human Rights (ECtHR). The idea of regional consensus as a treaty interpretation tool has been explored in the European context as a means to articulate the ECtHR's balancing of subsidiarity and the expansionist tendencies of interpreting an ever-evolving instrument.³ But the evolutive interpretation of the European Convention (ECHR) through consensus is one that almost seeks States Parties' "pre-approval" of the standard, before the ECtHR intervenes. The role of European consensus, as far as the ECtHR is concerned, seems to be also to maintain a certain degree of unity in the region, and finding common denominators in domestic human rights practice. In doing so, consensus interpretation enhances the legitimacy of the ECtHR.⁴

¹ See Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) *European Journal of International Law*, 585.

² *Atala Riffo and daughters v Chile* (Merits, Reparations and Costs) (Judgment, IACtHR, 24 February 2012) [83] (citations omitted) ('*Riffo and daughters*').

³ Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) [hereinafter Dzehtsiarou, *European Consensus and the Legitimacy*], 129. As he put it: "European consensus operates on the edge of the margin of appreciation and evolutive interpretation; both of these are necessary to maintain the stability of the Strasbourg system, with the former preventing the ECtHR from going too far in developing human rights standards and the latter ensuring that the ECtHR does not turn into a meaningless instrument preserving views from 60 years ago when the Convention was drafted, signed and ratified by the original Contracting Parties."

⁴ Dzehtsiarou, *European Consensus and the Legitimacy*, cit., at 1.

There are five key categories of consensus interpretation, in the ECtHR jurisprudence: (1) consensus among States Parties of the Council of Europe; (2) international consensus identified by international treaties; (3) internal consensus within a State; (4) expert consensus; and (5) consensus among ECtHR judges.⁵ *Tyrer v United Kingdom* is the case that started the use of consensus as a means for evolutive interpretation.⁶ In this case, corporal punishment of a minor was seen as no longer acceptable by the majority of States Parties to the ECHR, and that triggered an evolution of the standard for Article 3 of the ECHR (on cruel and degrading punishment).

What follows discusses the uses of consensus interpretation methods by the Inter-American Court (the Court or IACtHR) according to the different types of consensus, using Dzehtsiarou's two first categories, outlined above (consensus using international law and consensus using comparative law).

Consensus via International Law

The use of international law as a means to build consensus is perhaps the more common way in which the IACtHR engages with this method. Consensus is often based on reliance on other international treaties.⁷ This reliance helps clarify the scope of the treaty the human rights court is in charge of overseeing, and it also helps signal towards regional public opinion with respect to an issue. It is used by the IACtHR often in isolation, but increasingly also in conjunction with domestic law of States Parties. For instance, in *Kawas Fernández*, the IACtHR used a combination of non-Inter-American treaties, domestic law of States Parties, and even an Inter-American treaty to establish competence over environmental matters.⁸

The IACtHR often uses other treaties and what it calls the "*corpus juris* of international human rights law."⁹ Those are in addition to the Inter-American treaties beyond the ACHR that give specific competence to the IACtHR for its application.¹⁰ But, as I have discussed elsewhere,¹¹ the IACtHR tends to use only treaties to which the State in question was a party, aligning with the requirements of the Vienna Convention on the Law of Treaties (Article 31.3.c).

The IACtHR has systematically invoked treaties outside of the Inter-American System as a means to expand its jurisdiction, using Article 29 of the ACHR as a catapult for expanding its mandate. But there is some variation in the ways in which this will happen. In more politically delicate contexts, such

⁵ Ibid.

⁶ Dzehtsiarou, *European Consensus and the Legitimacy*, cit., at 139.

⁷ Dzehtsiarou, *European Consensus and the Legitimacy*, cit., at 46-47.

⁸ I/A Court H.R., Case of *Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 148.

⁹ Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2nd ed 2013), 13.

¹⁰ Pasqualucci, cit., 122-125.

¹¹ Lixinski, cit.

as indigenous rights and economic, social and cultural rights, municipal law (or internalized international treaties) seems to play a larger role in interpreting the American Convention. In other areas, such as International Humanitarian Law, the Court has more easily referred to other international treaties as interpretive aids, but it has also shown some reluctance in invoking international criminal law, using it only as part of the “factual matrix” of the case, rather than directly affecting the interpretation of provisions of the ACHR.¹²

The *Yean and Bosico Girls* case,¹³ involving the denial of nationality to two women of Haitian descent born in the Dominican Republic, is particularly relevant to thinking about the boundaries of this use of external treaties. In it, the court considered the status of a treaty to which the Dominican Republic was not a party, and whether it could influence the judgment.¹⁴

In *Yean and Bosico*, the IACtHR engaged with a treaty which the State had signed, but not ratified. The treaty in question is the Convention on the Reduction of Statelessness, which was signed by the Dominican Republic on December 5, 1961, and had been in force since December 13, 1975.¹⁵ In addition, the treaty had by then only been ratified by 26 States, certainly not a particularly representative share of the international community, sufficient to prove a consensus. Nevertheless, and without mentioning the principle of good faith with respect to treaties that have not entered into force for a State,¹⁶ the IACtHR added the treaty to the list of norms that needed to be contextually considered in deciding the scope of obligations under the ACHR. In a Separate Opinion in that case, Judge Cançado Trindade went even further: he examined the Convention on the Reduction of Statelessness, alongside the Convention relating to the Status of Stateless Persons (1954), and the European Convention on Nationality (1997) to make a claim for a general principle of international law to prevent statelessness.¹⁷

The IACtHR could use consensus to identify regional custom in the Americas, but it so far refrained from that. If it were to identify regional custom, that would require making a claim for regionalism and specialization in the field of human rights protection that the IACtHR has not often done itself, rather opting to selectively rely on ECtHR case law (as well as the findings of UN Treaty Bodies) to develop their own jurisprudence. It would seem that relying on regional custom could in theory enhance the legitimacy of the Inter-American system, at least inasmuch as it would clearly ground the IACtHR in the Americas.

¹² Lixinski, cit.

¹³ I/A Court H.R., Case of the Girls Yean and Bosico v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130.

¹⁴ Id., at para. 143.

¹⁵ *Yean and Bosico*, cit., para. 143.

¹⁶ Vienna Convention on the Law of Treaties, Article 18.

¹⁷ *Yean and Bosico*, cit. *Separate Opinion of Judge AA Cançado Trindade*, paras. 8-9.

Consensus via Comparative Law

The use of comparative law (that is, the domestic law of a number of countries) is the principal form of consensus interpretation in the ECtHR. However, while the IACtHR has used comparative law, it has not done so to the same extent. The strict separation between domestic and international that the IACtHR adopts prevents more reliance on domestic law, even if it would have positive legitimacy impacts on the IACtHR.

There are two variations on the use of comparative law as a tool to measure consensus: one, used more often, is to rely only on the domestic law of the States subject to the human rights tribunal's jurisdiction; another one is to look more broadly at domestic law across the world, regardless of whether they are parties to the relevant human rights treaty. While the latter practice can have a positive impact on developing general principles of law as a source of international law, it seems to be less relevant for the purposes of identifying consensus relevant to the interpretation of one specific treaty (and, as discussed in the previous section, the relationship between consensus interpretation and non-treaty sources of international law is only an incidental effect, and not an objective). That said, the IACtHR has referred to both types of comparative law use.

Consensus interpretation based on domestic law (as a proxy to domestic attitudes) is often used with respect to morally sensitive issues, such as the ECtHR's case law on LGBTI rights.¹⁸ The same can be said with respect to the IACtHR. *Atala Riffo*¹⁹ is the first case of the IACtHR dealing with LGBTI rights. The case revolves around the rights of Karen Atala Riffo and her daughters, in the context of custody and administrative proceedings. Ms Atala is a lesbian in a committed relationship, who had children from a previous (heterosexual) union. The case concerns the alleged international responsibility of the State for discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation, connected to proceedings resulting in the loss of custody of her three daughters.²⁰

The IACtHR asserted its role as a subsidiary jurisdiction, as a means to assert it would not re-scrutinize the findings of domestic jurisdictions on the facts or evidence. It restricted its mandate to compliance with international human rights norms.²¹ Subsidiarity also meant the IACtHR would not make a finding with respect to custody.²²

In determining whether the IACtHR could include sexual orientation among the grounds upon which discrimination is prohibited, the IACtHR said that:

¹⁸ Dzehtsiarou, *European Consensus and the Legitimacy*, cit., at 34.

¹⁹ I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239.

²⁰ Atala Riffo, cit., para. 3.

²¹ Atala Riffo, cit., para. 65.

²² Id., para. 66.

83. The Court has established, as has the European Human Rights Court, that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolving interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties. [footnotes omitted]²³

But the IACtHR immediately followed that with the *pro homine* principle, in saying that:

84. In this regard, when interpreting the words “any other social condition” of Article 1(1) of the Convention, it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being.²⁴

Therefore, in this case, evolutionary and teleological interpretations seem to come hand in hand. With respect to Latin American consensus, the IACtHR said that

92. With regard to the State’s argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.²⁵

Therefore, if the separation of domestic and international was used to promote subsidiarity and deference to domestic law early in the judgment, here the same separation is used to promote the authority of the international court.

Consensus interpretation was also invoked by a partially dissenting judge in *Atala Riffo*. Judge Alberto Pérez Pérez used constitutional provisions of thirteen Latin American countries to suggest that consensus had not emerged as to whether a same-sex couple and the children of one of them could be considered a “family”. He clearly tied the evolutionary interpretation of the ACHR to the need for a

²³ Atala Riffo, cit., para. 83.

²⁴ Id., para. 84.

²⁵ Id., para. 92.

consensus to be established, asserting that, while consensus could be found to support the idea that discrimination based on sexual orientation violates human rights, the same could not be said about same-sex couples constituting families in Latin America.²⁶ It is somewhat telling that the IACtHR seems to have ignored what by all effects is an orthodox application of the consensus method, in favor of a more progressive interpretation of the ACHR with respect to Article 17 (family protection), and still used a version of consensus interpretation with respect to the grounds for discrimination (Article 1(1)). A selective approach to consensus interpretation seems to have been adopted by the IACtHR, meaning that only consensus interpretation that supports a more progressive view of human rights will be ultimately deployed by the IACtHR.

Consensus was even more central in *Artavia Murillo*.²⁷ In this case, the IACtHR considered a prohibition of the practice of *in vitro* fertilization (hereinafter “IVF”) in Costa Rica, in the aftermath of a ruling of the Constitutional Chamber of the Costa Rican Supreme Court of Justice (hereinafter “Constitutional Chamber”). The IACtHR considered whether the prohibition amounted to an arbitrary interference in the right to private life and the right to found a family, the right to equality and the disproportionate impact of the ban on women and women’s rights.²⁸ The IACtHR used evolutionary interpretation (and consensus as a key component of it) particularly bearing in mind that IVF is a procedure that did not exist when the ACHR was drafted, and used it in respect to two issues: “(i) the pertinent developments in international and comparative law concerning the specific legal status of the embryo, and (ii) the regulations and practice of comparative law in relation to IVF.”²⁹

With respect to the latter, the IACtHR said that:

256. The Court considers that, even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understood as a person.³⁰

²⁶ Atala Riffo, cit. *Partially Dissenting Opinion of Judge Alverto Pérez Pérez*, paras. 19-23.

²⁷ I/A Court H.R., Case of *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257.

²⁸ *Artavia Murillo*, cit., para. 2.

²⁹ *Id.*, para. 246.

³⁰ *Id.*, para. 256.

In making this assessment, the IACtHR also relied on rules of the Vienna Convention on the Law of Treaties, particularly in articulating “generalized practice” as meaning subsequent practice under the ACHR. Therefore, it used consensus to rule out the argument that the prohibition of IVF could be justified to protect the right to life of the embryo.³¹ The IACtHR concluded that an embryo is not entitled to the right to life until it is implanted in the uterus, when it becomes a fetus.³² The IACtHR used multiple methods of interpretation, among which consensus was one of them, and it decided that they all led to a similar conclusion on the matter.

Reliance on comparative law can be useful in examinations of proportionality, which is an important element in tension with the Margin of Appreciation doctrine (at least inasmuch as they both act as defenses for the state). Resort to the law of multiple states helps legitimize choices inasmuch as it testifies to the success of a particular model.³³

The mechanism of seeking consensus through looking at the domestic law of states parties has been pursued by the IACtHR also in its advisory competence. The advisory competence of the IACtHR was intended to be wide, according to the drafters of the ACHR. They particularly envisioned the possibility of States Parties asking for Advisory Opinions on the compatibility of their domestic laws with the ACHR,³⁴ a type of Advisory Opinion that the IACtHR has rendered on a number of occasions.³⁵ In a way, these opinions have paved the way for the IACtHR to consider comparative domestic law as an avenue of interpretation.

But it was only in a recent Advisory Opinion that the IACtHR tackled the matter of consensus interpretation. In the Advisory Opinion on whether legal entities are holders of human rights under the ACHR,³⁶ the IACtHR noted that consensus could be a means to verify whether corporations are

³¹ Ibid.

³² Id., para. 264.

³³ Rosalind Dixon, ‘Proportionality & Comparative Constitutional Practice’, 5 (manuscript on file, cited with permission).

³⁴ Pasqualucci, cit., 39.

³⁵ I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4; I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5; I/A Court H.R., 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; I/A Court H.R., Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/85 of August 29, 1986. Series A No. 7; I/A Court H.R., Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights. Advisory Opinion OC-12/91 of December 6, 1991. Series A No.12; and I/A Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No.14.

³⁶ I/A Court H.R., Entitlement of legal entities to hold rights under the inter-american human rights system (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and

entitled to human rights. Even though it ultimately concluded that extending human rights to corporations fell outside the text of the ACHR, it engaged with the idea that evolutionary interpretation gives particular relevance to comparative law.³⁷

The IACtHR recognized that all States Parties to the ACHR which have accepted the jurisdiction of the court directly granted human rights to legal entities, but that there were some differences among States Parties with respect to which rights were granted to legal entities, and which legal entities were entitled to human rights.³⁸ But the IACtHR noted that a number of these countries said that ultimately the ACHR did not support conferring human rights to legal entities, in spite of their domestic law positions. Specifically, the IACtHR said that differences in approach among States Parties, and the fact that the domestic law was not seen as being pursuant to implementing the ACHR, made it so that consensus was not a determining factor in the interpretation of the ACHR in this respect.³⁹

Therefore, the IACtHR's use of domestic law seems to be more restricted to issues not squarely within the ACHR, whereas international treaties are used in these contexts, and also more generally to support the IACtHR's reasoning. Likewise, we suggest that the domestic law of States Parties to the ACHR is of limited relevance, at least inasmuch as the Court is to keep its leadership role in setting higher human rights standards across the continent.

Question 1

What is the protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the Convention as regards recognition of a change in a person's name based on his or her gender identity?

1.1 Right to Privacy (Article 11(2) ACHR)

Article 11(2) of the ACHR prescribes:

No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

To answer this question, one must look to other human rights systems because the Inter-American system has no jurisprudence on the matter. In the context of this question, ECtHR and HRCttee

62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador). Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22.

³⁷ OC-22/16, cit., para. 63.

³⁸ Id., para. 64.

³⁹ Id., para. 66-67.

practice has focused on the right to privacy (Article 11(2) ACHR), rather than the right to equal protection without discrimination (Article 24). The ECHR does not contain the right to a name (Article 18 ACHR), while the right to a name in the ICCPR pertains to children and has not been examined in the context of gender identity. However, the ECHR and the ICCPR seem to provide protection as regards recognition of name change based on gender identity. The existence of Article 18 only reinforces the right to a change of name, as it must be interpreted jointly with Article 11(2).

We recommend looking to other systems for guidance without advocating complete replication. Rather, it is important to keep in mind that interpretational differences between ‘norms that are prima facie similar or identical in their normative content’,⁴⁰ such as the right to privacy, may ‘generat[e] conflict between norms’⁴¹ and ‘create legitimacy deficits’.⁴²

1.1.1 The European system (Articles 8(1) and (2) ECHR)

Articles 8(1) and (2) of the ECHR provide:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The concept of ‘private life’ is not defined exhaustively in the European system;⁴³ the concept includes ‘a person’s physical and psychological integrity’ and ‘aspects of an individual’s physical and social

⁴⁰ Tomer Broude and Yuval Shany, ‘The International Law and Policy of Multi-Sourced Equivalent Norms’ in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011), 1–15, 11–12, quoted by Lucas Lixinski, ‘Comparative International Human Rights Law: An Analysis of the Right to Private and Family Life across Human Rights “Jurisdictions”’ (2014) 32(2) *Nordic Journal of Human Rights* 99, 101.

⁴¹ Lucas Lixinski, ‘Comparative International Human Rights Law: An Analysis of the Right to Private and Family Life across Human Rights “Jurisdictions”’ (2014) 32(2) *Nordic Journal of Human Rights* 99, 101.

⁴² Claire Charters, ‘Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples’ Rights under International Law’ in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011) 289, cited by Lixinski, above n 41, 101.

⁴³ *Y.Y. v. Turkey* [2015] Eur Court HR (volume composition for 2015 case law yet to be determined) [56] (case on domestic refusal to authorise gender reassignment surgery) (Y.Y.).

identity'.⁴⁴ 'Elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention'.⁴⁵

The right to respect for private life was first discussed in the context of gender recognition in a series of cases against the United Kingdom, where the ECtHR found that the government's lack of gender recognition did not violate article 8. In the first case of *Rees v. the United Kingdom*, the ECtHR found that state refusal to alter the birth register did not constitute an interference with the right to respect for private life, and that states generally did not have a positive obligation to make such alteration. Further, the nature of the English civil status system meant that allowing alterations to recognise gender reassignment would have onerous consequences in administration, and in other areas of law.⁴⁶ This finding was followed in subsequent cases against the United Kingdom.⁴⁷

The ECtHR's first finding of a violation in this context was in the case of *B. v. France*,⁴⁸ while the case of *Christine Goodwin v. the United Kingdom*⁴⁹ was the ECtHR's first finding of a violation in this context by the United Kingdom. These two cases continue to be foundational in cases involving gender recognition, and both cases consider name changes.

In *B. v. France*, the ECtHR diverged from its findings in the British cases on gender recognition. The applicant was a post-operative transgender woman. The state refused to amend the civil status register or the applicant's official identity documents to recognise her gender or her name. The applicant argued that this resulted in forced disclosure of personal information, and employment discrimination.⁵⁰ The state argued that evolving laws on gender recognition among member states did not provide 'identical solutions'.⁵¹

Accepting that there was no consensus among member states on gender recognition, the ECtHR nevertheless found that the state's position on gender recognition, including their refusal to recognise the name change, created 'a situation [for the applicant] which, taken as a whole, is not compatible with the respect due to her private life'.⁵² The ECtHR distinguished the British cases by finding that

⁴⁴ Ibid [56].

⁴⁵ Ibid [56]; *Van Kück v. Germany* [2003] VII Eur Court HR I [69] (case on domestic refusal of applicant's claim of gender reassignment surgery costs from private health insurance company). Both cases cited, inter alia, *Burghartz v. Switzerland* (ECtHR, Chamber, Application No 16213/90, 22 January 1994).

⁴⁶ *Rees v. the United Kingdom* (ECtHR, Court (Plenary), Application No 9532/81, 17 October 1986).

⁴⁷ *Cossey v. the United Kingdom* (ECtHR, Court (Plenary), Application No 10843/84, 27 September 1990); *Sheffield and Horsham v. the United Kingdom* (ECtHR, Court (Grand Chamber), Applications No 22985/83 and 23390/94, 30 July 1998).

⁴⁸ *B. v. France* (ECtHR, Court (Plenary), Application No 13343/87, 25 March 1992).

⁴⁹ *Christine Goodwin v. the United Kingdom* [2002] VI Eur Court HR I ('Christine Goodwin').

⁵⁰ *B.*, [43].

⁵¹ Ibid [47].

⁵² Ibid [63].

alterations of the French civil status system would not have the same onerous consequences that the English equivalent would bear. Thus, the ECtHR held:

... even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual ... ha[d] not been attained, and there [was] thus ... a violation of Article 8⁵³

In *Christine Goodwin*, the state refused to grant the applicant a new National Insurance number to accompany her new name and gender. UK law also prevented the applicant from changing her name and sex on her birth certificate. The applicant argued that these circumstances caused 'discriminatory and humiliating experiences in her everyday life', including forced disclosure and employment discrimination. The state argued that, unlike the applicant in the case of *B. v. France*, the applicant had recourse to existing laws on harassment at work. Further, she was able to obtain her passport and driver's license with her chosen names and sexual identity. The ECtHR placed more weight on other arguments: it attributed less importance to state consensus on gender recognition in light of the margin of appreciation and the individual rights at stake,⁵⁴ and noted that 'problems [from altering the civil status system] are far from insuperable'.⁵⁵ Further, while the state had kept appropriate measures under review regarding gender recognition, no changes or updates were made.⁵⁶

In light of these circumstances, the UK's measures fell outside their margin of appreciation, and the UK was held to have 'failed to comply with a positive obligation to ensure the right of the applicant ... to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment'.⁵⁷ The ECtHR explained its departure from precedent:

since the Convention is ... a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved ... failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement⁵⁸

This exemplifies the aforementioned *pro homine* approach. Further, more generally, the ECtHR declared that:

⁵³ Ibid.

⁵⁴ *Christine Goodwin*, [85].

⁵⁵ Ibid [91].

⁵⁶ Ibid [92].

⁵⁷ Ibid [71].

⁵⁸ Ibid [74].

personal autonomy is an important principle underlying the interpretation of [the] guarantees [of article 8] ... protection is given to the personal sphere of each individual, including the right to establish details of their identity ... In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.⁵⁹

The ECtHR also stressed that:

serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity ... The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.⁶⁰

Subsequent jurisprudence has not considered name changes because member states have generally legislated to recognise such changes. However, broader cases involving gender recognition continue to cite the principle that names 'fall within the personal sphere protected by Article 8'.⁶¹

The ECtHR has signalled that the above criteria and principles were developed in cases involving post-operative transgender persons and must be altered for cases involving pre-operative transgender persons.⁶² This may be addressed in the pending application of *S.V. v. Italy* (application number 55216/08), in which the applicant contests her inability to change her name without gender reassignment surgery.

Therefore, the *Christine Goodwin* judgment indicates the ECtHR approach to state recognition of transgender persons' name changes. Non-recognition of a post-operative transgender person's name change has been considered in conjunction with other circumstances to create a situation inconsistent with the right to respect for private life, beyond states' margin of appreciation.

⁵⁹ Ibid [90].

⁶⁰ Ibid [77].

⁶¹ See, eg, *Van Kück v. Germany* [2003] VII Eur Court HR I [69]; *Y.Y.*, [56].

⁶² *Y.Y.*, [62].

1.1.2 The international system (Article 17 ICCPR)

Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

'[T]he notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone... the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.'⁶³

The freedom from arbitrary or unlawful interference with one's privacy has only been discussed in the context of name changes in one individual communication: *Coeriel and Aurik v. The Netherlands*.⁶⁴ The matter did not concern gender recognition.

In *Coeriel and Aurik*, the authors received approval to change their first names to Hindu names for their religious studies. However, Dutch law did not allow the state to exercise its discretion to change the authors' surnames because Dutch citizens in religious minorities could not change their last names if the desired names bore 'cultural, religious or social connotations'. The state argued that this decision was neither unlawful nor arbitrary because it was pursuant to published domestic legislation and regulations.⁶⁵ The Committee rejected the argument because the notion of arbitrariness in article 17 entails that 'interference provided by law ... should be, in any event, reasonable in the particular circumstances.'⁶⁶

In light of this, the Committee found that there was a violation of article 17 because it found that the legislative reasons for refusing the name change were unreasonable.

⁶³ Human Rights Committee, *Views: Communication No 453/1991*, 52nd sess, UN Doc CCPR/C/52/D/453/1991 (9 December 1994) ('*Coeriel and Aurik v. The Netherlands*') [10.2].

⁶⁴ *Coeriel and Aurik v. The Netherlands*, [10.2].

⁶⁵ *Ibid* [7.2].

⁶⁶ *Ibid* [10.4], quoting Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy)*, U.N. Doc INT/CCPR/GEC/6624 (1988) [4].

While the case of *Coeriel and Aurik* articulates some principles for consideration, there is not enough jurisprudence from the Human Rights Committee to exemplify how that treaty regime would address a change of name on the basis of a person's gender identity.

1.2 Right to a Name (Article 18 ACHR)

Article 18 of the ACHR provides:

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.

To date, the Court's jurisprudence on Article 18 has remained in the context of children. However, the Court has more generally articulated the right to a name 'constitutes a basic and essential element of the identity of each individual, without which he cannot be recognized by society or registered by the State. ... States are obliged ... to protect the right to a name'.⁶⁷

Applying Article 18 to this context of gender recognition, the Convention must be interpreted in line with the *pro homine* principle in line with Article 24 ACHR. Thus, when assessing state measures with regard to name changes on the basis of gender identity, Article 18 should be interpreted in a manner that protects human rights. Taking this approach requires the recognition of the right of individuals to choose their own name, particularly in the event of gender reassignment. A contrary result would violate human dignity.

1.3 Right to Equal Protection (Article 24 ACHR)

Article 24 of the ACHR prescribes:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Articles 1 and 24 of the Convention seek to promote the free and full exercise of the rights and freedoms contained within the Convention, without any discrimination. Thus, any law or legal instrument (including regulations) which legitimises such discrimination is incompatible with the Convention.⁶⁸ The types of discrimination which violate the Convention are not exhaustive or

⁶⁷ *Yean and Bosico Girls v. Dominican Republic* (Judgment, IACtHR, 8 September 2005) [182], [183].

⁶⁸ *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* (IACtHR, Advisory Opinion OC-4/84 19 September 1984) [53].

restrictive; the list provided in article 1(1) is 'merely explanatory'.⁶⁹ The Commission has expressed that the onus lies on the State to demonstrate that the disputed discrimination is a reasonably necessary means to achieving a legitimate end.⁷⁰

'[T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens* ... discriminatory treatment of any person, owing to [the protected categories] ... is unacceptable'.⁷¹ The Court has ruled that sexual orientation and gender identity are categories protected by Article 1(1) of the ACHR.⁷² Thus, discrimination on the basis of gender identity would violate Article 24 in conjunction with Article 1(1) of the ACHR, which is the *jurisprudence constante* of the IACtHR.

In summary, in answer to the question posed:

1. What is the protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the Convention as regards recognition of a change in a person's name based on his or her gender identity?

Answer: Articles 11(2), 18 and 24 of the ACHR must be read as providing protection to a change of name on the basis of a person's gender identity, particularly in light of cases on the matter in other human rights systems.

Question 3

What is the protection given by Articles 11.2 and 24 in conjunction with Article 1 of the ACHR to the recognition of property rights flowing from a bond between persons of the same sex?

3.1 Right to Equal Protection (Article 24 ACHR)

The content of Articles 1 and 24 of the Convention was previously discussed in section 1.1, and we refer to those points for our views on the basic aims of these provisions. For the purposes of this section 3.1, it should be reiterated that sexual orientation is a protected category under Article 1(1) of the

⁶⁹ *Riffo and daughters*, [85].

⁷⁰ *Marcel Granier v Venezuela* (Report No 112/12, Case No 12.828, IACHR, 9 November 2012), [160].

⁷¹ *Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion)* (Advisory Opinion OC-18/03, IACtHR, 17 September 2003) [101]; see also *Ángel Alberto Duque v Colombia (Preliminary Objections, Merits, Reparations and Costs)* (Judgment, IACtHR, 26 February 2016) [91] (only available in Spanish) ('*Duque*').

⁷² *Duque*, [104], [105]; *Riffo and daughters*, [91], [93]. Paragraph 91 of the English text of the *Riffo* judgment does not refer to gender identity as a protected category, but paragraph 91 of the authentic Spanish text does make such reference.

Convention.⁷³ Difference in treatment based on sexual orientation in the form of ‘unequal protection by domestic laws... must be analyzed in light of’ Article 24 ACHR.⁷⁴ Such difference is discriminatory if it does not have an objective or reasonable justification: namely, the difference in treatment must pursue a legitimate purpose and be proportionate to the end sought.⁷⁵

The right to equal protection was first discussed in the context of property rights stemming from same-sex relationships in the case of *Duque*. The applicant was the surviving partner of a same-sex relationship, who was refused a survivor’s pension by Colombian internal regulations. The applicant argued that there was no reasonable or objective justification for the refusal.⁷⁶ The state did not counter that the difference in treatment had such a justification.⁷⁷ Instead, the state argued that recent national constitutional court jurisprudence remedied its previous refusal by enabling the applicant to obtain his survivor’s pension.⁷⁸

Finding a violation of Article 24 ACHR, the Court rejected the state’s arguments because the state’s labour code would limit the period for which the applicant could claim the pension. The Court also accepted that there was no reasonable or objective justification. Since the state did not argue this point, the Court took note of human rights treaty body documents and OAS member state jurisprudence, where the respective bodies found that sexual orientation should not be an obstacle for same-sex partner access to pension benefits.

While the Court did not delve into the state’s justification for the pension refusal, the Commission did in its decision on the merits of the case. The Court’s test of a ‘reasonable and objective’ justification had the criteria of proportionality and a legitimate purpose,⁷⁹ while the Commission also considered criteria of suitability and necessity.⁸⁰ On this note, the Commission found that, while the protection of the family may be a legitimate purpose in abstract, refusing Duque’s pension was not suitable for this purpose. The Commission stated that such a purpose

⁷³ *Duque*, [104], [105]; *Riffo and daughters*, [91], [93]. Paragraph 91 of the English text of the Riffo judgment does not refer to gender identity as a protected category, but paragraph 91 of the authentic Spanish text does make such reference.

⁷⁴ *Atala Riffo* [82]; *Duque* [94].

⁷⁵ *Duque* [106].

⁷⁶ *Duque* [86]–[87].

⁷⁷ *Duque* [107].

⁷⁸ *Duque* [129].

⁷⁹ *Duque* [106].

⁸⁰ IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, [86]; IACHR, Application before the Inter-American Court of Human Rights, Ángel Alberto Duque, 2 April 2014, [74].

assumes a narrow and stereotyped understanding of the concept of family, which arbitrarily excludes diverse forms of families such as those formed by same-sex couples, which are deserving of equal protection under the American Convention.⁸¹

The Court has expressed similar reasoning about the idea of protecting the family in the case of *Atala Riffo*, but in the context of the right to privacy. This will be addressed in the section on the right to privacy.

3.1.1 The international system (Article 26 ICCPR)

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Sexual orientation is a protected category under Article 26 ICCPR.⁸² The Committee's *jurisprudence constante* is that difference in treatment constitutes prohibited discrimination under Article 26 ICCPR if the difference is not 'based on reasonable and objective criteria'.⁸³

The Human Rights Committee first addressed Article 26 ICCPR in the context of same-sex couples' property rights in the communication of *Young v. Australia*.⁸⁴ The author of the communication was in a relationship with a veteran of the same sex. He was thus denied a dependent's pension because legislation required the dependent to be of the opposite sex. It is noteworthy that unmarried heterosexual couples also benefited from the pension, which means the exclusion was solely on the grounds of sexual orientation, and not their unmarried status. The state did not argue or present any evidence that there was reasonable or objective justification for the legal distinction. Thus, a violation of Article 26 ICCPR was found.

In *X v. Colombia*, the state refused to grant the author a survivor's pension after the passing of his partner of the same sex. Heterosexual de facto couples could access the survivor's pension. The state argued that the purpose of the relevant social security legislation was to protect the family, or

⁸¹ IACHR, Application before the Inter-American Court of Human Rights, Ángel Alberto Duque, 2 April 2014, [78].

⁸² *Toonen v. Australia*, cited by *Young v. Australia* [10.4].

⁸³ *Young v. Australia* [10.4].

⁸⁴ *Young v. Australia*, Human Rights Committee Communication No. 941/2000.

‘heterosexual unions, not to undermine other unions or cause them any detriment of harm’.⁸⁵ The Human Rights Committee rejected this argument and found that there was no reasonable and objective justification for the distinction between same-sex partners and unmarried heterosexual partners.⁸⁶ The Human Rights Committee thus found that the state had violated Article 26 ICCPR.

Within its mandate to deliver concluding observations, the Human Rights Committee has also expressed ‘concern’ that LGBT persons face discrimination in their access to housing by virtue of their sexual orientation and/or gender identity.⁸⁷ Particularly, referring to Article 26 ICCPR, the Human Rights Committee called for Japan to ‘remove’ ‘discriminatory provisions that exclude same-sex couples from’ municipal housing services.⁸⁸

Therefore, international human rights jurisprudence on the right to equality and non-discrimination has decidedly move towards affording full protection to property rights stemming from same-sex relationships. In light of the above jurisprudence, Article 24 ACHR, in conjunction with Article 1(1), must be read as protecting property rights stemming from same-sex relationships when such rights are subject to unequal protection by domestic laws.

3.2 Right to Privacy (Article 11(2) ACHR) in relation with Article 1 ACHR

Article 11(2) of the ACHR prescribes:

No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

‘[T]he sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities.’⁸⁹ The sphere is not exhaustively defined, and includes ‘the sex life and the right to establish and develop relationships with other human beings’.⁹⁰ In the context of family, ‘the American Convention does not define a limited concept of family ... [the

⁸⁵ *X v. Colombia* [4.10].

⁸⁶ *X v. Colombia* [7.2].

⁸⁷ *Concluding observations on the sixth periodic report of Japan*, UN Doc CCPR/C/JPN/CO/6 (23 July 2014) [11]; *Concluding observations of the Human Rights Committee: Islamic Republic of Iran*, UN Doc CCPR/C/IRN/CO/3 (29 November 2011) [10].

⁸⁸ *Concluding observations on the sixth periodic report of Japan*, UN Doc CCPR/C/JPN/CO/6 (23 July 2014) [11].

⁸⁹ *Escher* [113]; *Ituango Massacres v. Colombia (Preliminary Objections, Merits, Reparations, and Costs)* (Judgment, IACtHR, 1 July 2006) [194]; *Escué Zapata v. Colombia (Merits, Reparations and Costs)* (Judgment) (2007) IACtHR (ser C no. 165) [95].

⁹⁰ *Atala Riffo*

concept] is not limited only to marriage and must encompass other *de facto* family ties in which the parties live together outside of marriage’.⁹¹ ‘[T]he imposition of a single concept of family’ may constitute arbitrary interference with private life under Article 11(2) ACHR, and interference with the rights of the family under Article 17 ACHR.⁹² Restrictions on the right to privacy ‘must be regulated by the law, pursue a legitimate goal and comply with the requirements of suitability, necessity and proportionality’.⁹³

While the Court did not examine Article 11(2) ACHR in the case of *Duque*, we submit that its reasoning based on that same article in the case of *Atala Riffo* is transferable to this context. In the case of *Atala Riffo*, the applicant alleged that a domestic court decision to deprive her of custody of her daughters was based on her sexual orientation and thus in violation of Article 11 ACHR. The state argued that the court’s decision was based on the daughters’ best interest.

Applying the test, the Court held that, while the children’s best interest may constitute a legitimate purpose (as is required by the Convention on the Rights of the Child), the custody decision

was unsuitable and disproportionate to achieve that purpose, since the domestic courts should have limited themselves to examining parental behaviour ... but without exposing and scrutinizing Ms. Atala’s sexual orientation.⁹⁴

Further, the protection of Article 11(2) ACHR covered the applicant’s family unit.⁹⁵ The Court thus found a violation of Article 11(2) ACHR in conjunction with Article 1(1):

based on a stereotyped vision on the scope of Ms. Atala’s sexual orientation, there was arbitrary interference in her private life, given that sexual orientation is part of a person’s intimacy and is not relevant when examining aspects related to an individual’s suitability as a parent.⁹⁶

Therefore, the Court’s jurisprudence on Article 11 suggests that sexual orientation should not be a relevant ground to be considered by the state in implementing law and policy, which would extend naturally to the implementation and enforcement of domestic law and policy on property rights.

⁹¹ *Atala Riffo* [142].

⁹² *Atala Riffo and daughters v Chile* (Merits, Reparations and Costs) (Judgment, IACtHR, 24 February 2012) [175].

⁹³ *Atala Riffo* [164].

⁹⁴ *Atala Riffo* [166].

⁹⁵ *Atala Riffo* [177]–[178].

⁹⁶ *Atala Riffo* [167].

3.2.1 The European system (Articles 8(1) and (2) ECHR)

Articles 8(1) and (2) of the ECHR were previously cited and detailed. In the European system, the ECtHR has considered this context in light of the prohibition of discrimination in Article 14 ECHR in conjunction with Articles 8(1) and (2) ECHR. Article 14 ECHR provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The ECtHR applies a similar test to the Court on the prohibition of discrimination:

a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁹⁷

It is important to identify the discrepancies between the test in the European and Inter-American systems. States in the European system have a narrow margin of appreciation with respect to difference of treatment on the basis of sexual orientation.⁹⁸ Further, 'very weighty' or 'particularly serious' reasons must be provided for a difference in treatment exclusively on grounds of sex and/or sexual orientation.⁹⁹ These standards, while not controlling in the Inter-American context, provide important elements to consider the limits of state discretion in this matter.

These articles were considered in the context of the property rights deriving from a same-sex relationship in the case of *Karner v. Austria*. In that case, state legislation prevented the applicant to succeed to the tenancy of his deceased partner. The state submitted that the protection of the family was the objective and reasonable justification for refusing the applicant's claim. Accepting that protecting the family 'in the traditional sense' may be a legitimate aim,¹⁰⁰ the ECtHR went on to find that the state did not prove that refusing the tenancy was suitable or necessary for the protection of the family.¹⁰¹ A violation of Article 14 ECHR in conjunction with Article 8 was thus found.

⁹⁷ *Karner v. Austria* [37]; see also *Kozak v. Poland* [91].

⁹⁸ See, eg, *Karner v. Austria* [41].

⁹⁹ *P.B. and J.S. v. Austria* [38] (citations omitted); *Kozak v. Poland* [92].

¹⁰⁰ *Karner v. Austria* [40].

¹⁰¹ *Karner v. Austria* [41].

In *Kozak v. Poland*, the landlord of the applicant terminated the tenancy of a same-sex couple upon the death of the applicant's partner. Further, state legislation only allowed surviving partners in heterosexual couples to succeed to a tenancy. Like in *Karner v. Austria*, the state argued that the protection of a heterosexual family unit was the objective and reasonable justification for the difference in treatment. The ECtHR rejected this argument in similar reasoning to that employed in *Karner v. Austria*. The ECtHR held that the protection of the family could be a legitimate reason, but that the difference in treatment failed the proportionality component of the test.¹⁰² In addition, the ECtHR took a *pro homine* approach,¹⁰³ considered the state's narrow margin of appreciation in this context,¹⁰⁴ and eventually held that there was a violation of Article 14 ECHR in conjunction with Article 8.

In *P.B. and J.S. v. Austria*, the two applicants were a cohabiting same-sex couple. One of them benefited from accident and sickness insurance cover because of his job. The other was prevented from benefiting from that same cover because of state legislation. The applicants argued that the legislation occasioned discriminatory treatment on the basis of their sexual orientation. The state did not argue on the merits of the case. After the initial facts of the case, the legislation was amended to be neutral on the sex of cohabitants eligible for the insurance extension. The legislation also added the condition that cohabitants must raise children in a common household to be eligible for the extension.

Noting the similarity of the facts to that of *Karner v. Austria*, the ECtHR held that there was a violation of Article 14 ECHR in conjunction with Article 8 *before* the amendments. However, this violation ceased after the amendments came into force because the legislation no longer specified the sex of eligible cohabitants.

Therefore, even the European System's "margin of appreciation" doctrine cannot be used to deny property entitlements to persons in same-sex relationships under international human rights law. The comparable provision in the ACHR, Article 11(2) must therefore be interpreted in a way that protects the property rights of family units based on same-sex couples. Interference with such rights exclusively on the basis of sexual orientation contravenes Article 11(2) ACHR in conjunction with Article 1(1), because 'protecting the family' is not a reasonable and objective justification for such interference.

3.3 Right to Property (Article 21 ACHR)

This article of the Convention is not cited in the request for an advisory opinion. However, we believe that the Court should consider it, in the exercise of its competences under the principle of *iura novit*

¹⁰² *Kozak v. Poland*[99].

¹⁰³ *Kozak v. Poland*[98].

¹⁰⁴ *Kozak v. Poland*[99].

curia. Consideration of this provision is essential because of the broader property rights at the heart of the question. Further, interpretations of the International Covenant on Economic, Social and Cultural Rights shed light on this question.

Articles 21(1) and 21(2) of the ACHR prescribe:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

The Court has held that:

the concept of property is a broad one and [is] ... defined as those material objects which are susceptible of being possessed, as well as any rights which may be part of a person's assets. Such concept includes all movables and immovables, and all tangible and intangible assets, as well as any other property susceptible of having value.¹⁰⁵

While the Court has yet to consider Article 21 ACHR in the context of its operation in family settings and sexual orientation discrimination, it is worth pre-emptively arguing that alleged "protection of the family", as often asserted by states in this context, does not fall into the 'reasons of public utility or social interest' that may allow for the deprivation of property under the Article. Further, we believe that restricting property rights stemming from same-sex relationships exclusively on the basis of sexual orientation may occasion a violation of Article 21 ACHR in conjunction with Article 1(1).

3.3.1 The international system (ICESCR)

The Committee on Economic, Social and Cultural Rights (CESCR) has considered Covenant rights in conjunction with the prohibition of discrimination in Article 2(2) ICESCR. This is relevant to considerations of rights under the ACHR in conjunction with Article 1(1) ACHR. Article 2(2) ICESCR provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind

¹⁰⁵ *Palamara-Iribarne v. Chile* [102].

as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The CESCR has declared that 'States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights.'¹⁰⁶ Further, 'States parties must ... adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.'¹⁰⁷

Referring to Article 2(2) ICESCR, the CESCR has generally noted with concern 'discrimination against lesbian, gay, bisexual, transgender and intersex persons in the areas of ... housing'.¹⁰⁸ The CESCR has also declared that 'lack of recognition of same-sex couples, which impedes their enjoyment of Covenant rights'.¹⁰⁹

Thus, statements by CESCR yield some important points and examples for the Court's consideration in this matter, and suggest that the full gamut of social, economic and cultural rights, including but not limited to the enjoyment of property, must also be extended, without any discrimination, to persons in same-sex relationships.

In summary, in answer to the question posed:

3. What is the level of protection provided by Articles 11(2) and 24 in relation with Article 1 of the Convention to the recognition of property rights derived from a bond between same-sex persons?

Answer: Articles 11(2) and 24 of the ACHR must be read as providing protection and recognition to property rights derived from same-sex relationships. The Court should also consider Article 21 ACHR in this context for its broader relevance to property rights.

¹⁰⁶ *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), UN Doc E/C.12/GC/20 (2 July 2009) [32].

¹⁰⁷ *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), UN Doc E/C.12/GC/20 (2 July 2009) [11].

¹⁰⁸ *Concluding observations on the fourth periodic report of Mongolia*, UN Doc E/C.12/MNG/CO/4 (19 June 2015) [13]; see also *Concluding observations on the second periodic report of Slovenia*, UN Doc E/C.12/SVN/CO/2 (28 November 2014) [12]; *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, UN Doc E/C.12/CHN/CO/2 (23 May 2014) [41]; *Concluding observations on the second periodic report of the Islamic Republic of Iran*, UN Doc E/C.12/IRN/CO/2 (17 May 2013) [7]; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Uruguay*, UN Doc E/C.12/URY/CO/3-4 (1 December 2010) [7].

¹⁰⁹ *Concluding observations on the fourth periodic report of Mongolia*, UN Doc E/C.12/MNG/CO/4 (19 June 2015) [13].

Conclusions

There is a vast amount of international jurisprudence on matters related to transgender persons, and to relationships between persons of the same sex. While these are matters that admittedly are socially sensitive, the Court should not shy away from its mandate to advance human rights principles in the Americas, as it has always done. Looking at the domestic law of other states seems to be secondary, and the examination of international human rights law as applied by other bodies is paramount. When looking at the jurisprudence of other international bodies, particularly the European Court of Human Rights and the Human Rights Committee of the United Nations, it is clear that the rights to private and family life, property and equality and non-discrimination apply in full to transgender persons, and individuals in same-sex relationships. Any other interpretation of the American Convention would imply diminishing the current levels of protection of human rights in the continent.