



Belo Horizonte, 13 February 2017

Inter-American Court of Human Rights

Avenida 10, Calles 45 y 47 Los Yoses,
San Pedro, San Jose, Costa Rica
E-mail: tramite@cortheidh.or.cr

Submission by: Centro de Direito Internacional, Rua Santa Rita Durão, 1143, 5º andar,
Funcionários, Belo Horizonte/MG, Brasil, CEP 30.140-111, [REDACTED]
[REDACTED]

Reference: Written observations referring to the request for an advisory opinion submitted by the State of Costa Rica on May 18, 2016.

INTRODUCTION

It is with great honor and respect that we submit, on behalf of the *Centro de Direito Internacional*, the following written observations referring to the request for an advisory opinion submitted by the State of Costa Rica on May 18th, 2016. We truly hope that the observations below can help the Court delivering the best possible opinion on the relevant topic of LGBT rights.

The present document will address two out of the three points in the Costa Rica's request - the first and the last points. Firstly, we will discuss the right of a person to change his/her name based on his/her gender identity under the human rights to a name and to privacy. Secondly, we will deal with the recognition of patrimonial rights derived from a relationship composed by people of the same sex.

¹ The researchers involved in the production of these written observations were: Bruno de Oliveira Biazatti, Jaana Braz Rodrigues, Flávia Lana Faria da Veiga, Karen Martins Carvalho de Aguiar, Isadora Maciel Santos and Yasmin Borba Mahmud.

1 RIGHT TO NAME CHANGE IN ORDER TO ACCORD IT WITH GENDER IDENTITY

1.1 The Practice in the American Continent

Firstly, it is necessary to describe the current practice of the American States regarding changes of name on the grounds of gender identification. We will present the laws of five different States: Uruguay, Ecuador, Bolivia, Argentina, Colombia, Chile, Venezuela and Brazil.

In **Uruguay**, we have the Law no. 18620, whose Article 2 states the following: "Any person may request the adaptation of the registration statement of his name, sex, or both, when they do not match his gender identity."² According to this law, requests for name change will be accepted whenever the requesting person believes that his or her name, gender or both recorded in the birth certificate are not in accordance with his or her own gender identity and that the stability and persistence of this dissonance exists for at least two years. In no case, sexual reassignment surgery will be a requirement for the identity document change.³

Ecuador allows alterations in the sex and name due to gender identity reasons. For that, judicial authorization is mandatory.⁴ Also, the photograph for the identification card will be selected in order to respect the gender identity of the individual⁵. The Gender Identity Law of **Bolivia**, adopted on 21 May 2016, aims "[...] to establish the procedure for the change of the first name, gender and image of transsexual and transgender persons in all public and private documents related to their identity, allowing them to fully exercise the right to gender identity".⁶ In the same line, the **Argentinean** Law no. 26.743 states that "[a]ny person may request the rectification of

² URUGUAY. *Ley N° 18.620 (Derecho a la Identidad de Género y al Cambio de Nombre y Sexo en Documentos Identificatorios)*, 12 October 2016, art.2. Available at: <<https://legislativo.parlamento.gub.uy/temporales/leytemp1568652.htm>>. Access on: 10 Jan. 2017.

³ *Ibid.*, art.3.

⁴ ECUADOR. *Ley Organica de Gestion de la Identidad y Datos Civiles*, 1 February 2015, arts. 76 and 94. Available at: <http://www.registrocivil.gob.ec/wp-content/uploads/downloads/2016/03/LEY_ORGANICA_RC_2016.pdf>. Access on: 10 Jan. 2017.

⁵ *Ibid.*, art.94.

⁶ BOLIVIA. *Ley no. 807 del 21 de Mayo de 2016 ("Ley de Identidad de Género")*, 21 May 2016, art.1. Available at: <<http://www.derechoteca.com/gacetabolivia/ley-no-807-del-21-de-mayo-de-2016/>>. Access on: 10 Jan. 2017.

the register of his or her gender, and of his or her first name and image when they do not match the self-perceived gender identity"⁷.

On 4 June 2015, the President of **Colombia** issued the Decree no. 1227, recognizing the right of transgender people to correct their gender in official identification documents.⁸ Also, the Decree no. 1260, of 27 July 1970, allows Colombians to change their names in order to adequate them with the "personal identity" of the individual⁹.

In **Chile**, the Law no. 20.609, adopted on 12 July 2012, establishes measures against discrimination, including when based on sexuality and gender identity¹⁰. However, there is no specific law expressly regulating the change of one's first name due to gender identity reasons. Although there have been numerous attempts to introduce a law allowing the change of name and sex even without surgery, none have been approved yet.

In **Venezuela**, article 146 of the Organic Law of Civil Registry allows the change of the first name due to gender identity motives:

Any person may change his or her own name, only once, before the registrar or the civil registrar when the name in question is infamous, subject to public scorn, violates moral integrity, honor and reputation, or does not correspond to the person's gender, affecting the free development of his or her personality.¹¹

⁷ ARGENTINA. *Ley 26.743 (Identidad de Género)*, 23 May 2012, art.3. Available at: <<http://www.ms.gba.gov.ar/sitios/tocoginecologia/files/2014/01/Ley-26.743-IDENTIDAD-DE-GENERO.pdf>>. Access on: 10 Jan. 2017.

⁸ COLOMBIA. *Decreto no. 1127*, 4 June 2015, art.1. Available at: <<https://www.minjusticia.gov.co/Portals/0/Ministerio/decreto%20unico/%23%20decretos/1.%20DECRETO%202015-1227%20sexo%20c%C3%A9dula.pdf>>. Access on: 12 Dec. 2016.

⁹ COLOMBIA. *Decreto no. 1260*, 27 July 1970, art.94. Available at: <http://www3.registraduria.gov.co/normatividad/docs/DEC/DEC_1970_1260.pdf>. Access on: 10 Nov. 2016.

¹⁰ CHILE. *Ley no. 20.609*, 24 July 2012, art.2. Available at: <<http://www.leychile.cl/Navegar?idNorma=1042092>>. Access on: 12 Feb. 2017. Article 2 reads as follow: "Para los efectos de esta ley, se entiende por discriminación arbitraria toda distinción, exclusión o restricción que carezca de justificación razonable, efectuada por agentes del Estado o particulares, y que cause privación, perturbación o amenaza en el ejercicio legítimo de los derechos fundamentales establecidos en la Constitución Política de la República o en los tratados internacionales sobre derechos humanos ratificados por Chile y que se encuentren vigentes, en particular cuando se funden en motivos tales como la raza o etnia, la nacionalidad, la situación socioeconómica, el idioma, la ideología u opinión política, la religión o creencia, la sindicación o participación en organizaciones gremiales o la falta de ellas, el sexo, la orientación sexual, la identidad de género, el estado civil, la edad, la filiación, la apariencia personal y la enfermedad o discapacidad." (Emphasis added)

¹¹ VENEZUELA. *Ley Orgánica de Registro Civil*, 25 August 2009, art.146. Available at: <http://www.ministeriopublico.gob.ve/c/document_library/get_file?uuid=403354ff-9cda-4b73-8165-6cad4087b977&groupId=10136>. Access on: 20 Jan. 2017.

In the case of children, the parents can request the change of the first name, and if the person is older than 14, he or she can request by himself or herself¹².

In **Brazil**, although there is no law specifically addressing gender identity of transsexuals, the Law no. 6015, adopted on 31 December 1973, allows changes in the first name when it exposes the person to ridicule or to humiliation.¹³ Article 58 of the same statute determines that "[t]he first name shall be definitive, but its replacement by notorious public nicknames shall be permitted."¹⁴ In 2009, the Brazilian Attorney General has filed a petition before the Supreme Federal Tribunal requesting this court to officially recognize the right of transsexuals to change their name and gender in official documents even for those who did not perform surgery to change the characteristics of the genitalia. The Attorney General requested the Tribunal to recognize that the expression "notorious public nicknames" also includes the social names adopted by transsexuals. The petition argues that the non-recognition of the right of transsexuals to change their name and gender violates fundamental rights, such as human dignity, prohibition of discrimination, freedom and privacy. The case is still pending before the Supreme Federal Tribunal.¹⁵

In light of the foregoing, we can conclude that the American States above are generally favorable to modifications in one's name due to gender identity reasons. Hence, a conclusion of the Inter-American Court of Human Rights recognizing a change in a person's name based on his or her gender identification would not be in disregard or contrary to the existent practice in the American continent. In fact, an advisory opinion with this conclusion will enhance the protection of LGBT rights in the region.

1.2 The human right to a name

The human right to a name is codified in the Article 18 of the American Convention on Human Rights. This provision states as follows: "Every person has the

¹² *Ibid.*

¹³ BRAZIL. *Lei no. 6.015*, 31 December 1973, art.55. Available at: <https://www.planalto.gov.br/ccivil_03/leis/L6015consolidado.htm>. Access on: 12 Feb. 2017.

¹⁴ *Ibid.*, art.58.

¹⁵ Cf. BRAZIL. "PGR pede que Supremo reconheça direito de transexuais a mudar de nome", *Notícias STF*, 22 July 2009. Available at: <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=111026>>. Access on: 12 Feb. 2017.

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"¹⁶. An important case addressing this right is the *Case Gelman v. Uruguay*, which deals with the situation of María Macarena Gelman, who has lived with a different name and identity for over 23 years. Her name was modified by the Uruguayan authorities in official documents as a means of suppressing her identity and keeping secret the enforced disappearance of her mother. In its judgment, the Inter-American Court of Human Rights determined that "[...] the right to a name [...] constitutes a basic and essential element of the identity of every person, without which an individual cannot be recognized by society or registered before the State."¹⁷ The Court also pointed out that the right to a name implies that States must guarantee that the person is registered under the name chosen by his or her parents without any restriction or interference regarding the parents' decision to choose a name and that once the person is registered, that it be possible to preserve and reestablish this name and surname.¹⁸

The right to a name is closely connected to the human right to identity, which was recognized by the Inter-American Court in the cases *Gelman v. Uruguay*¹⁹ and *Contreras et al. v. El Salvador*²⁰. Although this right is not expressly assured in the American Convention of Human Rights, the Article 29(c) of this treaty reads as follows: "[n]o provision of this Convention shall be interpreted as [...] precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government."²¹ Hence, the wording of the American Convention is not strictly final and other implicit human rights can be derived from the Inter-American System of Human Rights as a whole. This rationale gives room to the Court to defend the existence of the right to identity, which protects the

[...] collection of attributes and characteristics that allow for the individualization of a person in society. In that sense, it includes several other rights according to the subject of the rights in question and the circumstances of the case. Thus, personal identity is intimately linked to the person in his or her specific individuality and private life, both of which are based on an

¹⁶ *American Convention on Human Rights ("Pact of San Jose")*, 22 November 1969, art.18.

¹⁷ *Case Gelman v. Uruguay*, IACtHR, Judgment of February 24, 2011 Series C No. 221, para.127.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para.122.

²⁰ *Case of Contreras et al. v. El Salvador*, IACtHR, Judgment of August 31, 2011. Series C No. 232, para.113.

²¹ *American Convention on Human Rights ("Pact of San Jose")*, 22 November 1969, art.29(c).

historical and biological experience, as well as the way in which each individual relates with others through the development of social and family ties. Moreover, it is important to stress that, although identity has special importance during childhood as it is essential for the development of a person, the truth is that the right to identity is not exclusive to children, because it is constantly evolving and the interest of individuals in maintaining their identity and preserving it does not diminish with the passage of time. In addition, the right to identity can be affected by numerous situations or contexts that can take place from childhood to adulthood.²²

The European Court of Human Rights has applied the right to identity to the gender identification context. Although the case *Pretty v. United Kingdom* does not deal with gender identity issues, the judgment of this case states that the right to privacy

[...] can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by [the right to privacy]. [...] Although no previous case has established as such any right to self-determination as being contained in [the human right to privacy], the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.²³ (Emphasis added).

Accordingly, the right to a name is much more than just having a name or the right not to be arbitrarily deprived of the name by the State. This human right in particular entitles any individual to have a name reflecting his/her perception and identification of himself/herself as well as the identification that one wants to have in the society in which he/she lives. Although one of the characteristics of the name is its immutability, this feature is not absolute. The name is an essential aspect of the personal and social identity of the individual, and accommodations must be made allowing modifications in the name in order to adequate it to the current identity of an individual.

Conclusively, LGBT persons are entitled to modify their original names in order to accord them with their current identification.

1.3 The human right to privacy

The human right to privacy is ensured by Article 11 of the American Convention on Human Rights, as follows:

1. Everyone has the right to have his honor respected and his dignity recognized.

²² *Case of Contreras et al. v. El Salvador*, IACtHR, Judgment of August 31, 2011. Series C No. 232, para.113.

²³ *Case of Pretty v. United Kingdom*, ECtHR, Application no. 2346/02, Judgment, 29 April 2002, para.61.

2. 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.
3. Everyone has the right to the protection of the law against such interference or attacks.²⁴

The interrelationship between name change and the right to privacy was upheld by the UN Human Rights Committee in the case *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*. The two authors were Dutch citizens and followers of the Hindu religion. They decided to become Hindu priests and for that, according to them, it is mandatory to adopt Hindu names. They appeared before the public authorities requesting to change their first names and their surnames, but the Dutch Minister of Justice rejected the authors' request to change the surname on the ground that their case did not meet the legal requirements and that their current surnames did not constitute an impediment to undertake studies for the Hindu priesthood. Concluding that the Netherlands' refusal to change the surname of both authors was in breach of the human right to privacy, the Human Rights Committee attested that "[...] a person's surname constitutes an important component of one's identity and that 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"²⁵.

One of the most important international decisions on this issue is the case *Christine Goodwin v. the United Kingdom*, ruled on 11 July 2002 by the European Court of Human Rights. The applicant is a British post-operative male to female transsexual. She complained of the lack of legal recognition of her gender re-assignment in the United Kingdom and in particular of her treatment in terms of employment and her social security and pension rights and of her inability to marry. In its 2002 judgment, the European Court recalled that in its previous rulings on gender identity of transsexuals it decided that refusal of the State to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as a violation of the human right to private life. There was no legal obligation to change official

²⁴ *American Convention on Human Rights* ("Pact of San Jose"), 22 November 1969, art.11.

²⁵ *A.R. Coeriel and M.A.R. Aurik v. The Netherlands*, Human Rights Committee, Communication no. 453/1991, UNDoc.CCPR/C/52/D/453/1991 (1994), para.10(2).

identification documents in order to accord them with the current gender identity of the individual²⁶.

In the Christine Goodwin judgment, the European Court emphasized that human rights treaties must be interpreted and applied in light of the present-day conditions²⁷. Taking this into account, the Court observed that serious interference with private life can arise if the domestic law of a certain State directly conflicts with an important aspect of personal identity, such as the gender identification of transsexuals²⁸. It warned that

[t]he 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 anxiety²⁹.

In the 21st century, the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others can no longer wait for more certainty and/or acceptance in relation to the scientific, moral, social and religious factors involved³⁰. Entitling a transgender to fall under the rules applicable to her or his current gender would cause no injustice to others, and

no concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost³¹.

Accordingly, it is quite clear that one's name is intimately related to his/her intimacy, and to coerce a transsexual to maintain a name that does not correspond to his or her current appearance and self-identification creates disproportional and unnecessary interference in the human right to privacy.

²⁶ *Case of Christine Goodwin v. the United Kingdom*, ECtHR, Application no. 28957/95, Judgment, 11 July 2002, para.73.

²⁷ *Ibid.*, para.75.

²⁸ *Ibid.*, para.77.

²⁹ *Ibid.*

³⁰ *Ibid.*, para.90.

³¹ *Ibid.*, para.91.

2 THE RECOGNITION OF PATRIMONIAL RIGHTS DERIVED FROM SAME-SEX RELATIONSHIPS

The Inter-American Court of Human Rights already concluded that the American Convention on Human Rights protects people from discrimination based on their sexual orientation³². In the *Case Atala Riffo and Daughters v. Chile*, it ruled that "[...] any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation"³³. It also states that

[a] right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation. This would violate Article 1(1) of the American Convention. This inter-American instrument proscribes discrimination, in general, including categories such as sexual orientation, which cannot be used as grounds for denying or restricting any of the rights established in the Convention³⁴.

In light of these findings in the *Atala Riffo Case*, we can conclude that a law, a judicial or administrative decision or a practice of a State party to the American Convention on Human Rights denying property rights to a person due to his or her sexual orientation is a violation of the prohibition of discrimination. Same-sex couples are entitled to the same patrimonial rights as heterosexual couples. It is not reasonable nor necessary in a democratic society the imposition of restrictions on the property rights of a certain person simply because he or she has a non-heterosexual orientation.

This rationale was upheld in the context of the universal system for the protection of human rights. The *Case Edward Young v. Australia*, before the UN Human Rights Committee, is a relevant precedent. The applicant, Mr. Edward Young, was in a same-sex relationship with Mr. C for 38 years. Mr. C was an Australian war veteran, who died on 20 December 1998. On 1 March 1999, Edward applied for a pension under the Australian Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's

³² *Case of Atala Riffo and daughters v. Chile*, Judgment of February 24, 2012. Series C No. 239, para.91.

³³ *Ibid.*

³⁴ *Ibid.*, para.93.

application under the allegation that he was not a dependant as defined by the VEA, given his non-heterosexual relationship with Mr. C.

After all his attempts to receive the pension were unsuccessful in the domestic jurisdiction of Australia, Edward initiated the proceedings before the Human Rights Committee. He claimed that Australia's refusal to grant him a pension on the ground that he does not meet the definition of “dependant”, for having been in a same-sex relationship with Mr. C, constitutes discrimination on the basis of his sexual orientation.

In its decision of 18 September 2003, the Committee mentioned that under the VEA only individuals involved in a heterosexual marriage-like relationship can be considered “dependant” for the purpose of receiving pension benefits. Australia did not contest this interpretation of the VEA. After recalling that the prohibition against discrimination also comprises sexual orientation, the Committee observed “[...] that not every distinction amounts to prohibited discrimination under the [International Covenant on Civil and Political Rights], as long as it is based on reasonable and objective criteria”.³⁵ The decision concluded that the distinction between same-sex and heterosexual couples regarding pension benefits, imposed by Australia, is not reasonable and objective. Australia failed to present any factor justifying such a differential treatment. In this context, the Committee found that Australia has breached its obligations under the prohibition of discrimination by denying Edward a pension on the basis of his sexual orientation³⁶.

The European Court of Human Rights also has a relevant case-law recognizing patrimonial rights to individuals in same-sex relationships. For instance, the *Case Kozak v. Poland* deals with the prohibition of succession to a tenancy by the surviving homosexual partner. In its 2010 judgment, the European Court observed that

[w]here a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realizing the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's

³⁵ *Edward Young v. Australia*, Human Rights Committee, Communication no. 941/2000, CCPR/C/78/D/941/2000, 18 September 2003, para.10(4).

³⁶ *Ibid.*

sexual orientation, this would amount to discrimination under the Convention³⁷.

The Court also recalled that human rights treaties are living instruments, whose interpretation must be done in the light of present-day conditions. Hence, State measures adopted to protect family life "[...] must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life"³⁸.

In view of the foregoing, the Court ruled that "[...] a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted [...] as necessary for the protection of the family viewed in its traditional sense."³⁹ Accordingly, the rejection of a claim for succession to a tenancy on grounds related to the homosexual nature of the relationship of the claimer with the deceased amounts to discrimination⁴⁰.

The *Case J.M. v. the United Kingdom* is also worth mentioning. The author - J.M. - was a British national and the mother of two children. After divorcing her husband, the applicant was legally required to supply financial support for the children, because her former-husband was their guardian. Since 1998, J.M. has been living with another woman in a non-marital relationship. Her child maintenance obligation was assessed in 2001 and, in accordance with the British law, she would be entitled to a reduction in the amount to be paid if she entered into a new relationship, married or unmarried. She was required to pay approximately 47 British pounds per week, but if she had formed a new relationship the amount due would be reduced to around 14 pounds. However, the authorities denied her request for reduction, because they take no account of homosexual relationships. She argued that this distinction between heterosexual and same-sex couples when setting the level of child maintenance constitutes discrimination on the basis of sexual orientation.

The European Court of Human Rights pointed out that the only point of difference between the applicant and every other absent parent who has formed a new

³⁷ *Case of Kozak v. Poland*, ECtHR, Application no. 13102/02, Judgment, 2 March 2010, para.92.

³⁸ *Ibid.*, para.98.

³⁹ *Ibid.*, para.99.

⁴⁰ *Ibid.*

heterosexual relationship is her sexual orientation⁴¹. "Her maintenance obligation towards her children was assessed differently on account of the nature of her new relationship. The difference in treatment at issue in the present case derives from sexual orientation, a ground that falls within the scope of [the prohibition of discrimination]".⁴² Hence, the Court held that there had been a violation of the prohibition of discrimination in conjunction with the human right to property⁴³.

Accordingly, we conclude that same-sex relationships can create patrimonial rights to the spouses, and any denial or restriction of these rights based on the homosexual nature of the family concerned constitutes a breach of the prohibition of discrimination and the human right to privacy.

FINAL OBSERVATIONS

In light of all the arguments presented above, we urge the Inter-American Court of Human Rights to conclude in its advisory opinion that:

- i)** One's name is intimately related to his or her intimacy and identity, and individuals are entitled, under the human right to privacy and the human right to a name, to change their names based on his or her gender identity.

- ii)** All States parties to the American Convention on Human Rights have the obligation to modify their domestic legislation in order to allow and/or facilitate the change of names based on gender identity.

- iii)** Same-sex relationships can create property rights to the members of the family, and limitations of the patrimonial rights of a person simply because she or he is engaged in a homosexual relationship violate the prohibition of discrimination.

⁴¹ *Case of J. M. v. the United Kingdom*, ECtHR, Application no. 37060/06, Judgment, 28 September 2010, para.55

⁴² *Ibid.*

⁴³ *Ibid.*, para.58.

iv) All States parties to the American Convention on Human Rights have the obligation to revoke any restriction on the patrimonial rights of a person due to her or his sexual orientation.


Júlia Soares Amaral
Centro de Direito Internacional
Legal Representative


Rodrigo Rocha Feres Ragil
Centro de Direito Internacional
Legal Representative